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# INTRODUCTION(1)

**Emilie Chevalier, Mariolina Eliantonio and Rui T. Lanceiro**

## *I. The notion of administrative cooperation in the European administrative space*

It is by now almost commonplace to observe that the governance model used for the implementation of EU law has departed from the traditional dichotomy between direct and indirect administration.(2) While not entirely a new phenomenon,(3) as of today, in virtually all EU policy fields, ranging from marketing authorisations to the management of EU funds to the area of Freedom, Security and Justice, banking supervision, or administrative cooperation in the field of taxation, there is increasing recourse to cooperative modes of operation between national and EU authorities, as well as between national authorities themselves. These cooperative structures and procedures take various shapes and are used for various ends, from authorising products on the market or industrial installations to be set up, to exchanging information, and to monitoring and sanctioning violations of EU law.

While lacking a general legislative framework in EU law,(4) the phenomenon of administrative cooperation has been given various labels,(5) and been studied from various perspectives, which have included some attempts at providing

(1) This volume has been prepared under the auspices of the Transnational Administrative Law Network, Réseau de droit administratif transnational. For more information see https://transadmlaw.org.

(2) On these notions, see J. Ziller, "Introduction – Concepts d'administration directe, d'administration indirecte et de co-administration et fondements du droit administratif européen", in J.-B. Auby and J. Dutheil de la Rochère (eds), *Traité de droit administratif europeéen*, Brussels, Bruylant, 2022, pp. 297-305.

(3) As early as the 1980s, Sabino Cassese had already pointed out that forms of cooperation were prevalent in the administrative governance of the European Union. See S. Cassese, "Theoretical Sketch of Cooperative and Multidimensional Nature of Community Bureaucracy", in J. Jamar and W. Wessels (eds), *Community Bureaucracy at the Crossroads – L'administration communautaire à l'heure du choix : actes du colloque organisé par le college d'Europe*, Bruges, De Temple, 1985, p. 39.

(4) S. Alonso de León, *Composite Administrative Procedures in the European Union* (PhD thesis, University Carlos III, Madrid), available at https://e-archivo.uc3m.es/bitstream/handle/10016/23445/Tesis_Sergio_Alonso_de_Leon_2016.pdf, p. 183, who also argues that "[P]rimary law […] ignores composite procedures and assumes that indirect administration is the rule and direct implementation is the exception, as if nothing existed in-between".

(5) For example, the term *Verwaltungskooperation* (administrative cooperation) was used initially: see E. Schmidt-Assmann, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen*



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taxonomies. Though not fully encapsulating the whole phenomenon of administrative cooperation, much research has been devoted to the understanding of the so-called "composite procedures".(6) This term refers to administrative decision-making procedures which foresee the involvement of administrative authorities belonging to more than one legal system at various stages of the procedures and with different intensities.(7) Such procedures provide solutions to reconcile the consistent and uniform application of EU law, which is best achieved by the EU's own administration, with implementation by the Member States, which is closer to the EU citizens and ensures greater effectiveness, since this level has more and better means of implementation.(8)

Furthermore, some authors have focused on the procedural rights during composite decision-making processes,(9) the question of access to justice,(10) or the regulatory mechanisms foreseen to solve disputes in cooperative

*Gemeinschaft*, Baden-Baden, Nomos, 1996. Other authors have spoken about *amministrazione mista* (mixed administration), such as G. Della Cananea and C. Franchini (eds), *I principi dell'amministrazione europea*, Turin, Giappichelli, 2017; or refer instead to the term *Verwaltungsverbund* (administrative union): see W. Weiss, *Der Europäische Verwaltungsverbund. Grundfragen, Kennzeichen, Herausforderungen*, Berlin, Duncker & Humblot GmbH, 2010; or they use the term "shared administration": see P. Craig, "Shared Administration and Networks – Global and EU Perspectives", in G. Anthony, J.-B. Auby, J. Morison and T. Zwart (eds), *Values in Global Administrative Law*, Oxford, Hart Publishing, 2011, pp. 1-16. Other literature speaks about "integrated administration", such as H.C.H. Hofmann and A.H. Türk (eds), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Cheltenham, Edward Elgar, 2009, p. 136; or "composite administration": see O. Jansen and B. Schöndorf-Haubold (eds), *The European Composite Administration*, Cambridge, Intersentia, 2011. Finally, reference is made to *co-administration*, J. Ziller, "Introduction – Concepts d'administration directe, d'administration indirecte et de co-administration et fondements du droit administratif européen", *op. cit.*, p. 297; or to *amministrazione intrecciata* (intervowen administration): see D. Urania Galetta, "Coamministrazione, reti di amministrazioni, Verwaltungsverbund – modelli organizzativi nuovi o alternative semantiche alla nozione di 'cooperazione amministrativa' dell'art. 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?", 6 *Rivista italiana di diritto pubblico comunitario*, 2009, pp. 1689-1698.

(6) See generally S. Alonso de León, *Composite Administrative Procedures in the European Union*, *op. cit.*; F. Brito Bastos, "Derivative Illegality in the European Composite Administrative Procedures", 55 *Common Market Law Review*, 2018, pp. 101-134; G. Della Cananea, "The European Union's Mixed Administrative Proceedings", 68 *Law & Contemp. Probs.*, 2005, pp. 197-218; M. Eliantonio, "Judicial Review in an Integrated Administration – The Case of 'Composite Procedures'", 7 *Review of European Administrative Law*, 2014, pp. 65-102; M.P. Chiti, "Forms of European Administrative Action", 68 *Law & Contemp. Probs.*, 2004, pp. 37-57; M. Ruffert, "European Composite Administration – The transnational administrative act", in O. Jansen and B. Schöndorf-Haubold (eds), *The European Composite Administration*, *op. cit.*, pp. 277-306.

(7) The term was famously coined by H. Hofmann. See H.C.H. Hofmann, "Composite Decision-making Procedures in EU Administrative Law", in H.C.H. Hofmann and A.H. Türk (eds), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, *op. cit.*

(8) See e.g., T. von Danwitz, *Europäisches Verwaltungsrecht*, Berlin, Springer, 2008, pp. 609-610; E. Schmidt-Aßman, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, *op. cit.*, pp. 270 ff.

(9) For a contribution focusing on the right to be heard, see Ch. Eckes and J. Mendes, "The Right to be Heard in Composite Administrative Procedures – Lost in Between Protection?", 36 *European Law Review*, 2011, pp. 651-670.

(10) See e.g., H.C.H. Hofmann, "Decision-Making in EU Administrative Law – The Problem of Composite Procedures", 61 *Administrative Law Review*, 2009, pp. 199-221; M. Eliantonio, "Judicial Review in an Integrated Administration – The Case of 'Composite Procedures'", *op. cit.*, pp. 65-102;



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structures.(11) Other authors have considered composite procedures in specific policy fields,(12) or involving specific EU administrative players, such as EU actors,(13) or specific types of cooperative mechanisms, such as inspections(14) or exchange of information procedures.(15)

The Court of Justice of the European Union (CJEU), in turn, has had the chance to rule on various issues linked to composite procedures, such as the right to be heard(16) and the duty to give reasons.(17) Yet, as has been pointed out, "composite procedures are not a legal category in the mind of the Union's

F. Brito Bastos, "Derivative Illegality in the European Composite Administrative Procedures", *op. cit.*, pp. 101-134; L. De Lucia, "Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts", 2 *Review of European Administrative Law*, 2012, pp. 17-45.

(11) L. De Lucia, "Conflict and Cooperation within European Composite Administration (Between Philia and Eris), 1 *Review of European Administrative Law*, 2012, pp. 43-77; M. Lottini, "From 'Administrative Cooperation' in the Application of European Union Law to 'Administrative Cooperation' in the Protection of European Rights and Liberties", 18 *EPL*, 2012, pp. 127-147.

(12) See e.g., on banking regulation: F. Brito Bastos, "Composite Procedures in the SSM and SRM – An Analytical Overview", in C. Zilioli and K-Ph. Wojcik (eds), *Judicial Review in the European Banking Union*, Cheltenham, Edward Elgar, 2021, pp. 97-113; L. Wissink, *Effective Legal Protection in Banking Supervision: an Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, Groningen, Europa Law Publishing, 2020; on risk regulation: M. Eliantonio and S. Röttger-Wirtz, "From Integration to Exclusion – EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals", 10 *European Journal of Risk Regulation*, 2019, pp. 393-411; R. Lanceiro and M. Eliantonio, "The Genetically Modified Organisms' Regime – A Playground for Multi-Level Administration and a Nightmare for Effective Judicial Protection?", 22 *German Law Journal*, 2021, pp. 371-390; in general on product authorisations: L. De Lucia, "Autorizzazioni transnazionali e cooperazione amministrativa nell'ordinamento europeo", 3 *Rivista italiana di diritto pubblico comunitario*, 2010, pp. 759-788; on the Common Agricultural Policy, L. Baroni, "Amministrazione diretta, amministrazione indiretta e cooperazione amministrativa: riflettendo sui modelli di amministrazione nella PAC", *Il diritto dell'Unione Europea*, 2011, pp. 95-111; on competition policy: G.F. Licata, "Limiti al principio dell'autonomia procedurale e rafforzamento della cooperazione amministrativa nell'Unione europea", 5 *Rivista italiana di diritto pubblico comunitario*, 2012, pp. 905-930; on public procurement: R. Cavallo Perin and G.M. Racca, "La cooperazione amministrativa europea nei contratti e servizi pubblici", 6 *Rivista italiana di diritto pubblico comunitario*, 2016, pp. 1457-1493.

(13) M. Scholten and A. Brenninkmeijer (eds), *Controlling EU Agencies – The Rule of Law in the Multi-Jurisdictional Legal Order*, Cheltenham, Edward Elgar, 2020; M. Luchtman and M. Scholten (eds), *Law Enforcement by EU Authorities – Political and Judicial Accountability in a Shared Legal Order*, Cheltenham, Edward Elgar, 2017.

(14) M. De Bellis, "Multi-level Administration, Inspections and Fundamental Rights – Is Judicial Protection Full and Effective?", 22 *German Law Journal*, 2021, pp. 416-440; and extensively M. De Bellis, *I poteri ispettivi dell'amministrazione europea*, Turin, Giappichelli, 2021.

(15) D.M. Curtin and F. Brito Bastos, "Interoperable Information Sharing and the Five Novel Frontiers of EU Governance – A Special Issue", 26 *European Public Law*, 2020, pp. 59-70; D.-U. Galetta, H.C.H. Hofmann and J.-P. Schneider, "Information Exchange in the European Administrative Union – An Introduction", 20 *European Public Law*, 2014, pp. 65-69; M. Eliantonio, "Information Exchange in European Administrative Law – A Threat to Effective Judicial Protection?", 23 *Maastricht Journal of European and Comparative Law*, 2016, pp. 531-549.

(16) *France Aviation v. Commission*, case T-346/94, EU:T:1995:187.

(17) *Eugénio Branco Ld^a v. Commission*, case T-347/03, EU:T:2005:265.



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judges".(18) While this might not be entirely true, especially when we look at more recent case law,(19) a full jurisprudential or legislative elaboration of the concept has still to appear.

Despite this increase in academic and case law attention, a comprehensive and horizontal analysis of the phenomenon of administrative cooperation, extending beyond decision-making procedures, in the European Union is currently lacking.

## *II. The aim and structure of this book*

Taking stock of this large – yet incomplete – body of literature on administrative cooperation, and in light of the limited horizontal legislative or jurisprudential interventions, the aim of this book is to add to the growing knowledge of this pervasive phenomenon of European administrative law by mapping the modes and structures of administrative cooperation in the European administrative space following a policy approach.

While the phenomenon of administrative cooperation is not new in the context of the process of European integration (and it exists beyond the EU regulatory space as well), it has developed in a piecemeal fashion, with *ad hoc* arrangements and little systematicity. This book seeks to provide a comprehensive overview of the mechanisms of administrative cooperation in order to identify common patterns, notable differences and shared trends. The book also allows the identification of the main difficulties encountered in terms of administrative cooperation in the policy areas examined, as well as the lessons learned from these cases.

In order to achieve its aim, and because of the almost complete absence of horizontal rules, the book has been structured through a sectorial approach, where each chapter maps the actors, modes and types of mechanisms of administrative cooperation. The sectors have been selected because they represent a mix of "old" and more recent policies, with cooperation mechanisms set up for very different regulatory purposes, including a variety of EU and national administrative actors, and operating within regulatory field where the EU has rather diverse competences. The aim in this context was to attempt at providing a landscape of administrative cooperation mechanisms which would be as

(18) S. Alonso de León, *Composite Administrative Procedures in the European Union*, *op. cit.*, p. 11.

(19) See not only the extensive discussion of the notion by AG Campos Sánchez-Bordona in *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, case C-219/17, EU:C:2018:502, but also the case *Satabank plc v. European Central Bank* (ECB), case T-72/20, EU:T:2023:149, where the term "composite administrative procedure" was used for the first time as a concept.



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representative as possible of the variety of actors, mechanisms, procedures and outcomes which come into play in the different policy fields. In turn, this variety serves to allow us to identify – horizontally – possible common trends and noticeable differences.

The authors of the chapters were asked to consider a number of questions which can be found in Annex I of this Introduction. The questions revolve, in essence, around three main axes, which have been considered essential to understand the "administrative cooperation ecosystem" peculiar to each policy field. In particular, the authors were asked, first of all, to map the relevant legislative and regulatory framework of each policy field, setting out the cooperation mechanisms, as well as the actors involved in cooperative structure and the compulsory or voluntary nature of the cooperation and the margin of discretion afforded to the administrative authorities therein. Secondly, the authors have examined the types of cooperative mechanisms (*i.e.*, whether or not they involve the European administrative level), the mechanisms of cooperation (namely, what the cooperative actions entail concretely) as well as the products of the cooperation, in terms of their concrete outputs. Thirdly, the authors addressed the role of the principles of administrative law in the cooperative structures they have identified, in order to understand which principles play a role and how they have emerged, and the question of the availability of judicial review.

After this Introduction, the various sectoral chapters will follow, after which a concluding chapter will bring the various contributions together, highlighting commonalities and differences (in terms of regulatory structures and possible challenges) in the mechanisms of administrative cooperation examined.



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# Annex I – Questions for authors

**1. Legal framework**: what are the legal bases as well as the relevant texts providing for administrative cooperation mechanisms? Does international law also constitute a relevant legal basis of administrative cooperation? Do soft law sources play a role?

**2. Institutional structures and actors**: who are the actors involved at national (e.g., independent regulatory agency, ministry, local administration), European and international level in administrative cooperation?

**3. Nature**: is administrative cooperation foreseen on a compulsory or voluntarily basis? Do the competent authorities enjoy a margin of discretion as to whether they want to cooperate? Can they refuse to cooperate, and, if so, on what ground(s)?

**4. Types** of cooperation: is cooperation vertical or horizontal (*i.e.*, with or without the involvement of the European level)?

**5. Mechanisms**: what kind of mechanisms are used (e.g., exchange of information, inspection, databases)?

**6. Outputs**: what is the final outcome of the cooperation mechanism (e.g., an authorisation decision, a sanction, a contract, a factual action)?

**7. Principles**: do principles of administrative law (e.g., the right to be heard) play a role? Are there specific provisions on principles in the relevant secondary law? Have such principles been developed in case law?

**8. Judicial review:** are the final outcomes of administrative cooperation reviewable? Are the preliminary acts adopted by a national authority or European authority reviewable? Is there a problem in the determination of the competent court for each of the acts or actions of the cooperation mechanism? Is there a problem in granting standing to challenge each of the acts or actions of the cooperation mechanism?



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# CHAPTER 1
# Administrative cooperation in European competition law

**François-Vivien GUIOT**

## *Introduction*

Competition law in the EU is a prime example of co-administration, as it relies on a network of administrative bodies "that decide on [EU competition] policy or jointly administer its implementation".(1) Even if cooperation between states in this field is not peculiar to the EU,(2) the level of integration in the field of competition policy achieved by European Union law is particularly remarkable.

In line with the Commission's own analysis,(3) administrative cooperation in competition law will be examined in this chapter through the concept of multi-level governance. It will be shown that administrative cooperation in the field of competition law creates a common European legal and administrative framework to the benefit of a competitive market. After recalling the scope and tools of cooperation, this chapter will describe the different forms of cooperation in the field of competition policy.

(1) See H. OBERDORFF, "Une communauté administrative pour l'Europe ou l'administration en reseau", 15 *Politiques et Management Public*, 1997, p. 2.

(2) An informal network of 138 competition authorities (the International Competition Network – ICN) was created in 2001. It has adopted a set of common principles on procedural issues (the Framework on Competition Agency Procedures). In 2021, the OECD and ICN produced a joint report on cooperation between competition authorities (available at https://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competition-enforcement-2021.htm).

(3) Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003 (COM(2009)206 final), 29 April 2009, pt 313.



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# *I. The scope and tools of cooperation in EU competition law*

## A. The material fields of cooperation

The need for administrative cooperation affects all areas of competition law, because the application of EU competition law provisions is a competence shared between the EU and the Member States. At the European level, the Commission's DG Competition fulfils the role of competition authority. Its general aim is to ensure free and effective competition in the European market. In this regard, it can conduct sectoral investigations, sanction anti-competitive practices, authorise mergers and control State aid likely to affect the single market. Each of these tasks may give rise to some form of administrative cooperation, although the cooperation is particularly prominent in the antitrust area.

### 1. Antitrust

At the time of its drafting, the articles of the Treaty of Rome on the abuse of dominance and cartels were conceived as general provisions of a constitutional nature, the scope of which would be specified in practice. The power to implement them has been entrusted to the Commission. When drafting these implementing measures, the Member States still left a great deal of autonomy to the (then) Community institutions. The resulting 1962 Regulation concentrated in the Commission's hands the power to authorise the holding of a cartel, agreement or practice affecting trade between Member States by way of negative clearance (Art. 2) or exemption (Art. 7).(4) It also allowed the Commission to define its priorities in investigations. As a result, the national authorities were marginalised, although they were integrated into an Advisory Committee of representatives of the Member States, a proto-form of administrative cooperation in the field of competition law.(5) However, the requests for exemption were so numerous that it was necessary to adopt a block exemption regulation as early as 1965.(6) On this occasion, the Commission's powers have been further strengthened, since the Council delegated to it the power to adopt general rules in this field, and thus to construct a genuine competition policy.

(4) Council Regulation (EEC) 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ L 13/204.

(5) As regards cooperation, pursuant to Article 10 of Council Regulation (EC) No. 1/2003 of 16 December 2003, [2003] OJ L 1/1, the Commission has to transmit information on ongoing procedures to the national authorities, the latter may submit any observations on these procedures, and a committee of national representatives is consulted for an opinion before any decision taken by the Commission. According to Article 11 et seq., the Commission has the power of investigation and inquiry, and the Member States must assist it.

(6) Council Regulation (EEC) 19/65 of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, [1965] OJ L 36/533.



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This system in place at the time reflected a certain distrust of national competition authorities, kept at a distance from the construction of the (then) Community competition policy. A radical change to this setup was brought about by Regulation 1/2003, which has been said to have created a "new legal architecture in competition law".(7)

Regulation 1/2003 introduced a system of cooperation between the Commission and national competition authorities, by creating "a network of public authorities applying Community rules",(8) with the Commission in a coordination role vis-à-vis the actions of national authorities within the European Network of Competition Authorities (ECN). This has allowed the development of both horizontal and vertical cooperation mechanisms between these different bodies.(9) Moreover, by decentralising the application of competition law, the new Regulation "seals the allegiance with, or perhaps the disappearance of, national competition laws".(10) Article 3 of Regulation 1/2003 specifies that the application of European law must be given priority over national rules: not only must national authorities apply Articles 101 and 102 TFEU whenever anti-competitive conduct is likely to affect trade between Member States, but national decisions can only be taken if they are in compliance with Commission decisions.(11) National law cannot therefore prohibit, in the name of competition, a practice authorised by European law, either because it would not restrict competition or because it would benefit from an exemption.

This reform has thus favoured the unity of application and interpretation of competition law by authorities networked into a single framework of European competition rules.

### 2. Mergers

The introduction of merger control into European law, almost 20 years after the Commission's proposal in this regard,(12) aimed to avoid having to rely solely on sanctioning mechanisms once anti-competitive practices have become

(7) See S. Poillot-Peruzzetto, "La réforme de la mise en œuvre des articles 81 et 82", 2 *Revue trimestrielle de droit commercial*, 2003, p. 397.

(8) Recital 15, Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

(9) See *infra*, II., A.

(10) M.-A. Frison-Roche, "À propos du règlement communautaire sur l'application des articles 81 et 82 du Traité – Variations sur les lois de modernisation", in G. Canivet (ed.), *La modernisation du droit de la concurrence*, Paris, LGDJ, 2006, p. 37.

(11) See *infra*, II., B.

(12) Commission Proposal for a Council Regulation on the control of concentrations between undertakings of 20 July 1973, [1973] OJ C 92/1. The proposal is the result of an intense debate that began in 1965 between DG IV and DG II on the economic merits of mergers. See L. Warzoulet, "Europe de la concurrence et politique industrielle communautaire – La naissance d'une opposition au sein de la CEE dans les années 1960", 1 *Histoire, Économie & Société*, 2008, p. 58.



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apparent. According to Regulation No. 4064/89, the "Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information".(13) This requirement is reflected in the obligation imposed on Member States to assist the Commission in providing the information and carrying out the checks necessary for the assessment of concentrations, in reciprocal information and notification obligations, and in the adoption of rules for the distribution of authorisation requests.(14) In the first year of the Regulation's application, DG Competition received about 30 applications for authorisation on this basis.(15) The Regulation was amended in 2004(16) with the objective of setting up a more efficient networked cooperation,(17) by allowing the most appropriate authority to be designated (in accordance with the principle of subsidiarity) and to promote procedural economy (*i.e.*, without necessarily involving the Commission). The result is a particularly flexible system for allocating procedures, making it possible to dispense with the allocation thresholds in favour of greater efficiency.

It should be noted that cooperation is particularly important for the review of cross-border mergers. In this context, a "best practices" guide was published on this topic on 8 November 2010.(18) In order to address the legal uncertainty caused by the need to obtain several national authorisations, the text encourages NCAs to assess the appropriateness of enhancing their cooperation and exchange of information during the authorisation procedure.

### 3. State aid

The establishment and maintenance of a competitive environment requires cross-sectoral cooperation from all public players.

(13) Recital 30, Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [1989] OJ L 395/1.

(14) Articles 11, 12 and 9 of Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, [1989] OJ L 395/1.

(15) While this has avoided more than 200 national proceedings (*i.e.*, about 10% of the total), it should be noted that Member States have sometimes opposed the Commission's intervention at the request of companies in order to examine the proposed operation themselves. See M. Wise, "Competition Law and Policy in the European Union", 9 *OECD Journal of Competition Law and Policy*, 2007, p. 58.

(16) Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] OJ L 24/1. For a presentation of the novelties of this text, see F. Brunet and P. Geffriaud, "La réforme du mécanisme des renvois : vers une coopération multilatérale ?", 30 *Legicom*, 2004, p. 49.

(17) For an assessment of this network structure, see the special issue of the *Revue juridique de la Sorbonne*, 2020/1: "Towards a European merger control network" (available at https://irjs.pantheonsorbonne.fr/sites/default/files/inline-files/Colloque_Vers_un_reseau_europeen_du_controle_des_concentrations%20Catherine%20Prieto.pdf).

(18) EU Merger Working Group, Best pratices on Cooperation between EU National Competition Authorities in Merge Review (available at: https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf). This document complements the guidelines set out in the Commission Notice on Case Referral in respect of concentrations, [2005] OJ C 56/2.



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This is particularly the case with regard to State aid.(19) Regulation 2015/1589 thus recalls that, while the Commission is competent to examine the conformity of aid schemes, States are required to cooperate with it under Article 4(3) TEU.(20) In particular, there is a need for cooperation for the constant review of existing aid schemes,(21) and for the implementation of investigative measures. In this regard, the need for regular discussions pushed the Commission in 2012 to set up a high-level forum bringing together the Members States.

Furthermore, state aid control has seen a form of decentralised implementation because of the system of exemptions. In particular, even if the Commission retains responsibility of control on domestic provisions, since 2012 the State Aid Modernisation Package(22) "extend[ed] national institutions' implementation tasks and require[ed] increased national institutional capacity".(23) To support this decentralisation, the Commission relied on soft law tools(24) and working groups to influence national authorities and clarify how to implement the legislative framework. It has also signed formal non-binding agreements with several national administrative bodies, such as the Italian Department of European Affairs.(25) On the basis of this

(19) The European Court of Auditors has emphasised the ineffectiveness of State aid control, due to the weakness of the procedures available in this field. See European Court of Auditors, "Do the Commission's procedures ensure effective management of State aid control?", Special Report No. 15, 2011, p. 60.

(20) See further the Code of Best Practice for the conduct of State aid control procedures, [2018] OJ C 253/14. This guide emphasises the importance of cooperation in the context of the modernisation of state aid law (para. 12, p. 25). In a centralised system, cooperation is a mean to fight the "Commission's weak monitoring and awareness-raising on domestic compliance" (C.M. Colombo, "State Aid Control in the Modernisation Era: Moving Towards a Differentiated Administrative Integration?", 25 *European Law Journal*, 2019, p. 295).

(21) Under Article 6 of Commission Regulation (EC) No. 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, [2004] OJ L 140/1, States should provide a report on existing aid schemes each year. On the basis of these national reports, the Commission publish a synopsis called "State aid Scoreboard".

(22) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions EU State Aid Modernisation (SAM), COM/2012/0209 final, 8.5.2012. See for a general overview, N. Pesaresi and R. Peduzzi, "State Aid Modernization", in B. Nascimbene and A. Di Pascale (eds), *The Modernisation of State Aid for Economic and Social Development – Studies in European Economic Law and Regulation*, Cham, Springer, 2018, pp. 17-42.

(23) C.M. Colombo, "State Aid Control in the Modernisation Era – Moving Towards a Differentiated Administrative Integration?", *op. cit.*, p. 296. For an analysis of the impact of the SAM on Italian administration, see V. Vecchietti, "Tasks for National Authorities in the Modernization Era – A Case Study – Italy", in B. Nascimbene and A. Di Pascale (eds), *The Modernisation of State Aid for Economic and Social Development – Studies in European Economic Law and Regulation*, *op. cit.*, p. 147.

(24) Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262/1.

(25) Available at: https://ec.europa.eu/competition/state_aid/modernisation/common_understanding_italy.pdf.



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agreement, the Italian administration supervises compliance with European requirements (in terms of duty of notification and communication) by all stakeholders and aid grantors.

In these exchanges, there is, however, no "cooperation in the exercise of centralised competences or for the coordination of distributed tasks".(26) The cooperation remains less formalised and less structural than in the areas mentioned above. Paradoxically in view of the responsibility given to Member States by the exemption regulations, "administrative responsibilities are [still] dispersed across a multiplicity of loosely coupled actors displaying dissimilar mechanisms and capacities".(27) However, it is not clear whether the objective of avoiding systematic involvement of the Commission in national enforcement of State aid rules can be achieved with the existing tools.

Doctrine has identified some mechanisms capable of achieving a more integrated administrative cooperation in the field of State aid. This is especially true for Regulation 1303/2013,(28) which adopts a conditionality approach towards EU structural and investment funds, thus adding a coercive dimension to the tools previously employed. As has been argued, "[M]ember States are now requested to give evidence that national authorities have sufficient administrative capacity to execute state aid rules, as well as measures in place for staff training, information dissemination and effective application of the legal framework".(29)

### 4. Services of general economic interest

Administrative cooperation also takes place in the field of services of general economic interest, the activities of which are regulated by independent bodies.

This is notably the case in the field of electricity, where the third energy package highlights the need for interaction between regulators and competition authorities.(30) Recital 61 of Directive 2009/72 specifies that "Regulatory

(26) C.M. Colombo, "State Aid Control in the Modernisation Era – Moving Towards a Differentiated Administrative Integration?", *op. cit.*, p. 304.

(27) *Ibid.*, p. 298.

(28) Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L 347/320.

(29) C.M. Colombo, "State Aid Control in the Modernisation Era – Moving Towards a Differentiated Administrative Integration?", *op. cit.*, 2019, p. 309.

(30) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L 211/55; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/C, [2009] OJ



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authorities should [...] provide information on the market to permit the Commission to exercise its role of observing and monitoring the internal market in electricity". More generally, EU legislation supports the principle that close consultation is necessary in order to achieve the objectives of opening up the national markets. In this sense, Article 13 of Directive 2009/72(31) and Article 14 of Directive 2009/73(32) provide for cooperation between regulatory authorities and competition authorities. The aim of this cooperation is to check if the conditions under which the network operator fulfils its obligations comply with competition law.(33)

However strong the regulation, the risk of a breach of competition law remains plausible and therefore supervision by the competition authorities is maintained. To this end, the two abovementioned directives give "all necessary powers" to the national competition authorities.(34) Conversely, they impose a duty on regulators to monitor and inform the competition authorities in the event of difficulties, and they confer investigative powers on them for this purpose.(35) The same needs dictate the existence of similar cross-cooperation mechanisms in other areas, such as rail transport or telecommunications.(36)

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L 211/94; Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, [2009] OJ L 211/1. For an example of interaction between the decision of a regulatory authority and an anti-competitive conduct, see *Deutsche Telekom v. Commission*, case C-280/08 P, EU:C:2010:603; and between the decisions of a regulatory authority and of a NCA, see *bpost*, case C-117/20, EU:C:2022:202.

(31) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L 211/55.

(32) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/C, [2009] OJ L 211/94.

(33) See on this issue, B. Blottin, *Concurrence, régulation, et énergie – Rôle des autorités de concurrence et des autorités de régulation sectorielle*, Brussels, Bruylant, 2016, p. 334.

(34) See Article 37 of 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L 211/55, and Article 41 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/C, [2009] OJ L 211/94.

(35) *Ibid*. In France, the *Conseil de la concurrence* warned the government authorities as early as 1998 of the need for cooperation between competition authorities and the regulatory authorities (opinion No. 98-A-05 of 28 April 1998 concerning a request for an opinion on the principles to be respected or the provisions to be introduced to ensure competition in the electricity market within the framework laid down by European Directive 96/92/EC – available at: https://www.autoritedelaconcurrence.fr/fr/avis/relatif-une-demande-davis-sur-les-principes-respecter-ou-les-dispositions-prevoir-pour-0). A legislative mechanism was therefore provided for by Article 39 of the Law of 10 February 2000 No. 2000-108 (JOFR No. 35 of 11 February 2000), which is now included in the Energy Code (Art. L 134-16). It includes information obligations, opinion procedures, as well as a power or sometimes an obligation to refer matters to the President of the Energy Regulation Commission. For details on implementation of these cooperation mechanisms, see B. Blottin, *Concurrence, régulation, et énergie – Rôle des autorités de concurrence et des autorités de régulation sectorielle*, *op. cit.*, p. 337.

(36) *Ibid*., pp. 337-338.



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## B. The legal channels for cooperation

### 1. Informal tools of cooperation

The establishment of cooperation mechanisms has developed, initially, in the form of exchanges of best practices.

Among the mechanisms for cooperation, it is worth recalling the existence of forums for exchange at the European and international levels (in particular the International Competition Network – ICN – and the OECD Competition Committee and Global Forum on Competition).(37) These organisations provide an opportunity to share experience and establish best practices.

At the European Union level, the European Competition Network (ECN) is the key European forum for the coordination of competition authorities.(38) It is the place for cooperation to implement competition rules, but it is "also a place for informal cooperation".(39) The members of the network meet, under the auspices of DG Competition, to determine competition policies and priorities in the EU by consensus. The representatives have developed the practice of holding plenary meetings on policy issues and setting up working groups on technical issues. Based on these exchanges, authorities can more easily draw up recommendations or legislative texts.

This informal practice is not limited to the field of anti-trust. For example, a working group on mergers was set up in 2010. As a result of its work, the abovementioned "best practices" document on cross-border merger control was adopted on 8 November 2011.(40) Although these recommendations are not binding, they complement the framework of the ECN Notice system, an

(37) See the special issue of the *Competition Law and Policy Review*, 2004, p. 340. As it presents itself, "[T]he ICN provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community." Similarly, the OECD Global Forum on Competition brings together every year competition officials from over 110 authorities and organisations worldwide.

(38) Mention should also be made of the European Competition Authorities (ECA) which gathers representatives of competition authorities from the European Economic Aera (EEA) since 2001.

(39) OECD, *Country studies. European Commission – Peer Review of Competition Law and Policy*, 2005, p. 46 (available at: https://www.oecd.org/eu/35908641.pdf). The report goes on to say that network members "hold occasional plenary meetings at the political level. There are also working groups on topics such as leniency, transition issues, sanctions and procedures, Article 82, and sectoral sub-groups".

(40) EU Merger Working Group, Best practices on Cooperation between EU National Competition Authorities in Merge Review (available at: https://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf). For operations that are not subject to Commission review, the text attempts to address the legal uncertainty caused by the need to obtain several national authorisations. It encourages NCAs to assess the appropriateness, on a case-by-case basis, of greater cooperation between them and of an exchange of information at the various stages of the procedure. The Guide also encourages active cooperation by the merging parties, who are encouraged to waive the confidentiality of the information transmitted, to allow for an effective exchange of information between NCAs.



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information system between EU and EEA Member States.(41) These recommendations form part of the broader framework of existing guidelines on the system of case re-allocation between Member States and the Commission. In addition to the adoption of a notice on the referral of merger cases,(42) and the European Competition Network's principles for the application by national authorities of Articles 4(5) and 22 of Regulation 139/2004/EC specifying the possibilities for referral,(43) the recent interpretative Notice on Article 22(44) is also worth highlighting, because it was designed to address the needs expressed by national authorities in this informal dialogue (and could open the way to a formal revision of these specific provisions).(45)

Voluntary cooperation may also precede a compulsory cooperation phase. This is the case with pre-notification in the field of State aid. In order to strengthen the effectiveness of the control,(46) the Commission formalised this pre-notification phase in 2009 in a Code of Good Practice (revised in 2018).(47) The purpose of this phase is to promote the exchange of information with the Member State concerned. In order to encourage its use, only pre-notified State aid is likely to benefit from a "streamlined" procedure during its examination. Those that have not been pre-notified are subject to the ordinary procedure (combining a preliminary phase and an adversarial phase).

Moreover, the code specifies that, to strengthen the partnership with national authorities, again, working groups should meet regularly to exchange information about practical aspects and lessons learned.(48) The Commission also undertakes to provide informal guidance on the interpretation of the new rules and to offer training to requesting states. Finally, a network of national

(41) The competition authorities dealing with a merger of a transnational dimension issue a notice. They indicate the names of the parties, the areas of activity involved, and the states concerned (for more details see: http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf).

(42) Commission Notice on Case Referral in respect of concentrations, [2005] OJ C 56/02.

(43) ECN, "Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation", January 2005 (available at: https://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf).

(44) Commission Notice of 31 March 2021, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, [2021] OJ C 113/01.

(45) See *infra*, II., B., 3.

(46) According to the Vademecum of the French Ministry of the Economy, "this pre-notification phase enables the Commission services, through contacts at an early stage, to examine informally the legal and economic aspects of a project before it is notified and to speed up their processing. Such early contacts are also recommended by the Commission in cases with particular novelties or specific characteristics, and can also be useful for projects of common interest. During the pre-notification phase, the Commission services make an initial assessment of whether a case is suitable for the application of the streamlined procedure". (Vade-mecum des aides d'État, éd. 2020, p. 244, available at: https://www.economie.gouv.fr/files/files/directions_services/daj/publications/Vade-mecum-aides-Etat-2020/Vademecum_aides240920.pdf).

(47) Code of Best Practices for the conduct of State aid control procedures, [2018] OJ C 253/05.

(48) *Ibid.*, para. 12.



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coordinators (in principle the permanent representatives of the States) has been set up to facilitate day-to-day contacts between the Member States and the Commission services.

Another form of voluntary cooperation in the field of State aid is the definition of priorities for examination.(49) States can participate in the identification of the Commission's review priorities. In this area, national authorities are invited to participate in the "portfolio approach exercise" organised twice a year by the Commission. In addition, where a preliminary examination appears impossible following a pre-notification, a "friendly planning" exercise is possible at the request of the State or on a proposal from the Commission. In exchange for the State's commitment to provide the necessary information, parties agree to treat the case as a priority and also define the course and timetable of the examination procedure, as well as the form and duration of the investigation.

### 2. The role of case law in the promotion of administrative cooperation

The adoption of secondary legislation, such as Regulations 2003/1 and 139/2004 mentioned above, has been an indispensable vehicle for the development of cooperation in the competition field. However, the Court of Justice has played a pivotal role in shaping the relevant Treaty articles as a complement to secondary legislation,(50) particularly as regards cooperation between the Commission and national courts.

Thus, based on the principle of loyal cooperation now enshrined in Article 4(3) TFEU, the EU courts have been able to encourage the exchange of information beyond the provisions laid down under the aegis of Regulation 17/62.(51) In the view of the CJEU, judicial authorities of the Member States are responsible for ensuring that national legal orders apply and comply with EU law. Accordingly, in the 1991 *Delimitis* case, the Court stated that a national court has the possibility to obtain information from the Commission on the existence of a possible procedure before the institution and on the likelihood that it will lead to a finding of an infringement of competition law. According to this case law, a court may also approach the Commission in case of particular difficulties, in order to obtain the economic and legal data that the Commission is able to provide.(52)

(49) *Ibid*., para. 4.1.

(50) Case law has even preceded the adoption of a regulatory framework. For example, Recital 21 of Council Regulation No. 4064/89 recalled that an obligation to cooperate is imposed on national authorities by virtue of the case law of the Court of Justice.

(51) Council Regulation No. 17/62, First Regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ 13/204.

(52) *Delimitis v. Henninger Bräu*, case C-234/89, EU:C:1991:91, para. 53. The consequences of the principle of sincere cooperation were then specified in the first Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, [1993] OJ C 39/06.



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In addition to the powers it grants to national authorities, the principle of loyal cooperation also imposes obligations on the Commission. Article 20(1) of Regulation 17/62 prohibited the use of information gathered by the Commission for a purpose other than that for which it was requested. However, the Court of First Instance considered that the principle of loyal cooperation nevertheless requires the Commission to offer active assistance to any national judicial authority acting to prosecute infringements of Community law. This may take the form, where appropriate, of a communication to national courts of any document acquired by the institutions because of their competition monitoring duties.(53)

The importance of case law is also identifiable in the area of State aid.(54) By recognising the direct effect of Article 108(3) TFEU, the Court of Justice has made national courts the guardians of the effectiveness of notification obligations and of the rights that individuals derive from it.(55) With regard to State aid deemed illegal by the Commission as incompatible with the internal market, the Court of Justice has also used the obligation of loyal cooperation between the Member States and the Commission. It states that in the event of "unforeseen and unforeseeable" difficulties in recovering the aid, the State must cooperate with the Commission in order to find an appropriate solution. This obligation could go as far as requiring the Commission to make "appropriate amendments to the decision in question".(56)

### 3. Formalised tools of administrative cooperation

The dialogue mechanisms(57) and the soft law tools presented above,(58) together with the role of the European Court of Justice are, however, not sufficient to fight transnational anti-competitive practices efficiently. Legal tools and hard law are necessary for effective cooperation to take place. That is why there has been a significant increase in cooperation agreements at international

(53) *Postbank v. Commission*, case T-353/94, EU:T:1996:119, para. 62.

(54) See Vade-mecum des aides d'État, éd. 2020, p. 279 (available at: https://www.economie.gouv.fr/files/files/directions_services/daj/publications/Vade-mecum-aides-Etat-2020/Vademecum_aides240920.pdf).

(55) *Salmon*, case C-354/90, EU:C:1991:440, para. 14. National courts must ensure the disappearance of all effects produced by aid paid without prior notification: invalidation of implementing acts, recovery of financial support and adoption of interim measures. (See also *Enedis*, case C-515/16, EU:C:2017:217, paras. 30-32).

(56) *Commission v. France*, case C-441/06, EU:C:007:616, para. 28.

(57) The discussions organised by the OECD can be found at: https://www.oecd.org/daf/competition/roundtables.htm.

(58) See further on this point C.M. Colombo, "State Aid Control in the Modernisation Era – Moving Towards a Differentiated Administrative Integration?", *op. cit.*, p. 302 and the references contained in footnote 80.



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level in which the European Union itself is taking part.(59) The European Commission has concluded formal agreements on competition with the United States (1991),(60) Canada (1999),(61) Japan (2003),(62) South Korea (2009),(63) Switzerland (2014)(64) and an agreement in principle with Mexico (2018),(65) as well as memoranda of understanding(66) in order to go beyond what informal cooperation allows.(67)

These agreements include the obligation to take the important interests of the other parties and the possibility of requiring a partner to take action to stop anti-competitive behaviour coming from its territory. Another advantage of formalising cooperation concerns the issue of information exchange. For instance, the bilateral agreement on cooperation between the European Union and Switzerland, signed in 2012,(68) established a legal framework to share evidence.(69)

These examples illustrate the importance of strengthening legal relations. The network of European competition authorities resulting from Regulation 1/2003 is a response to the same challenge. It aims to solve concrete problems and to strengthen the effectiveness of cooperation. In this respect, it is important to point out that, before this Regulation which is still the main instrument regulating administrative cooperation in the field of competition law, national authorities faced two kinds of obstacles.

(59) A full list of agreements can be found at: https://www.oecd.org/daf/competition/roundtables.htm.

(60) Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, [1995] OJ L 95/47.

(61) Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, [1999] OJ L 175/50.

(62) Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, [2003] OJ L 183/12.

(63) Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, [2009] L 202/36.

(64) Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, [2014] OJ L 347/3.

(65) For its presentation see: https://competition-policy.ec.europa.eu/international/bilateral-relations/mexico_en. The Commission and the Federal Economic Competition Commission of Mexico also concluded an administrative arrangement in 2018.

(66) Many cooperation agreements also contain provisions on competition law. The full list of bilateral provisions is available at https://ec.europa.eu/competition-policy/international/bilateral-relations_en.

(67) See further M. Wise, "Competition Law and Policy in the European Union", 9 *OECD Journal of Competition Law and Policy*, 2007, p. 58 et seq.

(68) D. Guex, "Bilateral Competition Cooperation Agreement between Switzerland and the European Union – New Developments and Questions Regarding the Exchange of Confidential Information Between Competition Authorities", 3 *Swiss Review of Business and Financial Market Law*, 2014, p. 3.

(69) Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws of 1 November 2012, [2014] OJ L 347/3.



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Firstly, they did not always have sufficient powers (in the form of interim measures, or sanctions). Regulation 1/2003 harmonised the legal tools available at national level. Furthermore, the principle of territoriality of the law prevented effective national enforcement of EU competition law: even where a national authority was competent to deal with a case mainly affecting its national territory, it was unable to investigate EU-wide undertakings and practices. Therefore, the Commission and its own investigative powers were often required, leading to a *de facto* centralisation. In response to this problem, Regulation 1/2003 pursued the objective of effective decentralisation by strengthening the possibilities for transnational cooperation.

Secondly, in substantive terms, the establishment of a system of networked cooperation has enabled national authorities to exercise a power of individual exemption. Until then, in cases where trade between Member States was affected, they could only ensure the application of provisions with direct effect (then Article 85(1) TEC and the block exemption regulation).(70) This process of decentralisation of the application of EU competition law pursues the objective of procedural economy.

The main rationale for administrative cooperation thus appears to be the effectiveness of European competition law in a context of decentralisation.(71) This objective requires that the uniform application of the law be ensured. To achieve this, it was necessary for the European competition rules to become "the law of the land" throughout Europe. It was also necessary that all authorities have the capacities to reach this goal (particularly in the new Member States). Regulation 1/2003, which implied a "new wave of communitarisation" of national competition rules, can therefore also be understood as a renewed governance of competition law implementation.(72)

After more than 15 years of implementation, the network has proved its worth. In particular, it has allowed for a pragmatic distribution of cases and a mutual control of the decisions taken within it.(73) However, the need to further strengthen the conditions for cooperation has recently been highlighted.(74) The

(70) See para. 5 of the Commission Notice on cooperation between national competition authorities and the Commission in dealing with cases falling within the scope of Articles 85 and 86 of the EC Treaty, [1997] OJ C 313/3.

(71) Commission Staff working paper accompanying the Notice from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003 (COM(2009)206 final, 20 April 2009, para. 312.

(72) B. Lasserre, "Modernisation – Les adaptations nécessaires du Conseil de la concurrence", 1 *Concurrences*, 2004, p. 29.

(73) See II., B., 3 and II., B., 5. On the details of the applicable rules, see C. Prieto and D. Bosco, *Droit européen de la concurrence – Ententes et abus de position dominante*, Brussels, Bruylant, 2013, p. 1118.

(74) European Court of Auditors, "The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight", Special Report No. 24, 2020.



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ECN + Directive should provide some answers to these challenges.(75) Overall, the Directive aims to improve the effectiveness of the existing cooperation mechanisms,(76) by tackling the diversity of human or budgetary resources, and by ensuring the independence of national authorities and the adequacy of their legal means. In line with the assessments made in the Communication "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives",(77) these important changes homogenise the functioning of the network, by aligning the powers of the national authorities with those of the Commission.(78)

## *II. The different types of cooperation and EU competition governance*

### A. The patterns of cooperation

#### 1. Vertical cooperation

The simplest form of cooperation in the field of competition law is that between the Commission and a national competition authority. Despite the establishment of the ECN, these relations between the Commission and the NCAs are still a common pattern of cooperation even in antitrust and it remains the *main* form of cooperation at present. This cooperation mechanism will be examined below in Section C.III.

(75) Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11/3.

(76) In particular, the ECN + Directive strengthens the obligation of national authorities to provide information; the powers to investigate companies' compliance with decisions taken within the network; measures of assistance during investigations or for the enforcement of penalties; and the possibilities for cooperation on leniency programmes.

(77) Communication from the Commission to the European Parliament and the Council, "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives", COM/2014/0453 final, paras. 24-25: "After ten years of working together, a substantial level of convergence in the application of the rules has been achieved but divergences subsist. They are largely due to differences in the institutional position of NCAs and in national procedures and sanctions. […] To enhance EU competition enforcement for the future, the institutional position of NCAs needs to be reinforced while at the same time ensuring further convergence of national procedures and sanctions applying to infringements of EU antitrust rules".

(78) This is the case with respect to the principle of discretionary prosecution, which also allows national authorities to prioritise cases according to the general interest at stake (Art. 4(5) of the ECN + Directive); the possibility of imposing proportionate structural or behavioural measures to put an end to the infringement (Art. 10(1) of the ECN + Directive); or, the possibility of modifying, supplementing and terminating commitments accepted by a national authority (Recital 39, and Art. 12 of the ECN + Directive). Finally, the ECN + Directive allows authorities to adopt *ex officio* protective measures (Art. 11 of the ECN + Directive).



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Vertical cooperation can also sometimes go unnoticed. For example, in the field of State aid, the Commission has a monopoly in the processing of notifications of State aid. However, the cooperation is not limited to these procedures of notification. As mentioned above,(79) Article 26 of Regulation No. 2015/1589 requires Member States to send the Commission an annual report on existing aid schemes. This obligation to provide information can be seen as a minimal form of vertical cooperation, as it facilitates the Commission's monitoring task.

### 2. Horizontal cooperation

The integration of States into a supranational organisation generally also implies a horizontal obligation to cooperate. In EU law, this requirement of cooperation among national authorities derives from the duty of loyal cooperation in Article 4(3) TEU,(80) but also from specific provisions (in particular with regard to the duty of mutual assistance).(81) This horizontal cooperation is mainly present at the investigation stage. When faced with cross-border companies' activities, national authorities need to cooperate to gather information and evidence. These exchanges, to be legal, must be regulated by law. The provisions required for this purpose are established in Article 12 of Regulation (EC) 1/2003.(82) Another form of horizontal cooperation can be found in Article 13. In order to avoid parallel (and potentially contradictory) ongoing proceedings, a national authority (as well as the Commission) can suspend or terminate its own investigation on the "sufficient grounds" that one authority is dealing with the case.(83)

In this respect, it should be noted there is room for improvement in the mechanisms of horizontal cooperation in the face of cross-border economic behaviour,(84) because of the lack of transnational effect of national authorities' final decisions, despite the improvement brought by the ECN + Directive concerning their transnational enforceability.(85) This limitation creates

(79) See *supra*, I., A., 3.

(80) See *infra*, II., B., 4.

(81) See in particular M. MEDJNAH, *Les rapports entre les autorités de régulation en matière de concurrence*, Paris, L'Harmattan, 2013, pp. 505-506.

(82) This is also one of the reasons of the agreements concluded between the Commission and foreign authorities (as mentioned above, B.II.3).

(83) See *infra*, II., B., 3.

(84) See, L. IDOT, "The Future of Regulation n° 1/2003 – New Relations between EU and National Laws", 11 *Journal of European Competition Law & Practice*, 2020, p. 409; and P. VAN CLEYNENBREUGEL, "Case (re-)Allocation Against the Backdrop of Procedural Convergence: Time for a Regulation '2' Upgrade?", 11 *Journal of European Competition Law & Practice*, 2020, p. 418.

(85) See *infra*, II., B., 6.



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difficulties with respect to the *ne bis in idem* principle in the field of competition law and more generally with the efficiency of the decentralisation of competition law enforcement.(86)

### 3. Networked cooperation

Apart from horizontal and vertical forms of cooperation, EU competition law also foresees mechanisms of networked cooperation through the European Competition Network. The network fits with Schmidt-Assmann's definition of "composite administration": "an idea of order which seeks to establish the necessary unity of action through the interweaving of two organisational principles, the principles of cooperation and hierarchy".(87) The latter principle seems however to prevail in the framework of the ECN.

First, the hierarchical dimension reveals itself from the authority that set up the network. While some international networks are purely voluntary cooperation structures, the ECN is based on a European regulation and, as mentioned above, is the result of a policy of decentralisation designed to ensure the effectiveness of European rules within the Member States.(88)

Second, because of the origin of the rules applied, the network appears to be structured around a centre-periphery axis. Indeed, the ECN formalises at its centre the predominant role of the Commission,(89) which uses this architecture to promote the development and dissemination of a common competition policy. In this sense some authors argue that its creation was designed as "a response to the failure of another tool of governance: soft law" and more precisely the limited impact of the notice on cooperation with NCAs.(90)

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(86) The recent adoption of an "*idem* factum" instead of the "*idem* crimen" criterion to apply the principle of *ne bis in idem* (*Nordzucker and Others*, case C-151/20, EU:C:2022:203) should reinforce the "one stop shop" principle at the risk of the effectiveness of European competition law. See L. Idot, "L'application du principe ne bis in *idem* en droit de la regulation économique", 32 *LexisNexis Europe*, 2022, p. 5.

(87) E. Schmidt-Assmann, *Der Europäische Verwaltungsverbund*, Tübingen, Mohr Siebeck, 2005, p. 7.

(88) On the problem of the decentralised application of exemptions under the old system, see H. Lesguillons, "Withdrawal of the Benefit of the Application of the Vertical Restraints Exemption Regulation by the Competent Authorities of the Member States", *RD aff. int./International Business Law Journal*, 1999, p. 509.

(89) Recital 34 of the Regulation (EC) 1/2003 recalls that while the text aims to involve "the Member States more closely in the application of the Community competition rules", the provisions of the Treaty "confer on the Community bodies a central role which should be maintained".

(90) I. Maher, "Revisiting Soft Law. Governance, Regulation and Networks", in M. Eliantonio, E. Korkea-aho and O. Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*, London, Hart, 2021, p. 21.



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Third, in line with the previous point, it should be highlighted that the network has not been conceived or designed based on a strict equality between the participants. According to Regulation 1/2003, the modalities for the cooperation shall "be laid down and revised by the Commission, in close cooperation with the Member States".(91) As early as 2004, this was accomplished by a Notice on cooperation within the Network of Competition Authorities.(92)

However, the network also values the cooperation of national authorities. At the heart of the ECN is a cooperative body: the Advisory Committee provided for in Article 14 of Regulation 1/2003. It brings together representatives of all the institutions applying European competition law (including national courts). Although its opinions are not binding,(93) they are an important and substantial part of the network's work, as the relevant provisions require such consultations at important stages of the decision-making process.(94)

### 4. Asymmetric cooperation

Cooperation does not only concern NCAs, but it also involves other actors of different natures. In addition to the case of cooperation between competition authorities and regulators mentioned above,(95) the obvious illustration of this asymmetrical cooperation is the relationship between a national competition authority and a judicial authority – either of them being able to trigger the cooperation.

As mentioned above, Article 6 of Regulation 1/2003 gives national courts full jurisdiction to apply Articles 101 and 102 TFEU. Mechanisms for cooperation with national courts have therefore been introduced to achieve a consistent application of competition law. Courts may thus request information or an opinion from the European Commission while adjudicating a case (Art. 15(1)). Conversely, NCAs and the Commission must be able to submit written

(91) Article 33 of the ECN + Directive also specifies that the Commission shall bear the operating expenditure and charge it to the general budget of the Union.

(92) Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43.

(93) Nevertheless, Article 14(5) states that "The Commission shall Take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account".

(94) Specifically, the Advisory Committee shall be consulted prior to the taking of any decision under Article 7 (Finding and termination of infringement), Article 8 (Interim measures), Article 9 (Commitments), Article 10 (Finding of inapplicability), Article 23 (Fines), Article 24(2) (Fixing the periodic penalty payments), and Article 29(1) (Exemptions withdrawal in individual cases).

(95) See *supra*, I., A., 4.



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observations (or oral observations with their agreement) to the courts on their own initiative.(96) To do so, they have to be kept informed of the existence of ongoing legal proceedings and on the merits of pending cases.(97)

Moreover, Regulation 1/2003 makes the national court "the judge of the execution, at national or individual level, of decisions rendered by the Commission".(98) The primacy of Commission decisions even leads national courts to suspend their proceedings when an administrative procedure is underway before the European Commission. This is to avoid a possible contradiction with future decisions (Art. 16(1)).

Furthermore, national courts may be seized to allow persons mandated by the Commission, possibly national executive agents, to carry out an inspection despite the opposition of an undertaking.(99) Article 20(8) of the Regulation provides that the national court may have to verify the proportionality of the coercive measures envisaged in the light of the suspected infringement of competition law and to this end it may request information from the competition authority or the Commission, without being able to request the communication of the file. While the legality of the Commission's decision remains solely within the competence of the Court of Justice, its enforcement depends wholly on the national court.

The involvement of national courts is not limited to the field of antitrust. Article 108(3) TFEU, for example, makes the national court the guardian of the effectiveness of the notification obligation of State aid.(100) It is up to the national courts to safeguard the rights that individuals derive from the direct effect of the prohibition on implementing aid prior to any Commission decision, while verifying the compatibility of the aid with the market rules remains the exclusive responsibility of the Commission.(101) The intervention of national courts is also often required in the context of the execution of a recovery decision adopted by the Commission, or for the recovery of damages caused by illegal State aid. The

(96) Pursuant to paras. 22 and 28 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC ([2004] OJ C 101), the Commission has undertaken to respond promptly (in principle within one month) to requests for information from national courts. For opinions, however, the deadline is extended to four months.

(97) This *amicus curiae* function raises questions of impartiality. See on this subject, E. Claudel, "La procédure d'*amicu curiae* – Bilan en demi-teinte de la pratique européenne et française", 4 *Concurrences*, 2012, p. 38.

(98) G. Canivet, "L'organisation des juridictions nationales pour l'application du droit communautaire de la concurrence", 1 *Concurrences*, 2004, p. 23.

(99) Pursuant to Art. 21 Regulation 1/2003, in addition to undertaking properties, the inspection can be carried out on "other premises, land and means of transport" and in particular the homes of persons connected with the business.

(100) See Vade-mecum des aides d'État, éd. 2020, p. 279 (available at: https://www.economie.gouv.fr/files/files/directions_services/daj/publications/Vade-mecum-aides-Etat-2020/Vademecum_aides240920.pdf).

(101) *Salmon*, case C-354/90, EU:C:1991:440. The different purpose of the actions of the two institutions explains why courts are not obliged to suspend the national procedure pending the Commission's decision (*CELF*, case C-1/09, EU:C:2010:136).



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principle of loyal cooperation binds the two authorities, as clarified by the Court of Justice.(102) This role of national courts has been clarified by Commission Notices(103) and subsequently enshrined in Regulation 734/2013.(104)

## B. The mechanisms of cooperation

### 1. Duty of notification and consultation

In its simplest form, cooperation entails a general obligation on the part of the NCAs to communicate with each other within the ECN. This obligation precedes and accompanies any investigation procedure. These notification mechanisms are established for the allocation of cases between the competition authorities within the European network. If the opening of a procedure by the Commission has the effect of removing the national authorities from the case concerned,(105) the Commission must indeed be informed that a national procedure is underway (Art. 11(4) Regulation 1/2003). Notifications and consultation mechanisms work both ways, as the Commission also has to consult any national authority already acting on a case before launching its own investigations (Art. 11(6)).

The abovementioned Advisory Committee within the ECN also forms part of the consultation tools. The Commission may place on the Committee's agenda a case dealt with by a national authority, either on its own initiative or at the request of a Member State (Art. 14(7)). As regards Commission decisions, Regulation 1/2003 requires the Advisory Committee to be consulted prior to any decision finding an infringement and imposing cease-and-desist measures, any provisional measure, any decision accepting commitments or any finding of non-application of Treaty articles (Arts. 7 to 10). The same obligation applies before imposing a fine or periodic penalty payment or withdrawing the benefit of a block exemption regulation (Arts. 23, 24 and 29). The Commission must present to the national representatives a statement of the case, indicate the most important documents and provide a preliminary draft

(102) *SFEI and Others*, case C-39/94, EU:C:1996:285, para. 50.

(103) Notice on cooperation between national courts and the Commission in the State aid field, [1995] OJ C 312/8; Notice on the enforcement of State aid law by national courts, [2009] OJ C 85/1.

(104) Council Regulation No. 734/2013 of 22 July 2013 amending *Regulation* (EC) No. 659/1999 laying down detailed *rules* for the application of Article 93 ([2013] OJ L 204/15) introduced a new provision in the Rules of Procedure allowing the Commission to present opinions, observations or information before national courts, either spontaneously or at their request. To this end, the Commission may obtain any relevant document held by the court (see Art. 29 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, [2015] OJ L 248/9).

(105) The objective is that inside the single market the same case should be settled once for all by a single decision.



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decision. The Committee then adopts an opinion on the case. In any case, the Commission must justify in its decision that it has taken this opinion fully into account.

The Commission must also consult the Committee before any decision on a merger. In this field, the opinion will even be annexed to the final decision. Regulation 139/2004 also lays down obligations to transmit to the national authorities territorially concerned any request or decision for information addressed by the Commission to undertakings (Art. 11(5)). More broadly, Article 19 requires that the Commission also communicates to national authorities every notification received and the most important procedural documents. This obligation allows the competition authorities to send back observations on ongoing proceedings.

### 2. Information exchange

The applicable legislative framework also provides for forms of cooperation based on the exchange of information. For example, Articles 11 and 14 of Regulation 1/2003 and Article 19 of Regulation 139/2004 provide that the Commission shall transmit to the NCAs, *ex officio* or on request, the documents it has collected in the course of proceedings for the application of European competition law.(106) Similarly, national authorities must not only notify the Commission in writing before the adoption of the first formal measures (or immediately after their adoption), but they must also make the information available to other NCAs. Furthermore, national authorities are obliged to respond to requests for information from the Commission (Art. 12(6) Regulation 139/2004).

In the field of State aid, there is also a compulsory mechanism of information exchange for which States are responsible. If a State receives a request from the Commission for additional information during the examination of a notified aid measure (Art. 4(5) Regulation 2015/1589),(107) it is obliged to comply (Art. 5(1) Regulation 2015/1589). After a reminder from the Commission (Art. 5(2)), silence on the part of the Member State will render the notification ineffective. The aid will therefore be classed as unnotified under European law (Art. 5(3)).

(106) For anti-competitive practices, this refers to the documents collected pursuant to Articles 7 to 10 and 29 of Regulation 1/2003. If the Commission's obligation relates to the most important documents, national authorities may request any document that was necessary for the Commission's assessment.

(107) According to Article 4, if a request of information is addressed by the Commission, the notification will only be considered as complete when the State has replied. This is an incentive, as the two-month period for the Commission to take a decision (which may be an implicit decision of compatibility) is postponed to "the day following the receipt of a complete notification".



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Within the ECN, the exchange of information cannot be limited by the protection of confidential or personal information of enterprises. This was one of the reasons for the adoption of Regulation 1/2003. According to Article 12 of the Regulation, "the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information", for the application of both European and national competition law (as long as the information is used for the same case).(108) If the information provided can lead to the adoption of sanctions, it is subject to the respect of the rights of defence. This condition is assessed in regard to the standards in force in the legal system concerned.(109)

However, even within the ECN, there are in practice limits to the exchange of information and accompanying safeguards (Art. 12 Regulation 1/2003). This is, in particular, the case where a leniency programme is at stake, as highlighted by the Commission's Notice on cooperation within the Network of Competition Authorities of 2004.(110) European law indeed provides that exchanges between competition authorities should preserve the confidentiality of the leniency applicant's statements (unless waived(111)). This protection is necessary as not all national authorities have a leniency programme yet. Companies would otherwise fear that their cooperation allow a competition authority member of the network to prosecute and sanction them.(112)

More broadly, competition authorities are subject to a duty of care: European law ensures the protection of professional secrecy. The aim is to preserve business secrecy and the legitimate interests of undertakings. All State agents or representatives who may become aware of information acquired in the course of an investigation are therefore required to not disclose it (Art. 28(2) Regulation 1/2003). This concern applies whether or not companies are held guilty of a violation of competition law.

(108) Such information may come from an investigation procedure into an abuse of dominance or a cartel, or from a merger review procedure. It may result from requests for information, hearings or searches.

(109) In the case of individual criminal sanctions, the provisions of the criminal law of the country of destination must also be similar to those of the country of origin of the information.

(110) Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43 (see especially p. 48, Section 2.3.3., Position of applicants claiming the benefit of a leniency programme).

(111) *Ibid.*, Section 2.3.3, para. 40.

(112) The Commission states that the exchange of information remains possible even in the absence of the company's consent, provided that the receiving authority undertakes in writing not to use the information obtained to sanction the company (*Ibid.*, p. 48, para. 41). This leads to the effect of a leniency measure being exported to the legal order of another State without any internal legal bases.



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Finally, Article 27(2) of Regulation 1/2003 guarantees the confidentiality of the authorities' internal documents and correspondence involved in the authorities' cooperation (this refers to the bilateral cooperation of Article 11, as well as the exchanges that take place within the Committee provided for in Article 14).

### 3. Allocation of cases and procedures

One of the key functions of cooperation is to allocate the examination of cases between authorities. To this end, the rules adopted by Regulation 1/2003 foresee cooperation mechanisms aimed at facilitating case allocation. As said previously, under Article 11(6), the Commission has the power to pre-empt a case.(113) The same provision, as well as Article 13, also establish rules to avoid duplication of proceedings. These rules are conceived with the idea that both the Commission and the national authorities are pursuing the same mission of "public interest in performing their general task of monitoring and enforcing the competition rules".(114) While establishing a system of parallel competences, Regulation 1/2003 thus pursues a principle of a single examination ("one stop shop" principle). The objective is to avoid the multiplication of controls deemed costly for companies, and the risk of divergence between authorities. In the field of cartels, the application of the allocation rules also takes place within the general framework of the principle of subsidiarity.

Accordingly, the Commission will normally be considered "particularly well placed" to conduct the investigation if the case involves more than three Member States.(115) However, this threshold is not mandatory. The Commission must always take the EU interest into account when dealing with a case itself. Conversely, it may also choose to reject a complaint because a national procedure is underway. If several national authorities have opened proceedings in the same case, they may suspend their proceedings or reject the

(113) To this end, in national systems where the judicial authority is the only one that can adopt coercive measures, Regulation 1/2003 provides that the administrative authorities in charge of the investigation must have the possibility to withdraw their judicial request for sanction. In this case, courts have to end the procedure without being able to invoke any grounds that could justify its continuation (Art. 35(4)).

(114) Notice of 15 October 1997 on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, [1997] OJ C 313/3.

(115) See Commission Notice on Cooperation within the Network of Competition Authorities, [2004] OJ C 101/43, p. 44, para. 14. However, according to paras. 11-13, it is possible for national authorities to carry out parallel procedures as long as they cooperate closely with each other and always with the guarantee that the Commission will take over the procedure in case of difficulties.



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complaints received. Similarly, if one of them has already adopted an infringement decision, other competition authorities may reject complaints relating to that case (Art. 13 Regulation 1/2003).

Regulation 139/2004 also provides for a form of coordination between competition authorities and establishes a complex bilateral referral mechanism (in particular in Arts. 9 and 22).(116) First, this system allows for a form of centralisation. It enables the Commission, with the agreement of the national authorities, to examine mergers, which do not have a Community dimension but which should have been examined by several Member States.(117) Competition Commissioner Vestager also announced that, from mid-2021, national authorities could transfer to the Commission the examination of mergers that meet neither the Community nor the national notification thresholds. This new interpretation of Article 22 of the Regulation aims to deal with "killer acquisitions" (anti-competitive acquisitions).(118) These operations do not fall within the competence of the national authorities, but nevertheless affect trade between Member States and threaten to significantly affect competition in the territory of the Member State(s) making the request.(119) In 2022, the General Court has confirmed the validity of this new referral policy. After a very strict and long scrutiny, judges held that "neither a legislative amendment nor a revision of the European dimension thresholds were [...] necessary"(120) to allow this renewed interpretation of Article 22.

(116) See also Commission Notice on Case Referral in respect of concentrations, [2005] OJ C 56/2.

(117) Since the revision brought about by Council Regulation (EC) No. 1310/97, the Commission is competent even where the operation does not have a Community dimension (by virtue of the thresholds defined in Art. 1(2)), provided that the undertakings have a significant turnover in three Member States.

(118) As explained by Vice-president Vestager, "the world is changing. With zero-price markets and business models based on data and early R&D, turnover is not the only signal of competitive significance – sometimes it is not a signal at all. The point being: the goals of our Merger Control policy have not changed, but the context in which we pursue those goals has evolved, and that is where flexibility comes in [...] By adapting the referral mechanism, we can capture below-threshold acquisitions that could raise competition concerns. And to maximise this potential, we need to work together with the national competition authorities across the Union to develop a unified and coherent approach." Speech at the International Bar Association 26th Annual Competition Conference in Florence, 9 September 2022, "Merger control: the goals and limits of competition policy in a changing world". For a discussion of this new interpretation, see D. Bosco, "Brief Remarks on New Interpretation of Article 22 of the European Merger Regulation", 1 *Competition Forum*, 2020 (available at: https://competition-forum.com).

(119) Communication from the Commission: Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, [2021] OJ C 113/1.

(120) *Illumina v. Commission*, case T-227/21, EU:T:2022:447, paras. 85-185. To support its conclusion, the General Court developed a literal, contextual, teleological and historical interpretation of the relevant provisions.



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But the ECJ overruled this judgment on appeal(121), holding "that the General Court erred in law in its interpretation of the first subparagraph of Article 22(1) of Regulation No 139/2004". It therefore seems that a formal revision of the regulation is required to extend its scope and introduce the Commission's competence "to examine a concentration which does not meet the turnover thresholds laid down in Article 1 of that regulation irrespective of the scope of the rules of the Member State that has made a referral request in the field of merger control".

According to the "one stop shop" principle, the parties to the transaction may also ask the Commission to examine the planned concentration by reasoned request. The States have 15 days to oppose the transfer of jurisdiction. Of course, national authorities may also submit a request for transfer to the Commission.(122) The Commission then informs the other Member States, which may join the request. The Commission has ten days to examine whether the concentration is likely to affect trade between Member States and significantly affect competition in the territory of the State(s) which have made the request for transfer. At the end of this period, the application benefits from an implicit decision of acceptance (Art. 22).

Conversely, a decentralisation of review procedures is possible. The Commission may refer to a national authority "notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market".(123) To this end, Article 4(4) of Regulation 139/2004 specifies that undertakings may address a reasoned request to the Commission before formally notifying the planned transaction, requesting that the transaction be examined by a national authority. In the absence of an explicit decision, the transfer is granted after a period of 25 days. If the Commission takes a decision before the deadline, it shall inform the Member States and the undertakings concerned. The referral to the national authority is very significant, as national competition law will then apply (unlike in the case of anti-competitive practices).

(121) 3 september 2024, *Illumina v. Commission*, case C-625/22 P, ECLI:EU:C:2024:677.

(122) According to Recital 15 Regulation 139/2004, "a Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory".

(123) *Id.* The referral is conditional: the national market must not constitute a substantial part of the common market, and the Commission is only obliged to make a referral at the request of one of the national authorities competent to examine the concentration.



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## 4. Investigation phase

Cooperation continues at the assessment stage leading to a final decision. It is well known that the Commission has investigative powers in competition law infringement proceedings. Where these measures are likely to have a link with the jurisdiction of a Member State, it is a matter of principle that it informs the competition authorities concerned. This is the case when it adopts a simple request for information or a decision addressed to undertakings or associations of undertakings. It must send a copy to the competition authorities concerned (Art. 18(5) Regulation 1/2003). The same rule applies in the event of an interview on the premises of an undertaking (Art. 19(2)) or an inspection (Art. 20(3)).(124) Finally, the Commission may conduct hearings, which contribute to the exercise of the rights of defence (Art. 27).(125)

Regulation 1/2003 also provides for the obligation of national competition authorities to cooperate in the implementation of these investigative powers (questioning,(126) sealing, requests for information, right of access to any premises that may contain business documentation, including private homes, recourse to the police forces in case of opposition).(127) In particular, Article 18(6) states that national authorities must provide it with all the information necessary to carry out its duties. Article 22 also allows the Commission to ask the national authorities to carry out the inspections which the Commission considers to be necessary. According to the principle of national procedural autonomy, these operations remain subject to national procedural provisions.

Cooperation can also have a horizontal dimension. National authorities may indeed assist each other with inspections and other necessary investigative measures. Article 22 specifies that a competition authority may carry out any inspection or investigative measure in accordance with the applicable national provisions "in the name and on behalf of a competition authority of another Member State in order to establish an infringement". The information obtained can serve as evidence in accordance with the provisions of Article 12.

(124) The obligation here is twofold: not only must notice of the inspection be given "in good time before the inspection", but the decision ordering an inspection can only be taken "after consulting the competition authority of the Member State in whose territory the inspection is to be conducted" (Art. 20(3) and (4)).

(125) Hearings are not conducted under the aegis of the Commissioner or the members of the DG Competition investigation team, but under the authority of a Hearing Officer. Hearing Officers are external to the DG and independent, ensuring the parties' right to be heard. They take decisions on procedural matters, in particular on confidentiality. They also prepare reports on procedural aspects, as well as on factual and evidentiary issues, if any, which are submitted to the Advisory Committee and to the Director General.

(126) Art. 19(2).

(127) Art. 20(5)-(8).



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In the area of mergers, the same solutions apply *mutatis mutandis*: the national authorities must carry out the inspections requested by the Commission (Art. 12 Regulation 139/2004), but they may also simply assist the persons mandated by the Commission (Art. 13).

### 5. Adoption of a final decision

Cooperation finally is foreseen in Article 25 Regulation 1/2003, which governs the Commission's power to impose sanctions. Pursuant to this provision, any act aimed at investigating or prosecuting an infringement interrupts the limitation periods, whether the Commission or the NCAs execute it. This mechanism reinforces the complementarity of interventions and confirms the "multilevel" dimension of the cooperation.

The adoption of a final decision is also an opportunity for cooperation. As mentioned above,(128) the ECN includes an advisory board which is consulted prior to each important decision in the field of antitrust (Art. 14 Regulation 1/2003). In particular, the Commission must consult the Committee prior to any decision finding an infringement, requiring that an infringement be brought to an end, or adopting any financial penalty. For the decisions of national authorities, there is no obligation to refer to the Committee, but NCAs or the Commission may choose to seek its opinion.

The same solution applies to mergers: the Advisory Committee must be consulted before any Commission decision declaring a notified operation compatible or incompatible with the internal market, as well as before any decision to impose a periodic penalty payment or financial sanction (Art. 19 Regulation 139/2004).

Finally, beyond the advisory process, there are still multiple information obligations at this stage of the procedure. For example, under Article 11(4) of Regulation 1/2003, Member States must inform the Commission 30 days before adopting a decision ordering the termination of an infringement, accepting commitments or withdrawing the benefit of a block exemption regulation. The same information obligation applies to judicial decisions under Article 15(2).(129) Similarly, Article 6(5) of Regulation 139/2004 requires the Commission to inform the national authorities and undertakings of its decisions on concentrations with a Community dimension.

(128) See *supra*, II., B., 1.

(129) The Commission also keeps a register of these decisions: https://ec.europa.eu/competition/elojade/antitrust/nationalcourts/



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## 6. Execution of decisions

The final stage of cooperation concerns the enforcement of decisions, mainly because the authority that adopts a measure is not necessarily responsible for its implementation.

For example, the intervention of a national authority may be necessary to pursue the enforcement of a sanction adopted by the Commission against undertakings for breach of competition law, as Article 26 of Regulation 1/2003 recalls. Similarly, a decision on State aid presupposes cooperation of national authorities to concretise the obligation to recover unlawful aid by "all necessary measure [...] in accordance with the procedures under the national law" (Art. 16 Regulation 2015/1589). In this field of anti-trust, cooperation can be even more developed: when they experience difficulties, national administrations are entitled under the principle of sincere cooperation to ask the Commission to modify its decision.(130) The Member State may even object to an absolute impossibility of enforcement, but only if it has first cooperated effectively and actively with the Commission.(131)

In addition, the obligation to cooperate under the State aid rules has a peculiar consequence. Following an incompatibility decision or a conditional decision, the Commission has the capacity to carry out checks (visit the companies concerned, consult their employees and documents). In case of difficulties, the Commission may ask the national authorities to assist in these verification operations in order to ultimately ensure that the Member State itself complies with the Commission's decisions, at the risk otherwise of facilitating an action before the Court of Justice on the basis of Article 108(2) TFEU (Art. 27 Regulation 2015/1589).

Finally, Article 26 of Directive 2019/1 now requires national authorities to enforce final decisions of other NCAs imposing fines or periodic penalty payments against an undertaking or association of undertakings established in the national territory. This obligation only applies if applicant authority has previously made reasonable efforts in its own territory, or if the undertaking or association of undertakings targeted are not established in the Member State of the applicant authority.

(130) *Commission v. Italy*, case C-304/09, EU:C:2010:812, para. 32.
(131) *Commission v. France*, case C-261/99, EU:C:2001:179, para. 24.



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## *Conclusions*

To conclude this chapter, some general trends about the mechanisms of administrative cooperation in the field of competition law can be highlighted. First, it should be stressed that the governance of European competition policy remains pluralistic due to the diversity of actors, mechanisms and norms involved. However, the steering of this policy benefits from both the continuous discussions amongst national authorities and the Commission, and the formalisation of the cooperation, notably through the ECN. The continuous strengthening of administrative integration and its procedural consequences play a fundamental role for the effectiveness of competition law, but is also a legal requirement because of the possible challenge to the fundamental rights of companies.(132)

Secondly, the focus on the ECN may lead to a misinterpretation of the working of the system of administrative cooperation in competition law. On the one hand, the role played by the network in antitrust enforcement may lead to a neglect of the cooperation mechanisms that take place in other branches of competition law and between different actors. On the other, the network is understood as a horizontal, decentralised and multilateral organisation. In reality, the Commission has a central position within the ECN which appears more like a "devolved" system. In this sense, the ECN reveals a vertical integration of competition authorities. Conversely, the horizontal links between national authorities seem still less developed, and less systematically addressed by European regulation, which represents a missed opportunity for the construction of a truly legally integrated economic and administrative area.

One improvement could come with the recognition of transnational effects to the decisions of the national authorities based on European competition law dealing with transnational economical behaviour. This evolution would aim to acknowledge the power of a national authority to pursue and sanction the conduct of companies that is detrimental for competition on several national markets. It would require strengthening the existing rules on allocation of cases, to harmonise the procedural standards and requirements such as the fine and penalty practices, to reinforce duties of cooperation and of consultation between NCAs, and maximise the transnational enforceability of national decisions, all with a view to enhancing mutual trust.

(132) Although this is constantly denied by European rules (Art. 23(5) Regulation 1/2003), competition law can be characterised as quasi-criminal (C. Prieto and D. Bosco, *Droit européen de la concurrence – Ententes et abus de position dominante*, *op. cit.*, p. 1084). This justifies a specific attention to fundamental rights, and may explain the recent reinterpretation of the *ne bis in idem* principle in this field in line with the case law of the European Court of Human Rights under Article 4 of Protocol No. 7.



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Finally, another point for improvement must be highlighted. As argued by Jansen, "effective legal protection against the acts of a composite system of administrative bodies requires more extensive cooperation between national courts".(133) Yet, the need for cooperation and coordination of courts has not received enough attention. In particular, the rights of the subjects and beneficiaries of competition law must be guaranteed. Due to the composite nature of the procedure, the adoption of a sanction may, for instance, be based on procedural and investigative acts from another legal system. However, the conditions for judicial review of these acts on which administrative cooperation is based is not sufficiently clear. The identification of a competent jurisdiction is not always obvious in the current state of the law. This lack of European harmonisation on the question of the admissibility of applications and the jurisdiction of courts(134) is all the more regrettable given that the Article 3(2) of the ECN + Directive recalls the need to guarantee the right to an effective remedy in accordance with Article 47 of the Charter of Fundamental Rights.

(133) E. Schmidt-Assmann, *Der Europäische Verwaltungsverbund*, *op. cit.*, p. 21.

(134) The Ordonnance No. 2021-649 of 26 May 2021 (JOFR No. 0121 of 27 May 2021), transposing the ECN + Directive, partly answers these issues and improves legal certainty in French law. Indeed, Article L311-1 of the Code of Judicial Organisation provides that litigation concerning the validity of a notification of a procedural act carried out by the French competition authority falls within the jurisdiction of the French courts. The solution is the same when the contested act is the result of a request from another competition authority. While this clarification provides greater certainty, it is regrettable that it is only the result of a national provision.



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# CHAPTER 2
# Administrative cooperation in customs policy

**Khalid Abdullah**

## *Introduction: the role of administrative cooperation in the EU customs union*

The abolishment of customs tariffs between multiple territories creates a necessity for enhanced cooperation amongst the customs administrations of those territories.(1) A reason for this necessity stems from the fact that the respective territories have different economic interests and market orientations. In the EU customs union, the national customs administrations of the Member States are collectively and solely competent for the assessment and collection of the Common Customs Tariff duties.(2) The Common Customs Tariff duties belong to the traditional own resources of the Union.(3) This responsibility has called for mutual assistance between Member States' customs administrations and the Commission in order to ensure the proper application of customs legislation and legal protection for the Union's financial interests.(4)

The cross-border trade in goods has increased through the surge of e-commerce, complexly interwoven value chains, and other novel trade trends stemming from globalisation and technological developments. The rapid

(1) See J. Viner and P. Oslington (ed.), *The Customs Union Issue*, Oxford, Oxford University Press, 2014, p. 103.

(2) Council Regulation (EU, Euratom) No. 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements (Recast), [2014] OJ L 168/39; Council Regulation (EU, Euratom) 2021/768 of 30 April 2021 laying down implementing measures for the system of own resources of the European Union and repealing Regulation (EU, Euratom) 608/2014, [2021] OJ L 165/1.

(3) Art. 3 Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ("Union Customs Code"), [2013] OJ L 269/1; Art. 2(1)(a) Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, [2020] OJ L 424/1.

(4) See, inter alia, the preamble to Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, [1997] OJ L 82/1.



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growth of cross-border trade brings new challenges to customs administration officers that heavily rely on data – collected from traders and third-country state actors – susceptible to malicious intent.

The EU customs legal framework for administrative customs cooperation consists of various legal instruments to detect and prevent fraudulent practices and other misconducts that might significantly undermine the Union's economic, fiscal and commercial interests. In that regard, intergovernmental (data) collaboration and the seamless exchange of information have been extended widely and become the norm of an effective means to tackle actions in breach of customs legislation.(5)

The way customs administrations, trade and logistics organisations operate is shifting due to the burgeoning digitalisation of customs process and formalities. The Member States' customs administrations and the Commission currently use customs-relevant data for a variety of objectives. These objectives include, inter alia, risk assessment, performance measurement, resource optimisation, tackling fraud, monitoring trade flows, constructing intelligence, policy analysis, and assessing the impact of trade and fiscal policies. As will become clear in this chapter, to keep up with the rate of the changing administrative environment, these technological advances are the key drivers behind how the system of administrative cooperation and mutual assistance on customs matters has evolved to its current state.

This chapter examines the EU legal framework for administrative cooperation in the sphere of customs. To begin, an overview of the pertinent legal instruments and the principles of Union law governing customs administrative cooperation is provided. The relevant institutions, structures and players involved in customs administrative cooperation and the interactions between them are discussed in passing. Secondly, the methods of customs administrative cooperation are reviewed. Thirdly, a brief overview of the different stages of the customs administrative cooperation procedure is provided. Finally, two main shortcomings and areas for improvement in customs administrative cooperation and mutual assistance are identified and discussed.

(5) World Customs Organization (WCO) 2016, Guidelines for Strengthening Cooperation and the Exchange of Information between Customs And Tax Authorities at the National Level, October 2016, http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/customs-tax-cooperation/customs_tax_guidelines_en_final2.pdf.



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# *I. Sources of customs administrative cooperation in combating fraud?*

## A. Legal instruments

Combating fraud in the context of the EU customs union policy, as stated in the introduction to this chapter, requires close cooperation between the administrative authorities responsible in each Member State (*i.e.*, horizontal cooperation). This is to ensure the proper implementation of provisions adopted in those fields. Close cooperation is also necessary between national administrative authorities and the Commission (*i.e.*, vertical cooperation), as the latter is responsible for ensuring the application of the EU Treaty and the provisions enacted as a result of it. Such effective cooperation, which demands the coordination of inquiries and other operations carried out by the parties involved, strengthens and safeguards the Union's financial interests.

Ever since the intention of the six original Member States to eliminate internal frontiers and to adopt a Common Customs Tariff, it has been recognised that national administrative procedures and those of the Commission have to be coordinated to ensure the proper application of EU customs legislation governing goods trade, both within the EU and with third countries.(6)

However, the six original Member States did not sign agreements on administrative cooperation and mutual assistance between customs administrations until 1967 under the Naples I Convention.(7) Two years later, the Benelux countries (Belgium, The Netherlands and Luxembourg) concluded the Benelux Convention of 29 April 1969 on cooperation in administrative and criminal matters in the context of the arrangements relating to the attainment of the aims of the Benelux Economic Union which to date is still in force.(8)

(6) See, in this respect, Opinion of The Economic and Social Committee on the proposal for a Council Regulation (EEC) replacing Regulation (EEC) No. 1468/81 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters, [1993] OJ C 161/15.

(7) Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations (Rome Convention of 7 September 1967), [1998] OJ C 24/2.

(8) The Benelux Convention is [was] limited to intra-Benelux frontier formalities (see, in that respect, *Pakvries*, case C-105/83, EU:C:1984:178). The Brussels Convention has a mixed character and, among the other mutual assistance arrangements mentioned in this chapter, has the most far-reaching form of cooperation. It contains, in fact, special provisions regarding criminal jurisdiction that may be exercised on the territory of another state. It is worth pointing out that with the abolition of the intra-Benelux frontiers, this legal instrument – while not yet formally repealed – has been deprived of its usefulness in the area of customs.



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Efforts to introduce an EU primary legal instrument on the matter were increased in 1981 when Regulation (EEC) No. 1468/81(9) was adopted, which was later supplemented and repealed by Regulation (EC) No. 515/97.(10) This salient legal instrument presently establishes the central regulatory framework for collaboration between the Member States and the Commission in all aspects relating to the application of the Common Customs Tariff and other Union customs provisions.

Regulation (EC) No. 515/97 covers matters of breaches to EU customs legislation, which, according to Article 3(1)(a) TFEU, is an area of exclusive EU competence. It is complemented by Council Decision 2009/917/JHA(11) on the use of automated information technology for customs purposes. The Decision deals with the infringement of national legislation in the domain of customs, which comes under the competence of the Member States.(12)

Customs fraud plays a major role in the Union's overall fraud-prevention effort. It adds to the overarching goal of safeguarding the Union's commercial interests as enshrined in Article 325 TFEU. Article 325 TFEU establishes the shared responsibility between the EU and the Member States to apply measures in the areas of preventing and combatting fraud, as well as any other illegal activities impacting the Union's financial interests that act as a deterrent. Article 33 TFEU establishes the foundation for the vast majority of information exchanges between customs authorities (*i.e.* horizontal cooperation) as well as between customs authorities and the Commission in the context of customs cooperation (*i.e.* vertical cooperation).(13)

(9) Council Regulation (EEC) No. 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters, [1981] OJ L 144/1.

(10) Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, [1997] OJ L 82/1.

(11) Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes, [2009] OJ L 323/20.

(12) See, in this context, Commission Staff Working Document Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, SWD(2013) 483 final.

(13) Horizontal customs cooperation does not only occur at a Member State level but also on a Union level between EU institutions, bodies, offices or agencies. The main privileged organisations in the context of customs anti-fraud enforcement are the European Anti-Fraud Office ("OLAF"), European Public Prosecutor's Office ("EPPO"), European Union Agency for Law Enforcement Cooperation ("Europol"), and European Union Agency for Criminal Justice Cooperation ("Eurojust"). The cooperative relationship between these EU anti-fraud organisations is generally governed by bilateral working arrangements.



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Many customs risks are recognised as presenting on a global scale.(14) Illicit supply chains can quickly adapt to changes in the risk management environment at one EU point of entry and shift their attention to other ports of entry with lesser levels of protection. To ensure a comparable level of protection against customs risks at all points of the EU external border, action at EU level is necessary. This need for uniformity justifies the use of a Regulation as the legal instrument given that it is directly applicable and thus contributes to a greater level of harmonisation and consistency. A uniform application of the customs legislation is imperative to prevent "customs shopping" which potentially may result in trade diversion and a distortion of competition within the customs territory of the Union.(15)

The significance of a uniform EU customs administration control has also manifested itself in the adoption of customs cooperation programmes established recently under Regulation (EU) 2021/444.(16) For more than three decades, the main added value of customs cooperation programmes has been to offer the structure, methods and budget for cooperation between national customs administrations, the Commission, third country authorities, traders and other parties involved in the management of the external border to achieve closer operational integration.(17)

In addition, the EU legal framework also provides for a uniform system of recovery assistance within the internal market established under Council Directive 2010/24/EU.(18) This legal instrument seeks to counter tax evasion by requiring the Member States to collaborate more closely and provide assistance in the recovery of claims relating to, inter alia, customs duties charged in another Member State.

(14) While the specific focus of this chapter is on cooperation in the field of customs taxation, it should be noted that the customs authorities have been given a growing wide range of non-traditional tasks in their capacity as "gatekeepers" at the external EU border. The responsibilities include, but are not limited to, protecting the public from terrorism, and health, environmental and other threats. More than 50 non-customs regulatory instruments apply to customs authorities, including those on export controls, weapons, drugs, currency movement, intellectual property rights, public health, product safety and consumer protection, wildlife and environmental protection.

(15) Opinion of the European Economic and Social Committee on "Proposal for a Regulation of the European Parliament and of the Council establishing the 'Customs' programme for cooperation in the field of customs", COM(2018) 442 final – 2018/0232 (COD), [2019] OJ C 62/45.

(16) Regulation (EU) 2021/444 of the European Parliament and of the Council of 11 March 2021 establishing the Customs programme for cooperation in the field of customs and repealing Regulation (EU) 1294/2013, [2021] OJ L 87/1.

(17) See, in this context, Commission Staff Working Document Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing the "Customs" programme for cooperation in the field of customs, SWD(2018) 321 final.

(18) Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, [2010] OJ L 84/1.



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The Naples II Convention(19) is another noteworthy legal instrument for customs administrative cooperation. The Naples II Convention, which governs mutual assistance between Member States' customs administrations, replaces the 1967 Naples I Convention. Article K.3 TFEU Convention,(20) complemented(21) by the provisions of Regulation No. 515/97, establishes a practical framework for administrative cooperation in the prevention, detection, prosecution and punishment of violations of national customs regulations. The development of a handbook was considered essential for the Convention's functional deployment. The Handbook on Customs Cooperation(22) is a field-oriented operational manual that describes the principal customs cooperation mechanisms under the Convention so that customs officials can put them into practice with greater ease. The Handbook should be considered a "soft law" instrument as it is designated as a guide having no legally binding effects.(23)

The EU continuously seeks international cooperation on customs matters with its main trading partners as part of its external policy.(24) Bilateral arrangements with third countries are viewed as a vital and indispensable instrument for balancing trade liberalisation with procedural trade facilitation in the fight against customs fraud. The European Commission has thus far signed bilateral customs cooperation agreements with Korea,(25) the

(19) Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations, [1998] OJ C 24/2.

(20) In the literature Article K.3 TFEU Conventions are defined as inter-state complementary agreements that do not possess "EC-like primacy" but rather fulfil(ed) a role that was functionally equivalent to EU secondary law (see B. De Witte and Th. Martinelli, "Treaties between EU Member States as Quasi-Instruments of EU Law", in M. Cremona and C. Kilpatrick (eds), *EU Legal Acts – Challenges and Transformations*, Oxford, Oxford University Press, 2018, p. 157.

(21) Art. 1(2) Regulation 515/97 states that "the provisions of this Regulation shall not apply where they overlap with the specific provisions of other legislation on mutual assistance between Member States' administrative authorities and cooperation between the latter and the Commission for the application of customs or agricultural legislation".

(22) The Handbook is accessible *via* the Council website and consists of three Parts. Part I, containing the General Provisions, is set out in document 13615/05 ENFOCUSTOM 61 + COR 1 (cz). Part II, containing National Fact Sheets, is set out in document 15429/16 JAI 1082 ENFOCUSTOM 23. Part III, containing the Annexes, is set out in document 13615/05 ENFOCUSTOM 61 ADD.

(23) Cover Note from the Presidency to Article 36 Committee, The ratification process of the Naples II Convention 1 and the preparation of a handbook for practical customs cooperation – Progress report, 8456/1/01 REV 1 LIMITE ENFOCUSTOM 20.

(24) See, inter alia, the proposal for a Council Decision concerning the conclusion of the Agreement between the European Community and the Government of Japan on customs cooperation and mutual administrative assistance in customs matters, COM/2007/177/FINAL, 2007/0067 (ACC).

(25) Agreement between the European Community and the Republic of Korea on cooperation and mutual administrative assistance in customs matters, [1997] OJ L 121/14.



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United States,(26) Canada,(27) Hong Kong,(28) India,(29) China,(30) and Japan.(31) In addition, the EU has concluded separate protocols with most, if not all, of its preferential trading partners or included specific provisions in the respective trade agreement on mutual administrative assistance in customs matters.(32) These bilateral arrangements provide a legal basis for mutual customs assistance between the EU and the contracting third-country party to ensure the appropriate administration of EU and international customs law.(33)

A shared quality between each of the aforementioned bilateral arrangements is that they are all drawn up based on the World Customs Organization's ("WCO") Model Bilateral Agreement on Mutual Administrative Assistance in Customs Matters.(34) This Model finds its roots in the Recommendation of the Customs Co-operation Council ("CCC")(35) on Mutual Administrative Assistance of 5 December 1953 which may appropriately be characterised as a "soft law" instrument.(36) While the 1953 Recommendation was

(26) Agreement between the European Community and the United States of America on customs cooperation and mutual assistance in customs matters, [1997] OJ L 222/17.

(27) Agreement between the European Community and Canada on customs cooperation and mutual assistance in customs matters, [1998] OJ L 7/38.

(28) Agreement between the European Community and Hong Kong, China on cooperation and mutual administrative assistance in customs matters, [1999] OJ L 151/21.

(29) Agreement between the European Community and the Republic of India on customs cooperation and mutual administrative assistance in customs matters, [2004] OJ L 304/25.

(30) Agreement between the European Community and the Government of the People's Republic of China on cooperation and mutual administrative assistance in customs matters, [2004] OJ L 375/20.

(31) Agreement between the European Community and the Government of Japan on cooperation and mutual administrative assistance in customs matters, [2008] OJ L 62/24.

(32) For a more comprehensive overview see https://anti-fraud.ec.europa.eu/policy/policies-prevent-and-deter-fraud/customs-cooperation-non-eu-countries_en.

(33) It should be noted that Member States also conclude bilateral arrangements with third countries in the field of customs cooperation (see, inter alia, the recent Agreement between the Kingdom of the Netherlands and New Zealand on mutual administrative assistance in customs matters concluded on 10 March 2022). Such arrangements, however, usually contain a clause spelling out that the scope of said agreement is without prejudice to the obligations of the respective Member State under the legislation of the European Union concerning its present and future obligations as a Member State of the European Union and any legislation enacted to implement those obligations, as well as its present and future obligations resulting from international agreements between the Member States of the European Union (*loc. cit.* Art. 2(3)). Pursuant to Art. 207 TFEU the Union has exclusive competence to conclude international agreements with respect to the customs cooperation as part of the common commercial policy. It appears that the Member States derive their competence to conclude similar agreements from Art. 212(3) TFEU.

(34) World Customs Organization (WCO) 2004, Model Bilateral Agreement on Mutual Administrative Assistance In Customs Matters, June 2004.

(35) The Customs Co-operation Council is the former name of the World Customs Organization.

(36) While not legally binding, Recommendations may – ex Art. III Convention Establishing A Customs Co-Operation Council – be used as an instrument to ensure the uniform interpretation and application of the WCO Conventions.



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updated and supplemented regularly(37) to intensify close customs cooperation between the WCO Members, the CCC recognised that regional, bilateral or multilateral arrangements could not provide a fully sufficient means of worldwide action against customs fraud, which was becoming more pervasive and concerned all countries in some ways. As a result, in June 1997, the "Nairobi Convention"(38) was adopted to which the EU is a signatory party. The Nairobi Convention – established under the auspices of the CCC – aims to prevent, investigate and repress customs offences(39) by accessing different administrative cooperation among States Members, consisting of the exchange of any intelligence, documents or any other information related to customs.(40)

Finally, another international legal instrument dealing with customs cooperation, which is characterised in the literature(41) as (partially) of a soft-law nature, is the WCO Revised Kyoto Convention(42) ("RKC"). The RKC – to which the EU acceded on 17 March 2003(43) – establishes a framework with (amongst others) standards and recommended practices for simplifying and harmonising customs procedures on a global scale, hence facilitating international trade. For instance, standard 6.7 of Appendix II to Annex I of the RCK provides that customs shall seek to cooperate with other customs administrations and seek to conclude mutual administrative

(37) See Recommendation of the Customs Co-operation Council on the Pooling of Information Concerning Customs Fraud of 8 June 1967 and 22 May 1975.

(38) International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences.

(39) Art. 2(1) of the Nairobi Convention.

(40) *Ibid*., Art. 5.

(41) See, for instance, A. Rogmann, "Impact of International Law on the EU Customs Union", 3 *Erasmus Law Review*, 2019, p. 233. The Court of Justice of the European Union has on several occasions utilised the (Revised) Kyoto Convention as an interpretive framework (see, inter alia, *Euro Tex Textilverwertung*, case C-56/06, EU:C:2007:347, para. 31; and *Oliver Jestel*, case C-454/10, EU:C:2011:752, para. 30). In that context, it should be recalled that the Court has repeatedly held that provisions of international agreements concluded by the EU under Article 216 TFEU – such as the RKC – form an integral part of the legal order of the EU. On that basis, it is the settled case law of the Court that the primacy of international agreements concluded by the EU over provisions of secondary EU legislation means that such provisions must, as far as is possible, be interpreted in a manner that is consistent with those agreements. It is also clear from settled case law that the provisions of such an agreement may have direct effect if they are unconditional and sufficiently precise (see, inter alia, *Haegeman*, case C-181/73, EU:C:1974:41, para. 5; and *Air Transport Association of America*, case C-366/10, EU:C:2011:864, paras. 73 and 79).

(42) International Convention on the Simplification and Harmonisation of Customs Procedures (as amended).

(43) 2003/231/EC: Council Decision of 17 March 2003 concerning the accession of the European Community to the Protocol of Amendment to the International Convention on the simplification and harmonisation of customs procedures (Kyoto Convention), [2003] OJ L 86/21.



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assistance agreements to enhance customs control.(44) The standard is further elaborated on in informative and non-binding guidelines, developed to ensure the uniform interpretation of the RKC rules, as well as to provide examples of national practices.

## B. Principles of EU law

The foregoing indicates that transnational but also multi-dimensional cooperation is essential to successfully prevent and combat customs fraud. In their dealings with each other, the Member States and the EU have to cooperate in such a manner that the principle of sincere cooperation enshrined in Article 4(3) TEU is observed.(45) The principle of sincere cooperation is widely acknowledged as a core part of the EU legal order and a fundamental component of the institutional balance sought by the Treaty.(46)

The Court has consistently held that the principle of sincere cooperation obliges the Member States to take all measures necessary to ensure the application and effectiveness of EU law.(47) Furthermore, in accordance with the Commission's role as guardian of the Treaties, conferred on it under Article 17(1) TEU, it is for that institution to ensure that the Member States properly perform their obligations in relation to the EU's own resources. In addition, when the Commission's supervision of the Member States' proper performance of their obligations in connection to the EU's own resources is substantially reliant on information provided by the Member States, those Member States are bound to make supporting documents and other relevant information available to the Commission under reasonable conditions, in order for the Commission to check whether the EU's own resources are being properly managed.(48)

(44) Similarly, the WTO (World Trade Organization) Trade Facilitation Agreement ("TFA") – having a hybrid character of soft and hard law like the RKC – also deals with customs cooperation in Article 12 of that Agreement. In the literature, it has been observed that Article 12 TFA is merely a reflection and "re-packaging" of the principles, rules and best practices contained in standard 6.7 RKC: see, to that effect, H.-M. Wolffgang and E. Kafeero, "Old wine in new skins – Analysis of the Trade Facilitation Agreement vis-à-vis the Revised Kyoto Convention", 8 *World Customs Journal*, 2014, p. 27.

(45) Article 4(3) TEU relates to the reciprocal duty in a bottom-up and top-down vertical relationship between the EU and the Member States. The analogous phrasing of Article 13 TEU conveys that the principle of sincere cooperation should be applied equally in EU inter-institutional interactions.

(46) See, inter alia, *Wells*, case C-201/02, EU:C:2004:12, para. 64; *Commission v. Italy*, case C-33/90, EU:C:1991:476, para. 20; *Luxembourg v. Parliament*, case C-230/81, EU:C:1983:32, para. 37; and *Parliament v. Council*, case C-65/93, EU:C:1995:91, paras. 21-28.

(47) See, to that effect, *Jonkman and Others*, joined cases C-231/06 to C-233/06, EU:C:2007:373, paras. 37 and 38; *Comune di Corridonia and Others*, joined cases C-196/16 and C-197/16, EU:C:2017:589, para. 35; and *Syndicaat van Chiropraxie and Others*, case C-597/17, EU:C:2019:544, para. 54.

(48) See, to that effect, the recent judgment 8 March 2022 in *Commission v. United Kingdom*, case C-213/19, EU:C:2022:167, paras. 584 to 586 and the case law cited therein.



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Article 33 TFEU allows for a broad variety of (both legislative and non-legislative) measures to promote customs cooperation between the Member States and inside the Union.(49) It served as the legal basis for Regulation (EU) 2021/444, which established the EU's programme for customs cooperation. I would submit that Article 33 TFEU incorporates the Union loyalty principle in its very essence.(50) In the same vein, as propounded by Advocate General Pikamäe in *Commission v. United Kingdom*,(51) and confirmed by the Court,(52) the Member States' obligations under Article 325(3) TFEU to counter any fraud or other illegal activities that may affect the financial interests of the European Union, is also a specific manifestation of the general principle of sincere cooperation laid down in Article 4(3) TEU.

Several fundamental principles of EU law that focus on administrative procedures ought to be equally important in administrative customs cooperation and mutual assistance procedures. The rights of individuals may be jeopardised as a result of information exchange if confidentiality is breached, information is misused, or information is improperly disclosed. The bewildering thicket of legal instruments dealing with customs cooperation and mutual assistance, typified by cross-border information exchange between multiple authorities, may pose an incremental risk for compliance with or enforcement of fundamental rights as it may usher in a degree of opaqueness. This risk is especially prevalent given that none of the legal instruments – as alluded to above – explicitly specify in their operative part the nature and scope of the fundamental rights of the economic operator during information exchange procedures, with an exception for the inalienable right to data protection.(53)

Accordingly, the question arises whether EU law confers certain procedural rights during an information exchange procedure. At the outset, it is necessary to distinguish two types of parties in this regard, *viz.* the third-party information holder on the one hand and the concerned taxpayer on the other. Furthermore, in its case law, the Court distinguishes between the "investigation" stage of tax proceedings, in which information from tax authorities in other Member States

(49) European Parliamentary Research Service (EPRS), Unlocking the potential of the EU Treaties; *An article-by-article analysis of the scope for action*, pp. 69-70.

(50) One author argues that the Union loyalty principle of Article 4(3) TFEU is secondary to more specific Treaty provisions regarded as a *lex specialis* when governing a specific field, e.g., customs cooperation (see M. Klamert, *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014, p. 13).

(51) See the Opinion of Advocate General Pikamäe in *Commission v. United Kingdom*, case C-213/19, EU:C:2021:724, para. 173.

(52) *Commission v. United Kingdom*, case C-213/19, EU:C:2022:167, para. 261.

(53) Recital 27 in the preamble to Regulation 515/97, however, does contain a reference that the Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, the Regulation aims to ensure full respect for the right to the protection of personal data (Art. 8 of the Charter of Fundamental Rights of the European Union).



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can be obtained, and the "contentious" stage, which begins with the sending of a proposal for correction or adjustment to the taxpayer concerned. In this stage, the taxpayer concerned can exercise their right of defence.(54)

With respect to the right to an effective remedy, as enshrined in Article 47 of the Charter of Fundamental Rights, the Court held that the third-party information holder is entitled to bring a direct action against a decision from a competent national authority to provide information about the taxpayer concerned (*i.e.*, an information order).(55)

Conversely, the Court ruled that the taxpayer concerned does not have the right to bring a direct action against an information order issued to the third-party information holder.(56)

## *II. Methods of customs administrative cooperation*

Customs cooperation refers to the provision and obtaining of mutual assistance in any authorised form between the competent authorities of the countries concerned.(57) The methods of customs cooperation can take the form of (A.) exchange of information on request, (B.) spontaneous exchange of information, and (C.) automatic exchange of information.

### A. Information exchange on request

The exchange of information on request occurs when a requested authority shares information with an applicant authority in response to a request for mutual assistance. On request, the competent authorities may provide each other with information that may enable them to ensure compliance with the provisions of customs legislation (*i.e.*, the collection of customs duties and charges of equivalent effect).(58)

The exchange of information on request, within the framework of mutual assistance, shall take place through pre-appointed national services or officers. In practice, both requests for information to other Member States and third countries and requests from those territories ought to be processed through these designated (central) units.(59)

(54) *État luxembourgeois (Right to bring an action against a request for information in tax matters)*, joined cases C-245/19 and C-246/19, EU:C:2020:795, para. 81 et seq. and the case law cited therein. It should be noted that these judgments are rendered in the context of mutual assistance in the field of direct taxation. However, there seems to me to be no reason why the principles set forth therein cannot be applied analogously in the field of customs taxation.

(55) *Ibid.*, para. 69.

(56) *Ibid.*, para. 93.

(57) Title IV Regulation 515/97 governs the special relationship with third countries.

(58) Art. 4 Regulation 515/97; Art. 10 Naples II Convention.

(59) *Ibid.*, Art. 2(2); *ibid.*, Art. 5.



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The requested authority shall at the request of the applicant authority carry out, or arrange to have carried out, the appropriate administrative enquiries concerning the respective illicit operations.(60) By agreement between the applicant authority and the requested authority, officials appointed by the applicant authority may be present at the administrative inquiries.(61) The request to be present should be considered part of the information request. Arguably, on-site presence should be permitted only in exceptional situations (e.g., if there is a risk that the (alleged) offence under investigation could potentially be time-barred and the physical presence may expedite the respective investigation).

## B. Spontaneous exchange of information

To increase efficient controls and successfully combat fraud, competent authorities and the Commission are impelled to share particular information about suspected activities without prior request. The competent authorities and the Commission should also provide on their own initiative any information concerning facts or circumstances suggesting that a customs infringement has been or is likely to be committed. The wording of the relevant provisions(62) pertaining to the spontaneous exchange of information suggests that this mechanism is of a mandatory nature, thereby leaving little or no space for discretion to the respective competent authorities.

The European Commission established the so-called Risk Information Form ("RIF") under Article 46 of the Union Customs Code to facilitate spontaneous information exchange. As part of the computerised EU Customs Risk Management System ("CRMS"), the RIF module was employed to identify and assess customs risk throughout the EU. The CRMS framework is designed to provide a quick and simple way for operational (customs) authorities and risk analysis centres in the Member States to share customs risk-related information. It is an important component of the establishment of a Union risk management framework since it allows for EU-wide customs action for the most serious hazards at the EU's external frontier. The RIF is filled out online and sent to all connected customs administrations immediately.(63)

(60) *Ibid.*, Art. 9; *ibid.*, Art. 12.

(61) *Ibid.*, Art. 9(2); *ibid.*, Art. 12(2).

(62) Title II and III Regulation 515/97 and Title III of the Naples II Convention.

(63) See for more information https://ec.europa.eu/taxation_customs/measures-customs-risk-management-framework.



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## C. Automatic exchange of information

Automatic exchange of information may take place on a regular or occasional basis. "Regular automatic exchange" refers to the systematic communication of predefined information without prior request, at pre-determined regular intervals, whereas "occasional automatic exchange" refers to the systematic communication of predefined information as and when that information becomes available, without prior request.(64) Unlike spontaneous information exchange, the use of automatic information exchange mechanisms appears not to be made compulsory for the Member States.(65)

As part of the automatic information exchange procedure, the Commission has developed the so-called Customs Information System ("CIS").(66) The objective of the CIS is to strengthen customs cooperation within the EU by disseminating crucial information more quickly. The CIS is made up of a network of national terminals of the customs territory of the Union that are linked to a central database that may be consulted in each Member State as well by the Commission. The data that may be included in the CIS are explicitly specified in the regulatory framework. The CIS data consists of both non-personal data(67) (e.g., fraud trends, availability of expertise, etc.) and personal data(68) (e.g., name and addresses of businesses, persons, etc.). Personal data is only shared when it is absolutely essential to meet the system's objectives, such as for sighting, particular inspections or operational analysis.(69) All data in the CIS is treated as confidential and may only be copied for technical reasons, such as when the information inquiry justifies it.(70) Personal data can only be communicated to risk management systems used for national customs controls or to operational analysis systems used at the EU level with the permission of the authority that entered them.(71)

(64) Art. 2(1) Regulation 515/97.

(65) See, for instance, Art. 15(2) Regulation 515/97 which uses the wording "may" indicating that the Member States have a certain margin of discretion in that regard. However, the discretion thus enjoyed by the Member States in exchanging information automatically should, in my view, be circumscribed by the principle of sincere cooperation obliging the Member States to take all measures necessary to ensure the application and effectiveness of EU law.

(66) See Title V Regulation 515/97 and Decision 2009/917/JHA.

(67) Art. 24 Regulation 515/97 read in conjunction with Art. 3 Decision 2009/917/JHA.

(68) Art. 25 Regulation 515/97 read in conjunction with Art. 4 Decision 2009/917/JHA.

(69) Art. 26 and Art. 27 Regulation 515/97.

(70) Art. 45 Regulation 515/97.

(71) Art. 35 Regulation 515/97 read in conjunction with Art. 21 Decision 2009/917/JHA.



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## *III. The customs administrative cooperation procedure*

The customs administrative cooperation procedure commences when one authority, the applicant authority, requests another authority, the requested authority, to provide it with the relevant information in relation to a presumed customs infringement. In principle, the requested authority should proceed as though acting on its own account or at the request of another authority in its own country.(72) However, the regulatory framework provides for a general "escape clause" for cases where adherence to the agreement would infringe public policy (*ordre public*) or other fundamental interests, in particular with regard to data protection, of the requested authority or where the scope of the action requested is obviously disproportionate to the seriousness of the presumed infringement. In all cases, reasons must be given for any refusal to provide assistance. It is also stipulated that the Commission must be informed as early as possible of any refusal to grant assistance and the reasoned grounds for refusal.(73)

Any disputes between the requested and applicant authority with respect to customs administrative cooperation procedures and interpretation of the relevant legal instruments are amenable to judicial review by the Court of Justice.(74)

In the event that the requested authority complies with the request for assistance, it shall in principle proceed without notifying the concerned person. However, the possibility is provided that the concerned person is notified by the requested authority on the explicit request of the applicant authority. The notification may take the form of a formal decision (or any other instrument) such as a proposal for correction or adjustment issued to the person concerned. Any documents issued by the requested authority, in that respect, should be provided in accordance with the rules and formalities in force of the (Member) State in which the applicant authority is based.(75)

Any information and data obtained in accordance with their national law by officers of the requested authority and transmitted to the applicant may constitute admissible evidence in administrative or judicial proceedings in accordance with national law by the competent bodies of the Member State where the applicant authority is based.(76) To my mind, such information and data should be subject to the same evidence evaluation rules as those applicable to administrative findings made by the applicant authority.

(72) *Ibid*., Art. 4(2) and Art. 9(1) second subparagraph and Art. 8(1) Naples II Convention.
(73) *Ibid*., Art. 48 Regulation 515/97 and Art. 28 Naples II Convention.
(74) *Ibid*., Art. 26 Naples II Convention.
(75) *Ibid*., Art. 6 Regulation 515/97 and Art. 13 Naples II Convention.
(76) *Ibid*., Art. 12 Regulation 515/97 and Art. 14 Naples II Convention.



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Once the investigative stage is completed and the person concerned is confronted with a proposed adverse decision, they should be granted their fundamental rights of defence.(77)

## *IV. Shortcomings and areas for improvement*

### A. Exchange of commercially sensitive and confidential business information

Customs administrative cooperation entails, inter alia, the transmission of *appropriate* (my emphasis) information between customs administrations which may enable it to ensure compliance with the provisions of customs. For the application of customs duties this, generally, concerns business- and account-related books and records pertaining to the origin, classification and valuation of goods. As such, the exchange of customs information, inevitably and not rarely, involves the sharing of sensitive business information that, if disclosed, could prejudice a company's commercial interests.

It is not uncommon for companies to share business-sensitive information, such as production process, intellectual property and financial information, with customs administrations, to ascertain respectively the customs origin, classification and value of a product. The legitimate (legal and commercial) interests of a company may severely be injured if such information is disclosed to its competitor(s) or otherwise shared in the public domain. Moreover, business-critical information is by its very nature susceptible to criminal interference, such as intellectual property theft.

Therefore, the majority of the legal instruments governing customs administrative cooperation – including the ones discussed in the previous sections of this chapter – contain clauses on the treatment and protection of such confidential business information.

By way of example, Article 16(1)(c) of the EU-China Customs Cooperation Agreement(78) provides that mutual administrative assistance may be refused if the contracting party is of the opinion that the respective mutual administrative assistance would violate an industrial, commercial or professional secret. Any information exchanged under the mutual administrative assistance procedure is to be handled in accordance with Article 17 of the Agreement, which does not specify the applicable confidentiality and professional secrecy regime.

(77) See *infra*, I. B. for more information on the individual right to an effective remedy for the person concerned.

(78) Agreement between the European Community and the Government of the People's Republic of China on cooperation and mutual administrative assistance in customs matters, [2004] OJ L 375/20 (as approved by 2004/889/EC: Council Decision of 16 November 2004, [2004] OJ L 375/19).



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The notion of 'confidential information 'is nowhere defined in the Agreement. Instead, the provision merely refers to the domestic laws of the contracting party. The professional secrecy regime applied in the third country, furthermore, as provided in Article 17 of the Agreement, ought to correspond to that applicable under Union law.

To ensure that the level of confidential treatment and professional secrecy under the domestic rules of a third country corresponds to that of the Union, it is recommended to establish a common framework. The common framework should provide a clear definition of what is understood by "confidential information" under the respective bilateral arrangements and provide assessment criteria to examine whether the standards and practices used by the foreign customs administration correspond to the professional secrecy regime of the Union. As a rule, confidential information ought to only be exchanged with a third-country customs administration after the express and informed consent of the company concerned and/or after a thorough stakeholder consultation procedure has been carried out.

Furthermore, the common framework ought to lay down the key principles governing the sharing, management and handling of confidential information, by both the Union customs administration and the third-country customs administration, with a view to the appropriate protection of its confidential nature. To the best knowledge of the author, the Union and national legislator, the Commission nor the Court have not yet developed key principles governing the exchange of confidential information in the area of customs administrative cooperation.

However, there are other areas of Union law where such key principles are adopted. The General Data Protection Regulation ("GDPR")(79) is one of the European Union acts that sets out key principles relating to the processing of (personal) data that can be found in the operative part of the Regulation and the recitals. Article 5 GDPR, headed "Principles relating to the processing of personal data", states the following key principles that are said to lie at the heart of the general data protection regime: lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality and accountability. These key principles can essentially, where appropriate, be transferred to cross-border mutual assistance in the field of customs to safeguard the legitimate interests of confidentiality of the company concerned.

(79) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1.



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The establishment a proper legal basis is recommended for the functioning of the common framework in the exchange of confidential information and professional secrecy with binding force vis-à-vis both the Union competent authorities and the third-country competent authorities. This result can be achieved by discussing and negotiating the draft common framework with the competent representatives of the contracting parties to the respective bilateral arrangement. In most, if not all, biliteral arrangements on customs cooperation and mutual assistance, the appropriate body designated for that purpose would be a Joint Customs Cooperation Committee ("JCCC").(80) The JCCC consists of representatives of the customs authorities of the contracting parties, that is to say, representatives of the third-party customs administration, the European Commission and the customs authorities of Member States. The binding rules setting out the applicable confidentiality and professional secrecy regime can be formalized in the form of – for instance – a Memorandum of Understanding/Agreement ("MUO/MOA"). The drafting of an MUO/MOA will assist the designated representatives to examine and elucidate the respective duties and responsibilities of the customs officials concerned to ensure the effective protection of confidential information and the supervision thereof.

## B. Right to an effective remedy on the part of the economic operator concerned

The European Anti-Fraud Office ("OLAF") frequently conducts "external investigations",(81) which may consist of on-the-spot checks and inspections in third countries, to establish whether any fraud, corruption or any other illegal activity has been committed that affects the financial interests of the Union (e.g., underpayment of EU anti-dumping duties due to misdeclaration of the country of origin). The external investigation procedure should be conducted in accordance with cooperation and mutual assistance agreements and any other legal instrument in force vis-à-vis the third country concerned. The findings and conclusion of an external investigation procedure are drawn up in a report by OLAF. As to the legal value of an OLAF report, the (General) Court has held that the report does not have a legally binding effect which brings about a distinct change in the legal position of the persons who are referred

(80) See, for instance, Art. 17(5) EU-China Customs Cooperation Agreement, which specifies that practical arrangements for the implementation of the confidentiality and professional provision shall be determined by the Joint Customs Cooperation Committee established under Article 21 of that Agreement.

(81) See Art. 3 Regulation (EU, Euratom) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999, [2013] OJ L 248/1.



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to in it by name. Therefore, the forwarding of information by OLAF to the national (customs) authorities cannot be regarded as an act adversely affecting the person concerned.(82) In that regard, the Court has held that the competent authorities are free to decide what action to take pursuant to a final OLAF report and are accordingly the only authorities which have the power to adopt decisions capable of affecting the legal position of those persons in relation to which the OLAF report recommended that such proceedings be instigated.(83)

According to the author, a particular difficulty lies in the principles set out in the abovementioned case law. This difficulty can be illustrated as follows. Let us imagine OLAF initiates an external investigation procedure in a third country in the context of an alleged circumvention of anti-dumping duties due to the misdeclaration of the non-preferential origin of the subject goods. As part of its investigation, OLAF interviews the person under investigation, either at the preliminary stage or the final stage as part of the investigated person's right to be heard. In general, the person under investigation is (amongst others) the exporting company in the third country concerned. More often than not, the person confronted with the post-clearance recovery of the underpaid anti-dumping duties, following the OLAF investigation, shall be the Union importer. In practice, the Union importer is not designated as an "interested party" in the OLAF investigation and thus that economic operator has not been placed in a position in which they could effectively make known their views before the OLAF findings are finalised in the report shared with the national (customs) authorities. The right to be heard is granted to the Union importer only after the national customs administration communicated its intention to take a post-clearance recovery decision that would adversely affect the economic operator.(84)

The question arises whether such a practice could potentially impair the fundamental rights of the Union importer as the addressee of the (intended) post-clearance recovery decision and the person indirectly concerned by the OLAF report.(85) Potential support for an answer to that question can be found in the Court's case law in relation to the exchange of information in the area of direct taxation (see also Section I., B.).

(82) *Camós Grau v. Commission*, case T-309/03, EU:T:2006:110, para. 48.

(83) *Ibid*.

(84) See Art. 22(6) read in conjunction with Art. 29 Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, [2013] OJ L 269/1.

(85) In particular, since the case law seems to suggest that the indirectly concerned Union importer has no right to be heard during the OLAF investigation procedure.



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From that case law, it follows that the essence of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law.(86)

The Court held that the essence of the right to an effective remedy does not require that the holder of that right must have a *direct remedy* (emphasis added) to the primary object which is to call into question a given measure.(87) It is only required that one or more legal remedies exist, before the various national courts having jurisdiction, enabling that rightsholder to obtain, *indirectly* (emphasis added), judicial review of that measure ensuring respect for the rights and freedoms guaranteed to that rightsholder by EU law.

Consequently, and by way of analogy, it could be argued that the right to an effective remedy of an economic operator, indirectly concerned by the information exchange as part of the OLAF investigation, is not infringed in the event it was not in a position to utilise direct remedies against the primary object (*i.e.*, the OLAF final report). The reason for this is that the economic operator has the right to obtain, indirectly, a judicial review of the OLAF report in the proceedings against the post-clearance recovery decision.

The scope and degree of the judicial review shall depend on the national rules, procedures and legal tradition applicable in the Member States concerned. Herein lies a potential risk of divergent (national) judgments throughout the Union which calls for undertaking substantial legally available efforts to progressively harmonise the level of such judicial review, to prevent detrimental effects on the Union's level playing field.

## *Conclusion*

Administrative cooperation in the field of EU customs is governed by a plethora of overlapping Union and international legal instruments, both of a "hard law" (in the form of binding provisions having direct effect) and a "soft law" character (in the form of non-binding standards). In today's world of digitalised supply chains, emerging technologies, and the rising volume of cross-border shipments, transnational customs cooperation is essential. The horizontal and vertical exchange of information at intra- and extra-EU level is a core part of such customs cooperation. The fundamental principle of sincere cooperation firmly underpins the legislative and non-legislative efforts to promote

(86) *État luxembourgeois (Right to bring an action against a request for information in tax matters)*, joined cases C-245/19 and C-246/19, EU:C:2020:795, para. 66 and the case law cited therein.

(87) *Ibid.*, para. 79.



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customs cooperation between the Member States and Union institutions but also vis-à-vis third countries. As shown in this chapter, data-driven interagency and intergovernmental collaboration together with the seamless exchange of information are utilised to tackle actions in breach and violation of customs legislation. The development should be recommended, as far as possible, of a harmonised Union approach with respect to customs cooperation and mutual assistance – in particular where it concerns the (cross-border) exchange of confidential information and the fundamental (procedural) rights of economic operators adversely affected by decisions in an indirect manner.



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# CHAPTER 3
# Administrative cooperation and the internal market for services

**Pablo Meix Cereceda**

## *Introduction*

In *The power of identity*, the second volume of his trilogy on *The information age*, Manuel Castells claims that "state control over space and time is increasingly bypassed by global flows of capital, goods, services, technology, communication and information".(1) According to this author, the nation-state is evolving into what he calls "the network state", in an effort to gain influence even at the cost of losing much of the traditional sovereignty of the state.(2) In the times of the COVID-19 pandemic, Žižek emphasised the need for "local mobilization of people outside state control *and strong and efficient international coordination and collaboration*" in order to push back the spread of the virus.(3) Cooperation between states, hence, appears as both unavoidable and urgent.

If we turn our attention to the realm of legal sources, hard law would be increasingly replaced by softer forms of authority, perhaps not entirely binding but intended to be just as effective in practice.(4) As Schuman declared 70 years ago, "the best assurance for the nation no longer lies in its splendid isolation, nor in its own strength – whatever its power –, but in the solidarity of the nations which are guided by the same spirit and which accept common tasks in

(1) M. Castells, *The Power of Identity*, 2nd ed., Oxford, Blackwell, 2004, p. 303.

(2) *Ibid.*, 323.

(3) S. Žižek, *Pandemic!*, London and New York, OR, 2020, pp. 67-68.

(4) J. Mendes, "The External Administrative Layer of EU Law-making – International Decisions in EU Law and the Case of CETA", 2 *European Papers*, 2017, pp. 489, 503 and 510, prefers to focus on "authority" rather than on the formally binding or non-binding nature, within EU law, of standards set by CETA bodies, which provide a useful example for the sake of this argument. This brings us back to the Roman distinction between *auctoritas* (based on personal prestige) and *potestas* (ultimately backed by *imperium*, the power to command the legions).



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a common interest".(5) From this perspective, administrative cooperation may be considered instrumental for ensuring the influence of states within larger and more complex structures such as the European Union.

Nevertheless, a contemporary *struggle for law* (to recall Jhering's powerful formulation)(6) can be observed in the efforts of the EU to adopt a number of directives and regulations seeking to improve both legitimacy and certainty in these interactions. For these reasons, the mechanisms of cooperation regulated by EU law often seek to exclude parallel forms of cooperation, as shown by the increasing number of directives that instruct authorities to use the IMI system in certification procedures, information exchanges or alert mechanisms.

This chapter deals with administrative cooperation in connection primarily with the freedom to provide services in the EU, including both the free provision of services in the strict sense (Art. 56 TFEU) and the freedom of establishment (Art. 49 TFEU). In addition, some of these cooperation mechanisms also regard the free movement of goods (Art. 28 TFEU). This is particularly the case of the Internal Market Information System (IMI) and of the Internal Market Problem Solving Network (SOLVIT). However, this chapter does not provide an extensive analysis of cooperation regarding the internal market for goods, which is discussed in depth in the chapter on cooperation in the field of customs.(7) This chapter will show that administrative cooperation in this field stems from the need to ensure communication and assistance between the authorities in the Member States which are competent for applying EU law, or between these authorities and the Commission, that often take place at the request of a competent authority. The existence of a previous request, however, is not a necessary condition for cooperation, as alert mechanisms illustrate.

Furthermore, the treaties refer to cooperation in the field of services as an instrument to "ascertain the particular situation within the Union of the various activities concerned" (Art. 50(2)(b) TFEU). Nevertheless, as secondary EU law reveals, administrative cooperation is not simply relied on to diagnose the situation of each kind of activity, but also to seek compliance with the law (for example, by carrying out inspections or by addressing disagreements between an authority and another party on the interpretation of EU law).

Concerning the internal market for services, and in particular freedom of establishment, Article 50(1) TFEU mandates "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and

(5) Declaration by Robert Schuman on 9 May 1950, cited by P.-Y. Monjal, "Les soixante-dix ans de la Déclaration Schuman ou l'étrange défaite de l'idée européenne", *Revue du droit de l'Union européenne*, 2020, pp. 217, 224, in his interesting reflections on the Declaration's present relevance (my translation).

(6) R. Jhering, *Der Kampf ums Recht*, English 2nd ed., Chicago, Callaghan, 1915.

(7) See K. Abdullah, "Administrative cooperation in customs policy" in this volume.



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after consulting the Economic and Social Committee, [to] act by means of directives." Of particular interest in this regard are the directive on services in the internal market and the directive on the recognition of professional qualifications.(8) Nevertheless, many other directives include provisions on cooperation in the field of services.(9)

Moreover, certain EU regulations are instrumental for the purposes of these directives. Some of these regulations concern administrative cooperation specifically. This is the case, among others, of the regulation on administrative cooperation through the Internal Market Information System,(10) that falls directly within the scope of this chapter. Other regulations deserve consideration as well.(11)

In addition, soft law plays an important role in this field. In 2001,(12) 2013(13) and 2017,(14) the Commission issued recommendations and communications on the SOLVIT network, that seek to help "citizens and businesses experiencing difficulties with their EU rights being recognized by public authorities in particular while moving or doing business cross-border in the EU".(15)

The mechanisms discussed in this chapter are created for certain particular purposes by the respective instruments of hard or soft law. The remit of these mechanisms, however, is often broadened by subsequent acts. In order to facilitate understanding of the matter, the chapter is organised around the *purposes* of cooperation rather than the specific mechanisms or the legal instruments that put them in place. In this regard, the 14th recital of the IMI Regulation provides a useful enumeration of cooperation purposes: the exchange of information (and notification procedures), alert mechanisms, mutual assistance arrangements and problem-solving systems.

(8) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36; Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, [2005] OJ L 255/22, respectively.

(9) See below Section I., B.

(10) Regulation (EU) 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (IMI Regulation), [2012] OJ L 316/1.

(11) See below Section I., B.

(12) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, "Effective Problem Solving in the Internal Market ('SOLVIT')", COM(2001) 702 final, 27 November 2001.

(13) Commission Recommendation 2013/461/EU of 17 September 2013 on the principles governing SOLVIT, [2013] OJ L 249/10.

(14) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Action plan on the Reinforcement of SOLVIT: Bringing the benefits of the Single Market to citizens and businesses", COM(2017) 0255 final, 2 May 2017.

(15) From the introduction to the 2017 Communication on the reinforcement of SOLVIT.



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The chapter will identify secondary legislation addressing administrative cooperation in the common market for services, and examine which players are entitled (or enjoined) to cooperate, whether cooperation is voluntary or compulsory, which limits and conditions exist for cooperation and whether individual rights are sufficiently taken in consideration.

## *I. Exchange of information*

Castells reminds us that "the control of information has been, long before the information age, the foundation of state power".(16) Bobbio, in turn, claims that under the ideal of representative democracy as well – as opposed to the ideal of direct democracy – "the public nature of power, understood as not secret, as open to the 'public', remains one of the basic criteria to distinguish the constitutional state from the absolute state".(17)

In the context of more recent EU history, Alemanno defines the principle of openness as an overarching concept encompassing transparency on the one hand and participation on the other. According to this author, Article 15(1) TFEU illustrates the raison d'être of openness: "to promote good governance and ensure *participation* of civil society".(18) In turn, Caporale reminds us that provisions on the use of information by EU institutions should be read in light of Article 42 of the Charter, granting both natural and legal persons "a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium".(19)

In this respect, most academic literature has placed emphasis on access to information from the perspective of citizens.(20) The highly important dimension of data protection has also been extensively discussed, in particular following the adoption of the General Data Protection Regulation (GDPR) in 2016.(21) However, less attention has been devoted to the exchange of information between public bodies or Member States, which is the object of this study.

(16) M. Castells, *The Power of Identity*, *op. cit.*, p. 320.

(17) N. Bobbio, "La democrazia e il potere invisibile", 10 *Rivista italiana di scienza politica*, 1980, pp.181, 184-185. My translation.

(18) A. Alemanno, "Unpacking the Principle of Openness in EU Law – Transparency, Participation and Democracy", 39 *European Law Review*, 2014, pp. 72, 74.

(19) M. Caporale, *Segreto di Stato, segreto amministrativo e sistema di classificazione delle informazioni*, Bologna, Bonomo, 2013, p. 184. My translation.

(20) See for instance E. Nieto Garrido, "Administración europea y derechos fundamentales: los derechos a una buena administración, de acceso a los documentos y a la protección de datos de carácter personal", in E. Nieto Garrido and I. Martín Delgado (eds), *Derecho administrativo europeo en el Tratado de Lisboa*, Madrid, Marcial Pons, 2010, pp. 54, 71, or M. Caporale, *Segreto di Stato, segreto amministrativo e sistema di classificazione delle informazioni*, *op. cit.*, *passim*.

(21) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1.



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From this perspective, the exchange of information is a prerequisite to the other forms of cooperation analysed, as any request for action by a competent authority of another state presupposes a certain knowledge of the affected citizen or company by the authority that is requested to intervene. This chapter accepts that *requests* for information do not generally require a specific legal basis, but can be simply sent as part of the duties of each administration to supervise the legality of economic activities in accordance with the relevant directives and regulations.(22) A general obligation in this regard can be derived from the services directive when it requires that every information request be duly motivated and prohibits any use of the information conveyed that differs from the original one.(23) On the other hand, the authority that *receives* a request for information should assess whether it is entitled to share such information or whether it should legally refrain from doing so. As Hofmann and Tidghi have argued, the principles of efficiency and legitimacy require "not only that the administration collects all necessary information as a requirement of a procedural nature", but also "that a thorough factual assessment of that information be conducted".(24) The following paragraphs examine which information may be conveyed (A.) and under which conditions this may be done (B.).

## A. Which information may be exchanged?

While EU law requires certain information to be open and allows other information to flow more or less freely, it also restricts (or even prohibits) the exchange of certain data. The examination of EU regulations on the treatment of data appears relevant at this point.

Firstly, a distinction should be made between the treatment of personal data and other data. As is known, personal data are defined by EU law as "any information relating to an identified or identifiable *natural person* [...] by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".(25)

(22) Recital 21 Regulation 1024/2012: "The exchange of information through IMI follows from the legal obligation on Member States' authorities to give mutual assistance".

(23) Art. 28 (3) Directive 2006/123/EC.

(24) H.C.H. Hofmann and M. Tidghi, "Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks", 20 *European Public Law*, 2014, pp. 147, 150.

(25) Art. 4(1) Regulation (EU) 2016/679 (emphasis added).



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Data fitting this definition are protected by certain procedural and substantial safeguards.(26) According to the GDPR, the processing of personal data is deemed lawful under certain circumstances: if it is necessary for compliance with a legal obligation to which the controller is subject; or in order to protect the vital interests of the data subject or of another natural person; or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (Art. 6(1)(c, d, e)). The principle of purpose limitation of data processing from the GDPR is also included in the IMI regulation.(27) This principle prohibits any use of personal data that is "incompatible with the original purpose" of the processing, "unless explicitly provided for by national law in accordance with Union law".

Conversely, all data not considered "personal" may, in principle, be transmitted freely within the EU, unless data localisation requirements are set – if they, however, can be "justified on grounds of public security in compliance with the principle of proportionality".(28)

With regard to data on legal persons, these are not included in the notion of personal data.(29) Accordingly, they are not protected by the Charter "unless the official title of those legal persons incorporates the name of one or more natural persons" (in which case they would be covered by the right of respect to private and family life guaranteed by Article 7 of the Charter).(30) Nevertheless, other reasons could justify protecting data of legal persons, such as trade secret(31) or the security of the state (a defence contractor researching a highly strategic technology, to the extent that data treatment could jeopardise security).

(26) I. Martín Delgado, "La carta ante las Administraciones nacionales: hacia la europeización de los derechos fundamentales", in E. Nieto Garrido and I. Martín Delgado (eds), *Derecho administrativo europeo en el Tratado de Lisboa*, *op. cit.*, p. 89, 138 points out that the protection of personal data is referred to "everyone" in the CFREU (Art. 8).

(27) Art. 5(1) Regulation (EU) 2016/679: "Personal data shall be […] (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes".

(28) Regulation 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, [2018] OJ L 303/59, Art. 4(1).

(29) E. Guichot, "Los límites de la transparencia y el derecho de acceso a la información", in M. Delgado (ed.), *Transparencia y acceso a la información pública: de la teoría a la práctica*, Madrid, Iustel, 2019, pp. 55, 84.

(30) *Commission v. Hungary*, case C-78/18, EU:C:2020:476, para. 125.

(31) Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No. 2006/2004, [2017] OJ L 345/1 provides as follows: "Art. 33 […] (1) Information […] shall only be used for the purposes of ensuring compliance with Union laws that protect consumers' interests. (2) The information referred to in paragraph 1 shall be treated as confidential



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Secondly, certain information should be made available to the public. Under the directive on professional qualifications, Member States are obliged to display certain general information online through the points of single contact created under the services directive. Such information should include lists of professions regulated in the Member State, professions for which the European Professional Card is available, professions to which the Member State applies the right to check qualifications under Article 7(4) (temporary provision of services) and a list of regulated education and training programmes. Information on other requirements such as fees, documentation, languages, procedures and possibilities of appeal should also be public.

Thirdly, other information may have to be exchanged through more restricted channels. This is particularly the case of disciplinary actions or sanctions entailing a restriction for the pursuit of activities,(32) or concerning insolvency or bankruptcy involving fraud.(33) In these cases, the right to the protection of personal data (for natural persons) and freedom to conduct a business (for individuals and companies) would require that such sensitive information be exchanged confidentially at least until such statuses were indisputably proven.(34) However, any relevant information not covered by the principle of openness shall be commonly exchanged through these kinds of channels (such as the IMI system).

## B. Means and conditions of restricted exchanges: the IMI System

It seems difficult to deny that many information exchanges are carried out informally on a person-to-person basis, and hence with little or no observance of any rules or procedure. Flexibility is thus one of the main strengths of networks,(35) as opposed to information gathered within a classic administrative procedure. Such "informal" information exchanges, however, are limited by legal provisions when the reputation of individuals or companies might be affected, or whenever leaving evidence of the information exchange may

and shall only be used and disclosed *with due regard to the commercial interests* of a natural person or legal person, *including trade secrets and intellectual property*" (emphasis added).

(32) As an automatic obligation of the Member State adopting the measure under the directive on professional qualifications (Art. 4e).

(33) At the substantiated request of a competent authority in another Member State under the services directive, Art. 33.

(34) Charter of Fundamental Rights of the EU, [2012] OJ C 326/391 ("the Charter"), Art. 8 and 16.

(35) M. De Bellis, "Las redes reguladoras transnacionales diez años después de la crisis: caracteres y problemas", in L. Arroyo Jiménez, M.I. Delgado and P. Meix Cereceda (eds), *Derecho Público Global. Fundamentos, Actores y Procesos*, Madrid, Iustel, 2020, pp. 159 and 161, spec. 159.



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be necessary to determine liability or to ensure the effectiveness of judicial or administrative remedies. Nevertheless, directives also require that requests be "duly substantiated",(36) "reasoned"(37) or the like, which is in accordance with the obligation of the administration to give reasons for its decisions under the Charter.(38)

Under these conditions, a regulated channel for the flow of information appears necessary.

In this respect, the services directive states that "cooperation between Member States requires a well-functioning electronic information system in order to allow competent authorities easily to identify their relevant interlocutors in other Member States and to communicate in an efficient way".(39) Apart from information covered by the rule of general publicity, information exchanges required by EU legislation are primarily carried out by means of the Internal Market Information System (IMI).

The IMI was first established by a Commission decision of 2007(40) and amended in 2012 and 2018 by two regulations. Its remit, however, has been expanded on numerous occasions by subsequent legislation. The system is based on an electronic tool maintained by the Commission. It is used particularly in information exchanges between the competent authorities of Member States, and less often between these and the Commission. At present, the IMI covers the following areas: recognition of professional qualifications,(41) provision of services,(42) posting of workers,(43) cross-border

(36) For instance, the services directive concerning requests "on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud taken by their competent authorities in respect of the provider" (Art. 33(1)), or generally for "information requests" (Art. 28(3)).

(37) Directive 96/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1996] OJ L 18/1, Art. 4(2); Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation"), [2014] OJ L 159/11, art. 6(2).

(38) Charter of Fundamental Rights of the European Union, [2000] OJ C 326/391, Art. 41(2)(c).

(39) Services directive, Recital 112.

(40) Commission decision of 12 December 2007 concerning the implementation of the Internal Market Information System (IMI) as regards the protection of personal data, [2008] OJ L 13/18.

(41) Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, [2005] OJ L 255/22, Arts. 4b to 4e, among other provisions.

(42) Services directive, Art. 21(4).

(43) Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, [2014] OJ L 159/11, Art. 21.



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transport of euro cash,(44) patients' rights,(45) train driving licences,(46) public procurement,(47) return of cultural objects,(48) data protection,(49) public documents,(50) firearms transfers,(51) consumer protection,(52) and even the handling of cases by the SOLVIT network.(53) Some of these directives or regulations do not expressly refer to the IMI system, but provide for the setting up of a database or other forms of (electronic) information exchange that have been included in the IMI system. The services directive, for example, mentioned in 2006 the need for electronic interoperable means that would facilitate the exchange of information (Arts. 34(1) and 36). The original text of the directive on professional qualifications, in turn, referred to exchanges of "information regarding disciplinary action or criminal sanctions" (Art. 56(2)), a provision that later developed into the current alert mechanism. The DPQ now expressly instructs authorities to send alerts *via* IMI (Art. 56a(1)).

To access and operate the IMI, competent authorities should register with a Member State coordinator, who is also in charge of providing training and assistance and ensuring a smooth functioning of the system, including adequate and

(44) Regulation (EU) 1214/2011 of the European Parliament and of the Council of 16 November 2011 on the professional cross-border transport of euro cash by road between euro-area Member States, [2011] OJ L 316/1, Art. 11(2). This provision does not mention IMI, but instructs the Commission to "set up a central secured database containing data on licences issued, suspended or withdrawn, which shall be accessible to the relevant authorities of the participating Member States".

(45) Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, [2011] OJ L 88/45, as amended in 2013, Art. 10.

(46) Commission Implementing Decision of 14 February 2014 on a pilot project to implement the administrative cooperation obligations set out in Directive 2007/59/EC of the European Parliament and of the Council by means of the Internal Market Information System, [2014] OJ L 45/36.

(47) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L 94/65, as amended in 2019. This directive (Art. 86(3)) and Directive 2014/25 (Art. 102(3)), provides for the launch of a pilot project "to test the suitability of using the Internal Market Information System".

(48) Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) 1024/2012 (Recast), [2014] OJ L 159/1, Art. 5 and 7.

(49) Art. 61(6) Regulation (EU) 2016/679.

(50) Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) 1024/2012, [2016] OJ L 200/1. This regulation relies heavily on the IMI system for the purpose of verifying documents submitted by applicants in a different Member State, especially in Articles 13, 14, 20, 22.

(51) Council Directive 91/477/EEC of 18 June 1991 on the control of the acquisition and possession of weapons, [1991] OJ L 256/51, as amended in 2017, Art. 13(4) and (5).

(52) Art. 35 Regulation 2017/2394.

(53) Recital 14 Commission recommendation 2013/461.



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timely answers by competent authorities in their own Member State.(54) In addition, the coordinator is responsible for communicating with the Commission on the functioning of the system.

The Commission, in turn, is in charge of maintaining the system from a technical point of view, providing the multilingual system, registering the IMI coordinators, monitoring the application of the regulation and reporting to the other institutions and to the European Data Protection Supervisor, and ensuring coordination with other bodies at EU level. The Commission does not participate in the processing of data unless another EU act expressly requires such participation.(55)

The information exchange is based on four different resources: firstly, a directory of competent authorities. Secondly, and for the most common requests, the system provides a workflow with standard pre-translated questions and answers.(56) Moreover, information repositories (databases) have been set up for certain areas. Lastly, if more precise or complex information is needed, competent authorities may use the IMI to insert free text in a language they are fluent in, or rely on an automated translation. In this respect, the traditional problem of the language of communication(57) has been addressed to a large extent by enabling the use and translation of all of the official languages of the EU.

Even if the IMI displays a number of advantages (in particular celerity and certainty), it is also affected by some of the general risks of online platforms. To be sure, many of the provisions that enjoin competent authorities to rely on the IMI affirm the principles of integrity, confidentiality and accuracy of the information exchanged.(58) And, as the IMI regulation claims, the system applies the "privacy-by-design principle" ("data protection by design and by default", in the updated formulation of the GDPR). Moreover, both the IMI regulation and the GDPR require that the rights of the data subject (to be informed, to object, and to obtain rectification and erasure, among others) are respected, which had been a long-time demand of

(54) Regulation 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ("the IMI Regulation"), [2012] OJ L 316/1, Art. 6.

(55) Art. 8(3) Regulation 1024/2012.

(56) According to the Merriam-Webster online dictionary, a *workflow* is "the sequence of steps involved in moving from the beginning to the end of a working process". The term is particularly common in the field of software.

(57) A. Mattera, "The Principle of Mutual Recognition and Respect for National, Regional and Local Identities and Traditions", in F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process*, New York, Palgrave, 2005, pp. 1, 18.

(58) See, for instance, Directive 2006/123/EC, Arts. 50(1), 56(1) and (2), 4b(4).



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the European Data Protection Supervisor.(59) Nevertheless, the exchange of information through the internet increases per se the risks of undesired dissemination of sensitive information, whether this concerns the reputation of a company or simply other aspects of its market strategy in a certain sector. While the IMI allows faster and easier information exchanges for lawful purposes, the possibility of cyberattacks is also enhanced, even if safeguards are set up.(60)

With regard to judicial review, some practical difficulties may arise in the case of exchanges concerning confidential information. If the person concerned were only informed at a late stage (such as at the beginning of a sanctioning procedure), it is possible that the deadline for challenging the information exchange under national law would have expired. A stringent interpretation of national remedies might limit the possibilities of challenging the sanction to cases where the relevant information had been obtained unlawfully, or for a purpose different from a disciplinary proceeding.(61) However, the right to an effective remedy requires that courts (especially national courts) adopt a flexible approach on the beginning of these deadlines. From this perspective, appeal deadlines should be counted from the day when the appellant had indisputable knowledge of the proceedings. According to Hofmann and Tidghi, Member States courts have an obligation "to avoid situations of denial of justice [...] creating, where necessary, remedies suitable to enforce the protection and enforcement of rights".(62)

Lastly, there is no indication in EU law whether a damage claim should be accepted in such situations, and hence the outcome would depend on national law.

(59) S. Galera Rodrigo and B. Hernández Bataller, "Cooperación administrativa en el mercado único: el sistema IMI", 325 *Noticias de la Unión Europea*, 2012, pp. 37, 47.

(60) According to the GDPR, controllers and processors of data are entrusted with the security of the data under Art. 32. In this regard, they shall adopt "technical and organisational measures including inter alia as appropriate: (a) the pseudonymisation and encryption of personal data; (b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services; (c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident; (d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing".

(61) Recital 6 and especially Art. 7(2) Regulation 1024/2012: "A competent authority may invoke as evidence any information, document, finding, statement or certified true copy which it has received electronically by means of IMI, on the same basis as similar information obtained in its own country, *for purposes compatible with the purposes for which the data were originally collected*" (emphasis added).

(62) H.C.H. Hofmann and M. Tidghi, "Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks", *op. cit.*, p. 153.



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## *II. Alert mechanisms*

Alert mechanisms are inputs fed into an information exchange system, usually without the need for a previous request. These information inputs are characterised by a certain degree of urgency and, more importantly, by the existence of a potential safety or health risk. According to Article 32 of the services directive, any Member State that becomes aware of such a risk "shall inform the Member State of establishment, the other Member States concerned and the Commission within the shortest possible period of time".

Following the 2013 amendment, Article 56a of the DPQ is much more precise than the services directive. Four aspects should be highlighted. Firstly, the DPQ specifically instructs competent authorities to use the IMI when sending an alert. Secondly, this directive refers to the groups of activities in which a professional could be affected by such an alert: activities with patient safety implications, activities relating to the education of minors (including childcare and early childhood education), and veterinary surgeons. Thirdly, the DPQ limits the information to the identity of the professional, the profession concerned, the national authority or court adopting the decision, the scope of the restriction or prohibition and the period of applicability. Fourthly, certain procedural safeguards are provided for, namely on the processing of personal data, the swiftness of the input into the IMI system (three days) and, most importantly, the rights of the professional affected to be informed at the time of sending the alert, to appeal under national law and to a damage claim in case of false alerts.(63)

Most of these rules, and especially the protection of the provider's interests, can be ultimately connected to the protection of personal data (if the service provider is a natural person) and to the freedoms to provide services and to conduct a business (if the provider is a natural or a legal person).(64) These rights would be overridden if the information were true and the restriction adopted were proportionate and necessary.(65) Conversely, if the information were false or inaccurate, or if the restriction adopted by the authority receiving the alert were excessive, then the provider's rights would prevail – at least to the extent that the information were inaccurate or the restriction excessive – and a right to a damage claim would arise.

(63) S. Galera Rodrigo and B. Hernández Bataller, "Cooperación administrativa en el mercado único: el sistema IMI", *op. cit.*, pp. 37, 47, point out that "an alert sent through the IMI system could have significant repercussions for the service provider, and hence both the Commission and the national authorities treat such situations with great caution" (my translation).

(64) Charter, Arts. 8, 15 and 16.

(65) According to Gewirth, a right "is violated when it is *unjustifiably* infringed" and it is "*overridden* when it is justifiably infringed", cited in N. Mavronicola, "What is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights", 12 *Human Rights Law Review*, 2012, pp. 723, 729.



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The specific nature of the provisions of the DPQ on alerts and, above all, the emphasis on the rights of the professional affected lend the system a balance between the value of safety and the need to protect the provider's reputation in the market. This can be a good example for other alert mechanisms, such as the one in the services directive.

## *III. Mutual assistance*

Mutual assistance is a broad concept that may refer to different forms of cooperation. Although most studies on mutual assistance deal with cooperation in the fields of taxes or security, Hofmann, Rowe and Türk examined these kinds of mechanisms and concluded that "no uniform detailed law on mutual assistance exists".(66) This quote still seems to be valid more than a decade later.

The purposes of mutual assistance can be diverse: this kind of cooperation may take place within the exercise of supervisory powers (an inspection to ensure compliance with legal requirements of facilities, equipment or the way a service is provided)(67) or within procedures to improve the safety of services.(68) Mutual assistance activities may be carried out at the request of the authorities in the Member State of establishment or, conversely, those in the Member State of provision.(69)

Part of mutual assistance activities may be carried out through the IMI system, namely the communication required to send requests and replies.(70) In some cases, the need for assistance may be satisfied by a simple information exchange, concerning for instance the legal requirements for the recognition of professional qualifications ("including information on the national legislation governing the professions and the pursuit of those professions, social legislation, and, where appropriate, the rules of ethics").(71) Mutual assistance, however, may often go beyond a simple information exchange on, for example, the status of a particular company or person in a certain Member State. Mutual assistance may require a certain expertise or specific training on the part of

(66) H.C.H. Hofmann, G. Rowe and A. Türk, *Administrative Law and Policy of the European Union*, Oxford, OUP, 2011, p. 414.

(67) Services directive, Art. 28(1).

(68) *Ibid.*, Arts. 18 and 35. The CJEU has accepted national requirements for the protection of safety and health concerning the installation of wind turbines (distance from residential buildings), provided that these requirements respect the principle of proportionality (*Syndyk Masy Upadłości ECO-WIND Construction S.A. w upadłości anciennement v. Samorządowe Kolegium Odwoławcze w Kielcach*, case C-727/17, EU:C:2020:393).

(69) *Ibid.*, Arts. 29(2) and 31(3).

(70) *Ibid.*, Art. 28(6).

(71) Art. 57b(1) Directive 2006/123/EC.



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the assisting authority, who should be informed about legal and administrative requirements and qualified to give an expert opinion on the matters falling under their remit.

A second kind of activities within the notion of mutual assistance may be described as "replacing" the requesting authority onsite. Even if the traditional separation between direct and indirect execution of EU law can be considered outdated,(72) national authorities often remain essential for the implementation of European administrative law within their own territory.(73) Therefore, the assisting competent authority may have to exercise onsite checks, inspections and investigations.(74) If this system were to be accepted, it could serve as an example of recognition of actions undertaken by foreign authorities (mutual recognition). However, in activities involving safety or health risks, Member States are often reluctant to relinquish their inspection powers – and often with good reason, as the *TÜV Rheinland* case revealed.(75)

Such actions, however, should always respect the principles of non-discrimination, necessity and proportionality,(76) as required by the services directive. Moreover, these principles are intrinsically linked to fundamental rights from the Charter, specifically the freedoms to provide services and establish in any

(72) J. Agudo González, "La administración del espacio administrativo europeo", 99-100 *Revista Vasca de Administración Pública*, 2014, pp. 111, 120, "the logic of the treaties favours a model of administration which is non-excluding (shared powers) and integrative, a model that can be adequately explained within the parameters of good governance" (my translation).

(73) M. Lottini, "The SOLVIT Network – State of the Art and Possible Future Developments", 13 *Review of European Administrative Law*, 2020, pp. 109, 110. This conclusion can be equally drawn from the services directive, Arts. 29(2), 30(3).

(74) Services directive, Art. 29(2).

(75) The case of *TÜV Rheinland LGA Products and Allianz IARD* concerns the activity of PIP, a French company manufacturing breast implants that turned out to be defective. Some of the implants were distributed by a Dutch company, Rofil Medical. Moreover, PIP had commissioned a "notified body" (TÜV Rheinland, a company created under German law) to carry out inspections of the production process. Neither the German notified body nor the Dutch authorities discovered any risks. Conversely, an inspection carried out by the French authorities found that PIP was using unauthorised industrial silicone and alerted doctors to the risks involved, risks that materialised in the case of the plaintiff (*RB v. TÜV Rheinland LGA Products GmbH and Allianz IARD S.A.*, case C-581/18, EU:C:2020:453). Such risks have probably lead to the resistance of Member States to grant automatic mutual recognition, as S. Röttger-Wirtz, "Mutual Recognition and the Ever-incomplete Internal Market for Pharmaceuticals", 13 *Review of European Administrative Law*, 2020, pp. 61, 62, has written about the pharmaceutical sector. L. De Lucia, "One and Triune – Mutual Recognition and the Circulation of Goods in the EU", 13 *Review of European Administrative Law*, 2020, pp. 7, 34, thinks that "it is not clear how the various players (both public and private) act in practice in the context of legal frameworks aimed at guaranteeing the free circulation of goods".

(76) Services directive, Art. 31(4). This provision concerns a service provider that is *temporarily* exercising an activity in a different Member State. However, a rights-based approach requires that these principles should be observed *a fortiori* when the service provider is established in the territory of the inspecting authority. The interests of the inspected company in the territory of establishment would be greater and hence a protectionist bias by the inspector could damage these interests to a larger extent.



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Member State(77) and the prohibition of discrimination on grounds of nationality.(78) The interpretation rules of the Charter, in turn, strengthen the importance of necessity and proportionality when a measure limiting Charter rights is adopted.(79)

## *IV. Dispute settlement*

Seeking to comprehend all kinds of administrative cooperation with regard to problem-solving in the internal market for services and goods would be too broad a task for this chapter. Examining certain specific rules, however, may be useful to illustrate how Member States cooperate in this kind of situations. Three examples will be analysed. They concern the "framework directive" for electronic communications,(80) the audiovisual media services directive(81) and the SOLVIT network.

The framework directive "establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services, and certain aspects of terminal equipment to facilitate access for disabled users" (Art. 1). Users, consumers, subscribers, broadcasters or service providers benefit from certain rights under this directive. According to Article 21, if a cross-border dispute arises between two or more of these persons or legal entities, then the competent regulatory authorities "shall coordinate their efforts [...] to bring about a consistent resolution of the dispute [...]". In so doing, they are obliged to respect the general aims of the directive (such as maximising benefit for users, avoiding competition distortions or protecting privacy).(82) In addition, any of the regulatory authorities may seek to obtain an opinion from the Body of European Regulators of Electronic Communications (BEREC).(83) The

(77) Charter, Arts. 15(2) and 16.

(78) Charter, Art. 21(2).

(79) Charter, Art. 52(1): "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be *provided for by law* and respect the essence of those rights and freedoms. Subject to the principle of proportionality, *limitations may be made only if they are necessary* and genuinely meet *objectives of general interest* [...]" (emphasis added).

(80) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), [2002] OJ L 108/33.

(81) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services ("Audiovisual Media Services Directive"), [2012] OJ L 95/1.

(82) Among others (see Framework Directive, Art. 8).

(83) The BEREC comprises a Board of Regulators (one member from each Member State) and working groups, and is assisted by the BEREC Office. According to Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for



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opinion of BEREC is not expressly considered binding, but the framework directive clearly considers this body as an authoritative source: if the dispute is not solved in four months – and unless a court has been seized – any party to the dispute may request the national regulatory authorities to "coordinate their efforts to resolve the dispute [...] *taking the utmost account of any opinion adopted by BEREC*".(84) This is a good example of how cooperation in dispute resolution works: regulatory authorities have a duty to cooperate and they may use a composite procedure encompassing a (formally) non-binding opinion by an independent supranational body.(85)

A second example can be found in the audiovisual media services directive. According to its Article 3(1), "Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States [...]". However, Member States may provisionally derogate from this general rule if a television broadcast coming from another Member State incites "to hatred based on race, sex, religion or nationality" (Art. 6) or might "seriously impair the physical, mental or moral development of minors" (Art. 27), provided that the broadcaster has infringed the prohibition on at least two *prior* occasions during the previous 12 months. Nevertheless, the right to derogate is only granted if the Member State has notified both the broadcaster and the Commission in writing and if "consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification [...]." Beyond the substantive conditions of the right to derogate, it is interesting to note how the directive creates certain obligations to cooperate before the extreme measure of restricting retransmissions is adopted. The right to information and the internal market for services are powerful reasons for the Commission and Member States to try and find "an amicable

Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation 2015/2120 and repealing Regulation 1211/2009, [2018] OJ L 321/1, "BEREC shall carry out its tasks independently, impartially, transparently and in a timely manner" (Art. 3(3)).

(84) Framework Directive, Art. 21(3). Emphasis added.

(85) S. Alonso de León, *Composite Administrative Procedures in the European Union*, Madrid, Iustel, 2017, p. 152, conceptualises composite procedures as those where "the contribution of the 'other' level of public administration is not a mere source of information that the public administration in charge of the decision can use with full discretion. There must be a further element, the input has to be decisive or, at least, it has to have a determinant effect in the subsequent steps that the other public administration follows". From this rather strict perspective, the participation of BEREC in dispute resolution procedures would probably not justify the label of composite. Different from Alonso's conception, H.C.H. Hofmann's, "Composite decision-making procedures in EU administrative law", *Legal Challenges in EU Administrative Law*, Edward Elgar Publishing, 2009, pp. 136, 139-140, more broadly considers the existence of "input" from EU or agencies of Member States as the relevant criterion to define a procedure as *composite*.



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settlement". The 15-day delay, however, may seem too long considering that a dangerous broadcast could be retransmitted without virtually any restrictions during that time.

The third example of cooperation in dispute settlement is the very important SOLVIT network. The network was created following a Commission recommendation of 2001,(86) later complemented by another recommendation in 2013.(87) As Lottini defines this network, "SOLVIT is an informal, free of charge, and non-binding mechanism which handles complaints from citizens (or businesses) of one Member State concerning the material application of EU law by a public authority of another Member State".(88) It therefore covers many areas and is not limited to the common market for services or goods.(89) From the perspective of individual rights, SOLVIT can be characterised as an informal mediation system, often capable of addressing conflicts before they lead to the use of more formalised remedies by the parties involved.(90) However, as some authors have noted, SOLVIT has gradually become a valuable tool for identifying more general or "structural" problems in the exercise of the movement freedoms.(91)

The network is based on a number of centres set up by Member States "within their own national administrations".(92) The Commission does not participate directly in the resolution of cases, but offers legal training and provides "informal advice" in complex cases.(93) More importantly, the Commission "monitors" the handling and outcomes of cases and it can intervene "whenever it considers that solutions proposed by SOLVIT centres are not compliant with Union law".

The organisation and functioning of the SOLVIT network are not regulated by any hard-law provisions. Even if there is no formally binding framework for their task, SOLVIT centres are bound, just like the parties in the disputes, by substantive EU law that is applicable in each case. The lack of hard-law provisions regulating SOLVIT creates a degree of informality, which has been

(86) Commission Recommendation 2001/893 of 7 December 2001 on principles for using "SOLVIT" – the Internal Market Problem Solving Network, [2001] OJ L 331/79.

(87) Art. 21 Directive 2014/67/EU.

(88) M. Lottini, "The SOLVIT Network – State of the Art and Possible Future Developments", *op. cit.*, p. 113.

(89) M. Lottini, "The SOLVIT Network and the Effective Enforcement of EU Law – What is New?", in S. Drake and M. Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy*, Cheltenham, Edward Elgar, 2016, pp. 130, 135.

(90) J. Agudo González, "La administración del espacio administrativo europeo", *op. cit.*, p. 125.

(91) D.-U. Galetta, "Informal Information Processing in Dispute Resolution Networks – Informality Versus the Protection of Individual's Rights?", 20 *European Public Law*, 2014, pp. 71, 74-75; M. Lottini, "The SOLVIT Network – State of the Art and Possible Future Developments", *op. cit.*, p. 116.

(92) Recital 3 Commission recommendation 2013/461.

(93) *Ibid.*, Recital 4.



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criticised from the perspective of individual rights. Criticism concerns chiefly the lack of clear procedural rules (in particular the lack of deadlines and time limits) and the risks for data protection, as the network handles and processes a lot of information on claimers and companies involved in a disagreement.(94) Part of the problems concerning data protection derived from a strict understanding of the scope of previous EU legislation on data protection.(95) Nonetheless, with the advent of the GDPR it seems difficult to conceive that the treatment of personal data by SOLVIT centres would not be covered by this regulation.(96) Lastly, and even if SOLVIT is not a mechanism of judicial review, the Charter of Fundamental Rights should inspire any solutions proposed by SOLVIT centres: non-discrimination, freedom to provide services and establish, freedom to conduct a business, necessity, or proportionality all seem applicable in any dispute settlement procedure.

Secondary law increasingly refers to SOLVIT. Moreover, a recent regulation on goods has acknowledged that informality could become a problem in some situations.(97) This regulation, however, accepts that such informality may be difficult to separate from the intentional flexibility and pragmatic orientation of SOLVIT. Indeed, in their attempt to satisfy the demands of the parties in the dispute, SOLVIT centres could run the risk of disregarding other legal requirements, such as the need to obtain an authorisation in the state where the service is provided.(98) Regulation 2019/515 allows Member States to restrict the marketing of goods on rather broad grounds(99) – that should be interpreted according to CJEU case law.(100) However, "where […] doubts remain regarding the compatibility of the administrative decision with the principle of mutual recognition", the SOLVIT centres are entitled to request an opinion from the Commission.(101)

(94) D.-U. Galetta, "Informal Information Processing in Dispute Resolution Networks – Informality Versus the Protection of Individual's Rights?", *op. cit.*, p. 73.

(95) See for instance D.-U. Galetta's critical view, *ibid.*, p. 77.

(96) C. Docksey and H. Hijmans, "The Court of Justice as a Key Player in Privacy and Data Protection – An Overview of Recent Trends in Case Law at the Start of a New Era of Data Protection Law", 5 *European Data Protection Law Review*, 2019, pp. 300, 312, explain how the CJEU has favoured an extensive interpretation of the scope of the GDPR and a restrictive one of the exceptions to its rules.

(97) Regulation 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation 764/2008, [2019] OJ L 91/1.

(98) See for example *Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s.*, case C-68/12, EU:C:2013:71, para. 15.

(99) Art. 36 of the TFEU allows restrictions based on the following reasons: "[P]ublic morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property".

(100) Recital 4 Regulation 2019/515.

(101) *Ibid.*, Recitals 37, 38 and especially 39.



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Some of the provisions in this Regulation concern the SOLVIT system directly. Firstly, when national authorities assess if certain goods are lawfully marketed in another Member State, the administrative decisions that they deliver "shall include a reference to the possibility for economic operators to use SOLVIT and the procedure under Article 8".(102) This will in all probability enhance the use of the network, but it does not affect how it works.

The abovementioned Article 8, on the other hand, concerns a "problem-solving procedure" within the SOLVIT network. Its provisions do not determine how SOLVIT centres should operate, but they open the possibility for these centres to request an opinion from the Commission when "doubts remain regarding the compatibility of the administrative decision with the principle of mutual recognition".(103) Furthermore, Article 8 sets a deadline (45 working days) and refers to the effects of the opinion of the Commission – the Regulation does not call it "binding", but states that it "shall be taken into account". Thus, the Commission becomes a referee of national decisions, which certainly reinforces its ability to identify "structural" or recurrent conflicts, and if necessary, initiate the infringement procedure under Article 258 TFEU.

## *Concluding observations*

As shown above, the legal bases of administrative cooperation in the field of services (and, to some extent, goods) consist of an increasing number of sectoral directives and regulations. However, certain Commission decisions and implementing decisions are also relevant, as well as two recommendations that set the general principles of the SOLVIT network.

In application of EU secondary law, cooperation is increasingly regulated and often compulsory for the players involved, as in most information exchanges, in alert mechanisms and in many forms of mutual assistance. Cooperation for the purpose of problem-solving, nevertheless, is often more complex: with the exception of the SOLVIT network (which is based on two Commission recommendations and is therefore purely voluntary), national administrations usually have an obligation to cooperate, but they are not required to follow the advice of a supranational body, or to reach an amicable solution. Moreover, a growing number of directives and regulations require the use of certain channels for cooperation: the IMI system is the prevalent instrument for information exchanges concerning the internal market, but also for sending alerts, and even for the handling of cases by the SOLVIT network.

(102) *Ibid.*, Art. 5(12).
(103) *Ibid.*, Recital 39.



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The relevant players are very diverse. Considering the broad scope of this chapter, state authorities may have to operate at national, regional or local levels, according to the allocation of competence in each Member State and for each kind of activity. Certain bodies have been created within state administrations in order to facilitate cooperation, such as the SOLVIT centres or the contact points of the services directive and the directive for the recognition of professional qualifications.

Cooperation, hence, is of a horizontal nature between state authorities, whereas certain national bodies have been established to provide training and ensure that deadlines and other requirements are respected (IMI coordinators). Supranational bodies, on the other hand, may fulfil advisory tasks at the request of state players or oversee the legality of certain proceedings (the Commission at the request of a SOLVIT centre, or the European Data Protection Supervisor on the functioning of the IMI system). Moreover, the Commission often bears the organisational burden of maintaining electronic platforms (as, once again, in the IMI system).

Concerning EU law principles, mutual recognition plays an important role in some of the mutual assistance mechanisms, such as the requests for checks, inspections and investigations. It also works as a limit for administrative decisions (mostly of state authorities) in problem-solving mechanisms. To this end, SOLVIT centres can monitor compliance and request the Commission to intervene.

The principle of proportionality is also relevant from several perspectives. It is the yardstick to measure if localisation requirements for non-personal data linked to public security are compatible with EU law, and hence whether a denial to transfer such data to a requesting authority from another Member State is legitimate. Moreover, and taken together with the principles of non-discrimination and necessity, proportionality should inspire every checking, inspecting and investigating activity on cross-border companies, especially if these activities are carried out on the initiative of the Member State of establishment. The aim is rather clear: to avoid the use of these powers as an instrument for protectionism.

The importance of individual rights in administrative cooperation increases with the potential damage to the provider or the company involved. Privacy is the key principle when it comes to personal data. It inspires the design of the IMI system, but also the communication of personal data through the IMI system or by any other means. Concerning alert mechanisms, other rights seem just as important: the rights to be informed, to file a legal remedy under national law and to a damage claim if false information was released.



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Lastly, a reference should be made to judicial review. Article 47 of the Charter of Fundamental Rights requires that an effective remedy is made available for "everyone whose rights and freedoms guaranteed by the law of the Union are violated". Given that most cooperation in these areas takes place between state authorities, any decision or activity that breaches individual rights would be subject to the possibility of a remedy *under national law*. Concerning damage claims, their acceptability would depend on national law, except for the aforementioned damages caused by false information in the alert mechanism of the directive on professional qualifications.



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# CHAPTER 4
# Administrative cooperation in the shared management of EU Funds

**Annalisa Volpato**

## *Introduction*

European Union funds constitute an essential instrument for the achievement of the EU objectives and policies. Flowing directly from the EU budget according to the allocation established by the Multiannual Financial Framework (MFF),(1) EU funds finance several programmes and projects that promote EU policy goals in a variety of areas, ranging from agriculture to research and innovation. In the aftermath of the COVID-19 pandemic, the challenge of mitigating its economic and social impact and making European economies and societies more sustainable, resilient, and better prepared for the green and digital transitions, was tackled through the establishment of a temporary € 800 billion recovery funding instrument, the NextGenerationEU, which will profoundly shape the EU economy in the foreseeable future.(2)

The management of the programmes and projects thus funded can be carried out by different administrative actors. It can be the European Commission, through its departments or EU executive agencies (*i.e.* in direct management); or non-EU countries, international organisations, development agencies and other bodies (*i.e.* in indirect management); or it can be shared between the Commission and the Member States, entrusted with implementing programmes

(1) Council Regulation 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, [2013] OJ L 347/884; Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, [2020] OJ L 433/11.

(2) On this instrument and its impact on the EU, see *inter alia* B. De Witte, "The European Union's COVID-19 Recovery Plan – The Legal Engineering of an Economic Policy Shift", 58 *Common Market Law Review*, 2021, pp. 635-682; R. Crowe, "An EU Budget of States and Citizens", 26 *European Law Journal*, 2020, pp. 331-344; *id.*, "The EU Recovery Plan – New Dynamics in the Financing of the EU Budget", in G. Barrett *et al.* (eds), *The Future of Legal Europe – Will We Trust in It?*, *Liber Amicorum in Honour of Wolfgang Heusel*, Cham, Springer, 2021, pp. 117-139; B. Laffan and A. De Feo (eds), *EU Financing for Next Decade – Beyond the MFF 2021-2027 and the Next Generation EU*, European University Institute, 2020.



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at national level under the supervision of EU institutions (*i.e.* in shared management).(3) Almost 80% of EU funding for the budgetary period 2013-2020 consisted in the five "European Structural & Investment Funds" ("ESI funds") under *shared* management.(4) For the budgetary period 2021-2027, the bulk of EU spending is still carried out under a particular form of shared management(5), in particular of seven funds:

i. European Regional Development Fund (ERDF);(6)
ii. Cohesion Fund (CF);(7)
iii. European Social Fund Plus (ESF + );(8)
iv. Just Transition Fund (JTF);(9)
v. European Maritime, Fisheries and Aquaculture Fund (EMFAF);(10)
vi. Asylum, Migration and Integration Fund (AMIF);(11)
vii. Internal Security Fund (ISF).(12)

These funds (hereinafter "the funds") mostly relate to underpinning policies which are of shared competence between the EU and the Member States under the Treaties.(13) Their operation implies the establishment of complex cooperative relations between different administrations and bodies, situated at different levels of the European administrative space. For this reason, and for their overwhelming importance for the EU budget, these funds represent a particularly interesting case for an analysis of administrative cooperation in the implementation of EU funds policy.

(3) European Commission, *A Guide to EU Funding*, 2017, https://op.europa.eu/en/publication-detail/-/publication/7d72330a-7020-11e7-b2f2-01aa75ed71a1/language-en/format-PDF/source-320958628 . However, it can be referred to more simply as European Commission, Directorate-General for Budget, A guide to EU funding – 2017 edition, EU Publications Office, 2017 accessed 8 December 2020, pp. 6-7.

(4) The European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund (CF), the European Agricultural Fund for Rural Development (EAFDR) and the European Maritime and Fisheries Fund (EMFF), see Recital 2 Regulation (EU) 1303/2013.

(5) See P. Thinus and P. Dermine, "Financial Oversight: Internal and External Control Authorities", REBUILD working paper (2024), p. 4. *Contra*, considering it as direct management, see C. Harwidi and C. Kreith, "Protecting the EU's Financial Interest in the New Recovery and Resilience Facility – The Role of the European Anti-Fraud Office", 3 *eucrim* (2021), p. 171-175.

(6) Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund, [2021] OJ L 231/60.

(7) *Ibid*.

(8) Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF + ) and repealing Regulation (EU) 1296/2013, [2021] OJ L 231/21.

(9) Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund, [2021] OJ L 231/1.

(10) Regulation (EU) 2021/1139 of the European Parliament and of the Council of 7 July 2021 establishing the European Maritime, Fisheries and Aquaculture Fund and amending Regulation (EU) 2017/1004, [2021] OJ L 247/1.

(11) Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, [2021] OJ L 251/1.

(12) Regulation (EU) 2021/1149 of the European Parliament and of the Council of 7 July 2021 establishing the Internal Security Fund, [2021] OJ L 251/94.

(13) See the list in Art. 4 TFEU.



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EU funds policy is characterised by a fundamental tension between the collective interest and the interests of the individual Member States.(14) On the one hand, the management of the funds involves the expenditure of large sums from the EU budget, which must be correctly deployed to achieve the objectives and priorities of the policy. Effective mechanisms for the application and enforcement of EU law are essential to ensure compliance and avoid mismanagement of resources, fraud and so on. On the other hand, Member States have an interest in maximising the allocation of EU resources in their territories and protecting their own financial interests.(15) Since the detection of financial irregularities in the national expenditure of funds may result in financial penalties for the state and in the withholding of further disbursement to particular projects, the individual Member State has an incentive to avoid these consequences in relation to projects conducted in its own territory.(16) This explains their chronic reluctance to cooperate and properly enforce this policy, as highlighted in several official reports.(17)

The chapter will provide an analysis of administrative cooperation in the shared management of EU funds. It will focus on the common provisions regulating the structural funds for the budgetary period 2014-2020 and 2021-2027. The chapter starts with a brief description of the legal framework and the principles governing the funds, before focusing on the topic of administrative cooperation therein. It examines cooperative mechanisms both vertically, between the national administrative authorities and the relevant European bodies, and horizontally, between the public authorities of different Member States. It argues that these mechanisms are inherent to the policy design and, albeit taking place in different phases and different forms, they are essentially aimed at easing the fundamental tension between the conflicting interests of the EU and the Member States, bringing the latter to "care" for the EU interest as well in the shared management of EU funds. The conclusion then reflects on the picture emerging from this analysis and on the functions of administrative cooperation in general.

(14) P. Craig, *EU Administrative Law*, 3rd ed., New York, Oxford University Press, 2018, pp. 91-110; J. Łacny, "Between the Devil and the Deep Blue Sea – The CJEU Case-law on Financial Corrections Imposed by the Commission on the Member States", 13 *Journal of Contemporary European Research*, 2017, pp. 1043, 1045.

(15) *Ibid.*, p. 1045.

(16) P. Craig, "Shared Administration, Disbursement of Community Funds and the Regulatory State", in H. Hofmann and A. Türk (eds), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Cheltenham, Edward Elgar, 2009, pp. 34, 37.

(17) *Inter alia*, Committee of Independent Experts, "Second report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud", Vol. 1, 10 September 1999; European Commission, 14th Annual Report on the Implementation of the Structural Funds, COM(2003) 646 final, 30 October 2003; Court of Auditors, Special Report 10/2001 concerning the financial control of the Structural Funds, Commission Regulations (EC) 2064/97 and (EC) 1681/94, together with the replies of the Commission, [2001] OJ C 314/26.



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## *I. The legal framework for EU funds: an overview*

The common legal framework for the funds is established in the overarching Regulation 2021/1060, which lays down the common provisions applicable in the programming period 2021-2027 (hereinafter, "CPR").(18) In the previous budgetary period, the funds in shared management were governed by Regulation (EU) 1303/2013 (hereinafter, "old CPR") which, due to the long-term nature of some structural funds projects' implementation, remained in force until the end of 2023.(19) The CPR is complemented by "fund-specific" regulations, establishing the specific rules for each fund which apply only when they are not in contradiction with the CPR.(20) In other words, they do not automatically constitute *lex specialis* vis-à-vis the CPR.

The functioning of the funds is a prime example of integrated or shared administration.(21) They are implemented in shared management, connoted by the Committee of Independent Experts as:

> [M]anagement of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the community policy to be implemented successfully.(22)

This mode of administration therefore entails a distribution of different tasks and responsibilities between national (including regional and local) and supranational authorities, which interact closely in the completion of the decision-making procedure. In general, the administrative procedure

(18) Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, [2021] OJ L 231/159.

(19) Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, [2013] OJ L 347/320.

(20) Art. 1(6) Regulation (EU) 2021/1060; Art. 1(5) Regulation 1303/2013.

(21) With reference to ESI funds, K. Pantazatou, "European Union Funds", in H. Hofmann, G. Rowe and A. Türk (eds), *Specialised Administrative Law of the European Union*, New York, Oxford University Press, 2018, pp. 532, 533. See also P. Craig, *EU Administrative Law*, *op. cit.*, pp. 91-110.

(22) Committee of Independent Experts, "Second report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud", *op. cit.*, para. 3.2.2, cited also in P. Craig, "Shared Administration, Disbursement of Community Funds and the Regulatory State", *op. cit.*, p. 34.



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leading to the allocation of EU funds can be divided into 4 phases: (i) the *preparatory* phase, which corresponds to the setting of the agenda, priorities and objectives; (ii) the *implementation* phase, which includes the selection of the projects and the disbursement of funds; (iii) the *control* phase, which consists in the reporting, monitoring and evaluation of programmes; and (iv) the *financial management* phase.(23) As we will see, to some extent all these phases are shared between the Union and the national administrations.(24)

The current regime is complex and relies heavily on an effective collaboration between the Commission and the Member States.(25) The existence of a plurality of levels in the management of EU funds entails frequent interactions between different public authorities in the decision-making process. Therefore, the management of EU funds is characterised by the strong presence, virtually in all its phases, of *composite* administrative procedures, with the consequent issues of accountability, liability and effective judicial protection identified in legal doctrine.(26) As noted by Pantazatou, the role of the Commission in EU funds management and control especially "often blurs the lines of responsibility within the decision-making process, and hampers the attribution of accountability in cases of mismanagement of funds".(27)

## *II. The principles underpinning administrative cooperation in EU funds*

The Member States are under a clear duty to cooperate in the management of EU funds (including in the recovery of sums unduly paid), stemming from the general principle of sincere cooperation set forth in Article 4(3) TEU.(28) This provision establishes a constitutional obligation for the authorities of the Union and the Member States to "assist each other in carrying out tasks which flow from the Treaties in full mutual respect" across all policy

(23) K. Pantazatou, "European Union Funds", *op. cit.*, p. 535.

(24) *Ibid.*

(25) P. Craig, *EU Administrative Law*, *op. cit.*, p. 107.

(26) See, *inter alia*, F. Brito Bastos, "An Administrative Crack in the EU's Rule of Law – Composite Decision-Making and Nonjusticiable National Law", 16 *European Constitutional Law Review*, 2020, p. 63; H. Hofmann and A. Türk, "The Development of Integrated Administration in the EU and Its Consequences", 13 *European Law Journal*, 2007, p. 253; H. Hofmann, "Composite Decision Making Procedures in EU Administrative Law", in H. Hofmann and A. Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Cheltenham, Edward Elgar, 2009, p. 136; M. Eliantonio, "Judicial Review in an Integrated Administration – The Case of Composite Procedures", 7 *Review of European Administrative Law*, 2014, p. 65.

(27) K. Pantazatou, "European Union Funds", *op. cit.*

(28) See *Firma Wilhem Fromme v. Bundesanstalt für landwirtschaftliche Marktordnung*, case C-54/81, EU:C:1982:142.



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areas of EU law, setting the tone for all forms of interaction between public authorities active at different governance levels.(29) Despite the conflicting interests individual Member States may have, "effective implementation of Union law by the Member States [...] shall be regarded as a matter of common interest".(30) In the specific area of EU funds, especially relevant is the obligation imposed in primary law to counter fraud and any other illegal activities affecting the financial interests of the Union.(31) In particular, Article 325(3) TFEU requires that "the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities." In this sense, administrative cooperation represents an essential tool not only to realise the principle of sincere cooperation under Article 4(3) TEU, but also to guarantee the effectiveness of EU law and the correct deployment of EU resources.(32)

In funds management, administrative cooperation is also demanded by policy-specific principles which underpin the structure of the CPR.(33) Some of them depend on the establishment of collaborative links to be fulfilled. This is the case not only with the principle of shared management described above, but also of the principle of partnership the *rationale* of which is to involve, at every stage, different actors at supranational and national level: regional, local, urban and other public authorities.(34) These partners are selected according to the principle of representativeness.(35) This is complemented by the further

(29) D.-U. Galetta, "Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di cooperazione amministrativa dell'art. 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?", 19 *Rivista italiana di diritto pubblico comunitario*, 2009, pp. 1689, 1697; O. Porchia, *Principi dell'ordinamento europeo. La cooperazione pluridirezionale*, Bologna, Zanichelli, 2008, p. 5.

(30) Art. 197 (1) TFEU. See also M. Macchina, "La cooperazione amministrativa come questione di interesse commune", in M.P. Chiti and A. Natalini (eds), *Lo spazio amministrativo europeo*, Bologna, Il Mulino, 2012, p. 87.

(31) Art. 325 (1) TFEU.

(32) Art. 197(2) TFEU. On the plurality of objectives pursued through administrative cooperation in general, see R. Cavallo Perin and G.M. Racca, "La cooperazione amministrativa europea nei contratti e servizi pubblici", 6 *Rivista italiana di diritto pubblico comunitario*, 2016, p. 1458.

(33) Namely the principles of shared management, of partnership, of representativeness, of additionality, of complementarity and of concentration, see K. Pantazatou, "European Union Funds", *op. cit.*, pp. 539-540.

(34) Recital 14 and Art. 8 Regulation (EU) 2021/1060; Recital 20 and Arts. 14-15 Regulation 1303/2013. See also A. Demidov, "Efficient Implementers and Partners", in J. Batchler *et al.* (eds), *EU Cohesion Policy – Reassessing Performance and Direction*, New York, Routledge, 2016, pp. 206-219.

(35) See also Commission Delegated Regulation (EU) of 7 January 2014 on the European code of conduct on partnership in the framework of the European Structural and Investment Funds, [2014] OJ L 74/1.



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principle of complementarity which, in principle, provides that national co-financing is required for EU financing of projects.(36) These principles, which are the pillars of the design of the policy, necessarily presuppose a certain amount of coordination to be effectively implemented in practice.

## *III. Vertical cooperation in EU funds management*

It is clear from the legal framework and its principles described above that vertical cooperation between EU and national authorities is inherent to the very design and functioning of the EU funds policy. Their management is essentially dependent on a systematic dialogue and collaboration between the two levels to "ensure the effectiveness of the ESI Funds during preparation and implementation, in relation to monitoring, reporting and evaluation".(37) A closer reading of the CPR, however, reveals that this vertical relationship is not simply bilateral: a plurality of actors is involved, at different levels of governance and with different tasks according to the phase of the procedure.

### A. Vertical cooperation in the preparatory phase

In the preparatory phase, the contacts between the national and EU authorities are aimed at elaborating a strategic approach for the implementation of ESI funds. Under the old CPR, while the initial preparatory phase was carried out by the Commission through the elaboration of a Common Strategic Framework where the general guiding principles, the objectives and the key actions were laid down,(38) the Member States had to specify the priorities established therein, adapting it to the specificities of their territories or conditions. This was done in the "Partnerships Agreements" (and "the regional aid maps") prepared by each Member State.(39) These are drawn up "in cooperation with the partners" – namely regional and local authorities, urban and other public authorities, economic and social partners, and relevant bodies representing the civil society(40) – and "in dialogue with the Commission".(41) Such a dialogue between the Commission and the national authority (generally, the competent directorate general and national ministries) was crucial for the adoption of the Partnership Agreement since the latter was subject to approval by the Commission.(42) In

(36) K. Pantazatou, "European Union Funds", *op. cit.*
(37) Art. 4 Regulation 1303/2013. See also Art. 7 Regulation (EU) 2021/1060.
(38) Arts. 9 and 10 and Annex I Regulation 1303/2013.
(39) *Ibid.*, Arts. 14-17 Regulation 1303/2013; Arts. 10-13 Regulation (EU) 2021/1060.
(40) *Ibid.*, Art. 5.
(41) *Ibid.*, Art. 14. See also Art. 10 Regulation (EU) 2021/1060.
(42) *Ibid.*, Art. 16.



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fact, the Member States had to submit for approval not only the Partnership Agreement, but also the operational programmes for each fund(43) and the major projects.(44)

Under the new CPR, although this phase has been simplified with the elimination of the Common Strategic Framework, the approval of the Partnership agreements and of the programmes by the Commission is still required.(45) Within three months, the Commission can make observations on these documents, which need to be taken into account by the Member States in thier revision. They can also later be amended by the Member States, but only after an assessment of the Commission and taking into account its observations.(46) Collaboration in the preparatory work for these documents has, thus, a clear steering function, which results in the co-definition of priorities and objectives and in a significant reduction of the administrative discretion of the national authorities in the implementation process.(47) This significantly affects the margin of appreciation of the Member States, especially because the approval of the Commission is conditional not only on the compliance with EU law, but also with the country-specific recommendations issued by the Commission or the Council, the *ex-ante* conditionalities, and the European Semester requirements.(48)

In this respect, it might be asked whether this relationship has progressively become almost "hierarchical"(49) rather than "collaborative" with the expansion of the mechanism of conditionality. Since the 2008 financial crisis, this mechanism which makes the spending of EU resources conditional on the compliance with certain objectives (distinct from the immediate objective of EU spending intervention) has been introduced in ESI funds policy as an important tool for the enforcement of EU economic governance.(50) First tried out in the Cohesion Fund in 1994-2013, the old CPR for the period 2014-2020 provided for a comprehensive macroeconomic conditionality clause,(51) reinforced

(43) *Ibid.*, Art. 96. See also the relevant provisions in the fund- specific regulations.

(44) *Ibid.*, Arts. 100-102.

(45) Arts. 12 and 23 Regulation 2021/1060.

(46) *Ibid.*, Art. 24.

(47) K. Pantazatou, "European Union Funds", *op. cit.*, p. 541.

(48) *Ibid.*, p. 534.

(49) The term is used here in a non-technical meaning: it does not imply that the national administration bodies are hierarchically subordinated to the EU authorities since this collaboration in the preparatory phase does not modify their position in the administrative organisation. See D.-U. Galetta, "Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di cooperazione amministrativa dell'art. 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?", *op. cit.*, p. 1692.

(50) V. Vita, "Revisiting the Dominant Discourse on Conditionality in the EU – The Case of EU Spending Conditionality", 19 *Cambridge Journal of European Legal Studies*, 2017, p. 116.

(51) Art. 23 Regulation [illegible]2013.



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by additional conditional measures linked to economic policy.(52) Although raising contentious issues of a political and constitutional nature,(53) the use of conditionalities is consolidated and further expanded in 2021-2027.(54) Particularly remarkable in this regard is the introduction of the so-called "rule of law conditionality"(55) and the "eco-schemes" in the Common Agricultural Policy, which subordinate a share of funding to the respect of agricultural practices beneficial for the environment and climate(56) Although these mechanisms have been the object of sustained scientific attention,(57) whether they have entailed more extensive forms of interaction in the preparatory phase between national and EU administrative authorities remains to be assessed.

## B. Vertical cooperation in the implementation phase

Once the national plans are approved by the Commission, the latter proceeds to the disbursement of funds to the Member States which are responsible for the selection of projects, allocation of funds to the beneficiaries, and, more in general, with all the actions connected to the implementation phase.(58) For the implementation of the structural funds, the Member States are required to establish a managing authority responsible for the operational programme.(59) This authority could also be designated at regional level, such as in the case of ERDF funding or the EAFRD in some Member States.(60) In certain cases, the Member State or the managing authority may designate one or more intermediate bodies, including local authorities, regional development bodies or non-governmental organisations, to carry out certain tasks of the managing

(52) *Ibid.*, Arts. 15 (1)(a) and 24.

(53) For an overview of the issues raised by conditionality, see V. Vita, "Research for REGI Committee – Conditionalities in Cohesion Policy", European Parliament, Policy Department for Structural Cohesion Policies, 2018.

(54) Art. 15 and Annex III Regulation 2021/1060.

(55) Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, [2020] OJ L 433/1.

(56) Art. 31 Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD), [2021] OJ L 435/1.

(57) Especially on the rule of law conditionality, see I. Staudinger, "The Rise and Fall of Rule of Law Conditionality", 7 *European Papers*, 2022, pp. 721-737; A. Baraggia and M. Bonelli, "Linking Money to Values – The New Rule of Law Conditionality Regulation and Its Constitutional Challenges", 23 *German Law Journal*, 2022, pp. 131-156; M. Fisicaro, "Beyond the Rule of Law Conditionality – Exploiting the EU Spending Power to Foster the Union's Values", 7 *European Papers*, 2022, pp. 697-719.

(58) K. Pantazatou, "European Union Funds", *op. cit.*, p. 534.

(59) Art. 125 Regulation 1303/2013; Art. 49 Regulation 2021/1060.

(60) For instance, in Italy. See European Commission, Implementing Decision on the Partnership Agreement with Italy, C(2018) 598 final, 8 February 2018.



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authority.(61) Under the new CPR, the Member State, at its own initiative, can also set up a coordination body specifically to liaise with and provide information to the Commission and to coordinate activities of the programme authorities in that Member State.(62)

The managing authority systematically exchanges information with the Commission. It is responsible for establishing a system to record and store in computerised form data on each operation.(63) Such electronic data exchange system should be interoperable with the electronic systems set up at the EU level and ensure exchanges of information between beneficiaries and the managing authority, the certifying authority, the audit authority and intermediate bodies.(64) All the documents regarding expenditure supported by ESI funds should be available to the Commission (and the Court of Auditors) upon request.(65) Moreover, the managing authority has an obligation to send to the Commission the annual report and specific reports on the implementation.(66) On these reports, the Commission can make observations on issues which significantly affect the implementation of the programme, to which the managing authority can respond by providing further information.(67) Every year, an annual review meeting is organised between the Commission and each Member State to examine the performance of each programme.(68) In this phase, therefore, administrative cooperation takes the form of exchanges of information carried out both as periodical transmissions and meetings, and in shared databases.(69)

(61) Recital 106, Art. 36 Regulation 1303/2013; Art. 71(3) Regulation 2021/1060.

(62) Art. 71(6) Regulation 2021/1060.

(63) Art. 125(2) Regulation 1303/2013; Art. 72(1)(e) Regulation 2021/1060.

(64) *Ibid*., Art. 122(3). This paragraph did not apply to the EMFF.

(65) *Ibid*., Art. 140(1); Art. 82 Regulation 2021/1060. See also Art. 50 Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) 1306/2013, [2021] OJ L 435/187 ("CAP Regulation"): "Member States shall make available to the Commission all information necessary for the smooth operation of the EAGF and EAFRD and shall take all appropriate measures to facilitate the checks which the Commission deems appropriate in connection with the management of Union financing." On vertical cooperation in the CAP, see L. Baroni, "Amministrazione diretta, amministrazione indiretta e cooperazione amministrativa: riflettendo sui modelli di amministrazione nella PAC", *Il Diritto dell'Unione Europea*, 2011, p. 95.

(66) Arts. 46 and 125(2) Regulation 1303/2013. The reporting obligations have been simplified (but made more frequent) in the period 2021-2027, see Art. 42 Regulation 2021/1060.

(67) Art. 50(8) Regulation 1303/2013; Art. 43(3) Regulation 2021/1060.

(68) Art. 51 Regulation 1303/2013; Art. 41 Regulation 2021/1060.

(69) On the different forms of exchange of information, see F. Lafarge, "Administrative Cooperation between Member States and Implementation of EU Law", 16 *European Public Law*, 2010, p. 611; repeated in F. Lafarge, "EU Law Implementation through Administrative Cooperation between Member States", 1 *Rivista italiana di diritto pubblico comunitario*, 2010, p. 119.



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## C. Vertical cooperation in the control phase

In the control of funds management, further administrative actors are involved. While, according to Article 123 of the old CPR, alongside the managing authority, the Member State also had to establish a monitoring committee, a steering committee, a certifying authority and an independent audit authority,(70) the new CPR expressly requires only an audit authority.(71) The cooperation of the Commission with these authorities is even closer since the Commission enjoys a general monitoring role in the control of funds management. In particular, the Commission may participate in the work of the monitoring committee(72) and of the steering committee in an advisory capacity.(73) While the certifying authority draws up and submits payment applications to the Commission, certifying that they result from reliable accounting systems,(74) the audit authority meets with the Commission on a regular basis and, as a general rule, at least once a year to examine the audit documents.(75) The Commission cooperates with audit authorities to coordinate their audit plans and methods and immediately exchanges with those authorities the results of audits carried out on management and control systems.(76)

The supervision and monitoring of the correct implementation of structural funds is mainly in the hands of these national authorities which must prevent, detect, and correct "irregularities".(77) All the official exchanges of information between these national authorities and the Commission are carried out by electronic data exchange systems,(78) notably the Irregularity Management System (IMS) established by the Commission for the mandatory notification of irregularities.(79) When required by the fund-specific regulations, other electronic systems may be used. An example is the Integrated Administration

(70) Art. 123 Regulation 1303/2013; in the new CPR, only the monitoring authority is expressly required, see Art. 38 Regulation 2021/1060. For a description of their tasks, see K. Pantazatou, "European Union Funds", *op. cit.*

(71) Art. 71 Regulation 2021/1060.

(72) Art. 48 (3) Regulation 1303/2013; Art. 39(2) Regulation 2021/1060.

(73) *Ibid.*, Art 108.

(74) *Ibid.*, Art. 126.

(75) *Ibid.*, Art. 128 (3); Art. 77(6) Regulation 2021/1060.

(76) *Ibid.*, Art. 128 (1); Art. 70 (1) Regulation 2021/1060.

(77) For a definition of what constitutes an "irregularity", see Art. 2(36) and (38) Regulation 1303/2013. On the obligation to report to the Commission irregularities, see Art. 122 and *"Baltlanta" UAB v. Lietuvos valstybė*, case C-410/13, EU:C:2014:2134.

(78) Art. 74(4) and Art. 122(3) Regulation 1303/2013; Art. 69 (9) Regulation 2021/1060.

(79) Art. 3 of Commission Implementing Regulation (EU) 2015/1974 of 8 July 2015 setting out the frequency and the format of the reporting of irregularities concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund, under Regulation (EU) 1303/2013 of the European Parliament and of the Council, [2015] OJ L 293/20. The IMS is now managed by OLAF, together with the Early Detection and Exclusion System, another system established by the Commission to reinforce the protection of the financial interests of the EU.



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and Control System (IACS), consisting of a number of digital and interconnected databases established by the Member States for management and control in the Common Agricultural Policy.(80) These systems allow an immediate and efficient transmission of information between the Member States and the Commission.

The picture that emerges is thus a group of collaborative links between the EU and different administrative authorities at national level – and even within the same level since the CPR also provides for the need to cooperate between the different national authorities for the preparation of the documents to be shared with the Commission.(81) This picture is further complicated by the plurality of actors who exist at the EU level as well. As a result of the agencification of the EU administrative landscape,(82) certain tasks are delegated to bodies outside the Commission and its DGs. Examples are the CHAFEA, an executive agency which is (marginally) involved in certain aspects of EAFRD,(83) and EFCA, which is entrusted with enforcement tasks in relation to the EMFF.(84) For the AMIF, ISF and BMVI funds, the relevant decentralised agencies are expressly envisaged to participate in the work of the monitoring

(80) See CAP Regulation; Commission Delegated Regulation (EU) 640/2014 of 11 March 2014 supplementing Regulation (EU) 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system and conditions for refusal or withdrawal of payments and administrative penalties applicable to direct payments, rural development support and cross compliance, [2014] OJ L 181/48; Commission Implementing Regulation (EU) 809/2014 of 17 July 2014 laying down rules for the application of Regulation (EU) 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system, rural development measures and cross compliance, [2014] OJ L 227/69.

(81) See, for instance, Art. 49 Regulation 1303/2013.

(82) On the phenomenon of agencification, see, *inter alia*, M. Everson, C. Monda and E. Vos, *European Agencies In between Institutions and Member States*, Alphen aan den Rijn, Wolters Kluwer, 2014; M. Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration*, New York, Oxford University Press, 2016; E. Chiti, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Padua, Cedam, 2002; C. Tovo, *Le agenzie decentrate dell'Unione europea*, Naples, Editoriale Scientifica, 2016; J. Alberti, *Le agenzie dell'Unione europea*, Milan, Giuffrè, 2018.

(83) CHAFEA is the Consumers, Health, Agriculture and Food Executive Agency, established according to Council Regulation (EC) No. 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, [2003] OJ L 11/1.

(84) EFCA is the European Fisheries Control Agency, established by Council Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy, [2009] OJ L 343/1, last amended by Regulation (EU) 2015/812 of the European Parliament and of the Council of 20 May 2015, [2015] OJ L 133/1. See Art. 36(1)(b) Regulation (EU) 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, [2013] OJ L 354/22. For an analysis of the tasks and the procedures involving EFCA, see F. Cacciatore and M. Eliantonio, "Fishing in Troubled Waters? Shared Enforcement of the Common Fisheries Policy and Accountability Gaps", in M. Scholten and M. Luchtman (eds), *Law Enforcement by EU Authorities – Political and Judicial Accountability in a Shared Legal Order*, Cheltenham, Edward Elgar, 2017, p. 168.



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programme.(85) Moreover, the EIB is involved in the preparatory and control phases of the programmes to which it contributes.(86) The resulting scenario is thus a polycentric, tangled web of administrative authorities, required to cooperate systematically with a variety of instruments.

## D. Vertical cooperation in financial management and enforcement

The evolution of legislation and of case law on EU funds policy has progressively strengthened the power of the Commission in relation to penalising irregularities.(87) Accordingly, the Commission may require a Member State to take actions which it deems necessary "to ensure the effective functioning of their management and control systems or the correctness of expenditures".(88) It can also carry out on-the-spot audits or checks itself,(89) which agents of the Member States can take part in as well.(90) Furthermore, it can suspend or cancel payments, especially for reasons of deficiencies in the management, control or monitoring of the operational programme, or serious irregularities and/or failure to meet priorities and conditionalities.(91)

The procedure for the adoption of the decisions to suspend or cancel payments (in jargon, "financial corrections") foresees some guarantees for the Member State concerned,(92) such as prior information and the possibility to provide comments and evidence on the actual extent of the irregularity.(93) If the disagreement persists, a hearing is held.(94) The regulation of agricultural

(85) Art. 39(3) Regulation 2021/1060.

(86) See, *inter alia*, Arts. 52 and 57 Regulation 1303/2013; Art. 39(2) Regulation 2021/1060.

(87) P. Craig, *EU Administrative Law*, *op. cit.*, pp. 91-98.

(88) Art. 75(3) Regulation 1303/2013; Art. 69(3) Regulation 2021/1060.

(89) *Ibid.*, Art. 75(2); *ibid.*, Art. 70(3). See also Council Regulation (Euratom, EC) No. 2185/96 of 11 November 1996 concerning spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, [1996] OJ L 292/2.

(90) See Art. 69(3) Regulation 2021/1060. This possibility is sometimes also provided by the fund-specific regulations.

(91) For suspension, see Art. 142 Regulation 1303/2013 and Art. 97 Regulation 2021/1060; for cancellation (financial corrections), see Art. 144 Regulation 1303/2013 and Art. 104 Regulation 2021/1060. See also the fund-specific regulations.

(92) On the importance of the right to be heard and the right of defence for the Member State, see *Kingdom of Spain v. Commission*, case C-287/02, EU:C:2005:368, paras. 37-38; *Hellenic Republic v. Commission*, case C-50/94, EU:C:1996:266, para. 9; *Federal Republic of Germany v. Commission*, case C-54/95, EU:C:1999:11, para. 91; *Federal Republic of Germany v. Commission*, case C-245/97, EU:C:2000:687, para. 48; *Kingdom of Netherlands v. Commission*, case C-278/98, EU:C:2001:124, para. 119; *Italian Republic v. Commission*, case C-147/99, EU:C:2001:624, para. 57; *Kingdom of Spain v. Commission*, case C-130/99, EU:C:2002:192, para. 125; *Kingdom of Spain v. Commission*, case C-329/00, EU:C:2003:355, para. 83.

(93) Art. 145(1) and (2) Regulation 1303/2013; Art. 104(2) Regulation 2021/1060.

(94) *Ibid.*, Art. 145(3); *ibid.*, Art. 104(3).



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funds envisages a more elaborated procedure which allows the Member State to have all the significant corrections examined by a panel of independent experts (*i.e.* the conciliation body) to reconcile the two positions.(95) Here, it is even more evident that the aim of this procedure is to transform a qualified disagreement between administrations(96) into a form of cooperation in order to reconcile the diverging interests of the protection of the EU budget, on the one hand, and the financial interests of the Member State concerned, on the other. In this sense, administrative cooperation in this context clearly serves the purpose of easing the fundamental tension underlying EU funds policy, providing a forum for negotiation and providing reasons in a contentious situation.

If the procedure results in an agreement, the Member State is allowed to reuse the funds concerned; otherwise, it must repay the sums to the EU budget, eventually recovering them from the beneficiaries.(97) And it is especially from the perspective of the beneficiaries asked to repay the "irregularly" used funds that these decisions on financial corrections are particularly problematic. Although the Court of Justice of the EU has broadly sanctioned the practices of applying financial corrections of the Commission,(98) the legal position of these individuals vis-à-vis this composite administrative procedure remains controversial.(99) In *Lisrestal*, for instance, the Court recognised that the Commission infringed the right to be heard of the beneficiary of EU funds because it adopted a decision requesting Portugal to return funds spent irregularly without giving the beneficiary the right to be heard in the procedure.(100) It thus looked at the substance more than at the strict form, which envisages the Member State as the sole formal party to the procedure, and recognised the beneficiary to be directly concerned and adversely affected by the decision.

However, in relation to the *locus standi* of the beneficiary under Article 263 TFEU, which depends on the same requirement of "direct concern" to challenge the decision, case law has not been so certain.(101) In the earlier cases, the Court considered settled case law that "a Commission decision reducing or cancelling financial assistance granted by the ESF is capable of directly and

(95) The proposals of the conciliation body are not binding for the Commission. See Art. 55 CAP Regulation.

(96) In the sense of L. De Lucia, "Conflict and Cooperation within European Composite Administration (between Philia and Eris)", 5 *Review of European Administrative Law*, 2012, p. 43.

(97) Art. 146 and 147 Regulation 1303/2013; Art. 104(4) Regulation 2021/1060.

(98) *Conserve Italia Soc. Coop. arl v. Commission*, case C-500/99 P, EU:C:2002:45; *Sociaal Economische Samenwerking West-Brabant*, case C-383-385/06, EU:C:2006:731; *Thessaloniki v. Commission*, case T-196/01, EU:T:2003:249; *Comunità montana della Valnerina v. Commission*, case T-340/00, EU:T:2003:71.

(99) K. Pantazatou, "European Union Funds", *op. cit.*, p. 554.

(100) *Lisrestal v. Commission*, case T-450/93, EU:T:1994:290, para. 49; appealed in *Commision v. Lisrestal*, case C-32/95 P, EU:C:1996:402.

(101) K. Pantazatou, "European Union Funds", *op. cit.*, p. 552.



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individually concerning the beneficiaries of such assistance and of adversely affecting them, even though the Member State concerned is the sole interlocutor of the ESF in the relevant administrative procedure".(102) However, in the later *Regione Siciliana*, a case concerning EU funding to the Region of Sicily for the construction of a dam, the Court refused to recognise direct concern to the ultimate beneficiary. Arguing from the fact that Italy had discretion in the recovery of the sums unduly paid, the decision of the Commission was found not to directly jeopardise the applicant's legal position.(103) The beneficiary should therefore seek judicial protection before the national courts, challenging the national measure based on the decision of the Commission.(104) Such a restrictive interpretation of the "direct concern" requirement raises serious concerns from the perspective of the right to effective judicial protection and of the consistency of the case law of the Court in EU funds policy.(105)

## *IV. Horizontal cooperation between Member States' administrations*

Although less extensive than vertical cooperation, EU funds policy also envisages forms of horizontal cooperation between administrative authorities of different Member States. In fact, transnational cooperation is recognised as having an added value for achieving the policy objectives, and to be essential for the effectiveness of the programmes and control activities, especially in the case of transnational projects and situations with transnational elements.(106) In this sense, horizontal cooperation in EU funds management contributes to pursuing the EU interest in a coherent, efficient and effective manner.

### A. The Shared Management of Transnational Programmes

With regard to transnational projects, the Common Strategic Framework for the period 2014-2020 expressly required Member States to incentivise cross-border activities in the form of macro-regional and sea-basin strategies,

(102) *Inter alia*, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap*, case T-102/00, EU:T:2003:192, para. 60.

(103) *Regione Siciliana v. Commission*, case C-15/06 P, EU:C:2007:183, para. 38. The judgment is the appeal to *Regione Siciliana v. Commission*, case T-60/03, EU:T:2005:360, where the General Court decided that Italy had no discretion and therefore the applicant had direct concern. Compare to another judgment concerning the Region of Sicily (on the construction of a motorway) where the General Court adopted an approach in line with the Court in *Regione Siciliana v. Commission*, case C-15/06 P, EU:C:2007:183, T-341/02, EU:T:2004:228.

(104) *Ibid.*, para. 39.

(105) K. Pantazatou, "European Union Funds", *op. cit.*, p. 554. See also K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, New York, Oxford University Press, 2014, p. 323.

(106) See for instance Recital 21 Regulation 1304/2013.



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and interregional and transnational actions with beneficiaries located in at least two different Member States.(107) Accordingly, the fund-specific regulations provided for the possibility to finance transnational projects, often supporting the creation of systems for the purpose of facilitating the setting up of transnational partnerships and the cooperation in cross-border projects.(108) For instance, the ERDF finances a EU-level platform, *Interact*, to facilitate cooperation programmes under the European territorial cooperation objective of the Cohesion Policy.(109) An important initiative for cross-border cooperation is the *Interreg* programme, financed by the European Regional Development Fund under the goal of European territorial cooperation.(110)

The management and control of these cross-border, transnational or interregional programmes and projects necessarily entails the establishment of cooperative links between administrations of different Member States. In certain cases, they have to establish a shared management system to manage, coordinate and supervise the implementation of a programme, with the creation of joint bodies, composed of representatives of the Member States participating in the programme. This is the case of the programmes under Interreg,(111) such as for instance of the Italy-Croatia CBC Programme, which is provided with a Joint Secretariat and a mixed Monitoring Committee.(112)

The mixed composition and the role of these joint bodies in the administrative procedures may raise controversial issues of effective judicial review. In the case *Liivimaa Lihaveis*, the Court was confronted with a preliminary ruling on the jurisdiction over a guideline document adopted by the monitoring committee of an operational programme between Estonia and Latvia.(113) The monitoring committee was composed of seven members from both Member States and it included a provision with an absolute ban on judicial review of a decision on the rejection of funding of a project by this body. Confirming that

(107) Pt 7 of Annex I Regulation 1303/2013. Transnational cooperation is particularly linked to the investment for growth and jobs goal of the operational programmes.

(108) Art. 64 Regulation (EU) 508/2014; Art. 3 Regulation 1301/2013; Art. 10(4) Regulation 1304/2013. See also Art. 96(3)(d) Regulation 1303/2013 and Art. 110 Regulation 2021/1060.

(109) Commission Implementing Decision of 15 July 2020, C(2020) 4890 final. For an overview of its activities, see <https://www.interact-eu.net/#o = about> accessed 1 February 2021.

(110) Regulation (EU) 2021/1059 of the European Parliament and of the Council of 24 June 2021 on specific provisions for the European territorial cooperation goal (Interreg) supported by the European Regional Development Fund and external financing instruments, [2021] OJ L 231/94.

(111) Art. 23 Regulation (EU) 1299/2013.

(112) Commission Implementing Decision of 23 January 2019 amending Implementing Decision C(2015) 9342 approving certain elements of the cooperation programme "Interreg V-A Italy-Croatia" for support from the European Regional Development Fund under the European territorial cooperation goal in Italy and Croatia, C(2019) 277 final, 23 January 2019. See also Veneto regional government resolution No. 257 on 8 March 2016.

(113) *Liivimaa Lihaveis*, case C-562/12, EU:C:2014:2229.



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Article 47 of the Charter applied to the activities of said committee since it implements EU law, the Court held that, in line with the principle of effectiveness, judicial protection had to be granted against the acts of the monitoring committee before the national courts.(114) Even if this act was to be considered a preparatory step for the subsequent decision of the managing authority, judicial review has to be granted when it constitutes "the culmination of a distinct stage in the main procedure and produce legal effects".(115) Thus, also in these composite procedures involving transnational bodies, the tenets of effective judicial protection must be respected, applying a similar reasoning than the one in *Borelli*.(116)

## B. Mutual Assistance in Control and Enforcement

Horizontal cooperation is important not only for the control of programmes and projects which are transnational in nature, but also of those which may present some transnational elements making the enactment of checks and controls difficult. In a Union where the national markets are by now integrated and the economic operators carry out transnational activities, the effectiveness of enforcement increasingly depends on the exchange of information and documents between public authorities, and on administrative assistance beyond national borders.

Mutual assistance between Member States is, however, expressly regulated at legislative level only in relation to agricultural funds. Article 79 of the CAP Regulation establishes an obligation for Member States to assist each other for the purposes of scrutinising the relevant documents (a) where an undertaking or third party is established in a Member State other than that in which the payment of the amount in question has or should have been made or received; and (b) where an undertaking or third party is established in a Member State other than that in which the documents and information required for scrutiny are to be found.(117) On the initiative of the Commission or on the basis of a proposal by a Member State, mutual assistance can also be carried out through joint actions.(118) In the budgetary period 2021-2027, joint investigation teams and cross-border operations are particularly promoted through the establishment of a Union Anti-Fraud Programme with the aim of support

(114) *Ibid.*, para. 58.

(115) *Ibid.*, para. 60.

(116) *Oleificio Borelli v. Commission*, case C-97/91, EU:C:1992:491.

(117) Art. 79 CAP Regulation.

(118) Art. 44 Commission Implementing Regulation (EU) 908/2014 of 6 August 2014 laying down rules for the application of Regulation (EU) 1306/2013, [2014] OJ L 255/59. See also Art. 45 on mutual assistance.



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mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.(119)

Moreover, Council Regulation 515/97 was specifically adopted to enumerate the forms of mutual assistance and cooperation in customs and agricultural matters, and so also in connection to EAFRD.(120) This legal act distinguishes between assistance on request by a national authority and spontaneous assistance. While the latter is limited to the spontaneous communication of all relevant information concerning operations which constitute, or appear to them to constitute, breaches of agricultural legislation by the Member State in which these take place, the former requires a more proactive attitude by the requested authorities. These must not only transmit to the applicant authority any information, attestation, document or copy of a document in its possession,(121) but also notify the addressee about instruments or decisions on behalf of the applicant authority.(122) At the request of the applicant authority, the requested authority must as far as possible keep a special watch on suspicious persons, places, movements of goods and means of transport.(123) Specific administrative enquiries can be carried out by the requested authority where, by agreement between the applicant authority and the requested authority, officials appointed by the applicant authority may be present.(124) The administrative cooperation in these investigative actions is thus very intense, requiring effective coordination between the agents of the different Member States. For this reason, the Commission may coordinate joint actions involving mutual assistance between two or more Member States and send its officials on the operations, always remaining informed about joint operations.(125)

### C. Exchanging and Networking between Public Authorities

If such an intense form of administrative cooperation as mutual assistance seems to be limited to the agricultural domain, forms of exchange of information or best practices are also common in the other structural funds. Under

(119) Regulation (EU) 2021/785 of the European Parliament and of the Council of 29 April 2021 establishing the Union Anti-Fraud Programme, [2021] OJ L 172/110, especially Art. 9(2)(b).

(120) Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, [1997] OJ L 82/1. See also Commission Regulation (EC) No. 846/2009 of 1 September 2009 amending Regulation (EC) No. 1828/2006, [2009] OJ L 250/1.

(121) Arts. 4-5 Council Regulation (EC) No. 515/97.

(122) *Ibid.*, Art. 6.

(123) *Ibid.*, Art. 7.

(124) *Ibid.*, Art. 9.

(125) *Ibid.*, Arts. 17-18.



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the CPR, the Commission can use part of the funds disbursement to support "actions to disseminate information, support networking, carry out communication activities, raise awareness and promote cooperation and exchange of experience" between public authorities in different Member States.(126) This provision is generally echoed in the fund-specific regulations, promoting the exchange of information or dissemination of good practices in the management of the specific fund.(127)

In certain cases, this exchange of information and best practices is expected to be structured in the form of a network of authorities. Under the EMFAF, for instance, a European network of fisheries local action groups is active,(128) whereas the ERDF provides for the creation of an urban development network to promote capacity-building, networking and the exchange of experience at Union level between urban authorities responsible for implementing sustainable urban development strategies.(129) These networking activities too can be funded with ESI resources.

## *Conclusions*

The analysis of administrative cooperation in the management of ESI funds has unveiled a rich and multifaceted reality of interrelationships involving a great variety of public authorities. Both at EU and national levels, different public actors are entrusted with specific tasks in this policy. While vertical cooperation is an inherent element of the very notion of shared management on which this policy is based, horizontal cooperation was developed to ensure an effective management and enforcement of the policy. The establishment of multiple authorities at national and sub-national level, and the involvement of independent bodies at EU level, generates a network of collaborative links between – and within – several governance levels. In this sense, this policy is a clear expression of multi-level governance in "territorially overarching policy networks".(130)

From the analysis it has also emerged that EU funds policy encompasses all the forms of administrative cooperation identified in the literature.(131) From the less intense exchanges of information (as single transmissions, shared

(126) Art. 58(1)(f) Regulation 1303/2013; Art. 35 Regulation 2021/1060.

(127) See for instance Art. 10 Regulation 1304/2013; Art. 3(1)(f) Regulation 1301/2013.

(128) Art. 92(c) Regulation (EU) 508/2014.

(129) Art. 9 Regulation 1301/2013.

(130) G. Marks, "Structural Policy and Multilevel Governance in the EC", in A. Cafruny and G. Rosenhal (eds), *The State of the European Community*, Vol. 2, Boulder, Lynne Rienner and Longman, 1993, pp. 402-403.

(131) F. Lafarge, "Administrative Cooperation between Member States and Implementation of EU Law", *op. cit.*, p. 611. See also F. Cortese, "Gli strumenti per la cooperazione amministrativa verticale", in M.P. Chiti and A. Natalini (eds), *Lo spazio amministrativo europeo*, Bologna, Il Mulino, 2012, p. 165.



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databases and mutual information mechanisms), it ranges to the most intrusive forms of cooperation, namely joint operations, joint bodies and mutual assistance. The latter is particularly developed in the agricultural funds. The role of the EU (in particular of the Commission) is often one of facilitating cooperation: even when cooperation is not mandatory nor organised by the Commission, the CPR provides for incentives to collaboration and networking, also in the form of financial support.(132) The Member States are thus encouraged to act beyond their particular financial interest.

Finally, it is interesting to reflect on the function that administrative cooperation fulfils in EU funds policy. If the fundamental objective of administrative cooperation is the effective implementation of EU law,(133) it is not surprising that, in both budgetary periods, the most intense and frequent forms of cooperation are found in the control of EU funds disbursement. In this context, cooperation is intrinsically functional to the protection of the financial interests of the EU and the correct allocation of EU resources, encouraging the national authorities to take proper care of EU monies. However, because of a fundamental tension with the financial interest of the individual Member States, in certain cases cooperation is also used for balancing conflicting interests and settling disagreements between the national and EU authorities.(134) A remarkable tendency in this regard is the strengthening of cooperation in the preparatory phase, especially through the use of conditionalities, arguably anticipating the confrontation between the different actors and preventing conflict at an early stage. Cooperation, there, seems to go beyond its traditional functions, to serve as a tool for pursuing specific objectives of an economic, environmental and political nature.(135)

In the light of this, further research is needed to understand the interplay between cooperation, national competences and the principle of subsidiarity in the EU funds policy, especially for 2021-2017.(136) Moreover, these dynamics

(132) On the distinction of mandatory and encouraged cooperation, and the importance of sector-specific incentives, see F. Lafarge, "Administrative Cooperation between Member States and Implementation of EU Law", 16 *European Public Law*, p. 606-610. See also M. Lottini, "From Administrative Cooperation in the Application of European Union Law to Administrative Cooperation in the Protection of Rights and Liberties", 18 *European Public Law*, 2018, p. 127, p. 130.

(133) F. Pocar and M.C. Baruffi, *Commentario breve ai Trattati dell'Unione europea*, Padova, Cedam, 2014, pp. 1134, 1135.

(134) L. De Lucia, "Conflict and Cooperation within European Composite Administration (between Philia and Eris)", *op. cit.*, p. 45.

(135) Reference here is to the European Semester, the eco-schemes and the rule of law conditionality, see para. 4.1.

(136) On the relationship between subsidiarity and administrative cooperation, see L. De Lucia, "Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts", 5 *Review of European Administrative Law*, 2012, pp. 17, 23; G. Fabio Licata, "Limiti al principio dell'autonomia procedurale e rafforzamento della cooperazione amministrativa europea", *Rivista italiana di diritto pubblico*, 2012, pp. 905, 907.



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in administrative cooperation raise significant questions of political accountability and, in consideration of the issues that have emerged in the analysed case law on composite procedures of judicial accountability in the management of EU funds. Answers to these questions are even more pressing today in view not only of the new legal framework for 2021-2027, but also for the extraordinary adoption of the NextGenerationEU instrument which, although only partially embodied within the structural funds, may potentially change the paradigm of EU integration.



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# CHAPTER 5
# Administrative cooperation in tax policy

**Stefano Dorigo**

## *Introduction: the role of tax cooperation in the current international context*

Cooperation between the tax administrations of different states is an essential instrument to ensure the correct taxation of transnational income as well as to enforce tax claims in other jurisdictions.(1) This dual function is clearly manifested in all the instruments through which tax cooperation is implemented: on the one hand, procedures (information exchange, simultaneous controls, physical presence in administrative offices and participation in administrative inquiries) which aim to ascertain the effective ability to pay of a taxpayer who has links with more than one jurisdiction; on the other hand, procedures (assistance in tax collection) through which a state can concretely implement its tax claim outside its national borders.(2)

At present such mechanisms are used much more widely than in the past, due to the awareness on the part of states of the need for greater cooperation to protect their fiscal systems, particularly following the global economic crisis;(3) indeed, they are proving to have an additional function, namely as privileged instruments for governing international tax policy choices.(4) The global economic crisis, which erupted in 2008, has led to international cooperation being given the pre-eminent role of helping to recover, as far as possible, revenue for state coffers. Thus, this issue has become central to the political debate

(1) See M. Stewart, "Transnational Tax Information Exchange Networks – Steps towards a Globalized, Legitimate Tax Administration", 4 *World Tax Journal*, 2012, p. 152.

(2) On the development of the strong tendency towards cooperation between States see X. Oberson, *International Exchange of Information in Tax Matters – Toward Global Transparency*, Cheltenham, Edward Elgar, 2015.

(3) A. Christians, "Taxation in a Time of Crisis – Policy Leadership from the OECD to the G20", 5 *Northwestern Journal of Law and Social Policy*, 2010, p. 19.

(4) For a detailed examination of the fiscal consequences of the global economic crisis, see J. Wouters and K. Meuwissen, "Global Tax Governance – Work in Progress?", EUI Working Papers RSCAS, 2011/12.



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between states, which have understood the need to strengthen forms of mutual assistance, without which, these days, no one nation is able to adequately govern its tax system. This awareness has favoured a multilateral approach, simultaneously involving a plurality of interested states, through both political forums (e.g., the G20 or the main multilateral organisations such as the UN and the OECD) and international multilateral agreements, which are capable of regulating the phenomenon without the fragmentation typical of the system of bilateral conventions against double taxation.(5)

The EU experience confirms this trend. Here tax cooperation not only has a strictly tax-related function, but also supports the whole European political framework, with – as we shall see – among other things, an unusual focus on the protection of taxpayers' rights.

This chapter focuses on the regulation of tax cooperation in the context of European Union law. After a brief overview of the European sources dealing with this area and their relationship with both conventional and soft law international instruments, the analysis will focus on the two main methods of cooperation between Member States in tax matters: information exchange and assistance in the collection of taxes. In particular, and despite the variety of applicable rules, some common evolutionary guidelines can be highlighted: the importance of automatic forms of collaboration; the growing involvement of private operators in the collection and sharing of data; and the importance of the judicial protection of the taxpayer involved in these procedures, a field, however, still mainly entrusted to the case law of the Court of Justice rather than to the intervention of the EU legislator. Although apparently characterised by recourse to multilateralism, the framework that emerges still aims to protect the tax system of each Member State and, therefore, is a partial contradiction in terms.(6)

(5) Some authors propose the institutionalisation of tax cooperation through the creation of a forum for consultations and common decisions, as already happens in other fields of international law (D. Rosembloom, N. Noked and M. Helal, "The Unruly World of Tax – A Proposal for an International Tax Cooperation Forum", *Rivista trimestrale di diritto tributario*, 2014, p. 183).

(6) The new features of sovereignty in tax matters have been explored by a large number of scholars in recent times. See, inter alia, T. Dagan, "Tax Sovereignty in an Era of Tax Multilateralism", in D. Weber (ed.), *EU Law and the Building of Global Supranational Tax Law – EU BEPS and State Aid*, Amsterdam, IBFD, 2017; B. Peeters, "Tax Sovereignty of EU Member States in View of the Global Financial and Economic Crisis", 19 *EC Tax*, 2010, p. 236; and L. Van Apeldoorn, "BEPS, Tax Sovereignty and Global Justice", 21 *Critical Review of International Social and Political Philosophy*, 2018, p. 478. On the contributions of the Italian doctrine, see F. Gallo, "Giustizia sociale e giustizia fiscale tra decentramento e globalizzazione", 14 *Rivista di diritto tributario*, 2004, p. 1069; and G. Tremonti, *La paura e la speranza. Europa: la crisi globale che si avvicina e la via per superarla*, Milan, Mondadori, 2008.



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## *I. Sources of tax cooperation in the EU*

In European law, tax cooperation, in its various practical forms, is ruled by regulatory instruments which differ for direct taxes and VAT, respectively. As far as VAT is concerned, the main instruments are Regulation 218/92,(7) later replaced by Regulation 1798/03,(8) and lastly by EU Regulation 904/10,(9) which came into force at the beginning of 2012. The use of regulations as a legal instrument directly applicable in all Member States reflects the fact that, with regard to VAT, substantive harmonisation has already been achieved.(10) Direct taxes, on the other hand, are regulated by directives: Directive 2011/16/EU,(11) amended several times, concerning the exchange of information, and Directive 2008/55/EC,(12) last updated by Directive 2010/24/EU of 16 March 2010,(13) concerning cooperation in the collection of taxes. The Directive ensures uniformity of the basic regulatory framework in the Union system, while the Member States are given the consequent task of adapting their internal legislation.

The European regime is part of the wider international regulation of tax cooperation, which has undergone multiple and rapid developments, especially in the last decade.(14) The framework of international sources is very varied. There are conventional instruments, which bind Member States, and soft law instruments, the force of penetration of which into national legislation in many cases is actually much stronger than the formal sources. The former include bilateral conventions against double taxation, which most often contain provisions on the exchange of information and assistance in the collection of taxes in accordance with Articles 26 and 27 of the OECD model;(15)

(7) Council Regulation (EEC) No. 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT), [1992] OJ L 24/1.

(8) Council Regulation (EC) No. 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No. 218/92, [2003] OJ L 264/1.

(9) Council Regulation (EU) 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, [2010] OJ L 268/1.

(10) I. De Troyer, "International Cooperation to Avoid Double Taxation in the Field of VAT – Does the Court of Justice Produce a Revolution?", 25 *EC Tax*, 2016, p. 170.

(11) Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] OJ L 64/1.

(12) Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (Codified version), [2008] OJ L 150/28.

(13) Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, [2010] OJ L 84/1.

(14) See, *inter alia*, I. Mosquera Valderrama, "Legitimacy and the Making of International Tax Law – The Challenges of Multilateralism", 7 *World Tax*, 2015, p. 3; F. Debelva and N. Diepvens, "Exchange of Information – An Analysis of the Scope of Article 26 OECD Model and Its Requirements – In Search for an Efficient but Balanced Procedure", 44 *Intertax*, 2016, p. 298.

(15) X. Oberson, "General Report", 98 *Exchange of Information and Cross-Border Cooperation Between Tax Authorities* in *IFA Cahiers*, 2013, p. 19; A. Dourado, "Exchange of Information and



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bilateral conventions on the exchange of information, drawn up on the basis of the model once again prepared by the OECD;(16) and the multilateral Convention on Mutual Administrative Assistance in Tax Matters, concluded under the auspices of the OECD and the Council of Europe in 1988 and then adapted to the most advanced international standards by the Paris Protocol of 2010, one of the rare examples of an international multilateral convention in tax matters.(17)

Examples of soft law include the guidelines drawn up by the G20, an informal political body which, in the aftermath of the start of the economic crisis in 2008, launched a series of actions to combat tax havens through greater cooperation between national tax authorities;(18) and, above all, the work of the BEPS project, led by the OECD, which, in addition to a multilateral convention that is already in force but still the object of much criticism, produced a series of recommendations addressed to states, also in the context of mutual cooperation in areas considered sensitive.(19)

The effect of this set of international sources on the European system is twofold. On the one hand, it influences the regulatory choices of the European institutions. This happens especially with regard to the soft law sources. It will be seen later, for example, that in introducing a form of cooperation on the incomes of multinational companies, the EU has in fact implemented the

Validity of Global Standards in Tax Law – Abstractionism and Expressionism or Where the Truth Lies", European University Institute, Working Paper RSCAS 2013/11, 2013.

(16) These so-called TIEAs, which stand for Tax Information Exchange Agreements, are bilateral agreements dedicated exclusively to the exchange of information. They are based on the model drawn up by the OECD in 2002 and may be concluded irrespective of the existence of a bilateral double taxation agreement between the two states concerned.

(17) The Convention was opened for signature in Strasbourg on 25 January 1988 and entered into force on 1 April 1995, following the deposition of the instrument of ratification by five signatory states (the United States, Sweden, Norway, Finland and Denmark). However, it had very little success and did not gather any further support for a long time. There was even a group of states which, pointing out the limited attention the text paid to the question of taxpayer protection and expressing the fear that states that did not become parties to the Convention would be favoured because they would have fewer obligations, expressly declared their opposition to the entry into force of the Treaty. The changed attitude of the international community following the start of the global economic crisis has also led to a rethink regarding this multilateral instrument. Thus, the OECD and the Council of Europe adopted a Protocol of Amendment to the Strasbourg Convention, which was opened for signature on 27 May 2010 in Paris. The Protocol was immediately so successful among the states that the amended version of the Convention was able to enter into force on 1 June 2011.

(18) See A. Christians, "Taxation in a Time of Crisis – Policy Leadership from the OECD to the G20", *op. cit.*

(19) The OECD drew up the BEPS (base erosion and profit shifting) project in 2013. It consists of a series of actions suggested to states in order to update their national discipline concerning international taxation. These actions, although not mandatory for the states, would deeply influence their behaviour (especially leading them to conclude international agreements), thus demonstrating greater persuasiveness than many formal international binding rules. About the BEPS project, see A. Dourado, "The Base Erosion and Profit Shifting (BEPS) Initiative under analysis", 43 *Intertax*, 2015, p. 2.



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BEPS guidelines on country-by-country reporting.(20) From a second point of view, international sources could bind Member States, thus posing the risk of a conflict of obligations.

Nevertheless, the latter situation is not likely to occur, precisely as a result of the "dialogue" between the European and international sources mentioned above. In any case, in order to avoid conflicts, there is a tendency to affirm the principle whereby the most efficient tax cooperation instrument takes precedence. Article 27(2) of the multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 Protocol, states that, in their mutual relations, those parties which are Member States of the European Union can apply the possibilities of assistance provided for by the Convention insofar as they allow wider co-operation than the possibilities offered by the applicable European Union rules. Although there are no such indications in the OECD model or in bilateral conventions concerning information exchange, it can reasonably be assumed that the same interpretative approach also applies to them.

Similarly, in the reverse direction, Article 1(3) of Directive 2011/16/EU on mutual assistance in the exchange of information sets out that "this Directive shall not affect the application in the Member States of the rules on mutual assistance in criminal matters. It shall also be without prejudice to the fulfilment of any obligations of the Member States in relation to wider administrative cooperation ensuing from other legal instruments, including bilateral or multilateral agreements".

In short, a new method of interpreting international instruments on information exchange seems to be emerging in order to ensure that, in the event of conflict, the rules most favourable to the purposes of cooperation between states prevail, regardless of the hierarchical relationship between the various sources covering the topic.

## *II. Forms of tax cooperation in the EU*

As stated above, there are many forms of international cooperation in tax matters. In general, these forms are free, in the sense that the national authorities involved may use any method deemed appropriate to achieve their common goals. However, in practice, some of these procedures take precedence. Information exchange and cooperation in the collection of taxes, concerning

(20) Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, [2016] OJ L 146/8, (so called "DAC4") introducing the Country-by-Country Reporting inside the EU system.



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the two central stages in the implementation of tax duties (assessment and collection), are the most widely used. Moreover, as we shall see, they are fully regulated in European directives.

Other instruments, though less widespread, also appear to be of some interest.(21) Simultaneous controls, for example, are those procedures in which, each within their own system, the tax authorities of two or more states simultaneously examine one or more taxpayers in whom they have a common interest, with a view to exchanging any relevant information they may collect.(22) Another instrument is the physical presence of tax officers in administrative offices abroad, directly taking part in the investigation conducted in the other state, so that they can gather the relevant information themselves: in this case, these officers' admission to the territory and the limits to the direct powers that they may exercise in the other state are subject to prior agreement between the two tax administrations in question.(23) These alternative forms of cooperation also include the sharing of best practices between the various authorities of the Member State, with the involvement of the European Commission. This can also serve to draw up general guidelines.(24)

## *III. Information exchange: the forms and unstoppable rise of automatic exchange*

Information exchange is the instrument through which two or more states make available to each other data and documents that have been collected in their own territory, in application of their domestic provisions, concerning the position of a resident taxpayer, in order to correctly determine the latter's worldwide tax base.(25) This form of tax cooperation takes place mainly between states. However, joint bodies can be set up in order to coordinate the procedure between the two states involved. For example, the Directive 2011/16/EU creates a European data supervisor and an exchange of information committee (Art. 26), whose task is to assist the Commission in the work of supervising and implementing the discipline therein. Moreover, the European data supervisor's remit also covers the circulation of information for tax purposes.(26)

(21) See, for the various national experiences, G. Marino (ed.), *New Exchange of Information Versus Tax Solutions of Equivalent Effect*, Amsterdam, IBFD, 2015, p. 261.

(22) Art. 12 Directive 2011/16/EU. See M. van Herksen, "Joint and Simultaneous Tax Audits – Mapping the New Landscape", 19 *Tax Management Transfer Pricing Report*, p. 886; L. van der Hel-van Dijk, "The European Union and More Effective Tax Audits", 65 *Bulletin for International Taxation*, 2011, p. 161.

(23) See Art. 11 Directive 2011/16/EU.

(24) *Ibid.*, Art. 15.

(25) For a thorough analysis of this kind of tax cooperation, see R. Seer and I. Gabert (eds), *Mutual assistance and information exchange*, Amsterdam, IBFD, 2010.

(26) See Art. 26 Directive 2011/16/EU.



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EU law leaves Member States free to choose the most appropriate modes of exchange. However, three methods are more commonly used. The most widely used to date is exchange on request, whereby the tax administration of one state requires the competent authorities of another state to collect and transmit information in its possession which might be of interest to the former. Therefore, if the state receiving the request does not already have the information in question, it has to activate the investigation procedures set out in its domestic law in order to obtain it. The request must be detailed, so as to allow the Member State in question to carry out targeted activities and thus avoid wasting resources;(27) in particular, it must indicate both the details of the taxpayer to whom the request refers and the elements already collected by the requesting state which led to the well-founded belief that the information requested is "foreseeably relevant" for the application of the domestic law, as pointed out by the Court of Justice on several occasions.(28)

These indications serve to avoid so-called "fishing expeditions", that is, the formulation of indeterminate and generic requests with the sole purpose of finding clues useful for the requesting state to begin an assessment activity.(29) The main aim is to protect the fiscal sovereignty of the requested state, which would be jeopardised by excessively vague requests. Additionally, more responsibility is also required on the part of the requesting state, so that it may only resort to the exchange of information after it has already identified elements that make the cooperation of the other state indispensable in a sufficiently delineated case.

Recently, for "group requests" – requests formulated not with reference to an individual and identified taxpayer, but to a class or group of taxpayers – this limit has been partly reduced. Nevertheless, the boundaries of group membership must be sufficiently outlined and circumscribed, so that it does not become an "excuse" to circumvent the ban on fishing expeditions.(30)

(27) C. Garbarino and S. Garufi, "Transparency and Exchange of Information in International Taxation", in A. Bianchi and B. Peters (eds), *Transparency in International Law*, Cambridge, Cambridge University Press, 2013, p. 172.

(28) According to para. 9 of the Recitals of Directive 2011/16/EU, "the standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer".

(29) Ph. Malherbe and M. Beynsberger, "2011: The Year of Implementation of the Standards?", in A. Rust and E. Fort (eds), *Exchange of Information and Bank Secrecy*, Alphen aan den Rijn, Kluwer, 2012, p. 119.

(30) L. Papadopoulos, "Switzerland: Demarcation between an Acceptable Group Request and an Unacceptable 'Fishing Expedition'", in M. Lang *et al.* (eds), *Tax Treaty Case Around The World 2017*, Vienna, Linde, 2018, p. 389.



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Spontaneous exchange is less widespread. In this case, a state which in the course of its internal investigation activities comes across data relating to residents of another country that are potentially relevant to its tax administration has the right to transmit them to the other state. The latter then decides whether and how to use the data for the purposes of its internal tax system.(31)

Finally, there is automatic information exchange, in other words the sharing of regularly updated databases between states, from which each tax administration can freely draw the information it needs.(32) The technical complexity of this form of cooperation conditioned its use for a long time. However, in just a few years, since the start of the world economic crisis in 2008, this type of exchange of information has developed rapidly. Today, the international community clearly believes that automatic exchange is the ideal means to wage an effective fight against international tax evasion and avoidance. In the European legal system, the last decade has seen the introduction of a series of legislative instruments that have greatly expanded the use of this type of exchange.

With EU Directive 2014/107/EU, which draws on developments in the OECD and G20 in the fight against tax fraud and tax evasion, the Council made it obligatory for Member States to automatically exchange information on certain categories of income (labour income, managers' income, life insurance products, pensions and real estate income) through transmission by resident financial intermediaries.(33) Then the automatic exchange was extended to cross-border rulings and advance transfer pricing agreements,(34) information gathered in application of anti-money laundering legislation,(35) reportable cross-border arrangements,(36) information held by digital platform operators,(37) and lastly information on the proceeds of cryptocurrency transactions and on advance tax rulings for wealthy individuals.(38)

(31) Art. 10, para. 10, Directive 2011/16/EU defines spontaneous exchange as "the non-systematic communication, at any moment and without prior request, of information to another Member State". The operative discipline is then provided for in Art. 9.

(32) M. Somare and V. Wohrer, "Automatic Exchange of Financial Information Under the Directive on Administrative Cooperation in the Light of the Global Movement Towards Transparency", 43 *Intertax*, 2015, p. 804.

(33) Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, [2014] OJ L 359/1.

(34) Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, [2015] OJ L 332/1.

(35) Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, [2016] OJ L 342/1.

(36) Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, [2018] OJ L 139/1.

(37) Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, [2021] OJ L 104/1.

(38) Council Directive (EU) 2023/2226 of 17 October 2023 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, [2023] OJ L, 2023/2226, 24 October 2023.



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Automatic exchange is therefore becoming the main form of tax cooperation within the EU: it ensures the elimination of the knowledge deficit between Member States, which had hitherto been exploited by some economic operators to obtain undue tax advantages; and it gives private entities and individuals – first financial institutions, now professionals and digital platform operators as well as crypto-asset service providers – the mandate to collect information useful for the tax policies of all Member States.

That exchange on request has been overtaken by automatic information exchange shows that tax cooperation is going in the direction of limiting forms of mutual recognition, *i.e.* cases in which one state accepts the request of another,(39) in favour of genuinely supranational administrative procedures.(40) The automatic nature of the sharing of data and information between states presupposes agreement on the identification of platforms for the collection of such data, procedures for accessing these platforms and rules on the use of the stored information. Hence, from the purely bilateral logic of exchange on request, we have therefore moved on to a multilateral system based on a set of rules and procedures shared between states.

## A. Obligations of the states involved in the information exchange

In both the international and European contexts, restrictions are progressively being placed on the freedom of states to cooperate in tax matters. Indeed, those states receiving a request to exchange information must follow it up even if this information is of no interest for the application of their domestic tax provisions.(41)

Bank secrecy cannot be used to justify the non-cooperation of one state with another. Article 18(2) of Directive 2011/16/EU now expressly prevents Member States from refusing to exchange information solely on the grounds

(39) It is worth noting that, according to one author, the development of the principle of mutual recognition for tax purposes within the EU runs counter to the legitimate expectations of Member States with regards to a non-harmonised field (J. Ghosh, "Tax Law and the Internal Market – A Critique of the Principle of Mutual Recognition", 16 *Cambridge Journal of European Legal Studies*, 2014, p. 1899). However, the resistance of the Member States to mutual recognition also covers a field such as VAT, which has already been harmonised according to Ph. Genschel, "Why No Mutual Recognition of VAT? Regulation, Taxation and the Integration of the EU's Internal Market for Goods", 14 *Journal of European Public Policy*, 2007, p. 743.

(40) See F. Lafarge, "EU Law Implementation through Administrative Cooperation between Member States", 1 *Rivista Italiana di Diritto pubblico comunitario*, 2010, p. 119. A wide-ranging study concerning the interactions between national tax law, EU law and international law, not limited to the issues under discussion in the present article, can be found in G. Bizioli, *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale*, Padua, CEDAM, 2008.

(41) Art. 18 Directive 2011/16/EU.



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that the information is held by a bank, other financial institution, agent or person acting in a fiduciary capacity. The new wording therefore seems to considerably restrict state discretion in exchanging information despite the latter being covered by banking secrecy in national law. The fact that the "era of banking secrecy" is now coming to an end is confirmed by the rise of automatic information exchange as the standard for tax cooperation in the EU system.(42) As currently outlined, this standard includes the obligation for the financial institutions of each participating state to collect the data in their possession concerning residents of other states. This must then be provided to the government authorities on a regular basis, so that the latter can upload the information on the common database.

Hence, the Directive asserts that the mere reception from another state of a request that meets some formal requirements places the requested state under an obligation to respond to the request. Therefore, this instrument lays out a system which implicitly recognises the administrative act containing the information request.(43)

Unlike the international system, in certain circumstances the EU system makes it obligatory for a Member State to use information exchange when the case subject to assessment is linked to another Member State. This duty stems from the function of tax cooperation within the EU system. Indeed, from the outset, the purpose of tax cooperation between Member States has not been only to combat evasive practices. Instead, it has been interpreted in a broader sense, as a means of promoting the establishment and correct functioning of the common market.

Article 94 of the EC Treaty, now Article 115 of the TFEU (significantly, the legal basis of Directive 77/799/EEC, the first act regulating the exchange of information between Member States), expressly envisages the adoption of directives for the approximation of national laws, regulations or administrative provisions concerning direct taxation, in the event the latter directly affect the establishment or functioning of the internal market.(44) Consequently, it can be argued that the instrument in question was designed not only to play a negative role, namely, to

(42) Reference is made to the final communiqué of the G-20 summit in London, Action Plan for Recovery and Reform, of 2 April 2009, where para. 15, pt 7, states that, as a result of the agreements made by the participating States, "the era of banking secrecy is over".

(43) See S. Dorigo, "Mutual Recognition Versus Transnational Administration in Tax Law – Is Fiscal Sovereignty Still Alive?", 13 *Review of European Administrative Law*, 2020, p. 111.

(44) The article reads as follows: "Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market".



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defend the European system against distortions by economic operators, but first and foremost to play a positive role in promoting the objectives of the Treaty, namely to achieve the fundamental freedoms of the common market.(45)

The link between tax cooperation and the defence of fundamental freedoms has therefore led the Court of Justice to emphasise the opportunity for Member States to make use of the exchange of information whenever the acquisition of such information appears relevant in order to avoid situations likely to affect the enjoyment of one of those freedoms.(46) Hence, it appears possible to maintain this obligation, which is closely linked to the original objectives of European integration, even in the context of automatic exchange as provided for in Directive 2014/107/EU.

## B. Limits to the use of information received

The information exchanged shall enjoy a high degree of confidentiality in the receiving state in order to prevent misuse outside the objectives pursued through the cooperation procedure.(47) Thus, Article 16 of the 2011 Directive lays down that information communicated between Member States be covered by the obligation of official secrecy. Moreover, it enjoys the protection extended to similar information under the national law of the Member State which received it. However, specific provisions against the misuse of taxpayers' data are missing from European legislation, especially with regard to the protection of privacy. Rather, after referring in general terms to the applicability of Directive 95/46/EC on data protection (now replaced by Regulation 2016/679), Article 25 of the Directive expressly states that the rights set out therein may be legitimately limited in the course of an exchange of information when an important economic and financial interest of the Member State or the Union, "including in tax matters", needs to be safeguarded.

The receiving state has wide discretion in the use of the information exchanged for its domestic purposes. The supplying state cannot condition or limit the discretion of the other state in the use of such information, provided that this use remains within proceedings for the assessment and collection of taxes.(48)

(45) The Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee about "Co-ordinating Member States' direct tax systems in the Internal Market" expressly acknowledged the importance of administrative cooperation between the Member States as a means not only of preventing abuses, but above all of ensuring the elimination of all forms of discrimination and double taxation as obstacles to Community freedoms.

(46) *Hein Persche v. Finanzamt Lüdenscheid*, case C-318/07, EU:C:2009:33.

(47) See F. Debelva and I. Mosquera, "Privacy and Confidentiality in Exchange of Information Procedures – Some Uncertainties, Many Issues, but Few Solutions", 45 *Intertax*, 2017, p. 362.

(48) Art. 16(1), Directive 2011/16/EU.



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A question arises with regard to the possible use of the information exchanged during criminal trials in the receiving state for crimes (tax or other crimes, for example, money laundering of profits from a tax offence) which could be proven by such data. It must be considered that such use is in principle not excluded, provided that it takes place in accordance with strict conditions. Indeed, Article 16 of Directive 2011/16/EU clarifies that "with the permission of the competent authority of the Member State communicating information pursuant to this Directive, and only insofar as this is allowed under the legislation of the Member State of the competent authority receiving the information, information and documents received pursuant to this Directive may be used for other purposes than those referred to in paragraph 1 [the administration and collection of taxes covered by the Directive]. Such permission shall be granted if the information can be used for similar purposes in the Member State of the competent authority communicating the information".(49)

The use of the information exchanged for tax purposes is therefore not permitted in different areas unless the state that provided it gives its express consent and its national legislation allows such a use: this prevents the data exchanged from being used in criminal proceedings in prejudice to the general rules and provisions governing defendants' rights.(50)

## C. Taxpayer protection during information exchange

According to what has been observed so far, information exchange is usually between states. In essence, it is an instrument to facilitate relations between the tax authorities of two or more states in order to acquire information useful for the determination of a taxpayer's tax liability if this information cannot be found within a single system. There is, however, a further person who is involved in the information exchange procedures: the taxpayer. In theory, the latter should be granted rights of information and intervention during the procedure in order to preserve their right of defence. So far, however, states have given the issue little attention: the main concern has been the effectiveness of the information exchange, so as to achieve fair taxation, in the belief that allowing some form of intervention by the other interested party would jeopardise this purpose.(51)

(49) S. Dorigo and P. Mastellone, "Lotta alla criminalità economica", in F. Amatucci and R. Cordeiro Guerra (eds), *L'evasione e l'elusione fiscale in ambito nazionale e internazionale*, Rome, Arachne, 2016, p. 599.

(50) See C. Sacchetto, "Lo scambio di informazioni in materia fiscale. Collegamenti con il procedimento penale. L'approccio italiano", *Rivista di diritto tributario internazionale*, 2009, p. 92.

(51) P. Mastellone, "Exchange of Information Versus Protection of Taxpayers' Rights – The Evident Imbalance Impedes Achieving a Fair International Tax Environment", 24 *Journal of International Tax, Trust and Corporate Planning*, 2017, p. 77. However, it has been held that "stronger



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European Union legislation on information exchange does not provide specific measures protecting the rights of the persons whose information is exchanged. Directive 2011/16/EU, as well as the amending Directives, contains a reference to the need for the cooperation procedure to respect "fundamental rights" and to observe "the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the right to the protection of personal data".(52) In the context of the Union, on the basis of what can be inferred from the Charter of Fundamental Rights, which is an integral part of EU law and therefore mandatory for Member States and EU institutions, it has been held that the taxpayer should be allowed to be informed about the existence of the exchange procedure in order to effectively defend their rights.(53) However, to date, there are no rules that actually implement the protection of those involved in the information exchange, be they the taxpayer or third parties holding the information.

The case law of the Court of Justice provides an impulse to overcome these limits. In the *Sabou* judgment,(54) the court initially denied that the Directives on information exchange could give rise to rights that the taxpayer could exercise immediately in the course of the procedure. According to the court, the right of defence is, however, protected in the subsequent stage of the procedure, as regulated by the individual state systems.(55) Nevertheless, it remained unclear whether, at that stage, the taxpayer could challenge the legality of the procedure of information exchange between states.

In the *Berlioz* judgment,(56) while acknowledging that the procedure for the exchange of information takes place between states, the Grand Chamber of the Court of Justice reaffirmed the importance of respecting "the fundamental

powers for tax authorities to cooperate in cross-border scenarios worldwide should march hand-in-hand with a stronger protection of taxpayers' basic rights" (P. Pistone, "Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law", 6 *World Tax Journal*, 2014).

(52) See Recital 28 Directive 2011/16/EU and Recital 17 Directive 2014/107/EU.

(53) The possibility to affirm the taxpayer's right to be informed and hence to participate to an exchange of information procedure under Art. 47 of the Charter of Fundamental Freedoms is advocated by F. Fernández Marín, "The Right of Defence and the Exchange of tax Information Ruled by EU law", 8 *Studi tributari europei*, 2018, p. 25. More in general, on the impact of EU Charter of Fundamental Rights on the rights of taxpayers see P. Pistone, "The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation", in B.J.M. Terra *et al.* (eds), *European Tax Law – General Topics and Direct Taxation*, Vol. 1, Amsterdam, Wolters Kluwer, 2018, p. 153.

(54) *Sabou*, case C-276/12, EU:C:2013:678.

(55) On the *Sabou* judgement, see F. Chaouche, W. Haslehner, "Cross-Border Exchange of Tax Information and Fundamental Rights", in W. Haslehner, G. Kofler and A. Rust (eds), *EU Tax Law and Policy in the 21st Century*, Alphen aan den Rijn, Wolters Kluwer, 2017, pp. 179, 188.

(56) *Berlioz Investment Fund S.A. v. Directeur de l'administration des contributions directes*, case C-682/15, EU:C:2017:373. For a comment on this judgment, see K. Pantazatou, "Fundamental Rights in the Era of Information Exchange – The Berlioz Case (C-682/15)", in M. Lang *et al.* (eds), *CJEU: Recent Developments in Direct Taxation*, Vienna, Linde, 2017, p. 127; J.F. Pinto Nogueira



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rights guaranteed in the legal order of the Union", including those enshrined in Article 47 of the Charter of Fundamental Rights.(57) Consequently, EU law requires each state to allow third parties who have been ordered to hand over documents relating to the taxpayer in the course of an international cooperation procedure to challenge both the legality of decisions imposing a penalty for the failure to hand over such documents and any flaws in the request for international administrative assistance before the judicial authorities of their state of residence.(58)

In order to ensure the effectiveness of this right, the court then recognised the right of these third parties to access the documents subject to the interstate cooperation procedure. On this point, the Grand Chamber highlighted the necessity of not altering the "principle of equality of arms, which is a corollary of the very concept of fair trial".(59) Therefore, there is a balance between the two opposing requirements (of the state and of the private subject), considering that the outcome must not completely sacrifice one requirement to the other, contrary to what is often held by national case law (in particular, with regard to the refusal of access to documents exchanged between Italy and France in relation to the so-called Falciani list).(60)

The interpretative trend inaugurated by the *Berlioz* judgment has been reinforced by the following ruling of the Grand Chamber on joined cases C-245/19 and C-246/19,(61) once again centred on Article 47 of the Charter of Fundamental Rights. The court ruled, coherently with the precedent cited above, that where, upon receipt of a request for information from another Member State, the state authorities require a resident to disclose information held on a taxpayer involved in an international cooperation procedure, that resident must be allowed to challenge the lawfulness of the decision and the subsequent request before the national court.(62) This approach was confirmed, just a few months later, by the Court of Justice in its ruling of 25 November 2021, also concerning the Luxembourg tax system.(63)

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*et al.*, "OS ECJ-TF 3/2017 on the Decision of the Court of Justice of the European Union of 16 May 2017 in Berlioz Investment Fund SA (case C-682/15), Concerning the Right to Judicial Review Under Article 47 of the EU Charter of Fundamental Rights in Cases of Cross-Border Mutual Assistance in Tax Matters", 58 *European Taxation*, 2018.

(57) *Berlioz Investment Fund S.A. v. Directeur de l'administration des contributions directes*, case C-682/15, para. 49.

(58) *Ibid.*, para. 59.

(59) *Ibid.*, para. 96.

(60) See the decision of the Italian Council of State, section IV, 9 December 2011, No. 6472.

(61) *Luxembourg State v. B*, joined cases C-245/19, and *Luxembourg State v. B and Others*, C-246/19, EU:C:2020:795.

(62) *Ibid.*, para. 58.

(63) *État du Grand-duché de Luxembourg v. L*, case C-437/19, EU:C:2021:953.



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On the contrary, the taxpayers involved in the investigation from which the information exchange request originated do not hold the same right. Although, theoretically, Article 47 of the Charter grants the taxpayer the right to effective judicial protection in procedures concerning their data, this does not justify their direct action against the decision of the requested state addressed to a third party which possesses the taxpayer's data. In fact, according to the court, the taxpayer has the right to effective protection before the authorities of their state of residence, and can exercise it against any assessment based on exchanged data.(64)

However, that right, which the court reaffirms in continuity with the *Sabou* ruling, seems now to have acquired a broader scope. As such, the taxpayer must also in any case be given the possibility of asserting, before their national court, the flaws of the original request and contesting the consequent decision issued by the requested authorities against the holder of their data.

The most recent judgments, therefore, on the one hand, reaffirm the conclusions of the previous *Berlioz* ruling. On the other hand, however, they extend protection to the taxpayer involved in the information exchange procedure, allowing them – although only once the international cooperation procedure has been concluded – to question the original request for assistance of the requesting state.

Therefore, full, albeit indirect, judicial protection is envisaged for the taxpayer with respect to the acts of the information exchange procedure.

## *IV. Assistance in the collection of taxes*

Cooperation in the collection of the tax claims of another state has long been denied on the basis of the principle of sovereignty.(65) Such a form of assistance would require the requested state to activate its own administrative recovery procedures, with the resulting costs. At the same time, the state itself would not be able to benefit from them in any way, even partially, since it would then have to transfer the amount resulting from the executive activities

(64) *Luxembourg State v. B*, cases C-245/19, para. 83.

(65) As one author has correctly highlighted, non-cooperation between states in tax matters depends on the nature of the tax rules and, therefore, on their essentially public and political implications. These characteristics, therefore, restrict the effects of these rules within the boundaries of the State which issued them (F. Persano, *La cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria*, Turin, Giappichelli, 2006). For a general overview of the impact of EU law on the tax sovereignty of Member States, see G. Bizioli, "Balancing the Fundamental Freedoms and Tax Sovereignty – Some Thoughts on Recent ECJ Case Law on Direct Taxation", 48 *European Taxation*, 2008, p. 133.



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carried out to the requesting state. There has been an evolution in this area too, which has led to wider margins for cooperation between states with regard to the collection of tax claims.(66)

In this respect, the European experience has been at the forefront. Directive 76/308/EEC regulated assistance between Member States in the collection of VAT and customs duties. Subsequently, the discipline was also extended to direct taxes. Today, the whole subject is dealt with in a single ruling, Directive 2008/55/EC, most recently updated by Directive 2010/24/EU, which entered into force on 1 January 2012.(67)

The European legislator's efforts have focused on eliminating those situations in which the requested state could slow down the collection operations or make them less effective as a result of the internal decision-making procedure concerning the enforceable title issued by the other state. As a result, Directive 2010/24/EU introduced the "uniform instrument", that is, an enforceable title drawn up according to a standard approved by all the Member States and able to operate in the requested state as if it were an internal instrument permitting enforcement. There is therefore no need for any recognition or nationalisation process.

The "uniform instrument" is defined as one "which contains the content of the initial instrument issued by the requesting Member State and which allows enforcement in the requested Member State"; it is added that "it constitutes the sole basis for recovery and precautionary measures taken in the requested Member State and is not the subject of any act of recognition, completion or replacement in that Member State".(68)

Under the rules in force, therefore, the requested Member State is obliged to enforce the tax claim of another Member State, without being able to verify the existence of the claim in any way. In fact, it is obliged to treat the claim as if it were its own, by activating the enforcement procedures laid down in domestic law. It is sufficient for the applicant state to certify that the instrument is capable, according to its own law, of enforcing recovery of the claim and to prove that it has taken all the measures which its domestic law provides to that end.

This rule of the prior exhaustion of internal procedures is justified by the need to limit recourse to the cooperation of another state to cases where the attempt to collect the claim in the territory of the creditor state has been

(66) Ch. McLure, "Globalization, Tax Rules and National Sovereignty", 55 *Bulletin for International Taxation*, 2001, p. 328.

(67) P. Mastellone, "The new EU discipline on assistance in the collection of foreign tax claims", 1 *Rivista di diritto tributario internazionale: International Tax Law Review*, 2012, p. 321.

(68) Art. 12(1), Directive 2010/24/EU.



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unsuccessful: although European regulations provide for reimbursement of the collection costs incurred by the requested state in the interest of the other state, this is still a situation which can only occur in exceptional circumstances.

The case of the European uniform instrument is the highest achievement of the model to create genuinely transnational administrative procedures and acts. Indeed, the Directive is not limited to outlining a procedure through which the tax claim of one state can be brought to execution in another. According to that procedure, one state may request the assistance of another state for the recovery of a tax claim. The requested state, however, is not obliged to recognise the foreign enforceable title, but remains free to replace it with an internal act which must have the requirements imposed by its internal legislation in order for it to be implemented.(69) Rather, Directive 2010/24/EU introduces a uniform instrument which can operate in the whole of the European area, proceeding from the contribution of both of the Member States concerned: the first, the credit holder that puts it together and transmits it to the authorities of the other state; and the second, which implements it practically.

The Directive also regulates the methods of redress for the taxpayer subject to the forced execution. If the title is contested in the state of origin, the collection procedure in the requested state must be suspended until the dispute is settled. The requesting state should communicate the existence of a pending contestation directly to the requested state: in practice, however, it is the taxpayer concerned who, after lodging an appeal or equivalent claim, may have an interest in informing the competent authorities of the other state. However, there is nothing to exclude that, even pending an appeal, the requesting state may insist that the requested state at least proceed with provisional measures. This request should, however, be examined by the authorities that received it in the light of the principles that inform their national legal system.(70)

As far as the protective measures available to the taxpayer are concerned, the European Union discipline expressly distinguishes between the case in which the taxpayer wants to assert flaws in the title and the case in which, on the contrary, the complaint is of violations of a procedural nature.(71) In the first case, the taxpayer has to apply to the authorities of the requesting state in order to prompt a review of the merits of the whole case; in the other case, they have to refer the matter to the courts of the requested state, challenging the legality of the recovery procedures put in place therein. It should be noted that the obligation of the requested state not to provide assistance

(69) M. Grau Ruiz, *Mutual Assistance for the Recovery of Tax Claims*, The Hague, Kluwer Law International, 2003.

(70) The rule is enshrined in Art. 14 Directive 2010/24/EU.

(71) Art. 14(1) and (2), Directive 2010/24/EU.



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in the event of the contestation of a title constitutes a valid form of protection of the taxpayer's interests. However, over time the instruments at the taxpayer's disposal to guarantee their rights in front of a court have appeared insufficient.(72)

Thus, in a case where a taxpayer complained that the enforceable title had not been translated into the language of their state of residence, the Court of Justice stated that the court of the latter state has the right to place the title under review in order to ensure that the taxpayer's rights are respected.(73) In particular, on the basis of the right to a fair trial enshrined in Article 47 of the Fundamental Charter (as well as in Article 6 of the European Convention on Human Rights), the national court may review the enforceable title served by another Member State and deny the regularity of a service in a language which the addressee neither understands nor is the official language of the recipient Member State.

In *Donnellan,*(74) the court added that the requested state may refuse to enforce a tax claim notified by another Member State if it is only by such a notification that the taxpayer becomes aware of the claim of the requesting state and is no longer able to challenge it before the courts of the requesting state as the time limits have expired. The principle of mutual trust between the Member States, which underpins mutual cooperation in tax collection by preventing the authorities of the requested state from reviewing the enforcement order issued by the other state, must give way to the taxpayer's right to effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights.(75)

Although based on the principle of mutual trust and designed to facilitate the practical implementation of tax claims in the various Member States, the mutual assistance system cannot, therefore, go so far as to restrict the taxable person's right to effectively contest the instrument of recovery before the competent authority of their own state. Indeed, in certain circumstances, the obligation to apply to the competent authority of another state (*i.e.*, the requesting state) is already tantamount to restricting that right.

(72) *Ibid*.

(73) *Milan Kyrian v. Celní úřad Tábor*, case C-233/08, EU:C:2010:11.

(74) *Eamonn Donnellan v. The Revenue Commissioners*, case C-34/17, EU:C:2018:282.

(75) On that case, see M. Eliantonio and P. Mazzotti, "Transnational Judicial Review in Horizontal Composite Procedures – Berlioz, Donnellan, and the Constitutional Law of the Union", 5 *European Papers*, 2020, p. 41.



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## *Conclusions*

The picture that emerges from the above analysis highlights two aspects of particular importance. On the one hand, tax cooperation between Member States has suddenly assumed a decisive role in the pursuit of not only strictly fiscal, but also political and economic objectives within the framework of the fight against global tax evasion and erosion. On the other, there has been a promotion of those cooperation mechanisms which most invade the sovereign choices of each system, in particular the automatic exchange of information – aimed to make it possible to trace and beat the most aggressive forms of tax planning – and assistance in the collection of taxes on the basis of the uniform instrument.

Therefore, the notion of a transnational administrative procedure, regulated by European legislation and aimed – in some cases through the establishment of joint bodies – at creating common decisions, is coming to the fore.(76) In other words, cooperation between states is becoming the rule and it is leading to the identification of common procedures and decisions which supplement national ones.

However, time has not been called on tax sovereignty yet. Rather than demonstrating the effective openness of states to the shared management of tax matters, tax cooperation shows features of the last defence of the principle of fiscal sovereignty in a globalised world. In a context in which there is no longer room for forms of "hunting reserves", and the scope for the recognition and circulation of tax acts issued by foreign authorities is becoming narrower, the joint procedures route allows new legal realities to be taken into account while maintaining a central state role.

On the other hand, although part of a process that is in some respects irreversible, it is clear that the evolution of tax cooperation within the EU demonstrates some shortcomings. These critical issues concern both the difficulty of initiating and managing procedures and structures designed to contain and share an immense amount of data with an unspecified number of other states, and the very unsatisfactory level of protection given to the taxpayer. From this last point of view, in the European dimension too, tax cooperation mainly seems to be a defence tool for individual Member States, thus explaining the low propensity to protect taxpayers' rights.

(76) See, in particular, G. Della Cananea, "From the Recognition of Foreign Acts to Transnational Administrative Procedures", in J. Rodríguez-Arana Muñoz (ed.), *Recognition of Foreign Administrative Acts*, Cham, Springer, 2016, p. 220. See also S. Dorigo, "Mutual Recognition Versus Transnational Administration in Tax Law – Is Fiscal Sovereignty Still Alive?", *op. cit.*



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The interpretative efforts by the Court of Justice are moving in the right direction to balance the need to protect the coffers of the Member States and appropriately guarantee rights of defence to the taxpayer and third parties involved in the tax cooperation procedures. However, since it is but a judicial trend, the situation is destined to remain uncertain, at least until the taxpayer's rights in these procedures find express regulation in EU legal provisions.

Notwithstanding the latter problems, which however could find solutions by looking at sectors other than tax law where sensitivity in this regard has long been more developed, it seems evident that the experience in the field of tax cooperation could be useful to affirm a model which could be replicated in other areas of law. The evolution of international cooperation in tax matters revolves around overcoming competition between States through the identification of procedures which, thanks to the strength and authority of European Union law, foster mutual trust between the States themselves. At the same time, these procedures do not deny the borders between Member States nor the need to defend the main features of their tax systems.

Hence, proceduralisation is the hallmark of a new way of conceiving relations between member states, enhancing the contribution of European law, from the perspective that the interest of one Member State cannot be adequately protected if not in the context of the common interests of all the other Member States.



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# CHAPTER 6
# Administrative cooperation in banking supervision

Laura Wissink

## *Introduction*(1)

The process of Europeanisation in banking supervision has been ongoing for many years, but has gained momentum since the financial crisis of 2008. Before that event, national supervisors cooperated mainly *via* their participation in European agencies, but the financial crisis required significant, farther-reaching cooperation, and prudential banking supervision was ultimately transferred to the EU level.(2) This resulted in the establishment of the Single Supervisory Mechanism(3) (SSM): a system composed of the European Central Bank (ECB) and national banking supervisors (national competent authorities (NCAs)(4)) providing for cooperation arrangements between them to ensure effective banking supervision. These arrangements for administrative cooperation in banking supervision are explored in more detail in this chapter.

(1) This chapter is based on Laura Wissink's dissertation, see: L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, Zutphen, Europa Law, 2021. Specific reference is made to the research when relevant. The cut-off date for information herein is 26 May 2023.

(2) For a discussion of the developments that resulted in the Banking Union, see inter alia: Ch. Zilioli and K.-Ph. Wojcik, "European Banking Union – A Giant Step Towards European Integration and a Challenge for Judicial Review", in C. Zilioli and K.P. Wojcik (eds), *Judicial Review in the European Banking Union*, Cheltenham, Edward Elgar, 2021, p. 1; L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 2-5, and for the pre-crisis developments, see inter alia: C. Gortsos, "The Evolution of European Banking Law – From the Principle of National Treatment to the European Banking Union", National and Kapodistrian University of Athens, 2015; T. Tröger, "Organizational Choices of Banks and the Effective Supervision of Transnational Financial Institutions", 48 *Texas International Law Journal*, 2012, p. 177; G. Lo Schiavo "From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe? – The Stability Function of the Single Supervisory Mechanism", 21 *Maastricht Journal of European and Comparative Law*, 2014, p. 110; L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 20-22.

(3) The SSM is the first pillar of the Banking Union and became operational on 4 November 2014. The other pillars are the Single Resolution Mechanism, which is also already in place, and a European Deposit Insurance Scheme. The latter has not yet been completed at the time of writing of this chapter.

(4) This only concerns NCAs of Member States which use the euro, or Member States which do not use the euro but have established close cooperation in accordance with Art. 7 Regulation (EU) No. 1024/2013



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The chapter will first discuss the legal framework and institutional structure, after which the applicable laws are analysed in general. This will be followed by a discussion on the characteristics of some of the main cooperation arrangements of the SSM and the challenges for ensuring judicial review in each of these cases. Whereas the far-reaching cooperation between the ECB and NCAs is considered necessary to ensure effective banking supervision, the discussions in this chapter illustrate that the complex collaboration between the EU and national administrative authorities result in quite a few legal challenges which so far have not been resolved. The growing Court case law on this topic is increasingly clarifying matters, and over the coming years will hopefully tackle some of the most important issues such as the ones discussed here.

## *I. Legal framework for cooperation between the ECB and NCAs*

The SSM is established by Council Regulation No. 1024/2013(5) (the SSM Regulation), on the basis of which the prudential supervision of banks was transferred from national to EU level. As a result, the ECB is exclusively competent for the prudential supervisory tasks in relation to all banks(6) and is responsible for the effective and consistent functioning of the SSM,(7) while the responsibilities for the supervision of Significant Institutions (SIs) and Less-Significant Institutions (LSIs) – in layman's language large and small banks – are divided between the ECB and NCAs.(8) Only the authorisation to carry out the business of a credit institution to be established in a participating member

of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, [2013] OJ L 287/63 (hereinafter: "SSM Regulation") (*cf.* Art. 2(2) and 2(1) SSM Regulation).

(5) Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63.

(6) In this chapter, "bank" or "credit institution" refers to credit institutions as defined in Art. 2(3) SSM Regulation.

(7) For the ECB's tasks, see Art. 4(1), 4(2) and 5(2) SSM Regulation, and for the ECB's overall responsibilities, see Art. 6(1) SSM regulation. Art. 4(1) lists the specific prudential supervisory tasks for which the ECB is exclusively competent.

(8) Art. 6(4) SSM Regulation. This article sets forth the institutions that are and are not considered to be less significant. In the *Landeskreditbank Baden-Württemberg v. ECB* case, the Court has confirmed the ECB's exclusive competence and framed the NCA's role as assisting the ECB in carrying out its supervisory tasks by a decentralised implementation of some of the ECB's tasks in relation to LSIs (*Landeskreditbank Baden-Württemberg v. ECB*, case C-450/17 P, EU:C:2019:372, paras. 38-41). For more about this case, see inter alia: F. Annunziata, "European Banking Supervision in the Age of the ECB – Landeskreditbank Baden-Württemberg-Förderbank v. ECB", 21 *European Business Organization Law Review*, 2020, p. 545; A. Luca Riso, "A Prime for SSM before the Court – The L-Bank case", in C. Zilioli and K.P. Wojcik (eds), *Judicial Review in the European Banking Union*, *op. cit.*, p. 494.



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state,(9) the withdrawal of authorisations, and the assessment of acquisitions of qualifying holdings in a credit institution established in a participating member state – together generally referred to as "common procedures" – are not subject to this division of responsibilities and remain the exclusive competence of the ECB for both SIs and LSIs.(10)

The division of tasks and responsibilities within the SSM results in a wide range of cooperation arrangements between the ECB and NCAs. As a starting point, the ECB and NCAs are subject to the duty of cooperation in good faith and an obligation to exchange information.(11) Moreover, in general, NCAs shall assist the ECB and follow its instructions, which are discussed in more detail in section V. below.(12) These basics are laid down in the SSM Regulation, which also includes the arrangements for common procedures and instructions. The more precise arrangements for cooperation between the ECB and NCAs are elaborated in Regulation (EU) No. 468/2014(13) (the SSM Framework Regulation). An important arrangement provided for in the SSM Framework Regulation is the creation of teams for the supervision of SIs which consist of both ECB and NCA staff (Joint Supervisory Teams). As discussed in section IV. below, these Joint Supervisory Teams carry out the day-to-day SI supervision.

The far-reaching cooperation between the ECB and NCAs implies that basically all decisions adopted in the context of the SSM are partly based on preparatory measures carried out at a level different than that at which the final decision is adopted. These can be ECB decisions partly based on NCA preparatory measures (*i.e.*, bottom-up composite procedures) or NCA decisions partly based on ECB preparatory measures (*i.e.*, top-down composite procedures). The way in which the input that is coming from "the other level" is structured can vary between informal cooperation and information exchange up to a formal intermediate step such as advice or instructions.(14) Cooperation within the SSM thus consists of many different types of arrangements. This chapter

(9) As defined in Art. 2(1) SSM Regulation, a "participating member state" means a Member State which uses the euro or a Member State which does not use the euro but has established close cooperation in accordance with Art. 7 SSM Regulation.

(10) These tasks are listed in Art. 4(1)(a) and (c) SSM Regulation and are excluded from the division of responsibilities as laid down in Art. 6(4) SSM Regulation.

(11) Art. 6(2) SSM Regulation.

(12) *Ibid.*, Art. 6(3) SSM Regulation.

(13) Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (hereinafter "SSM Framework Regulation"), [2014] OJ L 141/1. The SSM Framework Regulation is an ECB regulation drafted in close consultation with the NCAs.

(14) *Cf.* L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 11-13. For more general discussions about composite procedures in the SSM, see inter alia: C. Eckes



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will focus on some of the main cooperation structures – *i.e.*, common procedures, Joint Supervisory Teams and the instructions of the ECB addressed to NCAs – to be able to explore them in more depth.

Thus the main cooperation arrangements are vertical procedures involving both the EU and national levels. The horizontal relations between NCAs, for instance when the ECB requires an NCA to involve staff members from another NCA in their LSI supervisory team,(15) are not at the core of the SSM's cooperation arrangements and therefore will not be discussed further in this chapter.

## *II. Applicable administrative standards*

The close cooperation arrangements within the SSM result in challenging legal questions regarding which of the administrative standards apply and the part of the decision-making procedure to which they apply. Since both the ECB and NCAs, *i.e.* EU and national administrative authorities, are involved in the decision-making procedures of the SSM, both EU and national administrative standards may be applicable to one and the same decision-making procedure. Moreover, these standards may differ since there is no harmonised set of EU administrative standards as of yet. This section explores these questions with respect to the applicable administrative standards in general, before the ways that judicial protection can be gained in the SSM's main forms of cooperation between the ECB and NCAs are discussed in the following sections.

Applicable EU administrative standards are discussed first, followed by the exploration of the possibility of additional national administrative standards being applicable. The discussion only focuses on administrative standards and not on the substantial laws to be applied by the ECB and NCAs. Some of the legal challenges with respect to the latter are discussed briefly in section VI. below.

The ECB, as a Union institution, is subject to the Charter of Fundamental Rights of the European Union (Charter), general principles of EU law and other relevant Union law such as the SSM Regulation and SSM Framework Regulation. The Charter and general principles of EU law are also the minimum standards that must be complied with by NCAs. Member States are subject to the Charter and general principles of EU law when implementing Union

and R. D'Ambrosio, "Composite Administrative Procedures in the European Union", ECB Legal Working Paper Series, 2020, p. 23; F. Brito Bastos, "Composite Procedures in the SSM and SRM – An Analytical Overview", *op. cit.*, p. 97.

(15) Art. 7 SSM Framework Regulation in combination with Art. 31(2) SSM Regulation.



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law,(16) which is the case when banking laws are applied at a national level.(17) NCAs, which come under the responsibility of Member States,(18) must comply with these standards in the same way.(19)

However, it is uncertain whether or not national administrative standards that provide for more protection than the applicable EU administrative standards may also need to be adhered to by the ECB and NCAs given the cooperation arrangements in place within the SSM. In order to answer this question, a distinction is made between administrative standards encompassing procedural rules (e.g., time limits and notification requirements) and administrative standards encompassing legal safeguards for the persons in question (e.g. the right to be heard).

Additional national procedural rules may be needed in certain cases. The principle of national procedural autonomy, which is subject to the principles of equivalence and effectiveness,(20) may require that Member States have national procedural rules in place to ensure an effective implementation of Union law when there are no Union rules governing the matter.(21) The relevant Union laws for banking supervision do not govern all procedural matters such as time limits and notification requirements, which thus implies that in certain cases these matters must be laid down in national laws. Since there is no Union law in these cases that provides, for instance, for such time limits or

(16) Art. 51(1) Charter. See also *Åkerberg Fransson*, case C-617/10, EU:C:2013:105, paras. 17-23; *Sopropé*, case C-349/07, EU:C:2008:746, para. 38.

(17) The rules for prudential banking supervision are laid down in EU law, *i.e.*, the SSM Regulation, as well as the substantial banking rules (e.g. Capital Requirements Regulation (Regulation (EU) No. 575/2013, CRR) and Capital Requirements Directive (Directive 2013/36/EU, CRD)). *Cf.* L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, p. 70; M. Lamandini, D. Ramos and J. Solana, "The European Central Bank (ECB) Powers as a Catalyst for Change in EU Law. Part 2 – SSM, SRM and Fundamental Rights", 23 *Colum. J. Eur. L.*, 2017, pp. 204-206.

(18) For a discussion of the bodies that fall under a state's responsibility, see: J. Jans and T. Duijkersloot, "State Liability", in J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds), *Europeanisation of Public Law*, Groningen, Europa Law, 2015, pp. 465-475, and in particular p. 465 about the decisive element that "tasks of a public authority are carried out", which is the case for NCAs.

(19) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, p. 70.

(20) The principle of equivalence requires that the national procedural rules governing actions to ensure persons' rights stemming from EU law cannot be less favourable than those relating to similar actions of a domestic nature. The principle of effectiveness means that national procedural rules may not render the exercise of rights conferred by EU law practically impossible or excessively difficult. (*Cf. Rewe v. Landwirtschaftskammer für das Saarland*, case C-33/76, EU:C:1976:188, para. 5; *Comet BV v. Produktschap voor Siergewassen*, case C-45/76, EU:C:1976:191, para. 12-16; *Unibet*, case C-432/05, EU:C:2007:163, para. 43).

(21) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 162 and 103-105.



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notification requirements which could be applied by the ECB, and these procedural rules are generally rather straightforward, it seems likely that the ECB has to apply the additional national procedural rules in these cases. This seems only to be applicable in the event of the absence of Union procedural rules in relation to specific powers, and do not constitute an obligation for the ECB to apply all national procedural laws.(22) In practice, this may result in situations in which there are no applicable procedural rules at all, for instance, when EU law does not set a time limit and there is no national time limit related to the specific provision in question. A national authority would be bound by general national administrative rules, including general administrative rules regarding time limits in administrative procedures, while the ECB seems not to be bound by such general administrative national rules.

To determine what EU or national administrative rules compromising legal safeguards must be adhered to by the ECB and NCAs, it is necessary to first look at when national standards (that provide for more protection than EU administrative standards do) are permitted in this respect. Pursuant to CJEU case law in the context of fundamental rights protection, national fundamental rights protection may only be applied in certain cases.(23) National standards of protection of fundamental rights may only be applied if the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.(24) Moreover, the possibility to apply national standards only exists if the relevant measure of EU law does not fully harmonise the matter.(25) The relevant EU

(22) In a letter to banks about the ECB's competence to exercise supervisory powers granted under national law, the ECB explained that "the requests, applications and notifications shall be prepared and submitted in accordance with the applicable national law" (p. 2) and that it "will also comply with national law requirements, including also on procedural aspects, connected specifically to these types of supervisory powers" (p. 3) (see: ECB, "Letter to Banks from ECB of 31 March 2017. Additional Clarification Regarding the ECB's Competence to Exercise Supervisory Powers Granted under National Law", available at: https://www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.en.pdf). *A contrario* it could be reasoned that the ECB does not apply such national procedural rules in general. *Cf.* L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 166-167. See also K. Lackhoff, *Banking Supervision and COVID-19 – A Handbook*, New York, Bloomsbury, 2021, p. 150, for a discussion on this issue illustrated by a number of examples.

(23) For a more detailed discussion about the possibility of applying national fundamental rights protection, see L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 163-164 and the literature and case law mentioned.

(24) *Melloni*, case C-399/11, EU:C:2013:107, para. 60; *Åkerberg Fransson*, case C-617/10, EU:C:2013:105; *Pelham and Others*, case C-476/17, ECLI:EU:C:2019:624, para. 80.

(25) *Pelham and Others*, case C-476/17, ECLI:EU:C:2019:624, para. 81. This is determined for each measure separately (paras. 81-85). *Cf.* R.J.G.M. Widdershoven, "Nationale fundamentele rechten niet van toepassing bij volledige harmonisatie", 22-23 *AB Rechtspraak Bestuursrecht*, 2020, p. 1351.



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measure must allow for a degree of discretion with respect to the implementation in national law. If this is not the case, and the relevant EU measure creates full harmonisation, only the fundamental rights protection provided for in the Charter applies.(26) In the context of the SSM, fundamental rights are not fully – nor even further – harmonised. Thus, the Charter and possibly national standards for fundamental rights protection apply to the extent that they do not compromise the level of protection provided for by the Charter, nor the primacy, unity and effectiveness of EU law.(27)

When national standards of fundamental rights protection are allowed and in place, the question is about the applicability of these standards to the ECB and NCAs. When national standards have to be adhered to by the ECB and subsequently applied and interpreted by the EU Courts during the review of an ECB decision, it is difficult to see how this does not compromise the primacy, unity and effectiveness of Union law. The standards to which the ECB would have to adhere in a specific decision-making procedure would depend on which legal order is involved in that specific case, which could even include various national laws in one and the same decision-making procedure, and the ECB would have to be familiar with and apply these different standards. As a result, the ECB's effectiveness, and thus the implementation of EU law, would be harmed if the ECB has to adhere to different standards in each Member State. This applies equally to the primacy and unity of EU law when the review of EU acts is made according to different national standards.(28) It thus seems most likely that the ECB is only subject to the Charter, the general principles of EU law, and other legal safeguards included in relevant Union law.(29)

NCAs, being national administrative authorities, will generally have to comply with their own national administrative rules, including both procedural rules and legal safeguards. However, it is uncertain whether this is also the case when NCAs carry out preparatory acts that are part of an EU decision-making procedure. Although the application of different standards to EU and national authorities is not excluded,(30) it is doubtful if this is also permitted when ECB

(26) *Ibid.*, pp. 1350-1351; D. Sarmiento, "Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe", 50 *Common Market Law Review*, 2013, p. 1289.

(27) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, p. 164.

(28) For a detailed discussion with respect to the applicability of national standards to the ECB, see *ibid.*, pp. 164-168.

(29) See also K. Lackhoff, *Banking Supervision and COVID-19 – A Handbook*, *op. cit.*, pp. 150-151.

(30) In the *Akzo* case, the Court stated that the rules on legal professional privilege may vary according to the division of powers between the Commission and national authorities and the rules relevant to that division (para. 102). The principle of legal certainty did not require that identical criteria need be



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and NCA preparatory measures are part of one and the same EU decision-making procedure. A breach by an NCA of national legal safeguards may affect the legality of the ECB final decision in such case, which makes the ECB indirectly subject to national standards and may harm the unity and effectiveness of Union law. It seems likely that this will not be accepted by the Court for precisely this reason.(31)

## *III. Common procedures*

The common procedures – as defined in section I. above – involve a two-step procedure including a draft decision at the national level and a final decision at the EU level about the granting or withdrawal of authorisation of banks and the assessment of acquiring a qualifying holding in a bank.(32) After a brief explanation of the procedures involved, this section will discuss the way in which judicial protection is ensured with respect to the different measures that are part of these procedures.

Applications for an authorisation to carry out the business of a bank must be submitted to the relevant NCA,(33) which shall assess such applications on the basis of the requirements laid down in its national laws. If the applicant complies with all national conditions for authorisation, the NCA will take a draft decision proposing the ECB grant the authorisation (NCA draft decision).(34) If the conditions are not met, the NCA rejects the application immediately.(35) The NCA draft decision will be deemed to be adopted by the ECB unless the ECB objects within the set time limits. The ECB shall object only when the

applied in that specific case, in which case it was relevant according to the Court that the undertakings could determine their rights and obligations vis-à-vis the competent authorities in light of the powers of those authorities (*Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, case C-550/07 P, EU:C:2010:512, paras. 100-105). *Cf.* L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 168-169.

(31) For a more detailed analysis, see: *ibid.*, pp. 169-170. *Cf.* P. Dermine and M. Eliantonio, "Case Note – CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17 Silvio Berlusconi v. Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and others, EU:C:2018:502", 12 *Review of Administrative Law*, 2019, p. 249; S. Demková, "The Grand Chamber's Take on Composite Procedures under the Single Supervisory Mechanism – Comments on Judgment of 27 June 2018, C-219/17 Silvio Berlusconi v. Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and others, EU:C:2018:502", 12 *Review of European Administrative Law*, 2019, p. 217; M. Markakis, "Composite Procedures and Judicial Review in the Single Resolution Mechanism – Iccrea Banca", 13 *Review of European Administrative Law*, 2020, p. 122. For a general discussion of, in Brito Bastos' words, derivative illegality in composite procedures, see: F. Brito Bastos, "Derivative Illegality in European Composite Administrative Procedures", 55 *Common Market Law Review*, 2018, p. 101.

(32) Art. 14 and 15 SSM Regulation.

(33) *Ibid.*, Art. 14(1).

(34) *Ibid.*, Art. 14(2).

(35) *Ibid.*, Art. 14(2).



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relevant EU law conditions are not fulfilled.(36) The NCA shall notify the applicant of the ECB decision.(37) The ECB may withdraw an authorisation on its own initiative and after consultation with the relevant NCA, or on the proposal of the relevant NCA.(38)

An acquisition of a qualifying holding in a bank shall be notified to the NCA of the Member States in which that bank is established.(39) After having assessed the proposed acquisition, the relevant NCA shall send a proposal to the ECB for a decision to oppose or not to oppose the acquisition.(40) The ECB subsequently decides whether to oppose the acquisition or not.(41)

In general, ECB decisions, being acts of a Union institution, are subject to review by the EU Courts. Pursuant to Article 263 TFEU, an act is subject to review if it is intended to produce legal effect vis-à-vis third parties. It concerns "any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position".(42)

Preparatory measures are, in principle, not subject to a separate judicial review.(43) Any legal defect in a preparatory measure can be relied upon in an action against the final decision following such preparatory measure,(44) unless such a measure is itself an actionable decision under Article 263 TFEU.(45) Preparatory measures are considered an actionable act when they themselves create legal effects vis-à-vis the applicant and are the culmination of a special procedure distinct from the procedure in order to adopt a final decision on the substance of the case.(46) The way in which this case law applies to situations

(36) *Ibid.*, Art. 14(3).

(37) *Ibid.*, Art. 14(4).

(38) *Ibid.*, Art. 14(5).

(39) *Ibid.*, Art. 15(1).

(40) *Ibid.*, Art. 15(2).

(41) *Ibid.*, Art. 15(3).

(42) *IBM v. Commission*, case C-60/81, EU:C:1981:264, para. 9; *ABLV Bank v. ECB*, joined cases C-551/19 P and C-552/19 P, EU:C:2021:369, para. 39. *Cf.* L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 114-115 and the literature and case law mentioned. For a discussion about the IBM case and, in Lefterov's words, preparatory acts doctrine, in general, see A. Lefterov, "Judicial Review in a Multi-Level Administrative Framework – The Case of the SSM", ESCB Legal Conference 2020, 2021 (https://www.ecb.europa.eu/pub/pdf/other/ecb.escblegalconference-proceedings2020~4c11842967.en.pdf), pp. 287-293, and more specifically in relation to the SSM's multi-level administrative framework, see p. 293.

(43) *IBM v. Commission*, case C-60/81, EU:C:1981:264, para. 10; *Deutsche Post and Germany v. Commission*, joined cases C-463/10 P and C-475/10 P, EU:C:2011:656, para. 50; *ABLV Bank v. ECB*, joined cases C-551/19 P and C-552/19 P, EU:C:2021:369, para. 39.

(44) *IBM v. Commission*, case C-60/81, EU:C:1981:264, para. 12.

(45) *Ibid.*, para. 11.

(46) *Ibid.*, para. 11. For a broader discussion about when a preparatory act itself is subject to judicial review, see L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal*



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in which the preparatory measure is carried out at a level other than the one at which the final decision is adopted, *i.e.*, in cases of composite procedure, is being progressively clarified by the Court.

An important judgement in this respect is the *Berlusconi and Fininvest*(47) case in which the Court ruled that the NCA's draft decision is not separately subject to review by national courts in the case of an assessment of acquiring a qualifying holding. The case concerns a request for a preliminary ruling from the Italian Council of State related to a national judicial procedure in which Silvio Berlusconi (Berlusconi) and Finanziaria d'investimento Fininvest SpA (Fininvest) challenged the Bank of Italy's draft decision in an assessment of an acquisition of a qualifying holding by Berlusconi and Fininvest in Banca Mediolanum. In its draft decision, the Bank of Italy proposed to oppose the acquisition of a qualifying holding, a proposal which was taken up by the ECB in its final decision.(48)

To determine whether the NCA draft decision in question is separately subject to judicial review, the Court recalls the effects of the involvement of national authorities on the division of jurisdiction between EU courts and national courts. Where the EU institution exercises, alone, the final decision-making power without being bound by the national preparatory act, the EU Courts are exclusively competent to review such EU acts and to examine any defects vitiating the national preparatory acts that could affect the validity of the final EU decision.(49) Where the EU institution has only limited or no discretion, so that the national preparatory act is binding upon the EU

*Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 115-124.

(47) *Berlusconi and Fininvest*, case C-219/17, EU:C:2018:1023. For further discussion on this case, see F. Brito Bastos, "Judicial Review of Composite Administrative Procedures in the Single Supervisory Mechanism: Berlusconi", 56 *Common Market Law Review*, 2019, p. 1355; P. Dermine and M. Eliantonio, "Case Note – CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17 Silvio Berlusconi v. Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and others, EU:C:2018:502", *op. cit.*, p. 237; S. Demková, "The Grand Chamber's Take on Composite Procedures under the Single Supervisory Mechanism. Comments on Judgment of 27 June 2018, C-219/17 Silvio Berlusconi v. Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and others, EU:C:2018:502", *op. cit.*, p. 209; G. Bassani, "Silvio Berlusconi and William of Ockham – Entia Non Sunt Multiplicanda Sine Necessitate – Case C-219/17", in C. Zilioli and K.P. Wojcik (eds), *Judicial Review in the European Banking Union*, *op. cit.*, p. 530; L. Wissink, "CJEU moving towards integrated judicial protection?", *Blog EU Law Enforcement*, 2019, available at <https://eulawenforcement.com/?p=1567>; L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 145-150.

(48) *Berlusconi and Fininvest*, case C-219/17, EU:C:2018:1023, paras. 32-37.

(49) *Ibid.*, paras. 41-44. *Cf. Sweden v. Commission*, case C-64/05P, EU:C:2007:802; *Iccrea Banca*, case C-414/18, EU:C:2019:1036, paras. 37-39. For further discussion on the Iccrea Banca case, see M. Markakis, "Composite Procedures and Judicial Review in the Single Resolution Mechanism – Iccrea Banca", *op. cit.*, p. 109.



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institution, the review of such national acts is not within the jurisdiction of the EU Court. In such cases, it is for the national court to ensure effective judicial protection.(50)

The Court concludes that the procedure in question involved a cooperation mechanism based on the exclusive decision-making power of the ECB, in which case there must be a single judicial review by the EU Courts alone.(51) The Court continues that it alone is competent to determine, as an incidental matter, whether the legality of the ECB's decision at issue is affected by any defects rendering the preparatory measures unlawful.(52) This conclusion seems to be *mutatis mutandis* applicable to other common procedures since all of them are based on the ECB's exclusive decision-making power.(53)

The judgement remains silent on the manner in which EU Courts should review such national draft decisions that are part of an EU decision-making procedure in which the final decision-making power stays with the EU authority.(54) Unfortunately, the subsequent General Court judgement on the ECB's decision in question does not provide any further guidance in this respect either. The General Court considers the pleas regarding the national preparatory measures involved to be new pleas, raised after the application was lodged, and, therefore, not admissible.(55) In this way, it refrains from a substantive assessment of the national preparatory measures involved.

It is questionable if the EU Courts are fully equipped to review a national preparatory measure in the same way it would review similar EU measures. In previous cases that included the review of the national part of an EU

(50) *Berlusconi and Fininvest*, case C-219/17, EU:C:2018:1023, paras. 45-46. *Cf. Oleificio Borelli v. Commission*, case C-97/91, EU:C:1992:491.

(51) *Berlusconi and Fininvest*, case C-219/17, EU:C:2018:1023, paras. 48-49.

(52) *Ibid.*, para. 57. *Cf. Iccrea Banca*, case C-414/18, EU:C:2019:1036; para. 48.

(53) *Cf.* G. Buono, "Banking Authorisations and the Acquisition of Qualifying Holdings as Unitary and Composite Procedures and Their Judicial Review", in C. Zilioli and K.P. Wojcik (eds), *Judicial Review in the European Banking Union*, *op. cit.*, pp. 279-281; L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 148-149. Note that this reasoning is not applicable to an immediate rejection of an application for an authorisation by NCAs (Art. 14(2) SSM Regulation) and a withdrawal of an authorisation on the ECB's initiative (Art. 14(5) SSM Regulation) as these procedures are not "composite" in nature.

(54) *Cf.* J. Tegelaar, "De Unierechter als *juge de droit national*? Nationaal recht en de rechterlijke toetsing van gemengde procedures", in *Bestuursrecht in het echt. Liber amicorum Willemien den Ouden*, Wolters Kluwer, 2021, p. 296 who asked the question if the EU Court must be considered to be a *juge de droit national*.

(55) *Finanziaria d'investimento Fininvest SpA (Fininvest) and Silvio Berlusconi v. European Central Bank*, case T-913/16, EU:T:2022:279. For an analysis of the case, see A. Magliari, "Composite Procedures and Judicial Protection – In Fininvest and Silvio Berlusconi v. European Central Bank (T-913/16) the General Court delivers a 'Pilate's judgment'", *REALaw.blog*, 2022, available at <https://wp.me/pcQ0x2-sp>. The appeal before the CJEU is still pending (see: *Fininvest v. ECB and Others*, C-512/22 P (pending)).



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decision-making procedure, the Court imputed responsibility for the lawfulness of the entire decision-making procedure on the EU authority while limiting the latter's responsibility to verifying the existence of, and referring to, the national authority's reasoning.(56) An exhaustive assessment of the national measure by the EU institution was explicitly excluded, since the EU institution might wrongly decide differently to the national authorities.(57) It is questionable if a similar approach could be considered to ensure effective judicial protection in common procedure given the significantly larger role of the national authorities in these procedures.(58)

## *IV. Joint Supervisory Teams*

The day-to-day supervision of SIs is carried out by Joint Supervisory Teams (JSTs).(59) These teams are coordinated by an ECB staff member, and composed of both ECB and NCA staff members.(60) This cooperation remains informal and does not contain any formal intermediate steps at the national level.(61) The ECB remains ultimately responsible for the SI supervision and any decisions adopted in this respect will be ECB final decisions.(62) However, such ECB final decisions are thus prepared by staff members of both the ECB and NCAs.

(56) *Sweden v. Commission*, case C-64/05 P, EU:C:2007:802, paras. 93-94 (for the qualification of the decision-making procedure), and 88-89 and 98-99 (for the EU institution's responsibility). See also *IFAW Internationaler Tierschutz-Fonds v. Commission*, case C-135/11 P, EU:C:2012:376, para. 62; *Spirlea v. Commission*, case T-669/11, EU:T:2014:814, para. 53.

(57) *IFAW Internationaler Tierschutz-Fonds v. Commission*, case C-135/11 P, EU:C:2012:376, paras. 63-64; *Spirlea v. Commission*, case T-669/11, EU:T:2014:814, paras. 54-55.

(58) For a more detailed analysis of the relevant case law and the comparison with common procedures, see: L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 152-153.

(59) Art. 3 SSM Framework Regulation. For more about a JST's composition and tasks, see Art. 3-6 SSM Framework Regulation and para. 1.2.2. SSM Supervisory Manual, March 2018 (available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?42da4200dd38971a82c2d15b9ebc0e65). The JSTs are considered a main pillar of the supervision of SIs (see: Commission Report 2023, p. 6).

(60) Art. 3(1)SSM Framework Regulation.

(61) An exception is the more formal national preparatory measure in ongoing supervision where the ECB requests an NCA to prepare a draft decision in the context of ongoing supervision or an NCA does so on its own initiative (*cf.* Art. 90(1)(a), 91 and 95(2) SSM Framework Regulation). Since these draft decisions are comparable to common procedures, they are not discussed separately in this chapter.

(62) Joint Supervisory Teams have been characterised by Brito Bastos as a novel form of multilevel administration as they do not constitute, in his view, composite procedures nor institutional cooperation, and the cooperation is much more than a mere exchange of information (F. Brito Bastos, "Composite Procedures in the SSM and SRM – An Analytical Overview", *op. cit.*, pp. 107-108). For a broader discussion about the advantages and challenges of Joint Supervisory Teams for effective supervision, see L. Wissink, "Challenges to an Efficient European Centralised Banking Supervision (SSM) – Single Rulebook, Joint Supervisory Teams and Split Supervisory Tasks", 18 *European Business Organization Law Review*, 2017, pp. 444-447.



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To carry out its supervisory tasks, the ECB may gather information, carry out general investigations – and to that end, inter alia, require the submission of documents, examining books and records and obtaining written or oral explanations – and onsite inspections.(63) NCAs will more or less have similar powers to carry out their supervisory tasks.(64)

The main question once again concerns the review of the *national* preparatory actions: which court is competent to do so? Preparatory actions carried out by ECB staff – such as information gathering and examing records – can be included by a judicial review of the final ECB decision, unless separately subject to judicial review (see section III. above), since both the preparatory actions and the final measure take place at the same (EU) level. However, this is less straightforward with respect to preparatory actions carried out by NCA staff as the actions in such cases are carried out at a different level to that at which the final decision is adopted.

Although the aforementioned *Berlusconi and Fininvest* case confirms the EU Court's exclusive competence to review the entire decision-making procedure in case of common procedures, a closer look at the cooperation between the ECB and NCAs within Joint Supervisory Teams shows us that it is still uncertain if this also applies in cases of this form of administrative cooperation.

The *Berlusconi and Fininvest* judgment may, at first glance, imply that *all* national preparatory measures that are part of an EU decision-making procedure must be included in the EU Court's review of the final ECB decision following these preparatory measures. However, the *Berlusconi and Fininvest* case concerns a procedure in which the national preparatory measure is a formalised step, by means of an NCA draft decision, in the EU decision-making process. It cannot simply be concluded that the Court's reasoning applies *mutatis mutandis* to all national actions taken in the preparation of final ECB decisions.(65)

An important reason to not accept such *mutatis mutandis* applications to *all* national preparatory measures is that such an interpretation would result in a different approach to reviewability of ECB preparatory measures and NCA preparatory measures.(66)

(63) Art. 10-13 SSM Regulation. The ECB can exercise these powers towards the persons referred to in Art. 10(1) SSM Regulation, being for instance credit institutions established in the participating Member States and persons belonging to these entities.

(64) Art. 65(3) Directive 2013/36/EU requires that competent authorities shall have powers that are comparable to the ECB's powers laid down in Art. 10-13 SSM Regulation.

(65) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 193-194.

(66) For an analysis of the reviewability of ECB preparatory measures, see: *ibid.*, pp. 184-193, and for a detailed discussion about the possible interpretations of the *Berlusconi and Fininvest* case, and their merits and demerits, see pp. 194-196.



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For the assessment of the reviewability of EU preparatory measures, the Court considers the effect the measure creates, whether sufficient judicial protection is provided, the applicable procedural rules, and the possible risk of confusing procedural stages.(67) For instance, in the joined cases *Deutsche Post and Germany v. European Commission*, the Court concluded that the information injunction at issue was separately subject to judicial review because an action against the final decision following this information injunction was not capable of ensuring sufficient judicial protection and the possible legality attached to the preparatory measure could not be removed by an action against the final decision.(68)

If *all* national preparatory measures were to be included in the Court's review of the final EU decision, the Court's aforementioned consideration regarding the reviewability of EU preparatory measures would simply be ignored with respect to national preparatory measures. In the case of the example mentioned earlier, a comparable information request adopted by an NCA in preparation for an ECB final decision would never be able to be separately subjected to judicial review in this line of reasoning.

Thus, such an interpretation of the *Berlusconi and Fininvest* case excludes, beforehand, that any national preparatory measure could be separately subject to judicial review, while comparable ECB preparatory measure may be separately subject to judicial review under similar circumstances.(69)

The opposite approach in which the EU Courts only include formal intermediate national measures, such as NCA draft decisions, in their review of the ECB's final decision, may create uncertainty and gaps in judicial protection. Any defects in all other national preparatory measures must be established before the national courts and the effectiveness of the judicial protection thus depends on the national law in question. It is firstly questionable if such national preparatory measures will be subject to separate judicial review under national law, and it seems undesirable that the judicial protection differs between Member States.(70)

Another possibility could be that the Court decides to apply its own standards of reviewability based on Article 263 TFEU to both EU and national preparatory measures that are part of an EU decision-making procedure. This would avoid a different treatment of the ECB's and NCAs' preparatory

(67) *Ibid.*, p. 117. For an extensive discussion of the relevant case law, see pp. 117-124.

(68) *Deutsche Post and Germany v. Commission*, case C-463/10 P, EU:C:2011:656, paras. 55-60.

(69) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 194-195.

(70) *Ibid.*, pp. 195-196.



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measures that are part of an EU decision-making procedure, while also preventing different treatments of NCA preparatory measures, and thus avoid a patchwork of judicial protection in the SSM. Obviously, this would imply a large step towards harmonisation of the standards for reviewability of preparatory acts that are part of EU decision-making procedures. Furthermore, to avoid gaps in judicial protection, the Court must also oblige, in the same vein as the *Borelli* case,(71) national courts to ensure effective judicial protection when national preparatory measures are actionable acts themselves according to the Court's standards based on Article 263 TFEU.(72)

## *V. ECB instruction*

The above paragraphs discussed procedures comprised of preparatory measures carried out at the national level and final decisions adopted at the EU level. The procedures in place for ECB instructions, as discussed in this paragraph, are the total opposite: the ECB first carries out an intermediate step after which the NCA adopts a final decision. Article 6(3) SSM Regulation lays down the general obligation for NCAs to follow ECB instructions, which implies that all ECB instructions are binding on NCAs. However, as explained below, the exact nature of an ECB instruction also depends on the specific wording and context of that instruction. Before exploring the ECB instructions based on Article 9(1) of the SSM Regulation, judicial protection in the case of top-down procedures, such as the ECB instructions, is briefly discussed in general.

To determine which court is competent to review which measure in top-down procedures, it should be recalled that when a person can undoubtedly bring an action against the EU preparatory measure before the EU Courts, this procedure must be followed within the time limits of Article 263 TFEU. If this EU path is not followed while it was undoubtedly open for the person at hand, that person cannot call into question the lawfulness of the EU preparatory measure in an action against the national measure following such an EU preparatory measure.(73) National courts must assume the lawfulness of the EU

(71) *Oleificio Borelli v. Commission*, case C-97/91, EU:C:1992:491.

(72) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 195-196.

(73) *TWD v. Bundesrepublik Deutschland*, case C-188/92, EU:C:1994:90, paras. 16-18. The Court explained that allowing a person to indirectly challenge the EU preparatory measure before a national court in such cases would enable that person to bypass the time limits of Art. 263 TFEU and the definite nature which the measure assumes against that person once the time limit for bringing an action has expired (para. 18). The Court notes that an action before the EU Courts does not preclude an action before a national court against a national measure following the EU preparatory measure, since the action before the EU Courts overcomes any time-barring effects of the expiry of time limits under Art. 263 TFEU



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preparatory measure in question. However, if a person is not fully aware of the EU preparatory measure and of the fact that it could without any doubt have challenged that measure under Article 263 TFEU, a person may still challenge the EU preparatory measure in an action before the national court against the national measure following such preparatory measures.(74) National courts have the possibility to request a preliminary ruling from the Court regarding the validity of the EU preparatory measure in question.(75) Moreover, national courts may not declare EU acts invalid.(76)

The next step is to determine whether or not there is no doubt that a person can challenge an EU preparatory measure before the EU Courts and, thus, be obliged to follow the EU path to gain judicial protection. Besides the condition that a person must be fully aware of the EU preparatory measure, this requires, firstly, that the EU preparatory measure be subject to separate judicial review by the EU Courts and, secondly, the person in question has standing. These elements must thus also be considered in the case of ECB instructions in order to establish if the unlawfulness of an ECB instruction must be challenged directly before the EU Courts or can be challenged indirectly in a national judicial proceeding against the NCA decision following such an ECB instruction by means of a request for a preliminary ruling by that national court.(77)

The ECB may adopt instructions under Article 9(1), third subparagraph, SSM Regulation.(78) Pursuant to this provision, the ECB may, to the extent necessary to carry out its supervisory tasks, instruct NCAs to use their powers, under and in accordance with the conditions set out in national law, where the SSM Regulation does not confer such powers on the ECB.

It is uncertain whether the credit institution concerned is actually aware of the ECB instruction preceding the NCA's final decision. The ECB instruction is addressed to the relevant NCA, and there is no obligation for the ECB to either publish its instruction or to send it to the credit institution involved.(79) It will

(paras. 19-20). See also *Georgsmarienhütte and Others*, case C-135/16, EU:C:2018:582, para. 43; *Iccrea Banca*, case C-414/18, EU:C:2019:1036, paras. 70-74.

(74) *TWD v. Bundesrepublik Deutschland*, case C-188/92, EU:C:1994:90, paras. 21-24. This was the case in *Universität Hamburg v. Hauptzollamt Hamburg-Kehrwieder*, case C-216/82, EU:C:1983:248. For more on the TWD case, *cf.*: L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 113 and 222-223.

(75) Art. 267 TFEU.

(76) *Foto-Frost v. Hauptzollamt Lübeck-Ost*, case C-314/85, EU:C:1987:452, para. 15.

(77) For a more extensive discussion of reviewability and standing in top-down procedures, see: L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 222-227.

(78) See also Art. 22 SSM Framework Regulation.

(79) See also Hernández Saseta who points out that Art. 9(1) SSM Regulation and Art. 22 SSM Framework Regulation "are silent on the content, scope and conditions of application of these



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therefore depend on the ECB's practice in this respect. It must be noted that the credit institution involved must obviously be aware of the ECB instruction in order to be able to challenge it before EU Courts.(80)

If the credit institution involved is aware of the ECB instruction, the ECB instruction can be challenged directly before the EU Courts when the credit institution has standing and the act itself is reviewable.

Pursuant to Article 263 TFEU, a credit institution has standing when it is able to prove that the ECB instruction is of direct and individual concern to it.(81) The ECB instruction concerns, in principle, an instruction regarding a specific credit institution, and a credit institution will thus probably be able to prove easily that the ECB's instruction is of "individual concern" to it.(82) For the ECB instruction to also be of direct concern to the credit institution involved, it "must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules".(83) The latter criteria regarding "direct concern" are closely related to the criteria used for the assessment of the reviewability of the act at issue.(84) These conditions are therefore discussed together below.

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instructions" (C. Hernández Saseta, "The Legal Review of ECB Instructions Under Article 9 SSM Regulation", in C. Zilioli and K.P. Wojcik (eds), *Judicial Review in the European Banking Union*, *op. cit.*, p. 306).

(80) *Cf.* L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, p. 233.

(81) Art. 263, fourth subparagraph, TFEU reads "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures." An ECB instruction is addressed to the relevant NCA, and thus not to the credit institution involved; nor can the ECB instruction be qualified as a regulatory act (for more about regulatory acts, see inter alia: A. de Gregorio Merino, "The ECB's Regulatory Powers, their Scope and their Judicial Review", in C. Zilioli and K.P. Wojcik (eds), *Judicial Review in the European Banking Union*, *op. cit.*, pp. 341-343; L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 124-125). The credit institution must thus prove that the ECB instruction is of direct and individual concern to it.

(82) *Ibid.*, p. 233. On individual concern, see also p. 226 and the literature mentioned.

(83) *Dreyfus v. Commission*, case C-386/96P, EU:C:1998:193, para. 43. See also *International Fruit Company and Others v. Commission*, case C-41/70, EU:C:1971:53, paras. 23-29; *Iccrea Banca*, case C-414/18, EU:C:2019:1036, para. 66; *ECB v. Trasta Komercbanka and Others*, joined cases C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, para. 103.

(84) For an ECB preparatory measure to be subject to judicial review separately, it must intend to produce legal effect vis-à-vis a person, similar to the conditions mentioned in the context of the bottom-up procedures discussed in sections III. and IV. above. In top-down procedures, an ECB preparatory measure may create legal effect if it binds the NCA (L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, p. 223 and the case law mentioned).



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In general, it could be argued that the ECB instruction cannot be binding upon a credit institution, since the rationale of this "tool" is that the ECB does not have the power itself to directly bind the credit institution and thus needs the NCA to use its national powers to do so. At the same time, the ECB instruction is rather specific – it concerns a specific credit institution and the instruction for the NCA to use a specific power under its national laws – and must be followed by the NCA. It is thus more than possible that such an instruction would directly affect the legal situation of the credit institution involved.

Whether or not an ECB instruction actually directly affects the bank's legal situation, first of all, depends on the way in which it is formulated, e.g., does it fully determine the outcome of the NCA decision? Second, this will depend on the relevant national law, since Article 9(1), third subparagraph, SSM Regulation requires the NCA to make use of their powers "under and in accordance with the conditions set out in national law". If the specific relevant national rules may in practice result in discretion for the NCAs to a certain extent, this discretion may affect the legal effect of the ECB instruction. Thus, in principle the ECB instructions are binding, but it cannot be excluded that in certain cases the NCA still has discretionary powers to a certain extent depending on the wording of the instruction and the relevant national law.(85)

## *VI. Application of national substantive laws by the ECB*

The previous sections have examined the legal challenges with respect to the main cooperation arrangements in place within the SSM. Another peculiarity that is closely related to the far-reaching administrative cooperation and also results in interesting legal questions is the scope of substantive laws to be applied by the ECB.

The SSM Regulation states that the ECB has to apply *all* relevant Union law. Following Article 4(3) SSM Regulation, this means that, where relevant Union law is composed of directives, the ECB must apply national laws implementing such directives, and, where relevant Union law is composed of regulations that explicitly grant options for Member States, the national laws exercising those options. This novelty,(86) by which an EU institution has to

(85) For a more detailed discussion about the ECB instruction, see *ibid.*, pp. 233-235. See also C. Hernández Saseta, "The Legal Review of ECB Instructions Under Article 9 SSM Regulation", *op. cit.*, pp. 308-309.

(86) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*,



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apply national substantive law, results in an even more complex mix of legal orders. As a consequence of the closely intertwined administrative cooperation, both EU and national administrative standards may be relevant to one and the same decision-making procedure, and the fact that the ECB must also apply national substantive laws adds an extra layer of complexity to this mixed legal order.

A few cases concerning ECB decisions partly based on national law have already been brought to the Court, in which the EU Courts applied and interpreted national law.(87)

p. 156. *Cf.* W.H. Bovenschen *et al.*, "Europees bankentoezicht (SSM). Juridische en praktische perspectieven", 2010 *Nederlands Tijdschrift voor Europees Recht*, 2013, p. 367; M. Lehmann, "Single Supervisory Mechanism Without Regulatory Harmonisation? Introducing a European Banking Act and a 'CRR Light' for Smaller Institutions", European Banking Institute (EBI) Working Paper Series, 2017, pp. 7-8; L. Boucon and D. Jaros, "The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism – A New Mode of European Intergration?", 10 *European Journal of Legal Studies*, 2018, pp. 179-180; D. Sarmiento, "National Law as a Point of Law in Appeals at the Court of Justice – The Case of Crédit Mutuel Arkéa/ECB", *EU Law Live Blog*, 2019, available at <https://eulawlive.com/blog/2019/10/08/national-law-as-a-point-of-law-in-appeals-at-the-court-of-justice-the-case-of-credit-mutuel-arkea-ecb/>. For a detailed discussion of the application of national law by the ECB, see A. Witte, "The Application of National Law by the ECB, Including Options and Discretions, and its Impact on the Judicial Review", in C. Zilioli and K.P. Wojcik (eds), *Judicial Review in the European Banking Union*, *op. cit.*, p. 236. For a wider discussion about national law in the EU judicial procedures, see: M. Prek and S. Lefèvre, "The EU Courts as 'National' Courts – National Law in the EU Judicial Process", 54 *Common Market Law Review*, 2017, p. 369.

(87) *Crédit mutual Arkéa v. ECB*, joined cases C-152/18 P and C-153/18 P, EU:C:2019:810; Joined *Caisse régionale de credit agricole mutuel Alpes Provence v. ECB*, cases T-133/16 to 136/16, EU:T:2018:219 (For a discussion about these cases, see: D. Sarmiento, "National Law as a Point of Law in Appeals at the Court of Justice. The Case of Crédit Mutuel Arkéa/ECB", *op. cit.*; E. Gagliardi and L. Wissink, "Ensuring Effective Judicial Protection in Case of ECB Decisions Based on National Law", 13 *Review of European Administrative Law*, 2020, p. 44; *Anglo Austrian AAB AG, formerly Anglo Austrian AAB Bank AG and Belegging-Maatschappij "Far-East" BV v. European Central Bank*, case T-797/10, EU:T:2022:389 (For a brief discussion on this case, see: E. Gagliardi and L. Wissink, "So Far so Good – The Review of National Law in EU Judicial Proceedings (Case *Anglo Austrian AAB and Belegging-Maatschappij "Far-East"*, T-797/19)", *EU Law Live*, 2022, available at <https://eulawlive.com/op-ed-so-far-so-good-the-review-of-national-law-in-eu-judicial-proceedings-case-anglo-austrian-aab-and-belegging-maatschappij-far-east-t-797-19-by-enrico-gagliardi-and/>); *Corneli v. ECB*, case T-502/19, EU:T:2022:627. This latter case concerns the broader discussion about what supervisory authorities can do if a Member State has not implemented the relevant EU legislation correctly in its national laws. The General Court's stance in this matter seems to limit the authorities' possibilities to using a broader interpretation of the relevant national law in order to achieve the result as sought by the relevant EU laws (For a discussion about this case: D. Sarmiento, "National Law as a Point of Law in Appeals at the Court of Justice – The Case of Crédit Mutuel Arkéa/ECB", *op. cit.*; M. Markakis, "The General Court Annuls an ECB Decision for Misapplying National Law – Case T-502/19 Francesca Corneli v. ECB", *REALaw.blog*, available at <https://realaw.blog/?p=1947>). The last two cases are still the subject of appeals at the moment of writing (respectively *Anglo Austrian AAB v. ECB and Far East*, case C-579/22 P (pending) and *ECB v. Corneli*, case C-777/22 P (pending)).



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The Court did not explicitly consider whether a full judicial review can be guaranteed in cases in which EU Courts have to review EU decisions based on national law. However, this will depend on the Court's interpretation of its own mandate. For instance, will the Court accept an infringement of national law by the General Court to be grounds for appeal?(88)

An additional complexity is the question of whether EU Courts are equipped to apply and interpret national laws. In the aforementioned cases, the Court followed its general approach used in cases of questions of fact related to national law, in which cases the scope of national laws needs to be assessed in the light of the interpretation given to them by the national courts.(89) In some cases, the General Court even added that, in the absence of decisions by the competent national courts, it is for the Court to rule on the scope of the provisions in question.(90) However, in the case of the ECB applying national substantive laws transposing the relevant Union laws, it concerns questions of law related to that national law,(91) which seems to require a different approach than that normally required to prove a certain position or establish a fact, *i.e.*, required in cases of questions of fact.(92) This approach may be a useful point of departure, but it seems insufficient to answer all the questions of law that the EU Courts may face in the future.(93)

(88) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, p. 156. For a more detailed analysis, see: E. Gagliardi and L. Wissink, "Ensuring Effective Judicial Protection in Case of ECB Decisions Based on National Law", *op. cit.*, pp. 48-49.

(89) *Caisse régionale de credit agricole mutuel Alpes Provence v. ECB*, joined cases T-133/16 to 136/16, EU:T:2018:219, para. 84.

(90) *Crédit mutuel Arkéa v. ECB*, case T-712/15, EU:T:2017:900, para. 132; *Crédit mutuel Arkéa*, case T-52/16, EU:T:2017:902, para. 131. Note that the Court of Justice only recalls the General Court's statement that it is for the Court to rule on the scope of the national law provisions in such case (*Crédit mutuel Arkéa v. ECB*, joined cases C-152/18 P and C-153/18 P, EU:C:2019:810, para. 99). *Cf.* E. Gagliardi and L. Wissink, "Ensuring Effective Judicial Protection in Case of ECB Decisions Based on National Law", *op. cit.*, p. 43.

(91) For a discussion about the difference between the role of national law as a "question of fact" and as a "question of law", see: M. Prek and S. Lefèvre, "The EU Courts as 'National' Courts – National Law in the EU Judicial Process", *op. cit.*, pp. 371-374.

(92) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, p. 156. For a more detailed analysis of the Court's approach in relation to questions of law regarding national law, see: E. Gagliardi and L. Wissink, "Ensuring Effective Judicial Protection in Case of ECB Decisions Based on National Law", *op. cit.*, p. 50.

(93) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, pp. 156-157. *Cf.* E. Gagliardi and L. Wissink, "Ensuring Effective Judicial Protection in Case of ECB Decisions Based on National Law", *op. cit.*, pp. 50-51. See also P. Dermine and M. Eliantonio, "Case Note – CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17 Silvio Berlusconi v. Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and others, EU:C:2018:502", *op. cit.*, p. 251.



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## *Conclusions*

This chapter discusses some of the main cooperation arrangements within the SSM to illustrate the far-reaching shared administration in place for prudential banking supervision and its legal challenges.

The close cooperation between the ECB and NCAs results in complex administrative procedures and in the possible involvement of both the EU and national legal orders in the SSM's decision-making procedures. Due to the lack of a single set of European administrative standards and the still relatively separate judicial orders, this raises some quite interesting legal challenges.(94) Although the far-reaching shared administration seems necessary to ensure effective banking supervision, it becomes more challenging to ensure effective judicial protection.

It is still uncertain in some cases which of the administrative standards have to be complied with by the ECB and NCAs, and if additional national protection can be maintained. Furthermore, in certain procedures it is not yet clear which court is competent to review which part of the procedure. This seems to be particularly complex in cases of informal but closely intertwined cooperation such as in Joint Supervisory Teams. To add an additional layer of complexity, the ECB must also apply national laws transposing the relevant Union law and EU Courts may thus face cases in which they need to apply and interpret national laws. But, on a positive note, as more of these complex cases are brought to the Court, more of these challenges are clarified, and, step by step, the path towards effective judicial protection in these complex composite procedures can be seen.

(94) L. Wissink, *Effective Legal Protection in Banking Supervision – An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism*, *op. cit.*, p. 320.



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# CHAPTER 7
# Administrative cooperation and risk management

**Emilie Chevalier**

## *Introduction: risk regulation and administrative authorities*

As with any public entity, risk management in the European Union is a central issue. Faced with the rise of risks, whether natural or technological, public intervention is essential to respond to a growing public demand for safety.(1) This need is not specific to one area. However, the question of risk management becomes more acute when risks may impact human health and/or the environment.(2) In such cases, experts are given a central role, and the decision-making power of public authorities is thereby more limited. Nevertheless, from the perspective of a democratic society, public intervention is essential in the risk management stage, and decision-making procedures must include steps to collect expert opinions, on the basis of which decisions must be taken.

Within the framework of European Union law, risk is primarily regulated by the EU legislator itself. The need to define a regulatory approach to risk at European level is justified by several factors. First of all, the imperatives of the internal market and its logic justify intervention at EU level. A national approach of the different Member States individually could be seen as a source of obstacles for the internal market. On the basis of Article 36 TFEU, Member States may invoke the imperative of protecting human health and the environment to derogate from the fundamental freedom of movement of goods.(3) In this context, a national conception of risk prevails, which however must remain

(1) R. Löfstedt, *Risk Management in Post-trust Societies*, New York, Palgrave Macmillan, 2005.

(2) It is interesting to note that, under European Law, risk is mainly managed when it impacts human health, rather environmental protection, see for example the enforcement of the precautionary principle in the Court's case law: E. Brosset, "Le juge de l'Union et le principe de précaution : état des lieux", 51 *Rev. trim. dr. eur.*, 2015, p. 737; A. Alemanno, "The Shaping of the Precautionary Principle by European Courts – From Scientific Uncertainty to Legal Certainty", in L. Cuocolo and L. Luparia (eds), *Valori Costituzionali e nuove politiche del diritto*, Cahiers européens, 2007, pp. 11-24.

(3) See also Art. 114 TFEU.



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compatible with Union law, and is subject to review by the Union courts. Secondly, the Union authorities, in their action, are subject to the principles of prevention and precaution.(4) While the former is intended to intervene to manage scientific certainty, *i.e.*, regulating an existing and identified risk, risk management most often involves the application of the precautionary principle. Under this principle, in the event of scientific uncertainty, an action or a product may not be authorised. However, this principle does not as such prevent public authorities from acting, noticeably by taking additional protective measures (interim measures, for example).(5) Lastly, the regulation of risk at European level also responds to the challenge of building public trust in European policies. The Union was indeed encouraged to extend its risk regulation processes, particularly following the BSE scandal.(6)

Secondary legislation therefore defines procedures to implement the principles of prevention and precaution, especially through authorisation regimes, which are applied to different subject matters considered as presenting a risk for the environment and/or human health. While the intervention of the European legislator occurs at the risk regulation stage, EU and national administrative authorities act instead in the management of the risk. These administrative authorities are responsible for implementing the procedures defined, often in a very precise manner, at legislative level. The exercise of implementing powers has led to the definition of administrative cooperation mechanisms, involving national and EU authorities. It is not possible within the scope of this chapter to provide an exhaustive analysis of the administrative cooperation mechanisms applicable to risk management. In order to analyse these mechanisms, this chapter will draw on examples from the regulation of medicines, chemicals and plant protection products.(7)

What characterises these areas from a substantial point of view is that these activities present a risk for human health, beyond their possible impact on the environment. That is why these areas are scrutinised by public opinion and have been subject to much discussion in society. The choice of these areas is justified by their topicality on the European scene, and by the fact that they

(4) See *ibid.*, Art. 191 and 168.

(5) M. Van Asselt and E. Vos, "The Precautionary Principle and the Uncertainty Paradox", 9 *Journal of Risk Research*, 2006, pp. 313-336; J. Zander, *The Application of the Precautionary Principle in Practice – Comparative Dimensions*, Cambridge, Cambridge University Press, 2010.

(6) E. Vos, "EU Food Safety Regulation in the Aftermath of the BSE Crisis", 23 *Journal of Consumer Policy*, 2000, pp. 227-255.

(7) The chapter will not deal with risk management in other areas or polices, such as food safety (see on the question of GMOs: R. Lanceiro and M. Eliantonio, "The Genetically Modified Organisms' Regime – A Playground for Multi-Level Administration and a Nightmare for Effective Judicial Protection?", *22 German Law Journal*, pp. 371-390), nuclear policy, air emissions, climate change (see in this volume the chapter by S. Galera Rodrigo).



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each respond to a specific risk management issue: the authorisation regimes for medicinal products aim to guarantee safety and reliability, and ultimately confidence, in products that are intended to bring benefits to individuals; plant protection products and chemical substances, on the other hand, are regulated so as not to harm human health, and the environment.

The implementation of administrative cooperation mechanisms in this context responds to a concern for both the efficiency and legitimacy of administrative action. Their purpose is to help ensure a high level of protection of human health and the environment, while ensuring compliance with the requirements of the internal market. However, what is important to stress here is the diversity of the options chosen, even if they all converge around an authorisation model. Regulation 1107/2009 concerning the placing of plant protection products on the market(8) aims to define a dual authorisation process, one for substances and the other for plant protection products. The REACH Regulation, which concerns chemical substances, takes a substantially different approach.(9) The primary objective of this regulation, which is the first of its kind at international level, is to collect data on the intrinsic properties of certain chemical substances. The transmission of data to the European Chemical Agency (ECHA) is a prerequisite for marketing the substance in the European area, according to the "no data, no market" principle.(10) Thus, chemical substances, at the request of private operators, must be registered.(11) The procedure also includes an evaluation phase, which concerns only a limited number of substances. This evaluation is related to the dossier itself and to the substance. Substances of very high concern are subject to an authorisation process, which may lead, if needed, to the adoption of restrictive measures. Finally, European legislation on medicinal products aims to establish prior authorisation procedures before they are placed on the European market.(12)

The analysis of administrative cooperation mechanisms in these fields shows that they constitute a means of building a common risk management system, while allowing for differentiation. The aim of this chapter is to examine the

(8) Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market, [2009] OJ L 309/1.

(9) Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the registration, evaluation, authorisation and restriction of chemicals (REACH), establishing a European Chemicals Agency, [2006] OJ L 396/1.

(10) Art. 5 Regulation (EC) No. 1907/2006.

(11) *Ibid.*, Art. 6 and ff.

(12) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, [2001] OJ L 311/67; Regulation (EC) No. 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, [2004] OJ L 136/1.



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actors and mechanisms of administrative cooperation in the field of risk regulation. It will show, first, that administrative cooperation pursues the objective of building a common risk management system by associating various institutional actors and giving a prominent role to expertise. Secondly, it will show that, in order to achieve its aims, administrative cooperation takes mainly the form of exchange of information and the adoption of authorisation procedures and their monitoring, while attaching a strong importance to the procedural framework. Finally, the chapter will consider the question of the judicial review of actions taken by national and EU authorities in this area and will show that this question remains largely unresolved.

## *I. Actors of administrative cooperation*

In terms of risk management, the designed authorisation procedures provide for the involvement of actors at national and European level. These procedures are largely part of vertical co-administration mechanisms, though they include, to some extent, a horizontal dimension. The main administrative actors involved are not surprising: the Commission and the competent national authorities. However, there are some peculiarities in the types of actors involved, which reflect both the presence of experts in the decision-making process and the ongoing involvement of Member State representatives at EU level.

### A. The main administrative actors

Firstly, among the main actors, and insofar as vertical cooperation mechanisms are concerned, the Commission plays a key role. Traditionally, the Commission has a pivotal role in the implementation of administrative cooperation at its various stages: gathering information, adopting measures, assessing emergency measures and, more broadly, ensuring the proper implementation of the legislative regime. It is interesting to note that, although the Commission is often responsible for adopting the decisions, especially in the case of central authorisation procedures, *i.e.*, in case of authorisations adopted at the European level, it is not the only authority that intervenes in this context, including at European level.(13)

Secondly, national administrative authorities are involved in various ways, mainly in the collection and transmission of information, as well as in the assessment and decision-making phases, especially in the context of national authorisation procedures. Furthermore, even in the case of procedures centralised at the EU level, national authorities play a part. These authorities are

(13) See below Section II., A.



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most often administrations that are specialised in a given subject or include scientific experts in their internal functioning. Furthermore, as will be explained below, the national administrative authorities have different roles depending on their position in the different authorisation procedures. They can either be the authorities of the Member State responsible for the authorisation, *i.e.*, those of the so-called reference Member State, or those of a Member State that is consulted during the decision-making process.(14)

### B. The need for expertise: the role of European agencies

Other institutional actors, which are also common in the procedures for implementing EU risk regulation legislation, are the European agencies. Their aim, in this area, is to support and inform decision-making by providing scientific expertise, and in limited cases, to adopt decisions in highly technical areas. Three agencies are involved in the areas studied in this chapter: the European Medicines Agency (EMA),(15) the European Chemical Agency (ECHA)(16) and the European Food Safety Authority (EFSA).(17) The presence of these agencies allows the intervention of experts at European level, in addition to the national administrative authorities. For example, following secondary legislation, the European Medicines Agency has the task of ensuring "a single scientific assessment of the highest possible standard of quality, safety and efficacy of high-technology medicinal products".(18) Similarly, the European Food Safety Authority "should act as an independent scientific point of reference for risk assessment and thus contribute to the proper functioning of the internal market".(19)

The creation of an agency and its involvement in the procedure of enforcement of EU secondary legislation is a sign of the recentralisation of the process. Indeed, according to the principle of indirect administration, the execution of EU norms is part of the national competence. However, in line with the principle of subsidiarity within the EU, when "uniform conditions for implementing legally binding Union acts are needed" (Art. 291(2) TFEU), the Commission is responsible for the implementation process.(20) The creation of an agency

(14) See for example Art. 40 Regulation (EC) No. 1107/2009.

(15) Regulation (EC) No. 726/2004.

(16) Regulation (EC) No. 1907/2006.

(17) Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, [2002] OJ L 31/1.

(18) Preamble, pt 19 Regulation (EC) No. 726/2004.

(19) Preamble, pt 34 Regulation (EC) No. 178/2002.

(20) M. Scholten, "Mind the Trend! Enforcement of EU Law has been Moving to 'Brussels'", 24 *Journal of European Public Policy*, 2017, pp. 1348-1366.



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is sometimes part of this move to centralise the enforcement of Union law, in particular to provide technical expertise to the Commission in the exercise of its enforcement powers. The EU legislator has structured the internal organisation of the agencies so that the Member States are represented. Although the powers of the agencies covered in this chapter are different,(21) their structure is similar. Member States are involved in the decision-making procedure and experts from the various Member States are represented on the agencies' committees, intervening in various capacities during the authorisation procedure, whenever expertise is required. In the case of the European Medicines Agency, the Committee for Medicinal Products for Human Use(22) consists of a chairperson elected from among its members, one appointed member and one additional representative from each Member State, as well as from EFTA member countries, and up to five co-opted members chosen for their scientific competence. Generally, the Member State representatives are drawn from the national competent administrative authorities or are independent experts from the Member States.

Within the ECHA, in addition to the Risk Assessment and Socio-Economic Analysis Committees,(23) which are involved in the authorisation processes, there is also the Member State Committee "which is responsible for resolving any differences of opinion on draft decisions proposed by the Agency or the Member States under Title VI and on proposals for the identification of substances of very high concern to be subjected to the authorisation procedure under Title VII".(24) There is also a forum for exchange of information on implementation "which shall coordinate a network of Member State authorities responsible for the enforcement of this Regulation".(25) The Member States are therefore closely involved in the composition of the committees, either directly or indirectly, although their representatives must act independently within the agency. The agencies include in their internal organisation are therefore composed of a number of several committees, which intervene at different stages, in different respects, when the agency concerned is involved. They are usually in charge of the scientific assessment for which the Agency is responsible. The Agency's secretariat may also have a role in providing scientific advice and information.

(21) M. Chamon, *EU Agencies – Legal and Political Limits to the Transformation of the EU Administration*, Oxford University Press, 2016; E. Chiti, "Agences, administration indirecte et coadministration", in J.-B. Auby and J. Dutheil de la Rochère (eds), *Traité de droit administratif européen*, Brussels, Bruylant, 2022, p. 307.

(22) Art. 62 Regulation (EC) No. 726/2004.

(23) Art. 76 Regulation (EC) No. 1907/2006.

(24) *Ibid*.

(25) *Ibid*.



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Finally, concerning the EFSA, the organisation is slightly different. The Member States are represented in the Advisory Forum.(26)

As regards their powers, the situation differs between agencies. The European Medicines Agency acts in an advisory capacity during the authorisation procedure,(27) as does the European Food Safety Authority.(28) ECHA intervenes instead directly in the registration, evaluation and authorisation of substances.

Finally, in addition to the agencies, but linked to their role of expertise, the Member States also intervene through working groups or evaluation groups, organised with the Agency, as is the case with glyphosate, for example.(29) In this case, a small group of Member States is responsible for evaluating the substance, which will serve as the basis for the decision taken at European level.

The actors involved in the administrative cooperation mechanisms are thus different from an institutional point of view, but what they have in common is that they have a level of expertise, which is deemed adequate to participate in the authorisation procedures. Their roles are different, because while some have binding powers, others do not. However, it is the articulation and coordination of their interventions that is key to the effectiveness and legitimacy of the decisions taken within the European Union. However, the interaction of many different actors from different legal orders also adds to the complexity of the procedure and may make it difficult for citizens to understand it.(30)

## *II. Diversity in the objects of administrative cooperation*

In the fields under analysis, different procedures coexist, each with its own purpose. Grounded on the prevention and precautionary principles, certain procedures are part of the authorisation process for the medicinal products, substances or products concerned. In this case, the administrative cooperation mechanisms relate not only to the adoption of the authorisation decision itself,

(26) Art. 27 Regulation (EC) No. 178/2002.

(27) Art. 5 Regulation (EC) No. 726/2004.

(28) Art. 23 Regulation (EC) No. 178/2002.

(29) See Art. 7(2) Regulation (EC) No. 1107/2009. In the process of renewal of the authorisation of glyphosate, "the European Commission appointed four Member States – France, Hungary, the Netherlands and Sweden – to act as joint 'rapporteurs' and carry out the initial assessment. This group is known as the Assessment Group on Glyphosate (AGG)", see https://www.efsa.europa.eu/en/topics/topic/glyphosate.

(30) For example, during the COVID health crisis, the authorisations for the various vaccines were granted by the Commission, and not formally by the European Medicines Agency, even though the press reported that it was a decision adopted by the Agency itself. The Agency's opinion is the basis, in the great majority of cases, for the Commission's decision, but, formally, the Commission is not bound by the opinion and is responsible for the authorisation.



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but also to the exchanges of information that may precede or follow it, as part of the monitoring of the authorisation, or the settlement of disputes. The mechanisms cooperation are based on two alternatives, *i.e.*, national or European authorisation procedures.

## A. The national authorisation procedures

In line with the principle of indirect administration, according to which the implementation of EU law is primarily within the competence of the Member State, the implementation of EU law, *i.e.*, in this case the adoption of authorisations for substances or products, is first carried out through a procedure at national level. In the areas concerned, even if there is a strong trend towards centralisation, national authorisation procedures remain, allowing certain adaptations in the level of acceptable risk within each Member State.

In the case of the authorisation of pharmaceutical products, a national authorisation procedure is foreseen, but its scope is relatively limited and its application exceptional in practice.(31) The scope of this national procedure is defined by default: it applies to medicinal products that are not covered by any other procedures, *i.e.*, when the products do not fall within the scope of the centralised procedure or are marketed in only one Member State.(32) In that case, the procedure for adopting the authorisation is the sole responsibility of the Member State. However, even in this case, there is a need for cooperation between competent administrative authorities. Where national authorisations are required for the same product in different Member States, a Member State may decide to suspend the examination of the application, pending the evaluation report, which will then be sent to it once it has been drawn up.(33) In the event that the medicinal product has already been authorised in another Member State, the national authorities may request immediate communication of the assessment report. They have the option of recognising the decision of the other Member State and the summary of product characteristics or refusing to recognise the authorisation if they consider that the authorisation entails risks to health.(34) The dialogue between national competent authorities is used here to avoid duplication and the risk of contradictions, and preserve the effectiveness of the authorisation procedure, as an authorisation issued on the basis of a national procedure may produce effects in other Member States.

(31) For an extensive analysis of authorisation procedures of medicines in EU, see S. Röttger-Wirtz and M. Eliantonio, "From Integration to Exclusion – EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals", *10 European Journal of Risk Regulation*, 2019, pp. 393-411.

(32) *Cf.* Arts. 6, 17 and 18 Directive 2001/83/EC; Art. 3(1) Regulation (EC) No. 726/2004.

(33) Art. 17(2) Directive 2001/83/EC.

(34) Art. 18 Directive 2001/83/EC.



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In the field of plant protection products, the placing on the market of such a product on the territory of a Member State is also conditional upon obtaining a marketing authorisation for that Member State, which is therefore a national decision.(35) The requirements for applicants are set out in Article 29 of Regulation 1107/2009. Here too, cooperation between States is important, especially since, on the basis of the Regulation, the assessment is enforced by zones, which are defined by Annex I of the Regulation. Thus, while the applicant may choose to submit their application for authorisation to a Member State, another Member State belonging to the same zone may agree to examine the application, and the applicant will be informed.(36) The other Member States may then cooperate "in order to ensure a fair distribution of the workload", noticeably by making information available.(37) It is the examining Member State that has the responsibility for the assessment, while other Member States refrain from carrying out such an assessment on their own. Similarly, where an application has been submitted in more than one zone, Member States must coordinate when assessing the application, with regard to data which are not related to environmental and agricultural conditions.(38) The peculiarity of this field is that the authorisation system falls somewhere between a European procedure and a purely national one, since the Member States must coordinate with each other. Indeed, the assessment procedure is enforced at the zone level, involving the Member States authorities. Hence, the common assessment is a decisive part of the procedure. The authorisation, however, is a national decision, even if it is based on the common findings of several authorities. Finally, it should be noted that a Member State may refuse authorisation of the plant protection product in its territory if, due to its particular environmental or agricultural characteristics, there are reasons to consider that the product in question still presents an unacceptable risk to human or animal health or the environment. That Member State shall immediately inform the applicant and the Commission of its decision and provide the technical or scientific evidence supporting that decision.(39)

## B. The European procedures of authorisation (or approval)

Within centralised authorisation procedures, the European Commission has the main responsibility. Centralisation is seen as a guarantee of legal certainty and bureaucratic simplification for economic operators. Indeed, once

(35) Art. 28 Regulation (EC) No. 1107/2009.
(36) *Ibid.*, Art. 35.
(37) *Ibid.*
(38) *Ibid.*
(39) Art. 36(3) Regulation (EC) No. 1107/2009.



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an authorisation is adopted centrally, it is valid for the entire territory of the Union,(40) meaning that the operators would not have to go through the authorisation process in each Member State. However, even within the centralised procedures, Member States authorities are involved. Indeed, the decision-making processes for evaluation, registration or authorisation are articulated in different stages, which are the responsibility of the national or European levels, together with authorities of the other level, bound by the principle of loyal cooperation.(41)

On the basis of Regulation 726/2004, the authorisation procedure must be carried out at European level when medicinal products listed in the Annex to the Regulation are concerned, and optionally in other cases.(42) The authorisation decision is the responsibility of the Commission, with the involvement of the European Medicines Agency. The application for authorisation is submitted by the applicant to the Agency. The Committee for Medicinal Products for Human Use must issue an opinion on the application, which is sent to the Commission, the Member States and the applicant within 15 days of its adoption. This opinion is accompanied by a report describing the assessment of the medicinal product and stating the reasons for its conclusions, on the basis of which the Commission prepares a draft decision, which is sent to the applicant and the Member States. The Member States then have the opportunity to submit their written comments on the draft decision. The final decision is adopted through the comitology procedure (examination procedure).(43)

On the basis of Regulation 1107/2009, the approval process for active substances, which is different from the national authorisation process for plant protection products, is carried out at European level. This procedure is in the hands of the European Commission, with the involvement of the European Food Safety Authority. Nevertheless, in this case too, the national level is involved in the procedure with different roles. The application for approval (or modification of approval) of an active substance, constituted by a dossier in accordance with the requirements of the Regulation, must be submitted by the operator to the authorities of a Member State, which is then referred to as the rapporteur State. The application is examined by that Member State, unless another Member State agrees to take it on. The assessment of an application may also be entrusted to several associated Member States under a system of cooperation between co-rapporteurs. The Member States are therefore responsible for carrying out an initial assessment. This evaluation report is then sent,

(40) Except in case of derogation, see *infra*.
(41) See, for example, Art. 122 Regulation (EC) No. 1907/2006.
(42) Art. 3 Regulation (EC) No. 726/2004, *id.*
(43) Arts. 10 and 87 Regulation (EC) No. 726/2004.



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under the responsibility of the European Food Safety Authority, to the other Member States and the applicant. It is also the Agency that is responsible for carrying out a public consultation process.(44) EFSA monitors the evaluation process, and drafts the opinion, which is transmitted to the Commission. Finally, it is the Commission, following the comitology procedure (examination procedure), which adopts an approval decision in the form of an implementing regulation.(45) Thus, in the context of the centralised procedure, the Member States are not merely receivers of the applications for approval of substances. It is the Member States that must decide on the admissibility of the application on the basis of the information transmitted.(46) They also participate in the assessment of the application, potentially in a grouped manner. However, scientific evaluation remains the responsibility of the European level.

Concerning the registration process of substances, based on the REACH Regulation, the process is centralised in the hands of the ECHA. The prominent role of the Agency distinguishes this administrative cooperation process from the procedures discussed above. The granting of more important decision-making prerogatives to the Agency is explained by the logic of the REACH regime, which is based primarily on the need to collect and make available data on chemical substances. The ECHA is responsible for checking the completeness of the registration file submitted by the economic operator. Thereafter, the Agency notifies the competent authority of the Member State concerned, *i.e.*, the State of the manufacturer or of the importer, that the following information is available in the Agency's database.(47) The Agency also has the power to check the compliance of registrations with the Regulation's requirements. Here, communication is organised between the Agency and the competent national authorities, as soon as the list of priority substances concerned by the evaluation is defined, "in order to ensure a harmonised approach".(48) Subsequently, the States will share the substance evaluation process. In the event of disagreement between them, a designation procedure is provided for.(49) The Agency is responsible for coordinating the evaluation process.

Finally, concerning the authorisation procedure provided under the REACH Regulation, the process is centralised, for reasons linked to the internal market and the need for uniformity.(50) The authorisation procedure follows the

(44) Art. 12 Regulation (EC) No. 1107/2009.

(45) *Ibid.*, Art. 13.

(46) *Agrochem-Maks d.o.o. v. Commission*, case T-574/18, EU:T:2020:226.

(47) Art. 20 Regulation (EC) No. 1907/2006.

(48) *Ibid.*, Art. 44.

(49) *Ibid.*, Art. 45(3).

(50) *Ibid.*, Art. 55: "The aim of this Title is to ensure the good functioning of the internal market while assuring that the risks from substances of very high concern are properly controlled […]".



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following steps. The Commission is competent to decide on applications for authorisation, as well as on the revision or withdrawal of the authorisation.(51) Applications for authorisation shall be submitted by the manufacturer(s), importer(s) or user(s) of the substance to the ECHA.(52) The draft opinions are prepared by the Committee for Risk Assessment and the Committee for Socio-economic Analysis inside the ECHA. After submitting the opinion to the applicant,(53) the opinion is forwarded to the Commission and the Member States, which may submit comments, as may the applicant. On the basis of the Agency's opinions, the Commission draws up a draft decision, which will be adopted under the comitology procedure (examination procedure).

From the above analysis, it emerges that the various procedures defined by secondary legislation aim to ensure at least a minimum level of administrative cooperation so that, even in the case of national procedures, the various actors involved in the field are kept informed, because a national decision can have effects in other Member States. At the same time, the existence of a centralised procedure at European level does not exclude the presence of several forms of administrative cooperation. It is always important that the national level is involved at the European level, even if to different degrees. Moreover, one effect of administrative cooperation is to ensure that national decisions too are based not only on the same scientific data, but also on the same assessments that are made on this basis. The goal is then to promote a convergent approach to risk management.

### C. Cooperation in dispute settlement

In the field of risk regulation, particular attention is paid to the risks of contradiction both at the risk assessment and at the authorisation stage of the products and substances concerned.

An original feature of the field of regulation of pharmaceuticals is the existence of a mechanism aimed at settling disputes between the actors regarding risk assessment. More specifically, this mechanism, the so-called referral procedure, comes into play when divergent decisions exist among Member States regarding the authorisation of a medicinal product, *i.e.*, when the same medicinal product is the subject of several applications for marketing authorisation and the Member States have adopted divergent solutions.(54) A Member State,

(51) Art. 61 Regulation (EC) No. 1907/2006.

(52) Art. 62 Regulation (EC) No. 1907/2006 provides the applicable requirements to the application.

(53) See below for the notice and comment procedure.

(54) See for more details S. Röttger-Wirtz and M. Eliantonio, "From Integration to Exclusion – EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals", *op. cit.*



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the Commission or the marketing authorisation holder may refer the matter to the Committee in accordance with the procedure laid down in Article 32 of the Directive,(55) or in specific cases of Community interest. The Committee is then asked for an opinion. The operation of the Committee is governed by Article 32, which sets out a number of procedural requirements. It shall give its opinion within 90 days (which may be extended). It may appoint a rapporteur, and independent experts to advise it. The petitioner shall be heard, either in writing or orally. The committee must notify its opinion to the authorisation holder. The latter has 15 days to state their intention to appeal to the Agency, which can be done within 60 days. The opinion must be reasoned. Within 30 days of receiving the opinion, the Commission prepares a draft decision on the application. The Commission may also, exceptionally, adopt a decision which is not in accordance with the opinion of the Agency, the draft decision being sent to the Member States and the applicant.

Under the REACH regime, Article 95 provides for a mechanism for the REACH Agency to quickly identify potential sources of conflict in the assessment of the hazard of a substance. It ensures that any relevant scientific or technical information is shared and identifies the scientific or technical issues that could give rise to a difference of opinion. The Agency and the national authority concerned shall cooperate to resolve the conflict or to present a joint document to the Commission clarifying the scientific or technical issues on which the divergence of views exists.

Risk management within the European Union has led thus to the creation of different procedures, stressing the importance of cooperation between administrative authorities both at European and national level, and at all stages of the process. The way the decision-making process is designed has obvious consequences concerning the effects of the decisions resulting of it.

## *III. The effect of the acts resulting from administrative cooperation*

The effect of the acts resulting from administrative cooperation, mainly authorisations, differs depending on whether these authorisations are the result of a "purely" national process or a European process. Indeed, in principle, the advantage of a "Europeanised" process, *i.e.*, a centralised one, is that it leads to the adoption of a single decision, namely a European authorisation, valid and enforceable in all Member States. On the contrary, in principle, a national decision only produces effects in the territory of the Member State concerned.

(55) See Art. 30 Directive 2001/83/EC.



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However, secondary legislation has intervened, both to make it possible, on the basis of the principle of mutual recognition, to extend the scope of the effects of a national decision, and to limit the scope of a European decision within certain Member States.

## A. The application of the principle of mutual recognition

The relevant European legislation provides for various mechanisms to extend the scope of a national decision beyond the borders of the Member State that adopted the decision.(56) Indeed, although the principle is that the marketing of a product within a Member State is conditional on obtaining an authorisation within that State,(57) marketing of that product may be authorised, subject to conditions, within another Member State.

In the case of pharmaceutical products, and in the event of national authorisation decisions, mutual recognition is not automatic, and the process is triggered at the request of the authorisation holder, who must first inform the reference State, *i.e.*, the Member State which granted the authorisation initially.(58) The reference State must then draw up an assessment report (or update an existing report) which it sends to the States concerned by the application. The holder of the first authorisation must submit a marketing authorisation application to the competent authority of the States concerned. The documents accompanying the application must be identical to those submitted during the first authorisation procedure. The European Medicines Agency is also informed and receives the file. Each Member State concerned must then recognise the authorisation granted by the reference Member State. The reference Member State, the other Member States, the Agency and the authorisation holder are informed by the State recognising the authorisation.(59) However, according to Article 29 of the Directive, it is possible for a Member State to oppose to mutual recognition on the basis of the existence of a risk to public health. It must then give reasons for its position and inform the reference Member State. While enforcing this exception, the emphasis is on cooperation between Member States, in order to limit unilateral claims. Indeed, under Article 29, a communication is established between the Member States, which are invited to "use their best endeavours to agree on the measures to be taken in respect

(56) Due to the European dimension of the decisions adopted under REACH Regulation, a reference to the mutual recognition principle is not relevant in this context.

(57) See for an exception, Art. 53 Regulation (EC) No. 1107/2009: "1. By way of derogation from Article 28, in special circumstances a Member State may authorise, for a period not exceeding 120 days, the placing on the market of plant protection products, for limited and controlled use, where such a measure appears necessary because of a danger which cannot be contained by any other reasonable means".

(58) Art. 28 Directive 2001/83/EC.

(59) *Ibid*.



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of the application". The holder of the authorisation shall be informed. In the event of disagreement between the Member States, the committee referred to in Article 32 of the Directive will be seized, after having informed EMA, in order to solve the conflict.

Under Regulation 1107/2009, Article 40 provides for a specific mechanism of mutual recognition of the authorisation of a plant protection product. According to this provision, mutual recognition can be used in three cases: "[T]he authorisation was granted by a Member State (reference Member State) belonging to the same geographical areas zone;(60) the authorisation was granted by a Member State (reference Member State) belonging to a different zone, provided that the authorisation applied for is not used for the purpose of mutual recognition in another Member State of the same zone; the authorisation was granted by a Member State for use in greenhouses or as a post-harvest treatment or treatment of empty premises or containers used for storage of plants or plant products or for seed treatment, irrespective of the zone to which the reference Member State belongs".(61) This process is initiated at the request of the authorisation holder. There is another possibility where a mutual recognition procedure can be used. Where a plant protection product is not authorised in a Member State and no application for authorisation has been made there, official or scientific bodies working in the field of agriculture or professional agricultural organisations may, under the mutual recognition procedure, apply, with the agreement of the authorisation holder, for an authorisation for the same plant protection product, the same use and use according to the same agricultural practices in that Member State. In this case, the applicant must demonstrate that the use of such a plant protection product is of general interest to the Member State of introduction. The authorisation holder may object to such process. However, the requested Member State may accept the application on grounds of public interest, considering the circumstances prevailing on its territory. If the authorisation is recognised, the recognition has the same scope as the initial authorisation.(62)

Article 52 of Regulation 1107/2009 also provides for a parallel trade mechanism, which allows a plant protection product authorised in one Member State (Member State of origin) to be introduced, placed on the market and used in

(60) Recital 29 Regulation (EC) No. 1107/2009: "To avoid any duplication of work, to reduce the administrative burden for industry and for Member States and to provide for more harmonised availability of plant protection products, authorisations granted by one Member State should be accepted by other Member States where agricultural, plant health and environmental (including climatic) conditions are comparable. Therefore, the Community should be divided into zones with such comparable conditions in order to facilitate such mutual recognition"; see also Annex 1.

(61) Art. 40 Regulation (EC) No. 1107/2009.

(62) *Ibid.*, Art. 4.



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another Member State (Member State of introduction) if the latter establishes that the composition of the plant protection product is identical to that of a plant protection product already authorised in its territory (reference product). The application shall be addressed to the competent authority of the Member State of introduction. The parallel trade permit is valid for the duration of the authorisation of the reference product and is granted to an operator, who becomes the holder of this permit, which is therefore nominative, which guarantees "a high level of protection of human and animal health and the environment, but is fully in line with the harmonisation of the rules on parallel trade operated by Regulation 1107/2009 in order to increase the free movement of plant protection products".(63) If the authorisation holder of the reference product applies for the withdrawal of the authorisation pursuant to Article 45(1) and the requirements of Article 29 are still fulfilled, the validity of the parallel trade permit shall expire on the date on which the authorisation of the reference product would normally expire.(64)

## B. Limiting the scope of European authorisations

EU primary law leaves room for Member States to not apply authorisation decisions issued at European level on the grounds of environmental or human health protection.(65) In the field of risk regulation, these reasons are all the more relevant. Indeed, even if the system of European authorisations is designed to determine an acceptable level of risk at European level and to manage it, it does not rule out any national claim to retain a more limited level of risk at national level. Administrative cooperation is particularly important in this case, in order to ensure that all the players involved in the European area are adequately informed and to avoid any purely unilateral behaviour, which may have an adverse impact on the internal market. These mechanisms are specifically regulated by the relevant European legislation, on the basis of provisions providing for safeguard clauses and emergency measures.

Under Regulation 1107/2009, this issue is regulated by Chapter IX on emergency situations. In the event of a serious risk to human or animal health or the environment, at the request of a Member State or on the initiative of the Commission, measures to restrict or prohibit the use and/or sale of the substance or product in question are adopted at European level.(66) Before taking

(63) *Agrimotion S.A. v. ADAMA Deutschland GmbH*, case C-912/19, EU:C:2021:173.

(64) However, it is possible to grant a parallel trade permit for a shorter period than the permit, see Case C-445/18 *Vaselife International BV et Chrysal International BV v. College voor de toelating van gewasbeschermingsmiddelen en biociden*, EU:C:2019:968.

(65) Arts. 114 and 36 TFEU.

(66) Art. 69 Regulation (EC) No. 1107/2009.



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such measures, the Commission shall examine the evidence available and may seek the opinion of the EFSA. In cases of extreme urgency, the Commission may, after consulting the Member State(s) concerned and informing the other Member States, adopt emergency measures on a provisional basis.(67) Eventually, if there is no reaction at European level, a Member State may take interim protective measures. It must immediately inform the other Member States and the Commission. These national measures remain applicable only as long as no measures have been adopted at European level. In this context, the Court of Justice recalled the importance of the principle of loyal cooperation, according to which the information transmitted by the Member State to the Commission shall be clear and complete.(68)

Article 129 of the REACH Regulation foresees a safeguard clause, based on the need to protect human health or the environment. The Member State may take the measures it deems appropriate, while informing the Commission, the ECHA and the other Member States immediately. The Commission thereafter takes a decision authorising these measures or requesting the State to withdraw them, and if necessary, adapting the authorisation. It is also possible for national authorities to require additional registration at national level, which would allow them to review the compliance with the safety requirements, and this remains compatible with internal market requirements.(69)

Administrative cooperation also exists to ensure the reliability and safety of authorised pharmaceutical products. A monitoring procedure is provided for in secondary legislation. In the course of an inspection, the competent national or European authorities may conclude that a manufacturer or importer no longer complies with the obligations imposed by EU law and may raise an alert.(70) The Committee for Medicinal Products for Human Use within EMA and the Commission shall be immediately informed of this. The Commission shall request the opinion of EMA within a time limit which it shall lay down according to the urgency of the matter, in order to examine the reasons given. As far as possible, the holder of the marketing authorisation for the medicinal product for human use shall be invited to submit oral or written explanations. Following the opinion of EMA, the Commission shall adopt the necessary

(67) *Ibid.*, Art. 70.

(68) *Union des industries de la protection des plantes v. Premier ministre e.a.*, case C-514/19, EU:C:2020:803.

(69) *Canadian Oil Company Sweden AB and Anders Rantén v. Riksåklagaren*, case C-472/14, EU:C:2016:171, para. 46.

(70) Arts. 19 and 20 Regulation (EC) No. 726/2004, which grant inspection powers to the supervisory authorities which are responsible "for verifying on behalf of the Community that the holder of the marketing authorisation for the medicinal product for human use or the manufacturer or importer established within the Community satisfies the requirements laid down in Titles IV, IX and XI of Directive 2001/83/EC".



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provisional measures, which shall apply immediately, and within six months a final decision shall be adopted. In case of extreme urgency, a State may decide on its own initiative, in case of the need to protect human health or the environment, to suspend the use on its territory of a medicinal product for human use authorised in accordance with the Regulation. The Member State must then inform the Commission and the EMA. The Commission shall then initiate the abovementioned procedure. Emergency measures may also be adopted at European level. In this context, the assessment made by the Committee is independent of that made at national level.(71)

The above goes to show that administrative cooperation continues once the authorisation has been granted, especially when a Member State wishes to restrict the scope of an authorisation on its territory. The objective of administrative cooperation, in this case, is to ensure as far as possible a common approach, and to avoid the adoption of unilateral measures. However, it is interesting to note that, while it is always possible to derogate from the scope of an authorisation, whether European or national, the possibilities are much more limited when it comes to a European authorisation. In addition, the design of a structured administrative cooperation favours the implementation of the mutual recognition principle.

## *IV. The procedural framework for administrative cooperation*

In accordance with the principle of procedural autonomy, the procedural requirements applicable to national procedures, in particular authorisation procedures, are defined by national law. However, as is well known, in the name of the principles of effectiveness and equivalence, the national margin of discretion in determining the relevant procedural requirements is limited, so that they do not constitute obstacles to the effective implementation of Union law.(72) What is interesting in the field of risk regulation is that particular attention is paid to certain procedural requirements, which are defined by European secondary legislation.(73) In addition to supporting the efficiency of the administrative procedure, procedural rights and mechanisms are also defined in such

(71) *PP Nature-Balance Lizenz GmbH v. Commission*, case C-82/15 P, EU:C:2015:796.

(72) *Rewe Zentralfinanz EG and Rewe Zentral AG v. Landwirtschaftskammer für das Saarland*, case 33/76, EU:C:1976:188; *Comet BV v. Produktschap voor Siergewassen*, case 45/76, EU:C:1976:191; D.-U. Galetta, *Procedural Autonomy of EU Member States – Paradise Lost?*, Berlin, Springer-Verlag, 2010.

(73) E. Chevalier, "L'article 41 comme source d'une harmonisation de la procédure administrative non contentieuse : la limitation du champ des possibles ?", in R. Tinière and C. Vial (eds), *Les dix ans de la Charte des droits fondamentaux*, Brussels, Bruylant, 2020, p. 341.



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a way as to build public confidence in the decision-making process and the decisions taken, which is an essential element for the regulation of the areas concerned.(74) Thus, procedures, both centralised and decentralised, are subject to the requirements of the general principle of good administration.(75) In addition, as some of the areas in question have an impact on environment, *i.e.* chemicals and plant protection products, the Aarhus Convention also creates obligations that will apply to all actors in the European administrative space.(76)

## A. Duty to act within a reasonable time

First of all, particular attention is paid in the legislation to time limits. While the right to obtain a decision within a reasonable period of time is a principle of good administration,(77) and the definition of this requirement traditionally leaves room for manoeuvre to the authorities concerned, the time limits to be respected are rather strictly defined in the procedures under analysis. Time limits are essential in this context because they establish the rhythm of the procedure. The definition of a reasonable time limit is part of an objective seeking to reconcile the search for the efficiency of the procedure with the guarantee of a diligent examination.(78) Secondary legislation is precise in this respect, defining the time limits for the various stages of the procedures: issuing the opinion,(79) consulting the Member States and issuing objections,(80) decision-making by the Commission or the national authorities.(81) Unsurprisingly, in the context of emergency procedures, the deadlines are shortened at all stages of the procedure and are strictly imposed on the Member States, even if in some cases,

(74) K. Kanska, "Towards Administrative Human Rights in the EU – Impact of the Charter of Fundamental Rights", 10 *European Law Journal*, 2004, p. 296; H. Peter Nehl, *Principles of Administrative Procedure in EC Law*, Oxford, Hart Publishing, 1999.

(75) The general principle of good administration is assimilated, from a substantial point of view to Article 41 of the Charter of Fundamental Rights, see E. Chevalier "L'application de l'article 41 de la Charte des droits fondamentaux dans l'ordre juridique interne ou le dialogue des juges au péril des droits fondamentaux", in *Entre les ordres juridiques – Mélanges en hommage à François Hervouët*, Poitiers, LGDJ, 2015, p. 59; *Technische Glaswerke Illmenau GmbH v. Commission*, case T-198/01R, EU:T:2004:222; H.C.H. Hofmann and A. Türk, "Policy Implementation", in H.C.H. Hofmann and A. Türk (eds), *EU Administrative Governance*, Cheltenham, Edward Elgar, 2006, p. 74. If the wording of Article 41 of the Charter, referring only to EU administration bodies, may limit the enforceability of the right to a good administration, there is no doubt, following the case law of the CJEU, that the general principle of good administration is applicable to both EU authorities and national authorities, when enforcing EU law.

(76) H.C.H. Hofmann, "Mapping the European Administrative Space", 13 *West European Politics*, 2008, p. 662.

(77) Art. 41 of the EU Charter of Fundamental Rights.

(78) *JCB Service v. Commission*, case T-67/01, EU:T:2004:3.

(79) See for example Arts. 9, 10 and 34 Regulation (EC) No. 726/2004.

(80) Art. 10 Regulation (EC) No. 726/2004.

(81) Art. 42 Regulation (EC) No. 1107/2009; Art. 45 Regulation (EC) No. 1907/2006.



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the time limits are not precisely defined. Often, the provisions provide that the national authorities must usually notify "without delay" or "as soon as possible" the decision to trigger emergency measures or safeguard clauses.(82)

## B. Impartiality and transparency

Secondly, the legislation pays attention to the requirement of impartiality,(83) especially in a scientific evaluation context. First, the guarantee of the independence of scientific assessments is fundamental to the legitimacy and quality of the authorisation process. Secondary legislation provides for specific requirements in this respect, which relate mainly to the functioning of the European agencies.(84)

For example, in the field of pharmaceutical authorisations, there is an obligation for the members of EMA to submit to a declaration of financial interests, and any "indirect interest likely to have a link with the pharmaceutical industry" must be declared,(85) before any participation in EMA's activities. This applies to all actors in the Agency: members and experts of committees, working groups and scientific advisory groups or *ad hoc* expert groups. The declaration of interests must be made publicly available. EMA has also itself taken steps in preventing conflicting interests. These requirements are reflected in internal codes of conduct, drawn up by the Agency itself.(86)

In addition, the agencies themselves have developed internal policies to reinforce the impartiality and independence of the experts involved in the consultation processes. A case-by-case examination must be carried out by the Agency concerned.(87) The General Court also recalled the scope of the principle of impartiality.(88) Thus, following the conception adopted by the European

(82) Arts. 69 and 70 Regulation (EC) No. 1107/2009.

(83) See Art. 41 of the EU Charter of Fundamental Rights; *Technische Universität München v. Hauptzollamt München-Mitte*, case C-269/90, EU:C:1991:438.

(84) N. Athanasiadou, E. Vos and L. Dohmen, *EU Agencies and Conflicts of Interests*, European Parliament, 2020, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621934/IPOL_STU(2020)621934_EN.pdf.

(85) Art. 63 Regulation (EC) No. 726/2004, *id.*

(86) See the code of conduct of EMA, available online at: https://www.ema.europa.eu/en/documents/other/european-medicines-agency-code-conduct_en.pdf.

(87) *Dr. August Wolff GmbH & Co. KG Arzneimittel et Remedia d.o.o. v. Commission*, case C-680/16 P, EU:C:2019:257, para. 38: "It is therefore for the Committee, in view of the rapporteur's own responsibilities, to be particularly vigilant in attributing that role in order to avoid giving rise to any legitimate doubt as to possible bias".

(88) *GE Healthcare A/S v. Commission*, case T-783/17, EU:T:2019:624, para. 172: "In that regard, it should be noted that the need for impartiality, required of institutions, bodies, offices and agencies in carrying out their missions, is intended to guarantee equality of treatment, which is at the heart of the European Union. That requirement is intended, inter alia, to avoid a situation where there could be a conflict of interest with regard to officials or agents acting on behalf of those institutions, bodies, offices and agencies. Having regard to the fundamental importance of ensuring the independence and probity of EU



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Court of Human Rights,(89) it is both objective impartiality and subjective impartiality that must be strived for.(90) The requirement of impartiality applies also to experts.(91) It is sufficient that a legitimate doubt in this respect exists and cannot be dispelled to impose the removal of an expert.(92)

Furthermore, closely related to the requirement of impartiality, the requirement of transparency is fundamental. First of all, it applies to the general functioning of European Agencies,(93) and it may be considered as requiring the availability of all information relating to experts and other members of the agencies, in particular as regards declarations of interest. In addition, the principle of transparency implies the right of access to information, which is guaranteed by the applicable secondary legislation. This right is safeguarded on various grounds depending on the type of information, or the authorities from which the information is requested. In the case of information held by a Union institution, body, office or agency, the request is governed by Regulation 1049/2001.(94) If the request is introduced before national authorities, national law will apply, but it must guarantee the effectiveness of the right of access to information. Furthermore, information on plant protection products or chemical substances, may be qualified as environmental information,(95) and as such access to it is guaranteed on the basis of the Aarhus

institutions and bodies as regards both their internal functioning and external reputation, the requirement of impartiality covers all circumstances in which an official or agent who is called upon to decide on an issue must reasonably consider that issue as being of such a nature as to be viewed by third parties as a possible source of impairment of his or her independence in that matter".

(89) ECHR, *Kyrianou v. Cyprus*, Application No. 73797/01.

(90) *Dr. August Wolff GmbH & Co. KG Arzneimittel et Remedia d.o.o. v. Commission*, case C-680/16 P, EU:C:2019:257, para. 27: "Thus, it is incumbent upon those institutions and bodies to comply with both components of the requirement of impartiality, which are, on the one hand, subjective impartiality, by virtue of which no member of the institution concerned may show bias or personal prejudice and, on the other, objective impartiality, under which there must be sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned".

(91) *Now Pharm AG v. Commission*, case T-74/08, EU:T:2010:376, para. 88: "It should also be recalled that the requirement of impartiality to which the Community institutions are subject also extends to experts consulted in that regard. In particular, where an expert is requested to give an opinion on the effects of a potential medicinal product, it is necessary for that expert to perform his task impartially".

(92) *Dr. August Wolff GmbH & Co. KG Arzneimittel and Remedia d.o.o. v. Commission*, case C-680/16 P, EU:C:2019:257.

(93) Art. 11 TEU.

(94) Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43.

(95) Art. 2(d) Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] OJ L 264/13; Art. 2(1) Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, [2003] OJ L 41/26; *Bayer CropScience SA-NV and Stichting De Bijenstichting v. College voor de toelating van gewasbeschermingsmiddelen en biociden*, case C-442/14, EU:C:2016:890.



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Convention, and the secondary legislation implementing it, which imposes such an obligation both on European(96) and on national authorities.(97) The specificity of the regime, compared to the general regime of access to documents, is that it imposes a very restrictive interpretation of the exceptions based in particular on confidentiality and business secrecy, aiming to promote the widest possible access to this type of information. The European Court of Justice has confirmed the need to ensure the widest possible access to information when environmental protection is at stake.(98) In addition, secondary law applicable to the fields under analysis provides for an obligation to make available to the public the opinions of the competent authorities, expert assessment conclusions and the data used for the decision-making process.(99) Finally, Article 13 of Regulation 726/2004 states that the assessment report on a medicinal product shall "include a summary written in a manner that is understandable to the public".

Another issue related to the Aarhus Convention is the guarantee of public participation. This aspect often remains underdeveloped in EU secondary legislation, but can be translated into increased procedural rights for stakeholders. It can, for example, take the form of notice-and-comment procedures, which enable stakeholders, such as economic operators, to be involved in the drafting of general soft law acts, taking various forms: code of conduct, guide to good practice, guidelines, recommendations, mediation, draft technical standards, opinions, etc. This is the case, for example, under REACH regulation. Registrants(100) and downstream users(101) have the right to comment, within a certain time limit, on the registration decision or the evaluation made by the ECHA, which, if relevant, "shall take any comments received into account and may amend the draft decision accordingly".(102)

(96) Regulation (EC) No. 1367/2006.

(97) Directive 2003/4/EC.

(98) Confidential treatment of information held by agencies should remain an exception, see, for example, *Arysta LifeScience Netherlands BV, formerly Chemtura Netherlands BV v. European Food Safety Authority*, case T-725/15, EU:T:2018:977; M. Peeters and S. Nóbrega, "Climate Change-related Aarhus Conflicts – How Successful are Procedural Rights in EU Climate Law?", 23 *Review of European, Comparative and International Environmental Law*, 2014, pp. 354-366; E. Chevalier, "L'accès aux informations environnementales des institutions de l'Union : une partition inachevée ?", 2 *Revue Aménagement – Environnement*, 2019, pp. 74-85.

(99) Under Regulation (EC) No. 1107/2009, see e.g., Arts. 10, 12, 13, 16; under Regulation (EC) No. 726/2004, see e.g., Arts. 11, 12, 14; under Regulation (EC) No. 1907/2006, see e.g., Arts. 54, 58, 64.

(100) Art. 3(7) Regulation (EC) No. 1907/2006: "[R]egistrant: means the manufacturer or the importer of a substance or the producer or importer of an article submitting a registration for a substance".

(101) Art. 3(13) Regulation (EC) No. 1907/2006: "[D]ownstream user: means any natural or legal person established within the Community, other than the manufacturer or the importer, who uses a substance, either on its own or in a mixture, in the course of his industrial or professional activities".

(102) Art. 50 Regulation (EC) No. 1907/2006, *id.*



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The system of administrative cooperation seems therefore to contribute to the circulation of common procedural standards in risk management procedures, including cases of national decision-making process.

## *V. Complexity of judicial review of acts resulting from administrative cooperation*

The mechanisms of administrative cooperation examined above foresee administrative authorities of different legal orders interacting in order to take the decision to authorise or refuse to authorise a medicinal product, substance or product. This creates a complex system whereby authorities of different legal systems, with different types of powers, binding or advisory, intervene in different stages of the decision-making process. Furthermore, as a result of the principle of mutual recognition, a decision adopted by an authority in one Member State can produce effects in another Member State. Such situations run counter to the traditional approach to the judicial review of administrative acts, according to which, by virtue of the principle of territoriality, the jurisdiction of the national court is limited to the acts of the legal order to which it belongs.(103) The solutions provided to this issue in terms of judicial review differ depending on the procedure used and the act to be challenged.

### A. The competent court to review a national decision

The national decisions that may be challengeable by applicants (e.g., holder of authorisation, competitor, NGOs) are various. According to their object and nature, the solutions regarding the designation of the competent court may vary. The adopted solutions, mostly defined by European law, and especially by CJEU case law, are expressions of an attempt to balance the right to an effective remedy and the principle of territoriality.

The starting point of the discussion is that it is possible to challenge the legality of a national decision to authorise or refuse authorisation before the court of the national legal order in question. Therefore, the conditions of admissibility and the scope of the court's review will be determined in accordance with national requirements and Articles 6 and 13 ECHR, as well as the requirements relating to the right to an effective remedy under Union law.(104) Hence, even in the case of a purely national procedure, such as that defined by

(103) E. Chevalier and O. Dubos, "The Notion of 'Transnationality' in Administrative Law – Taxonomy and Judicial Review", 22 *German Law Journal*, 2021, pp. 325-343.

(104) It is interesting to note that relevant secondary law rules may provide for the obligation for Member States to guarantee the right to challenge the national decisions before national courts, see e.g., Art.36(3) Regulation (EC) No. 1107/2009. See also M. Eliantonio and E. Muir "The Principle of Effectiveness – Under Strain?", 12 *Review of European Administrative Law*, 2019, pp. 255-265.



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Directive 2001/83, the final authorisation decision can be considered as an act implementing EU law, and therefore bound by the compliance with the relevant EU requirements. The same approach should also apply to challenge national decisions that are intended to limit the scope of an authorisation delivered by another Member State, meaning limiting or excluding the effect of the mutual recognition principle. However, in this case, the court's judicial review remains limited to the review of the national act and its national "components", noticeably its factual or legal grounds and cannot, in principle, be extended to examining the legal or factual grounds of the foreign act of authorisation.

Consequently, the national court cannot assess the legality of the decision of authorisation adopted by the authority of another legal system and benefiting from mutual recognition in the Member State of the national judge. By virtue of the principle of territoriality, these decisions will in principle be challengeable only before the court of the legal system that adopted the authorisation decision. In *the Astellas Pharma* ruling,(105) the Court of Justice had to deal with the question of access to a judicial remedy to challenge the refusal of a national authority of a Member State to recognize effect to a pharmaceutical marketing authorisation adopted in another Member State.(106) The Court confirmed that the holder of the marketing authorisation can challenge the refusal of that Member State only before its national courts. However, these courts are not able to review the authorisation decision itself. This solution also applies to decisions relating to the refusal of authorisation for parallel trade.(107) However, it should be noted that, even if access to a national court is open to challenge a decision, access to court remains complex concretely. Indeed, if the applicant wants to review the entirety of the cooperation process, they will have to introduce actions in different Member States, complying with different requirements, noticeably concerning standing or times limits.

Besides, it is still worth mentioning that the national court is not competent to review an EU decision, when an action is brought against a national decision grounded on that EU measure, by virtue of the CJEU's monopoly on the review of the legality of EU measures.(108) Hence, in an action against a national decision authorising a plant protection product, a challenge against the European authorisation of the substance (which may be regarded as a ground

(105) *Astellas Pharma*, case C-557/16, EU:C:2018:181. For an analysis in depth of the case law of the ECJ related to the judicial review of pharmaceutical decisions, see S. Röttger-Wirtz and M. Eliantonio, "From Integration to Exclusion – EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals", *op. cit.*

(106) On that situation, see above Section III.

(107) *Vaselife International BV et Chrysal International BV v. College voor de toelating van gewasbeschermingsmiddelen en biociden*, case C-445/18, EU:C:2019:968.

(108) Art. 19 TEU.



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for the national authorisation of a product) will require the national court to send a preliminary reference for validity.(109) Similarly, a national decision adopted following the emergency procedure, and approved by the European Commission, can be challenged before the national court, but the national court will not be competent to review the presence of an emergency condition and adequacy of the adopted measures, as these issues can only be reviewed by the CJEU.(110)

## B. The review of a European authorisation (or refusal of authorisation) decision

As an act having adverse effects, a Commission decision approving or refusing an authorisation for a product or substance is an act that can be challenged before the Union Courts under Article 263 TFEU. However, access to judicial review may be limited because of the standing requirements. The scope of review may also be limited because of the type of challenged acts.

### 1. Obstacles related to standing requirements

Standing requirements under Article 263(4) TFEU may be more or less difficult to fulfil depending on the type of challenged act and the nature of the plaintiff. When the action is brought against a decision of the Commission refusing to authorise a pharmaceutical product, or limiting the scope of the authorisation, or withdrawing a former authorisation, the operator having requested such authorisation or the competitor of the authorisation's holder does not need to prove any standing requirements, as the Commission measure is addressed to them.(111)

The situation is different and more difficult for an NGO, wanting to bring an action against a decision of approval or authorisation of a substance, a situation which is quite common as far as environmental protection may be affected by the decision. Indeed, such decisions, in the case of pesticides or chemical substances, are adopted through a Regulation or Implementing Regulation, hence an act of general scope. According to the current case law of the Court of Justice, the NGO would have to prove that that the act is of individual concern to it within the meaning of the so-called "Plaumann test",(112) making it impossible for such applicants to ever be able to challenge these measures before

(109) See following paragraph.

(110) Conseil d'État, 19 June 2015, ECLI:FR:XX:2015:371517.

(111) See, for example, concerning pharmaceuticals: *BASF AS v. Commiss*ion, case T-472/19, EU:T:2020:432.

(112) *Plaumann & Co. v. Commission*, case 25/62, EU:C:1963:17. M. Pagano, "Overcoming Plaumann in EU Environmental Litigation – An Analysis of ENGOs Legal Arguments in Actions for Annulment", *Diritto e Processo*, 2019, pp. 311-360.



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the EU Courts. Nevertheless, according to the Court, such situations do not, in principle, infringe the right to an effective remedy,(113) since the possibility to challenge these EU measures indirectly remains open: while challenging a national implementation measure of the EU act, the national court has the possibility to ask the Court of Justice to rule on the validity of EU measures. This is for example the case with pesticides. Indeed, following the authorisation given at the EU level, the national administrative authorities are competent to grant an authorisation for products containing the authorised substance.

However, in practice matters may become complicated. Actions related to this matter brought before the CJEU through the preliminary ruling of validity, showed that it is not self-evident that implementing measures may be adopted at the national level. In an action against a national marketing authorisation, a preliminary reference was sent to challenge Regulation 1107/2009 itself, the validity of which was eventually upheld by the CJEU.(114) This ruling confirms that it is always necessary for a national marketing authorisation measure (or a refusal thereof) to be adopted in order to eventually reach the Court of Justice. However, the *Region Bruxelles-Capitale* ruling shows that the adoption of such a measure is not automatic, and in this case, the action for annulment before the CJEU is, in principle, the only route open for judicial protection.(115) However, this route may in turn be closed because of the assessment of the direct concern by the CJEU.(116) The local entity's action against Implementing Regulation (EU) 2017/2324 concerning the renewal of the approval of the active substance glyphosate was indeed declared inadmissible for lack of standing.(117) The applicant had argued that a restrictive interpretation of standing would infringe their right to an effective remedy, since no national measure could be challenged at national level, because the Belgian authorities had decided to extend the existing authorisation, and not adopting a new decision, which would not be challengeable, in particular because of the time limit for appeal. Hence, an Implementing Regulation authorising a substance on the basis of Regulation 1107/2009 would have to be considered as a regulatory act which "does not entail implementing measures", so that the

(113) *Associazione Nazionale GranoSalus – Liberi Cerealicoltori & Consumatori (Associazione GranoSalus) v. Commission*, case C-313/19 P, EU:C:2020:869, para. 62.

(114) *Blaise*, case C-616/17, EU:C:2019:800.

(115) *Region Bruxelles-Capitale v. Commission*, case C-352/19 P, EU:C:2020:978.

(116) *Region Bruxelles-Capitale v. Commission*, case C-352/19 P, EU:C:2020:978, para. 64: "[…]that the condition of 'direct concern' means inter alia that the measure in question must directly affect the legal situation of the natural or legal person who intends to bring an action under the fourth paragraph of Article 263 TFEU. Thus, such a condition must be assessed only with regard to the legal effects of the measure, the possible political effects of that measure not having any bearing on that assessment […]".

(117) See E. Chevalier, "Réflexions sur un non-évènement : CJUE, 3 décembre 2020, Région de Bruxelles-Capitale c. Commission, C-352/19 P", 2 *Revue juridique de l'environnement*, 2021, pp. 335-347.



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applicant would only have to prove direct concern.(118) However, the Court considered that the test of direct concern was not met, arguing that the intervention of an act at Union level did not have the effect of calling into question all autonomy on the part of the competent national authorities.(119)

### 2. Limits resulting from the reviewing of scientific assessment

Beyond the question of the admissibility of the claim, it should be noted that the intensity of the European courts' review may also be limited. The field of risk regulation is characterised by the weight of scientific assessment in a context of uncertainty. Due to the complex nature of the assessment of the facts, especially when the assessment of scientific knowledge is involved, the review is usually limited to verifying "compliance with the procedural rules, the substantive accuracy of the facts adopted by the Commission, the absence of a manifest error in the assessment of those facts or the absence of misuse of powers".(120) Moreover, with regard to the manifest error of assessment, it is up to the applicant who challenges the decision authorising a pharmaceutical or a substance to provide evidence that may call into question the assessment of the facts and of scientific evidence. The court checks the existence of a scientific risk assessment that is as exhaustive as possible on the basis of available scientific opinions. Therefore, the court does not substitute its assessment of complex facts for that of the author of the act.(121) So, in this context, the control of procedural requirements is crucial.(122) The control of the respect of procedural guarantees aims to ensure "the scientific objectivity of the measures and to avoid the taking of arbitrary measures".(123) Nevertheless, cases of annulment on that ground are few.(124)

(118) Art. 263(4) TFEU: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which *is of direct concern to them and does not entail implementing measures*". [emphasis added] *Associazione Nazionale GranoSalus – Liberi Cerealicoltori & Consumatori (Associazione GranoSalus) v. Commission*, case C-313/19 P, EU:C:2020:869, para. 41.

(119) *Ibid.*

(120) *Taminco BVBA and Arysta LifeScience Great Britain Ltd v. Commission*, case T-740/18, para. 53; see also *Bayer CropScience AG e.a. v. Commission*, case T-429/13 et T-451/13, para. 83.

(121) *Taminco BVBA and Arysta LifeScience Great Britain Ltd*, case T-740/18, para. 54: "Subject to this examination of plausibility, it is not for the Court of First Instance to substitute its assessment of complex facts for that of the author of the act".

(122) *Taminco BVBA and Arysta LifeScience Great Britain Ltd*, case T-740/18, para. 55: "[…] it should be noted that, in cases where an institution has a wide discretion, the monitoring of compliance with the guarantees conferred by the Union legal order in administrative procedures is of fundamental importance. The Court has had occasion to specify that those guarantees include the obligation of the competent institution to examine, with care and impartiality, all the relevant factors of the case and to give adequate reasons for its decision".

(123) *Taminco BVBA and Arysta LifeScience Great Britain Ltd*, case T-740/18, para. 56.

(124) S. Röttger-Wirtz, "Case C-616/17 Blaise and Others – The Precautionary Principle and its Role in Judicial Review – Glyphosate and the Regulatory Framework for Pesticides", 27 *Maastricht Journal of European and Comparative Law*, 2020, pp. 529-542.



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Another issue in terms of judicial review of scientific assessment is the review of opinions issued by the European Agencies. As was shown above, the role of Agencies is decisive in the analysed procedures, even if in most of cases, they have "only" advisory powers. An opinion is a non-binding act, and as such cannot be subject to direct judicial review.(125) However, by virtue of the theory of complex acts, and as a preparatory act of the Commission's decision, its legality can be reviewed in the course of a claim against the final decision. Indeed, the court reviews the legality of the opinion, "insofar as this decision purely and simply confirms the EMA's opinion, the content of this opinion, as well as that of the assessment report on which it is based, forms an integral part of the reasoning of this decision, particularly with regard to the scientific assessment of the medicinal product in question".(126) In this case, the Court's review concerns "both the regularity of the committee's operation and the internal consistency and reasoning of its opinion".(127)

## *Conclusion*

The three areas analysed, *i.e.*, pharmaceuticals, pesticides and chemical substances, are subject to separate legal frameworks within European Union law with the aim of guaranteeing a certain degree of safety in the use of these products, as a guarantee of access to the European market. The analysis carried out above shows that risk regulation procedures concerning pharmaceuticals, chemicals and plant protection products are largely implemented through vertical co-administration mechanisms, involving the European and national levels at different stages of risk regulation.

The comparison of these three fields of risk regulation shows, first of all, the diversity in the systems of administrative cooperation foreseen by EU law. While the legislation tends towards a common objective, *i.e.*, the health and/or environmental safety of marketed products, the implementation methods set therein differs, ranging from national authorisations to European ones.

Another interesting lesson concerns the role of the European Agencies. In the three areas examined, their role is central because of the need for scientific expertise. However, it is interesting to note that this does not exclude the Member States, which are not only represented within the organisation of the Agencies, but are also closely involved at national level in collecting and

(125) *Vanda Pharmaceuticals Ltd v. Commission*, case T-211/18, EU:T:2019:892.
(126) *Vanda Pharmaceuticals Ltd v. Commission*, case T-211/18, EU:T:2019:892, para. 32.
(127) *Acino AG v. Commission*, case C-269/13 P, EU:C:2014:255.



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providing expertise. At the same time, the presence of the Agencies, with limited democratic credentials, may lead to risks in terms of legitimacy of the decision-making process.

Finally, linked to this previous point, the question of the legitimacy of the administrative cooperation process arises, in the light of its capacity to achieve the desired objective, namely an adequate risk regulation in the European Union. In the field of risk regulation, the design of administrative cooperation aims at fostering a concerted approach to risk management and, above all, to determining the level of risk acceptable for the European society. It strengthens the legitimacy of European risk management. The design of administrative cooperation is not neutral from a political point of view. However, at present, the European option may be criticised, noticeably concerning pesticides and chemical substances, as it may not be able to achieve an adequate level of protection, calling for more decentralisation and individualisation of solutions. In this respect, administrative cooperation cannot be the only key to achieving an expression of a common will. Administrative cooperation cannot solve everything, but it should not create new difficulties, such as opacity in the decision-making process.



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# CHAPTER 8
# Administrative cooperation in energy policy

**Oana Stefan**

## *Introduction*(1)

Energy is an area where multi-level governance manifests itself through all its aspects. First, energy is a topic essentially intertwined with other policy fields, as regulation should focus, in principle, on the so-called energy triangle: harmoniously combining conflicting goals such as the security of supply, competition, and environmental protection. Cross-sectoral cooperation between authorities is therefore vital; in fact, various legal bases were used for energy regulation, with a dedicated Article introduced only at Lisbon (Art. 194 TFEU). Second, while energy is an area of shared competence, coordination between the national, regional, and European levels of governance is required for a well-functioning grid capable to transmit energy to consumers in Europe. In other words, one must follow a multi-level logic if one wants to keep the lights on. Third, energy regulation involves high specialism, and needs to draw on the expertise of market participants. The system design has therefore to include close links between national regulators and private bodies.

The cooperation mechanisms are complex, not always formalized, and the products of cooperation can also manifest in non-legally binding, non-justiciable forms. Furthermore, the various domains of energy regulation are quite different, as inherent in the various markets.(2) Thus, EU regulation has concerned mostly gas and electricity and to a less extent oil, a market which is more international in nature. Nowadays, plans are underway to diversify energy sources, such as hydrogen.(3) Whilst regulation of all energy sources is interconnected, generalizations are impossible, and this chapter will use electricity regulation as a case study of administrative cooperation.

(1) The author thanks the editors for suggestions on previous drafts. This article states the law and the literature as they stood on the 10th of May 2023. All websites accessed 10 May 2023.

(2) P. Slot, "Energy and Competition", 31 *Common Market Law Review*, 1994, p. 515.

(3) Communication From the Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions REPowerEU Plan COM/2022/230 final.



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The road since the early days of national monopolies, state-planned systems, to today's Energy Union and the emerging decentralization of energy has been one of profound transformation. The current challenges raised by the climate crisis, as well as by rapid technological modernization, mean that the field is constantly evolving. The war in Ukraine has generated an immense upheaval in the gas market, which has in turn upset the prevailing model of green transitions premised on gas flowing in relatively unlimited supply. A reform is currently ongoing as a result in the gas sector, including a push towards promoting alternative sources, such as hydrogen,(4) but overall energy legislation is likely to change as this book goes to press(5). With this caveat in mind, the chapter first explains the roots of these collaborations and the actors involved, all a product of an ever-evolving regulatory field of shared competences. It then investigates the mechanisms in place to foster cooperation, unveiling certain legal problems that warrant further research and leave room for reform.

## *I. The regulatory framework: subsidiarity in the spotlight*

Energy is an area of shared competences between the EU and its Member States,(6) a sector where subsidiarity has been playing a massive role. Member States have been reluctant to relinquish national sovereignty in this sector to Brussels, even though energy has been at the core of founding documents such as the ECSC Treaty and Euratom. Progress was slow and it was pushed at the end of the 90s and the first decade of the new Millennium through three "energy packages",(7) aimed at achieving market integration, fostering competition and consumer choice. Subsidiarity is stressed in Article 194 TFEU, the legal basis of energy regulation, which requires legislation issued at the EU level to be respectful of Member States' choices regarding exploitation of energy sources and regarding the energy mix. The governance of the sector was thus conceived as a hybrid, combining national regulators, private operators, the Commission, and a tailor-made Agency for the Cooperation of Energy Regulators (ACER).

(4) https://energy.ec.europa.eu/topics/markets-and-consumers/market-legislation/hydrogen-and-decarbonised-gas-market-package_en.

(5) This chapter only states the law and the literature up to its submission date, which is the 10th of May 2023.

(6) Consolidated version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/01, Art. 4(2)(i).

(7) K. Talus, *Introduction to EU Energy Law*, 1st ed., Oxford, Oxford University Press, 2016, pp. 4-5.



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The current legal framework is complex, with the electricity rules updated by the Clean Energy Package, adopted in 2018-2019.(8) The latter answered the need for more cohesive rules for energy and environmental protection, through accommodating various technological progress for greener energy and increasing the involvement of consumers. However, the Clean Energy Package is already in need of deep review. As this book goes to press, legislation is being amended following a multitude of initiatives such as the European Green Deal(9) and Fit for 55 legislative package.(10) Such rapid evolutions challenge general procedures and principles. For instance, the principle of non-retroactivity is creatively interpreted as ACER's Board of Appeal is now required to exercise its review in the light of amendments to the legal framework that occurred since the adoption of contested decisions.(11)

This chapter draws mainly on instruments aimed at fostering cooperation on the internal electricity market, as updated by the Clean Energy Package and other measures issued in response to the pandemic and the invasion of Ukraine. These include the e-Directive,(12) aimed at establishing common rules to ensure the cross-border trade in electricity and the e-Regulation,(13) setting out the conditions for access to the network for cross-border exchanges in electricity. Such exchanges cannot happen in the absence of a strong, and technologically reliable, infrastructure, with the recently revised Trans-European Networks for energy (TEN-E) Regulation(14) creating the legal framework for the development thereof. The TEN-E Regulation sets the ground rules for identifying priorities, individual projects, and financing, after years when a regulatory patchwork across Europe led to slow administrative procedures to grant permits.(15)

The e-Directive, the e-Regulation, and the TEN-E regulation all give a crucial role to private actors in initiating the regulatory details of cross-border exchanges or investments. Consequently, such actors need to be properly

(8) European Commission, *Clean Energy for all Europeans*, 2019, https://data.europa.eu/doi/10.2833/9937.

(9) https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

(10) https://www.europarl.europa.eu/legislative-train/package-fit-for-55.

(11) *BNetzA v. ACER*, case T-631/19, ECLI:EU:T:2022:509.

(12) Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity, [2019] OJ L 158/125.

(13) Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, [2019] OJ L 158/54.

(14) Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No. 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) 347/2013, [2022] OJ L 152/45.

(15) T. Chittekatte *et al.*, "Making the TEN-E Regulation Compatible with the Green Deal – Eligibility, Selection, and Cost Allocation for PCIs", 2020/27 *Policy Briefs, Florence School of Regulation, Copenhagen School of Energy Infrastructure*, 2020, pp. 1, 3.



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supervised, with the REMIT regulation(16) establishing specific rules, fostering wholesale energy markets integrity and transparency while enhancing consumer confidence and open and fair competition in interconnected cross-border markets. REMIT was issued to cover a regulatory gap: while the instruments designed for financial markets also applied to energy trading, they did not cover most of the energy transactions. Cross-sectoral cooperation is extremely important in this context, and it includes links between national and EU energy, financial, and competition authorities.

The Governance of the Energy Union Regulation(17) integrates environmental protection and energy regulation, answering to the 2030 EU Climate and Energy Framework and the targets set for the Union therein. The Regulation was amended by the European Climate Law Regulation,(18) and updated to the European Green Deal and the goal for Europe's economy and society to become climate-neutral by 2050. The target is to reduce net greenhouse gas emissions by at least 55 % by 2030, compared to 1990 levels. These Regulations streamline a vast variety of planning, monitoring, and reporting obligations, integrated commitments under the Paris Agreement, and enhanced cooperation between the Member States with regards to planning.

As illustrated below, all these instruments spur horizontal cooperation between energy authorities, but also vertical, with the European level, and public-private linkages, which creates the need for structuring such cooperation through ACER. The ACER regulation(19) sets out a formalized forum for the cooperation of the national regulatory authorities (NRAs) in Europe and entrusts the Agency with important information exchange and supervision tasks, but little decisional power. The next subsection turns to the actors of energy administrative cooperation before discussing the mechanisms laid out in the outlined instruments.

(16) Regulation (EU) 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency, [2011] OJ L 326/1.

(17) Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, [2018] OJ L 328/1.

(18) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ("European Climate Law"), [2021] OJ L 243/1.

(19) Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, [2019] OJ L 158/22.



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## *II. Actors: multi-level public and private cooperation fora*

With Member States retaining large powers, regulation of energy was left to informal networks of stakeholders. The strategy of the Commission has been to close the "regulatory gap" generated by the failure to harmonize sensitive sectors (such as energy) through promoting informal harmonization by transnational regulatory networks.(20) The current regulatory framework builds on these informal arrangements, while delegating regulatory and enforcement powers to public national regulators, to private Transmission System Operators (TSOs), and most recently, to Distribution System Operators.

The creation of NRAs in energy was pushed through the three liberalization packages, and, by 2005, there was at least one NRA in each Member State.(21) The tasks entrusted to them included monitoring rules on interconnection and unbundling, and network access; approving terms and conditions (including tariffs) for new producers, and the conditions for connection and access to the network. Cooperation between these NRAs was driven by the Commission through the Electricity Regulatory Forum held in Florence, which led in 2000 to the creation of the Council of European Energy Regulators (CEER). Some sort of formalization came only in the second energy package through the European Regulators Group for Electricity and Gas (ERGEG),(22) a voluntary cooperation platform tasked formally with advising the Commission.(23) The need to create a European regulator was apparent given the regulatory gap between the NRAs and the Commission,(24) and 2011 saw the creation of ACER(25) – an agency with limited powers tagged to this day as a "relatively small supranational secretariat that relies heavily on the administrative capacity of national energy regulators".(26) This design is due to a strict interpretation

(20) B. Eberline and E. Grande, "Beyond Delegation – Transnational Regulatory Regimes and the EU Regulatory State", 12 *Journal of European Public Policy*, 2005, pp. 89 and 100.

(21) C.W. Jones and W. Webster, *EU Energy Law – The Internal Energy Market*, Vol. 1, 2nd ed., Leuven, Claeys & Casteels, 2006, pp. 111-112.

(22) Commission Decision 2003/796/EC of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas, [2003] OJ L 296/34.

(23) D. Haverbeke, B. Naesens and W. Vandorpe, "European Energy Markets and the New Agency for Cooperation of Energy Regulators", 28 *Journal of Energy and Natural Resources Law*, 2010, p. 403.

(24) Commission staff working document accompanying the Communication from the Commission – Inquiry pursuant to Article 17 of Regulation (EC) No. 1/2003 into the European gas and electricity sectors (Final Report), [2006] COM(2006) 851 final.

(25) Commission Decision 2011/280/EU of 16 May 2011 on repealing Decision 2003/796/EC on establishing the European Regulators Group for Electricity and Gas, [2011] OJ L 129/14.

(26) S. Eckert, "EU Agencies in Banking and Energy between Institutional and Policy Centralisation", SAFE Working Paper 278, 2020, <https://ssrn.com/abstract = 3609845>, p. 6.



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of the *Meroni* doctrine,(27) according to which the EU institutions can only delegate implementing powers that are clearly defined and supervised by the delegator (or the judiciary)(28) based on specific and objective criteria. ACER is a network agency gathering representatives of national regulatory agencies in its Board of Regulators. Classic network regulation challenges(29) are present as the Agency relies on *voluntary* cooperation of NRAs and secondment of experts from those authorities to participate in its work. ACER carries out tasks meant essentially to enhance cooperation between the different public and private players (the Commission, the Transmissions System Operators, and the NRAs, while also having a monitoring function, and decision-making power in technical areas.

Nowadays, ACER's powers are in constant evolution, starting with the adoption of the REMIT and TEN-E Regulations, and the Clean Energy Package. This is especially because the potential for ACER to help build the Energy Union through market integration tools, such as regional initiatives, the network codes and market monitoring. However, its actions are limited in areas such as energy security and energy poverty, as these tools are too indirect to address politically and socially charged issues.(30) Furthermore, ACER has not been transformed into a European Pan-regulator for staffing and budgetary reasons, as well as following a concern regarding the concentration of experts in the Agency.(31) Its budget was increased through the possibility to collect fees for various services it provides, such as issuing exemptions from the regulatory framework or centralizing the reporting and information under REMIT. ACER's governance structure was streamlined by increasing the control that the Board of Regulators exercises over the powers of the Director. In the past, the role of the director has been considered too powerful, as it was usually the Director who would put forward proposals, which would generally be approved by the Board. An important forum with increasing responsibilities in

(27) *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community* [1958], case C-10/56, ECLI:EU:C:1958:7.

(28) *Giuseppe Romano v. Institut national d'assurance maladie-invalidité*, case 98/80, EU:C:1981:104, para. 20.

(29) B. Eberline and E. Grande, "Beyond Delegation – Transnational Regulatory Regimes and the EU Regulatory State", *op. cit.*, p. 103.

(30) M. Labelle, "Regulating for Consumers? The Agency for Cooperation of Energy Regulators", in S. Andersen (eds), *Energy Union – Europe's New Liberal Mercantilism?*, London, Palgrave, pp. 147, 153 et s.

(31) Commission staff working document impact assessment 2016/0379 Accompanying the document Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast) Proposal for a Regulation of the European Parliament and of the Council on the electricity market (recast) Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast) Proposal for a Regulation of the European Parliament and of the Council on risk preparedness in the electricity sector [2016] SWD/2016/0410 final.



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individual rights protection is the Board of Appeal, where ACER decisions can be challenged. In a recent case, the EUCJ raised considerably the bar for the Board's standard of review, requiring in depth economic and technical checks to be undertaken.(32)

Alongside ACER, and formally constituted outside of the EU, the Council of European Energy Regulators is still active today, providing another platform for cooperation between national regulatory authorities responsible for electricity and/or gas. Established in 2000 under Belgian law, this is a non-profit organization of EU, British, Icelandic and Norwegian regulatory authorities. It is meant to complement but not overlap with the work of ACER.(33) Interestingly, ACER and the Council of European Energy Regulators share an important number of members, which shows that, ultimately, it is the same persons who prepare and decide on the issues discussed by both bodies.

The third energy package also provided for reinforced cooperation between the TSOs, through the creation, by ACER and the Commission, of European Networks of Transmission System Operators for gas and electricity. The Clean Energy Package advances work on the integration of the *regional* level by streamlining the Regional Coordination Centers. This builds on the previously established Regional Security Coordinators supposed to perform tasks of regional coordination, which in turn were based on voluntary cooperation started by the TSOs.(34) The Regional Coordination Centres have wider regionalisation tasks, including system operation, market related and risk preparedness tasks.(35) Real time operation of the electricity system remains a task of national TSOs.(36)

The Clean Energy Package provided for mechanisms to help with the decentralisation of the power system, which is one of the challenges in energy today.(37) Decentralisation of energy refers to energy produced close to the user and involving many smaller power generation plants and storage units, such as individuals or businesses. At the time of the Clean Energy package, it was estimated that, in some Member States as much as 90% of the renewable energy is connected to the distribution system. The Commission evaluated some 2,600 Distribution System Operators in

(32) *ACER v. Aquind*, case C-46/21 P, ECLI:EU:C:2023:182.

(33) B. Eberline and E. Grande, "Beyond Delegation – Transnational Regulatory Regimes and the EU Regulatory State", *op. cit.*, p. 102.

(34) https://docstore.entsoe.eu/major-projects/RSC/Pages/default.aspx.

(35) Art. 37 Regulation (EU) 2019/943.

(36) A. Nouicer and L. Meeus, *The EU Clean Energy Package*, Fiesole, European University Institute, 2019, p. 39.

(37) World Economic Forum, "The Future of Electricity New Technologies Transforming the Grid Edge", *World Economic Forum*, 10 March 2017, <http://www3.weforum.org/docs/WEF_Future_of_Electricity_2017.pdf>.



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Europe, a concentrated industry, however, with just 13% having more than 100,000 customers.(38) The Clean Energy Package streamlined the functions of these Distribution System Operators, providing for the creation of an EU-Distribution System Operators entity,(39) commissioned to work in the European interest.(40)

Other platforms helping coordination gather in different combinations officials from Member States, representatives of ACER, the European Networks of Transmission System Operators, the industry and consumers,(41) and have an important informal role in energy regulation.(42) The actors are thus varied, and fulfil different functions, reflected in a multitude of instruments. This makes the cooperation model difficult to pin down as vertical or horizontal, as competence sharing departs here from the classic configuration with EU and the Member States being given separate tasks and limited interaction opportunities. In most of the situations, the power rests still with the NRAs and the TSOs, understandably so given the distribution of competences in energy regulation. Yet, the Commission and ACER fulfil certain coordination and centralization functions. Perhaps the model is best described as an "integrative paradigm" whereby the Commission and regulatory networks are working together towards the application of European law.(43) It is to this integrative paradigm to which the paper now turns, looking at five main aspects of energy regulation: the management and supervision of private actors, planning and reporting, the development of a functional network, including the investment in the infrastructure, as well as maintaining the level playing field while ensuring security of supply.

## *III. Managing private actors cooperation and supervising their behavior on the market*

TSOs have played a central role in the regulation of the energy sector. These have been traditionally organised in networks at the EU level, and currently are involved in catalysing the cooperation of newer entities. Given this

(38) Commission staff working document impact assessment 2016/0379, *supra*, note 33.

(39) Art. 52 Regulation (EU) 2019/943, materialised in E.DSO, https://www.edsoforsmartgrids.eu/about-us/who-we-are.

(40) Art. 52(2) Regulation (EU) 2019/943.

(41) On the Madrid Forum see H. Krüger, *European Energy Law and Policy – An Introduction*, Cheltenham, Edward Elgar, 2016, p. 146.

(42) M. Groenleer, "Redundancy in Multi-level Energy Governance", TARN working paper 6/2016, 2016, p. 13. Website address where this was available has changed in the publication process.

(43) L. Hancher and P. Larouche, "The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest", in P. Craig and G. Búrca (eds), *The Evolution of EU Law*, Oxford, Oxford University Press, 2011, p. 768.



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importance afforded to market participants, supervision of their activities becomes crucial, and is done through both horizontal and vertical cooperation between authorities.

## A. Cooperation of market participants in energy regulation, between established and newer entrants

The certification of market operators in order to be able to enter the energy market falls in the competence of national authorities. For TSOs, NRAs are entrusted with certification, while making sure that unbundling requirements are met.(44) There is an obligation to notify draft certifications to the Commission, who will issue an opinion, eventually after consulting also ACER. NRAs need to "take the utmost account" of this opinion in the final decision and publish both the Commission opinion and the certification together.(45) Commission opinions are non-legally binding acts according to Art. 288 TFEU, yet it can be argued that this obligation to publish them alongside NRAs decisions might give them more weight in practice. The Commission can, alongside NRAs, request information from those operators seeking certification.(46) Furthermore, the Commission can issue a reasoned request to NRAs to open a certification procedure.(47)

On their turn, TSOs cooperate within the European Network of Transmission System Operators for electricity to set up new actor cooperation, such as the Regional Coordination Centers and the Distribution System Operator entity. With regards to the Regional Coordination Centers, the European Network of Transmission System Operators for Electricity first submits a proposal to ACER regarding the geographical scope of the Regional Coordination Centers (or the System Operation Region). The second step is decentralised and requires TSOs to submit plans to the NRAs regarding the implementation of the Regional Coordination Centers.

The Regional Coordination Centers can adopt only coordinated actions or recommendations, essentially non-binding soft law (a watered-down version of the initial suggestion of the Commission that they should issue "binding decisions").(48) The procedure of adoption of these instruments is set by the TSOs. Coordinated actions are issued only in respect of capacity calculation and security analysis, while other Regional Coordination Centers tasks are carried out through recommendations. Coordinated actions need to be implemented by

(44) Art. 53 Directive (EU) 2019/944.
(45) Art. 51 Regulation (EU) 2019/943.
(46) *Ibid.*, Art. 51(3).
(47) Art. 52(4)(c) Directive (EU) 2019/944.
(48) A. Nouicer and L. Meeus, *The EU Clean Energy Package*, *op. cit.*, p. 39.



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the TSOs, except when their implementation would result "in a violation of the operational security limits defined by each transmission system operator in accordance with the system operation guideline".(49) In case of departure from the coordinated action, the TSO shall offer reasons to the Regional Coordination Center, who can suggest a different course of action, taking into consideration the impact on other TSOs of the relevant system operation region. With regards to the recommendations of the Regional Coordination Centers, these can be departed from provided the TSO submits its justification to the Regional Coordination Centers and the other relevant TSOs. The review of coordinated actions or recommendations is triggered by the TSOs themselves.

The Distribution System Operators Entity (EU DSO) was launched in June 2021,(50) following approval of its statutes by ACER and the Commission (with amendments related to transparency and representation).(51) The tasks entrusted to the European Network of Transmission System Operators for electricity include network codes drafting, preparing and implementing multi-annual development network and the specification for flexibility services procured, in cooperation with ACER and the regulators. Distribution System Operators need to cooperate with the TSOs, with regards to the operation of the network(52) and in the procurement of flexibility services.(53) Competition and overall consumer welfare can only benefit if the Distribution System Operators gain more competences in the future, potentially shared with TSOs who are currently more powerful. A recent study evaluated that there has been little progress regarding the empowerment of the Distribution System Operators, even though they have been acted towards the goals set by the EU. There is also a strong degree of fragmentation amongst the operators themselves, as well as between the operators and the regulators with regards to the future of these entities, suggesting that their roles need to be further clarified. Finally, the different levels of resourcing, different degrees of unbundling, and different competences of Distribution System Operators at the national level can raise further complications with regards to their role in greening the energy markets.(54)

(49) Art. 42 Regulation (EU) 2019/943.

(50) EU DSO Entity, "The EU DSO Entity Goes Live – President is Endorsed and Workplan Approved", *EU DSO Entity*, Brussels, 30 June 2021.

(51) In accordance with Art. 53 Regulation (EU) 2019/943. See also Commission Opinion on the statutory documents on the establishment of the EU DSO Entity, [2020] C(2020) 8067 final.

(52) Art. 57(1) Regulation (EU) 2019/943.

(53) Art. 32(2) Directive (EU) 2019/944.

(54) K. Anaya *et al.*, "Where Next for the Electricity Distribution System Operator? Evidence from a Survey of European DSOs and National Regulatory Authorities", 23 *Competition and Regulation in Network Industries*, 2022, pp. 245-269.



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## B. The supervision of private operators

The new entities mentioned in the previous subsection are monitored by ACER,(55) who can issue opinions to this effect that need to be given utmost consideration.(56) In case of non-compliance of these actors with the regulatory framework, the national regulatory authorities concerned have the power to decide of whether there is a breach or not, with ACER having power to act only if there is no consensus.(57) ACER can only issue reasoned opinions or recommendations to the ENTSO for Electricity, the EU Distribution System Operator entity, or the Regional Coordination Centers with regards to compliance. If non-compliance of these actors is established but not remedied, ACER will step in issuing a recommendation to the regulatory authority concerned to take action.(58)

Under REMIT, the system of supervision of markets is complex. Energy authorities have overlapping competence with authorities in financial regulation and competition, starting with the national level, and ACER, European Security Markets Authority (ESMA) or the Commission at the EU level. Informal cooperation through the Council of European Energy Regulators co-exists with formalized mechanisms of cooperation between ACER and NRAs(59) regarding the obligation of NRAs to inform ACER when they suspect a breach of REMIT.(60) The memorandum of understanding ACER-ESMA,(61) materialises ACER's regulatory obligation to inform ESMA where it has reasonable grounds to suspect the existence of market abuse.(62) Examples of cross-sectoral cooperation between authorities within single Member States include agreements between financial and energy NRAs in the Netherlands or France.(63) It is expected that the recent increase in enforcement actions might lead to an increase in cross-border information exchange, though this is not yet noticeable in practice.(64)

(55) Arts. 4, 7, 8 Regulation (EU) 2019/942.

(56) *Ibid.*, Recital 24.

(57) *Ibid.*, Arts. 4(6) and 4(7).

(58) *Ibid.*, Art. 4(8).

(59) Agency for the Cooperation of Energy Regulators, "Multilateral Memorandum of Understanding between ACER, NRAs and Market Monitoring Bodies Concerning Cooperation and Coordination of Market Monitoring under REMIT", *ACER*, 23 August 2013, <https://acer.europa.eu/en/remit/Documents/MoU%20with%20NRAs.pdf>.

(60) Art. 16(2) Regulation (EU) 1227/2011.

(61) European Securities and Markets Authorities and Agency for the Cooperation of Energy Regulators, "Memorandum of Understanding Concerning the Consultation and Cooperation Regarding Their Regulatory Responsibilities in Relation to EU Wholesale Energy Markets", *ESMA*, 18 July 2013 <https://www.esma.europa.eu/sites/default/files/library/ESMA-ACER_MoU_Consultation_and_cooperation_in_relation_to_EU_wholesale_energy_markets.pdf>.

(62) Arts. 16 and 10 Regulation (EU) 1227/2011.

(63) L. Hiemstra, "Energy Trading and the Exchange of Information between Supervisors – Effectiveness of Fragmented Supervision and Information Sharing", 39 *Journal of Energy & Natural Resources Law*, 2021, p. 159, footnote 46.

(64) *Ibid.*, p. 170.



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ACER is responsible with gathering and centralizing information, being more restricted in its powers than ESMA(65) or the Commission. ACER centralizes, through an online portal (ARIS), transactions and orders to trade in energy markets, an unprecedented task for the setting up of which ACER cooperated with the US Federal Energy Regulatory Commission.(66) ACER uses for triaging an automatic platform followed by analysis of anomalous instances, and then selects which cases to report back to the national authorities as suspicious.(67)

The decision-making power of ACER is limited to adopting binding individual decisions to request information from TSOs and NRAs, or to deciding whether a case falls within the competence of an energy, a financial, or a competition authority.(68) Enforcement and sanctioning powers rest with the NRAs,(69) whilst ACER issues regularly non-binding guidance to ensure consistency and coordination.(70) Even though the prospects of effectiveness of such instruments are rather limited,(71) it seems that in practice both private actors and the NRAs are aware of the Guidance and are committed to apply it, partly due to the existence of close networks between private and public bodies.(72) NRAs publish their own guidance too,(73) taking similar positions, though differing on certain aspects.(74)

ACER's obligation to foster information exchange and cooperation makes it a node within a wider network of regulatory bodies.(75) Information is to a certain extent power in an area of regulatory policy involving highly specialized

(65) M. Van Rijsbergen, "EU Agencies' Soft Rule-Making – Lessons Learnt from the European Securities and Markets Authority", Dissertation, Utrecht University, 2018.

(66) A. Potoschnig, "The ACER Experience", in S. Niels (ed.), *The European Energy Transition – Actors, Factors, Sectors*, Leuven, Claeys & Castels, 2019, pp. 175, 184-187.

(67) *Ibid*.

(68) Art. 16(4) Regulation (EU) 1227/201.

(69) 13 decisions taken 2018-2020. See J. Ratliff *et al.*, "Market Manipulation under REMIT – Key Concepts and Developing Enforcement Practice", 9 *European Energy Journal*, 2020, pp. 71 and 76.

(70) Agency for the Cooperation of Energy Regulators, *ACER Guidance on the Application of Regulation (EU) No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale Energy Market Integrity and Transparency*, 6th ed., Ljubljana, ACER, 2021; Agency for the Cooperation of Energy Regulators, *Guidance note 1/2017 on the Application of Article 5 of REMIT on the Prohibition of Market Manipulation Wash Trades*, 1st ed., Ljubljana, ACER, 2017.

(71) O. Stefan and M. Petri, "Too Weak to Be Controlled – Judicial Review of ACER Soft Law", 37 *Yearbook of European Law*, 2018, p. 525.

(72) P. Cabany, "The Involvement of Persons Professionally Arranging Transactions in the Monitoring of Transparency in Wholesale Energy Markets – The Role of the ACER Guidance", Master Thesis, King's College London 2019.

(73) Bundesnetzagentur & Bundeskartellamt, German *Bundesnetzagentur & Bundeskartell amt*, "Joint Guidance on the notion of market abuse with regard to electricity generation and wholesale trade", *Bundesnetzagentur*, 2019 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/27_09_2019_Leitfaden_Preisspitzen.html.

(74) J. Ratliff *et al.*, "Market Manipulation under REMIT – Key Concepts and Developing Enforcement Practice", *op. cit.*, p. 75.

(75) S. Burris *et al.*, "Changes in Governance – A Cross-Disciplinary Review of Current Scholarship", 41 *Akron Law Review*, 2008, p. 1.



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technical knowledge, and information becomes an important tool for regulation and control.(76) Yet, the effectiveness of supervision by ACER appears to be diluted by the multiple authorities with overlapping competences active in the area, as well as by the numerous reporting mechanisms to which market participants are subjected. Furthermore, a delicate balance needs to be struck between on the one hand the necessity of information sharing and the commitment to protect confidentiality and professional secrecy.(77)

## *IV. Planning and Reporting*

An important part of the development of the energy markets, as well as of the integration of climate goals, rests on planning and reporting. As already mentioned, the Governance Regulation as amended by the Climate Law Regulation merged and simplified relevant reporting across relevant sectors, while building on the experience acquired with the European Semester to set out an entire coordination mechanism.(78) Thus, Member States are required to draw Integrated National Energy and Climate Plans (NECP), setting out actions for the following ten years, on the main areas of the Energy Union. The achievement of the plans is monitored through annual and bi-annual progress reports by the Member States, and Commission evaluation of the implementation of the national plans. In this process, cooperation is key, as it is embedded within national plans, with Member States given the opportunity to comment on each other's plans. Member States are also to draw up a fifty-year plan regarding their Low Emissions Strategies towards achieving greenhouse gas reductions. The Climate Law Regulation adds the climate neutrality objective as a basis for reporting and evaluation.

The literature identified these cooperation mechanisms as "harder soft governance".(79) While framed around coordination with central goals and decentralized implementation, they contain harder elements, imposing algorithms to calculate renewable energy targets,(80) comply-or-explain mechanisms,(81) blaming and shaming mechanisms,(82) and regulation

(76) B. Eberline and E. Grande, "Beyond Delegation – Transnational Regulatory Regimes and the EU Regulatory State", *op. cit.*, p. 101.

(77) L. Hiemstra, "Energy Trading and the Exchange of Information between Supervisors – Effectiveness of Fragmented Supervision and Information Sharing", *op. cit.*, pp. 173 et s.

(78) M. Ringel and M. Knodt, "The Governance of the European Energy Union – Efficiency, Effectiveness and Acceptance of the Winter Package", 112 *Energy Policy*, 2018, pp. 209 and 217.

(79) M. Knodt, M. Ringel and R. Müller, "Harder' soft Governance in the European Energy Union", 22 *Journal of Environmental Policy & Planning*, 2020, pp. 787, 792-793.

(80) Annex III Regulation (EU) 2018/1999.

(81) *Ibid.*, Art. 9(3).

(82) *Ibid.*, Art. 35.



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in the shadow of (Commission's) authority.(83) Going forward, researchers recommend taking full advantage of stakeholder involvement mechanisms embedded in the Governance Regulation, as they would foreseeably limit national claims for energy sovereignty.(84) Under the Fit for 55 package, the mechanisms for reporting are supposed to undertake further updates, however a question still remains as to the effectiveness of the NECPs given the fluid character of the recommendations that the Commission formulates in this regard.(85)

Planning is important for network development and functioning, as this necessitates complicated forecasts and calculations. Cooperation rests on initiatives from the private operators while linking national and European regulators. Since 2009, the European Network of Transmission System Operators for electricity is tasked to develop, every two years, a non-binding EU Ten-Year Network Development Plan, respectful of non-discrimination, effective competition, the efficient functioning of the market and a sufficient level of cross-border interconnection open to third-party access. ACER can propose amendments if it appreciates that these principles are not respected.(86) A similar process is replicated at the national level, with national TSOs required to submit every two years a Ten-Year Network Development Plan to their NRA. The NRAs are required to consult, examine the consistency with the plans under the Governance Regulation,(87) whilst ACER assesses the consistency of the national plans with the Union-wide network development plan.(88)

Action plans are sometimes introduced as an alternative to decision-making in case consensus cannot be reached. One example is the process of bidding zone configuration. The EU energy market is divided into zones within which wholesale electricity prices are the same, called bidding zones. The process of setting up such zones aims at resolving network congestion problems, maximizing economic efficiency and increasing cross-zonal trading opportunities.(89) To this end, the European Network of Transmission System Operators for Electricity is tasked with reporting annually on congestions. It is the TSOs who initiate, on this basis, a review of bidding zones, by first making

(83) *Ibid*., Arts. 31 and 43.

(84) P. Bocquillon, E. Brooks and T. Maltby, "Speak Softly and Carry a Big Stick – Hardening Soft Governance in EU Energy and Health Policies", 22 *Journal of Environmental Policy & Planning*, 2020, pp. 843-856, spec. 852.

(85) S. Schlacke *et al.*, "Implementing the EU Climate Law *via* the 'Fit for 55' package", 1 *Oxford Open Energy*, 2022, pp. 1 and 12.

(86) Art. 32 Regulation (EU) 2019/943.

(87) Art. 51 Directive (EU) 2019/944.

(88) Art. 48 Regulation 2019/943.

(89) Art. 14 Regulation (EU) 2019/943.



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suggestions on methodologies, assumptions, and alternative configurations. The NRAs unanimously decide on these suggestions within three months, with ACER being empowered to decide in case of disagreement.(90) TSOs then compare current to alternative bidding zones configurations according to the suggested methodologies and submit a joint proposal to Member States and NRAs to maintain or amend bidding zones. This essentially means that initial disagreement on methodologies is likely to resurface anyway at this latter stage. Member States and NRAs have the option to either establish national or multination action plans, or to review and amend the bidding zone configuration, with the Commission empowered to decide in case of disagreement, after consulting ACER. The action plans have been considered rather inefficient in the literature, with a tendency to maintain the status quo rather than resolving congestions and improve the flows between the Member States,(91) and have not yielded significant results towards the cross-zonal trade goals expressed in the e-Regulation.(92)

## *V. Cooperating towards a functional network: Network codes and Network Guidelines*

Network codes and guidelines are rules necessary to eliminate technical barriers to the flows of energy across the borders, pertaining to the way in which the grid and trade are operated. The procedure starts with ACER drawing non-binding framework guidelines in collaboration with the Commission and following consultation of the European Networks of Transmission System Operators. The network codes and guidelines are then elaborated by the European Networks of Transmission System Operators and should be approved by the Commission through comitology, or remain non-binding soft law. Initially, ACER could not change the codes adopted by the European Networks of Transmission System Operators, but only formulated opinions on the codes that it sent to the Commission, while sometimes asking the European Networks of Transmission

(90) For instance Decision 29/2020 of the European Union Agency for the Cooperation of Energy Regulators of 24 November 2020 on the methodology and assumptions that are to be used in the bidding zone review process and for the alternative bidding zone configurations to be considered [2020] https://www.acer.europa.eu/sites/default/files/documents/Individual%20Decisions/ACER%20Decision%2029-2020%20on%20the%20Methodology%20and%20assumptions%20that%20are%20to%20be%20used%20in%20the%20bidding%20zone%20review%20process%20and%20for%20the%20alternative%20bidding%20zone%20configurations%20to%20be%20considered_0.pdf.

(91) L. Hancher *et al.*, *The EU Electricity Network Codes and Guidelines – A Legal Perspective*, 2nd ed., Fiesole, European University institute, 2021, p. 63.

(92) Art. 16(8) Regulation (EU) 2019/943.



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System Operators to redraft them. This changed under the Clean Energy Package to a more efficient and centralized system, whereby ACER can rewrite draft codes and send them directly to the Commission.(93)

## A. Compliance with Network Codes and Guidelines

NRAs are expected to cooperate in decision making on issues with cross-border relevance, and they are meant to be helped in this task by ACER. The Commission and the NRAs can request ACER to issue an opinion regarding compliance of decisions by NRAs with the network codes and guidelines,(94) but ACER does not have the initiative of this control. Also, its opinion is non-binding, but noncompliance will be notified to the Commission. Following such notification, following notification of other NRA related to noncompliance, or on its own initiative, the Commission can decide to examine a case further. It will take its decision after hearing the NRA concerned, and can either not raise objections, or ask the NRA to withdraw the problematic decision. In case of non-compliance, the Commission can initiate infringement proceedings.

This compliance mechanism might be considered to have a hybrid character, since ACER's opinion constitutes soft law, but it is backed up by a procedure in front of the Commission which can theoretically culminate in infringement proceedings. Yet, while crucial in this process, ACER's opinion is not justiciable, as illustrated by one of the many episodes of the Austrian-German bidding zone split saga. Traditionally, the territory of Austria, Germany, and Luxembourg represented one sole bidding zone. Germany's *Energiewende* determined an increase in wind energy, which, coupled with poor connecting infrastructure led to that extra power being pushed through the grids in the neighbouring countries, in particular Poland and the Czech Republic. Splitting the Austria/Germany bidding zone was the solution to ease such congestion, yet Austria, who benefitted from cheaper electricity, disagreed to such course of action.

Before the splitting of the zones, at the request of the Polish regulator, ACER issued an opinion requesting the implementation of a coordinated capacity allocation procedure on the German-Austrian border. The Austrian regulator, E-Control, sought the annulment of this opinion, but it was rejected by both ACER's Board of Appeal(95) and by the General

(93) Art. 5(1)(c) Regulation (EU) 2019/942.

(94) *Ibid*., Art. 6(5); Art. 63 Directive (EU) 2019/944.

(95) Board of Appeal of the Agency for the Cooperation of Energy Regulators *Energie-Control Austria (E-Control) v. Agency for the Cooperation of Energy Regulators*, A-001-2015.



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Court(96) on grounds that opinions lacked legally binding effects. This case shows once again that, notwithstanding the possibility that soft law has some legal relevance by providing "final legal assessments including legal requirements",(97) instruments which do not set out, expressly, rights or obligations cannot be subject to judicial review. This was regardless of the potential for infringement proceedings in case of non-compliance with the opinion and despite evidence which showed that the opinion did produce effects in practice, as it was taken on board in subsequent documents from the European Networks of Transmission System Operators, and endorsed by certain NRAs who expressed the will to voluntarily comply.(98)

More generally, it appears that judicial review by EU Courts in the area of network codes and guidelines is limited, as there is a high potential for circumvention of the preliminary ruling procedure, as illustrated by a case related to the Capacity Allocation and Congestion Management Guideline (CACM).(99) *Baltic Cable* concerns congestion displacement at the German/Swedish border. Such congestion displacement occurs when congestion is pushed from the internal part of the network towards the borders, creating serious problems on interconnectors, and is in principle prohibited by the e-Regulation.(100) As the owner of the interconnection, Baltic Cable was considered both by the German regulator as well as by the national courts as the only one responsible to resolve the congestion, despite the fact that roots of the problem lied with the German transmission network, owned by TenneT. The German Supreme Court refused to send a question in preliminary ruling to the ECJ, considering its own interpretation of EU law to be straightforward under the *acte clair* doctrine.(101) This was even though important interpretation issues were at stake, as the congestion might be very well have been considered structural within the terms of the Capacity Allocation and Congestion Management Guideline, in which case a wider revision of the bidding zones would have been warranted.(102) This case raises wider concerns regarding the effectiveness of judicial protection in

(96) Order in *E-Control v. ACER*, case T-671/15, ECLI:EU:T:2016:626; *E-Control v. ACER*, case T-63/16 ECLI:EU:T:2017:456.

(97) Order in *E-Control v. ACER*, case T-671/15, ECLI:EU:T:2016:626, para. 64.

(98) *E-Control v. ACER*, case T-671/15, ECLI:EU:T:2016:626, paras. 77-79.

(99) Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, [2015] OJ L 197/24.

(100) Art. 16(4) Regulation (EU) 2019/943.

(101) Baltic Cable AB v. TenneT TSO GmbH [2016] Bundesnetzagentur BK6-14-130 [167] – [168]. See J. Rumpf, "Congestion Displacement in European Electricity Transmission Systems – Finally Getting a Grip on it? Revised safeguards in the Clean Energy Package and the European network codes", 38 *Journal of Energy & Natural Resources Law*, 2020, p. 409.

(102) L. Hancher *et al.*, *The EU Electricity Network Codes and Guidelines – A Legal Perspective*, *op. cit.*, pp. 50-51.



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EU energy law, especially given the important number of not legally binding instruments issued in the sector, which are not directly justiciable in front of the ECJ.(103)

## B. Terms, Conditions, and Methodologies

Network guidelines are usually accompanied by further Terms and Conditions and Methodologies detailing a variety of concrete, technical issues related to market and system operation, such as the calculation of cross-border capacity,(104) or the splitting long-term cross-zonal capacity.(105) The procedures of adoption are slightly different for regional or EU-wide Terms and Conditions and Methodologies. The main drafting responsibility rests with the TSOs, sometimes alongside other market players, which are then adopted by the NRAs or by ACER, and finally implemented nationally through binding decisions.

EU-wide Terms and Conditions and Methodologies used to need the unanimous approval of all NRAs, which was in practice impossible. ACER's Board of Regulators is now entrusted with the adoption of the European Terms and Conditions and Methodologies according to qualified majority voting.(106) Regional Terms and Conditions and Methodologies still need the unanimous approval of the NRAs concerned. This cooperation occurs in regional fora, organized through the support of Council of European Energy Regulators.(107) ACER intervenes in case no agreement can be reached, or if the decision has a tangible impact on the internal energy market or on security of supply beyond the region in question. Regardless of the Terms and Conditions and Methodologies being adopted by ACER or by the regulatory authorities, the European Networks of Transmission System Operators and the Distribution System Operators have to be consulted.

ACER adopts the Terms and Conditions and Methodologies through a decision,(108) hence a challengeable hard law – both in front of ACER's Board of Appeal and in front of EU Courts. The issue of standing is relevant here, with the legislative framework presenting an anomaly. Article 28 of the ACER

(103) O. Stefan and M. Petri, "Too Weak to Be Controlled – Judicial Review of ACER Soft Law", *op. cit.*,p. 525; I. Maher and O. Stefan, "Delegation of Powers and the Rule of Law – Energy Justice in EU Energy Regulation", 128 *Energy Policy*, 2019, p. 84.

(104) Art. 20 Commission Regulation (EU) 2015/1222.

(105) Art. 16 Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation C/2016/5946 OJ L 259/42.

(106) Recital 21 and Art. 5(2) Regulation (EU) 2019/942.

(107) L. Hancher *et al.*, *The EU Electricity Network Codes and Guidelines – A Legal Perspective*, *op. cit.*, p. 44.

(108) Art. 2(d) Regulation (EU) 2019/942.



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Regulation mirrors restrictive pre-Lisbon Treaty provisions on direct actions against EU acts in front of the Court of Justice. It states that individuals and regulatory authorities can appeal against ACER decisions which are addressed to them or against decisions addressed to another person but of direct and individual concern to the appellant. In *Rewe Supply & Trading*,(109) the BoA was asked to review an ACER decision(110) which was not addressed to the appellant. Although the appellant was directly concerned by the decision, individual concern could not be established by the Board under the *Plaumann* formula. Yet, the decision at stake matched the description of a regulatory act. Or, under Article 263 (4) TFEU, the Court of Justice can review regulatory acts, which creates a curious situation whereby the threshold for standing is more stringent in the front of the administrative review body (the BoA) than in front of the Court. ACER's BoA exercised constitutional restraint in *Rewe Supply & Trading*, whilst noting that it is not its place to question the validity of Article 28 of the Agency Regulation against the principle of judicial protection, a task left to the jurisdiction of the Court of Justice.(111) As *Rewe Supply & Trading* is currently under appeal at the General Court (T-95&96/23), time will tell whether the Court will nudge a legislative change to extend the standing rules before the BoAs.

The status of the Terms and Conditions and Methodologies adopted through "agreement" by the national authorities regionally is less certain. While they could be in theory challenged before the board of the relevant authority, there is a high probability that such action would be rejected, given that the authority agreed to the respective Terms and Conditions and Methodologies. Such acts would be difficult to challenge before the EU Courts, as they would probably not count as binding EU acts. Presumably, an indirect challenge could be envisaged through preliminary reference if the implementing decision of the national authority is brought in front of the national court, notwithstanding the limitations expressed above.

The initial procedures for the adoption of Terms and Conditions and Methodologies was detrimental to NRAs cooperation, as illustrated by another episode of the Austrian-German bidding zone split. The Capacity Allocation and Congestion Management Guideline(112) required setting up capacity calculation regions by way of pan-European Terms and Conditions

(109) ACER BoA Decision A-002-2022, https://www.acer.europa.eu/sites/default/files/documents/en/The_agency/Organisation/Board_of_Appeal/Decisions/A-002-2022-RWE_v_ACER-Decision.pdf.

(110) ACER Decision No. 03/2022 on the amendment to the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process.

(111) Para. 52 BoA Decision A-002-2022.

(112) Art. 15(1) Commission Regulation (EU) 2015/1222.



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and Methodologies. At the time, this required NRAs to approve TSOs' proposal unanimously within six months,(113) with ACER intervening only in case of disagreement. Days before the deadline, the Austrian regulator, E-Control, submitted amendments to the proposed Terms and Conditions and Methodologies. They required that Austria/Germany/Luxembourg should form one common Central Western Europe- Central Eastern Europe capacity calculation region. Such amendments would need to be discussed by the TSOs and the Terms and Conditions and Methodologies proposal would need to be reviewed and resubmitted to the NRAs.(114) Yet, at the expiry of the initial six months deadline, ACER noted that the NRAs failed to agree on a common position and decided itself on the Terms and Conditions and Methodologies.(115) Whilst it argued it did consider the amendment suggested by E-Control,(116) ACER maintained the border between Austria and Germany. Following litigation,(117) the General Court found that, as E-Control introduced its amendments within the six months deadline, ACER was no longer competent to approve the initial common proposal, and the procedure was to restart from scratch.(118) Whilst the judgment emphasised the need to respect national competences in energy, the solution reached allowed thus one authority to delay the adoption process for Terms, Conditions, and Methodologies. In the interest of an effective cooperation between the authorities, the Commission changed the procedures, requiring now that amendments are introduced jointly by the competent authorities.(119)

Recent case law has been supportive of ACER's role to foster effective energy regulation and to act against regulatory void. In *BNetzA v. ACER*,(120) the General Court confirmed that the discretion of ACER to decide in case of NRAs failure to reach an agreement was not limited only to the points of disagreement, but the Agency had full competence to take a decision on the whole contested

(113) *Ibid.*, Art. 9(10).

(114) *Ibid.*, Art. 9(12).

(115) Decision No. 06/2016 of the European Union Agency for the Cooperation of Energy Regulators of 17 November 2016 on the electricity transmission system operators' proposal for the determination of capacity calculation regions.

(116) *Ibid.*, Section 3.2.

(117) BoA of ACER '*E-Control and others v. ACER*, A-001-2017; *E-Control v. ACER*, case T-332/17, ECLI:EU:T:2019:761; *Austrian Power Grid AG and Vorarlberger Übertragungsnetz GmbH v. European Union Agency for the Cooperation of Energy Regulators*, case T-333/17, EU:T:2019:760.

(118) *Austrian Power Grid AG and Vorarlberger Übertragungsnetz GmbH ACER*, case T-333/17, EU:T:2019:760, para. 55.

(119) Commission Implementing Regulation (EU) 2021/280 of 22 February 2021 amending Regulations (EU) 2015/1222, (EU) 2016/1719, (EU) 2017/2195 and (EU) 2017/1485 in order to align them with Regulation (EU) 2019/943, [2021] OJ L 62/24.

(120) *BNetzA v. ACER*, case T-631/19, EU:T:2022:509, para. 49-50.



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methodology.(121) The General Court noted that ACER could not decide on contentious aspects of the contested methodology without changing some of the aspects on which there was consensus because all these issues are interrelated. ACER's powers remain subsidiary: ACER only acts in case of disagreement of the NRAs. ACER's director can only take decisions after having obtained a greenlight from the same NRAs representatives gathered within the Board of Regulators. Yet, ACER's independence from regulators means that ACER is not bound to take into consideration points on which the latter agreed. The Clean Energy Package introduced further accountability mechanisms for the development and adoption of Terms and Conditions and Methodologies, with the Commission required to submit a report to the to the European Parliament and to the Council on ACER's involvement. The report can be accompanied by a legislative proposal to transfer or modify the necessary powers to ACER, hence creating further opportunities for centralization.(122)

## *VI. Cooperation to develop the infrastructure*

The TEN-E Regulation aims at speedy development of projects interconnecting energy networks across Europe, called projects of common interest. Administrative costs for these priority projects(123) are low, with one-stop-shop procedure for permit granting,(124) and the regulation provides for increased participation from the stakeholders through consultations and transparency.(125) The revised Regulation identified eleven priority corridors and three priority thematic areas to develop and interconnect EU-wide. Cooperation between authorities in the realization of these ambitions is key. A detailed discussion of the administrative cooperation on projects of common interest exceeds the purpose of this chapter, however, some examples will be provided for illustration.

Projects of Common Interest need to be included in the latest Ten-Year Network Development Plan and need to be included on the Union list of projects of common interest. This renders a previously political assessment of what projects are most important more objective.(126) The process to draw

(121) ACER decision 02/2019 on the day-ahead and intraday common capacity calculation methodologies within the Core capacity calculation region. ACER files have been moved from the web in the year since the submission of this chapter for publication until the generation of proofs. Some files might still be found here: https://documents.acer.europa.eu/official_documents/acts_of_the_agency/individual%20decisions/forms/allitems.aspx.

(122) Art. 5(4) Regulation (EU) 2019/942.

(123) Art. 7 Regulation (EU) 2022/869.

(124) *Ibid.*, Art. 8.

(125) *Ibid.*, Art. 9.

(126) T. Chittekatte *et al.*, "Making the TEN-E Regulation Compatible with the Green Deal – Eligibility, Selection, and Cost Allocation for PCIs", *op. cit.*, p. 6.



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up the lists is as follows. First, the TEN-E regulation provides the setting up of Regional groups, with decision making restricted in the groups to the Member States and the Commission. The groups draw regional lists, including projects approved by all Member States to whose territory the project relates, while considering the advice from the Commission in order to have a manageable total number of projects of common interest. Through delegated acts, the Commission establishes the Union list of projects,(127) with five such lists published so far.(128)

The European Network of Transmission System Operators for electricity is entrusted to develop a European cost-benefit analysis methodology,(129) which has changed three times since its first edition in 2014, and is currently undergoing updating.(130) The European Network of Transmission System Operators for electricity's proposal is submitted for an opinion to ACER, and the Member States, and approved ultimately by the Commission. While progress was evaluated positively, literature has criticized the fact that ACER's opinions on the cost-benefit analysis methodology were not always taken into consideration.(131) The new TEN-E regulation streamlines more these consultations processes, requiring for that the opinions of ACER and the Member states are fully taken into account,(132) hence enhancing the cooperation mechanisms. Furthermore, cooperation is also cross-sectoral, with the Revised Regulation integrating better gas and electricity methodologies, which need to be consistent with each other.(133)

The Revised TEN-E Regulation aims at providing an optimal and efficient integrated infrastructure planning, which means that the European Networks of Transmission System Operators will need to produce joint scenarios for the future, identifying long-term infrastructure issues and assessing individual projects. In this context, the oversight from the Commission and ACER on the European Networks of Transmission System Operators has increased. ACER is given a mandate to carry tasks such as developing framework guidelines to orient the European Networks of Transmission System Operators in the development of their scenarios.(134) Adding to these, a stronger involvement

(127) Regulation (EU) 2022/869, Art. 3.

(128) Commission Delegated Regulation (EU) 2022/564 of 19 November 2021 [2021] OJ L 109/14.

(129) Regulation (EU) 2022/869, Art. 11.

(130) https://eepublicdownloads.blob.core.windows.net/public-cdn-container/tyndp-documents/CBA/CBA4/221215_CBA4-Guideline_v1.0_for-public-consultation.pdf.

(131) Tim Chittekatte *et al.*, "Making the TEN-E Regulation Compatible with the Green Deal – Eligibility, Selection, and Cost Allocation for PCIs", *op. cit.*, p. 7.

(132) *Ibid.*, Art. 11 (5).

(133) *Ibid.*, Art. 11 (1).

(134) *Ibid.*, Art. 12.



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by the Distribution System Operator entity and relevant stakeholders is also welcome,(135) which is to be consulted on the cost-benefit analysis methodologies.(136)

## *VII. Maintaining the level playing field and security of supply*

Maintaining competitive conditions on the energy market is an important task, to which several authorities contribute, as we seen in Section 4. Another concern is the granting of State aid through the form of capacity mechanisms, or financing measures meant to ensure the security of supply to avoid blackouts. These have been regulated through the Guidelines for State aid in energy,(137) with the Commission playing the main role in approving or rejecting various schemes. While the need for capacity mechanisms will be reduced by market reform, this will take a long time, which is problematic given the supply concerns for the future.(138) Thus, The Clean Energy Package opted for centralising the procedures for assessing the need for capacity mechanisms, and for introducing a principled approach for the design of such mechanisms, requiring cross-border collaboration and partnership with the private sector.

Annually, the European Network of Transmission System Operators for electricity draws an adequacy assessment based on data provided by the national TSOs, who draw on information from generators and other market participants. The draft is submitted to the Energy Coordination Group and ACER. Member States may diverge from the EU assessment but need to give reasons. ACER is competent to amend national assessments through a non-binding opinion, with Member States required to give reasons in case of divergence. Furthermore, the standards to assess the level of security of supply in the Member States are established in a transparent manner,(139) jointly by relevant authorities for cross-border bidding zones.

The national implementation of capacity mechanisms is conditional on market reforms which would palliate resource adequacy concerns caused by regulatory distortions. A tracking system of such reforms requires Member States to

(135) Tim Chittekatte *et al.*, "Making the TEN-E Regulation Compatible with the Green Deal – Eligibility, Selection, and Cost Allocation for PCIs", *op. cit.*, p. 8.

(136) Art. 11(2) Regulation (EU) 2022/869.

(137) Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014-2020, [2014] OJ C 200/1.

(138) Final Commission Report of the Sector Inquiry on Capacity Mechanisms [2016] COM/2016/0752 final.

(139) Art. 25 Regulation (EU) 2019/943.



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publish an implementation plan and a timeline for the elimination of regulatory distortions or market failures,(140) and to report progress to the Commission. Capacity mechanisms need to respond to an identified resource adequacy concern, following the European or national assessment. Cross-border effects of the measure need to be studied, and there is an obligation to consult neighbouring Member States with existing direct network connections, and the stakeholders of those Member States.(141) The capacity mechanism cannot be introduced in the absence of a favourable Commission opinion on the implementation plan. Such mechanisms can only be temporary and are approved by the Commission for maximum 10 years, with an administrative phase-out provided for at the design stage.

Cross-border participation in capacity mechanisms needs to be organised in an effective and non-discriminatory manner,(142) which is likely to limit distortions on the internal market and incentivise interconnection investment.(143) The participation of foreign capacities is calculated by the national TSOs on the basis of a recommendation of the Regional Coordination Centers.(144) National TSOs of where the foreign capacity is located fulfil various other tasks regarding the participation in cross-border mechanisms, as set out by ACER in a Decision.(145) The latter was drafted by the European Network of Transmission System Operators for electricity, following stakeholder consultations, and in its turn, ACER also organised a public consultation on the final text.(146) The regulatory framework in place is of course rather new and its effectiveness can only be assessed later in the process; what we note is an increased degree of cooperation between the various public and private stakeholders. The comply or explain duties attached to some of the soft law might increase the weight of these instruments in practice.

(140) *Ibid.*, Art. 20(3).

(141) *Ibid.*, Art. 21(2).

(142) *Ibid.*, Art. 21(2).

(143) A. Nouicer and L. Meeus, *The EU Clean Energy Package*, *op. cit.*, p. 31.

(144) Art. 26(7) Regulation (EU) 2019/943.

(145) ACER Decision 36/2020 on technical specifications for cross-border participation in capacity mechanisms, *ACER*, 22 December 2020 https://www.acer.europa.eu/sites/default/files/documents/Individual%20Decisions/ACER%20Decision%2036-2020%20on%20cross-border%20participation_XBP%20CM_0.pdf.

(146) According to Agency for the Cooperation of Energy Regulators, "Public notice", *ACER* <https://www.acer.europa.eu/Media/News/Documents/Public%20Notice%20%20initiation%20of%20approval%20for%20technical%20specifications%20for%20cross-border%20participation%20in%20capacity%20mechanisms.pdf>. This used to be available at the time of writing. Sadly, no mention is made any longer on the website of ACER to these consultations.



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## *Conclusion*

The picture emerging from this analysis is that administrative cooperation in energy is a mix, with actors at all levels of governance and instruments of various degrees of formality. Such regulatory outcomes and institutional settings are inevitable given the historical evolution of a former national monopoly, the high complexity of the technical issues at stake, as well as the constraints of the "energy triangle" itself. Indeed, a mix of actors and of types of instruments need to be employed to solve the conundrum among ensuring competition, environmental protection, and security of supply. Yet, cooperation is essential in this sector for a certain degree of efficiency, coherence, and ultimately accountability to be ensured. Cooperation has been recently orchestrated by ACER, but the system is far from a primus inter pares scenario, with the Agency given the power to adopt mostly soft law and having little decisional powers with regards to actions by the TSOs or the NRAs. The new reform put in place by The Clean Energy Package is welcome in that it increases some of ACER's power and its budget.

Centralization is far from being the key to the effectiveness of the system, as cooperation in the area of energy regulation is strongly influenced by the application of the principle of subsidiarity, with countries still holding on to powers with regards to issues such as the energy mix. The current regulatory framework appears however to follow the aim at incrementally changing the balance of the relationships between various policy makers and stakeholders, and could be best described as a work in progress. The constantly evolving relationships in energy merit to be closely followed up in the short to medium term, in particular the regional level cooperation, and the inclusion of Distribution System Operators and consumers/prosumers which will hopefully reduce the important weight played by powerful TSOs.

Of course, the change in paradigm brought by the war in Ukraine and the unavailability of gas to support energy transitions adds a paramount challenge to energy regulation. This poses difficulties in the application of the principles of the Energy Union itself: security, solidarity and trust; a fully integrated internal energy market; energy efficiency; climate action, decarbonising the economy; research, innovation and competitiveness. In 2022, the Commission presented REPowerEU, an ambitious plan to phase out Europe's dependency on Russian energy imports.(147) Cooperation with stakeholders, Member States authorities, and trusted external partners is a keyword of the plan, however, only time will tell if the ongoing war will push towards "more Europe" in energy. Some authors illustrate that there are indicators of future

(147) REPowerEU Plan, *supra*, note 3.



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pessimistic outcomes in this regard.(148) Others consider that it is too early for such predictions and invite to close monitoring of the existing administrative arrangements in the energy sector. Indeed, new cooperation might spawn whilst striking a new balance on the energy trilemma, as higher energy costs will enhance the links between energy and social policy, whilst external threats will intertwin energy and security even more than before.(149)

(148) Ph. Genschel *et al.*, "War and Integration – The Russian Attack on Ukraine and the Institutional Development of the EU", 45 *Journal of European Integration*, 2023, p. 343.

(149) J. Osička and F. Černoch, "European energy politics after Ukraine: The road ahead", 91 *Energy Research & Social Science*, 2022, p. 102757.



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# CHAPTER 9
# Administrative cooperation in environmental policy

**Rui T. Lanceiro**

## *Introduction*

Cooperation is an essential tool to answer the several challenges presented in the field of the environment. As environmental problems ignore political boundaries, they can be adequately addressed only through cooperation between states. For this reason, the duty to cooperate in environmental matters is particularly developed in the context of EU (administrative) law.

The EU Treaties establish that the EU shall act in the field of the environment to ensure a high level of protection and improvement of the quality of the environment, protect human health, and promote prudent and rational utilisation of natural resources (Art. 3(3) TEU and Article 191(1) TFEU). EU environmental policy builds on the principles of preventive action, rectification of pollution at source, precaution and polluter pays (Art. 191(2) TFEU).

To achieve these aims, the EU depends on a framework of cooperation between EU institutions, bodies, and agencies, between the EU and its Member States, and amongst the Member States themselves. This framework relies on the principle of sincere cooperation, contained in Article 4(3) TFEU. In this context, the principle of sincere cooperation guarantees the existence of general mutual duties of respect, assistance, articulation and non-contradiction – of coherence of action – between all the entities covered by the EU legal order. The principle of sincere cooperation has a particular importance in the environmental policy field. The integration of environmental protection across EU policies and activities is mandated by Article 11 TFEU and requires cooperation between Member States and the EU, and between EU institutions, bodies and organisms.(1)

(1) According to Article 11 TFEU, EU institutions, bodies, and organisms must integrate environmental protection "into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". Article 37 of the Charter of Fundamental



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This chapter will start by addressing the EU legal sources of cooperation duties in the field of environmental law. When discussing cooperation, in this context, the focus of analysis will be on the administrative cooperation between Member States of the EU and with the European institutions.(2) First, the institutional framework of administrative cooperation in EU environmental law is presented. After that, a typology of the different types of cooperation in EU environmental law, with several examples, is proposed. The chapter will show that the EU legal order contains several types of cooperation mechanisms, allowing for the development of different relations (consultation, consent, coordination). This may be considered problematic, because it is difficult to understand and may lead to a deficit in judicial control. However, it also demonstrates that EU environmental law is a laboratory in terms of administrative cooperation solutions.

## *I. The institutional framework of administrative cooperation in EU environmental law*

Environmental policy is an area of shared competence between the EU and the Member States (Art. 4(2)(e) TFEU).(3) While, for some environmental problems, action at national or local level is sufficient, many forms of environmental degradation span Member States' borders and need to be addressed at EU level, in line with the principle of subsidiarity. Sometimes broader regional or even international approaches are required.

In the EU institutional framework, the European Commission, and in particular its Directorate-General for Environment (DG ENVI), plays a key role in the administrative implementation of environmental law and policy.(4) The EU also has an agency specifically dedicated to environmental issues: the

Rights of the EU also establishes that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". However, the way in which this objective is to be implemented is not entirely clear. See A. Volpato and E. Vos, "The Institutional Architecture of EU Environmental Governance – The Role of EU Agencies", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, Cheltenham, Edward Elgar Publishing, 2020, p. 54, note 7.

(2) This means that international cooperation with third countries and cooperation between administration and civil society (including environmental non-governmental organisations, trade unions, and academics or scientists) are outside of the scope of this chapter.

(3) See H.T. Anker, "Competences for EU Environmental Legislation – About Blurry Boundaries and Potential Opportunities", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, p. 7.

(4) A. Volpato and E. Vos, "The Institutional Architecture of EU Environmental Governance – The Role of EU Agencies", *op. cit.*



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European Environment Agency (EEA).(5) The task of the EEA is to provide objective, reliable, and comparable information on the environment for those involved in developing, adopting and implementing environmental policy, namely its members and cooperating countries,(6) the EU institutions, bodies and organisms, but also the general public.(7) The EEA was also entrusted with providing the necessary technical and scientific support to the institutions, namely DG ENVI.(8) It is additionally responsible for the establishment and coordination, in cooperation with the Member States, of the European environment information and observation network (Eionet).(9)

The main responsibility for the implementation and safeguarding of EU law lies with the Member States (Art. 291(1) TFEU).(10) Member States must ensure the "effective implementation of Union law" (Art. 197(1) TFEU). The public administrations of the Member States(11) are thus tasked with ensuring the administrative implementation of EU law in cooperation with the EU institutions, especially the Commission.(12) The main forums for such

(5) The EEA was established by Regulation (EC) No. 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, [2009] OJ L 126/13.

(6) The EEA has 32 member countries and six cooperating countries. The member countries include the 27 European Union Member States together with Iceland, Liechtenstein, Norway, Switzerland, and Turkey. The six West Balkan countries are cooperating countries (Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Serbia, as well as Kosovo).

(7) See Art. 1(2) Regulation (EC) No. 401/2009.

(8) The relationship between the two has not always been harmonious, see A. Volpato and E. Vos, "The Institutional Architecture of EU Environmental Governance – The Role of EU Agencies", *op. cit.*, p. 59.

(9) The EEA works with national focal points (e.g., the national environment agencies or environment ministries), which are responsible for coordinating networks of national reference centres, bringing together national experts. Eionet also includes seven European Topic Centres, which are consortia of institutions across EEA member countries dealing with specific environmental topics. See Art. 2(a) Regulation (EC) No. 401/2009. See A. Volpato and E. Vos, "The Institutional Architecture of EU Environmental Governance – The Role of EU Agencies", *op. cit.*, p. 60.

(10) Even before the Treaty of Lisbon, which introduced that provision, this task of the Member States' administrations was recognised by the CJEU, as a consequence of the principle of sincere cooperation, within the duty of Member States to ensure the full effectiveness of EU law, provided for in Article 5 TEEC, later Article 10 TCE – today, Article 4 (3) TEU (*v.g.*, *Schlüter & Maack v. Hauptzollamt Hamburg Jonas*, case C-94/71, EU:C:1972:45, para. 10; *Deutsche Milchkontor GmbH*, joined cases C-205/82 to C-215/82, EU:C:1983:233, paras. 17 and 19).

(11) The regional and local authorities of the Member States are also key players in this area. Cooperation with the Committee of the Regions (CoR), where these authorities are represented, is facilitated by the Technical Platform for Cooperation on the Environment. It is a forum set up by the Commission for Environment, Climate Change and Energy (ENVE Commission) at the CoR and DG ENVI aimed at fostering dialogue on local and regional problems and solutions in the implementation of EU environment law, and to exchange best practices at a technical level.

(12) See e.g., Th. Von Danwitz, *Europäisches Verwaltungsrecht*, Berlin, Springer, 2008, pp. 302, 309, 469; S. González-Varas Ibáñez, *Tratado de Derecho Administrativo – El Derecho Administrativo Europeo*, Toronto, Civitas/Thomson Reuters, 2012, p. 33; J. Schwarze, "European Administrative Law in the Light of the Treaty of Lisbon", *European Public Law*, 2012, p. 285; R. Widdershoven, "European Administrative Law", in R. Seerden and F.A.M. Stroink (eds), *Administrative Law of the European*



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cooperation between Member States and between them and the Commission are the committees set up by the EU legislation, usually under the comitology(13) procedure.(14)

In this area, the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) also plays a role. It is an international non-profit association (under Belgian law) of the environmental authorities of the EU Member States, acceding and candidate countries of the EU, EEA, and EFTA countries and potential candidates.(15) It allows policymakers, environmental inspectors, and enforcement officers to exchange ideas, and encourages the development of enforcement structures and best practices.

## *II. The different types of cooperation in EU environmental law*

Drawing a typology of administrative cooperation in the field of EU environmental law is not easy. The different types of cooperation duties and their quantity and complex nature are partly responsible for this difficulty.

Despite these difficulties, a taxonomy of the different types of cooperation duties is possible and will be provided below. The first is the duty to consult different Member States and/or EU institutions or bodies in the framework of a national decision-making procedure. There are also cases where the decision-making procedure not only involves a consultation stage, but also prior consent by another state or the Commission. Sometimes, the level of cooperation is such that it leads to the establishment of a composite decision-making procedure. There are also cases of duties of coordination of Member State action, namely in the management of shared resources. Finally, the duties regarding the exchange of information and of notification are also analysed.

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*Union, its Member States and the United States – A comparative analysis*, Antwerpen-Groningen, Intersentia, 2002, p. 265.

(13) On comitology after the Treaty of Lisbon, see Th. Christiansen and M. Dobbels, "Non-legislative Rule Making after the Lisbon Treaty – Implementing the New System of Comitology and Delegated Acts", 19 *ELJ*, 2013, p. 42; J. Mendes, "Delegated and Implementing Rule Making – Proceduralisation and Constitutional Design", 19 *European Law Journal*, 2013, p. 22; A. Windhoff-Héritier *et al.*, *Changing Rules of Delegation – A Contest for Power in Comitology*, Oxford, Oxford University Press, 2013, p. 48.

(14) For example, the Committee of Competent Authorities established in Article 27 of the Seveso Directive. Some of these fora are established outside of the comitology procedure, such as the body provided for in Article 13(3) of the Industrial Emissions Directive, consisting of representatives of Member States, the industries concerned and non-governmental organisations promoting environmental protection.

(15) Currently, IMPEL has 55 members from 36 countries including all EU Member States, North Macedonia, Serbia, Turkey, Iceland, Kosovo, Albania, Switzerland and Norway.



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## A. Consultation and participation in national decision-making procedures

One of the mechanisms of administrative transboundary cooperation in the field of environmental law is the establishment, in national decision-making procedures, of a stage of consultation of other states. This mechanism derives from international law, especially the so-called "no-harm rule"(16) and the duty to prevent or mitigate cross-border environmental damages that would result from the activities or projects in question.(17)

The main example of this cooperation mechanism is the consultation stage of the environmental impact assessment (EIA) procedure in a transboundary context. The EIA procedure is regulated by the EIA Directive as a national procedure, under the responsibility of the Member State in the territory of which the project in question is intended to be carried out.(18) The international obligations to cooperate(19) were implemented at EU level by Article 7 of the EIA

(16) The principle of international cooperation places an obligation on states to ensure that activities undertaken on their territories do not cause damage to the environment of other states or which could harm the health of their inhabitants (the "no harm rule"). It was established in the first international judicial decisions with an environmental dimension, *i.e.*, the Trail Smelter case (Arbitral Awards, 16 April 1938 and 11 March 1941, Trail Smelter (*United States v. Canada*), R.S.A., Vol. III, p. 1965) and the Corfu Channel case (ICJ, Judgment of 9 April 1949, Corfu Channel Case [*U.K. v. Albania*], 1949 ICJ, p. 4). See also Lac Lanoux Arbitration (France v. Spain), 12 R.I.A.A. 285. Island of Palmas (*U.S. v. Netherland*), 11 R.I.A.A. 829. H. Kelsen, *Principles of International Law*, The Lawbook Exchange, New Jersey, 1966, pp. 205-206.

(17) The obligation on states to cooperate in addressing international issues is recognised as a fundamental rule of general international law (Art. 55 and 56 of the Charter of the United Nations), emanating from the principle of "good-neighbourliness" (Art. 74 of the Charter). This principle is laid down in "soft law" instruments of environmental law such as in Principle 24 of the Stockholm Declaration and in Principle 7 of the Rio Declaration. From the principle of international cooperation stems a duty of due diligence for states to prevent or reduce transboundary harm by controlling activities on their territory.

(18) J.H. Jans and H.H.B. Vedder, *European Environmental Law – After Lisbon*, Zutphen, Europa Law Publishing, 2012, p. 311; A. García-Ureta, "Environmental Impact Assessment in the EU", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, p. 164.

(19) In the *Pulp Mills* case the ICJ established that EIA has gained so much acceptance among states that it may now be considered a requirement under general international law "where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource" (Pulp Mills on the River Uruguay (*Argentina v. Uruguay*) (Merits 20 April 2010) [2010] ICJ Rep 2010 paras 204-205). The ICJ had an opportunity to look again at the content of state obligations on EIA in the *Costa Rica v. Nicaragua and Nicaragua v. Costa Rica* cases, jointly decided in December 2015 (Certain Activities Carried out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*) and Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v. Costa Rica*) (Joined Cases 16 December 2015) [2015] ICJ Rep 2015 ("*Costa Rica v. Nicaragua*/*Nicaragua v. Costa Rica*"). However, both judgements left a considerable degree of ambiguity on the scope of states' obligations concerning EIA, and their legal basis. See J. Harrison, "Significant International Environmental Law Cases – 2015-16", 28 *Journal of Environmental Law*, 2016, pp. 533, 537. In Europe, this principle was expressly recognised through the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), signed in that Finnish city in 1991. On the Espoo Convention, see A. Boyle, "Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention", 20 *Review of European, Comparative and International Environmental Law*, 2011, p. 227.



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Directive. The cooperation mechanism has three stages. In the first stage, there must be an exchange of information. If a Member State finds that a project is likely to have significant effects on the environment in another Member State, the latter must be given information on the project and on the procedure. This can also happen at the request of the Member State likely to be significantly affected.

The EIA Directive adopted an overall assessment of the effects of projects on the environment, which may extend to the territory of a number of Member States.(20) If a project is located close to a border, the CJEU has already considered that it was "indisputable that the project could also have significant effects on the environment in the [other] Member State, within the meaning of Article7(1)" of the EIA Directive.(21) This also means that projects listed in Annex I to the EIA Directive which extend to the territory of several Member States cannot be exempted from the application of the Directive. The CJEU considered that such an exemption would seriously interfere with the objective of the EIA Directive and seriously compromise its effectiveness.(22)

If the Member State which receives the information indicates that it intends to participate in the environmental decision-making procedure, a consultation stage ensues (Art. 7(4) of the Directive).

In this case, the other Member State and its citizens have the possibility to participate in the environmental decision-making procedures of the Member State conducting the EIA, which must take into consideration the transboundary effects on the environment of the project in the national administrative decision-making procedure. Interestingly, the Espoo Convention and the EIA Directive go beyond intergovernmental cooperation and ensure the participation of local authorities and the public. The Espoo Convention requires that the public in the affected party be informed of the proposed activity and be given the opportunity to comment on or object to it. This is reinforced by the Aarhus Convention, which provides for the right of the public concerned to participate in environmental decision-making, regardless of their citizenship.(23) The comments must be transmitted to the competent authority of the party of origin, either directly or through the state of origin itself (Art. 3(8) of the

(20) *Umweltanwalt von Kärnten*, case C-205/08, EU:C:2009:767, para. 51.

(21) *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, case C-411/17, EU:C:2019:622, paras. 76-81.

(22) *Umweltanwalt von Kärnten*, case C-205/08, EU:C:2009:767, paras 54-55.

(23) J. Ebbesson, "A Modest Contribution to Environmental Democracy and Justice in Transboundary Contexts – The Combined Impact of the Espoo Convention and Aarhus Convention", 20 *Review of European, Comparative and International Environmental Law*, 2011, p. 248.



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Espoo Convention). The EIA Directive goes further in ensuring that not only the public concerned, but also public authorities of the affected Member State likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences, can effectively participate in EIA procedures in a transboundary context (Arts. 7(3) and (5) of the EIA Directive).(24) The information provided by the Member State conducting the EIA to the potentially affected Member State must be communicated to the public and to the authorities within a reasonable period of time and they must be given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the Member State responsible for the assessment.

In the final stage, the results of consultations and the information gathered must be duly considered in the development consent procedure by the Member State responsible for the assessment. After the national decision is taken, it must be notified to the affected Member State, including a summary of how the comments received from it have been incorporated or otherwise addressed in the decision (Arts. 8 and 9(1)(b) and (2) of the Directive). The final decision must be also made available to the public and to the local authorities of the affected Member State at its request.

Similar procedures of notice and consultation are established in Article 7 of the Strategic Environmental Assessment (SEA) Directive,(25) when the implementation of a plan or programme being prepared is likely to have significant effects on the environment in another Member State, Article 14(3) of the Seveso Directive,(26) and in Article 26 of the Industrial Emissions Directive,(27) for the activities set out in its Annex I.

In all these procedures, the EU law establishes the need for a national decision-making procedure, that may include a horizontal consultation stage of potentially affected Member States. They (and their citizens) should be informed

(24) The EIA Directive was amended extensively in 2003, following the signing of the Aarhus Convention by the EU, through Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending them with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, [2003] OJ L 156/17.

(25) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, [2001] OJ L 197/30, which implements the Kiev Protocol to the Espoo Convention that sets forth the procedure for transnational consultation at the level of plans and programmes.

(26) Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, [2012] OJ L 197/1.

(27) Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), [2010] OJ L 334/17.



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and have the power to issue opinions that must be taken into consideration by the Member State conducting the procedure. Thus, the national final decision must (also) be reasoned in the light of the results of the cross-border consultation.

## B. Prior consent

In some cases, notification and consultation of neighbouring states are not considered sufficient, and prior informed consent is required. This happens, typically, when the national administrative authority's decision produces effects in the territory of another state. A possible example of this situation is the Basel Convention,(28) which goes beyond the mere consultation and notification requirements. It mandates the explicit prior consent of potentially affected states that must be based on information supplied by an exporter and be sufficient to enable the nature and the effects on human health and the environment of the proposed movement to be assessed.(29) Similar provisions on prior informed consent can also be found in other conventions dealing with trade in toxic or hazardous substances or wastes such as the Rotterdam, Stockholm, Bamako and Waigani Conventions.(30) The regimes applicable to the prior notification and consent in these cases in the EU, which is a party to the Basel, Rotterdam and Stockholm Conventions,(31) was implemented through

(28) Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Basel, 1989, 28 I.L.M. 649. See K. Kummer, "The Basel Convention – Ten Years On", 7 *Review of European, Comparative and International Environmental Law*, 1998, p. 227; F. Bitar, *Les mouvements transfrontières de déchets dangereux selon la Convention de Bâle*, Paris, A. Pedone, 1997; M. Allen, "Slowing Europe's Hazardous Waste Trade – Implementing the Basel Convention into European Union Law", 6 *Colorado Journal of International Law and Policy*, 1995, p. 163; C. De Villeneuve, "Les mouvements transfrontières des déchets dangereux : Convention de Bâle et droit Communautaire", 340 *Revue du Marché commun et de l'Union européenne*, 1990, p. 568.

(29) Basel Convention, Art. 6(4).

(30) Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (adopted on 10 September 1998, entered into force on 24 February 2004) (1999) 38 ILM 1; Stockholm Convention on persistent organic pollutants (POPs), entered into force on 17 May 2004; Organisation of African Unity: Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, 29 January 1991, Art. 6, 30 I.L.M. 773, 785; Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention), 2001. P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, Oxford, Oxford University Press, 2009, pp. 476-477 and 486.

(31) See the Council Decision 93/98/EEC of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention), [1993] OJ L 39/1; Council Decision 2003/106/EC of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, [2002] OJ L 63/27; and the Council Decision 2006/507/EC of 14 October 2004 concerning the conclusion, on behalf of the European Community, of the Stockholm Convention on Persistent Organic Pollutants, [2004] OJ L 209/1.



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regulations.(32) In the case of the enforcement of the Basel Convention, the shipment of certain types of waste within the EU must be notified to the competent authority of dispatch, which transmits the notification to the competent authority of destination with copies to any competent authorities of transit (Arts. 3 and 7 Regulation (EC) No. 1013/2006). Only if all these authorities give their express or tacit consent is the shipment legal (Art. 2(35) of the Regulation).

In a different area, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity(33) similarly establishes an advance informed agreement procedure for ensuring that states are provided with the information necessary to make informed decisions before agreeing to the import of living modified organisms resulting from modern biotechnology into their territory. The EU is also a Party to the Cartagena Protocol(34) and has implemented it through EU legislation.(35) Another example can be found in the regime of access to genetic resources.(36)

There are also cases where prior positive opinion of the Commission is required before the national administration can adopt an act. One example is established in the Habitats Directive.(37) Article 6(3) of this Directive requires that any plan or project likely to have a significant effect on a Natura 2000 site must be subject to an appropriate assessment of its

(32) Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, [2006] OJ L 190/1; Regulation (EU) No. 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals, [2012] OJ L 201/60; and Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants, [2019] OJ L 169/45. See J.H. Jans and H.H.B. Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, p. 438.

(33) See R. Hill, S. Johnston and C. Sendashonga, "Risk Assessment and Precaution in the Biosafety Protocol", 13 *Review of European, Comparative and International Environmental Law*, 2004, p. 263; Ruth MacKenzie, "The Cartagena Protocol after the First Meeting of the Parties", 13 *Review of European, Comparative and International Environmental Law*, 2004, p. 270.

(34) Council Decision 2002/628/EC of 25 June 2002 concerning the conclusion, on behalf of the European Community, of the Cartagena Protocol on Biosafety, [2002] OJ L 201/48.

(35) Regulation (EC) No. 1946/2003 of the European Parliament and of the Council of 15 July 2003 on transboundary movements of genetically modified organisms, [2003] OJ L 287/1.

(36) See U.N. Convention on Biological Diversity, at Article 15(5), and the Nagoya Protocol on Access and Benefit-sharing. Both were approved on behalf of the EU in accordance with Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity, [1993] OJ L 309/1, and with Council Decision 2014/283/EU of 14 April 2014 on the conclusion, on behalf of the European Union, of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, [2014] OJ L 150/231. They were implemented by the EU through Regulation (EU) 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in the Union, [2014] OJ L 150/59. See B. Coolsaet, F. Batur and A. Broggiato (eds), *Implementing the Nagoya Protocol – Comparing Access and Benefit-Sharing Regimes in Europe*, Leiden/Boston, Brill/Nijhoff, 2015.

(37) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L 206/7.



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implications in view of the sites' conservation objectives.(38) Only if the competent national authorities conclude that the plan or project will not adversely affect the integrity of the site concerned can they approve it. However, a plan or project which has had a negative appropriate assessment of its implications for a site may still be greenlighted, in the absence of alternative solutions, if the Member State invokes imperative reasons of overriding public interest, including those of a social or economic nature, if all compensatory measures necessary are taken (Art. 6(4) of the Habitats Directive). If the site in question hosts a priority natural habitat type and/or a priority species, the plan or project can only be carried out if the Member State invokes reasons related to human health or public safety or beneficial consequences of primary importance for the environment or, after receiving the Commission's opinion, other imperative reasons of overriding public interest.(39) This opinion is, in substance, binding on the Member States – without it they cannot carry out the action in question.

Also in this area, the Birds Directive(40) provides that Member States must consult the Commission before allowing the sale, transport for sale, keeping for sale and the offering for sale of some species of birds that fall within the scope of the Directive (Art. 6(3) of the Birds Directive).(41) After joint examination, if the Commission considers that the intended authorisation will or may lead to a species being endangered, it shall forward a reasoned recommendation to the Member State concerned, which is published in the Official Journal, stating its opposition to the marketing of the species in question. Although it is not established that this recommendation is binding, failure to respect it would mean that the Member State is in breach of EU law.

In these cases, national decision-making procedures not only have a stage where other States or the Commission participate but are also bound by the need of a prior positive decision by the other party before reaching the final decision. These cases are not the most common but may arise when the procedure impacts the sovereignty of another state or deals with shared resources.

(38) A. Cliquet, "EU Nature Conservation Law – Fit for Purpose", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, p. 273.

(39) See Art. 6(4) of the Habitats Directive. This provision must be interpreted restrictively and does not exempt an environmental assessment from being carried out (see ECJ judgment in *Commission v. Italy*, case C-304/05, EU:C:2007:532, paras. 81-83). The opinions can be found at https://ec.europa.eu/environment/nature/natura2000/management/opinion_en.htm.

(40) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, [2009] OJ L 20/7.

(41) A. Cliquet, "EU nature Conservation Law – Fit for Purpose", *op. cit.*, p. 276.



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## C. Coordination of national decision-making

A different type of cooperation mechanism is the establishment of duties of coordination of national decision-making procedures and action. In this case, national decision-making procedures must take into consideration the acts and positions of the other Member States involved. When several Member States are implementing the same set of EU law obligations, this may lead to joint action. The objective of this coordination is to ensure coherence of action and effective implementation of EU law.

This is especially relevant in cases of management of shared resources or ecosystems. A good example of this is provided by the EU legal regime applicable to shared bodies of water.(42) The Water Framework Directive(43) defines the river basins as the basic operational entity of water management. These are natural entities independent of administrative and political borders. The Member States are responsible for identifying the river basins and to assign them to districts (Art. 3(1) of the Water Framework Directive). A river basin extending over the territory of more than one Member State should be integrated into an international river basin district (Art. 3(3)). The duty of cooperation does not stop at the stage of designation of river basin districts, but also encompasses the transboundary cooperation for their management. A general obligation to coordinate all programmes of measures for the whole of the river basin district, namely through existing structures stemming from international agreements (Art. 3(4)-(5) of the Water Framework Directive), can be distinguished from a more specific obligation regarding management plans. In international river basin districts, Member States must ensure coordination with the aim of producing a single international river basin management plan (Art. 13(2)-(3) of the Water Framework Directive).(44) For river basins extending beyond the boundaries of the Union, Member States should equally ensure the appropriate coordination with the relevant non-member States. Co-ordination on transboundary pollution is to be arranged through mechanisms under the Water Framework Directive.

(42) J.H. Jans and H.H.B. Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, p. 346; N. Hervé-Fournereau, "Beyond the 2019 Fitness Check of the Water Framework Directive – Designing the Future of European Water Law", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, p. 280.

(43) Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, [2000] OJ L 327/1.

(44) If that is not possible, they are under the obligation to produce river basin management plans covering at least those parts of the international river basin district falling within their territory to achieve the objectives of this Directive.



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Coordination duties are also established in: *i)* the Groundwater Directive(45) for the establishment of threshold values for the monitoring and the identification of relevant hazardous substances (Art. 3(4) of the Groundwater Directive), in the case of shared bodies of groundwater; *ii)* in the Quality Standards for Water Directive,(46) for the requirements for the achievement of the environmental objectives set out in Article 4 of the Water Framework Directive, monitoring activities and, as appropriate, the compilation of inventories between Member States sharing bodies of surface water; *iii)* as well as in the Floods Directive,(47) for the identification of potential significant flood risks and the production of flood risk management plans at the level of the international river basin district (Arts. 5(2) and 8(2) and (3) of the Floods Directive). In solidarity, Member States must not undertake measures that would increase flood risks upstream or downstream in neighbouring countries (Art. 7(4) of the Floods Directive).

Because of the transboundary nature of the marine environment, the Marine Strategy Framework Directive(48) also establishes the duty of Member States to cooperate with each other and with third countries to ensure the coordinated initial assessment and development of marine strategies for each marine region or subregion (Arts. 5(2)-(3), 6, 8(3) of the Marine Strategy Framework Directive). Member States shall also work with neighbouring countries to coordinate monitoring programmes to ensure that methods are consistent and that transboundary issues are addressed (Art. 11(2)). The cooperation and coordination may use and build upon relevant international forums, including mechanisms and structures of regional sea conventions.(49)

This type of mechanism can also be found in the control of air quality. In the event an alert threshold, limit value or target value (plus a relevant margin of tolerance or long-term objective) is exceeded due to significant transboundary transport of air pollutants, the Member States concerned must cooperate and,

(45) Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration, [2006] OJ L 372/19.

(46) Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council, [2008] OJ L 348/84.

(47) Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, [2007] OJ L 288/27.

(48) Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), [2008] OJ L 164/19. See J.H. Jans and H.H.B. Vedder, *European Environmental Law: After Lisbon*, *op. cit.*, pp. 372-373.

(49) Such as the Convention on the Protection of the Marine Environment of the Baltic Sea, the Convention for the Protection of the Marine Environment of the North-East Atlantic and the Convention for the Marine Environment and the Coastal Region of the Mediterranean Sea.



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where appropriate, draw up joint activities, such as the preparation of joint or coordinated air quality plans in order to address the problem through the application of appropriate but proportionate measures (Art. 25(1) of the Ambient Air Quality Directive(50)).

Besides the cases of shared resources, EU law also establishes a duty of cooperation in cases where environmental damages affect or are likely to affect several Member States, with a view to ensuring proper and effective preventive or remedial action (Art. 15(1) of the Environmental Liability Directive(51)). Where a Member State identifies damage within its borders which was not caused within them it may report the issue to the Commission and any other Member State concerned. In this case, the Member State may make recommendations to other Member States for the adoption of preventive or remedial measures (Art. 15(3) of the Environmental Liability Directive).

The need for coordination may also lead to duties to give effect to decisions taken by other Member States. An example of this can be found in the EU implementation regime of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),(52) which include the so-called Basic Regulation,(53) as well as several implementing regulations.(54) This regime provides a framework for Member State administrative decisions with transnational effect.(55) In fact, permits and certificates

(50) Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, [2008] OJ L 152/1. J.H. Jans and H.H.B. Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, p. 374; K. Pedrosa and B. Vanheusden, "EU Air Pollution Law – Comprehensive But Insufficient", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, p. 296.

(51) Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, [2004] OJ L 143/56.

(52) CITES has created a system of permits and certificates for the import and export of specimens of endangered species, with different types of protection. All EU Member States are party to CITES, although the EU as an organisation is not.

(53) Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, [1996] OJ L 61/1.

(54) Commission Regulation (EC) No. 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein, [2006] OJ L 166/1 (the *Implementing Regulation*); Commission Implementing Regulation (EU) 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein and amending Commission Regulation (EC) No. 865/2006, [2012] OJ L 242/13 (the *Permit Regulation*). The Basic Regulation provides the Commission with the possibility to restrict the introduction of species into the EU (see Commission Implementing Regulation (EU) 2019/1587 of 24 September 2019 prohibiting the introduction into the Union of specimens of certain species of wild fauna and flora in accordance with Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein, [2019] OJ L 248/5, the *Suspension Regulation*).

(55) See A. Keessen, *European Administrative Decisions how the EU Regulates Products on the Internal Market*, Groningen, Europa Law, 2009, p. 58; L. De Lucia and M.Ch. Romano, "Transnational



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issued by the competent authorities of the Member States in accordance with the CITES Basic Regulation are valid throughout the EU (Art. 11(1)). Member States are not obliged to consult each other before issuing the decision, nor is there any provision for a conciliation mechanism or the intervention of the Commission,(56) but they may adopt stricter measures in certain cases.(57) Decisions may also be deemed void if a competent authority or the Commission, after consultation with the competent authority which issued the permit or certificate concerned, establishes that they were issued on the false premise that the conditions for their issue were respected (Art. 11(2)). In other words, the competent authorities of the Member States must ascertain whether a permit issued by the competent authorities of the other Member States is valid for each of the specimens mentioned.(58) This ensures a horizontal control of legality of transnational administrative decisions.

More relevant in terms of coordination to ensure consistency of application, is the duty of Member States to recognise the rejection of applications by the competent authorities of the other Member States, where such a rejection is based on the provisions of the CITES Basic Regulation, according to its Article 6(4). To ensure the effectiveness of this regime, when a Member State rejects an application for a permit or certificate "in a case of significance in respect of the objectives" of the Regulation, it must immediately inform the Commission which is responsible for informing the other Member States (Arts. 6(1) and (2) of the CITES Basic Regulation). Only if the circumstances have significantly changed or where new evidence to support an application has become available may the Member States fail to respect the previous rejection. In this case, if the management authority issues a permit or certificate, it must inform the Commission and state the reasons for issuance (Art. 6(4) of the CITES Basic Regulation). This means that, in this case, not only the permits or certificates issued have transnational value, but also the national decision rejecting a request. This binding effect on other Member States' administrations reflects the principle of sincere cooperation, in the dimension of avoiding contradictions and ensuring coordination between national administrations.(59)

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Administrative Acts in EU Environmental Law", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, pp. 101 and 105; J.H. Jans and H.H.B. Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, p. 463.

(56) A. Keessen, *European Administrative Decisions how the EU Regulates Products on the Internal Market*, *op. cit.*, p. 65.

(57) See *Nationale Raad van Dierenkwekers en Liefhebbers and Andibel*, case C-219/07, EU:C:2008:353.

(58) See *Sofia Zoo*, case C-532/13, EU:C:2014:2140, para. 30.

(59) A. Keessen, *European Administrative Decisions how the EU Regulates Products on the Internal Market*, *op. cit.*, p. 55; L. De Lucia and M.Ch. Romano, "Transnational Administrative Acts in EU Environmental Law", *op. cit.*, p. 101, pp. 105-106.



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There are also cases where the Commission is empowered to issue generic guidelines as to how national administration should act. The aim is to ensure harmonisation and uniform application by the Member States' administrations. An example of this can be found in the Directive on Industrial Emissions, concerning the adoption of best available techniques (BAT).(60) Firstly, the Commission is responsible for drawing up BAT reference documents (BREFs), which are documents describing, inter alia, the techniques used to determine best available techniques and BAT conclusions (Arts. 3(11) and (12) of the Industrial Emissions Directive), with the participation of Member States, industry, non-governmental organisations and the public (Art. 13). The part of the BREFs laying down the so-called "BAT conclusions" are the reference for setting the permit conditions by the national permitting authorities (Art. 14(3)).(61) BAT conclusions are the reference to the competent authority of Member States to set emission limit values that ensure that, under normal operating conditions, emissions do not exceed the emission levels associated with the BAT established therein (Art. 15(3)). Derogations from these BAT associated emission levels, as resulting from the BAT conclusions, are foreseen if they would lead to disproportionately high costs compared to the environmental benefits obtained. However, also in this case, the Commission may, if necessary, issue further guidance, establishing the criteria to be considered, based on information provided by Member States (Art. 15(4) of the Directive). The Commission is also permitted to adopt guidelines on the criteria for the appraisal of environmental risks in environmental inspections (Art. 23(4), subparagraph 5) and to establish guidelines to assist Member States in encouraging the development and application of emerging techniques as identified in BAT reference documents (Art. 27(2)).

Duties of coordination can also be found in the area of enforcement of EU law. Recommendation (2001/331/EC) providing for minimum criteria for environmental inspections in the Member States (RMCEI)(62) contains non-binding criteria for the planning, carrying out, following up and reporting on environmental inspections.(63) It recommends the coordination between Member States of inspections with regard to installations and activities which might have significant transboundary impact (Recommendation III(3) of RMCEI).

(60) J.H. Jans and H.H.B. Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, pp. 324-327; L. Braaksma and H. Tolsma, "Integrated Pollution and Prevention – A Critical Legal Perspective on All-inclusive Integration", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, p. 313, pp. 318-319.

(61) They are adopted by the Commission as implementing decisions in accordance with the examination procedure.

(62) Recommendation 2001/331/EC of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States, [2001] OJ L 118/41.

(63) M. Hedemann-Robinson, "Environmental Inspection by Public Authorities", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, pp. 196 and 202.



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## D. Composite decision-making procedures

There are cases when the EU legislator requires such a high level of cooperation between administrations that it establishes a decision-making procedure, with stages at both the national and Union level, requiring the active participation of both levels, where the final decision may be taken by either one of these administrations (or by both together) – a composite decision-making procedure.(64)

An example of a composite procedure is the designation of Natura 2000 sites.(65) The sites can be Special Areas of Conservation (SAC), designated under the Habitats Directive, or Special Protection Areas (SPA), established under the Birds Directive. The composite procedure was established for the designation of SAC,(66) and has three stages.(67)

In the first stage, each Member State must compose a national list of sites based on the criteria set out in the annexes to the Habitats Directive, indicating the habitats and the wild animal and plant species concerned. The list is to be transmitted to the Commission, together with information on each site.(68)

(64) See Th. Von Danwitz, *Europäisches Verwaltungsrecht*, *op. cit.*, p. 609; S. Cassese, "European Administrative Proceedings", 68 *Law & Contemporary Problems*, 2004, p. 21; G. Della Cananea, "The European Union's Mixed Administrative Proceedings", 68 *Law & Contemp. Problems*, 2004, p. 198; M.P. Chiti, *Diritto amministrativo europeo*, Milan, Giuffre, 2018, p. 469; C. Fra[illegible]ni, "European Principles Governing National Administrative Proceedings", 68 *Law & Contemporary Problems*, 2004, p. 191; E. Schmidt-Assmann, "Introduction – European Composite Administration and the Role of European Administrative Law", in O. Jansen and B. Schöndorf-Haubold (eds), *The European Composite Administration*, *op. cit.*; L. De Lucia, "Conflict and Cooperation within European Composite Administration (between Philia and Eris)", 5 *Review of European Administrative Law*, 2012, p. 43; H. Hofmann, "Composite Decision Making Procedures in EU Administrative Law", in H. Hofmann and A. Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Cheltenham, Edward Elgar, 2009; M. Eliantonio, "Judicial Review in an Integrated Administration – The Case of 'Composite Procedures'", 7 *Review of European Administrative Law*, 2014, pp. 65-66.

(65) Natura 2000 is an ecological network of protected areas established by the EU to ensure biodiversity by conserving natural habitats and wild fauna and flora of Community interest throughout the territory of the Member States by providing a common framework applicable to them in a network of ecological protection areas in the territory of the EU. See J.H. Jans and H.H.B. Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, pp. 451-463; A. Cliquet, "EU Nature Conservation Law – Fit for Purpose", *op. cit.*, p. 265.

(66) The designation of SPA under the Birds Directive depends solely on the Member States. Despite the absence of a composite procedure for monitoring Member States' action, their discretion to act remains in this case. See, for example, *Commission v. Austria*, case C-209/04, EU:C:2006:195, paras. 33-40; *Commission v. Ireland*, case C-418/04, EU:C:2007:780, paras. 39, 141, 142.

(67) A Cliquet, "EU Nature Conservation Law – Fit for Purpose", *op. cit.*, p. 269; H. Schoukens and H.E. Woldendorp, "Site Selection and Designation Under the Habitats and Birds Directives – A Sisyphean task?", in C.-H. Born *et al.* (eds), *The Habitats Directive in its EU Environmental Law context – European Nature's Best Hope?*, London, Routledge, 2015, p. 31.

(68) According to the ECJ, Article 4(1) of the Habitats Directive must be interpreted as meaning that a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, when selecting and delimiting sites to be proposed to the Commission for identification as SCI. See *First Corporate Shipping*, case C-371/98, EU:C:2000:600.



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As a second step, based on the national lists and in coordination with the Member States, the Commission will establish and adopt, by means of an implementing decision, a list of sites of Community importance (SCI) for each of the nine biogeographical regions of the EU under the comitology procedure.(69) If the Commission establishes that a site which should be on the national list according to the criteria laid down in the Directive is not there (for example because it is a site corresponding to a priority natural habitat type or hosting a priority species), it initiates a bilateral dialogue with the Member State.(70) In the absence of agreement, the inclusion of the site on the Community list of sites may be decided on by the Council by unanimity (Art. 5 of the Habitats Directive).

Sites considered to be of Community importance are immediately covered by the protection regime of the Habitats Directive.(71) Member States are obliged to take protective measures, in the light of the Directive's conservation objective, to safeguard the ecological interest of sites on their national lists that may be identified as SCI. When the Commission takes its decision, the sites identified by the Member States must reflect the situation in which they were when the scientific assessments was made. Otherwise, the Commission decision-making procedure, which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by ecological comparisons between the different sites proposed by the Member States, could be distorted and the Commission would no longer be able to fulfil its duties in this matter.(72)

Finally, in a third stage, the Member States must designate the SCI as SAC within a maximum period of six years (Art. 4(4) of the Habitats Directive).

This composite procedure is rather complex because it involves a national first stage, a second supranational stage and a third, again national, stage. The Commission has a significant role to play and may not list as SCI sites included on the national list or suggest the addition of sites not included. The last stage, at national level, is a purely implementing stage since there does not seem to be any scope for Member States to refuse to designate sites as SAC.(73) The

(69) See Art. 4(2) para. 3 and Art. 21 of the Habitats Directive. To the extent that Article 21 of the Directive refers to Article 5 of the repealed Comitology II Decision, the examination procedure (Art. 5 of the Comitology Regulation) should be understood to apply and the basic act provides that in the absence of an opinion the Commission may not adopt the draft implementing act (Art. 5(4)(b), *ex vi* Art. 13(1)(c) of the Comitology Regulation).

(70) A Member State cannot refuse to agree to the inclusion of a site in the draft list of SCI drawn up by the Commission, on grounds other than environmental protection. See *Stadt Papenburg*, case C-226/08, EU:C:2010:10.

(71) See *Società Italiana Dragaggi*, case C-117/03, EU:C:2005:16.

(72) See *Bund Naturschutz in Bayern*, case C-244/05, EU:C:2006:579.

(73) See *Commission v. Poland*, case C-441/17, EU:C:2019:669, para. 207.



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various stages, both national and supranational, serve specific objectives and allow for the representation of national interests of Member States and the EU (through the Commission).

The complexity of these procedures leads to possible problems of judicial protection, namely because the decision to designate a site has consequences for the owners of the land.(74) The final decision, to designate a SAC, belongs to the national level, indicating the control would fall to the national courts. However, the national administration has no discretion and must designate all sites listed as SCI. In that case, access to justice lies primarily before the national courts(75) and the legality of the selection of a site as SCI by the EU institutions can be challenged through a preliminary question of validity to the CJEU, under the *Fotofrost* case law.(76) Some problems may emerge, however, because the protection of the sites under the Directive begins with their inclusion in the list of SCI (Art. 4(5) of the Directive) and Member States may take a significant amount of time to designate them as SAC.(77) During that period, the only way to control the legality of the selection of a SCI would be before the CJEU, under Article 263 TFEU. That is problematic because of the uncertainty it brings on which courts ultimately have jurisdiction on any given time (the national courts or the CJEU).(78)

(74) See e.g., *Cascina Tre Pini*, case C-301/12, EU:C:2014:214, on the declassification of a site at the request of the owner.

(75) That can be problematic firstly, because of the standard of review to which national courts must adhere when deciding matters within the scope of EU law and, secondly, access to scientific knowledge in environmental litigation. On this matter, see M. Eliantonio, "The Impact of EU Law on Access to Scientific Knowledge and the Standard of Review in National Environmental Litigation – A Story of Moving Targets and Vague Guidance", 27 *European Energy and Environmental Law Review*, 2018, p. 115.

(76) See *Foto-Frost*, case C-314/85, EU:C:1987:452.

(77) Six years, according to Article 4(4) of the Habitats Directive. In case of infringement, this period can be significantly longer. For instance, in 2019 Portugal still had not designated as SAC sites included in the SCI list in 2004 and 2006. See *Commission v. Portugal*, case C-290/18, EU:C:2019:669.

(78) In the event jurisdiction lies with the CJEU, there is also the question of its powers of control over the national preparatory acts (the national list of proposed sites). The *Oleificio Borelli* doctrine seems to be inapplicable because of the presence of a margin of discretion by the EU institutions. See *Oleificio Borelli*, case C-97/91, EU:C:1992:491. The *Berlusconi* case law might be applied, meaning that it falls to the CJEU not only to rule on the legality of the decision adopted by the EU institution, but also to examine any defects vitiating the national list of proposed sites that would be such as to affect the validity of that final decision. See *Berlusconi and Fininvest*, case C-219/17, EU:C:2018:1023. See on this point, F. Brito Bastos, "The Borelli Doctrine Revisited – Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice", 8 *Review of European Administrative Law*, 2015, p. 269; P. Dermine and M. Eliantonio, "Case Note – CJEU (Grand Chamber), Judgment of 18 Dec. 2018, C-219/17, Fininvest v. IVASS", 12 *Review of European Administrative Law*, 2019, p. 250; F. Brito Bastos, "Derivative Illegality in European Composite Administrative Procedures", 55 *Common Market Law Review*, 2018, p. 126; *id.*, "An Administrative Crack in the EU's Rule of Law – Composite Decision-Making and Nonjusticiable National Law", 16 *European Constitutional Law Review*, 2020, p. 78.



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## *III. Exchange of information and duties of notification*

### A. Exchange of information

The exchange of information between public administrations at the national and EU levels is vital for the administrative enforcement of EU environmental law. Access to sound and correct data is important to ensure that the administrative decision-making procedures lead to efficient and factually accurate decisions. The exchange of information is also critical in monitoring the domestic implementation of EU obligations, allowing the Commission to control if a Member State is complying with its EU environmental law obligations.

The cooperative exchange of information between Member States and EU institutions, bodies and organisms may take the form of a particular step in the decision-making process, an independent duty to inform, or may be institutionalised as a network for information exchange, allowing for a more dynamic exchange.

Besides the generic obligation to provide information, derived from the principle of sincere cooperation, there are several examples of specific obligations of reporting of data and monitoring in EU law. The Member States, based on their internal monitoring, submit information and data in relation to the environment in general or to the compliance and state-of-implementation of international law commitments or EU requirements through national reports to the Commission which then presents its findings, through implementation reports to the European Parliament and the Council, maps or scoreboards.

One example of this can be found in Article 27 of the Ambient Air Quality Directive, which establishes that Member States must provide information on ambient air quality to the Commission. Another example can be found in Article 13(2-3) of the Drinking Water Directive,(79) that establishes that each Member State must send a report to the Commission every three years on the quality of water intended for human consumption. Also, under Article 15(1-2) of the Environmental Liability Directive, when environmental damage has occurred, the Member State in the territory of which the damage originates must provide sufficient information to the potentially affected Member States.

(79) Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, [1998] OJ L 330/32. This Directive was repealed, with effect from 13 January 2023, by Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast), [2020] OJ L 435/1. This Directive establishes the duties of the Member States in relation to information on monitoring of implementation in Article 18. See J.H. Jans and H.H.B Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, pp. 366-367.



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To ensure the effective collection, exchange and use of environmental data and information across Europe, the "Shared Environmental Information System" (SEIS) was established. It is a collaborative initiative of the European Commission(80) together with the EEA and the 39 countries of the Eionet. One of the three pillars of SEIS is cooperation – to manage the inputs of data and the networking (the other two pillars are content (data) and infrastructure).

Sometimes the monitoring and reporting framework has been strengthened, with the regime establishing the need for inspections by national administrations. An example of the express establishment of the duty to set up a system of environmental inspections can be found in the Industrial Emissions Directive (Art. 23), addressing the examination of the relevant environmental effects from the installations concerned, and in the Seveso Directive(81) (Art. 20), on the control of major-accident hazards involving dangerous substances.

These duties can also be imposed upon the Commission(82) or on other agencies or bodies of the EU.(83)

The exchange of information duties may lead to the creation of databases. One example of this is the database established in Article 21(3-4) of the Seveso Directive that contains the reports of Member States of major accidents meeting which have occurred within their territory (Art. 18(1)). This is the Major Accident Reporting System (eMARS), the purpose of which is to facilitate exchange of lessons learned from accidents and near misses involving dangerous substances to improve chemical accident prevention and mitigation of potential consequences. The eMARS contains the reports provided to the Major Accident Hazards Bureau (MAHB) of the Commission's Joint Research Centre (JRC) from EU, EEA, OECD and UNECE countries (under the TEIA Convention).(84)

(80) SEIS was proposed, in February 2008, by the European Commission Communication "Towards a Shared Environmental Information System (SEIS)" (COM(2008) 46 final) as a solution to Europe's environmental information challenge.

(81) Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, [2012] OJ L 197/1.

(82) See e.g., the duty of the Commission to report on the implementation of Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (Art. 11); or the duty to publish a synthesis report on the quality of water intended for human consumption in the Union (Art. 13(5) of Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption).

(83) For example, the duty to publish annual evaluation progress reports by ECHA (Art. 54 of REACH Regulation (EC) No. 1907/2006).

(84) For non-EU OECD and UNECE countries, reporting accidents to the eMARS database is voluntary.



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Sometimes the duty to provide information takes the form of duties of notification. There are two main groups of cases where EU legislation provides for these duties: *i)* the adoption, by the Member State, of a particular measure or decision; *ii)* alert mechanisms in case of emergencies.

## B. Duties of notification of Member States' administrative decisions

Sometimes, the duty of notification exists where EU legislation recognises a margin of discretion to the Member States, allowing them to depart from the intended general rule. An example can be found find in Article 193 TFEU, which establishes the duty of Member States to notify to the Commission the adoption of more stringent protective measures of the environment (in comparison with the ones adopted under Art. 192 TFEU).(85)

Another example of this can be found in Article 6(4) of the Habitats Directive. According to that provision, a Member State, despite a negative assessment of the implications of the project or plan for the site, may consider that it must nevertheless be carried out. However, this can only happen in the absence of alternative solutions, and because of an "imperative reason of overriding public interest". If this happens, the Member State must take all compensatory measures necessary to ensure that all the overall coherence of Natura 2000 is protected. The compensatory measures adopted must be notified to the Commission.

This margin of discretion of the Member States can be related with exemptions or exceptions to duties imposed by the EU legal order. An example can be found in Article 2(4) of the EIA Directive, which establishes the possibility for Member States, in exceptional cases, to exempt a specific project from going through an EIA, where the application of those provisions would result in adversely affecting the purpose of the project, provided the objectives of this Directive are met.(86) In such a case, the Member State must inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals. The Commission immediately forwards the

(85) However, "while that provision requires Member States to communicate to the Commission the more stringent protective measures which they intend to maintain or introduce in environmental matters, it does not make implementation of the planned measures conditional upon agreement by the Commission […]" (*Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, case C-2/10, EU:C:2011:502, para. 52. See also L. Reins, "Where Eagles Dare – How Much Further May EU Member States go under Article 193 TFEU?", in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law*, *op. cit.*, p. 22.

(86) See *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, case C-411/17, EU:C:2019:622, paras. 95-102.



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documents received to the other Member States and reports annually to the European Parliament and to the Council on the application of this exemption. The mere fact that a Member State must notify the Commission – and that the notification is made public – works as a deterrent to the possible abuses of the powers attributed to the Member States, for instance, to exempt projects from compliance with the relevant EU legal obligations. Through this system, the Commission can also check more easily if the exemption was lawful.

### C. Alert mechanisms

The EU law framework provides for several examples of duties to notify neighbouring Member States and/or the Commission in case of any natural disasters, industrial accidents or other emergencies that are likely to produce transboundary effects.(87)

For example, Article 25(3) of the Ambient Air Quality Directive establishes the duty to inform the competent authorities in the neighbouring Member States concerned (as well as the public) in the event of the information threshold or alert thresholds being exceeded in zones or agglomerations close to national borders.

Another example is the area of prevention and management of the introduction and spread of invasive alien species.(88) Besides general duties of notification (Art. 24 Regulation (EU) 1143/2014), the Member States are under the duty to notify the Commission of the early detection of the introduction or presence of invasive alien species of Union concern and inform the other Member States about the appearance or re-appearance of these species on their territory (Art. 16) and of the eradication measures applied (Art. 17) or of the decision not to apply eradication measures pursuant to Article 18. Other duties of notification can be found in Article 18 of the Seveso Directive, concerning major industrial accidents.(89)

## *Conclusions*

It is no surprise that, given the global scope of the environmental problems, cooperation plays a central role in both international and EU environmental law. In this sense, the EU legal order, which is very dependent on the principle of sincere cooperation, in environmental policy, implements and complements the international environmental law obligations.

(87) Rio Declaration, principle 18.

(88) Regulation (EU) 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species, [2014] OJ L 317/35.

(89) See also Art. 10(2) of the Convention on the Transboundary Effects of Industrial Accidents (TEIA Convention).



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Several cooperation mechanisms or instruments emerge. Some of them are institutional in nature – such as the establishment of joint bodies, where both the Member States and the Commission are represented, or formal or informal networks. These fora serve multiple purposes, that range from the sharing of lessons learned or solutions to common problems to the guarantee of harmonisation of the interpretation and implementation of EU law.

Besides these organisational mechanisms, we can also find procedural mechanisms of cooperation. There are general duties of cooperation, such as the exchanging of information or the establishment of composite decision-making procedures. However, some specificities emerge in environmental policy. These are related, on the one hand to the potentially transboundary nature of potential environmental damages – in a logic of prevention, mitigation and remediation of their effects. The principle of good neighbourliness imposes that Member States can have access to information and may be consulted in the national decision-making procedure relative to activities in other Member States that may have damaging effects on their environment. In this case, the power to participate in the national procedure of a different Member State emerges, in such a way that an affected citizen of that state would have a right to be heard if potentially affected. In cases where a national decision involving potential threats to the environment has a direct impact on the territory of another state, such as in the case of the trade in waste, the law may establish the need to obtain prior informed consent of the other state, equivalent to a veto power, because of the principle of sovereignty. The response to transboundary environmental damages is also justification for some of the alert mechanisms found.

On the other hand, as nature knows no borders, EU environmental law needs to deal with questions of management of shared resources – a watercourse, a biodiversity relevant site or the atmosphere, for instance. This is the explanation for several of the coordination duties discussed above, in air, water or biodiversity law. Specifically, it is the justification for the composite decision-making procedure for the designation of Natura 2000 sites or the establishment, by the Commission, in cooperation with the Member States, of the parameters for industrial emissions.

The existent framework applicable for cooperation in the area of the environment is, however, somewhat problematic. As can be seen by this chapter, there is a multitude of mechanisms of cooperation, with different solutions being used, but the reason justifying each case is not clear. Sometimes a national decision-making procedure with a stage for consultation of neighbouring Member States (e.g., the EIA procedure), in other cases a duty to coordinate national decision-making procedures to reach a single conclusion (e.g., a single international river basin management plan), or to coordinate national decisions with



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EU-wide parameters (e.g., the BAT conclusions), or a composite decision-making procedure (SAC designation). In some cases, the procedure applicable for cooperation is regulated (e.g., the EIA procedure) and in other cases it is not (as in the Art. 15(1) of the Environmental Liability Directive). The role played by the Commission also varies significantly. This lack of clarity is problematic because it makes it difficult to anticipate the solutions adopted and the rationale behind them. It is also problematic because it leads to different levels of efficiency of enforcement (clear rules are easier to follow and to control than to have a generic duty to cooperate). Finally, this wide range of mechanisms also lead to very different degrees of access to justice to control the different types of activities.

In any case, it may be concluded that environmental policy is an area of great cooperation – both vertical and horizontal – that can serve as a laboratory to experiment cooperation mechanisms to be exported to other policy areas.



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# CHAPTER 10
# Administrative cooperation in EU climate change policy

**Susana Galera Rodrigo**

## *Introduction*

Climate change is not foreseen as an autonomous policy in the European Treaties, but is instead linked to other two European policies. On the one hand, the promotion of measures "combating climate change" is among the objectives of EU environmental policy (Art. 191(1) TFEU). On the other, the promotion of "energy efficiency and energy saving and the development of new and renewable forms of energy" is a central objective of EU energy policy (Art. 194(1)(c)), constituting at the same time the key action for climate strategies. These two policies have been progressively linked, and finally energy and climate change have converged in a single and common legal framework through Regulation 2018/1999 on the Governance of the Energy Union and Climate Action, which was adopted in 2018.(1)

As is well known, EU climate law and policy is strongly influenced by the international treaties signed both by the EU and its Member States, the United Nations Framework Climate Change Convention (UNFCCC) adopted in 1992 being the most prominent. These treaties establish general commitments for the EU as a whole, while their implementation mostly depends on the Member States. That situation explains the close cooperation needed between the Commission and the Member States in order to implement EU climate and energy policy, because a single position must be presented in the framework of the relevant international commitments.(2)

(1) Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, [2018] OJ L 328/1. Last updated by Directive (EU) 2023/959. [2023] OJ L130/134.

(2) See as a general overview, M. Campins Eritja, "Some Challenges for Strengthening the EU's International Influence in the Climate Change Regime", in M. Campins Eritja (ed.), *The European Union and Global Environmental Protection – Transforming Influence into Action*, London, Routledge, 2021, p. 12.



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Currently, there are two main pieces of climate change legislation at EU level: on the one hand, the so-called Emission Trading System (ETS) Directive, which determines the allocation and trade of emission of the Greenhouse Gases (GHG) allowances(3) and, on the other hand, the above mentioned Regulation on the Governance of the Energy Union and Climate Action, which provides for the actions and instruments to be adopted at national and EU level that are required to connect European climate policies with the international commitments. Their provisions contain various types of administrative cooperation mechanisms both among the Member States and between the Member States and the European Commission.

In the following sections, the administrative cooperation procedures foreseen in EU climate change legislation will be analysed. This contribution will demonstrate that climate change legislation embodies administrative cooperation mechanisms of different types: firstly, procedures initiated by one Member State where the Commission and other Member States participate before a final national decision is adopted; secondly, national administrative acts having transnational effects, automatically or through mutual recognition procedures; and thirdly, exchange of information or information storage systems at national and EU levels.

The chapter concludes with a reflection on the progress and shortcomings that arise from the implementation process of climate change policy and particularly from the prominent position of the European Commission.

## *I. EU Climate Change Law: the external and internal dimensions*

As already mentioned in the introduction, the implementation of climate change legislation is based on the permanent dialogue between the EU and the national levels which is concretised in procedures regulated in detail by EU law. In particular, two types of especially intense administrative cooperation mechanisms can be identified: on the one hand, composite procedures of various types,(4) which end in what De Lucia refers to as "joint decisions", namely

(3) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community, [2003] OJ L 275/32. Last amended by Directive (EU) 2023/959, 16 May 2023, OJ L130/134.

(4) The administrative activity formalised in this kind of procedure has been studied from the 1990s. Among the earliest works, see S. Galera Rodrigo, *La aplicación administrativa del Derecho comunitario. Administración mixta: tercera vía de aplicación*, Madrid, Editorial Cívitas 1998; S. Cassese, "European Administrative Proceedings", 68 *Law & Contemporary Problems*, 2004, p. 21; M.P. Chiti, "Forms of European Administrative Action", 68 *Law & Contemporary Problems*, 2004, p. 37; J.A. Fuentetaja Pastor, *La Administracion Europea. La ejecución europea del Derecho y las Políticas de la Unión*, Madrid, Thomson-Civitas, 2007; in recent years these procedures have been increasingly



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national decisions which are "the result of a composite procedure to which all the state administrations involved, as well as at time the Commission, participate with a co-decisional role".(5) These procedures notably embody a "decisional interdependence",(6) in which it is not always easy to attribute the various steps of the decision-making process to a single participant. On the other hand, there are national administrative decisions having transnational effects automatically or through the principle of mutual recognition.

It has to be underlined that such intense administrative cooperation involves the whole implementation cycle of the relevant EU law provisions, from its early stages, before national implementing measures are adopted, to the close follow-up of their effects. This very tight-knit legislative framework could be explained in two different ways: firstly, the remarkable complexity of the legislation at hand both in legal and technical terms, which requires a careful implementation in each Member State; secondly, the fact that the implementation must remain within the boundaries set by the framework of the international commitments binding on the EU, and particularly the periodical reporting obligations set up by the Paris Agreement, and the obligation of the parties to present their National Domestic Contribution (NDC) to the UNFCCC Secretariat.

The following sections are devoted to the presentation of the provisions of EU climate legislation which involve administrative cooperation and will show that these cooperation mechanisms are necessary to ensure the coherence of EU activity vis-à-vis the international level. This coherence can only be achieved if the different national activities are fully consistent with the common EU objectives, and the relevant information and data are produced and shared in such a way that they are later capable of being aggregated.

## *II. The governance of the Energy Union and Climate Action: Regulation (EU) 2018/1999*

As mentioned in the introduction, Regulation 2018/1999 on the Governance of the Energy Union and Climate Action connects European energy and climate change policies with the international commitments of the EU, aiming at the

more often created by European secondary law, and corresponding academic reflection has followed. Among the recent literature summarising the academic position, see M. Eliantonio, "Judicial Review in an Integrated Administration – The Case of 'Composite Procedures'", *op. cit.*, 2014, p. 65 and J. Agudo González, "La Administración del espacio administrativo europeo", *Revista Vasca de Administración Pública*, 2014, pp. 99-100, 111.

(5) L. De Lucia, "Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts", 5 *Review of European Administrative Law*, 2012, p. 28.

(6) "Decisional interdependence" is regarded as the "hallmark of composite decision-making", see F. Brito Bastos, "An Administrative Crack in the EU's Rule of Law – Composite Decision-making and Non-justiciable National Law", 16 *European Constitutional Law Review*, 2020, p. 63.



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same time to simplify and enhance the coherence of the obligations of Member States which had been dispersed in different regulations in the framework previously applicable. It has been argued that the Regulation has the function of an "umbrella Regulation" which aims at the "overarching control of energy and climate policies for the period 2021 to 2030",(7) and follows the same "soft approach" which has been adopted by the Paris Agreement. Indeed, compared to the older framework, the Regulation leaves a wider margin of manoeuvre to the Member States, and provides for softer steering and sanctioning mechanisms compared to the previous framework. However, such apparent softness is balanced by a reinforced system of administrative cooperation and a persistent watchful role of the Commission over the national implementation activity.(8)

The bottom-up governance system set up by the Regulation is based, on the one hand, on the principles of integration of strategic planning and reporting on the implementation of climate and energy policies and, on the other, the coordination between the actors responsible for energy and climate policy at Union, national and regional level. As has been argued, the Regulation embodies "strengthened obligations to prepare national plans, long-term strategies and regular progress reports, as well as [foreseeing] the enhanced monitoring and supervisory powers of the European Commission".(9)

The Integrated National Energy and Climate Plan (NECP) is the key piece of the system: it integrates into a single instrument the so-called five "dimensions" of the Energy Union(10) and replaces the main national planning obligations foreseen in the former energy legislation, namely those related to renewables, energy efficiency and emission allocations. According to Article 3 of the Regulation, Member States must submit their NECPs for periods of ten years (the first period is 2020-2030). The Regulation provides a mandatory and very detailed template(11) in order to ensure that all national plans are sufficiently

(7) S. Schlacke and M. Knodt, "The Governance System of the European Energy Union and Climate Action", 16 *Journal for European Environmental & Planning Law*, 2019, p. 323.

(8) In this regard, see S. Oberthür, "Hard or Soft Governance? The EU's Climate and Energy Policy Framework for 2030", 7 *Politics and Governance*, p. 17.

(9) *Ibid.*, p. 25. In 2023, for the first time, the Commission assessed progress towards the climate neutrality and adaptation objectives: See Communication from the Commission EU wide assessment of the draft updated National Energy and Climate Plans [COM(2023) 796 final]. The complete report, the technical information and individual recommendations and assessment of each NECP are available at https://climate.ec.europa.eu/eu-action/climate-strategies-targets/progress-made-cutting-emissions_en (last access June 2024).

(10) These five dimensions are specified in Art. 1(2) of the Regulation on the Governance of the Energy Union and Climate Action, which states: "This Regulation applies to the five dimensions of the Energy Union, which are closely related and mutually reinforcing: (a) energy security; (b) internal energy market; (c) energy efficiency; (d) decarbonisation; and (e) research, innovation and competitiveness".

(11) The template is contained in Annex I of the Regulation on the Governance of the Energy Union and Climate Action.



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comprehensive and to facilitate comparison and aggregation amongst them. The setting up of the NECP entails a structured, transparent, iterative administrative cooperation process between the Commission and Member States for the purpose of its final approval. No less tight is the cooperation during the NECP implementation process which is developed in the framework of a set of continuous reporting obligations for the Member States.

The model set up by the Regulation thus foresees the participation of the Commission in three different phases: firstly, through the assessment of the draft NECP submitted by the Member States (Art. 9(2)); secondly, through the assessment of the NECP once it has been approved by the Member State, making sure it includes possible recommendations or suggestions made in the previous step (Art. 13) and its periodical updates (Art. 14(1)); and, thirdly, through the assessment of the implementation of the NECP on the basis of the various annual reports and communications which the Member States should submit regarding specific results (Arts. 17 to 26).

In the specific case of the procedure for the adoption of the NECPs provided by Articles 3 to 14, there is furthermore a specific provision that makes horizontal administrative cooperation a compulsory step in the whole procedure. In particular, Article 12, devoted to "regional cooperation", requires Member States, before submitting the draft NECP to the Commission, to consult their neighbouring Member States, and to set out the results of these consultations in their NECPs. The Member States may also carry out these consultations with other – non-neighbouring – Member States or third countries if considered appropriate. This consultation phase provides the consulted Member States the opportunity to oppose the adoption of the final NECPs, thereby reducing to some extent the decision-making autonomy of Member States when drafting their NECP. The case law of the CJEU has clarified that the breach of this required consultation phase is a procedural defect causing the invalidity of the final decision.(12)

The assessment powers of the Commission are regulated in detail through different provisions corresponding to different procedural NECP moments (draft, approval, implementation, reporting). Consistently with the supervisory role of the Commission, the Regulation provides the framework of the assessment

(12) Here reference is made to the procedure to set up national technical standards foreseen by Directive 98/43/EC laying down a procedure for the provision of information in the field of technical standards and regulations (later replaced by Directive (UE) 2015/1535. In this context, the consequence of the failure to notify a technical standard amounts to a procedural defect that limits the enforceability of national regulations of the basis of the *CIA Security International* case law (*CIA Security International SA tegen Signalson SA en Securitel SPRL*, case C-194/94, ECLI:EU:C:1996:172), which has been further clarified in *James Elliott Construction Limited v. Irish Asphalt Limited*, case C-613/14, ECLI:EU:C:2016:821.



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of the Commission, which must consider the possible "inconsistencies with the overarching Energy Union objectives and targets" (Art. 30) or the "response to insufficient ambition of integrated national energy and climate plans" (Art. 31) of the NECP. For these and other cases, the Regulation on the Governance of the Energy Union and Climate Action foresees the possibility for the Commission to adopt a recommendation (Art. 34). Even though the recommendation does not have binding force according to Article 288 TFEU, it does produce legal effects as Member States should nevertheless "take due account"(13) of such recommendations and explain in subsequent progress reports how they have done so.(14)

In some cases, in addition to recommendations, the Commission also has more far-reaching powers. In the case of an NECP with insufficient ambition (Art. 31) regarding "the collective achievement of the Energy Union objectives and, in particular, for the first ten-year period, for the Union's 2030 targets for renewable energy and energy efficiency", the Commission "shall propose measures and exercise its powers at Union level in order to ensure the collective achievement of those objectives and targets" (Art. 31(3)). This is a last-resort provision in the event the system of administrative cooperation does not sufficiently ensure the level of harmonisation required in the implementation of EU legislation, and risks jeopardising the achievement of the common climate objectives at EU level. It can be assumed that, if the Member State "does not take due account" of the criteria stated in a recommendation, the Commission will have the power to make a (compulsory) decision regarding the Member States and later to open an infringement procedure so as to avoid significant deviations from the EU common objectives.

The obligations of the Member States are reaffirmed in a specific provision devoted to the "[C]ooperation between the Member States and the Union" (Art. 41), which provides that Member States must cooperate and coordinate fully with each other and with the Union in relation to obligations under the Regulation. This provision lists specific cooperation obligations on the different procedural stages, particularly relating to:

> a) the process for preparing, adopting, notifying and assessing the integrated national energy and climate plans pursuant to Articles 9 to 13 of the Regulation;

(13) The CJEU has interpreted the expression "have to take into account" in these procedural contexts as stating an obligation of reinforced motivation. See the case law referred to in the Opinion of Advocate General Logan in *thyssenkrupp Electrical Steel GmbH, thyssenkrupp Electrical Steel Ugo v. European Commission*, case C-572/18 P, ECLI:EU:C:2020:973, paras. 62 and 70.

(14) Recital 54 Regulation 2018/1999 illustrates the function of these recommendations, stating in its third paragraph: "If the Commission issues a recommendation with regard to a Member State's draft national plan… the Member State concerned *should take due consideration* of the Commission's recommendations *before finalising its national plan*, and the need to avoid the risk of delay of the Member State's national plan". [emphasis added]



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b) the process for preparing, adopting, notifying and assessing the integrated national energy and climate progress report pursuant to Article 17 of the Regulation and annual reporting pursuant to Article 26;

c) the process related to the Commission recommendations and addressing those recommendations pursuant to Article 9(2) and (3), Article 17(6), Article 30(1), Article 31(1) and Article 32(1) and (2) of the Regulation;

d) compiling the Union greenhouse gas inventory and preparing the Union greenhouse gas inventory report, pursuant to Article 26(4);

e) preparing the Union national communication pursuant to Article 12 of the UNFCCC and the Union biennial report pursuant to Decision 2/CP.17 or subsequent relevant decisions adopted by the bodies of the UNFCCC;

f) review and compliance procedures under the UNFCCC and the Paris Agreement in accordance with any applicable decision under the UNFCCC as well as the procedure of the Union to review the greenhouse gas inventories of Member States referred to in Article 38 of the Regulation;

g) any adjustments following the review process referred to in Article 38 or other changes to inventories and inventory reports submitted, or to be submitted, to the UNFCCC Secretariat;

h) compiling the Union approximated greenhouse gas inventory, pursuant to Article 26(2) of the Regulation.

Furthermore, according to the same provision, "[T]he Commission may provide technical support to the Member States in relation to obligations under th[e] Regulation upon request from a Member State".

It must be underlined that the obligations of administrative cooperation listed in Article 41 of the Regulation arise in different moments of the process of implementation of the climate change normative framework and relate to both the "domestic" phases taking place at EU level (paras. 1, a) to d)) and external ones relating to the UNFCCC commitments (paras. 1, e) to h).

The mechanisms discussed in this section reveal the subordinated position of the Member States and the continuous intervention of the Commission in the decision-making process in the implementation of the Integrated National Energy and Climate Plans,(15) a never-ending administrative activity where there are not many possibilities for the Member States to depart from the Commission-set criteria. The obligation of information and reporting are so

(15) "It appears that the Energy Union… has been a new opportunity for the Commission to gain more leverage over Member State strategizing by means of greater monitoring". See J.J. Schoenefeld and A.J. Jordan, "Towards Harder Soft Governance? Monitoring Climate Policy in the EU", 22 *Journal of Environmental Policy & Planning*, 2020, p. 781.



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broad(16) that some scholars propose to qualify these as a new form of soft governance, a "harder soft governance", which entails the "increasing willingness to imbue policy monitoring (and therefore soft governance) with 'harder' elements, such a greater publicity, peer review and even indirect sanctioning mechanisms".(17)

## *III. The allocation of allowances of Greenhouse Gases: the EU ETS Directive*

Directive 2003/87/EC (the ETS Directive) aims to govern a complex process – the allocation of, trade with and surrender of allowances – which *per se* entails two typical administrative cooperation tools: transnational decision-making procedures and national administrative decisions with either automatic transnational effects or with transnational effects on the basis of the principle of mutual recognition. These mechanisms aim to achieve the objectives of EU emissions legislation, while assigning the responsibility to issue greenhouse gas emission permits to the Member States without a binding assignment of national quotas.

The ETS Directive sets up the EU emission trading scheme which implements the commitments of the Kyoto Protocol in order to reduce the anthropogenic emission of GHG. It has been amended as many times as have been required by the most ambitious climate objectives successively adopted by the EU -as the Pris Agreement, the EU Green Deal or the Fit-for-55(18) and the new ETS2, which extends the traditional sectors submitted to the system of allowances to bulding, road transport and small industries.(19)

The EU ETS is based on the "cap and trade" approach: a cap represents the total amount of certain GHG that can be emitted by installations covered by the system. Since the previous phase of the EU ETS (phase 3, 2013-2020), the cap on emissions is set for the EU as a whole and the total number of emission allowances is subject to a linear reduction each year. The emission allowances

(16) In addition to the NECP update processes every ten years (Art. 14: the first will start in 2023), Regulation 2018/1999 requires each Member State to present to the Commission, every two years starting from 2021, an integrated national energy and climate progress report covering all five dimensions of the Energy Union (Art. 17), an integrated report on greenhouse gas policies and measures and on projections (Art. 18) and an integrated report on national adaptation actions, financial and technology support provided to developing countries and auctioning revenues (Art. 19). The content of these reports is highly detailed. It is interesting to underline that, with respect to the "Adaptation Report", Art. 19 states that its information should be "in accordance with the reporting requirements agreed upon under the UNFCCC and the Paris Agreement".

(17) J.J. Schoenefeld and A.J. Jordan, "Towards Harder Soft Governance? Monitoring Climate Policy in the EU", *op. cit.*, p. 781.

(18) In this regard, see the account of events and the corresponding legal reforms in the Recital of the last substantial modification through Directive (EU) 2023/959 already mentioned.

(19) Which will be fully implemented in 2027, starting in 2025.



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are allocated either through auctions or for free. In both cases, the procedure gives rise to transnational administrative acts: the decisions on allocation have effects in the whole EU territory, as the allowances have to be surrendered yearly to the national authority of the Member State in which the installation is located, regardless of where they were issued or the type of the allocation on the basis of which the allowance was granted.

The Directive sets up an intensive system of administrative cooperation on different aspects and at different moments of its implementation. Two of these are particularly noteworthy: firstly, the procedure related to entering of the National Allocation Tables into the Union Registry, and secondly the procedure for the allocation of allowances through the system of free allocation. These two mechanisms of administrative cooperation will be further examined in turn.

## A. National Allocation Plans and National Allocation Tables

In its original wording, Article 19 of the ETS Directive required Member States to develop a National Allocation Plan (NAP), stating the total amount of allowances and how they proposed to allocate them for each allocation period. It was a formal obligation and non-compliance could lead to an infringement procedure under Article 258 TFEU.(20) The Plan had to be approved by the Commission with the assistance of the relevant comitology Committee (Art. 23).

Following an important amendment in 2009, "National Allocation Plans" have disappeared and have been substituted by a single "Union-wide quantity of allowances" (Art. 9). On this basis, there exists a global national rate of annual reductions(21) and "National Allocation Tables" produced by Member States and reflected in the Union Registry of Emission which is the reference for the national allocation activity. The Commission controls the entering and possible corrections of the National Allocation Tables in the Union Registry in a way which is similar to the NAPs: the National Allocation Tables are submitted by the Member States to the Commission periodically and are reflected in the Registry if the Commission considers that the tables are in conformity with the ETS Directive. If the tables are rejected, Member States have to submit a revised version within a time limit of three months.(22)

(20) *Commission of the European Communities v. Grand Duchy of Luxemburg*, case C-61/07, ECLI:EU:C:2007:463; *Commission of the European Communities v. Grand Duchy of Luxemburg*, case C-390/08, ECLI:EU:C:2009:313.

(21) Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) 525/2013, [2018] OJ L 156/26, last amended by Regulation (EU) 2023/857 (2023) OJ L111/1 26 April 2023.

(22) Commission Delegated Regulation (EU) 2019/1122 of 12 March 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards the functioning of the Union Registry, [2019] OJ L 177/3, Art. 46.



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In these procedures, we can observe a characteristic element of composite procedures stemming from administrative cooperation mechanisms: an objection at the European level provokes an upward movement of the decisional competence, leaving the Member State unable to finalise the procedure independently of these objections.(23)

## B. Emission Allowances

With respect to allocating allowances, the ETS Directive provides a general rule and a transitional regime. Auctioning is the rule for the allocation of emission allowances from 2013 onwards, although some free allocation of allowances was available for eligible operators under specific conditions. It is for the Member States to allocate allowances under both systems.

For the purposes of this chapter, the free allocation of emission allowances is the more interesting type of procedure, due to the intensive procedural dialogue that it entails. For the free allocation of allowances, the ETS Directive empowers the Commission to adopt delegated acts concerning "EU-wide and fully-harmonised rules for the allocation of allowances" (Art. 10a(1)). This provision was operationalised through two key acts, namely, Delegated Regulation (EU) 2019/331 of 19 December 2018 determining transitional Union-wide rules for harmonised free allocation of emission allowances;(24) and Decision 2013/448/EU, concerning national implementation measures for the free allocation of GHG.(25)

According to this framework, the Member States are required to submit to the Commission their National Implementation Measures (NIMs), comprising, amongst others, a list of installations covered by the ETS Directive and the preliminary amount of free allowances. The Commission then opens the phase of evaluation, analysing both the completeness of all the NIMs and the consistency of the data itself and the consistency of the data with the harmonised allocation rules. In the case of approval by the Commission of the inclusion of

(23) L. De Lucia, "Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts", 5 *Review of European Administrative Law*, 2012.

(24) Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Art. 10a of Directive 2003/87/EC of the European Parliament and of the Council, [2011] OJ L 130/1, where the Commission set up benchmarks by sectors on the basis of the information directly collected from relevant stakeholders by taking into account the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of carbon dioxide.

(25) Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Art. 11(3) of Directive 2003/87/EC of the European Parliament and of the Council, [2013] OJ L 240/27. There is a new version which is applied from 2021 in the Commission Delegated Regulation (EU) 2019/31 determining transitional Union-wide rules for harmonised free allocation of emission allowances.



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an installation in that list, the Member States determine and notify the preliminary annual amounts per installation of free allowances (Art. 14(5) of Delegated Regulation (EU) 2019/331).

From a functional approach, the procedural dialogue between the Commission and the Member States for the free allocation of the emission allowances is twofold: first, the Member States submit to the Commission a tentative list of installations; second, the Commission assesses this list and, if it raises no objections, the Member State is allowed to move on to the following step, *i.e.* the determination of the final amount of allowances; if the Commission later disagrees with this determination, it can impose new "arithmetical" adjustments in order to reach a different result through the approval of a new and specific decision.

In the implementation of the predecessor of Delegated Regulation (EU) 2019/331 *i.e.*, Decision 2011/278/EU, the Commission had detected some irregularities in the application of the harmonised rules for free allocation included in the NIMs for this period. Consequently, by Decision 2013/448/EU, the Commission approved a cross-sectorial correction factor and a linear factor which had to be applied by the Member States in order to establish the final annual amount of emission allowances. The amendments had to be notified to the Commission before the final amount of allowances would be determined. In such cases, a double participation of the Commission in the national implementation process can be identified: first, it stated the criteria for allocation through Decision 2011/278/EU and, later, it assessed how it had been applied by the Member States: as the Commission did not support how the national authorities interpreted the rules and the final amount of free allocation coming from said interpretation, it adopted further rules and set correction factors with Decision 2013/448/EU.

It has to be underlined that Decision 2013/448/EU was adopted as a result of the in-depth compliance assessment of the Commission of the NIMs for each individual Member State: it thus seems to show a regulatory move to depart from a logic of administrative cooperation, towards a model where the Commission has the power to direct national administrative activity. The question that arises is thus whether the national – purely mechanical – activity is enough to qualify as "national decision" through which the administrative procedure comes to an end.(26)

From the perspective of the effects of the allowances allocated by the national administrative authorities, transnational effects as a further type of administrative cooperation have to be mentioned: the trading of allowances is

(26) See F. Brito Bastos, "An Administrative Crack in the EU's Rule of Law – Composite Decision-Making and Nonjusticiable National Law", *op. cit.*, qualifying some of these acts as having a mere "rubber-stamping" role after a decision is adopted at EU level.



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a normal operation within EU territory and is the basis for the "cap and trade" system. The ETS Directive specifies the obligation of the Member States to ensure that allowances can be transferred between persons within the Union (Art. 12(1)(a)), which implies their automatic transnational effects regardless of the national authority which originally allocated the allowances. Furthermore, it also requires that Member States ensure the transfer of allowances between persons within the Union and persons in third countries where such allowances are recognised (Art. 12(1)(b)) and which have signed the Kyoto Protocol and with which the EU has concluded a mutual recognition agreement, in accordance with the procedure referred to in Article 25.

## C. Union Registry of emission transactions: confidentiality and exchange of information

The EU framework for allocating allowances foreseen by the ETS Directive has set up a European Registry to account for the transactions under the GHG emission allowance trading, empowering to the European Commission to regulate it in detail. The Registry is currently governed by Commission Delegated Regulation (EU) 2019/1122,(27) which supplements the ETS Directive, and which is intended to ensure the accurate accounting of transactions under the system for GHG allowance trading within the Union set up by the ETS Directive. The Registry is a database which, first, consolidates the data originating from national registries and, second, enables transactions between different Member States to be identified.(28)

The Delegated Regulation states in detail the information available in the Registry,(29) as well as the division of power between national and European level (the different responsibilities of the "central administrator" and the "national administrators") and the intense dialogue between them. According to the Delegated Regulation, "[T]he central administrator's main responsibilities are to provide, operate and maintain the Union Registry and the European Union Transaction Log (EUTL), to manage central accounts and to perform operations which are carried out centrally. The main responsibilities of the national administrators are to be the contact point with their respective account holders in the Union Registry and perform all the operations involving direct contact with them, including the opening, suspension of access to and closure of accounts".(30)

(27) Commission Delegated Regulation (EU) 2019/1122.

(28) See Recital 3 Commission Delegated Regulation (EU) 2019/1122.

(29) Art. 8 and Annex I Commission Delegated Regulation (EU) 2019/1122 detail the information which has to be specified for each type of account, aiming to track the issue, holding, transfer and cancellation of allowances.

(30) See Recital 13 Commission Delegated Regulation (EU) 2019/1122.



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In this context, administrative cooperation works under the form of exchange of information between national authorities and the Commission, although it is the exception to the general rule of strict confidentiality governing the information system.(31)

The *Holcim* ruling illustrates the mechanism of administrative cooperation at work through the European Registry.(32) In this case, the applicant was a holder of emission allowances accounts at the Romanian registry and it realised that an unauthorised person has unlawfully accessed those accounts and as a result one million allowances belonging to it had been unlawfully transferred to an account in Italy and 600,000 allowances had been transferred to Liechtenstein. The applicant officially notified the incident to the Commission and asked it to "request... the National Registries to freeze" the emission allowances allegedly stolen and "block the... accounts" through which the allowances had passed. It also brought claims before national (judicial) authorities, stressing the need to disclose the "current location in the national registries" of the allegedly stolen allowances.(33)

The Director-General "Climate Action" of the Commission acting as Registry central administrator replied to this request, firstly, stating that the recovery of any allowances which are claimed to have been transferred fraudulently is a matter for national law and national law enforcement authorities. Consequently, the Commission had no powers to block any such allowances in a registry account as such allowances continue to represent legally valid compliance instruments. Secondly, the requested information was considered confidential, although the Commission did co-operate with relevant law enforcement authorities to solve the issue of unauthorised access to the accounts in question.

It is relevant to note that the applicant argued that the conduct of the Commission to keep the requested information relating to emission allowances that were allegedly stolen confidential infringed the right to effective judicial protection laid down in Article 47 of the Charter of Fundamental Rights, as it *de facto* prevented it "from bringing the necessary actions with a view to recovering its allegedly stolen allowances", as it did not know "where or against whom to bring them".(34)

The General Court dismissed the plea, confirmed the confidentiality of the requested information regarding the applicant and recalled the possibility of applying an exception to this rule for security and crime investigation purposes. In this context, according to the General Court, a breach of the rights of defence of the applicant did not occur, as the applicant could access the required information in an indirect way: the legal framework did not prevent "the Romanian

(31) See *ibid.*, Art. 80.
(32) *Holcim (Romania) v. Commission*, case T-317/12, ECLI:EU:T:2014:782.
(33) *Ibid.*, para. 38.
(34) *Ibid.*, para. 171 and following.



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public prosecutor from sending to the applicant the confidential information which the Commission's response to the request made by way of letters rogatory is likely to contain".(35)

This legal framework has been subject to several amendments in the meantime; however, the strict confidentiality of the information stored in the European Registry and the "final and irrevocable" character of the registered transactions remains unchanged in the legislation currently in force.(36) Serious questions can be raised as to whether this framework complies with the right to an effective remedy and good administration, both protected under the Charter of Fundamental Rights.

There is a second exception to the rule of confidentiality regarding information: in specific cases of refusal to open an account, or suspended and closed accounts, "national administrators shall make available through secure means to all other national administrators and the administrator the name, nationality and date and place of birth of (related) persons" (Art. 80(8)) of Commission Delegated Regulation (EU) 2019/1122). In these cases, national administrators shall inform the persons concerned about this information sharing, and they "may object to the information sharing at the competent authority or the relevant authority under national law [...] within 30 calendar days"; this national authority shall instruct the national administrator either to stop sharing or maintain the sharing of information in a "reasoned decision". Article 80(8) thus foresees a "review measure", detailing the term, the competent authority and possible interim measures, which may be filed against the exchange of information embodied in a "secure means".

Finally, it should be noted that the rule is applied to the specific cases of sharing of information between national administrators mentioned in the Regulation – refusal, suspension or cancelation of the Registry accounts – but there are no specific rules for other cases of information sharing, for example, in cases in which the information is requested by and transmitted to Europol, the European Anti-fraud Office, national (fiscal) police, supervisory authorities and all other authorities referred to in Article 80(3). In these cases, there is a gap in the procedural guarantees that ought to apply in the framework of the exchange of information, particularly the right to be informed where personal data is about to be transmitted to another (national or EU) authority.(37)

(35) *Ibid.*, para. 174.

(36) In this regard, Art. 36(4) of Commission Delegated Regulation (EU) 2019/1122 states that: "An account holder or a third party shall not be prevented from exercising any right or claim resulting from the underlying transaction that they may have in law, ... *as long as this does not lead to the reversal, revocation or unwinding of the transaction in the Union Registry*" [emphasis added].

(37) Except when such information could prevent the underlying purpose of the request for assistance. See on this point D.-U. Galetta *et al.*, "Book V – Mutual Assistance", in P. Craig *et al.* (eds),



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## *Conclusions*

The current EU legal framework on energy and climate foresees a number of administrative cooperation mechanisms, both vertical (between the Commission and the Member State authorities) and horizontal (between the national authorities themselves), as well as a variety of tools used to operationalise these mechanisms (composite procedures, transnational administrative acts and databases). In compliance with the international commitments of the EU, the EU Emission Trading legislation does not determine nor assign specific quotas or contributions to each Member State to achieve the common climate objectives. It is in the administrative implementation of climate legislation that quantitative obligations are specified. This legislative setup requires an intense and permanent coordination between the participants during the implementation phase so as to avoid individual deviations which would jeopardise the achievement of the common goals. This need for coordination is operationalised through various tools of administrative cooperation, providing for participation opportunities between the European Commission and the Member States in the national implementation of the EU Climate and Energy framework. Furthermore, it should be noted that administrative cooperation takes place at very different moments of the implementation process, from the early stages of the setting up of the planning instruments – such as the NECP or the NIMs – to the last moments of the adoption of national administrative measures.

Since energy and climate policy is a shared competence field, we might be tempted to presume that the abovementioned system of cooperation works with a significant margin of national discretion. In reality, the cooperation mechanisms discussed in this chapter operate under the tight control of the Commission in the implementation process. This is due to the existence of a very detailed legal framework at the EU level driving the climate obligations of the Member States.

The main climate documents – such as Integrated National Energy and Climate Plans – are adopted by the Member States through a composite and transnational procedure which includes consultation with other Member States and a positive assessment by the European Commission. There is furthermore a very intense follow-up of the implementation of the national strategies and planning, which is based on periodical national reporting obligations regarding specific climate objectives: on the basis of this information, the European Commission can state additional goals to be achieved at the national level.

With respect to allocating allowances, it has been shown that they are allocated through national administrative acts with automatic transnational effects throughout the whole of the EU, which in some cases are taken through composite procedures where the European Commission holds a decisive position.

*ReNEUAL model rules on EU administrative procedure*, Oxford, Oxford University Press, 2017, p. 78, Art. V-5.



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Finally, there is also a system of information exchange through a European Registry which collects all the information on allocating allowances and which is based on a strict confidentiality principle. Doubts however can be raised as to the compatibility of this cooperation system with the rights to effective judicial protection and good administration.

These features show how the implementation of EU climate law takes place within a single administrative space, which is based on a reinforced administrative cooperation system, where the European Commission has a prominent role and national administrative discretion is reduced dramatically. This is understandable in light of the fact that the results of the implementation process have to be harmonised enough to be the basis of the single EU position in international climate fora. In other words, each national administration operates, beyond the general duties of EU law implementation, as a part of a single "climate organisation" headed by the European Commission which is seeking permanently the achievement of common European goals. This activity is exhaustively regulated by EU legislation that, in turn, complies with and develops the international climate commitments and standards.

In general terms, it is acceptable to affirm that Regulation 2018/1999 has established a robust system of governance for climate change and energy, making it possible for various national and complex policies to converge into a single European policy that can be presented as such to the rest of the world. The recent and successive economic and military crises that Europe has endured, along with the evolution of climate and energy problems, have prompted corresponding regulatory changes. However, these have been specific adjustments that adapted new objectives to the legislation, while the basic structure of the relationship between the Member States and the Commission, on which the current framework is based, has functioned adequately during these turbulent times.

However, this model still presents a weak point that has not been satisfactorily resolved, related to the legal review, judicial or administrative, of this cooperative administrative activity. Although it is well-known, it is appropriate to keep reminding it until a satisfactory approach is found. The traditional functional division between European and national jurisdictions, based on the indirect and direct implementation of European law, overlooks some situations where these complex, composite, and mixed decision-making processes appear in administrative practice. These third types of procedures are neither occasional nor exceptional; rather, they represent the procedural model in cases where, such as in customs law or climate law, the EU acts as a clear and unified actor on the global stage.



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# CHAPTER 11
# Administrative cooperation in the Schengen Area

**Karine Abderemane and Sarah Tas**

## *Introduction*

Strengthening the Schengen Area has always been high on the European agenda. In 2023, the Commission published the second State of Schengen Report in which it highlighted that Schengen is overall well-functioning and robust, and in which it recalled the need to continuously reinforce the governance of the Schengen Area.(1) The year 2023 marked several changes for the Schengen Area, with Croatia joining, a renewed Schengen Information System (SIS) and a strengthening of Europol. The Commission does not intend to end here and also wants to include Romania and Bulgaria to fully join the Schengen Area, and the administrative cooperation occurring therein.

The Schengen Area policies refer to rules the status of which has evolved within the participating states.(2) In the 1980s, a legislative harmonisation process based on former Article 100 of the Treaty establishing the European Community failed. Since a consensus could not be reached, the Schengen Agreement and the Convention implementing the Schengen Agreement of 14 June 1985 were concluded between Member States and non-Member States of the (then) European Economic Community.(3) These rules were gradually incorporated into European Union (EU) law by the Treaty of Amsterdam and, more recently, by the Treaty of Lisbon as part of the creation of an Area of Freedom, Security and Justice.

(1) Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2023) 274 final of 16 May 2023, State of Schengen Report.

(2) Currently most EU Member States (except for certain overseas territories and countries as well as Cyprus, Ireland, Bulgaria, and Romania) and four non-EU Member States (Iceland, Norway, Switzerland, and Liechtenstein).

(3) Schengen Agreement of 14 June 1985 and Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders.



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The aim of this chapter is primarily to map the mechanisms of administrative cooperation required to implement the policies stemming from the Schengen *acquis*, and their related judicial challenges.(4) The policies seek to create an area of free movement of persons, through the development of common asylum and migration rules, and the creation of an integrated management system for external borders.(5) Since 1985, the aim of the Schengen Area has been, first, to establish harmonised visa rules, then gradually develop a common asylum system, establish legal channels for immigration and minimum conditions for the reception, residence and "return" of illegally residing third-country nationals, and, lastly, to a greater extent since 2015, operate integrated border management.(6) The analysis of the mechanisms of administrative cooperation discussed in this chapter does not extend to judicial cooperation in civil and criminal matters and police cooperation,(7) despite their interdependence with the Schengen *acquis*, and the securitisation trend of migration in the EU.(8)

It is interesting to note that, while administrative cooperation is central to the implementation of Schengen policies, this does not result from the Treaties. The Treaty on the Functioning of the European Union (TFEU) does not provide for an obligation for the EU or national administrations to cooperate in the Schengen Area.(9) Administrative cooperation is simply encouraged by the Treaties, and yet, it represents a key element of Schengen.

The chapter will show, on the one hand, the sensitive nature of the Schengen policies. This sensitivity is linked to the political difficulty of navigating an area which is traditionally considered as "sovereign" and adopting policies that would be mindful of national prerogatives, such as the right to grant asylum.(10) On the other hand, this chapter will demonstrate the development of new forms of "sovereignty adjustment" through the creation of channels

(4) Protocol (No. 19) on the Schengen acquis integrated into the framework of the EU of 26 October 2012, annexed to the Treaty on the EU (TEU) and the Treaty on the Functioning of the EU (TFEU), [2012] OJ C 326/1.

(5) See preamble, Art. 1, 17 and 18 of the Schengen Agreement and Art. 67(2) TFEU.

(6) Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Corps of Border Guards and Coastguards and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624, [2019] OJ L 295/1.

(7) See Chapter 13, Marta Muñoz de Morales Romero, "Administrative cooperation in European Criminal Policy", in this volume.

(8) V. Mitsilegas, *The Criminalisation of Migration in Europe – Challenges for Human Rights and the Rule of Law*, Cham, Springer, 2015.

(9) Art. 74 and 197 TFEU.

(10) This sensitivity is also reflected in the institutional framework by the explicit and redundant formulation of the role of the European Council in the legislative and operational programming of the EU within this area (Art. 68 TFEU), by the reaffirmed importance of the control of the principles of subsidiarity and proportionality by the national parliaments (Art. 69 TFEU), by the explicit requirement, under the aegis of the Commission, of an evaluation of the policies in question (Art. 70 TFEU), and by the establishment of the PSC to promote operational cooperation in the field of internal security.



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and frameworks for cooperation between the Member States aimed to guarantee access to the rights enshrined or recognised by EU law.(11) In this way, harmonisation or, depending on the area, mutual recognition schemes do not remove, but rather reinforce the obligation for participating states to cooperate. Indeed, their collaboration is so decisive that it is most often a determining factor in forming transnational decisions and/or procedures that give access to the Schengen Area and the rights attached to it.

The chapter will cover several areas where mechanisms of administrative cooperation are foreseen. Among them, the organisation of the shared responsibilities between states for examining asylum applications (known as the Dublin mechanism),(12)the relocation arrangements and the new resettlement framework,(13) the material and financial support linked to integrated border management,(14) the creation of a European border guard system and the reinforcement of EU agencies,(15) as well as the sharing of information, further increased through interoperability.(16)

The chapter proceeds as follows. First, it starts by mapping the different mechanisms of administrative cooperation in the Schengen Area, focusing specifically on mutual assistance and information sharing. The latter mechanism has different layers, as it may concern information-sharing during operations, through networks or through information systems. The chapter then moves on to discuss procedures of administrative cooperation, distinguishing procedures involving mutual recognition, composite procedures and joint operations, as well as representation agreements. This part allows a further understanding of the complexity of administrative cooperation in the field and hints towards subsequent judicial review challenges. The final part of the chapter focuses

(11) On this notion, see P. Pescatore, *Le droit de l'intégration : émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, Leiden, A.W. Sijthoff, 1972, p. 10.

(12) Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31.

(13) Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission, and other complementary pathways, [2020] OJ L 317/13.

(14) Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, [2021] OJ L 251/1.

(15) Regulation (EU) 2019/1896; Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast), [2019] OJ L 198/88.

(16) Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No. 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA, [2019] OJ L 135/27.



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specifically on the question of judicial review and notes that the judicial control of the cooperation mechanisms in this area essentially remains insufficient. While transnational decisions can be partially reviewed, composite procedures are extremely difficult to fully bring before courts. Finally, some acts escape any control at all, even though they form the basis of cooperation that may impact an individual's legal sphere.

## *I. The mechanisms of administrative cooperation in the Schengen Area*

Different types of administrative cooperation exist within the Schengen Area. The Schengen Area includes Member States of the EU, as well as Iceland, Liechtenstein, Norway and Switzerland, and creates an area without internal borders. To ensure a safe area, cooperation is key, and may exist between the national, European and international levels. Member States can cooperate with other national authorities, EU agencies, and with third countries or international organisations. Additionally, EU agencies may also cooperate with each other or with third countries or international organisations. Cooperation between the national and European level follows the general framework laid down by the European legislator, namely Articles 6(g) or 74 TFEU or Articles 77(2) and (3) TFEU, 78 TFEU and 79 TFEU. The procedures foreseen therein enable each national administration to exercise its powers in compliance with the obligations and rights enshrined in the EU. Cooperation with third countries, is based instead either on status agreements (signed by the national administration or the European Commission),(17) or working arrangements (which may be concluded directly by EU agencies) which lay down – in most cases in a standardised manner – the framework and conditions for cooperation, in accordance with EU secondary law. Within the Schengen Area, administrative cooperation is most visible in two main ways: (A.) mutual assistance, and (B.) information sharing.(18)

### A. Mutual assistance

Mutual assistance is foreseen in Article 197(2) TFEU and can take different forms. Mutual assistance can refer, first, to mutual *operational* assistance. This occurs through sending and receiving trainee officials, through the

(17) E.g., Council Decision (EU) 2018/1031 on the signing, on behalf of the Union, of the Agreement on the status between the EU and the Republic of Albania on the actions of the European Border and Coast Guard Agency in the territory of the Republic of Albania.

(18) For questions relating to the protection of personal data, see Chapter 12, Lisette Mustert, "Administrative cooperation in data protection policy", in this volume.



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secondment(19) and exchange of liaison officers,(20) through staff training, as is the case with the creation of joint police and customs cooperation centres, or through the possibility of carrying out joint investigations to improve coordination of the action of cross-border units.(21)

Mutual operational assistance can either occur bilaterally at the initiative of a Member State,(22) or multilaterally, binding thereby the Schengen states with a third country. This is notably the case of the agreement between the Republic of Serbia and the Schengen group partners on the facilitation of the issuance of visas.(23) According to this, Serbian citizens benefit from a documentary evidence facilitation regarding the purpose of their journey to the EU. However, this works only if Serbia offers the same guarantees for EU citizens, and that this does not lead to illegal migration and an increased security risk. The agreement may be suspended at any moment for reasons of public order, protection of national security or protection of public health.(24) These agreements protect EU interests by strengthening cooperation at external borders, for example with neighbouring countries,(25) but they may benefit third countries, as they make their borders more secure.(26)

Mutual assistance is further reinforced by the assistance of EU agencies, such as Frontex and the European Union Asylum Agency (EUAA). Operational support manifests itself, for example, through the provision of personnel for border control or asylum procedure management.(27)

(19) They must then comply with the internal rules of the secondment unit and guarantee the same protection and assistance to each of the parties.

(20) Regulation (EU) No. 604/2013, Article 36(1)(b); Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast), [2019] OJ L 198/88.

(21) E.g., the administrative arrangement between the Minister of the Interior of the French Republic and the Minister of the Interior of the Kingdom of Spain relating to the creation of joint police stations in the common border area of 3 June 1996.

(22) E.g., The strategic partnership developed for the Franco-Slovak bilateral relationship of 2008 as mentioned here <https://www.diplomatie.gouv.fr/en/country-files/slovakia/france-and-slovakia-65067/>.

(23) Agreement between the European Community and the Republic of Serbia on the facilitation of the issuance of visas – Declarations, [2007] OJ L 334.

(24) *Ibid.*, Art. 14(5).

(25) A. Brzozowski, "EU Does not Rule out Suspending Serbia Visa Waiver Over Migration Spike", *Euractiv*, 14 October 2022 <https://www.euractiv.com/section/justice-home-affairs/news/eu-does-not-rule-out-suspending-serbia-visa-waiver-over-migration-spike/> accessed 23 November 2023.

(26) E.g., the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea ports of both Countries on the Channel and North Sea, signed on 4 February 2003; amended by the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the reinforcement of cooperation for the coordinated management of their shared border, signed on 1 February 2018, known as the Sandhurst Agreement.

(27) Regulation (EU) 2019/1896; Regulation (EU) 2021/2302 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum, [2021] OJ L 468/1.



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According to the Frontex Regulation, Frontex offers technical and operational support to Member States,(28) and deploys members of its statutory staff from the European Border and Coast Guard standing corps to the relevant Member State.(29) Frontex, for example, deployed 40 officers and staff members on Lampedusa to support Italian authorities in the identification and registration of incoming migrants.(30) Frontex also plays a key role in coordinating joint operations for one or more Member States (e.g., Joint Operation Themis or Poseidon). The organisation of joint operations are perfect illustration of administrative cooperation. It starts with a request from a Member State to Frontex to launch a joint operation and requires the approval (after evaluation) of the Executive Director.(31) An operational plan is then prepared jointly by the Executive Director and the host Member State, in cooperation with the participating Member States, and includes a detailed description of the situation and of the joint operation, as well as a list of equipment and staff needed.(32) This same procedure also applies to third countries, such as Moldova, with which Frontex concluded an operational agreement.(33) Similarly, the EUAA may also, at the request of a Member State, or on its own initiative, provide equipment and support personnel to Member States facing a disproportionate pressure on their asylum system. In 2022, the EUAA provided direct operational assistance to 11 Member States.(34)

Mutual assistance can also refer to *financial* assistance and support. The EU, for example, allocates funds *via* the Asylum and Integration Fund, which aims to increase national capacities and improve migration management and solidarity between Member States.(35) It also intends to strengthen and

(28) Art. 10(1)(g) Regulation (EU) 2019/1986.

(29) *Ibid.*, Art. 55.

(30) Frontex, "Frontex Boosts Support to Italy", *Frontex News*, 20 September 2023 <https://www.frontex.europa.eu/media-centre/news/news-release/frontex-boosts-support-to-italy-IHEK3y> accessed 23 November 2023.

(31) Art. 37 Regulation (EU) 2019/1986.

(32) *Ibid.*, Art. 38.

(33) Frontex, "Frontex Sending Standing Corps Officers to Moldova", *Frontex News*, 21 March 2022 <https://frontex.europa.eu/media-centre/news/news-release/frontex-sending-standing-corps-officers-to-moldova-8KKC9T> accessed 23 November 2023.

(34) EUAA, Asylum Report 2022 (2022), <https://euaa.europa.eu/asylum-report-2022>, p. 61.

(35) Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No. 573/2007/EC and No. 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, [2014] OJ L 150/168; European Commission Migration and Home Affairs, "Asylum, Migration and Integration Fund (2021-2027)", <https://home-affairs.ec.europa.eu/funding/asylum-migration-and-integration-funds/asylum-migration-and-integration-fund-2021-2027_en> accessed 23 November 2023.



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develop the common European asylum system.(36) Specific partnerships may also be set up, that allow for financial support to third countries, outside of the official EU budget.(37) This helps to strengthen legal migration channels, facilitate readmission or, following the COVID-19 crisis, remove administrative barriers to accessing healthcare services.(38)

Finally, when it comes to emergency situations, *special* types of mutual assistance may be employed. In cases where the EU's internal borders are at risk of being re-established, the need for effective control of external borders intensifies. The health crisis and the war in Ukraine illustrated the importance of European support to Member States in these scenarios. This is the case with the tailor-made emergency operational aid provided by EUAA, which is aimed at strengthening local procedures for examining asylum applications and to help speed up the time taken to examine these requests.(39)

## B. Information sharing

Alongside mutual assistance, administrative cooperation manifests itself through information sharing, which is essential to implement the Schengen *acquis*. Information may be exchanged either directly or through the creation of databases.(40)

### 1. Direct information sharing

EU agencies function thanks to information sharing. Information not only feeds into their work, but also forms part of their core function, namely of data exchanges. To perform their tasks, it is therefore key for agencies and national authorities to exchange all relevant information.(41) When the EUAA is, for example, producing reports, these are based on data obtained by national authorities. Its latest annual flagship asylum report came from input from civil societies, national authorities and independent

(36) Regulation (EU) 516/2014; Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, [2021] OJ L 251/1, Art. 3.

(37) K. Terry, "The EU-Turkey Deal, Five Years On – A Frayed and Controversial but Enduring Blueprint", *Migration Policy Institute*, 8 April 2021, <https://www.migrationpolicy.org/article/eu-turkey-deal-five-years-on> accessed 23 November 2023.

(38) Commission Implementing Decision of 25 November 2021 on the financing of components of the Thematic Facility under the Asylum, Migration and Integration Fund and adoption of the Work Programme for 2021 and 2022, C(2021) 8458 final.

(39) EUAA, "Operations" <https://euaa.europa.eu/operations> accessed 23 November 2023.

(40) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996] OJ L 77/20, Art. 1(1).

(41) Art. 4 Regulation (EU) 2021/2303.



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judiciaries.(42) Similarly, when Frontex provides comprehensive situational awareness, it relies on information sharing by national authorities.(43) This information sharing goes beyond the mere national and European level and can also encompass the international level. Information sharing with third countries depends on various legal bases. Firstly, information sharing takes places through working arrangements concluded by EU agencies.(44) Frontex concluded several working arrangements with third countries, which include the regular sharing of information and analytical products, concerning, for example, border management, situational awareness, migratory routes and challenges.(45) Secondly, status agreements are concluded by the EU for Frontex, to allow actions to be conducted on the territory of third countries and deploy border management teams with executive powers.(46) They include provisions on cooperation and the protection of personal data.(47) Finally, information sharing may be based on bilateral (or multilateral) agreements concluded between Member States and third countries.(48) These include information-sharing, and may cover specific aspects such as cooperation in the control of illegal immigration and readmission.(49)

### 2. Information systems and networks

Next to the more traditional methods, information sharing also occurs in information systems and networks. Frontex, for example, provides digital tools and information management systems to support Member States, notably in return procedures.(50) On the one hand, Frontex helps to improve national return case management systems through a reference

(42) EUAA, Asylum Report 2023 (2023), <https://euaa.europa.eu/asylum-report-2023> accessed 23 November 2023.

(43) Frontex, Technical and Operational Strategy for European Integrated Border Management (2019), p. 27.

(44) Art. 73(4) Frontex Regulation (EU) 2019/1896.

(45) See for Frontex, "Public Register of Documents Working Arrangement" – 18 working arrangements concluded with Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, North Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Turkey, Ukraine and the United States.

(46) Art. 76(1) Regulation (EU) 2019/1896.

(47) Communication from the Commission to the European Parliament and the Council, Model status agreement as referred to in Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624, COM(2021) 829 final, see for example with Serbia, Moldova, Montenegro, Albania and North Macedonia <https://eur-lex.europa.eu/EN/legal-content/summary/frontex-status-agreements-with-non-eu-countries.html> accessed 14 December 2023.

(48) Art. 72 Frontex Regulation (EU) 2019/1896.

(49) E.g., Council Decision of 18 July 2005 on the conclusion of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, [2005] OJ L 265/1.

(50) Art. 48(1)(c) Regulation (EU) 2019/1896.



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model according to which the agency's specialists compare the reference model with the actual national system and make recommendations for improvements.(51) On the other hand, Frontex runs the integrated return management application, which is an information system that allows for information exchange.(52) Frontex also established a framework for information exchange and cooperation between Member States and Frontex to improve situational awareness, the European Border Surveillance System (EUROSUR).(53) EUROSUR is used by Member States and Frontex to exchange information and cooperate in the field of border control and management, including land, maritime and air border surveillance. The aim is for the agency to maintain a European view of the situation at the EU borders.(54) Finally, when it comes to third countries, Frontex also contributes to piloting large regional cooperation and joint analysis networks, such as the Western Balkans Risk Analysis Network,(55)or the Eastern Partnership Risk Analysis Network.(56)

In emergency situations, specific platforms may be set up to promote information sharing between Member States and the EU. For example, in addition to the solidarity platform providing information, when applying the Temporary Protection Directive on the reception capacities of Ukrainian exiles fleeing the war,(57) the Commission recommended setting up a preparedness and crisis management plan for migration based on the creation of a multi-scale information network activated between the Member States, the Council, the Commission, the European External Action Service, and Justice and Home Affairs Agencies.(58)

(51) Frontex, Return operations <https://frontex.europa.eu/return-and-reintegration/return-operations/return-digitalisation/> accessed 23 November 2023.

(52) *Ibid.*

(53) Regulation (EU) 2019/1896, Section 3.

(54) European Commission Migration and Home Affairs, Eurosur, <https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing/eurosur_en#:~:text = EUROSUR%20is%20essential%20to%20the,border%20operations%20and%20integrated%20planning> accessed 23 November 2023.

(55) Frontex, Western Balkans Quarterly – Quarter 2 April-June 2018 (2018), <https://www.frontex.europa.eu/assets/Publications/Risk_Analysis/WB/WB_Q2_2018.pdf> accessed 14 December 2023.

(56) Frontex, Eastern Partnership Annual Risk Analysis 2017 (2017), <https://www.frontex.europa.eu/assets/Publications/Risk_Analysis/EaP-ARA_2017.pdf> accessed 14 December 2023.

(57) See, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum COM(2022) 740 final.

(58) Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration, [2020] OJ L 317/26, on the Blueprint Network.



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### 3. European centralised databases

Several European centralised databases exist in the Schengen Area. First and foremost, the Schengen Information System (SIS) is the most widely used and largest information sharing system for security and border management.(59) It includes several types of alerts (such as return decisions, persons wanted for arrest, missing persons, objects seized for criminal procedures), and is used by Schengen States. There is also the Visa Information System (VIS), which supports the implementation of the common EU visa policy, and records biometric data (fingerprints and digital photographs) and visa application forms.(60) National competent authorities can then get access to them when carrying out checks at external borders for example. Thirdly, Eurodac is the EU's asylum fingerprint database, and contains fingerprints of all asylum applicants. It allows the determination of national responsibility for examining asylum applications.(61) Fourth, the European Travel information and Authorisation System (ETIAS) is an electronic system that keeps tracks of visa-exempt nationals travelling to Europe,(62) and fifth, the European Criminal Records Information System for third-country nationals (ECRIS-TCN), which allows for specific exchange on criminal convictions.(63) Finally, the Entry/Exit system could be mentioned; however it is not yet in operation. All these systems allow for information-sharing in specific sectors.

While initially this sectoral approach was central, the multiplication of databases justified implementing interoperability mechanisms,(64) including with third countries.(65) The aim of interoperability is for these

(59) Regulation (EU) 2018/1860 on the use of the SIS for the return of illegally staying third-country nationals, [2018] OJ L 312/1; Regulation (EU) 2018/1861 on the establishment operation and use of the SIS in the field of border checks, [2018] OJ L 312/14.

(60) Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 reforming the Visa Information System, [2021] OJ L 248/11.

(61) Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints, [2013] OJ L 180/1.

(62) Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing ETIAS, [2018] OJ L 236/1.

(63) Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralized system for identification of Member States holding conviction information on third-country nationals and stateless persons, [2019] OJ L 135/1.

(64) Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 establishing a framework for the interoperability of EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, [2019] OJ L 135/85.

(65) Council Decision (EU) 2019/837 of 14 May 2019 on the conclusion, on behalf of the Union, of the Arrangement between the European Union, onf the one part, and the Kingdom of Norway, the Republic of Iceland, the Swiss Confederation and the Principality of Liechtenstein, of the other part, on the participation by those States in the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, [2019] OJ L 138/9. For instance, Risk Analysis Cells.



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systems to communicate with each other and ensure an additional level of information exchange. This may cause issues with fundamental rights compliance, and particularly the rights to privacy and data protection of individuals.(66)

## *II. The procedures of administrative cooperation*

Schengen policies require transnational acts, namely acts which produce legal effects beyond the borders of the issuing state and/or, because of the transnational conditions under which they are drawn up, involve at least two administrative bodies.(67) These acts may involve either various national administrative authorities, or authorities from the various governance levels involved (national, European and/or international). They are adopted through four main instruments: mutual recognition, composite procedures, joint operations and representation agreements.

### A. Mutual recognition

The essence of mutual recognition lies in the recognition of national standards and decisions adopted in one Member State by another Member State.(68) Thus, mutual recognition has been seen from a more general European administrative law perspective as an instrument of transnational administrative law.(69) As has been considered often by the CJEU, in order for mutual recognition to work, mutual trust is needed between the various Member States.(70)

(66) N. Vavoula, "Interoperability of EU Information Systems – The Deathblow to the Rights to Privacy and Personal Data Protection of Third-Country Nationals?", 26 *European Public Law*, 2020, p. 131; E. Brouwer, "Interoperability of Databases and Interstate Trust – A Perilous Combination for Fundamental Rights", *Verfassungsblog*, 25 May 2019, <https://verfassungsblog.de/interoperability-of-databases-and-interstate-trust-a-perilous-combination-for-fundamental-rights/> accessed 14 December 2023.

(67) A.S. Gerontas, "Deterritorialization in Administrative Law – Exploring Transnational Administrative Decisions", 19 *Columbia Journal of European Law*, 2013, pp. 423 and 437; For a doctrinal approach to the classification of transnational acts due to these "one for all" effects, see C. Velasco Rico, "L'acte administratif transnational dans le contexte du droit de l'Union européenne", in J.-B. Auby and J. Dutheil De La Rochère (eds), *Traité de droit administratif européen*, 3rd ed., Brussels, Bruylant, 2022, p. 927.

(68) ECRE, "Protected across borders: mutual recognition of asylum decisions in the EU", ECRE Policy Note #03, 2016 <https://ecre.org/wp-content/uploads/2016/12/Policy-Note-03.pdf> accessed 29 November 2023.

(69) S. Dorigo, M. Eliantonio and R. Lanceiro, "The Principle of Mutual Recognition in European Administrative Law – Still Alive and Kicking?", 13 *Review of European Administrative Law*, 2020, p. 183.

(70) *Slovakia and Hungary v. Council*, joined cases C-643/15 and C-647/15, EU:C:2017:631, para. 309; *Openbaar Ministerie*, joined cases C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, para. 37; *HF v. Generalstaatsanwaltschaft München*, case C-435/22 PPU, EU:C:2022:852, paras. 92-94; Opinion of Advocate General Sharpston in *Minh Khoa Vo*, case C-83/12 PPU, EU:C:2012:170, para. 25.



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In the Schengen Area, applying mutual recognition may have both negative and positive consequences for the legal status of the migrant.(71) An example of a positive effect is that a person who has been issued a Schengen visa by one Member State is then free to travel within the territory of all the Member States that are part of the Schengen Area. Several instruments were adopted that apply the mechanism of mutual recognition in the Schengen Area. Just to name a few, there is the Council Directive 2001/40/EC on decisions on the expulsion of third country nationals.(72) The directive foresees a system of mutual recognition of expulsion decisions to ensure greater effectiveness in their enforcement. Secondly, according to the recast Directive 2013/32/EU on asylum procedures, a Member State can consider an asylum application inadmissible if another Member State granted international protection to the applicant.(73) The Member State will not question the validity of the status, but merely quasi-automatically recognise it. The international protection granted to the applicant consequently produces transnational effects. However, mutual recognition can also produce negative effects for migrants. For example, the SIS mentioned above also implies that Member States mutually recognise and enforce the alerts entered in the system.(74) A visa authority or border guard that consults the SIS shall, for example, refuse entrance to the territory to an individual reported in the system for the purpose of refusal of entry in the Schengen Area. This implies that an alert entered in the SIS applies transnationally, and has effects throughout the entire Schengen Area, thus, negatively affecting individuals' rights. Similarly, the Dublin III Regulation is based on mutual trust, when deciding on asylum application.(75) One Member State is allocated the responsibility for taking the decision on the application, and it is assumed that each Member States takes the decision in full line with international and European law.

EU institutions may also facilitate mutual trust and mutual recognition. In this regard, the European Commission may support Member States, for example, in the recognition of validity of travel documents. It does so, in cooperation

(71) H. Battjes *et al.*, *The principle of Mutual Trust in European Asylum, Migration and Criminal Law – Reconciling Trust and Fundamental Rights*, Utrecht, FORUM, 2011, p. 6.

(72) Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, [2001] OJ L 149/34.

(73) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60, Art. 33(1).

(74) H. Battjes *et al.*, *The principle of Mutual Trust in European Asylum, Migration and Criminal Law – Reconciling Trust and Fundamental Rights*, *op. cit.*, p. 20.

(75) Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31.



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with the Member States' consulates, by drawing up an exhaustive list of travel documents issued by the host country.(76) The EU also created a uniform format for an EU visa, which creates mutual recognition of short-stay visas issued by a Schengen state.(77) This will allow the visa holder to travel throughout the Schengen states for up to 90 days.

The European Commission recently emphasised the need to also have mutual recognition of return decisions.(78) According to the Commission, this would facilitate and accelerate the return processes and contribute to deterring irregular migration. A step towards mutual recognition of return decision had already been adopted in the Schengen Information System, with the adoption of Regulation (EU) 2018/1860 on the introduction of return alerts.(79) The added value of this feature will, however, depend on whether Member States decide to enter return alerts into the system. In the same way, the Commission tabled a proposal for a regulation on the digitalisation of the visa application procedure, the aim of which would also be to determine "in a partially-automated manner the Member State responsible for examining the visa application, which would considerably reduce the risk of 'visa shopping'".(80) This demonstrates a certain trend from mutual recognition to semi-automatic transnationality.

## B. Composite procedures

Composite procedures can be defined as multiple-step decision-making procedures including input from administrative authorities from different jurisdictions.(81) Composite procedures can either be horizontal, when various national administrative authorities cooperate, or vertical when national authorities cooperate with European authorities. In the Schengen Area, certain acts related to the implementation of the Schengen *acquis* involve

(76) Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), [2009] OJ L 243/1, Art. 48(1)(c).

(77) Regulation (EU) 2017/1370 of the European Parliament and of the Council of 4 July 2017 amending Council Regulation (EC) No. 1683/95 laying down a uniform format for visas, [2017] OJ L 198/24.

(78) Commission Recommendation of 16 March 2023 on mutual recognition of return decisions and expediting returns when implementing Directive 2008/115/EC of the European Parliament and of the Council COM C(2023) 1763 final.

(79) Regulation (EU) 2018/1860.

(80) Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EC) No. 767/2008, (EC) No. 810/2009 and (EEU) 2017/2226 of the European Parliament and of the Council, Council Regulations (EC) No. 1683/95, (EC) No. 693/2003 and (EC) No. 694/2003 and Convention implementing the Schengen Agreement, as regards the digitalization of the visa procedure, COM(2022) 658 final, 27 April 2022, Article 7a.

(81) H.C.H. Hofmann, "Composite Decision-Making Procedures in EU Administrative Law", in H.C.H. Hofmann and A.H. Türk (eds), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration*, Cheltenham, Edward Elgar, 2009, p. 139.



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the cooperation of several administrative authorities. An example thereof is related to relocation measures in the emergency relocation programme that was launched by the EU in 2015 to reduce the burden on Italy and Greece.(82) According to Article 5 of the Council Decision, Member States shall regularly and at least every three months, indicate the number of applicants who can be rapidly relocated to their territory. Based on this, Italy and Greece can then identify applicants to be relocated, and, following approval from the Member State of relocation, proceed to the relocation. The emergency relocation programme included intensive cooperation between national authorities, since relocation occurred only through decisions taken by the Member State of relocation and Italy or Greece. It also articulated the cooperation aimed at examining applications for asylum or international protection. These decisions also included the support of the EUAA (at the time still the European Asylum Support Office – EASO), adding another level of complexity and cooperation to the procedure. Since the end of September 2017, this system is no longer in force. In 2022, Member States agreed to implement a voluntary solidarity mechanism, which further develops administrative cooperation and entails relocations and financial support to Member States in need.(83)

Cooperation of several administrative authorities also takes places for transfer decisions. Under the Dublin mechanism, when a third-country national or stateless person lodges an application for international protection in a Member State, the latter must assess which Member State is responsible for examining the application.(84) It may then adopt a transfer decision addressed to the responsible Member State. The regulation foresees either the possibility of asking the Member State to take charge of the application for international protection, or to take back the application that was made in that country.(85) In both cases, the Member State asked must respond to the request and accept it so that the transfer can take place. In its response, elements of proof and circumstantial evidence must be used to determine the responsible Member State. Thus, transfer decisions start with the request of one Member State, and the acceptance of another on the basis of which the transfer can take place.

(82) Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L 248/80.

(83) European Commission Press Release, "Migration and Asylum – Commission Welcomes Today's Progress in the Council on the New Pact on Migration and Asylum", 22 June 2022, <https://ec-europa-eu.eui.idm.oclc.org/commission/presscorner/detail/en/ip_22_3970> accessed 19 November 2023.

(84) Regulation (EU) 604/2013.

(85) *Ibid.*



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Finally, composite procedures may also take place in joint operations, that are developed in the section below. In this regard, Frontex and the EUAA, when supporting Member States through debriefing or admissibility interviews, are generally adopting a preparatory measure which is used by national administrative authorities to reach their final decisions.(86) However, joint operations deserve their own section, as some actions may not fall squarely under the notion of composite procedures. This is the case when solely factual actions are taken, such as in the execution of a return decision.(87)

## C. Joint operations

In the Schengen Area, administrative cooperation also takes place in-the-field during joint operations. Frontex launched several joint operations with Member States of the EU to face challenges that arose, such as illegal immigration, or to provide increased technical and operational assistance.(88) An example of a famous joint operation is Operation Triton, which was launched by Frontex and Italy in 2014.(89) Assets from the agency (such as vessels, aircrafts, and debriefing officers) were deployed to assist in search and rescue, to control the borders, as well as to detect drug smuggling and illegal fishing. A total of 26 EU countries took part in the operation and deployed technical or border guards to Italy. This means that cooperation occurred on a daily basis between national authorities, and between national authorities and Frontex. As mentioned above, these types of joint operations cannot easily be qualified as composite procedures, as they lack the "decisional" aspect.

However, some joint operations launched by the Agency may be qualified as composite procedures. For example, the decision to launch an operation starts with a request by a Member State, which may include the profiles of the operational staff needed for the operation.(90) Frontex's Executive Director then evaluates, approves and coordinates the proposals made by Member States.(91) The operational plans for the joint operation are then prepared together by the agency and the host Member State.(92) More specifically, the

(86) D.F. Rojo, "Migration, Asylum and Border Management – The New Role of Frontex in the Aftermath of the 'Refugee Crisis'", *Open Migration*, 3 April 2019, <https://openmigration.org/en/analyses/migration-asylum-and-border-management-the-new-role-of-frontex-in-the-aftermath-of-the-refugee-crisis/> accessed 23 November 2023.

(87) As was the case in *WS and Others v. Frontex*, case T-600/21, EU:T:2023:492.

(88) Regulation (EU) 2019/1896, Article 37.

(89) Frontex News Release, Joint Operation Triton (Italy), 10 October 2016, <https://www.frontex.europa.eu/media-centre/news/news-release/joint-operation-triton-italy--b0UcS8> accessed 29 November 2023.

(90) Art. 37(1) Regulation (EU) 2019/1896.

(91) *Ibid.*, Art. 37(3).

(92) *Ibid*, Art. 38.



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Member State draws up a list of available and required resources, and based on this Frontex defines a package of technical and operational reinforcement. Other participating Member States may also be consulted.

In hotspots, furthermore, agencies like Frontex and the EUAA participate and support frontline Member States facing disproportionate migratory pressure.(93) This has been the case with Italy and Greece.(94) In the hotspots, Frontex supports in determining the nationality of incoming migrants, and makes a recommendation that may have a significant influence over the national official's final decision.(95) A wrong assessment by Frontex may lead to a potential incorrect registration, directly impacting the individuals' procedures of relocation, asylum and return. Similarly, when staff from the EUAA conducts admissibility interviews in the Greek hotspots, it has a direct consequence on the final decision taken by Greek asylum authorities.(96)

Frontex can also assist third countries in border management, and subject to a mutual agreement, the agency may organise joint operations with executive powers in their territory.(97) This may include deploying border guards, for example.(98) To do so a status agreement shall be drawn up by the Commission that includes all the relevant aspects of the operation (the scope, criminal and civil liability, tasks and powers of the members of teams, etc). The EU, for example, concluded five status agreements with Albania, Bosnia-Herzegovina, Montenegro, North Macedonia and Serbia, as mentioned above, that allowed Frontex to carry out joint surveillance operations or rapid border interventions on their territories. On the basis of the agreement, Albania and Frontex launched the first ever joint operation outside of the EU in 2019.(99) The aim is to control migratory flows, tackle cross-border crime and enhance cooperation. Border guards from EU Member States are deployed and work together with Albanian colleagues on border surveillance, border checks,

(93) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration, COM(2015) 240 final, 13 May 2015.

(94) Dutch Council for Refugees, "The implementation of the hotspots in Italy and Greece", 2016, <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf> accessed 29 November 2023.

(95) D.F. Rojo, "Migration, asylum and border management: the new role of Frontex in the aftermath of the 'refugee crisis'", *op. cit.*

(96) S. Horii, "Accountability, Dependency, and EU Agencies – The Hotspot Approach in the Refugee Crisis", 37 *Refugee Survey Quarterly*, 2018, p. 204.

(97) Art. 73 Regulation (EU) 2019/1896.

(98) *Ibid.*, Art. 43.

(99) European Union External Action, Albania and FRONTEX launch the first ever joint operation outside EU (21 May 2019), < https://www.eeas.europa.eu/node/62894_en#:~:text = Today%2C%20the%20European%20Border%20and,EU%20and%20Western%20Balkan%20partners. >, accessed 20 May 2024.



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training activities, and exchange of operational information and best practices.(100) Frontex staff can also perform executive duties, such as border checks and the registration of persons.(101) More recently, Frontex also launched a joint operation in North Macedonia.(102) This type of administrative cooperation has been regarded as opaque in nature, making the control of these joint operations difficult.

### D. Representation agreements

This final category of procedures of administrative cooperation relates to representation agreements, that do not fully seem to fit in any of the above categories.(103) The Visa Code notably provides for a Member State to represent another Member State in the examination of visa applicants and their issuance. In more limited manner, it may also be possible to collect applications and enrol biometric identifiers.(104) To do so, a bilateral agreement can be concluded between the two Member States, including the duration of such representation, the provision of premises, staff and payments, and potential excluding situations. Horizontal cooperation thus occurs, in which one Member State grants the right to another Member State to take decisions on its behalf.

## *III. Judicial review over administrative cooperation – from limited to non-existent?*

The sections above discussed the various types of administrative cooperation mechanism that exist in the Schengen Area, that go from mutual recognition to composite procedures, joint operations and representation agreements. These procedures may have a significant impact on individuals' fundamental rights in the Schengen Area. When an asylum decision is taken through a composite decision-making procedure (for example, with a preparatory act by the EUAA, and a final decision by a national asylum authority), the impact of either act may determine the future of the asylum seeker. It is, therefore, important for these acts to be subject to judicial review. However, this section will show, the

(100) Status Agreement between the EU and the Republic of Albania on actions carried out by Frontex in the Republic of Albania, 18 February 2019, OJ L 46/3.

(101) M. Gkliati and J. Kilpatrick, "Frontex Cooperation with Third Countries – Examining the Human Rights Implications", *Statewatch*, 19 November 2021, <https://www.statewatch.org/analyses/2021/frontex-cooperation-with-third-countries-examining-the-human-rights-implications/> accessed 29 November 2023.

(102) Frontex New Release, Frontex launches joint operation in North Macedonia (2023) <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-joint-operation-in-north-macedonia-U4l3lv> accessed 29 November 2023.

(103) Art. 8(1) Regulation (EC) No. 810/2009.

(104) *Ibid.*



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current system of judicial review is not without its pitfalls. A glance at the possibilities of judicial review of these instruments, indeed, shows that it goes from limited review to a quasi-impossible or non-existent review by courts, and particularly by the Court of Justice of the European Union (CJEU).

## A. Limited – but existing – review of transnational decisions based on mutual recognition

Mutual trust and recognition imply that Member States accept as a matter of law decisions taken by another Member States, and trust it is compliant with the rule of law. This system is used, as mentioned above, when alerts are entered in the SIS. If Spain introduces an alert on a third-country national subject to a return decision, the Italian police facing this individual will in principle return the individual, based on the assessment made by Spain. The introduction of the alert in this case is, in principle, subject to the jurisdiction of Spanish administrative courts, while the return decision itself is to be controlled by the competent Italian courts. This clear-cut distinction has been somewhat nuanced in case law. This is particularly visible in cases decided by French national courts on the legality of entering alerts in the SIS.(105) In principle, the SIS implies that Member States mutually recognise and enforce the alerts entered in the system,(106) which can be characterised as foreign administrative measures for the authority taking a final return decision. In principle, therefore, the national court of the Member States that entered the alert should have jurisdiction. However, the French Supreme Administrative Court has still agreed to review alerts of the SIS by foreign authorities in three subsequent cases. First, in the *Hamssaoui* case, which dealt with a grandmother who was refused a visa to go to France because her name had been entered into the SIS.(107) The *Conseil d'État* quashed the refusal, because the alert failed to provide sufficient information for the grandmother to know why her data was entered in the system. Second, in the *Forabosco* case decided on the same day, a Romanian national who married a French national and sought a visa to come to France for family reunification was refused entry on the grounds of an alert in the SIS.(108) Again, the *Conseil d'État* noted that it had jurisdiction to examine the legality of a decision refusing entry into French territory and its compliance with European standards. Finally, in the

(105) E. Guild, "Moving the Borders of Europe" (Inaugural Speech at the Catholic University of Nijmegen) 2001, <https://cmr.jur.ru.nl/cmr/docs/oratie.eg.pdf> accessed 29 November 2023, p. 26.

(106) H. Battjes *et al.*, *The principle of Mutual Trust in European Asylum, Migration and Criminal Law – Reconciling Trust and Fundamental Rights*, Utrecht, FORUM, 2011, p. 20.

(107) Conseil d'État, *Mme Hamssaoui*, 9 June 1999, FR:CESSR:1999:188344.19990609.

(108) Conseil d'État, *Forabosco*, 9 June 1999, FR:CESSR:1999:190384.19990609.



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*Catrina* judgment, the *Conseil d'État* confirmed once again that national courts can review the foreign decision to issue the alert in relation to EU law, but that it cannot review the foreign national decision on which the decision to issue the alert was based.(109) While the control remains limited, in the sense that it cannot extend to the lawfulness of the national – foreign – procedure for entering the alert, French courts still feel entitled to review the legality of foreign acts against EU law parameters.(110) Further – comparative – research ought to be carried to investigate whether the same case law can be found in other legal systems.

This possibility for national courts to assess the legality of acts with transnational effects has, in a somewhat different scenario, also been recognised by the CJEU in *R.N.N.S. and K.A.* on a Schengen visa.(111) The applicant was refused a Schengen visa because of an objection raised by another Member State. The CJEU stated that different national courts are competent to review the legality of the various stages of the decision-making process. On the one hand, the national courts of the Member State which refused the visa must verify the correct application of the procedural guarantees and the prior consultation procedure. On the other hand, the national court of the objecting Member State shall review the substantive legality of the objection. While this allows individuals access to the courts, it does make it hard to enforce their rights in practice, since actions must be started in two different legal orders.

Finally, the Court of Justice even went one step beyond regarding the Dublin III Regulation and the concept of "safe country" in the *NS and M.E.* case on the transfer of Afghan asylum seekers to Greece.(112) In this case, the Court stated that, if it is necessary to protect the individual's fundamental rights, the Member State must examine itself the application for asylum, which constitutes a foreign decision for the court of the legal system in which the transfer decision was adopted. Thus, there cannot be a conclusive presumption that the applicant's fundamental rights will be observed, particularly when systemic deficiencies in the asylum procedure were demonstrated. This means that there cannot simply be blind trust by the Member States, but that some level of control needs to remain in place, that somehow undermines mutual recognition.

(109) Conseil d'État, *Catrina*, 23 May 2003, FR:CESSR:2003:237934.20030523.

(110) E. Chevalier and O. Dubos, "The Notion of 'Transnationality' in Administrative Law – Taxonomy and Judicial Review", 22 *German Law Journal*, 2021, pp. 325 and 341.

(111) *R.N.N.S. and K.A. v. Minister van Buitenlandse Zaken*, case C-225/19, EU:C:2020:951.

(112) *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10, EU:C:2011:865; ECHR, *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, Application No. 30696/09.



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## B. A judicial blind spot of most administrative cooperation arrangements

In the Schengen Area, composite administrative procedures are visible in the situations mentioned above, namely in relocation mechanisms, in transfer decisions, and may occur in joint operations launched by Frontex.

It has been repeatedly stated that it is difficult to review composite decision-making procedures,(113) particularly when an EU Agency is involved.(114) This is because, according to Article 263 TFEU, the CJEU is solely competent to review acts that produce legal effects *vis-à-vis* third parties. This means that preparatory acts and factual actions, which represent a large part of EU agencies' work will not be reviewable by the Court. As of today, for example, Frontex's actions in composite procedures have never been reviewed by the Court of Justice of the EU in an action for annulment.

Similarly, the preliminary assessment by EUAA of interviews constitutes an act that is preparatory in nature and does not directly affect the individual's legal sphere.(115) The only possibility for applicants would then be to bring an action against the final decision before national courts and request the national courts to refer a preliminary question for validity to the Court of Justice under Article 267 TFEU, an option which is not without its challenges and limitations.(116)

For the same reasons, the same conclusions can be reached with regards to soft law measures, such as the working arrangements mentioned above, that Frontex has concluded with third countries.(117) These are still currently used for the agency to cooperate with third countries. The legal nature of these arrangements excludes them from judicial review of the Court of Justice of the European Union.(118) This is related to the fact that this cooperation is

(113) *Ibid*; M. Eliantonio, "Access to Justice in Composite Procedures for the Implementation of EU Law – The Story so Far", <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4373333> accessed 29 November 2023.

(114) G. Lisi and M. Eliantonio, "The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hostpots", 4 *European Papers*, 2019, p. 589; S. Tas, "Frontex Actions – Out of Control? The complexity of composite decision-making procedures", TARN Working Papers 3, 2020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3632712> accessed 29 November 2023; S. Nicolosi, "Frontex and Migrants' Access to Justice", *Verfassungsblog*, 7 September 2022, <https://verfassungsblog.de/frontex-and-migrants-access-to-justice/> accessed 29 November 2023.

(115) G. Lisi and M. Eliantonio, "The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hostpots", *op. cit.*, p. 599.

(116) M. Eliantonio, "Judicial Review in an Integrated Administration – The Case of the Habitats Directive", 23 *European Energy and Environmental Law Review*, 2014, p. 116.

(117) Frontex, Public Register of Documents (Working Arrangements).

(118) M. Fink, "Frontex Working Arrangements – Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'", 28 *Utrecht Journal of International and European Law*, 2012, p. 20.



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presented as a technical non-binding one, and thus unable to affect the individuals' legal sphere according the criteria set out in Article 263 TFEU.(119) With the current scandals related to Frontex, this limitation of judicial control remains highly contentious. The nature of the working arrangements has been amended with the use of the Model Working arrangement developed by the European Commission for Frontex.(120) The latter includes the possibility when it comes to data protection issues, for data subjects to have the right to effective administrative and judicial redress.(121)

Actions for damages do not seem to have a much higher chances of success. Given the situation of cooperation between national and EU authorities, the Court of Justice would have to find a situation of so-called "shared liability". Shared liability refers to situations where the damage is attributed to several actors. This attribution can be due either to the fact these actions formally share the exercise of power (e.g., liability in data processing, where the purposes and means of the processing are determined jointly),(122) or because the composite unity of the perpetrator of the harmful act is recognised by case law (e.g., in European competition law).(123) In EU law, co-responsibility implies the recognition of a jointly exercised authority and the bringing of parallel liability actions against the EU (before the CJEU) and against the Member States (before the competent national courts). In practice, and as shown by cases involving Frontex, it is very complex to allocate responsibility when more than one actor causes harm.(124) This has been shown by the most recent case brought before the General Court against Frontex.(125) The cases related to

(119) *Ibid.*, p. 33.

(120) Communication from the Commission to the European Parliament and the Council, Model working arrangement as referred to in Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624, COM(2021) 830 final.

(121) *Ibid.*, pt 8.1 (m).

(122) However, Article 26 of the GDPR requires the conclusion of an agreement determining such responsibility. The extension of such a hypothesis to Schengen policies would then be conceivable in the case of operational border management, see *UZ v. Bundesrepublik Deutschland*, case C-60/22, EU:C:2023:373.

(123) B. Cheynel, "La 'coresponsabilité' en droit européen de la concurrence", 4 *Revue des affaires européennes*, 2015, pp. 621, 630.

(124) M. Fink and J.J. Rijpma, "Responsibility in Joint Returns after WS and Others v. Frontex – Letting the Active By-Stander Off the Hook", *EU Law Analysis*, 22 September 2023, <https://eulawanalysis.blogspot.com/2023/09/responsibility-in-joint-returns-after.html> accessed 29 November 2023; J. De Coninck, "Shielding Frontex – On the EU General Court's 'WS and others v. Frontex'", *Verfassungsblog*, 9 September 2023, <https://verfassungsblog.de/shielding-frontex/> accessed 29 November 2023; S. Tas, "Frontex above the Law – A Missed Opportunity for a Landmark Judgment on Frontex's Responsibility with Regards Fundamental Rights violations – WS and Others v. Frontex", *EU Law Live*, 20 September 2023, <https://eulawlive.com/op-ed-frontex-above-the-law-a-missed-opportunity-for-a-landmark-judgment-on-frontexs-responsibility-with-regards-fundamental-rights-violations-ws-and-others-v-frontex-t-600-21/> accessed 29 November 2023.

(125) *WS and Others v. Frontex*, case T-600/21, EU:T:2023:492.



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an action for damages and gave the Court the possibility for the first time to substantively assess whether Frontex's conduct in-the-field complied with fundamental rights. Instead of doing so, the Court simply noted that Frontex has a solely supportive and coordinating role, and that Member States are responsible for the unlawful conduct.(126) While the Regulation provides for shared liability,(127) the General Court did not go into the analysis of shared liability, which has yet to be practically used by the Court. Consequently, in respect of action for damages under Article 340 TFEU, the main hurdle seems to be for EU agencies to fulfil the causality requirement.(128)

## *Conclusions*

This chapter analysed administrative cooperation in the Schengen Area. In this regard, the chapter not only maps the relevant legal and regulatory framework of Schengen policies, but also attempts to provide a taxonomy of the various cooperation mechanisms that exist. Administrative cooperation is visible, on the one hand, through various mechanisms, such as mutual assistance and information sharing that occurs either in-the-field or through networks and information systems, which have witnessed an exponential increase in the past years. On the other hand, the chapter also shed light on the procedures of administrative cooperation, focusing particularly on mutual recognition, composite procedures, as well as joint operations and representation agreements. These are all forms of administrative cooperation, each of them bringing their own challenges when it comes to judicial review. The ways in which Schengen policies are implemented, notably with the recognition of transnational acts and complex decision-making procedures, contribute to building the EU's administrative powers in the Schengen Area. The Schengen Area is marked by clear cooperation in the administrative function of the Member States on a horizontal level, by a collaborative dimension of the EU administration on a vertical level, and by integrated border management.

When it comes to judicial review, the chapter notes the various complex forms of administrative cooperation, which render a full and effective judicial review nearly impossible. While review of transnational decisions based on mutual recognition has been accepted (at least by the French courts), it remains hard to enforce in practice, particularly in situations where actions must be started in two different legal orders. Furthermore, composite procedures, visible in every

(126) *Ibid.*, para. 64.

(127) Art. 7 Regulation (EU) 2019/1896.

(128) S. Tas, "Frontex Actions – Out of Control? The complexity of composite decision-making procedures", *op. cit.*; J. De Coninck, "Shielding Frontex – On the EU General Court's 'WS and others v. Frontex'", *op. cit.*



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sector of the Schengen Area, face challenges and are rarely fully reviewable. The solution by the EU co-legislators to develop shared liability does not seem to remedy the existing shortcomings. Finally, some acts on which administrative cooperation is based cannot, due to their nature, be reviewed by the Court of Justice of the EU. This lack of judicial accountability is problematic, in light of the sensitivity of the subject matter, affecting vulnerable individuals and third-country nationals. The cooperation mechanisms can significantly impact an individual's legal situation and cause fundamental rights violations. The worry would be less serious if only other accountability forums ensured a complete review of these mechanisms. Although a certain degree of administrative accountability has been achieved, notably by the European Ombudsman, the general lack of transparency of administrative cooperation constitutes a major obstacle.(129) As administrative accountability forums should not, in any case, replace the right of an individual to access the courts, the question of how to ensure compliance with the fundamental right to an effective remedy contained in Article 47 of the Charter remains open.

(129) E. (Lilian) Tsourdi, "Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making – Mission Impossible?", 21 *German Law Journal*, 2020, p. 506; S. Tas, "Frontex Actions – Out of Control? The complexity of composite decision-making procedures", *op. cit.*



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# CHAPTER 12
# Administrative cooperation in data protection policy

**Lisette Mustert**

## *Introduction*

Rapid technological developments and cross-border flows of personal data have brought new challenges and concerns for the protection of personal data.(1) Especially because there is a risk that data subjects are unable to exercise their right to the protection of personal data and protect themselves from the unlawful use of information when their personal data moves across borders. Therefore, the European Union ("EU") needed a coherent framework of substantive data protection rules, backed by strong enforcement, which resulted in the General Data Protection Regulation ("GDPR" or "the Regulation").(2) This instrument provides that enforcement is mainly entrusted to national supervisory authorities ("SAS").(3) However, these authorities may find that they are unable to conduct investigations relating to data processing activities outside their territory. Therefore, it is essential that SAs work closely together and cooperate in order to monitor and address breaches of the data protection rules of the EU in cross-border cases.(4) The ultimate goal of such administrative cooperation under the GDPR is reaching an agreement with all the SAs involved on the outcome of the case. For this purpose, the GDPR provides for multiple forms of administrative cooperation that national SAs will make use of when investigating and perhaps sanctioning violations of the Regulation. Thus, SAs will exchange all relevant information, they will assist each other by providing mutual assistance, they will conduct joint operations and they

(1) Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), [2012] COM/2012/011 final.

(2) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 216 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46, [2016] OJ L 119/1.

(3) Each Member State shall provide for one or more independent public authorities which are responsible for monitoring the application of the GDPR, see Arts. 51-54 Regulation (EU) 2016/679.

(4) Recital 91 Commission Proposal COM/2012/011 final.



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will consult each other on draft decisions.(5) These national SAs shall cooperate under the coordination of the European Data Protection Board ("EDPB" or "the Board"),(6) who shall step in when the national SAs request the Board's opinion on a matter, when disputes arise between the national SAs, or where an urgent matter requires the involvement of the Board. Besides institutionalised forms of cooperation, the Commission and the EDPB established voluntary forms of cooperation, for instance, *via* a "support pool of experts" or "voluntary mutual assistance".(7)

All these forms of administrative cooperation may take place when the national SAs investigate and enforce alleged breaches of the GDPR in cross-border cases. Consequently, enforcement decisions taken under the GDPR, may be prepared by multiple authorities – at national and EU level – who cooperate in complex structures, exchanging relevant information and perhaps assisting each other in different phases of the enforcement process. This chapter briefly discusses the sources that regulate the area of administrative cooperation in data protection policy and offers a structured overview of the different forms of administrative cooperation taking place when an alleged data breach is being enforced. This overview includes, first, a discussion of the one-stop-shop mechanism – according to which one SA shall take the lead in the enforcement process – and how to reconcile this with the obligation for SAs to cooperate in an endeavour to reach consensus on the outcome of the enforcement process as laid down in the GDPR.(8) Furthermore, the overview includes an analysis of the institutionalised and voluntary mechanisms that enable SAs to cooperate with each other and allow them to be involved in the enforcement process. Lastly, this chapter focuses on the protection of the data processing companies under investigation and data subjects, in particular their procedural rights, including the right to an effective judicial remedy.

## *I. Legal framework*

In the EU, the protection of personal data is regulated by the General Data Protection Regulation, which came into force on 25 May 2018. Prior to the adoption of this instrument, the area was regulated by the European Data Protection Directive, which, however, led to fragmentation in the

(5) Arts. 60-62 Regulation (EU) 2016/679.

(6) The EDPB is an independent EU body with legal personality. The Board consists of the head of one SA of each Member State and the European Data Protection Supervisor. The Commission has the right to participate, without voting rights. The Board is assisted by the secretariat of the EDPS, who shall provide analytical, administrative and logistical support to the Board. See Arts. 68(1)(5)(6), 69(1) and 75 Regulation (EU) 2016/679.

(7) See Section II., C., 3.

(8) Where all SAs agree on the outcome of the case.



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implementation and enforcement of data protection laws across the EU.(9) The GDPR now provides in detail the rights of data subjects and offers the SAs equivalent tasks and powers for monitoring and ensuring compliance with the Regulation.(10) These tasks include, amongst others, the duty to cooperate with other SAs, including sharing information, providing mutual assistance and conducting joint operations.(11) The GDPR allows the Member States to further regulate certain topics, and therefore, the GDPR must always be read together with the national implementation acts. There is, for instance, a certain margin of manoeuvre since each Member State may provide by law that its SA has additional powers beyond those laid down in the GDPR.(12) These national implementation acts do not per se further specify the cooperation procedures, however, they may influence the smooth functioning of the cooperation process since SAs will have to comply with their national (procedural) rules while cooperating with authorities established in other EU Member States.

The area is further "regulated" by guidelines, recommendations and best practices of the EDPB.(13) These instruments may be adopted on the initiative of the Board itself, at the request of one of its members or of the Commission, and allow the Board to effectively and flexibly respond to new developments.(14) The Board may adopt this soft law on any question covering the application of the GDPR.(15) This means that it may clarify substantive questions of the GDPR and offer interpretations on how the obligations under the Regulation should be respected, but it may also include further specifications on how certain administrative procedures should function. Examples of the latter are the guidelines of the Board on what constitutes a relevant and reasoned objection to a draft decision of another SA, guidelines for identifying the lead SA of a data processing company, or on the application of the dispute resolution mechanism of the Board.(16) Although these guidelines are not

(9) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281/31; Recital 9 Regulation (EU) 2016/679. Examples of the risk of fragmentation under the Directive can be found in D. Korff, *EC Study on Implementation of Data Protection Directive – Comparative Study of National Laws*, Colchester, University of Essex, 2002.

(10) Recital 11 Regulation (EU) 2016/679.

(11) Arts. 57(1)(g) and 60(2) Regulation (EU) 2016/679.

(12) *Ibid.*, Art. 58(6).

(13) *Ibid.*, Art. 70(1)(e).

(14) P. Blok, "The Role of Private Actors in Data Protection Law and Data Protection Practice", in M. De Cock Buning and L. Senden (eds), *Private Regulation and Enforcement in the EU*, Oxford, Hart Publishing, 2020, pp. 95, 118.

(15) Art. 70(1)(e) Regulation (EU) 2016/679.

(16) European Data Protection Board, "Guidelines 09/2020 on Relevant and Reasoned Objection under Regulation 2016/679 Version 2.0", *EDPB*, 9 March 2021, <https://edpb.europa.eu/our-work-tools/documents/public-consultations/2020/guidelines-092020-relevant-and-reasoned_en> accessed 10 December 2021; "Guidelines for Identifying a Controller or Processor's Lead Supervisory Authority" [2016] 16/EN WP 244,



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strictly binding by law, the SAs may apply these guidelines in order to ensure the consistent application and enforcement of the GDPR,(17) and thus, they cannot be regarded as merely voluntary nor without legal effects.(18) Nevertheless, these effects are uncertain and may vary per guideline document.(19)

Furthermore, the Commission may adopt implementing and delegating acts which, for instance, specify the formats and procedures for mutual assistance and the arrangement of the exchange of information by electronic means between national SAs, and between national SAs and the EDPB.(20) Thus, the EU Commission may facilitate cooperation between authorities through the provision of certain tools.(21) So far, the Commission adopted an implementing decision on a pilot project to implement the administrative cooperation provisions set out in the GDPR, in which it established that the Internal Market Information System ("IMI") is the software application that will be used for the implementation of information exchange requirements.(22)

By regulating the area of data protection by means of a Regulation, the legislator's aim was to set out a uniform set of data protection rights for data subjects, and obligations for data processing companies, as well as equivalent tasks and powers for enforcing the Regulation.(23) Nevertheless, the rules covering the enforcement procedures – including administrative cooperation – turn out to be a complex web of rules laid down in the GDPR, national implementation acts, national procedural laws, guidelines of the Board, and delegated and implementing acts of the Commission. Therefore, it is a highly welcome

p. 9 (endorsed by the EDPB, see European Data Protection Board, "Guidelines for Identifying a Controller or Processor's Lead Supervisory Authority, WP244 rev.01", *EDPB*, 25 May 2018 <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-identifying-controller-or-processors-lead_en> accessed 10 December 2021); European Data Protection Board, "Guidelines 03/2021 on the Application of Article 65(1)(a) GDPR", *EDPB*, 16 April 2021, <https://edpb.europa.eu/our-work-tools/documents/public-consultations/2021/guidelines-032021-application-article-651a-gdpr_en> accessed 10 December 2021, para. 70.

(17) Ensuring a consistent application of the GDPR is an obligation for the SAs that follows from Art. 63 Regulation (EU) 2016/679.

(18) Art. 57(1)(g) Regulation (EU) 2016/679. Senden argues that this is a *post law* function, where soft law supplements and supports EU secondary legislation to ensure the proper implementation thereof in the Member States. See further L. Senden, "Soft Post-Legislative Rulemaking – A Time for More Stringent Control", 19 *European Law Journal*, 2013, p. 57.

(19) M. Magierska, "Three EDPB Binding Decisions in the Art. 65 GDPR Procedure and Two Major Questions for the Future", 9 *European Data Protection Law Review*, 2023, p. 55. L. Mustert, "Cross-border enforcement of the GDPR by independent administrative authorities", PhD thesis, Université du Luxembourg 2023.

(20) Art. 61(9), Recital 168 Regulation (EU) 2016/679.

(21) D. Barnard-Wills *et al.*, "Data Protection Authority Perspectives on the impact of data protection reform on cooperation in the EU", 32 *Computer Law & Security Review*, 2016, pp. 587, 594.

(22) Commission Implementing Decision (EU) 2018/743 of 16 May 2018 on a pilot project to implement the administrative cooperation provisions set out in Regulation (EU) 2016/679 of the European Parliament and of the Council by means of the Internal Market Information System, [2018] OJ L 123/115, Recitals 1 and 2.

(23) Recital 11 Regulation (EU) 2016/679.



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development that in July 2023, the EU Commission presented a proposal for a Regulation to ensure stronger enforcement of the GDPR, after concerns regarding GDPR enforcement in the context of cross-border violations has reached the EU institutions. (24) This instrument attempts to harmonize the treatment of complaints, and the applicable procedural rights of parties under investigation and - to a certain extent - complainants. Furthermore, the proposal aims to streamline the cooperation and dispute resolution procedure in order to address cross-border cases. (25). While this initiative is currently being discussed in the Parliament and Council, the next sections will demonstrate the complexity of administrative cooperation in the area of data protection on the basis of the legal sources available at the time of writing, with references to the Commission proposal where relevant.

## *II. Cooperation under the GDPR*

The GDPR provides that the SAs cooperate with each other in order to reach consensus on the outcome of cross-border cases.(26) Nevertheless, the GDPR created a system in which one authority takes the lead, in accordance with the so-called "one-stop-shop mechanism" (A.). This lead authority is then supposed to endeavour to reach consensus with the other concerned authorities during every stage of the enforcement procedure (B.). This means that the lead SA shall involve the other concerned SAs, for instance, by exchanging all relevant information, requesting mutual assistance or conducting joint operations. Section C focusses on all these aspects of administrative cooperation in an endeavour to reach consensus on the enforcement actions to be taken in case of a suspected violation of the GDPR.

### A. One-stop-shop mechanism

The GDPR provides that the authorities cooperate with each other in cases of alleged infringements with a cross-border element,(27) in which one of the SAs has a leading role. This means that one lead SA shall be the sole interlocutor

(24) European Commission, "Further Specifying Procedural Rules Relating to the Enforcement of the General Data Protection Regulation", 2023, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13745-Further-specifying-procedural-rules-relating-to-the-enforcementof-the-General-Data-Protection-Regulation_en> accessed 15 May 2023; Commission Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, [2023] COM(2023) 348 final.

(25) Commission Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, [2023] COM(2023) 348 final, pp. 2-3.

(26) *Ibid.*, Art. 60.

(27) "Cross-border processing means either processing of personal data which takes place in the context of activities of establishments in more than one Member State of a controller or processor in the



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of the controller and processor,(28) which is determined on the basis of where the data processing company has its headquarters.(29) Despite being the sole interlocutor, the lead SA is obliged to work together with the other SAs "concerned". Another authority is concerned because (i) the controller or processor has an establishment – not being the main establishment – in the territory of that Member State, (ii) because the data subjects, which are (likely to be) substantially affected by the data breach, reside in that Member State, or (iii) because the complaint is lodged with that SA.(30) This system is meant to ensure that the one-stop-shop system of determining a lead authority "does not prevent the other supervisory authorities from having a say in how the matter is dealt with".(31) The original Commission proposal contained a different Article 56: the lead SA would have an exclusive competence, and would not have to lead or coordinate enforcement actions with other SAs. However, such a system would not lead to structural cooperation between the SAs,(32) which would mean that another SA – not being the lead SA – would not be able to effectively protect affected data subjects within its territory, because this role was delegated to the lead authority in another Member State.(33)

The process of determining the lead authority is in itself a procedure where cooperation takes place. The EDPB guidelines for identifying a controller or processor's lead SA,(34) provide that the conclusion on where the main establishment is located should not be based solely on the statements provided by the data processing company. Instead, this may require an active inquiry to decide where the relevant processing decisions are taken and where there is the power to implement those decisions. This prevents forum-shopping, where a company claims to have its main establishment in one Member State, but no effective and real exercise of management activity or decision-making over the processing of personal data takes place there. For this purpose, the supervisory authorities may ask the data processing company to provide clear evidence as proof of where the main

Union where the controller or processor is established in more than one Member State; or processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State". See Art. 4(23) Regulation (EU) 2016/679.

(28) Art. 56(6) Regulation (EU) 2016/679.

(29) For a definition of "main establishment", see Art. 4(16) Regulation (EU) 2016/679.

(30) Art. 4(22) Regulation (EU) 2016/679.

(31) "Guidelines for Identifying a Controller or Processor's lead Supervisory Authority" [2016] 16/EN WP 244, *op. cit.*, p. 9.

(32) H. Hijmans, "The EU as a Constitutional Guardian of Internet Privacy and Data Protection", PhD Thesis, University of Amsterdam, 2016, p. 403.

(33) H. Hijmans, "Article 56 Competence of the Lead Supervisory Authority", in C. Kuner *et al* (eds), *The EU General Data Protection Regulation (GDPR) – A Commentary*, Oxford, Oxford University Press, 2020, p. 128.

(34) "Guidelines for Identifying a Controller or Processor's Lead Supervisory Authority" [2016] 16/EN WP 244, *op. cit.*, p. 8.



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establishment is located. The guidelines do not provide any further specifications on how the SAs should assess the evidence together. All the first Commission evaluation reveals is that the IMI software includes a workflow which facilitates the SAs in identifying their role as the lead or SA concerned, before the formal one-stop-shop mechanism is triggered.(35) If, however, the SAs cannot agree on where the main establishment is located and who should take the lead, the matter will be referred to the EDPB for a binding decision under Article 65(1)(b) GDPR, to be explained further in section II., C., 3.(36)

## B. The cooperation mechanism

The ultimate goal for SAs will be to achieve an agreement on the outcome of the matter under investigation.(37) An investigation into a potential violation of the GDPR can be initiated on the initiative of the SA itself – for instance after it is notified by a controller about a personal data breach(38) – or on the basis of a complaint from a data subject.(39) Achieving an agreement applies to every stage of the enforcement procedure, starting with the investigation of the case, extending to the whole decision-making process. Thus, consensus needs to be reached on substantive matters, but also on the course of enforcement actions (e.g., the scope of the investigation or the decision not to handle a case).(40) This means that the initial proposal of the Commission to give the lead SA exclusive competence for the supervision of processing activities of data processing companies has been adjusted.(41)

Finding agreement on the scope and intensity of the investigation should not be overly difficult when a procedure is started on the basis of a complaint, since the investigation will then mainly focus on matters raised by that complaint. Nevertheless, now that the GDPR is up and running for six years, it became visible that particular SAs have strict prioritization policies in place, which allow them to investigate only those aspects raised by a

(35) European Data Protection Board, "Contribution to the Evaluation of the GDPR under Article 97", *EDPB*, 18 February, <https://edpb.europa.eu/our-work-tools/our-documents/other/contribution-edpb-evaluation-gdpr-under-article-97_en> accessed 10 December 2021, p. 7.

(36) "Guidelines for Identifying a Controller or Processor's Lead Supervisory Authority" [2016] 16/EN WP 244, *op. cit.*

(37) European Data Protection Board, "Guidelines 09/2020", paras. 1 and 28.

(38) Art. 33(1) Regulation (EU) 2016/679. Personal data breach means "a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed", see Art. 4(12) Regulation (EU) 2016/679.

(39) Recital 141 and Arts. 57(2) and 77 Regulation (EU) 2016/679.

(40) "Guidelines for Identifying a Controller or Processor's Lead Supervisory Authority" [2016] 16/EN WP 244, *op. cit.*, p. 10.

(41) D. Wright, "Enforcing Privacy", in D. Wright and P. De Hert (eds), *Enforcing Privacy – Regulatory, Legal and Technological, Approaches*, 1st ed., New York City, Springer International Publishing, 2016, p. 44.



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complaint that meet their priorities, which diminishes the right of data subjects to complain and have their complaints handled.(42) Therefore, while seeking consensus on the scope of the investigation was intended to be necessary only in case of own-volition investigations,(43) this became important for complaint-based investigations too. This may prove to be difficult, however, because SAs may have highly differing views on what is required to act with all due diligence upon a complaint.(44) The Commission addresses this concern in its proposal for a GDPR procedural regulation by requiring SAs to streamline cooperation early on in the enforcement procedure. For that reason, the Commission proposes that the lead SA shall draft a summary of key issues which shall include the main relevant facts; a preliminary identification of the scope of the investigation; an identification of the complex legal and technical assessments; and a preliminary identification of potential corrective measures. (45) Concerned SAs shall have four weeks' time to comment on this summary. While this should assist the SAs in finding consensus on whether and how to proceed, the EDPB and EPDS have expressed some critical comments to this proposal: why, for example, shall the lead SA only have to communicate complex legal and technical assessments, why is there no requirement for the lead SA to engage with the concerned SAs' comments, and why does the Commission allow the EDPB to impose restrictions on the maximum length of comments submitted to the summary of key issues?.(46) Where SAs consult each other on the scope and intensity of the

(42) European Data Protection Board, "Binding Decision 05/2022 on the Dispute Submitted by the Irish SA Regarding Whatsapp Ireland Limited", 5 December 2022, <https://edpb.europa.eu/system/files/2023-01/edpb_bindingdecision_202205_ie_sa_whatsapp_en.pdf> accessed 15 May 2023, forms an illustrative example of a complaint-based investigation where the scope of the inquiry was excessively limited. In its proposal for a GDPR procedural regulation, the Commission now explicitly confirms that it falls within the SA's discretion to decide the extent to which a complaint should be investigated, for which the gravity of the alleged infringement and its systemic or repetitive nature may be taken into account. See Commission Proposal COM(2023) 348 final, recital 6 and Art. 4

(43) European Data Protection Board, "Guidelines 09/2020", *op. cit.*, para. 28. Disputes between the Irish SA and other concerned SAs brought forward to the EDPB in accordance with Art. 65(1)(a) GDPR, demonstrate that SAs may struggle to reach consensus on the scope of own-volition inquiries. See European Data Protection Board, "Decision 01/2020 on the Dispute Arisen on the Draft Decision of the Irish Supervisory Authority regarding Twitter International Company under Article 65(1)(a) GDPR", *EDPB*, 9 November 2020, <https://edpb.europa.eu/our-work-tools/our-documents/binding-decision-board-art-65/decision-012020-dispute-arisen-draft_en> accessed 10 December 2021. See also European Data Protection Board, "Binding Decision 1/2021 on the Dispute Arisen on the Draft Decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR", *EDPB*, 28 July 2021 <https://edpb.europa.eu/our-work-tools/our-documents/binding-decision-board-art-65/binding-decision-12021-dispute-arisen_en> accessed 10 December 2021.

(44) L. Mustert, "The EDPB's Second Article 65 Decision – Is the Board Stepping up its Game?", 7 *European Data Protection Law Review*, 2021, pp. 416-422.

(45) Commission Proposal COM(2023) 328 final, Art. 9(1).

(46) European Data Protection Board and European Data Protection Supervisor, "Joint Opinion 01/2023 on the Proposal for a Regulation of the European Parliament and of the Council laying down



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investigation, this usually happens *via* the "Voluntary Mutual Assistance" workflow, provided by the IMI system (this form of administrative cooperation will be discussed in section II., C., 3.).

### 1. Consensual decision-making

Not only during the investigative phase, but also during the decision-making phase, the SAs are obliged to cooperate in an endeavour to reach consensus. Thus, when adopting the final binding decision, the lead SA should closely involve the other concerned SAs.(47) Therefore, the lead SA shall exchange, without delay, all relevant information and shall consult the other concerned SAs on its draft decision.(48) For that purpose, the draft decision is shared with the concerned SAs for their opinion. During the following four weeks, the concerned SAs will be able to share relevant and reasoned objections to the draft decision of the lead SA, of which the latter shall take due account.(49) An objection is relevant if it involves an objection "as to whether there is an infringement of the Regulation, or whether envisaged action in relation to the controller of processor complies with this Regulation",(50) and reasoned when it "clearly demonstrates the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects and, where applicable, the free flow of personal data within the Union".(51) The guidelines of the Board further specify that an objection is relevant when "there is a direct link between the objection and the substance of the draft decision at issue"(52) and reasoned when "the objection specifies why an amendment of the decision is proposed and how the change would lead to a different conclusion".(53) In order to submit such well-reasoned and relevant objections, it is essential that the concerned SAs have an in-depth understanding of the case, and thus, that they are involved in the process leading to a draft decision and are well informed by the lead SA – *i.e.*, that all relevant information has been exchanged.(54) The GDPR, however, does not lay down when the lead SA shall exchange relevant

additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, *EDPB-EDPS* 19 September 2023, <https://www.edpb.europa.eu/system/files/2023-09/edpb_edps_jointopinion_202301_proceduralrules_ec_en.pdf> accessed 19 May 2024, paras. 52, 54, 60.

(47) Recital 125 Regulation (EU) 2016/679.

(48) *Ibid.*, Art. 60.

(49) *Ibid.*, Art. 60(3)(4).

(50) *Ibid.*, Art. 4(24).

(51) *Ibid.*, Art. 4(24).

(52) European Data Protection Board, "Guidelines 09/2020", *op. cit.*, para. 12.

(53) *Ibid.*, para. 12.

(54) The amount of detail in the draft decision and the degree of involvement of the concerned SAs in the process affect the degree of detail of the objections and the depth of the analysis included therein; Recital 129 Regulation (EU) 2016/679; European Data Protection Board, "Guidelines 09/2020", *op. cit.*, para. 8.



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information, what this information shall entail, who shall have access to this information et cetera. Therefore, the meaningful participation of concerned SAs in the decision-making process depends on the willingness of the lead SA to exchange all relevant information prior to the initiation of the formal consultation procedure.(55) While the Commission proposal now aims to address these concerns, for example, by requiring from the lead SA to share a summary of the key issues early on in the enforcement procedure, other proposed changes may decrease the meaningful role of concerned SAs instead. The Commission, for instance, proposes that the lead SA shall draft preliminary findings which set out the allegations, the relevant facts, the legal analysis, supporting evidence, and the proposed corrective measures (56). These findings shall, however, only be shared with the parties under investigation and not with the concerned SAs (57), meaning that these SAs cannot.

The guidelines of the Board list examples of disagreements that could be subject of a relevant and reasoned objection.(58) Objections can address, for instance, the existence of a given or alternative infringement of the GDPR or the enforcement action envisaged by the draft decision. This is very useful to prevent different corrective measures being chosen by SAs in similar cases.(59) The guidelines also stress that objections could deal with procedural aspects, as long as these affect the conclusions reached in the draft decision.(60) Thus, objections could address deficiencies in terms of involvement of concerned SAs in the enforcement process or disputes on the scope of the investigation.(61) The EDPB, however, recalls that "raising an objection is not the most preferable tool to remedy an insufficient degree of cooperation in the preceding stages of the one-stop-shop proceeding",(62) and it prefers to have these issues solved *via* informal cooperation at an earlier stage of the enforcement process.

Worrisome is that the Commission proposal seems to limit the role of concerned SAs in consensus finding by means of the submission of relevant and reasoned objections. The Commission's proposal now lays down detailed

(55) L. Mustert, "The First Article 65 Decision – Correct and Consistent Application of the GDPR Ensured?", 7 *European Data Protection Law Review*, 2021, p. 94.

(56) Commission Proposal COM (2023) 348 final, Art. 10(3).

(57) Commission Proposal COM (2023) 348 final, Art. 14(2).

(58) European Data Protection Board, "Guidelines 03/2021 on the application of Article 65(1)(a) GDPR", *op. cit.*

(59) "Guidelines for Identifying a Controller or Processor's Lead Supervisory Authority" [2016] 16/EN WP 244, *op. cit.*, p. 5. Recital 150 Regulation (EU) 2016/679 indeed confirms that "the consistency mechanism may also be used to promote a consistent application of administrative fines". Therefore, it would be possible for a concerned SA to challenge the elements relied upon to calculate the height of the fine, see EDPB, "Guidelines 09/2020", *op. cit.*, para. 34.

(60) European Data Protection Board, "Guidelines 09/2020", *op. cit.*, para. 30.

(61) *Ibid.*, para. 9.

(62) *Ibid.*, para. 9.



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requirements for the form and structure of such relevant and reasoned objections: (i) confined to factual elements included in the draft decision, (ii) not changing the scope of the investigation, and (iii) not changing the scope of the allegations by identifying additional allegations or changing the intrinsic nature of the allegations raised. (63). Additionally, the Commission poses limits to the form of relevant and reasoned objections by providing that the objections shall inter alia not exceed three pages and shall not include annexes. (64)

If the lead SA follows the objections of the concerned SAs, a revised draft decision shall be shared with the concerned SAs for their opinion.(65) If there are no further objections, the lead SA and concerned SAs agree on the outcome of the case, which means that the lead SA shall adopt the final decision and notify it to the data processing company.(66) The SA with whom the complaint was lodged – which is not always the lead SA – shall inform the complainant of the decision.(67) Only if the complaint is dismissed or rejected, the final decision shall be adopted by the SA with whom the complaint was lodged.(68) This, however, means that separate decisions shall be adopted "if the SAs agree to dismiss or reject parts of a complaint and to act on other parts of that same complaint".(69)

Reaching consensus is not an easy task. Differences above all in national procedures may hinder cooperation and consensual decision-making. This can include different interpretations of concepts that are essential for a smooth functioning of the cooperation process, such as what constitutes "relevant information", what does "without delay" mean, and what elements should a draft decision entail.(70) The SAs may also have different approaches related to timing, e.g., when to involve other concerned SAs or when to communicate relevant information to them.(71) Thus, involving all SAs in the process, does not per se guarantee the most prompt response to a violation of

(63) Commission Proposal COM (2023) 348 final, Art. 18(2)(a).

(64) Commission Proposal COM (2023) 348 final, Art. 18(2)(a).

(65) Art. 60(5) Regulation (EU) 2016/679. For this round of consultation, the deadline for SAs to submit their objections stands at two weeks.

(66) Such a decision may contain issuing of a warning or reprimand; the imposition of temporary or definitive limitations including a ban on processing; ordering rectification or erasure; imposing administrative fines et cetera. See Art. 58(2) Regulation (EU) 2016/679.

(67) Art. 60(7) Regulation (EU) 2016/67.

(68) *Ibid.*, Recital 125 and Art. 60(8).

(69) *Ibid.*, Art. 60(9).

(70) These aspects are, unfortunately, not addressed by the Commission proposal for a GDPR procedural regulation. See L. Mustert, "The Commission Proposal for a New GDPR Procedural Regulation: Effective and Protected Enforcement Ensured?", 9 *European Data Protection Law Review*, 2023, pp. 454-464.

(71) European Data Protection Board, "Contribution of the EDPB to the Evaluation of the GDPR under Article 97", *EDPB*, 18 February 2020, <https://edpb.europa.eu/our-work-tools/our-documents/other/contribution-edpb-evaluation-gdpr-under-article-97_nl> accessed 10 December 2021, p. 10.



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the GDPR.(72) Therefore, it could be argued that there is a need for a more common approach to handling complaints. More structured procedures would help to overcome the challenges just mentioned, which the Commission proposal is a welcome development. Nevertheless, for the reasons set out above, a higher level of harmonization would be required.(73)

### 2. Disputes between the lead and concerned Supervisory Authorities

The EDPB emphasised that the focus of all SAs should be on resolving disputes in the consensus-finding process in such a way that a consensual decision is the result. However, there are situations in which no consensus can be reached. In those cases where the lead SA has rejected the objections of the concerned SAs, or considered them as not being relevant or reasoned,(74) the matter will be submitted to the dispute resolution mechanism of the EDPB.(75) The Board will then assess the matter and adopt a binding decision addressed to the lead and concerned SAs.(76) Importantly, the Board will only assess the merits of the objections that are reasoned and relevant. Because of the opening clauses in the GDPR, the Board will also have to interpret and apply the national implementation acts and decide which of these national laws apply to the matter.(77)

Although the Board recalled that "the aim of 65(1)(a) is to resolve conflicting views on the merits of the case and not to resolve possible disputes regarding procedural requirements or duties of cooperation",(78) such procedural aspects could be subject to the assessment of the Board if the objections clarify why the procedural failures led to a different conclusion in the draft decision. If a procedural failure led to a situation where the EDPB is unable

(72) H. Hijmans, "The European Union as a Constitutional Guardian of Internet Privacy and Data Protection", PhD Thesis, University of Amsterdam, 2016, p. 386; A. Giurgiu and T.A. Larsen, "Roles and Powers of National Data Protection Authorities", 2 *European Data Protection Law Review*, 2016, pp. 342, 352.

(73) D. Barnard-Wills *et al.*, "Data Protection Authority Perspectives on the Impact of data Protection Reform on Cooperation in the EU", *op. cit.*, p. 595.

(74) Which is not expected to happen often as the Board states in its guidelines that the exchange of information and consultation among SAs often enables an agreement to be reached at earlier stages of the case. See European Data Protection Board, "Guidelines 09/2020", *op. cit.*, para. 1.

(75) Art. 65(1)(a) Regulation (EU) 2016/679. The dispute resolution mechanism may also be triggered when there are conflicting views on who is competent for the main establishment and, thus, shall take the leading role or if an opinion of the Board is not requested in cases of Art. 64(1) or an opinion is not followed, see Art. 65(1)(b)(c) Regulation (EU) 2016/679.

(76) Art. 65(2) Regulation (EU) 2016/679.

(77) L. Feiler *et al.*, *The EU General Data Protection Regulation (GDPR) – A Commentary*, Surrey, German Law Publishers, 1st ed., 2018, p. 262.

(78) European Data Protection Board, "Guidelines 03/2021 on the Application of Article 65(1)(a) GDPR", *op. cit.*, para. 88.



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to resolve the dispute because it does not possess all the relevant factual elements,(79) the Board, for instance, can order the lead SA to investigate the matter further.(80)

Once the Board has adopted its decision, the competent SA shall adopt its final decision addressed to the data processing company.(81) The division of competences laid down by the GDPR is clear: during the decision-making period of the Board, the SAs shall not adopt a decision on the same subject matter,(82) and after the adoption of the decision of the Board, the competent SA will have to give full effect to the directions set out by the Board. If, for instance, the EDPB considers that there has been an infringement of the GDPR, the competent SA may not decide otherwise in its final decision.(83)

Ensuring consistency is an important role of the Board, but it seems that the organisation of the dispute resolution mechanism is not so much aimed at developing consistent practices. It focuses rather on solving conflicts that arise between the SAs in their endeavour to reach consensus on the outcome of a case. It is likely that disputes between SAs will often occur in complex cases, which means that assessing these matters may absorb the attention the Board. This will force the EDPB to focus on individual issues to the detriment of more general matters, while the focus on, for instance, the adoption of guidelines and recommendations could be more advantageous for the protection of personal data in the EU in the long term.(84)

(79) The EDPB is optimistic in its guidelines, however, and recalls that "in most cases the information exchanged during the cooperation procedure will be sufficient to enable the concerned SA to substantiate its objection in such a way that it will be possible to assess whether alternative infringements took place". See EDPB, European Data Protection Board, "Guidelines 03/2021 on the application of Article 65(1)(a) GDPR", *op. cit.*, para. 76. Nevertheless, in practice, the EDPB had to conclude various times that it did not possess sufficient relevant information to settle a dispute. See for example European Data Protection Board, "Decision 02/2022 on the dispute arisen on the draft decision of the Irish SA regarding Meta Platforms Ireland Limited (Instagram) under Article 65(1)(a) GDPR", 28 July 2022, <https://www.edpb.europa.eu/system/files/2022-09/edpb_bindingdecision_20222_ie_sa_instagramchildusers_en.pdf> accessed 19 May 2024, para. 221.

(80) *Ibid.*, para. 89. This could mean that the lead SA will have to open a new case.

(81) Art. 65(6) Regulation (EU) 2016/679.

(82) *Ibid.*, Art. 65(4).

(83) European Data Protection Board, "Guidelines 03/2021 on the Application of Article 65(1)(a) GDPR", *op. cit.*, para. 50.

(84) D. Kelleher and K. Murray, *EU Data Protection Law*, 1st ed., London, Bloomsbury, 2018, p. 368.



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## C. Mechanisms for administrative cooperation under the GDPR

SAs are obliged to cooperate in order to reach consensus, meaning that the lead SA shall involve the concerned SAs at every stage of the enforcement procedure. The following section provides an overview of the mandatory and voluntary forms of cooperation that the GDPR provides to support the authorities in their process to reach consensus.

### 1. Mandatory forms of cooperation

The GDPR provides for several mechanisms that the SAs can make use of when cooperation is needed to investigate and respond to an alleged breach of the GDPR. Articles 60 and 61 provide, for instance, that the lead SA can request the other concerned SAs to provide mutual assistance or conduct joint operations at any time.(85) When requesting mutual assistance, this shall cover, in particular, information requests and supervisory measures, such as carrying out consultations, inspections and investigations.(86) The information that is being shared under this mechanism may only be used for the purpose for which it was requested.(87) Interestingly, however, the implementing act of the Commission provides that data processed in the IMI system during information exchanges related to administrative cooperation under the GDPR, shall be stored and may be reused for subsequent processing.(88)

Furthermore, the GDPR provides for the organisation of joint operations, which may include joint investigations or joint enforcement measures in which members or staff of SAs of different Member States are involved.(89) In cases of alleged violations of the GDPR that contain cross-border processing, the other concerned SAs even have the right to participate in joint operations.(90) In those cases, the lead SA shall invite the other concerned SAs to participate, or the lead SA shall respond to the request of the concerned SA to participate.(91) Joint operations may include the conferral of powers on the seconding of SA staff involved in joint operations, which may include investigative powers. This shall take place only in accordance with Member State law and with the authorisation of the seconding SA. The host SA may also allow the seconding staff to exercise

(85) Likewise, concerned SAs can request the lead SA to monitor and enforce a particular infringement for which it is competent as lead authority *via* the mutual assistance procedure as laid down in Art. 61(1) Regulation (EU) 2016/679.

(86) Art. 61(1) Regulation (EU) 2016/679.

(87) *Ibid.*, Art. 61(3).

(88) Art. 5 Commission Implementing Decision (EU) 2018/743.

(89) Art. 62(1) Regulation (EU) 2016/679.

(90) *Ibid.*, Art. 62(2).

(91) *Ibid.*, Art. 62(2).



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their investigative powers in accordance with the law of the Member State of the seconding SA, only if the national law of the host SA permits this. Nevertheless, the seconding SA staff will have limited powers because they exercise tasks in the presence and under the guidance of members or staff of the host SA, and they shall be subject to the procedural laws of the Member State of the host SA.(92) The GDPR implies that the seconding SA will be responsible for the actions of its staff if it operates in its own territory; however, when staff of a seconding SA operates in *another* Member State, the host SA shall be responsible for the actions of the staff of the seconding SA in accordance with the national laws of the Member State in whose territory they are operating.(93) Looking at the complexity of this procedure, joint operations may result in situations where it is very difficult to determine which authority was responsible for certain actions and what national procedural laws are applicable to these actions.

In order to comply with the obligations related to mutual assistance and joint operations, SAs need to make available their human and financial resources – e.g., because SAs need to make daily efforts to facilitate cooperation which leads to an increased workload.(94) A shortage of these resources, however, is a serious barrier to providing mutual assistance and conducting joint operations.(95) It is, thus, not surprising that only one joint operation has been organised since the entry into force of the GDPR.(96) Additionally, SAs find cross-border cases to be more complex. Investigating, for instance, large companies such as Facebook or Google, is in itself already an extremely difficult task, but this did not per se become easier because of the complex cooperation procedures and the duty to reach consensus with SAs located in many other EU Member States.(97) The Dutch SA argued that, due to this, cross-border investigations take a long time or cannot be completed, and often the SA is not even able to commence the cross-border investigations.(98)

(92) *Ibid.*, Art. 6(3).

(93) *Ibid.*, Art. 62(3)(4).

(94) European Data Protection Board, "EDPB Document on Coordinated Enforcement Framework under Regulation 2016/679", *EDPB*, 20 October 2020, <https://edpb.europa.eu/our-work-tools/our-documents/other/edpb-document-coordinated-enforcement-framework-under-regulation_en> accessed 10 December 2021, p. 8; European Data Protection Board, "First Overview on the Implementation of the GDPR and the Roles and Means of the National Supervisory Authorities", *EDBP*, 26 February 2019 <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2019/02-25/9_EDPB_report_EN.pdf> accessed 10 December 2021, p. 2.

(95) D. Barnard-Wills *et al.*, "Data Protection Authority Perspectives on the Impact of Data Protection Reform on Cooperation in the EU", *op. cit.*, p. 590.

(96) European Data Protection Board, "2020 Annual Report", *EDPB*, 25 May 2021, <https://edpb.europa.eu/system/files/2021-06/edpb_aar_2020_final_27.05.21.pdf> accessed 10 December 2021.

(97) D. Wright, *Enforcing Privacy*, *op. cit.*, p. 17.

(98) Autoriteit Persoonsgegevens (Dutch SA), "Jaarverslag 2020", *Autoriteit Persoonsgegevens*, 8 June 2021, <https://www.autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/ap_jaarverslag_2020.pdf≥ accessed 10 December 2021, p. 11.



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## 2. Consequences of non-compliance with cooperative duties

In order to ensure that SAs comply with their duties, the GDPR provides that SAs that receive a request to provide mutual assistance or conduct joint operations, shall not refuse to comply with this request.(99) Refusing to comply with a request for mutual assistance is only justified when the SA "is not competent for the subject-matter of the request or for the measures it is requested to execute"(100) or when compliance with the request would infringe the GDPR or EU or Member State law to which the SA receiving the request is subject.(101) It is questionable whether this includes legal barriers around confidentiality which would prevent SAs sharing information with other SAs. Due to the one-stop-shop mechanism, it could be argued that the SAs act as one large, single authority and, therefore, "national confidentiality should be interpreted as allowing the sharing of information within this group".(102)

If an SA is of the opinion, however, that the requested SA does not comply with its obligations regarding mutual assistance – and the exceptions do not apply – or joint operations, any SA, the Chair of the Board or the Commission may request the opinion of the Board on the matter. The SA shall take the utmost account of this opinion and shall communicate to the Board whether it intends to follow it. Although opinions are non-binding, the opinion of the Board may be turned into a binding decision *via* the dispute resolution mechanism.(103) The EU legislator gives the impression that requesting the opinion of the Board is meant for a situation where an SA does not live up to its cooperative duties because Article 64 paragraph 2 provides that the opinion of the Board may be requested on "any matter of general application or producing effects in more than one Member State",(104) *in particular*, when a competent SA does not comply with its obligations related to mutual assistance and joint operations. This formulation, however, does not exclude the possibility for the Board to adopt an opinion where there are different views on the substance of the case.(105) This means that the EDPB could have a final word in many cases where the SAs might disagree. As a consequence, however, SAs "might tend to

(99) Arts. 61(4) and 62(7) Regulation (EU) 2016/679.

(100) *Ibid.*, Art. 61(4)(a).

(101) *Ibid.*, Art. 61(4)(b).

(102) D. Barnard-Wills *et al.*, "Data Protection Authority Perspectives on the Impact of data Protection Reform on Cooperation in the EU", *op. cit.*, p. 592.

(103) Arts. 64(8) and 65(1)(c) Regulation (EU) 2016/679.

(104) *Ibid.*, Art. 64(2).

(105) *Ibid.*, Art. 64(2). H. Hijmans, "The DPAs and their Cooperation – How Far Are We in Making Enforcement of Data Protection Law More European?", 3 *European Data Protection Law Review*, 2016, p. 370.



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avoid outsourcing their powers to the EDPB and try to solve the issues through cooperation within the one-stop-shop mechanism rather than triggering the consistency mechanism".(106)

Alternatively, if a SA refuses to comply with its obligations regarding mutual assistance(107) or joint operations, the SA which requested mutual assistance or the SA which wishes to participate in joint operations, may adopt provisional measures on its territory, with a period of validity which shall not exceed three months.(108) In such cases, the urgent need to act shall be presumed to be met and, therefore, require an urgent binding decision of the EDPB in accordance with Article 66 paragraph 2 GDPR.(109) An urgent binding decision may also be requested in other cases where an SA considers that there is an urgent need to act in order to protect the rights of data subjects. In those cases, however, the urgent need is not presumed and will have to be proved.(110)

### 3. Voluntary forms of cooperation between the Supervisory Authorities

Cooperation – whether this entails the identification of the lead authority, the exchange of information, a request for mutual assistance or the organisation of joint operations – takes place by electronic means, *via* a standardised form.(111) The Commission adopted an implementing decision in which it lays down that the Internal Market Information System (IMI) could be an effective tool for implementing the GDPR provisions on administrative cooperation.(112) This IMI system is a central database from which different procedures can be started – it, for instance, enables SAs to identify their respective role as lead or concerned SA or to request mutual assistance from another SA. The software system is also used to share draft or revised decisions for consultation or to share information with the Board for the adoption of opinions or binding decisions. Furthermore, the IMI system offers SAs the possibility to initiate *informal* communication with other SAs, for instance to collect information

(106) H. Hijmans, "The European Union as a Constitutional Guardian of Internet Privacy and Data Protection", *op. cit.*, p. 386; A. Giurgiu and T.A. Larsen, "Roles and Powers of National Data Protection Authorities", *op. cit.*, p. 350.

(107) And the SA does not fall under the exception of Art. 61(4) Regulation (EU) 2016/679.

(108) *Ibid.*, Art. 61(8).

(109) In case of the refusal to conduct joint operations, this may also require an urgent opinion of the Board instead of an urgent binding decision, *ibid.*, Art. 62(7).

(110) *Ibid.*, Art. 66(3).

(111) *Ibid.*, Art. 60(12).

(112) *Ibid.*, Arts. 67 and 61(9); Commission Implementing Decision (EU) 2018/743; the IMI has been developed by the Commission's "DG GROW" and was adapted together with the secretariat of the EDPB and the national SAs to meet the needs of the GDPR. The GDPR is the 13th legal area supported by the system.



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when preparing a draft decision.(113) According to the Commission, informal communication is based on Article 57(1)(g) GDPR, which lays down the general obligation for SAs to cooperate with each other.(114) The advantage of informal cooperation is the flexibility of the procedure, because it knows no legal deadline.(115) Looking at the statistics, "voluntary mutual assistance" – as this form of cooperation is called by the EDPB – is most frequently used by the SAs. In the first four and a half years after the entry into force of the GDPR, the SAs have launched 10,027 procedures of voluntary mutual assistance, whereas the formal mutual assistance procedure was launched only 852 times.(116) Cooperation *via* voluntary, flexible and informal ways creates some concerns, mostly related to the mechanisms that the GDPR provides to make sure that the SAs act in compliance with their duties under the formal cooperation mechanism established by the Regulation. When an SA fails to act in accordance with these formal obligations, the SA may request the opinion of the Board, a binding decision or may trigger an urgency procedure.(117) Since informal cooperation does not have a legal deadline, and cooperation is voluntary, the tools to push another SA to cooperate are not available here. Thus, in its first binding decision in accordance with the urgency procedure of Article 66, the Board had to conclude that it was not in the position to adopt an urgent binding decision because the Hamburg (German) SA never formally launched a request for mutual assistance. Instead, the Hamburg SA merely made use of voluntary mutual assistance. Therefore, the urgent nature of the request of the SA could not be presumed.(118) Hence, it is of the utmost importance that SAs continue using the formal ways of cooperation if they believe that the matter is a real threat to the protection of personal data which requires assistance from other SAs and perhaps the involvement of the EDPB.(119)

(113) European Data Protection Board, "First Overview on the Implementation of the GDPR and the Roles and Means of the National Supervisory Authorities", *op. cit.*, pp. 2-4.

(114) European Data Protection Board, "Contribution of the EDPB to the Evaluation of the GDPR under Article 97", *op. cit.*, p. 13.

(115) Whereas mutual assistance and joint operations have a deadline of one month.

(116) European Data Protection Board, "State of Play – IMI for GDPR Purposes", 27 June 2018, <https://edpb.europa.eu/news/news/2018/state-play-imi-gdpr-purposes_en> accessed 10 December 2021; European Data Protection Board, "Annual Report 2022 – Streamlining Enforcement Through Cooperation", 2022, <https://edpb.europa.eu/system/files/2023-04/edpb_annual_report_2022_en.pdf> accessed 15 May 2023.

(117) Art. 66 Regulation (EU) 2016/679.

(118) European Data Protection Board, "Urgent Binding Decision 01/2021 on the Request under Article 66(2) GDPR from the Hamburg (German) Supervisory Authority for Ordering the Adoption of Final Measures Regarding Facebook Ireland Limited", 12 July 2021, <https://edpb.europa.eu/system/files/2021-07/edpb_urgentbindingdecision_20210712_requesthh_fbireland_en.pdf> accessed 10 December 2021, para. 181.

(119) The urgency procedure may also be triggered without launching a formal request in accordance with Art. 61 or 62 Regulation (EU) 2016/679, however, in those cases "urgency" is not presumed and will have to be proved.



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The EDPB, however, is clearly in favour of informality, since its rules of procedure provide that "the Board shall operate efficiently and as flexible as possible so to achieve internally the highest level of synergies among its members, […] by using new technologies to help bring efficiencies to current working methods such as the *minimisation of formalities* and providing efficient administrative support".(120) The Board supports cooperative activities by establishing two consistency procedures, which the SAs can make use of on a voluntary basis. The first mechanism is the "Coordinated Enforcement Framework", which offers the EDPB and the SAs the opportunity to organise recurring annual activities focusing on a pre-defined topic. The objective of this framework is to facilitate joint actions in a coordinated but flexible way, ranging from joint awareness-raising to joint investigations and enforcement actions.(121) Looking at its flexible and voluntary character, the EDPB stressed that triggering, for instance, formal requests for mutual assistance or joint operations are not preferred and should be avoided here. Instead, the EDPB wishes for sharing or requesting information or joint actions organised in accordance with the Coordinated Enforcement Framework to happen *via* voluntary mutual assistance in the IMI system.(122)

Furthermore, the Board established a "Support Pool of Experts"(123) – consisting of EDPB, SA and external experts – which *may* assist in the carrying out of investigative and enforcement activities of national SAs. Such support can include, among other things, analytical support (e.g., sharing or explaining a methodology for calculating a fine), assisting in the preparation of investigative reports, or preparing a final decision or appeal.(124) The pool aims at contributing to a high and consistent level of personal data protection by providing material support to the SAs in the form of expertise.(125) The pool, however, should not prevent SAs from directly providing each other with support whenever the need arises in accordance with the cooperation mechanisms of the GDPR.(126) The SAs may voluntarily request assistance from the pool in cases with a

(120) European Data Protection Board, "Rules of Procedure", 25 May 2018, <https://edpb.europa.eu/sites/default/files/files/file1/edpb_rop_version_7_adopted_20201008_en.pdf> accessed 10 December 2021, Art. 3.

(121) During the coordinated action, SAs make use of their general investigative and enforcement powers laid down in Arts. 57(1) and 58(1)(2)(3) Regulation (EU) 2016/679; see European Data Protection Board, "EDPB Document on Coordinated Enforcement Framework under Regulation 2016/679", *op. cit.*, p. 6.

(122) *Ibid.*, p. 8.

(123) European Data Protection Board, "EDPB Document on Terms of Reference of the EDPB Support Pool of Experts", 15 December 2020 <https://edpb.europa.eu/sites/default/files/files/file1/edpb_document_supportpoolofexpertstor_en.pdf> accessed 10 December 2021.

(124) *Ibid.*, paras. 9-11.

(125) *Ibid.*, para. 2.

(126) *Ibid.*, para. 21.



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significant common interest.(127) A case may be of significant common interest if it is large and complex, but also if it is smaller but strategically important (e.g., because a matter concerns the interpretation of GDPR provisions). All in all, as long as there is an actual operational need – *i.e.*, "the SA in charge would have difficulty to proceed with its investigation or enforcement activity without receiving additional support going beyond the mere exchange of views or general discussion of the experiences from other SAs"(128) – assistance from the Pool of Experts can be requested. It is questionable, however, whether this mechanism does not make the already complex formal enforcement procedure even more complex.

## *III. Protection of data processing companies and data subjects*

Cooperation under the GDPR takes place between the national SAs or between the national SAs and the EDPB. However, there are additional persons involved, namely the data processing company under investigation and the data subjects (because their personal data is being processed and/or because they have lodged a complaint against this data processing company with an SA).

There are multiple references within the GDPR to the procedural rights of these persons. Recital 129, for instance, lays down that the powers of the SA – whether investigating the behaviour of or imposing measures on a data processing company – "should be exercised in accordance with appropriate procedural safeguards set out in Union and Member State law, impartially, fairly and within a reasonable time".(129) Regarding the imposition of measures, the GDPR continues that the SAs should "respect the right of every person to be heard before any individual measure which would affect him or her adversely is taken".(130) Because national procedural safeguards are also applicable when SAs exercise their tasks and powers, multiple laws could be applicable during one enforcement procedure, making it difficult for data processing companies and individuals to understand what their rights are. Additionally, a worrying development is the situation where a data subject is not recognized as a party to the procedure in many Member States. This is now confirmed in the

(127) E.g., involving major global companies the activities of which have a substantial impact on the protection of personal data. See *ibid.*, paras. 1 and 4.

(128) *Ibid.*, para. 7.

(129) Recital 129 and Art. 58(4) Regulation (EU) 2016/679. This, however, should not preclude additional requirements pursuant to Member State procedural law.

(130) *Ibid.*, Recital 129. It should be noted, however, that this are also general principles of EU law which, thus, apply in the absence of specific national laws. European Data Protection Board, "Guidelines 03/2021 on the Application of Article 65(1)(a) GDPR", *op. cit.*, para. 103.



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Commission proposal for a GDPR procedural regulation, as it emphasizes that the complainant and the parties under investigation are not in the same procedural situation and, therefore, complainants are not considered to be parties to the procedure. See Commission Proposal COM(2023) 348 final, recital 25.

The GDPR does not make any references to procedural safeguards that should be taken into account by the Board. However, the EDPB Rules of Procedure lay down that the Board shall respect the right to good administration, as set out by Article 41 CFR, which includes handling every person's affairs impartially, fairly and within a reasonable period of time.(131) This shall also mean that the Board gives reasons for its decisions and makes sure that all persons that might be adversely affected by a decision, have been heard prior to the adoption of such a decision.(132) Thus, if a matter is submitted to the Board in accordance with Article 65(1) GDPR, and the Board finds that documents are submitted which have not been subject to the right to be heard, the EDPB shall take further action.(133) In those cases, the EDPB may instruct the competent SA to ensure that the affected parties are being heard or the Board itself may ensure that the right to be heard is respected. In the latter case, the Board can request written observations from the affected party within a specific timeframe.(134)

Furthermore, the GDPR provides that the adoption of legally binding decisions(135) may give rise to judicial review by the national court in the Member State of the SA that adopted the decision.(136) Article 78 of the GDPR also provides that an effective judicial remedy must be available against the inactivity of an SA.(137) Judicial proceedings shall be brought before the national courts of the Member State where the SA is established.(138) Thus, if the lead SA adopts a final binding decision, the court

(131) European Data Protection Board, "Rules of Procedure", *op. cit.*; European Data Protection Board, "Guidelines 03/2021 on the Application of Article 65(1)(a) GDPR", *op. cit.*, paras. 8-9.

(132) European Data Protection Board, "Rules of Procedure", *op. cit.*, Art. 11. Although the decision of the Board is addressed to lead or concerned SAs, it will be decisive for the outcome of the enforcement procedure at national level and thus, may affect the interests of persons who were part of the procedure. European Data Protection Board, "Guidelines 03/2021 on the Application of Article 65(1)(a) GDPR", *op. cit.*, paras. 98-99.

(133) The Commission Proposal for a GDPR procedural regulation now proposes a general right of parties under investigation – and complainants if their complaint is rejected or dismissed – to submit their views before the EDPB adopts its decision. See Commission Proposal COM(2023) 348 final, Art. 24(2).

(134) European Data Protection Board, "Guidelines 03/2021 on the Application of Article 65(1)(a) GDPR", *op. cit.*, para. 108.

(135) L. Feiler *et al.*, *The EU General Data Protection Regulation (GDPR) – A Commentary*, *op. cit.*, p. 282.

(136) Recital 129, Art. 78(1) Regulation (EU) 2016/679.

(137) *Ibid.*, Art. 78.

(138) *Ibid.*, Art. 78(2)(3).



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of the Member State where the lead SA is established is competent.(139) In cases where the complaint was rejected or dismissed, and the concerned SA adopts a final binding decision, the court of the Member State where this concerned SA is established is competent. A complicating situation arises when the complaint is partly rejected or dismissed by the concerned SA, and the lead SA partly acted on it. Consequently, two courts in two different Member States are then competent to review two decisions based on the same set of facts. The GDPR provides that in such case the court seized later *may* suspend the proceedings.(140)

Another concern relates to the question of whether national courts, when reviewing final decisions in which multiple authorities at EU and national level were involved, are allowed to involve the acts of authorities from other Member States or the EU in its review. Regarding EU acts that influence the final decision of the SA, the GDPR provides that where proceedings are brought against a decision of an SA which was preceded by an opinion or decision of the Board, the SA shall forward that opinion or decision to the CJEU. Thus, according to the GDPR opinions or decisions of the Board can directly be challenged before the CJEU.(141) Nevertheless, in the case *Whatsapp Ireland Ltd v. the EDPB*, the General Court concluded that the EDPB's decision adopted in the context of the Board's dispute resolution mechanism, more particularly, in accordance with Article 65(1)(a) of the GDPR, constitutes "an *intermediate act* whose purpose is to prepare for the final decision", which does not in principle, constitute an act open to be challenged.(142) Therefore, only the final national decision could be challenged before a national court, while the EDPB's intermediate act may only be challenged indirectly *via* a preliminary reference procedure.(143)

Furthermore, concerns may arise in the context of whether national courts are able to review acts of authorities established in different Member States. In the Berlioz case, the "CJEU has held that a national court is able to review the lawfulness of acts taken by foreign authorities in order to comply with Article 47

(139) Data subjects not residing in that Member State may have difficulties to challenge a decision in a foreign legal system or different language.

(140) Art. 81(2) Regulation (EU) 2016/679.

(141) A general feature of EU administrative law is that national courts are exclusively competent to review decisions of their own authorities, whereas the CJEU is competent to review acts of EU institutions, bodies and agencies. See H.C.H. Hofmann *et al.*, *EU Administrative Law and Policy*, Oxford, Oxford University Press, 2011, p. 12. Problematic in this regard, however, is the question of whether natural persons have legal standing before the CJEU in accordance with Art. 263(4) TFEU since they are probably not directly concerned by the decisions of the Board because national SAs will implement the decision of the Board, which entails discretionary choices.

(142) *Whatsapp Ireland Ltd v. EDPB*, case T-709/21, EU:T:2022:783, para. 43. Reference is made to *IBM v. Commission*, case C-60/81, EU:C:1981:264, para. 10.

(143) Art. 267 TFEU; M. Eliantonio, "Judicial Review in an Integrated Administration – The Case of 'Composite Procedures'", *7 Review of European Administrative Law*, 2014, p. 81.



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CFR".(144) Therefore, the national court where the action against the final measure is brought, should be able to review the preparatory acts adopted at earlier stages of the enforcement process by the SAs in other Member States, using EU law as a parameter.(145) As a consequence, however, such foreign national preparatory acts under review by a court of another Member State, are immune from judicial control of possible violations of national law.(146) It is, furthermore, questionable whether cooperation that takes place *via* voluntary mutual assistance can be understood as a "preparatory act". Although this form of cooperation influences the final act, it is not something that is set forth in the legislation of the EU as necessary for the issuance of this final binding decision.(147) Thus, SAs may not only circumvent the complex cooperation procedures laid down in the GDPR by choosing to go for voluntary cooperation, they may also escape judicial review.

## *Conclusion*

Since violations of EU data protection rules often cross borders, it is essential that national SAs work together in order to monitor and address these breaches. For this purpose, the GDPR provides for multiple forms of administrative cooperation, ultimately leading to a situation where all concerned SAs and the lead SA are involved in the enforcement process and agree on the outcome of the case. Thus, the EU legislator created a system where common decisions are the norm. These forms of cooperation are not voluntary, and there are even several tools that the SAs can make use of when they wish to push another SA to take action – *via* the opinions, decisions and urgency procedure of the Board (the so-called "consistency mechanism"). The cooperation and consistency procedures, however, are complex: the area of administrative cooperation under the GDPR is regulated by multiple instruments – the GDPR, national implementing acts, national administrative laws, EDPB guidelines and Commission implementing and delegated acts – and there are multiple authorities at EU and national level involved in the adoption of a final decision, each acting in accordance with the GDPR and their own national laws. Cooperation and reaching

(144) *Berlioz Investment Fund*, case C-682/15, ECLI:EU:C:2017:373, para. 59; R. Lanceiro and M. Eliantonio, "The Genetically Modified Organisms' Regime – A Playground for Multi-Level Administration and a Nightmare for Effective Judicial Protection?", *22 German Law Journal*, 2021, p. 389.

(145) *Ibid.*, p. 389; P. Mazzotti and M. Eliantonio, "Transnational Judicial Review in Horizontal Composite Procedures – Berlioz, Donnellan, and the Constitutional Law of the Union", *5 European Papers*, 2020, p. 53.

(146) R. Lanceiro and M. Eliantonio, "The Genetically Modified Organisms' Regime – A Playground for Multi-Level Administration and a Nightmare for Effective Judicial Protection?", *op. cit.*, p. 390.

(147) P. Mazzotti and M. Eliantonio, "Transnational Judicial Review in Horizontal Composite Procedures – Berlioz, Donnellan, and the Constitutional Law of the Union", *op. cit.*, fn. 25.



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consensus may, thus, be hindered by differences in national procedures, such as the interpretation of certain concepts essential for a smooth functioning of the cooperation mechanism. Cooperation may also be hindered by the lack of available human and financial resources, which are not sufficient for dealing with the immense workload that is created with regard to the additional duties of the SAs under the cooperation mechanism. Additionally, the procedures are long and cumbersome and, thus, do not always guarantee the promptest response to a violation of the GDPR. It is, therefore, not surprising that national SAs prefer to cooperate *via* informal ways. In such cases, no legal deadlines apply which offers the SAs the possibility to prioritise other matters and respond to requests of other SAs whenever it suits them. Circumventing formal obligations under the GDPR, however, means that the tools to push another SA to cooperate are not available. Besides circumventing the formal cooperation procedures, SAs may also escape judicial review. Judicial review of decisions involving multiple authorities is uncertain in general, but especially with regard to informal actions it becomes difficult to allocate responsibilities. Furthermore, it is questionable whether informal cooperative actions can qualify as "preparatory act" and, thus, whether they are reviewable by a foreign national court. A first step to overcome these challenges to administrative cooperation, could be to further proceduralise the process, as recently proposed by the Commission.(148) However, the proposed regulation may not substantially improve cross-border GDPR enforcement since large concerns in cooperation and individual protection remain unaddressed, or are even worsened. It will therefore be interesting to see how the text will turn out after the European Parliament and the Council of the EU have shed their light on it.

(148) Commission Proposal COM(2023) 348 final.



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# CHAPTER 13
# Administrative cooperation in European criminal policy

**Marta Muñoz de Morales Romero**

## *Introduction*

EU administrative cooperation in criminal matters concerns various mechanisms whereby police and justice administrations of the EU Member States and the EU itself cooperate with one another to detect, punish, and reduce crime. EU administrative action in this field takes place within the sphere of the competences of the EU foreseen in Title V of the TFEU devoted to the creation of an Area of Freedom, Security and Justice (AFSJ), which is, according to Article 3(2) of the TEU, one of the EU missions. To carry out this mission, the EU may adopt "appropriate measures with respect to [...] the prevention and combating of crime". Article 67(3) of the TFEU reinforces this idea by indicating that the EU is to ensure a high level of security through different measures combating crime and through cooperation based on mutual recognition, while Article 82(1) TFEU provides that cooperation in criminal matters "shall be based on the principle of mutual recognition of judgments and judicial decisions".

However, neither Title V nor any other legal provision of primary law provide for a definition of police and judicial cooperation. Both generally refer to the investigation of crimes and the gathering and exchange of information and evidence. Judicial cooperation usually concerns requests for the surrender of individuals, the transfer of proceedings, the recognition of judgments, the transfer of convicted persons, etc. Police cooperation refers to all other aspects of investigating a crime (*i.e.*, the exchange of information, specific evidence that foreign counterparts are required to gather, etc.). Joint capacitation and training are also tools of police and judicial cooperation.

These kinds of activities are traditionally rooted in the core of the sovereignty of states. This explains why the road towards the consolidation of judicial and police cooperation has been a very long one in many ways. Firstly, because until the Treaty of Lisbon, police and judicial cooperation in the EU



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were Third-Pillar competences.(1) As competences of an intergovernmental character, their exercise remained substantially under the control of the Member States (Member States).(2) Judicial and police cooperation and harmonisation measures were adopted by unanimity, meaning that all the Member States voting had to agree. The Treaty of Lisbon eradicated the pillar structure and changed the legislative process.(3) The Member States accepted qualified majority voting within the Council, substituted framework decisions for directives subject to infringement proceedings, and underlined the need of aligning national criminal law, policing powers, and judicial process.

Despite these changes in primary law, the reluctance of the Member States to confer criminal competences to the EU has always been at the heart of the integration process in this field. Probably for this reason the EU categorically opted for the horizontalization of cooperation by introducing mutual recognition. In fact, the Member States found in this principle a perfect mechanism to achieve common goals while keeping national legal systems intact.(4) To put it another way, the Member States expected to preserve their sovereignty by resorting to the principle of mutual recognition.(5)

The Third-Pillar spirit is also present in vertical cooperation. Europol and Eurojust, the two EU agencies active in the field of criminal cooperation, still depend greatly on the Member States. They both provide support for and coordination of national police officers and other law enforcement services (Europol) and national investigating and prosecuting authorities (Eurojust).

The aim of this chapter is to provide a general overview of the different means, tools, and institutional structures of horizontal cooperation between national authorities(6) (I.) and vertical cooperation between the Member States and the

(1) For an evolution of substantive criminal law in the EU, see M. Muñoz de Morales Romero, *El legislador penal europeo: Legitimidad y Racionalidad*, Civitas-Thomson Reuters, 2011, p. 266; for a wider approach (not only from a substantive point of view), see M. Chaves, "The Evolution of European Union Criminal Law (1957-2012)", DPhil thesis, London School of Economics, 2012, chapter 1.

(2) S. Peers, "Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon", 48 *Common Market Law Review*, 2013, p. 661.

(3) V. Mitsilegas, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", 43 *Common Market Law Review*, 2006, p. 1277.

(4) K. Lenaerts, "The Principle of Mutual Recognition in the Area of Freedom, Security and Justice", The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford (30 January 2015); V. Mitsilegas, "Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice", 57 *Common Market Law Review*, 2020, p. 45.

(5) However, they were wrong. Practice has shown that harmonising measures are necessary to impose mutual trust and mutual recognition. In other words, mutual recognition of national decisions is easier if the national legal systems are to a certain extent similar or compatible. See P. Asp, "The Procedural Criminal Law Cooperation", Research Paper Series 6, 2016, p. 54.

(6) Horizontal cooperation takes place between national authorities of the same nature and level (*i.e.*, a request from one police force to another). Vertical cooperation appears between Member States and EU agencies. Some legal scholars refer to cooperation between Member States and Europol/



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EU in the EU criminal policy area (II.). Given that the exchange of information is an essential mechanism to enforce cooperation, a final section of this chapter will be focused on the setting up of technical tools (III.).

On the basis of this analysis, it will be shown that judicial and police cooperation in criminal matters has been gradually nourished by common administrative tasks such as the coordination of administrative networks (*i.e.*, the European Judicial Network) including the establishment of agencies (*i.e.*, Eurojust, Europol); the assigning of tasks to, and coordination and supervision of, private players (*i.e.*, those involved in anti-money laundering rules(7)); the preparation and introduction of legislative measures, which is mainly a task of the European Commission with its almost exclusive right to initiate secondary legislation; the management of information with many different types of administrative players charged with the tasks of generating or gathering information serving a range of purposes; the exchange of information between national enforcement authorities (either voluntarily or upon request); or direct cooperation between the enforcement agencies as a principle (instead of the "royal route" *via* the Ministries of Foreign Affairs).

## *I. Horizontal cooperation*

### A. Mutual recognition as a primary law principle

Transposed from EU internal market law,(8) the principle of mutual recognition is conceived as the "cornerstone" of judicial cooperation in civil and criminal matters.(9) The European Arrest Warrant (EAW) was the first mutual recognition instrument in this field. Adopted in 2002, it is the instrument

Eurojust as "hybrid" vertical cooperation since there is not technically speaking a hierarchical relationship between the Member States and them. Here, however, all cooperation between Member States and EU agencies will be considered as vertical cooperation, bearing in mind that the powers of Europol and Eurojust have been strengthened after the Lisbon Treaty. See S. Gless, "Police and Judicial Cooperation Between the EU Member States. Results and Practice", in C. Fijnaut and J. Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the EU*, Leiden, Martinus Nijhoff Publishers, 2010, p. 31.

(7) As it will be seen later there are two aspects to consider as regards how anti-money laundering rules are applied on the ground: the control and assessment of obligated parties' compliance with their preventive duties, on the one hand, and cooperation between them and the national authorities, on the other.

(8) *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, case C-120/78, EU:C:1979:42. For an evolution of the principle of mutual recognition in the internal market, see D. Utrilla Fernández-Bermejo, "El reconocimiento mutuo y el Derecho primario del mercado interior", in L. Arroyo Jiménez and A. Nieto Martín (eds), *El reconocimiento mutuo en el Derecho español y europeo*, Madrid, Marcial Pons, 2018, p. 11.

(9) See Presidency Conclusions, Tampere European Council (15-16 October 1999), para. 33.



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where most experience has been gained regarding the issue of mutual recognition.(10) However, the proliferation of legal instruments based on this principle is impressive in both quantitative and qualitative terms.(11) Currently, there are mutual recognition legal instruments which cover the three stages of a criminal procedure, that is, the pre-trial stage (*i.e.*, recognition of supervision measures as an alternative to provisional detention);(12) the trial stage (*i.e.*, recognition of investigation orders);(13) and the post-trial stage (*i.e.*, recognition of financial penalties).(14)

Although the Treaty of Lisbon constitutionalised this principle (in Arts. 67(3) and 82(1) TFEU), a concept of mutual recognition cannot be found in primary law, but only in policy documents of the European Commission. Mutual recognition has been defined as "a principle [...] based on the thought that while another State may not deal with a certain matter in the same or even a similar way as one's own State, the results will be such that they are accepted as equivalent to decisions by one's own State".(15) That means that "a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case".(16)

This definition configures the principle of mutual recognition with the following features: *extraterritoriality*, *assimilation of foreign decisions*, and *automaticity*. Mutual recognition is nourished by *extraterritoriality* and *assimilation of foreign decisions* because it leads to the will of a judicial authority in one Member State being carried out in the territory of another Member State. Consequently, the latter state "makes its own" a judicial decision originating abroad. On the other hand, recognition of judicial requests is quasi *automatic* since there are few grounds for refusal.(17)

(10) The Member States have 16 years of experience with the instrument in question. This experience has led to a rich body of case law at both national and European level.

(11) For an in-depth analysis on the principle of mutual recognition, see M. Muñoz de Morales, *Derecho penal europeo*, Valencia, Tirant lo blanch, 2020, p. 34 et seq.

(12) See Council Framework Decision (CFWD) 2009/829/JHA of 23 October 2009 on the application, between Member States of the EU, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, [2009] OJ L 294/20.

(13) See Directive 2014/41/EU of the EP and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, [2014] OJ L 130/1.

(14) CFWD 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, [2005] OJ L 76/16.

(15) Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters COM(2000) 0495 Final, 26 July 2000, p. 4.

(16) *Ibid*.

(17) *Openbaar Ministerie v. Tadas Tupikas*, case C-270/17 PPU, EU:C:2017:628; *LM*, case C-216/18 PPU, EU:C:2018:586.



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Taking this premise into account, mutual recognition has led to a far more developed system of cooperation compared with the traditional one (which continues to be applied with respect to non-EU countries). Unlike classical cooperation, the EU Member States are no longer sovereign States that cooperate with each other because they regard it as politically convenient to do so. As already mentioned, after the Treaty of Lisbon, the intergovernmental nature of this area was lost since Member States have to cooperate and cooperation is now founded on the rules establishing mutual recognition regimes and on the duty of sincere cooperation (Art. 4(3) TEU). Therefore, the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties.(18) It should also be noted that cooperation in criminal matters is a shared competence, which means that the Member State may only act if the EU does not exercise, or explicitly decided not to exercise, its own competence. Given that the EU has adopted legal instruments based on the principle of mutual recognition, a Member State could not enact a law on cooperation that failed to comply with the assumptions set forth in the respective instrument of mutual recognition. It could not, in short, return to the rules and principles of classical cooperation.(19) This change in the "rules of the game" has had a major impact on national law.

## B. Impact on national law

### 1. Judicialization

One of the most significant changes introduced by the principle of mutual recognition is that the decision to cooperate is a judicial competence. In traditional cooperation, government authorities play a prominent role as they decide whether to cooperate with another state. In the mutual recognition model of cooperation, central authorities (administrative, political bodies or law enforcement officials) perform merely auxiliary tasks (*i.e.*, the Ministry of Justice is responsible for the translation of documents, their transmission to the competent authority, etc.) without decision-making powers. However, some Member States (*i.e.*, Estonia, Ireland) have granted the designated central authorities additional powers which exceed the simple facilitating role permitted by the mutual recognition instruments. In some cases, the central authorities are responsible for preliminary endorsement of incoming EAWs or may,

(18) *Openbaar Ministerie*, joined cases C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paras. 48 and more recently, *E.D.L.*, case C-699/21, EU:C:2023:295, para. 45.

(19) A. Nieto Martín, "Reconocimiento mutuo, orden público e identidad nacional: la doble incriminación como ejemplo", 59 *La Ley*, 2018, p. 3.



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under certain conditions, postpone the implementation of a ruling on surrender. The establishment of intermediaries in national transposition acts(20) blurred the requirement of direct communication between judicial authorities, which does not seem to be in conformity with the rules of play of the principle of mutual recognition.(21)

The decision on which judicial authority is competent to issue and/or execute a judicial cooperation request is governed by the principle of procedural autonomy.(22) However, the CJEU has stated that the concept of judicial authority does not only include judges and courts, but also prosecutors.(23) In this case, they have enjoyed a status such as to ensure their independence. Therefore, in the context of an arrest warrant, the CJEU has held that national law must guarantee that national prosecutors are "not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive".(24) Even though they may be subject to instructions, the prosecutors will be empowered to issue an EAW, provided that their decision is open to challenge before a court.(25) This case law has required practical and/or legal reforms in the judicial systems of some Member States. Germany has relocated the competence of issuing EAWs to the courts. In the Netherlands, domestic law was amended to grant the competence of issuing an EAW to investigative judges on request of the prosecutor.(26)

(20) Report from the Commission to the European Parliament and the Council, on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant (EAW) and the surrender procedures between Member States COM(2020) 270 Final, 2 July 2020, p. 7.

(21) M. Jimeno Bulnes, "The Enforcement of the EAW – A Comparison Between Spain and the UK", 15 *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, p. 276.

(22) See, *i.e.*, Art. 6(2) CFWD on the EAW: "The executing judicial authority shall be the judicial authority of the executing Member States which is competent to execute the European arrest warrant by virtue of the law of that State".

(23) *Openbaar Ministerie v. Krzysztof Marek Poltorak*, case C-452/16 PPU, EU:C:2016:858; *Openbaar Ministerie v. Ruslanas Kovalkovas*, case C-477/16 PPU, EU:C:2016:861; *Openbaar Ministerie v. Halil Ibrahim Özçelik*, case C-453/16 PPU, EU:C:2016:860.

(24) *Minister for Justice and Equality v. OG and PI*, joined cases C-508/18 and C-82/19 PPU, EU:C:2019:456, para. 74. The German public prosecutor's offices in Lübeck and Zwickau were not considered independent authorities. The independence requirement was met in the case of the Lithuanian, Lyon and Tours Public Prosecutor's Offices (*Minister for Justice and Equality v. PF*, case C-509/18, EU:C:2019:457; *Parquet général du Grand-Duché de Luxembourg and de Tours*, joined cases C-566/19 PPU and C-626/19 PP, UEU:C:2019:1077. For a comment on this case law, see M. Böse, "The European Arrest Warrant and the Independence of Public Prosecutors – OG & PI, PF, JR &YC", 57 *Common Market Law R*eview, 2020, p. 1259.

(25) However, the ECJ has stated that this case law does not apply in the case of the issuing of European investigation orders. *A. and others*, case C-584/19, EU:C:2020:1002.

(26) Eurojust, Questionnaire on the CJEU's Judgments in Relation to the Independence of Issuing Judicial Authorities and Effective Judicial Protection, 2020.



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The concept of procedural autonomy has also been questioned in the *Puigdemont case*.(27) The Belgian judge as executing authority reproaches the Spanish Supreme Court for ignoring and misapplying the procedural rules on jurisdictional competence and thus violating the right to a natural judge. Therefore, the surrender of one of the independent leaders, Mr. Puig, was rejected. In judgment of 31 January 2023(28) the ECJ discussed whether the executing judge could challenge the issuing judge's competence under the autonomous concept of "judicial authority". The answer was in the affirmative, since issuing judges must always meet the conditions of independence and objectivity required by European case law. However, this does not mean that it can verify that the issuing judge had jurisdiction under its own national law (para. 85). In other words, the Belgian judge can inquire whether the Supreme Court is an independent court but cannot verify whether it is competent within the Spanish judicial system to issue the arrest warrant. The CJEU insists here that the designation of the competent issuing authority is a matter of domestic law because the European legislator itself has so decided (para. 87). To do otherwise violates the principle of procedural autonomy, but also the principle of distribution of functions or tasks, since if the person who issues the European arrest warrant is a judge who does not have jurisdiction under the national law of that Member State, it will be the higher-ranking judges of that State who will be responsible, by appeal, for rectifying the mistake (para. 87).

Another related issue is whether the scope of application of the mutual recognition procedure also includes resolutions issued by administrative authorities or bodies in respect of a criminal offence. As they are not issued by a judicial authority, mutual recognition should not be applicable. However, some mutual recognition instruments have been sensitive to national diversity with the aim of improving judicial cooperation. In this regard, the Framework Decision on the mutual recognition of financial penalties(29) and the Directive on the European Investigation Order (EIO)(30) include as decisions to be recognised those issued by administrative authorities or bodies, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in criminal matters.

(27) See A. Nieto Martín and M. Muñoz de Morales Romero, "La orden de detención europea y el caso del procès algunas reflexiones", *Libro Homenaje a Giovanni Grasso*, 2023.

(28) *Lluís Puig Gordi*, case C-158/21, EU:C:2023:57. For a comment on this case, see A. Hernández López, "El procedimiento de entrega de Carles Puigdemont: estado actual y perspectivas", 1 *Revista de Estudios Europeos*, 2023, pp. 279-310.

(29) Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, [2005] OJ L 76/256.

(30) Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.



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This solution has led to problems in Member States where administrative sanctions are imposed and appealed against before a jurisdictional body with no competence in criminal matters. This is the case with Spain. This Member State can never request the taking of evidence in the investigation of road traffic offences that do not constitute a criminal offence, nor can it request the recognition of pecuniary sanctions imposed for committing road traffic or environmental infractions. Nevertheless, Spain receives and must execute many requests for judicial assistance to investigate facts that being administrative infractions there would never give rise to judicial cooperation in criminal mattes according to Spanish law. This leads to a greater effectiveness of the administrative sanctioning regime applied to foreigners in some countries rather than others, depending on national criteria of attribution of either criminal or administrative competences.(31)

The same thing happens in the field of obtaining evidence. In countries like Germany, non-judicial administrative authorities make undue requests for the identification of vehicles in the cases of drivers who failed to pay a toll or did not respect maximum driving hours. Article 2, c) of the Directive on the EIO may contribute to minimising disproportionate cases of judicial cooperation. According to this legal provision, when the issuing Member State is not a judicial authority, the request must be validated by a judicial authority.

### 2. Little room for national discretion

Although traditional and mutual recognition cooperation both require a legal basis, the principle of legality works in a different manner. In the classical model, states agree freely on how to cooperate: whether through international conventions or internal procedures. They may change the cooperation rules at any time. However, in the mutual recognition system, the Member States are forced to execute requests for cooperation in accordance with conditions and standards established by the European legislature in directives. In other words, the facultative and mandatory refusal grounds are pre-determined by the EU and theoretically could not be changed or supplemented at national level.(32)

The consequences for national sovereignty are clear, for example,(33) in the removal or new meaning of some grounds for refusal. I will provide only three examples.

(31) Spanish Attorney General of the State, Annual Report, Years 2018 (pp. 934-936); 2017 (p. 615) and 2016 (pp. 571-572).

(32) L. Klimek, *Mutual Recognition of Judicial Decision in the European Criminal Law*, Springer, 2018, p. 34; J. Vervaele, "The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU", 6 *Review of European Administrative Law*, 2013, pp. 37-39.

(33) See S.A. Bloks and T. Van den Brink, "The Impact on National Sovereignty of Mutual Recognition in the AFSJ – Case-Study of the EAW", 22 *German Law Journal*, 2021, pp. 45-64.



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The first concerns the principle of double criminality according to which the offence for which the act of cooperation is requested must be constitutive of a crime in both the requesting and the requested state. In mutual recognition procedures, the EU legislature decided to abolish this requirement in some cases,(34) which means that a Member State must execute a judicial decision related to an act that is not an offence under its national law.

The second example regards the principle of non-surrender of nationals. In extradition procedures, this principle is only waived under terms of reciprocity – that is to say, when the requesting state likewise allows for the surrender of its own nationals when acting as a requested state. In the case of the EAW, the surrender of nationals is the general rule. This rule does not permit exceptions for sovereignty reasons (control by the state over its national citizens) but for criteria of resocialisation (*i.e.*, the offender should serve in the executing state the custodial sentence since that will contribute to the chance of resocialisation for the convicted person).(35)

The last example relates to possibility of implementing or applying additional grounds of refusal. Since mutual recognition can lead a judge to recognise a judicial decision adopted with far fewer guarantees than if it had been adopted in its own Member State, the ECJ has dealt with many cases in which the referring domestic court asked whether additional grounds for non-execution could be implemented.(36) At first, the ECJ stated the Member States must or may refuse to execute a warrant only in cases listed in the respective mutual recognition legal instrument.(37) Fundamental rights were not included in the list of grounds of refusal in the case of the EAW, so in theory they could not play any role in non-execution. In this regard, in Opinion 1/2013 of 14 October 2013, the ECJ established a general presumption of compliance by all Member States with EU law and specifically with fundamental rights. That means that the Member States must not check whether the issuing Member State is

(34) The double criminality of the act is not verified if the order is based in one of the offences listed in the framework decision if they are punishable in the issuing Member States by a custodial sentence or a detention order for a maximum period of at least three years (Art. 2(2) CFWD on the EAW).

(35) See M. Muñoz de Morales Romero, "The Role of the European Court of Justice in the Execution of Sentences", in A. Bernardi and A. Martufi (eds), *Prison overcrowding and alternatives to detention*, Naples, Jovene Editore, 2016, p. 74.

(36) Despite that, "over half of the Member States have provided for additional grounds for non-execution". See Report from the Commission to the European Parliament and the Council, on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant (EAW) and the surrender procedures between Member States COM(2020) 270 Final, 2 July 2020, p. 13.

(37) *Leymann and Pustovarov*, case C-388/08 PPU, EU:C:2008:669; *Jeremy F v. Premier minister*, case C-168/13 PPU, EU:C:2013:358; *Gaetano Mantello*, case C-261/09, EU:C:2010:683; *Ciprian Vasile Radu*, case C-396/11, EU:C:2013:39. See V. Mitsilegas, "Mutual Recognition, Mutual Trust and Fundamental Rights after Lisbon", in V. Mitsilegas, M. Bergström and T. Konstadinides (eds), *Research Handbook on EU Criminal Law*, Cheltenham, Edward Elgar, 2016, p. 148.



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in compliance with fundamental rights. This approach was altered somewhat with the *Caldararu/Aranyosi* cases.(38) Although the ECJ did not recognise the violation of fundamental rights as a general ground of non-execution of the EAW, since it did not want to undermine the effectiveness of mutual recognition, it introduced a double filter test allowing the executing judge to refuse to surrender an individual. The double filter consists of, on the one hand, verifying the existence of a systemic risk of violation of a fundamental right (in those cases, prison conditions were not respected in the issuing state). On the other hand, the risk has to be specified. In other words, the risk can be circumvented if the issuing judge ensures that the person will not suffer any violations of their fundamental rights (*i.e.*, because they will serve a sentence in a prison that respects European prison standards).

### C. Players involved in horizontal cooperation

Even before mutual recognition became the cornerstone of judicial cooperation in criminal matters, cooperation between national authorities was hampered by linguistic and logistical problems. The judge or police officer could not always know to which counterpart authority in another Member State they should address their request, in which language, what formalities they should follow, etc. Knowing their counterparts as well as the logic and practice of legal systems began to be a priority. A better understanding of the different legal orders of the Member States to achieve trust was precisely the aim of the first players involved in police and judicial cooperation.

Liaison magistrates have existed since 1996.(39) They are judges, prosecutors or officials specialising in criminal and civil judicial cooperation who are sent or exchanged between Member States on the basis of bilateral or multilateral agreements in order to gain a better understanding of the different legal and judicial systems of the Member States. Their counterparts in police cooperation are the liaison officers (Art. 47 of the *Convention Implementing the Schengen Agreement* (CISA)). They exchange information aimed at combatting crime by means of both prevention and law enforcement. They do not take independent police action since their tasks are limited by the instructions provided by the seconding Member State and by the one to which they are seconded.

(38) *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, joined cases C-404/15 and C-659/15 PPU, EU:C:2016:198. For a comment on this case, see A. Weyembergh, "Arrêt 'Aranyosi et Caldararu' : imposition de certaines limites à la confiance mutuelle dans la coopération judiciaire pénale", 6 *J.D.E.*, p. 225; M. Muñoz de Morales Romero, "Dime cómo son tus cárceles y ya veré yo si coopero'. Los casos Caldararu y Aranyosi", 1 *Indret*, 2017.

(39) 96/277/JHA: Joint Action of 22 April 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union, [1996] OJ L 105/1.



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At European level, a network of contact points, the European Judicial Network (EJN),(40) was established in 1998(41) to improve and speed up judicial cooperation between Member States. The basic principle guiding its actions is direct communication between its contact points which are designated by each Member State according to domestic rules. The contact points are also judges, prosecutors or officials with specific competences in the framework of international cooperation.(42) The European Commission can also appoint contact points in the EJN in areas of its competence (*i.e.*, fraud offences against the EU's financial interests). The direct contact is often informal, allowing rapid knowledge of what stage the request is, if any additional document is required, etc. Contact points participate in and promote training sessions at national level in cooperation with the European Judicial Training Network. Furthermore, the EJN website offers very useful information, such as the "Belgian files" with practical information on all the EU instruments of judicial cooperation; the "compendium" tool, which offers the possibility of creating a request electronically; the "judicial atlas" on the competent enforcement authorities; or the "judicial library" where the status of notifications, user manuals, reports, etc., are published.(43)

While these players do not perform operational functions, joint investigation teams (JIT) do. This kind of horizontal cooperation includes transborder operative activities developed commonly by national authorities in a specific legal framework which gives rise to coordination. JITs are set up *ad hoc* for specific situations (cross-border and related investigations requiring coordination).(44) Each JIT acts under the coordination of the national body of the country where the investigation is mainly carried out and its added value lies

(40) There are others relevant networks involved in or connected to EU criminal policy issues. This is the case, for example, with the European network of contact points in relation to persons responsible for genocide, crimes against humanity and war crimes (002/494/JHA: Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, [2002] OJ L 167/1) the EU contact-point network against corruption (Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption, [2008] OJ L 301/38) *or the E*uropean Judicial Cybercrime Network (EJCN).

(41) Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (98/428/JHA), [1998] OJ L 191/4, replaced by Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, [2008] OJ L 348/130.

(42) It currently has over 350 contact points. See Eurojust, "Joint Paper on Assistance in International Cooperation in Criminal Matters for Practitioners European Judicial Network and Eurojust. What can we do for you?", 31 January 2018, <https://www.eurojust.europa.eu/joint-paper-assistance-international-cooperation-criminal-matters-practitioners-european-judicial> accessed on 15 June 2021.

(43) European Judicial Network <https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx> last accessed 19 November 2020.

(44) Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA), [2002] OJ L 162/1.



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in the exchange of information and the "sharing" of best practices by national authorities. JITs have a mixed nature since they may be composed of police and judicial authorities from Member State, and sometimes also of members of Europol, Eurojust and OLAF. They all cooperate directly, share information, and collect evidence without the need for resort to traditional and time-consuming judicial assistance. The material obtained is shared within the team and may be used as evidence in another jurisdiction. However, information obtained by a JIT can only be used for the purposes for which the team was set up (based on the principle of speciality), unless there is an agreement for its possible use in other cases.

In the case of police cooperation, there are controlled deliveries and cover investigations which may take place outside or within a JIT. In this last case, they will be possibly under the coordination of Eurojust. The legal basis for these two special investigation techniques is conventional.(45) Furthermore, Articles 40 and 41 CISA provide for transborder operating procedures of police cooperation such as surveillance and pursuit. In the first case, a Member State may authorise police officers of other Member State to continue their surveillance activity within its territory in specific cases. Cross-border pursuit is possible when officers are pursuing an individual in their own country who was caught in the act of committing or of participating in specific crimes (*i.e.*, murder). In this case, they are authorised to continue the pursuit without prior authorisation in the territory of another Member State under specific circumstances (Art. 41 CISA). During the surveillance and pursuit, the officers operating in the territory of another Member State are considered officers of this latter State with respect to offences committed against or by them (Art. 42 CISA).

Mention must finally be made of the practice of assigning tasks of coordination and supervision to private players (the so-called public-private partnerships). The particularity of this type of cooperation is that the Member States must implement national bodies which become focal points for cooperation into domestic law. Examples of this are the Financial Intelligence Units (FIU). FIUs are national centralised bodies which receive, analyse, and transmit to the competent authorities information on transactions suspected of being linked to money laundering. This information is provided for by the "obliged entities", which include a huge variety of private players (*i.e.*, lawyers, financial institutions, etc.). Although they are defined as police, administrative and independent

(45) Art. 12-18 of the Council Act of 29 May 2000 establishing in accordance with Art. 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, [2000] OJ C 197/1 and Art. 14 and 19 of II Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 1959.



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units, their structure varies from one Member State to another.(46) This also depends on whether they have supervisory powers (*i.e.*, Spain). Information handled by FIUs must be shared with the FIUs of other Member State. FIUs have the obligation to promptly forward reports which concern another Member State to the FIU of that Member State,(47) disseminate spontaneously, upon the discretionary decision of the FIU, relevant information or analysis for another Member State and reply to requests for information from another FIU (Art. 53.1 of the Anti-Money Laundering Directive (EU) 2015/849). Grounds for refusal of information are limited to exceptional circumstances (based on fundamental principles of national law) (Art. 53.3).

Similar are the Passenger Information Units (PIUs) created by Directive (EU) 2016/681.(48) PIUs are national bodies that collect air passengers' data, store, and process them and transfer them (or the result of the processing of such data) to the competent authorities. They also exchange information with each other and with Europol. PIUs draw up profiles for the purpose of identifying persons who are not *a priori* suspects but who, after an analysis of their passenger name record (PNR) data, are suspected of being involved in and who should be further investigated by the competent authorities. The *PNR.net* system ensures secure communication and matching of available data between the different PNR units and between them and Europol and third countries. The main difference between requests for information between PNR units and FIUs is that in the former case the requests have to be duly motivated (Art. 9(2)).

Another example of national structures is the AROs(49) (Asset Recovery Offices) with functions of exchanging information and good practices (Art. 2). The exchange of information may take place at the request of an organisation or spontaneously. However, the transmission of information may be subject to several restrictions and/or conditions (*i.e.*, the information is not used to compensate the victims of the offences). It should be noted that AROs also differ greatly from one state to another. There are some that only have investigative functions, others that have management functions and a third model, such as

(46) I. Deleanu, "FIUs in the European Union – Facts and Figures, Functions and Facilities", in B. Unger, M. van den Broek and I. Deleanu (eds), *The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy*, Cheltenham, Edward Elgar, 2014, p. 97.

(47) FIUs do not comply with this obligation. See Report from the Commission to the European Parliament and the Council, assessing the framework for cooperation between Financial Intelligence Units COM(2019) 371 Final, 24 July 2019, p. 7.

(48) Directive (EU) 2016/681 of the EP and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, [2016] OJ L 119/132.

(49) Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, [2007] OJ L 332/103.



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the Spanish ARO (ORGA), which has both types of powers.(50) Directive (EU) 2019/1153(51) has given them direct and immediate access to national centralised bank account registers as well as to financial information and financial analysis from FIUs (Art. 3(1)).

## *II. Vertical cooperation*

### A. General remarks

With the aim of increasing the political weight of the EU, the AFSJ also has common judicial, police and even administrative institutions and bodies.(52) For the purposes of criminal law, the most important ones(53) are Eurojust, Europol and the European Public Prosecutor's Office (EPPO).(54) All of these are considered centralised bodies at EU level.

However, the vestiges of the former Third Pillar(55) can also be detected here. Europol and Eurojust were born before the Lisbon Treaty. They are cooperation and coordination structures rather than agencies with full operational powers. In other words, they were not set up to lighten the work of the Commission

(50) See I. Blanco Cordero, "La aplicación del comiso y la necesidad de crear organismos de recuperación de activos", *ReAIDP (Electronic Review of the International Association of Penal Law)*, 2007, p. 17.

(51) Directive (EU) 2019/1153 of the EP and of the Council of 20 June 2019 laying down rules to facilitate the use of financial and other information for the prevention, detection, investigation, or prosecution of criminal offences, [2019] OJ L 186/122.

(52) V. Mitsilegas and F. Giuffrida, "The Role of EU Agencies in Fighting Transnational Environmental Crime – New Challenges for Eurojust and Europol", 1 *Transnational Crime*, 2017, p. 21.

(53) Obviously, there are many other EU agencies involved in or connected to EU criminal policy issues. This is the case of the European Border and Coast Guard Agency (FRONTEX), the European Agency on Immigration (EASO) and the European Agency for the Operational Management of Large-Scale IT Systems in the AFSJ (EULISA) called on to play an important role in matters of interoperability; the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA); the European network of contact points in relation to persons responsible for genocide, crimes against humanity and war crimes, etc. Other bodies with external security functions could also be added, such as the counter-terrorism coordinator established by the Council following the Madrid terrorist attacks of March 2004 and the EU Intelligence and Situation Centre (INTCEN). Furthermore, the development of the AFSJ objectives is linked to the activity of other agencies, even though they do not carry out their competences exclusively in this field. For example, the Fundamental Rights Agency (FRA), the European Institute for Gender Equality (EIGE), which is active on a programmatic basis for the eradication of violence against women.

(54) Because of limitations of space, no mention will be made of the OLAF which is a body with autonomous and supranational administrative powers in the field of EU financial interests. Therefore, it is closely related to the activities of the EPPO. OLAF deals with administrative investigations, while the EPPO focuses exclusively on criminal investigations and prosecutions. The new regulation of the OLAF provides for rules of cooperation between them. See Regulation 2020/2223 of 23 December 2020 amending Regulation (EU, Euratom) No. 883/2013, as regards cooperation with the EPPO and the effectiveness of the OLAF, [2020] OJ L 437/49.

(55) A. Weyembergh, I. Arada and C. Brière, "The Inter-agency Cooperation and Future Architecture of the EU Criminal Justice and Law Enforcement Area", Study for the LIBE Committee, 2014, p. 8.



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or to provide technical and specialised expertise, but to increase or strengthen Member State cooperation to meet transnational crime challenges.(56) In this regard, they assist the Member State more than the European institutions.

Although the EPPO (Art. 86), Europol (Art. 87) and Eurojust (Art. 87) all have a specific provision in the TFEU, they are mainly governed by secondary legislation.(57)

## B. Structure

Europol has a centralised and a decentralised structure. At the centralised level, it has a decision-making body, the Management Board, composed of one representative of each Member State and one representative of the Commission. Europol is also integrated by hundreds of liaison officers from the Member States. They ensure that the interests of their respective law enforcement agencies are represented in the headquarters of Europol and are connected through a special network to the various national units in the capitals of the different Member States (decentralised level). These relationships are based on vertical, but not hierarchical, cooperation.

In contrast, Eurojust has a fully centralised structure with the College (its decision-making body), the national members, the Executive Board, and the Administrative Director. The national members (one from each Member State) are judges, prosecutors or judicial authorities with equivalent powers. Together with a representative from the Commission, they make up the College.

Like Europol, the EPPO has a two-tier structure.(58) At the centralised level, there is a central office consisting of a College, the Permanent Chambers, the Chief Prosecutor, two Deputy European Chief Prosecutors (who assist the former), the European prosecutors and the Administrative Director. At

(56) M. Busuioc, *European Agencies – Law and Practices of Accountability*, Oxford, Oxford University Press, 2013, p. 29.

(57) Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), replacing and repealing Council Decision 2002/187/JHA, [2018] OJ L 295/138, amended by Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022, as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences [OJ L 148, 31.5.2022]; Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, [2016] OJ L 135/53, amended by Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation [OJ L 169, 27.6.2022]; Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), [2017] OJ L 283/1.

(58) For an overview of the structure of the EPPO see J. Öberg, "The European Public Prosecutor – Quintessential Supranational Criminal Law?", 28 *Maastricht Journal of European and Comparative Law*, 2021, p. 164.



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the decentralised level, there are the European Delegated Prosecutors (EDP) working in and from their respective Member States. Composed of the Chief Prosecutor and one European Public Prosecutor per Member State, the main task of the College is to supervise the EPPO activities by taking strategic decisions and adopting criteria on general policy issues. The College cannot, however, take operational decisions on individual cases. The Permanent Chambers have four members and have decision-making functions such as deciding on the allocation/reallocation of cases between the various EDPs, the joinder of different cases or the division of a case into different cases. They may also order an EDP to initiate an investigation or to exercise the power of referral of a case under investigation by the national authorities, etc.

The European Prosecutors are national prosecutors who supervise the actions of the EDP from the headquarters of the EPPO. They draft summaries of cases, give instructions, etc. Finally, the EDP has developed real operational powers. They conduct investigations directly and prosecute those suspected of having committed a crime against EU financial interests. They have duties as national prosecutors in addition to those of the EPPO. However, they are not completely free when acting as they have followed the indications of the Permanent Chambers.

## C. Competences

Although the post-Lisbon regulations of Europol(59) and Eurojust have paved the way, their tasks are very much run by the *owner principle* (based on which information sharing can only go as far as Member States allow it),(60) the rogatory principle and the principle of indirect enforcement.(61) In a nutshell, neither of them has proper operational powers.(62) The EPPO instead has operational powers. However, they are limited because of its structure.

Europol was designed to deal primarily with the exchange of information between national authorities. The intention of the Member States was never to create a European FBI(63) with full operational powers. Article 3(1) of the

(59) For a historical evolution of Europol's powers, see K. Lingenfelter and S. Miettinen, "Obstacles to Supranational Operational Police Powers in the European Union – Europol Reform and the Construction of Trust Between National Police Authorities", 28 *Maastricht Journal of European and Comparative Law*, 2021, p. 182.

(60) A. Weyembergh, I. Arada and C. Brière, "The Inter-agency Cooperation and Future Architecture of the EU Criminal Justice and Law Enforcement Area", *op. cit.*, p. 24.

(61) They do not have supranational powers. Therefore, they cannot investigate or prosecute criminal offences. The both operate on a demand-driven basis.

(62) J.A.E. Vervaele, "European Criminal Justice in the European and Global Context", 10 *New Journal of European Criminal Law*, 2019, p. 12.

(63) F. Irúrzun Montoro, "El diseño institucional de los órganos de cooperación en materia policial y judicial penal", in L.A. Arroyo Zapatero, A. Nieto Martin and M. Muñoz de Morales Romero



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Europol Regulation assigns to Europol the task of supporting and strengthening the action by the competent authorities of the Member States and their cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union police. According to scholars, its mission leads it to be classified as an agency with cooperative and coordination functions.(64) Consequently, Member States use this support on a voluntary basis.

Regarding its specific competences, Article 4(1)(c) of the Europol regulation allows it to "coordinate, organise and implement investigative and operational actions", but only if this is done to support and strengthen joint actions with the competent authorities of the Member State or in the context of a JIT. Article 88(3) TFEU is very clear in this regard: "Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned".

Europol has been reinforced in its data-mining competences (Art. 18). It is given a great capacity to analyse volumetric quantities of data with the aim of identifying patterns, statistical or predictive models, etc.(65) This capacity for massive data collection raises data protection problems (*i.e.*, regarding the principle of proportionality, purpose limitation, minimisation of data, etc.).(66) However, it leads to equating Europol with national police services.

Concerning Eurojust, Article 86(1)(a) TFEU opened the door for the agency itself to initiate investigations. This is a competence of a markedly vertical nature which would give Eurojust greater autonomy. However, the new 2019 regulation has not taken advantage of this opportunity and everything has been left to the Member States. Therefore, Eurojust continues to work primarily on an "on demand" basis, cooperating in national criminal cases conducted by national prosecutors or judges.

Eurojust investigations also have an insurmountable limitation, since "formal acts of judicial procedure shall be carried out by the competent national officials" (Art. 85(2) TFEU, Art. 8(3) of the Eurojust Regulation). Only

(eds), *El Derecho penal de la UE: Situación actual y perspectivas de futuro*, Universidad de Castilla-La Mancha, 2007, p. 219.

(64) H. Aden, "Cooperation Among Security Agencies in the EU – Europeanisation of Public Administrations in Just another Variation?", Paper for the 15th Biannual EUSA Conference on the AFSJ, 2017, p. 6.

(65) R. Sicurella and V. Scalia, "Data Mining and Profiling in the Area of Freedom, Security and Justice", 4 *New Journal of European Criminal Law*, 2013, pp. 409 and 420.

(66) A. Giannakoula, D. Lima and M. Kaiafa-Gbandi, *Combating Crime in the Digital Age – A Critical Review of EU Information Systems in the Area of Freedom – Security and Justice in the Post-Interoperability Era*, Leiden, Brill, 2020, p. 60.



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national members have the power to issue or execute any request for mutual assistance or mutual recognition, and even to order, request or execute investigative measures, and always in accordance with domestic law and in agreement with competent national authorities. Therefore, any decision taken by a national member in the exercise of its powers is not directly enforceable. It must be recognised and enforced by national judicial authorities in accordance with national law.(67) Nevertheless, in cases of urgency and where it is not possible to identify or contact the competent national authority, Article 8(4) empowers national members to take measures such as issuing or executing requests for mutual recognition or ordering, requesting, or executing investigative measures provided for in the EIO Directive (*i.e.*, searches of homes, interception of communications, etc.). These are legally binding decisions taken outside the national authorities which give rise to a "vertical chain of command" between the national members of Eurojust and the national authorities.(68) In other words, these powers clearly impose a change on the national systems considered as a small step "towards more integration within the EU's criminal justice area".(69)

Despite their limited operational powers, the tasks of Europol and Eurojust go beyond typical cooperation activities (exchange of information, provision of technical assistance (expertise), establishment of advisory bodies, etc.). Article 88(2)(b) TFEU gives Europol powers to "coordinate, organise and conduct investigations and operational activities" in conjunction with national authorities, JITs or Eurojust. Article 85(1) TFEU does the same concerning Eurojust since its mission "shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States". Providing both agencies with coordination powers implies the introduction of hierarchy criteria. For example, Eurojust has the power to "resolve" conflicts of jurisdiction(70) and may – without the need for any state to request it – issue an opinion to determine which state is in the best position to initiate proceedings

(67) Eurojust, *Memoria de actividades del miembro nacional de España en Eurojust, 2019*, p. 2 <https://www.mjusticia.gob.es/es/AreaInternacional/ParticipacionMinisterioJusticia/Documents/1292430368249-Memoria_de_actividades_del_Miembro_Nacional_de_Espana_en_Eurojust_2019.PDF> accessed 15 June 2021.

(68) T. Huisjes and S. Tosza, "Eurojust – Mechanisms Controlling the Agency for Coordination and Cooperation in Criminal Matters", in M. Scholten and A. Brenninkmeijer (eds), *Controlling EU Agencies – The Rule of law in a Multi-Jurisdictional Legal Order*, Cheltenham, Edward Elgar, 2020, p. 238.

(69) Even before the adoption of the 2018 Eurojust Regulation, J. Monar, "Eurojust and the EPPO Perspective – From Cooperation to Integration in EU Criminal Justice?", 14 *Perspective on European Politics and Society*, 2013, p. 347.

(70) See A. Hernández López, *El papel de Eurojust en la resolución de conflictos de jurisdicción penal en la UE – Propuestas legislativas*, Ed. Thomson Reuters Aranzadi, 2020.



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(Art. 85(1)(a) and (b) TFEU). In fact, this power is of crucial importance for Eurojust to demonstrate its "usefulness" and legitimacy in handling issues such as terrorism or compensation for environmental disasters (such as the Prestige oil spill).(71) Europol can also ask the Member States to initiate criminal investigations.

On paper these are non-binding decisions, and this is reflected in the power of the Member State not to follow their instructions. Article 6(3) of the Europol Regulation empowers national authorities not to follow up on a request to initiate an investigation, but introduces a duty to provide for reasons, subject to a deadline.(72) Article 4(6) of the Eurojust Regulation allows national authorities to disregard its instructions or opinions on grounds of national security, the success of an ongoing investigation or the safety of individuals. Should one of the above reasons not be given, national authorities would be obliged to follow the opinion of Eurojust. If not, it can be said that there is a kind of "naming and shaming" sanction. Non-compliance Member State are given a "warning" in the Eurojust annual reports, and no Member State has any desire to appear there. That makes Eurojust instructions almost binding.(73)

The EPPO case is somewhat more complex. The EPPO became operational in the 22 EU Member States that have joined the effort *via* enhanced cooperation on 1 June 2021. It is the first supranational criminal law enforcement body in the EU with direct powers against individuals. Its establishment is a revolution as a "clear expression of supranational sovereignty in a core area usually reserved for [...] the Member States".(74) It acts on the ground by investigating and, where appropriate, directly conducting investigations and proceedings against suspected perpetrators of crimes affecting EU financial interests. However, the final structure of the EPPO clearly shows the reluctance of the Member States to abandon their sovereignty in the field of criminal law. The EPPO has a more decentralised structure than was originally

(71) A. Mégie, "Eurojust in Action – An Institutionalisation of European Legal Culture", in R. Colson and S. Field (eds), *EU Criminal Justice and the Challenges of Legal Diversity*, Cambridge, Cambridge University Press, 2016, p. 101.

(72) Doctrine has stressed that the duty to provide for reasons strengthens the coordinating powers of Europol while maintaining the non-binding nature of the request. See M. Wade, "The EPPO and the Pitfalls of Actuarial Justice", 28 *MJ*, 2021, p. 269; S. Gless and Th. Wahl, "A Comparison of the Evolution and Pace of Police and Judicial Cooperation in Criminal Matters – A Race Between Europol and Eurojust", in C. Brière and A. Weyembergh (eds), *The Needed Balances in EU Criminal Law. Past, Present and Future*, Oregon, Hart Publishing, 2017, p. 344. However, the national authority is exempted from the duty to provide for reasons if this would be contrary to the fundamental security interests or would jeopardise the conduct of ongoing investigations or the safety of individuals.

(73) T. Huisjes and S. Tosza, "Eurojust – Mechanisms Controlling the Agency for Coordination and Cooperation in Criminal Matters", *op. cit.*

(74) M. Wade, "The EPPO and the Pitfalls of Actuarial justice", *op. cit.*, p. 266.



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proposed by the Commission(75) and this has consequences for its functioning. The factual power of the EPPO rests in the Permanent Chambers composed of European public prosecutors who directly supervise the investigation of the European delegated prosecutors. They participate in the deliberations of the Permanent Chambers where decisions on prosecutions, dismissals, plea agreements, etc. are adopted. Therefore, the European Public Prosecutors exercise a decision-making authority which at the same time is supervised by themselves. That ends up stripping the EPPO of its supranational features(76) as any investigation even in the name of EPPO is carried out and directed by national prosecutors.

## D. Judicial control

Apart from the ECJ competences to review compliance with data protection provisions which are not covered in this Chapter,(77) the ECJ exercises some control not only over the validity and interpretation of the rules governing the agencies analysed above, but also over their actions, albeit with limitations.

The ECJ may judge the activity of Europol and Eurojust by means of an action for non-contractual liability (Art. 268 TFUE).(78) An action for annulment is also possible (Art. 263 TFUE) if the act adopted by an agency produces legal effects *vis-à-vis* third parties.(79) In fact, Eurojust has been a party in ECJ cases regarding staff-related matters and data protection.(80) However, judicial accountability has not been included for the powers of Eurojust in cases where third parties are affected, such as decisions on forum choices. As mentioned above, Eurojust can give instructions as to which

(75) The EPPO structure was subject to intensive discussions. See K. Ligeti, "The European Public Prosecutor's Office", in V. Mitsilegas, M. Bergström and T. Konstadinides (eds), *Research Handbook on EU Criminal Law*, *op. cit.*, pp. 488-489. On the differences between the final regulation adopted and the Commission proposal, see M. Wade, "The European Public Prosecutor – Controversy Expressed in Structural Form", in T. Rararaci and R. Belfiore (eds), *EU Criminal Justice*, New York, Springer, 2019, p. 165.

(76) T. Rafaraci, "Brief Notes on the European Public Prosecutor's Office – Ideas, Project and Fulfilment", in T. Rararaci and R. Belfiore (eds), *EU Criminal Justice*, *op. cit.*, p. 160.

(77) The Europol, Eurojust and EPPO regulations state that the European Data Protection Supervisor (EDPS) oversees compliance with data protection provisions and its decisions may be appealed against before the ECJ. On this issue, see A. Gutiérrez Zarza, "El régimen de protección de datos de las agencias del espacio de LSJ", in C. Blasi Casagran and M. Illamola Dausa (eds), *El control de las agencias del ELSJ: Contrapeso necesario a su autonomía*, Madrid, Marcial Pons, 2017, pp. 135-160.

(78) An action for non-contractual liability is possible for any damage caused to an individual which results from the unauthorised or incorrect processing of data carried out by it (Art. 46 of the Eurojust Regulation and Art. 50 of the Europol Regulation). According to Article 78 of the Eurojust Regulation, Eurojust shall "make good any damage caused by it or its staff in the performance of their duties".

(79) Until the entry into force of the Treaty of Lisbon, the acts of Eurojust and Europol, as Third-Pillar agencies, could not be controlled by means of an action for annulment. See *Kingdom of Spain v. Eurojust*, case C-160/03, EU:C:2005:168.

(80) *Sapara v. Eurojust*, case F-61/06, EU:F:2008:98; *AJ*, case T-277/10, EU:T:2010:485.



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Member State is best placed to prosecute. In theory, such a decision should be based on the principle of good administration of justice (ease of finding witnesses, gathering evidence, etc.). However, transferring a case to a court in another Member State involves other relevant features (*i.e.*, the language of the proceedings, rules on pre-trial detention or investigative measures, a wider or narrower scope of offences and sanctions, etc.). The decision on which Member State is best placed is taken by the College of Eurojust, where the respective national members vote without having heard the accused or investigated if anyone's situation might be affected adversely depending on where the proceedings are initiated. The traditional approach has thus prevailed, whereby the instructions of Eurojust do not directly address individuals but national authorities. In this sense, it is understood that what really affects the legal position of the individual concerned is the exercise of authority by the relevant national agency (*i.e.*, to open an investigation or not, to prosecute or not). In this regard, Eurojust instructions merely influence the decision of national authorities.(81)

Concerning the specific powers of the national members of Eurojust (such as the issuing or executing of requests for mutual legal assistance or mutual recognition; the order, request or execution of investigative measures), these are exercised in accordance with national law. Therefore, the courts of Member States should be competent to review those measures in accordance with the requirements and procedures laid down by national law (Recital 15 of the Eurojust Regulation).

The EPPO case is again peculiar. The main tool of control for the ECJ will be the preliminary rulings. The ECJ has the power (Art. 42(2)) to rule on the validity of the EPPO procedural acts; the interpretation or validity of the provisions of Union law; the interpretation of the provisions of EPPO concerning its material, territorial and personal jurisdiction, etc. Furthermore, the ECJ will have jurisdiction in disputes relating to compensation for damage caused by the EPPO.

However, the control of the EPPO procedural acts intended to produce legal effects *vis-à-vis* third parties is mainly entrusted to the national judicial authorities (Art. 42(1) of the EPPO Regulation). The validity of the decisions of the permanent chambers with a significant impact on the legal

(81) Nevertheless, following WADE's opinion, "any legislative provision for institutions which have the potential powers which Eurojust now most certainly has, should include consideration of its broader context and of the institutionalisation of a citizen's right to appeal against the activities of bodies interfering with his or her rights". See M. WADE, "Judicial Control – The CJEU and the Future of Eurojust", 14 *ERA Forum*, 2013, pp. 212-213.



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position of the defendant(82) such as where an investigation and prosecution are initiated, the merging or reallocation of cases, and decisions on choice of forum and conflicts of jurisdiction will be not reviewed by the ECJ, but by the national courts.

The very limited review of EPPO acts by the ECJ was justified on the basis of the "exceptional" nature of the EPPO in relation to other EU agencies and the strong link between its operations and the legal orders of the Member States. However, the limited jurisdiction of the ECJ is a questionable exception to the general rule, according to which judicial control of EU bodies or the decisions of institutions is entrusted to the EU courts.(83) This legislative choice also violates the system of jurisdictional control established in the treaties(84) and is hard to reconcile with the right to effective judicial protection, since secondary EU law cannot limit substantially judicial review for EU agencies. National courts might not have "the capacity and the powers at national level to provide effective judicial protection *vis-à-vis* decisions taken by the EPPO at the centralized level, including assessing meaningful scrutiny of choice of forum decisions".(85) A national court can assess according to its own rules of jurisdiction whether it is competent or not. Nevertheless, it cannot assess which Member State would be competent to the exclusion of the others.(86)

## *III. Information management systems*

Since the 11 September terrorist attacks, the efforts of Member States in terms of information exchange mechanisms increased significantly. Nowadays, the EU has a wide range of channels and databases governed by sets of very different rules depending on their centralised or decentralised nature.

(82) Except for decisions not to prosecute.

(83) If national bodies were able to rule on the validity of an EU act, the uniform application of EU law and legal certainty would be undermined. The TFEU foresees the competence of the ECJ to examine the legality of acts of the EU institutions through, essentially, the preliminary ruling procedure and the action for annulment. This system does not allow for concurrent jurisdiction by national courts. See *Foto-Frost v. Hauptzollamt Lübeck-Ost*, case C-314/85, EU:C:1987:452, paras. 15-17.

(84) See M. Böse, "Judicial Control of the European Public Prosecutor's Office", in T. Rararaci and R. Belfiore (eds), *EU Criminal Justice*, *op. cit.*, pp. 191-204; G. Birkeland, "Judicial Review of Procedural Acts of the European Public Prosecutor's Office – A Legal Analysis of Article 42 of the Regulation on the Establishment of the EPPO", Master Thesis, Uppsala University, 2020; V. Mitsilegas, "European Prosecution between Cooperation and Integration – The European Public Prosecutor's Office and the Rule of Law", 28 *Maastricht Journal of European and Comparative Law*, 2021, p. 260.

(85) *Ibid.*, p. 262.

(86) M. Panzavolta, "The Choice of National Court in Proceedings of the European Public Prosecutor's Office – Who is Competent", in L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office*, 2018, New York, Springer, p. 86.



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The principle of availability is the basis for collection, use and exchange of information in decentralised information systems. It was first set out in the Hague Programme (2005).(87) It is defined as a kind of "co-ownership" of information: where "a police officer in one Member State [needs] information in order to carry out his duties, he [could] obtain it from another Member State and have it supplied by the law enforcement agency of the other Member State which holds [and would] provide it for the stated purpose, considering the requirement of ongoing investigations in that State".(88) The so-called Prüm Framework,(89) which ensures storage of DNA, vehicle registration and fingerprint data, is an example of this approach. The principle of availability obliges the Member States to give access to requests for information, inter alia, on DNA profiles, dactyloscopic data and vehicle registration. In other words, all national competent authorities have direct access to the respective national Prüm databases of the other Member States. For example, DNA profiles found at a crime scene in one EU Member State can be compared automatically with profiles held in the databases of the other Member States.

The European Criminal Record Information Systems (ECRIS)(90) and the PNR system(91) are also decentralised systems. ECRIS facilitates the exchange of information concerning criminal convictions imposed on EU citizens which is stored in the national criminal record databases. ECRIS-TCN is its counterpart for third-country nationals.(92) However, this is a separate and centralised information system. Regarding the PNR system, this

(87) The Hague Programme: Strengthening Freedom, Security and Justice in European Union, [2005] OJ C 53/1.

(88) The expression is from A. Nieto Martín, "Modelos de organización del Sistema europeo de Derecho penal", *op. cit.*, p. 170.

(89) Although it was a treaty at the beginning, their provisions were subsequently incorporated into EU law by Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, [2008] OJ L 210/1 and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, [2008] OJ L 210/12.

(90) Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from criminal records between Member States, [2009] OJ L 93/23. See European Commission, European Criminal Records Information System (ECRIS) <https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/tools-judicial-cooperation/european-criminal-records-information-system-ecris_en> last access 26 May 2021.

(91) Directive (EU) 2016/681 of the EP and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, [2016] OJ L 119/132.

(92) Regulation (EU) 2019/816 of the EP and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding information on convictions of third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System, [2019] OJ L 135/1, amended by Regulation (EU) 2021/1151 of the EP and of the Council of 7 July 2021, as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, [2021] OJ L 249/7.



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is an example of public-private partnership as data collected by air carriers are transferred to the corresponding national unit for storage with the aim of preventing, detecting, investigating, and prosecuting terrorist offences as serious crimes.

Probably, the most famous centralised EU information system is the SIS II,(93) a useful tool for police and judicial cooperation in criminal matters (as it stores alerts on persons wanted for arrest or surrender or missing objects and stolen documents and vehicles) and for immigration and border control. Other centralised EU information systems were not primary established to serve criminal law purposes, but generally speaking to promote security and facilitate asylum applications (EURODAC,(94) a database of fingerprints of asylum seekers), or reinforce the management of external borders (VIS,(95) allowing border guards to verify whether the person presenting a visa is the legitimate holder; EES,(96) a database which registers the entry and exit of third-country nationals traveling to the EU; ETIAS,(97) designed to reinforce the checks on visa-free travellers to European territory). Afterwards, their

(93) Regulation (EU) 2018/1862 of the EP and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No. 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU [2018] OJ L 312/56.

(94) It contains the identity, including fingerprints, of asylum seekers who have registered with the EU MEMS and partner countries. This database is crucial for the application of the Dublin Regulation (Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31). It can be used to verify whether a person has previously applied for asylum in another state; to check whether they have been detected when entering European territory illegally; and to determine which Member State is responsible for examining an asylum application.

(95) Regulation (EC) No. 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), [2008] OJ L 218/60. See European Commission, Visa Information System <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system_en> last access 16 March 2023.

(96) Regulation (EU) 2017/2226 of the EP and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No. 767/2008 and (EU) 1077/2011, [2017] OJ L 327/20. See European Commission, Entry/Exit System <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/smart-borders/ees_en> last access 16 March 2023.

(97) Regulation (EU) 2018/1240 of the EP and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) 1077/2011, (EU) 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, [2018] OJ L 236/1. *See European Commission, European Travel Information and Authorisation System (ETIAS)* <https://travel-europe.europa.eu/etias_en>, last access 15 May 2024.



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scope was extended to include the secondary purpose of combating terrorism and other serious crimes by allowing access to designated national authorities and Europol.

All these centralised information systems are now governed by the principle of interoperability. This principle is defined as "the ability of an information system to exchange data and to enable the exchange of information with another, technically different, information system and to use the information that has been exchanged".(98) To this end, a "one-stop-shop" system is established, the European Search Portal. This portal will give quick, uninterrupted, systematic, and controlled access for national authorities of different kinds (administrative, police, judicial) and EU agencies to EU databases, Europol data and its databases for certain purposes (including contributing to the prevention, detection, and investigation of terrorist offences(99) and other serious crimes). This new interoperability framework also consists of a shared biometric matching service that will store facial images and fingerprints; a common identity repository that will create individual records of persons "clocked in" to other databases, and a multiple-identity detector that will create records of confirmation of identity through cross-referencing data from other databases to detect multiple identities. All four tools will be developed and managed by EU-LISA.

Facilitating the collection and exchange of information are no doubt necessary tools to fight transnational criminality. But at the same time, they involve high risks for fundamental rights. Many rules concerning legal protection (against possible privacy and data protection violations) have been introduced. In fact, it could be said that after the Lisbon Treaty, we are witnessing a rapid hypertrophy of data protection rules: the "criminal" data protection directive;(100) the Europol and Eurojust Regulations, the general data protection Regulation of 2016;(101) the general regulation for the processing of

(98) F. Galli, "Interoperable Law Enforcement Cooperation Challenges in the EU Area of Freedom, Security and Justice", European University Institute Working Paper 2019/15, p. 2.

(99) As defined in national regulations or with equivalence to one of those provided for in Directive (EU) 2017/541 of the EP and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, [2017] OJ L 88/6.

(100) Directive (EU) 2016/680 of the EP and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, [2016] OJ L 119/89.

(101) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1.



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personal data by EU institutions, bodies, etc. of 2018;(102) the 2013 OLAF Regulation;(103) the FRONTEX regulation,(104) the specific provisions that each rule on each register or information system contains,(105) etc.

However, interoperability transforms the way data protection principles are interpreted. Mass data collections contradicts relevant key principles (*i.e.*, the principles of purpose limitation, of data minimisation, and of necessity and proportionality).(106) Furthermore, interoperability is challenging for other many reasons: technical problems of implementation and security (to avoid cyber-attacks); risks of human mistakes when entering the data (the correction of which in time is rare), problems of proper identification of persons (identity theft), the quality of the data and its harmonisation in order to facilitate access. Not to mention that each database itself is governed by its own specific legislation with its own principles of data protection and, in general, fundamental rights. This is a system that automatically processes and grants access to sensitive personal data (fingerprints, facial images, etc.) linked to biographical data (name, nationality, residence, etc.) and other relevant data (criminal

(102) Regulation (EU) 2018/1725 of the EP and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices, and agencies and on the free movement of such data, and repealing Regulation (EC) No. 45/2001 and Decision No. 1247/2002/EC, [2018] OJ L 295/39.

(103) Regulation (EU, Euratom) No. 883/2013 of the EP and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999, [2013] OJ L 248/1.

(104) Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC, [2005] OJ L 251/1, repealed by Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, [2019] OJ L 295/1.

(105) For example, Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, [2016] OJ L 119/132; Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), [2007] OJ L 205/63, repealed by Regulation (EU) 2018/1862 of the EP and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, [2018] OJ L 312/56; Regulation (EU) 603/2013 of the EP and of the Council of 26 June 2013 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, [2013] OJ L 180/1.

(106) A. Giannakoula, D. Lima and M. Kaiafa-Gbandi, *Combating Crime in the Digital Age – A Critical Review of EU Information Systems in the Area of Freedom – Security and Justice in the Post-Interoperability Era*, *op. cit.*, pp. 45 and 60.



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records). The right to respect for private and family life or the right to data protection (Arts. 7 and 8 of the EU Charter of Fundamental Rights) should be given priority here. Therefore, general, and indiscriminate retention of data for the purposes of combating crime is not justified, while targeted retention for the same purposes is on condition that it would be limited to what is strictly necessary.(107) The ECJ has also stated that the right to privacy is violated when data transferring is authorised by legislation on a generalised basis

> "without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data, and of tis subsequent use, for purposes which specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail".(108)

The interoperability regulations address some of the technical issues by, for example, providing for specific profiles of persons who may access the systems, explicitly maintaining access logs, enhancing data transfers to third parties, and granting specific rights to data subjects such as the right to access, rectify and delete personal data. Powers of supervision by independent bodies, including the European Data Protection Supervisor, are also foreseen. However, interoperability transforms the way basic data protection principles are interpreted. The principle of purpose limitation can be cited as an example. This principle entails that data must be collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes. It was precisely the fragmentation of the various information systems that gave meaning to this principle. Many of the European information systems now governed by the principle of interoperability originally served purposes outside the scope of police and judicial cooperation in criminal matters. As Giannakoula *et al.* state "when extending their purpose to cover criminal law objectives, without adding any further requirements, this essentially results in law enforcement authorities having access to a wider pool of data […]" and in circumventing the principle of purpose limitation, given that "if these systems have been set up from the start with criminal law purposes in mind, they most probably would have been narrower in scope and would have included added safeguards".(109)

(107) *Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others*, joined cases C-203/15 and C-698/15, EU:C:2016:970.

(108) *Maximilliam Schrems v. Data Protection Commissioner*, case C-362/14, EU:C:2015:650, para. 93.

(109) A. Giannakoula, D. Lima and M. Kaiafa-Gbandi, *Combating Crime in the Digital Age – A Critical Review of EU Information Systems in the Area of Freedom – Security and Justice in*



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## *Conclusions*

A few final thoughts on the administrative dimension of EU criminal law. European policing and judicial cooperation have similar features to other areas of cross-border administrative cooperation. As shown in this chapter, one would be the establishment and proliferation of EU agencies, Union bodies, networks and national bodies. However, if there is one thing that distinguishes EU criminal law from other areas of cooperation, it is undoubtedly the fields it touches. Protecting citizens from crime and punishing the perpetrators of a crime is traditionally rooted in the core of the sovereignty of states. This feature powerfully conditions an analysis of European criminal policy since an "intergovernmental third pillar spirit" is still present in this field. In other words, "the delicate balance between Europeanization and the maintenance of state sovereignty in criminal justice is still evident".(110)

This can easily be seen in the evolution of the two oldest agencies coexisting in the AFSJ with competences in criminal law. Europol and Eurojust are still, in many ways, in the hands of Member States, since they have no real enforcement powers, neither for investigation nor for sanctioning. Their governance structure also shows intergovernmental features, being considered as "mini-Council formations".(111) Undoubtfully, the role they play in criminal investigations, proceedings and mutual legal assistance is not negligible. But their involvement in specific cases depends on the goodwill of national authorities. In other words, both agencies remain "service providers"(112) since the Member States "have jealously guarded their law enforcement powers in this area".(113) Indeed, the Member States seem not to accept the role they were supposed to strive for from the beginning. Europol is far from becoming a "European FBI" and Eurojust is far from producing and disseminating a European judicial culture. Even

*the Post-Interoperability Era*, *op. cit.*, p. 45; Similar, GDPS, Opinion 4/2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems.

(110) V. Mitsilegas and N. Vavoula, "European Criminal Law", in H.C.H. Hofmann, G. Rowe and A. Türk (eds), *Specialized Administrative Law of the European Union – A Sectoral Review*, 2018, Oxford, Oxford University Press, p. 188.

(111) S. Wolff, "Integrating in Justice and Home Affairs A Case of New Intergovernmentalism Par Excellence?", in C.J. Bickerton, D. Hodson and U. Puetter (eds), *The New Intergovernmentalism – States and Supranational Actors in the Post-Maastricht Era*, Oxford, Oxford University Press, 2015, p. 140.

(112) M. Wade, "Developing a Criminal Justice Area", Study at the request of the LIBE Committee, 2014, p. 57; C. Brière, "Cooperation of Europol and Eurojust with External Partners in the Fight Again Crime – What are the Challenges Ahead?", Brexit Institute Working Paper No. 1, 2018, p. 11.

(113) C. Harding and J. Öberg, "The Journey of EU Criminal Law on the Ship of Fools – What are the Implications for Supranational Governance of EU Criminal Justice Agencies", 28 *Maastricht Journal of European and Comparative Law*, 2021, p. 206.



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though the Lisbon Treaty opened up certain possibilities for the reinforcement of their operational capacities, Eurojust and Europol "must gain the trust of national authorities and convince them of their added value".(114)

Concerning the EPPO, it can be said that although its creation represents a supranational triumph, it is in fact an agency which operates mainly along the lines of intergovernmental practice. Whether the EPPO will work efficiently and act as an authentic supranational body remains an unanswered question. The dependency of EPPO on European Prosecutors with strong decision-making powers and the "double hat" of the European delegated prosecutors deprives the EPPO of its notes of supranationality. In other words, the structure of EPPO facilitates the control of the national authorities over investigations and prosecutions. In addition, the EPPO operational powers are governed by domestic law and judicial review has been entrusted to national judges.

Given the great diversity within the criminal justice system of the Member States, it will not be easy to ensure coherence.(115) In fact, diversity will result in a system of variable geometry that gives rise to great legal uncertainty concerning its enforcement powers and modalities.(116) Unfortunately, this lack of coherence is somehow almost unavoidable, since the EU has a constitutional duty to respect diversity between Member States (Art. 4(1) of TEU and Art. 67(3) of TFEU), and in this area this value carries a great deal of weight.

The intergovernmental origins of police and judicial cooperation have also led to much more incisive horizontal cooperation compared to other EU areas of administrative cooperation. Bilateral means of cooperation have been preferred because trust, as an essential prerequisite for effective cooperation, emerges more easily. However, even in horizontal cooperation, mutual distrust is commonplace (evidence, for example, in the need for the independence of public prosecutor's offices, the tendency to refuse recognition on minor formalities and corresponding delays, etc.). When transferring distrust to the area of interoperability, the result is even worse. Interoperability involves authorities, bodies, etc. of a very diverse nature. Government authorities will have access to some information systems (e.g., visas). In other cases, law enforcement agencies will have access to these systems to prevent or investigate illegal immigration

(114) A. Weyembergh, I. Armada and C. Briere, "Competition or Cooperation? State of Play and Future Perspectives on the Relations between Europol, Eurojust and the European Judicial Network", 6 *New Journal of European Criminal Law*, 2015, p. 264.

(115) Th. Elholm, "EPPO and a Common Sense of Justice", 28 *Maastricht Journal of European and Comparative Law*, p. 215.

(116) M. Luchtmann and J. Vervaele, "The European Agencies for Criminal Justice and Share Enforcement (Eurojust and the European Public Prosecutor's Office)", 14 *Utrecht Law Review*, 2014, p. 149.



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and other serious crimes. There are police services in some Member States clearly delinked from the judiciary (judges or prosecutors); in others, police investigations are conducted by the investigating judge or prosecutor.

In a nutshell, EU criminal law is faced with a difficult paradox. Trust has been a main driver of integration in this field and the best proof of this is the EAW, but at the same time mutual trust is still not enough to justify the application of a trade-based internal market model of mutual recognition in the Area of Freedom, Security and Justice. Therefore, an effort should be made to enhance trustworthiness while preserving the identities of national criminal systems. In this regard, harmonisation alone, as a process of merely amending national laws, is not the solution to the problem. As Caeiro has stated,

> "trust is necessary where the law does not go, *i.e.*, in relation to what we do not know. This is the case with the specific practice and law enforcement in a given Member State [...] This practice cannot be harmonised: it can be attempted to be corrected, with or without success, by the adoption of laws; but, in the end, trust will always have an impact on the practice, not on the legal system".(117)

Therefore, a better knowledge and understanding of domestic legal practices should be acquired in order to find functional equivalents. Things may not work in the same way in the Member States involved in cooperation, but this should not always mean that cooperation is rejected.

(117) P. Caeiro, "Una nota sobre reconocimiento mutuo y armonización penal sustantiva en la UE", in L. Arroyo Jiménez and A. Nieto Martín (eds), *El reconocimiento mutuo en el Derecho español y europeo*, *op. cit.*, p. 310.



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# CHAPTER 14
# Administrative cooperation in the field of defence

**Fabien Terpan**

## *Introduction*

At first glance defence is a specific field within the European Union due to its particular legal and political nature. The so-called Community Method does not apply to the Common Security and Defence Policy (CSDP), and state sovereignty is strongly protected by the European treaties in this area. Both the Commission and the Parliament are peripheral players while the Court of Justice of the European Union (CJEU) has no jurisdiction over defence issues. Accordingly, cooperation is presumed to occupy a central position in the functioning of defence policy as a way to compensate for the lack of supranationality. However, as we will see, cooperation on defence matters may also result from decisions made outside the framework of CSDP, with a strong involvement of the Commission.

Title V of the Treaty on the European Union (TEU), dedicated to external action, provides several provisions dealing, directly or indirectly, with defence issues and administrative cooperation in this field. While *General provisions on EU external action* (Title 1, Chapter 1) and *Common provisions on the Common Foreign and Security Policy* (CFSP) (Title 1, Chapter 2, Section 1) may concern security and defence matters, the latter are mainly dealt with in a Section entitled *Provisions on the Common Security and Defence Policy* (CSDP) (Title 1, Chapter 2, Section 2). More specifically, the elaboration and implementation of the defence policy are based on the CSDP section of the TEU.(1) Yet, CSDP being a component of CFSP and CFSP being a component of EU external action, general provisions on CFSP and EU external action must be taken into account.(2)

(1) M. Smith, *Europe's Common Security and Defence Policy*, Cambridge, Cambridge University Press, 2017; P. Koutrakos, "Security and Defence Policy within the Context of EU External Relations – Issues of Coherence, Consistency and Effectiveness", in M. Trybus and N.D. White (eds), *European Security Law*, Oxford, Oxford University Press, 2007, p. 249.

(2) F. Terpan, *La politique étrangère, de sécurité et de défense de l'Union européenne*, La documentation française, coll. Réflexe Europe, 2010; id., *La politique étrangère et de sécurité commune de l'Union européenne*, Brussels, Bruylant, 2003; M. Cremona and B. de Witte (eds), *EU Foreign Relations*



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CFSP, including its defence component CSDP, still functions on an intergovernmental basis.(3) It is the only competence entirely based on the Treaty of the European Union. Contrary to other EU competences, the Treaty on the functioning of the European Union (TFEU), in its Article 2-4, only mentions CFSP as a TEU-based competence but does not include it in one of the categories established in Articles 3, 4, 5 and 6 TFEU.

However, the boundaries between the different competences of the EU, and between different policy areas, are not so clearly delineated. This explains why defence-related actions have also been implemented outside CFSP-CSDP. EU competence in industrial policy, in particular, has been used by the Commission to launch military programmes and different forms of related administrative cooperation. Public procurement in defence matters is also based on the TFEU.(4)

The distinction between CSDP and non-CSDP matters is important as it marks a difference between two kinds of cooperation: cooperation as an alternative to regulation (CSDP) and cooperation as a result of regulation (non-CSDP).

As seen above, and as far as primary law is concerned, administrative cooperation in defence matters is first and foremost based on the TEU (for CFSP-CSDP matters), and in a complementary way on the TFEU (for non CFSP-CSDP matters). This has consequences on the type of secondary law that is used in this field: while regulations, directives and decisions are a possible option for administrative cooperation in non CFSP-CSDP matters, only decisions are adopted within the framework of CFSP-CSDP, where legislation is not permitted by the treaties. It follows from this that this cooperation within CSDP is never born out of regulations.

In contrast, soft law is very much used as a source of cooperation on defence matters. The 2016 EU Global Strategy for Foreign and Security Policy (EUGS), in particular, can be seen as a central "soft" source of

*Law – Constitutional Fundamentals*, Oxford and Portland, Hart Publishing, 2008; A. Dashwood and C. Hillion (eds), *The General Law of E.C. External Relations*, London, Sweet & Maxwell, 2000; R.A. Wessel, *The European Union's Foreign and Security Policy – A Legal and Institutional Perspective*, The Hague, Kluwer Law International, 2000.

(3) D. Thym, "The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive", 7 *European Constitutional Law Review*, 2011, vol. 7, p. 453; M. Cremona, "The Position of CFSP/CSDP in the EU's Constitutional Architecture", in S. Blokmans and P. Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, Cheltenham, Edward Elgar Publishing, 2018, p. 5.

(4) D. Fiott, *Defence Industrial Cooperation in the European Union – The State, the Firm and Europe*, New York, Routledge, 2019; B. Heuninckx, *The Law of Collaborative Defence Procurement in the European Union*, Cambridge, Cambridge University Press, 2016; F. Terpan and S. Saurugger, "Assessing Judicial Activism of the CJEU the Case of the Court's Defence Procurement Rulings", 41 *Journal of European Integration*, 2019, p. 543.



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cooperation in the security-defence area.(5) According to the strategy, "the EU will systematically encourage defence cooperation and strive to create a solid European defence industry, which is critical for Europe's autonomy of decision and action".(6) This has been followed by another "soft" act adopted at ministerial level: in their conclusions of November 2016, the EU Foreign and Defence ministers decided on a new "level of ambition" as well as key steps to upgrade cooperation in line with the Global Strategy.(7) These conclusions were based on an Implementation Plan on Security and Defence (IPSD) issued by the former High Representative Federica Mogherini.(8) The Commission has also contributed to the "soft" framing of defence cooperation through its European Defence Action Plan (EDAP).(9) In December 2016, the European Council "welcomed" the EDAP and "approved" the IPSD.

More recently, in March 2022, the European Council has approved the Strategic Compass, a document elaborated by the EEAS (European External Action Service), which provides an action plan for strengthening the EU's defence policy by 2030.(10) This decision was made in the context of the Russian invasion of Ukraine, and a few days after the European Council adopted the Versailles Declaration of 10-11 March 2022, reiterating the EU's commitment to take more responsibility for its own security, through different means, including collaboration between Member States.

This soft law framing of defence cooperation has triggered the creation of a series of different tools, some of them driven by the Commission (European Defence Fund – EDF, European Defence Industrial Development Programme – EDIDP), others developed through intergovernmental frameworks (Coordinated Annual Review of Defence – CARD, Permanent Structured Cooperation – PESCO, Military Planning and Command Capability – MPCC).

(5) European External Action Service, A Global Strategy for the European Union's Foreign and Security Policy – Shared Vision, Common Action – A Stronger Europe, <https://eeas.europa.eu/topics/eu-global-strategy/17304/global-strategy-european-unions-foreign-and-security-policy_en> last accessed 8 June 2023.

(6) *Ibid*.

(7) Foreign Affairs Council, Conclusions on implementing the EU Global Strategy in the area of Security and Defence, No. 14149/16, 14 November 2016.

(8) High Representative of the Union for Foreign Affairs and Security Policy, Vice-President of the European Commission, and Head of the European Defence Agency, Implementation Plan on Security and Defence, No. 14392/16, 14 November 2016.

(9) Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, "European Defence Action Plan", COM(2016) 950 final, 30 November 2016.

(10) https://www.eeas.europa.eu/eeas/strategic-compass-security-and-defence-0_en, last accessed 8 June 2023.



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These tools, clearly situated at EU level, do not preclude the Member States from cooperating at bilateral and multilateral level, as well as outside the European Union.

Section I. of this chapter will elaborate on the institutional structure of defence cooperation, which derives from the legal framework presented above. It will confirm the intergovernmental nature of this cooperation while bringing to light the additional input of supranational and hybrid organs. It will also testify of the centrality of cooperation in the field of defence, given the general lack of supranational regulation in this sector. Hence, the importance granted to the effectiveness of the norms and instruments created to strengthen defence cooperation, which will be assessed in Section II.

## *I. The institutional structure of defence cooperation*

The structure of defence administrative cooperation is threefold, depending on the nature of its institutional origin: intergovernmental, hybrid (partly intergovernmental, partly supranational) and supranational.(11) First, it takes place at intergovernmental level: within the Council, between Member States through bilateral and multilateral relations, and between the EU and the North Atlantic Treaty Organization (NATO). Secondly, it is facilitated by hybrid organs such as the European Defence Agency (EDA) and the European External Action Service (EEAS). Third, it results from defence-related programmes managed by the Commission, a supranational institution.

### A. Administrative cooperation within intergovernmental frameworks

#### 1. Cooperation within the Council

Several committees within the Council are in charge of defence-related matters, with a view to preparing decisions taken by the Council.(12) It is a specific body, the Political and Security Committee (COPS), and not the COREPER, which deals with defence issues. Apart from preparing ministerial meetings, the former performs operational administrative tasks such

(11) C. Hoeffler, "Differentiated Integration in CSDP through Defence Market Integration", 6 *European Review of International Studies*, 2019, p. 43; C. Håkansson, "The European Commission's New Role in EU Security and Defence Cooperation – The Case of the European Defence Fund", 30 *European Security*, 2021, p. 1.

(12) P.M. Norheim-Martinsen, *The European Union and Military Force – Governance and Strategy*, Cambridge, Cambridge University Press, 2012; J. Howorth, "Decision-making in Security and Defense Policy – Towards Supranational Intergovernmentalism?", 47 *Cooperation and Conflict*, 2012, p. 433.



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as providing political direction to CFSP military operations and organising the mobility of military staff in the European Union (in relation with the European External Action Service). The COPS receives the support of the EU Military Committee (EUMC) while the Committee on Civilian Aspects of Crisis Management (CIVCOM), helps the Member States cooperate on CSDP civilian missions. The Political and Military Group covers the political aspects of EU military and civil-military issues, including concepts, capabilities, and operations and missions. At the level of working parties, two organs are worth mentioning: the EU Military Committee Working Group (EUMCWG), a support body to the EUMC, and the EU Military Committee Working Group Headline Goal Task Force (EUMCWG/HTF), a group of experts dealing with capability development.

All these committees and working groups allow the Member States to defend their own preferences in administrative phases prior to meeting at ministerial level.

### 2. Cooperation within PESCO and other defence tools

The Permanent Structured Cooperation (PESCO, Article 42-6 and 46 TEU, Protocol 10 of the TEU) is a form of cooperation that concerns "[T]hose Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions". The aim is to jointly develop defence capabilities and make them available for EU military operations in line with the EU Capability Development Plan (CDP) and the Coordinated Annual Review on Defence (CARD). Decision-making is in the hands of the participating Member States.(13)

On 13 November 2017, the ministers of the participating states sent a common notification to the High Representative and the Council. Through this document they made proposals regarding the governance and the main principles of PESCO. It was followed by a Decision of 11 December 2017(14) whereby the Council established the Permanent Structured Cooperation and its list of participants. 25 member states finally agreed to contribute. They were joined by a 26th member when Denmark, in the context of the war in Ukraine, decided to put an end to its opt out from participating in defence cooperation. A Council Decision 2023/1015 of 23 May 2023 formally confirmed the participation of

(13) D. Fiott, A. Missiroli and Th. Tardy, "Permanent Structured Cooperation – What's in a Name?", 142 *Chaillot Papers EUISS*, 2017, p. 142.

(14) Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, [2017] OJ L 331/57.



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Denmark in PESCO.(15) PESCO is organised at both Council level (policy direction and decision-making) and projects level (managed by those Member States taking part in the project, under the oversight of the Council). To more precisely organise the governance of the projects, a decision was adopted by the Council on 25 June 2018.(16) The function of secretariat for PESCO is provided by the EDA and the EEAS, including the Military Staff.

While PESCO has become a central feature of EU defence cooperation, other forms of cooperation have been institutionalised. The Capability Development Plan (CDP) is a tool whereby the Member States are invited to translate the identified defence capability priorities into concrete European collaborative capability development or procurement programmes. Periodic CDP revisions are produced by the European Defence Agency in close cooperation with the Member States and with active contributions from the EUMC and the EUMS. They mainly rely on the involvement of interested Member States, although the support of EU funding instruments is also helpful.

Building on the Policy Framework for Systematic and Long-Term Defence Cooperation, the Coordinated Annual Review of Defence (CARD) aims "to develop, on a voluntary basis, a more structured way to deliver identified capabilities based on greater transparency, political visibility and commitment from Member States".(17)

At a more operational level, cooperation is also required, from the financing of CSDP operations and missions(18) to military and political control of these actions. CSDP military structures have been progressively established to that purpose, including an EU Operations Centre(19) and a Military Planning and Command Capability (MPCC).(20)

While cooperation mainly relies on meetings of representatives from Member States, additional mechanisms are supposed to enhance cooperation. "Critical enablers for cooperation" have been identified, which include: standardisation

(15) Council Decision (CFSP) 2023/1015 of 23 May 2023 confirming the participation of Denmark in PESCO, and amending Decision (CFSP) 2017/2315 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, [2023] OJ L 136/73. The list of PESCO members is now made of: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

(16) Council Decision (CFSP) 2018/909 of 25 June 2018 establishing a common set of governance rules for PESCO projects, OJ L 161/37.

(17) Foreign Affairs Council, Conclusions on implementing the EU Global Strategy in the area of Security and Defence, No. 14149/16, 14 November 2016.

(18) F. Terpan, "Financing CSDP Operations – Explaining Change and Inertia in A Fragmented and Flexible Structure", 24 *European Security*, 2014, p. 221.

(19) F. Schnell and F. Terpan, "Member States Resistance to the EU Operations Centre", 20 *European Foreign Affairs Review*, 2015, p. 63.

(20) Th. Tardy, "MPCC – Towards an EU Military Command", 17 *EUISS Issue Brief*, 2017, p. 1.



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derived from the CDP; harmonised certification in the land, air and sea domains, with an initial focus on ammunition and (military) airworthiness; establishing a network of national test and evaluation centres; supporting; the development of a European training framework among Member States; making use of national training centres.(21)

### 3. Cooperation at bilateral and multilateral level

Military cooperation has been developed by EU Member States, through bilateral and plurilateral treaties, even before the CSDP was created. The Franco-German and the Franco-British bilateral relationships are of particular importance in terms of military capabilities. While British participation in defence instruments such as PESCO is thrown into doubt by Brexit, the relationship between the United Kingdom and some EU Member States should become even more important.(22)

Other forms of cooperation include a larger number of Member States, which decide to cooperate for a specific military purpose (cooperation in defence industry, multilateral forces) or for a more political purpose (Visegrad group, Nordic states). Some of these collaborations, for instance the multinational European Air Transport Command in Eindhoven, the Eurocorps and the European Gendarmerie Force, have been presented by the High Representative as concrete "models of European cooperation" that should be replicated.(23)

### 4. Cooperation with and within NATO(24)

The Treaty on the European Union does not preclude the Member States from cooperating within NATO. On the contrary, Article 42-2 TEU makes it clear that CSDP "shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North

(21) High Representative of the Union for Foreign Affairs and Security Policy, Vice-President of the European Commission, and Head of the European Defence Agency, Implementation Plan on Security and Defence, No. 14392/16, 14 November 2016.

(22) D. Deschaux-Dutard, "La coopération militaire franco-allemande et la défense européenne après le Brexit", 1 *Les Champs de Mars*, 2019, p. 53; D. Deschaux-Dutard, "The French-German Military Cooperation and the Revival of European Defence After Brexit – Between Reality and Political Myth", in C.A. Baciu and J. Doyle (eds), *Peace, Security and Defence Cooperation in Post-Brexit Europe*, Cham, Springer, 2019, p. 53; F. Terpan, "Assessing the Influence of France and Germany on EU Foreign and Security Policy", 13 *Canadian Journal of European and Russian Affairs*, 2019, p. 1.

(23) High Representative of the Union for Foreign Affairs and Security Policy, Vice-President of the European Commission, and Head of the European Defence Agency, Implementation Plan on Security and Defence, No. 14392/16, 14 November 2016.

(24) J. Howorth, "EU–NATO Cooperation – The Key to Europe's Security Future", 26 *European Security*, 2017, p. 454.



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Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework".

Thus, in order to ensure consistency between NATO and CSDP, a cooperation framework has been established between the two organisations. In January 2001, the NATO Secretary General and the EU Presidency defined the scope and modalities of this cooperation in an exchange of letters. Cooperation further developed with the signing of the NATO-EU Declaration on ESDP in December 2002 and the agreement, in March 2003, of a framework for cooperation.(25) Recently, in the context of the defence initiatives of the EU, a joint declaration was adopted in 2016 in order to enhance existing forms of cooperation.(26)

This cooperation takes place at ministerial level, with the High Representative participating in NATO Defence Ministers' meetings and the NATO Secretary General attending the EU Foreign Ministers' meetings. But it is also implemented at a lower level.(27) In addition to formal and informal meetings between the North Atlantic Council and the EU Political and Security Committee (PSC), the NATO Secretary General meets regularly with the EU High Representative, but also the presidents of the European Commission and the European Council. NATO Deputy Secretary General, Assistant Secretaries General and the Supreme Allied Commander Europe (SACEUR) regularly brief the COPS and the European Defence Agency Steering Board on the agenda and priorities of NATO. Dialogue between the EU and NATO also takes place though military bodies, between the Military Staff of the EU and the International Military Staff of NATO, and between the Military Committee of NATO and the Military Committee of the EU.

Administrative cooperation is a prerequisite for further operational cooperation. Joint exercises and training, incorporated in the framework for cooperation in 2016, aim to develop common working methods and create mutual trust. The coordination of operations developed in the early 1990s in the context of the Balkan wars. Cooperation on capability development is supposed to develop military capabilities while avoiding unnecessary duplication between

(25) EU-NATO Declaration on ESDP, 16 December 2021, (2002) 142.

(26) Joint declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization, 8 July 2016, (2016) 119.

(27) On EU-NATO cooperation, see: European Parliament Research Service, Understanding EU-NATO cooperation – Theory and Practice, EPRS Briefings PE 659.269, 2020; N. Græger, "European Security as Practice – EU-NATO Communities of Practice in the Making?", 25 *European Security*, 2016, p. 478.



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the two organisations. A NATO-EU capability group was established in 2003 to ensure the coherence and mutual reinforcement of efforts to address capability shortfalls.

## B. Administrative cooperation organised by hybrid organs

Administration cooperation is organised by hybrid organs, *i.e.* organs such as the EEAS and the EDA, which combine supranational and intergovernmental characteristics.

### 1. Cooperation organised by the EEAS

The European External Action Service (EEAS) was established in order to deal with external action and security-defence issues at EU level, while avoiding a strong and direct involvement of the Commission. Indeed, the High Representative, head of the EEAS, is at the same time Vice President of the Commission and President of the Council of Foreign Affairs.(28) The composition of the EEAS is balanced, with staff coming from the Commission, the Council and the Member States. Due to its hybrid nature, the EEAS offers good opportunities to enhance defence cooperation. The EEAS is more specifically involved in strategy building and crisis management, and remains on the sidelines as far as capability building is concerned.

The High Representative and the EEAS were the driving force behind the adoption of the EU Global Strategy in 2016.(29) They successfully influenced the Member States when preparing the new strategy. Between November 2014 and June 2015, Federica Mogherini created and managed a working group including not only representatives of the Member States and the Council secretariat but also of the Commission, even though the mandate of European Council did not foresee a contribution from the Commission. Federica Mogherini and Jean-Claude Juncker being on the same page regarding strategic ambitions, the presence of representatives from the Commission was considered useful by the High

(28) S. Blockmans and R.A. Wessel, "The EEAS at Ten – Reason for a Celebration?", 26 *European Foreign Affairs Review*, 2021, p. 5; G. De Baere and R.A. Wessel, "EU Law and the EEAS – Of Complex Competences and Constitutional Consequences – In The European External Action Service", in J. Bátora and D. Spence (eds), *The EU's Diplomatic System – Post Westphalia and the European External Action Service*, London, Palgrave MacMillan, 2015, p. 175; Th. Henökl and J. Trondal, "Unveiling the Anatomy of Autonomy – Dissecting Actor-level Independence in the European External Action Service", 22 *Journal of European Public Policy*, 2015, p. 1426; M. Gatti, *European External Action Service, Promoting Coherence through Autonomy and Coordination*, Leiden, Brill, 2016.

(29) N. Tocci, "The Making of the EU Global Strategy", 37 *Contemporary Security Policy*, 2016, p. 461; *id.*, "From the European Security Strategy to the EU Global Strategy – Explaining the Journey", 54 *International Politics*, 2017, p. 487; *id.*, *Framing the EU Global Strategy – A Stronger Europe in A Fragile World*, London, Palgrave Macmillan, 2017; *id.*, "Towards a European Security and Defence Union – Was 2017 a Watershed?", 56 *Journal of Common Market Studies*, 2018, p. 131.



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Representative.(30) As far as working methods are concerned, Mogherini carefully avoided making use of intergovernmental committees, and instead established a consultation process between "points of contact" (POC).(31) This new way of functioning allowed her to gain control over the whole process, with the EEAS Strategic Planning Division playing a central role. The Political and Security Committee was set aside.(32) Later on, the EEAS has also been in charge of the elaboration of the Strategic Compass, in close cooperation with the Member States, with a strong contribution from France during its presidency of the Council (second semester 2022).

In the field of crisis management, the EU Military Staff (EU MS) is part of the EEAS and provides assistance to the EU Military Committee within the Council. Cooperation with regard to early warning and intelligence is also made possible thanks to bodies like the EU Intelligence Assessment and Situation Centre (EU INTCEN) and the Intelligence Directorate of the European Military Staff (EUMS INT).

In these different fields, the role of the EEAS goes beyond organising cooperation between Member States; it offers guidance on external action and defence policy, and takes initiatives. Several scholars have observed that the EEAS tended to gain autonomy from the Member States,(33) although the latter resist this evolution.(34)

### 2. Cooperation organised by the European Defence Agency

The EDA (Art. 45 TEU) is one of the handful of agencies that have been created by treaty provision. It is an intergovernmental agency of the Council, in which all EU Member States participate, including Denmark since the Danish

(30) See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a more competitive and efficient defence and security sector COM(2013) 542 Final, 24 July 2013; Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, European Defense Action Plan COM(2016) 950 Final, 30 November 2016.

(31) J. Howorth and V. Schmidt, "50. Jolyon Howorth & Vivien Schmidt", in A. Missiroli (ed.), *Towards an EU Global Strategy – Consulting the Experts*, Paris, European Union Institute for Security Studies, 2016, p. 107.

(32) P. Morillas, "Autonomy in Intergovernmentalism – The Role of de novo Bodies in External Action During the Making of the EU Global Strategy", 42 *Journal of European Integration*, 2020, p. 231.

(33) Th. Henökl, "The European External Action Service – Torn Apart between Several Principals or Acting as a Smart 'double-agent'?", 10 *Journal of Contemporary European Research*, 2014, p. 381; Th. Henökl and J. Trondal, "Unveiling the Anatomy of Autonomy – Dissecting Actor-level Independence in the European External Action Service", 22 *Journal of European Public Policy*, 2015, p. 1426; A.E. Juncos and K. Pomorska, "Manufacturing Esprit De Corps – The Case of the European External Action Service", 52 *Journal of Common Market Studies*, 2014, p. 302.

(34) K. Pomorska and S. Vanhoonacker, "Resisting the European External Action Service", 20 *European Foreign Affairs Review*, 2015, p. 21.



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decided to abolish their opt out clause on European defence. Administrative arrangements, negotiated by the Head of the Agency and approved by the European Council, have been signed with third states: Norway (2006), Switzerland (2012), the Republic of Serbia (2013), Ukraine (2015) and the United States (2023).(35)

Its mission is to organise cooperation between the Member States with the aim of strengthening EU military capabilities. More specifically, Article 45-2 TEU assigns five main tasks to the Agency:

> "(a) contribute to identifying the Member States' military capability objectives and evaluating observance of the capability commitments given by the Member States; (b) promote harmonisation of operational needs and adoption of effective, compatible procurement methods; (c) propose multilateral projects to fulfil the objectives in terms of military capabilities, ensure coordination of the programmes implemented by the Member States and management of specific cooperation programmes; (d) support defence technology research, and coordinate and plan joint research activities and the study of technical solutions meeting future operational needs; (e) contribute to identifying and, if necessary, implementing any useful measure for strengthening the industrial and technological base of the defence sector and for improving the effectiveness of military expenditure".

The EDA supports the Member States and the Council in their efforts to improve defence capabilities, and therefore cooperates with the Member States on a regular basis. Top-level cooperation takes place through the steering board or at the working level in expert teams. Overall, the EDA connects around 4,000 national-based experts in cooperative defence projects. National experts are organised in Integrated Development Teams (IDTs), Project Teams (PTs) as well as CapTechs in the research & technology domain. Additionally, *ad hoc* working groups comprised of national experts can be formed for any given subject. Coordination between the Member States and the agency is facilitated by networks of national Points of Contacts (POCs). The EDA also acts "as an interface between Member States and the Commission without being a substitute for national positions being conveyed to the Commission through other channels".(36)

(35) F. Terpan, "Art. 45 TEU – Tasks and Powers of the European Defence Agency", in H. Blanke and S. Magianelli (eds), *The Treaty on European Union – A Commentary*, New York, Springer, 2013, p. 1261; N. Karampekios and I. Oikonomou (eds), *The European Defence Agency – Arming Europe*, New York, Routledge, 2015.

(36) High Representative of the Union for Foreign Affairs and Security Policy, Vice-President of the European Commission, and Head of the European Defence Agency, Implementation Plan on Security and Defence, No. 14392/16, 14 November 2016.



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The governance of the EDA is dominated by the Member States. The agency falls under the authority of the Council, to which it reports and from which it receives guidelines. The steering board meets at ministerial level and at the level of National Armaments Directors, R&T Directors and Capability Directors. While the High Representative is the Head of the Agency, the Chief Executive is appointed by decision of the Steering Board. There are no more than 170 staff working at the EDA, which places severe limits to the potential autonomy of the agency. The three directorates of the EDA provide their own understanding of those defence capabilities required to face security challenges. However, this expertise remains highly dependent on the willingness of the Member States to cooperate.

The Member States have reduced the margin of manoeuvre of the EDA, interpreting its mandate in a rather restrictive way.(37) As a sign of the weakness of the agency, the 2016 relaunch of defence cooperation originated outside the EDA and gave a rather limited role to the Agency.(38) While PESCO is mainly driven by the participating Member States, the EDA together with the EEAS provides the secretariat. The same applies to the CARD. The Commission is in charge of the European Defence Fund (EDF) with the exception of the preparatory action on defence research (PADR, see below), which is run by the EDA through a delegation agreement signed in May 2017. The war against Ukraine, however, has given new incentives for EDA-driven cooperation and might contribute to the strengthening of the organisation.

## C. Administrative cooperation deriving from the Commission and its programmes

Military programmes come under the aegis of the Commission, and more specifically its Directorate-General DEFIS (Defence Industry and Space). DG DEFIS, taking over from the Directorate-General Internal Market, Industry, Entrepreneurship and SMEs (GROW), develops and carries out the policies of the Commission on defence industry and space. Each programme is elaborated and implemented through a process involving the Member States within programme committees; this is where administrative cooperation takes place. EU regions may also be involved through the European Network of Defence-Related Regions.

(37) L. Chappell, Th. Exadaktylos and P. Petrov, "A More Capable EU? Assessing the Role of the EU's Institutions in Defence Capability Development", 42 *Journal of European Integration*, 2019, p. 10.

(38) J. Bátora, "European Defence Agency – A Flashpoint of Institutional Logics", 32 *West European Politics*, 2009, p. 1075.



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The European Defence Fund is to date the most ambitious military programme ever established in the EU.(39) It aims to promote defence cooperation between companies and EU Member States to foster innovation and develop state-of-the-art defence technology and products. It has two strands related to research and capabilities.

Under the research strand, the EU budget will provide funding for collaborative defence research projects. A Preparatory Action on Defence Research(40) was established by the Commission in June 2017 with a view to creating a European Defence Research programme as part of the next EU Multiannual Financial Framework 2021-2027.(41) Under the capability strand, the EU will create incentives for companies and EU countries to collaborate on the joint development of defence products and technologies through co-financing from the EU budget.

Under the capabilities strand, other programmes are worth mentioning, in particular the EDIDP (European Defence Industrial Development Programme), established by Regulation (EU) 2018/1092. The EDIDP was a precursor industrial programme paving the way to the EDF and aiming to support the competitiveness and innovation capacity of the defence industry of the Union, by co-financing the joint development of defence products and technologies. It was implemented by the Commission through annual calls for proposals in 2019 and in 2020.

The EDF is implemented through annual work programmes structured along 17 thematic and horizontal categories of actions. The different programmes display many similarities in terms of how they operate. Programme committees are established within the framework of the programmes to assist the Commission in its implementation tasks.(42) Committees meet in the format of national defence experts to provide specific assistance to the Commission. It is for the Member States to designate their respective

(39) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Launching the European Defence Fund COM(2017) 295 Final, 7 June 2017.

(40) European Commission, "Preparatory Action on Defence Research (PADR)", *Defence Industry and Space – European Commission*, <https://ec.europa.eu/defence-industry-space/eu-defence-industry/preparatory-action-defence-research-padr_fr> last accessed 8 June 2023.

(41) J. Mawdsley, "The Emergence of the European Defence Research Programme", in N. Karampekios, I. Oikonomou and E. Carayannis (eds), *The Emergence of EU Defense Policy Research from Innovation to Militarization*, New York, Springer, 2017, p. 202.

(42) Regulation 2018/1092 of the European Parliament and of the Council of 18 July 2018 establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovation capacity of the defence industry of the Union, [2018] OJ L 200/30.



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representatives on the Committees. Committee members should be given early and effective opportunities to examine the draft implementing acts and express their views.

In the context of the EDIDP and the EDF, the Commission has reaffirmed, in a notice providing guidance on various possibilities of cooperative defence procurement, that "more cooperation among Member States in defence procurement is needed". The notice aims to demonstrate how cooperative military programmes can be made consistent with the 2009 Defence Procurement Directive, the implementation of which is supported by the Commission.(43) Indeed, Article 13(c) of the Directive lays down a specific exclusion for cooperative programmes based on research and development: the Directive shall not apply to "contracts awarded in the framework of a cooperative programme based on research and development, conducted jointly by at least two Member States for the development of a new product and, where applicable, the later phases of all or part of the life-cycle of this product".

Through military programmes based on industrial policy, the Commission has struggled to find its niche, and as such has become involved in a rivalry with the EDA.(44) Although the EDA – as well as the EEAS – is involved in these programmes, the Commission has taken the lead through its competence related to the defence industry and internal market.

As seen above, two kinds of cooperation need to be distinguished. The first is purely intergovernmental and takes place at Council and Member States level. The second is guided by hybrid organs (EDA and EEAS) and supranational ones (Commission). The Member States act in a schizophrenic way, allowing non-intergovernmental bodies to interfere with their mutual relationship, and at the same time resisting this evolution in order to keep control of the overall process.(45) This diversity makes the effectiveness of defence cooperation even more challenging.

(43) Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, [2009] OJ L 216/76.

(44) D. Fiott, "The European Commission and the European Defence Agency – A Case of Rivalry?", 53 *Journal of Common Market Studies*, 2014, p. 542.

(45) S. Saurugger and F. Terpan, "Studying Resistance to EU Norms in Foreign and Security Policy", 20 *European Foreign Affairs Review*, 2015, p. 1; F. Schnell and F. Terpan, "Member States Resistance to the EU Operations Centre", *op. cit.*



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## *II. The effectiveness of defence cooperation*

The effectiveness of these different forms of defence cooperation partly depends on legal considerations related to the commitments made by the Member States as well as the existence of an enforcement mechanism aimed at inciting/forcing the Member States to cooperate. From a legal perspective, the assumption would be that: the more constraining, the greater the effectiveness of the cooperation. However, political factors – out of the scope of the present research – may interfere in a way that contradicts the assumption. In the end, the effectiveness can be measured by the outcomes of the cooperation. Accordingly, this section will first analyse the commitments and enforcement mechanism relating to defence cooperation, and secondly, the results of this cooperation.

### A. Commitments and enforcement

#### 1. Commitments and enforcement through CSDP treaty provisions

Soft law acts such as the 2003 European Union Security Strategy and the more recent 2016 EU Global Strategy for Foreign and Security Policy (EUGS) set out political objectives with regard to security and defence and offer a political basis for further cooperation in this field. The EUGS 2016, in particular, justifies defence cooperation as follows:

> "While defence policy and spending remain national prerogatives, no Member State can afford to do this individually: this requires a concerted and cooperative effort. Deeper defence cooperation engenders interoperability, effectiveness, efficiency and trust: it increases the output of defence spending. Developing and maintaining defence capabilities requires both investments and optimising the use of national resources through deeper cooperation".(46)

When looking beyond strategic documents, cooperation in defence matters appears as a legal obligation compensating for the limited degree of integration in CFSP-CSDP. Several provisions of the TEU organise this cooperation and frame it as an obligation with regards to CFSP in general and CSDP in particular. Thus, the Treaty on the European Union includes rules targeted at the Union generally speaking, at EU institutions, at the Member States, or at both EU institutions and the Member States.

(46) European External Action Service, A Global Strategy for the European Union's Foreign and Security Policy – Shared Vision, Common Action – A Stronger Europe, *op. cit.*



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First, cooperation is an obligation for the Union as such under Article 21-2 TEU, according to which the Union "shall work for a high degree of cooperation in all fields of international relations", which includes military operations and international negotiations in the field of defence. Second, EU institutions have to cooperate in order to "ensure consistency between the different areas of its external action and between these and its other policies" (Art. 21-3 TEU): this concerns more particularly the Council and the Commission, assisted by the High Representative. Third, EU institutions must cooperate with the Member States at both diplomatic and operational level. The EU treaty mentions cooperation between the European External Action Service (EEAS) and diplomatic services of the Member States on the one hand (Art. 27-3 TEU), and between EU delegations in third countries and at international organisations on the other (Art. 32 TEU). Crisis management operations also imply cooperation. Indeed, the Political and Security Committee, exercises, "under the responsibility of the Council and of the High Representative, the political control and strategic direction of the crisis management operations" (Art. 37 TEU). And when the Council entrusts "the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task", those Member States, in association with the High Representative, "agree on the management of the task" (Art. 44 TEU).

Fourth, and more significantly, several forms of cooperation between the Member States are organised in the TEU. Given that the Member States, together with the High Representative, have been given the task of implementing the CFSP (Art. 26-3 TEU), it is no surprise that their relation is central in the treaty. Thus, as a general obligation the "Member States shall work together to enhance and develop their mutual political solidarity" in external and security policy (Art. 24-3 TEU), which is a source of administrative cooperation. "Systematic cooperation between Member States" is one of the means allowing the Union to conduct a common foreign and security policy (Art. 25 TEU). The Member States shall "consult one another" on any matter of foreign and security policy of general interest in order to determine a common approach, before undertaking any action on the international scene or entering into any commitment which could affect the interests of the Union (Art. 32 TEU). And they need to coordinate in international organisations (Arts. 34 and 35 TEU). All these provisions induce administrative cooperation in CFSP, including defence policy.

Similarly, the fact that defence policy relies on the capabilities of the Member States renders cooperation necessary to build and strengthen capabilities and make it available for military operations. Article 42-1 TEU, 42-3 TEU, 42-4 TEU, 42-5 TEU provide legal bases for cooperation in military operations.



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Legal obligations are numerous but the Court of Justice of the European Union controls very few of them. Indeed, under the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, CFSP-CSDP is placed beyond the jurisdiction of the CJEU, with two exceptions (sanctions and competence delimitation) that do not concern administrative cooperation. Yet, since those articles introduce a derogation from the rule of general jurisdiction under Article 19 TEU, they must be interpreted narrowly, according to a constant case law of the Court. Thus, in *Elitaliana v. Eulex Kosovo*, the Court confirmed its jurisdiction to rule on an action for annulment and damages brought by the applicant based on the award by Eulex Kosovo of a public contract for helicopter services to another tenderer.(47) The fact that the measures the annulment of which was sought concerned a CSDP mission was not enough to exclude the jurisdiction of the Court to interpret and apply the provisions of the EU Financial Regulation with regard to public procurement.

Similarly, in *H v. Council and Others*, the Court upheld the jurisdiction of the EU Courts to hear an action for annulment and damages lodged by a seconded staff member of a CSDP civilian mission, the European Union Police Mission in Bosnia and Herzegovina, in connection with decisions taken by the Head of Mission redeploying her to a post in a regional office.(48) Although the contested decisions were set in the context of CFSP-CSDP, they also constituted acts of staff management. The restrictions on the jurisdiction of the Court over CFSP did not preclude reviewing acts of staff management relating to staff members seconded by the Member States, when the EU Courts have jurisdiction, under Article 270 TFEU, to review such acts where they concern staff members seconded by the EU institutions. Otherwise, where a single act of staff management relating to "field" operations concerns both staff members seconded by the Member States and those seconded by the EU institutions, the decision with regard to the former would be liable to be irreconcilable with the decision with regard to the latter. The same type of reasoning was used in *European Union Satellite Center (SatCent) v. KF*, in a case about the suspension and removal by the Director of SatCent of a staff member of the agency.(49)

It follows from this that administrative measures can be controlled by the EU courts even when they take place in the context of CFSP-CSDP. This, however, does not give the CJEU jurisdiction over defence cooperation more generally. Compliance with treaty provisions dealing with defence cooperation continues to rely mostly on the good will of both EU Member States and

(47) *Eulex Kosovo v. Elitaliana*, case C-439/13 P, EU:C:2015:753, paras. 41 to 50.
(48) *H v. Council and Commission*, case C-455/14 P, EU:C:2016:569, paras. 39 to 61.
(49) *CSUE v. KF*, case C-14/19 P, EU:C:2020:492.



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institutions. While the obligations are hard, the enforcement is soft, or even non-existent. In other words, if CFSP-CSDP is to be seen as (hard) law, it is a very soft form of hard law: defence cooperation takes place within or under the supervision of EU institutions, but without any real possibility to coerce the Member States.

### 2. Commitments and enforcement within EDA and PESCO

The 26 Member States participating in the EDA have a right to participate in day-to-day cooperation within the agency, but are not forced to commit themselves within particular programmes. For example, helicopter initiatives taken since 2009 concern only 15 out of the 26 EDA states,(50) while Maritime Surveillance (MARSUR) involves 20 Member States.(51) Through the agency's "à la carte" approach, Member States can decide whether or not to participate in projects according to national needs. When they choose to be in, they remain submitted to rather soft commitments through arrangements, memorandums of understanding, technical agreements, code of conducts, monitoring or guidelines.

Similarly, participation in the Permanent Structured Cooperation is voluntary. The decision to participate, however, implies a contribution "to fulfil the more binding commitments under PESCO", which includes in particular joint and collaborative defence capability development projects.(52) Thus, and contrary to other forms of cooperation, PESCO includes legally binding commitments. As written in the third Review of the EU Global Strategy, "PESCO provides a binding framework to enhance joint defence investment, cooperation and operational readiness among the [...] participating Member States, which are individually responsible for fulfilling the commitments they have made to one another".(53) A list of commitments in the areas of defence investment, capability development and operational readiness, was set out in the notification of 13 November 2017(54) and included as an annex to the Council decision of 8 December 2017 establishing PESCO

(50) European Defence Agency, Helicopter Initiatives, <https://eda.europa.eu/what-we-do/all-activities/activities-search/helicopter-initiatives> last accessed 8 June 2023.

(51) European Defence Agency, Maritime Surveillance (Marsur), <https://eda.europa.eu/what-we-do/all-activities/activities-search/maritime-surveillance-(marsur)> last accessed 8 June 2023.

(52) Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, [2017] OJ L 57.

(53) European External Action Service, The European Union's Global Strategy Three Years On, Looking Forward (2019), available at <https://eeas.europa.eu/topics/eu-global-strategy/64045/european-unions-global-strategy-three-years-moving-forward_en> last accessed 8 June 2023.

(54) Joint notification by member states to the High Representative and to the Council on PESCO, 13 November 2017, available at <https://www.consilium.europa.eu/en/press/press-releases/2017/11/13/defence-cooperation-23-member-states-sign-joint-notification-on-pesco/> last accessed 8 June 2023.



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and determining the list of participants. On 6 March 2018, the Council also adopted a recommendation setting out a roadmap for the implementation of PESCO.(55)

Participating Member States outline how they meet the more binding commitments in their National Implementation Plans, which are to be updated annually and communicated to the EEAS and the EDA, and made available to other participants. The High Representative presents an annual report on PESCO to the Council based on contributions by the EDA and the EEAS (acting as PESCO secretariat). On the basis of this annual report and the NPI, the Council reviews once a year whether the participating Member States continue to fulfil the more binding commitments referred to in Article 3. The first Council assessment was adopted in May 2019.(56)

The Council, within the framework of Article 46(6) TEU, and with the contribution of the High Representative, also ensures the unity, consistency and effectiveness of PESCO.

### 3. Commitments and enforcement within military programmes of the Commission(57)

As stated above, military programmes have been launched on the basis of industrial policy. In a way, the Member States have committed themselves though different provisions of the regulations adopted by the Council and the Parliament to establishing the programmes. However, those regulations primarily concern the Commission, in charge of monitoring the implementation of the programmes and reporting to the Parliament and the Council on the progress made in the implementation process.(58) Thus, the effectiveness and efficiency of Union policy actions in this field relies of soft enforcement mechanisms.

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(55) Council Recommendation concerning a roadmap for the implementation of PESCO, No. 588/1/18, 6 March 2018.

(56) Council Recommendation of 14 May 2019 assessing the progress made by the participating Member States to fulfil commitments undertaken in the framework of permanent structured cooperation (PESCO), [2019] OJ C 166/1.

(57) See the website dedicated to the activities of the Commission under the European Defence Fund: <https://ec.europa.eu/growth/sectors/defence/european-defence-fund_en> last accessed 8 June 2023.

See also: T. Guay, *At Arm's Length – The European Union and Europe's defence industry*, New York, Springer, 2016; D. Fiott, *Defence Industrial Cooperation in the European Union – The State, the Firm and Europe*, *op. cit.*; G. de la Brosse, *Deploying Financial Tools in Support of European Defence Cooperation*, Armament Industry European Research Group (ARES), 2017; J. Mawdsley, "The Emergence of the European Defence Research Programme", *op. cit.*, p. 205; P. Haroche, "The European Defence Fund – How the European Commission is Becoming a Defence Actor", IRSEM Research Paper No. 65, 2018.

(58) Art. 27 to 35 of the Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund COM(2018) 476 final, 13 June 2018. See also: Art. 17 Regulation (EU) 2018/1092 of the European Parliament and of the Council establishing the European Defence



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There are also commitments for the Commission to take into account the results of administrative cooperation when implementing military programmes such as the EDIDP and the EDF: the Commission should endeavour to find solutions which command the widest possible support within the committee.

In the framework of the EDF, and to prevent a governance risk leading to a lack of cooperation between Member States during the comitology process, the Member States "are involved since the preparation of the working programmes in an interactive way".(59) This draws on a practice developed under the preparatory action and the European Defence Industrial Development Programme.

Through military programmes it is capable of orienting the cooperation Member States more than might be imagined after reading the Treaties.(60)

## B. Results: Building a strategic culture and strengthening capabilities

Administrative cooperation in the field of defence has contributed to the development of a European common strategic culture and to the strengthening of EU military capacities.

### 1. A Common Strategic Culture

A common strategic culture has been emerging from defence cooperation within the framework of the European Union. This can be observed through high-level documents such as the 2016 EU Global Strategy and the 2022 Strategic Compass, but also through a greater likelihood of cooperation within the framework of CSDP and fully considering CSDP when dealing with defence issues.

A common culture is reflected in the EU Global Strategy, the latter giving a frame to CSDP, and more generally to CFSP and external action. In the words of Federica Mogherini, the former High Representative, the Global Strategy can be seen as a "compass for action"(61) instead of being a purely

Industrial Development Programme aiming at supporting the competitiveness and innovation capacity of the defence industry of the Union, [2018] OJ L 200/30.

(59) See Legislative Financial Statement (2. Management Measures), Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund COM(2018) 476 final, 13 June 2018.

(60) P. Haroche, "Supranationalism Strikes Back – A Neofunctionalist Account of the European Defence Fund", 27 *Journal of European Public Policy*, 2019, p. 1; F. Terpan, "La place de la Commission dans la PESC-PSDC, marginalisation ou nouvelles opportunités ?", in J. Auvret-Finck (eds), *La Commission en voie de redynamisation ?*, Paris, Pedone, 2017, p. 329.

(61) European External Action Service, The European Union's Global Strategy Three Years On, *op. cit.*



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rhetorical exercise. Since 2016, three reports have assessed the implementation of the strategy in many areas, including security and defence. They tend to encapsulate the on-going initiatives into a single and coherent strategic framework. In line with the Global Strategy, the 2022 Strategic Compass provides a shared assessment of the EU's strategic environment, of the threats and challenges the Union faces, and on this basis sets up an action plan to improve the EU's contribution to security and defence. Drawing on the existing literature on CSDP, we can define the EU strategic culture as made up of four main elements: the fact that defence is not only a matter of national sovereignty but an area that needs to be dealt with at EU level, with European partners; the necessity of European cooperation taking place not only within NATO but also within the EU; the prevalence of external operations and missions over territorial defence; an approach of defence combining military and non-military instruments.(62)

Obviously, the building of a strategic culture is not without limits and sovereignty continues to interfere. Political science accounts of CSDP have at the same time established the emergence of a strategic culture resulting from defence cooperation, and brought to light the remaining limitations.(63) More specifically, a common EU strategic culture is more easily found within EU institutions than national ones. It is more present within some Member States (France, Germany) than others (United Kingdom). However, the trend is clearly towards a growing development of a strategic culture, more particularly when looking at the administrative level. Administrative staff are better equipped for EU defence cooperation than politicians.(64)

## 2. Capacity-building

A second way to assess the results of defence cooperation is to see whether it has succeeded in developing military capabilities.(65) From the early 1990s to the mid-2010s, a number of initiatives allowed for the building of new military tools, a process that has been widely described as slow and limited.(66)

(62) S.B.H. Faure, *Défense européenne – Émergence d'une culture stratégique commune*, Montreal, Athéna, 2016.

(63) S. Rynning, "The European Union: Towards a Strategic Culture?", 34 *Security Dialogue*, 2003, p. 479; Chr. O. Meyer, *The Quest for a European Strategic Culture: Changing Norms on Security and Defence in the European Union*, New York, Palgrave Macmillan, 2006.

(64) S.B.H. Faure, *Défense européenne – Émergence d'une culture stratégique commune*, *op. cit.*

(65) Directorate-General for External Policies of the Union, In-Depth Analysis CSDP defence capabilities development, PE 603.482 (January 2020), available at <https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603482/EXPO_IDA(2020)603482_EN.pdf> last accessed 8 June 2023.

(66) B. Giegerich, "Chapter Two – Military and Civilian Capabilities for EU-led Crisis-management Operations", 50 *Adelphi series Europe and Global Security*, 2010, p. 41; K. Schilde, "European Military Capabilities – Enablers and Constraints on EU Power?", 55 *JCMS*, 2017, p. 37.



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This is why the recent relaunch of the European defence policy has raised expectations. Will the new forms of cooperation created in 2016-17 lead to concrete, actual results? The last Capability Development Plan revision was completed in June 2018 with the approval, by Member States, of 11 new EU Capability Development Priorities. In this context, the Member States are supposed to commit themselves within new instruments such as PESCO and the EDF. For the time being, 68 projects have been agreed by the Council within PESCO, in five different steps (6 March 2018, 20 November 2018, 12 November 2019, 16 November 2021 and 23 May 2023). However, the success of PESCO is not yet assured.(67)

The European Defence Fund has been anticipated through two precursory programmes. The Preparatory Action on Defence Research (PADR) has provided grants for collaborative defence research with a budget of 90 million euros for 2017-2019. The first PADR grant agreement was signed in December 2017, and by the beginning of 2019, eight grant agreements were signed, allowing for the launch of several projects. The European Defence Industrial Development Programme has offered co-financing for collaborative defence development projects with a budget of 500 million euros for 2019-2020. These two programmes have paved the way for the launching of EDF programmes. The EDF, however, has seen its funding fall by 40% compared to the proposal of the Commission. Indeed, the recent agreement on the 2021-2027 multiannual financial framework has attributed a budget of close to 8 billion euros for 2021-2027 to the new fund, instead of 13 billion. Out of these 8 billion, 2.7 are meant to fund collaborative defence research xhile 5.3 billion will fund collaborative capability development projects complementing national contributions.

These efforts made at EU level were at first met with reluctance by the transatlantic community, echoing fears of potential duplication. However, they ended up being welcomed as a contribution to collective security and burden-sharing. In particular, the EU-NATO 2018 joint declaration welcomes these efforts as contributing to "peace and stability in the neighbourhood and beyond".(68)

The international context is now playing in favour of the strengthening of military capabilities. This was not the case in 2020-21 with the COVID-19 crisis and its economic impact puting strong constraints on defence spending, even though the need for more cooperation remained high. But then, the war against Ukraine turned the tide, most Member States deciding to increase their defence budgets to cope with a riskier environment, and the European Union reimbursing

(67) S. Biscop, "European Defence – Give PESCO a Chance", 60 *Survival*, 2018, p. 161.

(68) Joint declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization (2016), <https://www.consilium.europa.eu/fr/press/press-releases/2016/07/08/eu-nato-joint-declaration/> last accessed 8 June 2023.



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the Member States through the Facility for peace for ammunition donated to Ukraine. It remains to be seen whether this new context will contribute to boost EDF programmes, or will rather benefit to other frames such as NATO.

## *Conclusion*

Administrative cooperation in the field of defence takes mostly place through intergovernmental frameworks consistent with the specific nature of CSDP, with the Council playing a central role and the Member States exerting control on the newly created Permanent Structured Cooperation. These frameworks do not necessarily include all the Member States and sometimes include third states, giving birth to differentiated forms of cooperation. However, cooperation is not limited to intergovernmentalism: hybrid organs such as the European Defence Agency and the European External Action Service are also involved, and the Commission has succeeded in getting a grip on defence issues through industrial policy.

The field of defence is not strongly legalised and remains dominated by soft law, even though there are actual legal commitments in the Treaty on the European Union, as well as in secondary law. Should cooperation in this field be considered as a legal requirement, it continues to rely on the political willingness of the Member States. Enforcement mechanisms are rather limited, with the CJEU being excluded from most parts of CSDP. However, in recent years this rather loose framework for cooperation has allowed for a relaunch of the defence project thanks to the adoption of new instruments such as PESCO, CARD and the EDF.

We only have the preliminary results of these new instruments. It remains to be seen whether they will be ascertained in a near future, in a war context that has justified the increase in defence spending. While the COVID-19 pandemic and the economic crisis it has caused have placed serious constraints on military expenditure, and have contributed to a reduction of the European Defence Fund budget,(69) the war in Ukraine has made defence cooperation and capacity building more crucial than ever. And cooperation in the field of armaments retains all its relevance as it is supposed to ensure economies of scale. Defence cooperation should continue to be promoted for two complementary reasons, because it contributes to reducing the costs of defence and security, and because it may help to achieve European strategic autonomy in an unstable and unsecure context.

(69) In June 2018, the EDF was allocated €13 billion euros by the Commission under the Multiannual Financial Framework 2021-2027. It is now down to €8 billion, <http://finabel.org/european-defence-fund-time-to-shine/> last accessed 8 June 2023.



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# CONCLUSIONS

**Emilie Chevalier, Mariolina Eliantonio and Rui T. Lanceiro**

## *Introduction: from direct and indirect administration to administrative cooperation*

The EU relies on the Member States' public administrations for the administrative implementation and enforcement of EU law. The role and importance of national administrative authorities has deepened over time, culminating in the current wording of Article 291(1) TFEU.(1) The TFEU also expressly recognises that Member States must ensure, together with the European institutions, the "effective implementation of Union law", which is considered "essential for the proper functioning of the Union" (Art. 197(1) TFEU).(2) Even before the Lisbon Treaty, which introduced both Articles 197(1) and 291(1), the paramount role of Member States' administrations in the implementation and enforcement of EU law had been recognised by the Court of Justice of the European Union (CJEU) through the principle of sincere cooperation, and as an expression of the duty of Member States to ensure the full effectiveness of EU law, provided for in Article 5 TEEC at the time and in Article 4(3) TEU today.(3)

(1) Th. von Danwitz, *Europäisches Verwaltungsrecht*, Berlin, Springer, 2008, p. 307.

(2) See e.g., *ibid.*, pp. 302-303, 309, spec. p. 469; S. González-Varas Ibáñez, *Tratado de Derecho Administrativo – El Derecho Administrativo Europeo*, 2nd ed., Civitas/Thomson, 2012, pp. 33 ff.; J. Schwarze, *Droit administratif européen*, 2e ed., Brussels, Bruylant, 2009, pp. 29 ff.; S. Cassese, "Il sistema amministrativo europeo e la sua evoluzione", 3 *Rivista Trimestrale di Diritto Pubblico*, 1991, pp. 769-774; R. Widdershoven, "European Administrative Law", in R. Seerden (ed.), *Comparative Administrative Law*, 2018, Intersentia, pp. 265-269.

(3) See *Schlüter & Maack v. Hauptzollamt Hamburg-Jonas*, case C-94/71, EU:C:1972:45, para. 10; *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany*, joined cases 205 to 215/82, EU:C:1983:233, paras. 17 and 19. *UPC Nederland BV v. Gemeente Hilversum*, case C-518/11, EU:C:2013:709, para. 59. See on this., Th. von Danwitz, *Europäisches Verwaltungsrecht*, *op. cit.*, pp. 302-303, 307, 309, 469; S. González-Varas Ibáñez, *Tratado de Derecho Administrativo*, *op. cit.*, pp. 33 ff.; J. Schwarze, *Droit administratif européen*, ~~Bruxelles~~, Bruylant, 2009, pp. 29 ff; V. A. M. Keessen, *European administrative decisions. How the EU regulates products on the internal market*, Europa Law Publishing, 2009, p. 85.



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However, the central nature of national administrations in the implementation of EU law does not mean that the EU plays no role. The implementation of EU law may also be tasked to the EU institutions when justified by the interests of the EU and the application of the principles of subsidiarity and proportionality, as established in Article 291(2) TFEU.

The organisation of the "European Administrative Union" is thus based on a multi-level structure deriving from Article 291(1) and (2) TFEU: the national administrations of the Member States (dealing with the ordinary implementation of EU law) and the EU's own administration (in exceptional cases). In this context, a classical distinction can be made between: (i) direct implementation of EU law, carried out by the EU's own administrative bodies; and (ii) indirect implementation, when the administrative authorities of the Member States are instead entrusted to implement EU law.(4)

Beyond the strict dichotomy between direct and indirect implementation of EU law, there is, however, a progressive emergence of implementation and enforcement procedures in which both administrations (national and EU) participate jointly. The aim of this book is to add to the growing knowledge of the use of cooperation tools in the field of European administrative law. The aim of these conclusions is to tease out some of the trends that emerge from the several chapters, touching in particular on the sources of administrative cooperation (I.), the mechanisms of cooperation (II.), the actors involved in these mechanisms (III.), and the principles governing them (IV.). Finally, in section V., some thoughts will be provided on the future perspectives and challenges relating to administrative cooperation in the European Union.

## *I. The sources of administrative cooperation*

The existence of cooperation duties was found in all the policy areas covered in this collection, although with different levels of intensity. Interestingly, there is no obvious connection between the scope of the cooperation duties and the type of policy area or the fact that an area is of exclusive competence of the EU or shared with the Member States.

As for the source that establishes the duties of cooperation, as already mentioned in the introduction, it is already at the level of the EU Treaties that the cornerstone of administrative cooperation can be found. Indeed, on the basis of the principle of sincere cooperation set forth in Article 4(3) TEU, it can already be concluded that there exists a general duty of administrative cooperation within

(4) Th. von Danwitz, *Europäisches Verwaltungsrecht*, *op. cit.*, pp. 607 ff. J. Schwarze, *Droit administratif européen*, *op. cit.*



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the EU.(5) This provision establishes a constitutional obligation for the Union and the Member States' authorities to "assist each other in carrying out tasks which flow from the Treaties in full mutual respect" across all policy areas of EU law, setting the tone for all forms of interaction between public authorities active at different governance levels.(6) Despite the conflicting interests individual Member States may have, "effective implementation of Union law by the Member States […] shall be regarded as a matter of common interest".(7) In some of the policy areas, besides the principle of sincere cooperation, the principle of mutual recognition and its corollary of mutual trust also play a very important role – especially in horizontal cooperation. This is the case, for example, of administrative cooperation in criminal law enforcement.

Despite the establishment of the principle of sincere cooperation at treaty level, in all the policy areas covered in the book, the EU co-legislators felt the need to establish specific duties of cooperation and cooperative mechanisms. Indeed, beside this broad and general duty to cooperate, we can find specific provisions providing for duties to cooperate in legal frameworks set out in secondary EU law – both in directives and regulations – throughout the chapters. In some cases, there is also an international law framework at play – that is the case, for instance, in tax policy or climate change. In that case, the European regime is part of the wider international regulation set up by international organisations.

Soft law sources also play an important role in several of the policy areas covered. For instance, in the tax policy area, examples of use of soft law could be found in the drawing up of guidelines by the G20 to combat tax havens through stronger cooperation between national tax authorities, and in the work of the BEPS project, led by the OECD. The Commission's recommendations and communications on the SOLVIT network, in the area of internal market for services, the guidelines, recommendations and best practices of the European Data Protection Board (EDPB) on any question covering the application of the GDPR, the recommendations and opinions of the Agency for the Cooperation of Energy Regulators (ACER), in the energy field, are some other examples of the use of soft law as a tool of administrative cooperation.

(5) See *Firma Wilhem Fromme*, case C-54/81, EU:C:1982:142.

(6) D.-U. Galetta, "Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di cooperazione amministrativa dell'art. 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?", 6 *Rivista Italiana di Diritto Publico Comunitario*, 2009, pp. 1689-1700, spec. p. 1697; O. Porchia, *Principi dell'ordinamento europeo. La cooperazione pluridirezionale*, Bologna, Zanichelli, 2008, p. 5.

(7) Art. 197(1) TFEU. See also M. Macchina, "La cooperazione amministrativa come questione di interesse commune", *in* M.P. Chiti and A. Natalini (eds), *Lo spazio amministrativo europeo*, Bologna, Il Mulino, 2012, pp. 87-117.



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In general, the chapters show a complex web of obligations stemming from international and EU primary and secondary – binding and non-binding – sources. The picture that emerges, however, is also one of diversity: beyond those established by primary law, duties of cooperation (and their origins) vary for each policy field.

## *II. The mechanisms of administrative cooperation*

Although the task is fraught with difficulties, the chapters in this collection contribute to sketching a typology of mechanisms of administrative cooperation. The existence of numerous types of cooperation duties and their complexity are partly responsible for this difficulty.

One possible distinction may be drawn between mandatory and voluntary cooperation. Besides the widespread establishment of duties to cooperate with other administrative authorities, several policy areas contain mechanisms of voluntary cooperation, namely through the institution of voluntary networks, such as the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) in environmental policy. Voluntary forms of cooperation between the national supervisory authorities can also be found in the area of data protection through the establishment by the Commission and the EDPB of a "support pool of experts" or "voluntary mutual assistance".

It is also possible to differentiate between formal cooperation, based in a concrete legal framework and the possibility of informal cooperation, recognised in some policy areas. For instance, the SOLVIT mechanism, which handles complaints from citizens or businesses of one Member State concerning the application of EU law by a public authority of another Member State, is an example of a mechanism of informal cooperation. An example of formalised cooperation is that of the Joint Supervisory Teams (JSTs), coordinated by an ECB staff member, and composed of both ECB and national competent authorities (NCAs) staff.(8) In some areas, such as defence and criminal law, there is understandably little room for informal mechanisms.

The mechanisms of cooperation may also be categorised as institutional or procedural. Institutional mechanisms of cooperation are present when a body or entity is created, with representatives of several administrative bodies (or Member States), with the objective of preventing or avoiding conflict between

(8) Art. 3(1) SSM Framework Regulation. Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), [2014] OJ L 141/1.



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these bodies, or to ensure a smooth and coherent enforcement of EU law, for instance through the creation of networks, such as in the case of competition law. These bodies or entities can be created by law or through an act of private law, creating an association, for instance. Participation can also be mandatory or voluntary. Examples of institutional cooperation can be found in several of the policy areas covered, such as Europol or the European Public Prosecutor's Office (EPPO), in criminal policy, the European Data Protection Board, in data protection. Sometimes hybrid organs such as the European Defence Agency and the European External Action Service are also involved. Also, the establishment of common databases, such as in the field of asylum, can be characterised as a form of institutional cooperation.

Procedural mechanisms of cooperation can be identified when a specific administrative decision-making process or a stage of that process is established to ensure consultation or agreement between several administrative bodies (or Member States) with the same objective. One example of such mechanisms can be found in environmental law, more specifically the consultation stage of the environmental impact assessment (EIA) procedure in a transboundary context. Other examples include the authorisation procedure that must be carried out at European level when medicinal products listed in the Annex to Regulation 726/2004 are concerned (and may optionally also be followed in other cases), during which the Member States have the opportunity to submit their written comments on the draft decision.(9)

Similarly, administrative cooperation mechanisms can be categorised as vertical or horizontal. Vertical cooperation, entailing the presence of the EU and national administrative level may be found, for example, in respect of the shared management of EU funds, or the approval of new products entering the single market. In the area of banking law, the applicable legal framework also involves a two-step procedure including a draft decision at the national level and a final decision at the EU level concerning the granting or withdrawal of authorisation of banks and the assessment of acquiring a qualifying holding in a bank. Cases of horizontal cooperation can be found, for example, in the field of tax policy (through mechanisms of exchange of information) or free movement of persons and diploma recognition. The latter are cases where EU law foresees national administrative procedures leading to administrative decisions of the Member States with transnational effects throughout the EU (either directly or after a recognition procedure).

(9) Regulation (EC) No. 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, [2004] OJ L 136/1.



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Cooperation mechanisms may also be categorised on the basis of the activity they entail. On this basis, it is possible to find various types of activities which national and EU authority carry out in the framework of their cooperation activities.

First, several policy areas foresee duties of exchange of information and of notification. These are present in all the policy areas covered in this volume, but are especially prominent in tax procedures or data protection. Information exchange provides an instrument through which two or more administrative authorities make available to each other data and documents that have been collected in their own territory, in application of their domestic provisions. The exchange of information can be also institutionalised through the creation of information systems, such as the Schengen Information System, a tool for police and judicial cooperation in criminal matters, or databases, which allow the sharing of regularly updated information, such as the Union Registry of emission transactions, in the area of climate change. Alert mechanisms can be associated with the duties of exchange of information, mandating that information be provided under certain circumstances, usually without the need for a previous request. These information exchanges are characterised by a certain degree of urgency and, more importantly, by the existence of a potential safety or health risk, for instance in the areas of environmental protection or risk regulation, but also, more broadly, in Article 32 of the Services Directive.(10)

Another mechanism of cooperation is the duty to consult different Member States and/or EU institutions or bodies in the framework of a national decision-making procedure. There are also cases, namely in the environmental policy area where the decision-making procedure not only involves a consultation stage, but also prior consent by another State or the Commission.

Finally, a common example of cooperation is the establishment of duties of mutual assistance. This may represent a duty to act according to a request made by the authorities of another Member State or the Commission – acting in their name or as their "replacement". This is the case, for instance, in Article 83 of the Common Agricultural Policy Regulation,(11) which establishes an obligation for Member States to assist each other for the purposes of carrying out the scrutiny of the relevant documents. In the area of EU funds, Council Regulation No. 515/97 was specifically adopted to enumerate the forms of mutual assistance and cooperation in customs and agricultural matters in connection to

(10) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36.

(11) Regulation (EU) 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy, [2013] OJ L 347/549 (CAP Regulation).



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the European Agricultural Fund for Rural Development (EAFRD).(12) The "uniform instrument" provided by Directive 2010/24/EU in the taxation policy area is another example of legislation setting out a duty of mutual assistance, determining that the requested Member State enforce another Member State's tax claim.(13) Mutual assistance may also entail the organisation of joint operations, which may include joint investigations or joint enforcement measures in which members or staff of authorities of different Member States are involved, as provided by the GDPR, for instance. Another example is the Joint Supervisory Teams, which are coordinated by an ECB staff member and composed of both ECB and national administration staff members.

## *III. The actors of administrative cooperation*

With regard to the players involved in the administrative cooperation process within the European Union, the contributions show that here too there is a wide diversity, although administrative authorities, individuals and courts represent a constant "triangle" which is present across all policy fields examined.

### A. The administrative authorities

Administrative authorities understandably play a central role in administrative cooperation mechanisms. However, this category is not homogeneous, and several types of administrative authorities can be distinguished. In addition, it should be noted that in certain fields, such as criminal matters or defence, the administrative authorities have specific characteristics due to their areas of action. The roles and responsibilities of police and justice administrations or of the armed forces have distinct characteristics in terms of their nature, autonomy and applicable regime that have to be taken into consideration when analysing cooperation in these fields.

A first distinction can be made according to the legal system to which these authorities belong. The administrative authorities involved in cooperation are mainly authorities either from a Member State or from the European legal system. However, some policy areas also foresee the presence of international players. These are usually other international organisations, such as the World Custom Organisation (in the customs policy area), the Council of Europe (in tax matters, for example) or NATO (when it comes to administrative cooperation

(12) Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, [1997] OJ L 82/1.

(13) Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, [2010] OJ L 84/1.



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in the field of defence). In addition, the administrative authorities of third countries are regularly involved, especially those that are close to the European Union, such as candidate or potential candidate countries, or those belonging to the EEA or EFTA, as is shown in the chapters concerning the free movement of services or customs. This configuration is also particularly common in the case of issues with a broad international dimension, such as the fight against climate change. The integration of European and national authorities into this type of international network also contributes to the opening of the European administrative space, by offering opportunities for exchanges with international partners, which, in turn, can contribute to the development of best practices. This is true, for example, for the competition area, with the International Competition Network and the OECD Competition Committee and Global Forum for Competition. In other areas, such as climate change policy, the international level sets a framework which, in turn, influences EU legislation and shapes the administrative cooperation foreseen therein.

Another distinction that can be drawn is between administrative authorities with general competence and specialised administrative authorities. The former refers, in particular, to administrative authorities which carry out tasks in general areas, and which are involved, in one capacity or another, in administrative cooperation processes foreseen by EU secondary law. By virtue of the principle of institutional autonomy, Member States may decide which authorities are entrusted with the implementation of cooperation duties provided in EU law.(14) However, EU law may sometimes require the setting up of specialised authorities. For example, each Member State is to provide one or more independent authorities responsible for monitoring the application of the GDPR. The same requirements are imposed in the competition or energy policy fields.

At European level, the central administrative authority with general competence is the European Commission. However, the Commission's role in the various administrative cooperation processes can vary considerably. In general, it holds decision-making powers in areas such as competition, climate, chemical or pesticides policy. It may also intervene in an advisory capacity, or it may be required to make comments on draft national decisions (as in the GMOs or climate change policy, for example). In specific fields, the Commission's supervisory role is replaced by specialised institutions, such as the European Central Bank and the Single Supervisory Mechanism. This can be explained by the

(14) See e.g., *Horvath v. Secretary of State for Environment, Food and Rural Affairs*, case C-428/07, EU:C:2009:458, para. 49; *Fuchs and Köhler v. Land Hessen*, joined cases C-159/10 and C-160/10, EU:C:2011:508, para. 55; *Digibet and Albers v. Westdeutsche Lotterie GmbH & Co. OHG*, case C-156/13, EU:C:2014:1756, para. 33.



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Union's specialised competence in economic and monetary matters. Similarly, in the field of defence, it is the Council (rather than the Commission) which plays a dominant role, in conjunction with the Political and Security Committee (COPS), because of the politically sensitive issues involved in this policy area.

At European level, the trend towards specialisation may also be shown by the creation of agencies. Although there is no single model, the establishment of European agencies is part of an objective to strengthen the European Union's capacity for expertise, particularly at the stage of implementing European Union law. While the agencies may be consulted by the European Commission as part of various decision-making processes, as is the case in the food safety, chemicals, and pesticides policy fields, they also play an important role in other administrative cooperation processes. Indeed, European agencies are largely involved in the implementation and enforcement of EU law (as in the case of FRONTEX, the European Defence Agency, the European Securities and Markets Authority or the European Food Safety Authority) and could therefore be likened to a form of "in-house vertical cooperation". By virtue of their composition and organisation, the agencies are forums for exchange between the European and national levels. Within the European Food Safety Authority, for example, representatives of the Member States are involved as experts or are members of the Management Board.

In addition to these various administrative authorities, European networks are also important actors in administrative cooperation. An emblematic and long-standing network is the European Network of Competition Authorities (ECN). Networks consolidate cooperation between players. They can be used for a variety of purposes, such as exchanging information, making decisions, regulating a sector or promoting capacity building. For example, in the area of EU funds, the creation of an Urban Development Network was meant to promote capacity-building, networking and exchange of experience at Union level between urban authorities responsible for implementing sustainable urban development strategies. The networks are of different legal types. Most often, they bring together different types of stakeholders (as is the case, for example, in the field of freedom of movement of services or with the Network for the Implementation and Enforcement of Environmental Law (IMPEL)). The degree of formalisation of a network may vary according to the sector concerned. For example, in the energy sector, regulation of energy has been left to informal networks of stakeholders.

Finally, other types of actors may interact with national and European administrative authorities through the established mechanisms of cooperation. One example is the Council of European Energy Regulators, which is a non-profit organisation of the EU. It is a platform for cooperation between national



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regulatory authorities responsible for electricity and/or gas. Similarly, in the field of defence, given the predominance of the intergovernmental approach, cooperation at European level does not preclude bilateral and multilateral cooperation channels, between Member States and third countries. In the area of structural funds, the development of forms of cooperation has led to the creation of special bodies, such as Joint Secretariats or Mixed Monitoring Committees, responsible for supervising the running of programmes, such as Interreg.

## B. The courts

A player who cannot be ignored in the context of administrative cooperation is the courts. While their role is to intervene *after* cooperation mechanisms have been implemented, they remain essential to ensuring the legality of acts and actions resulting from administrative cooperation. In the multi-level system set up by EU law, both courts of the Union and the national courts are involved. As several chapters have shown, the potential involvement of both national and EU courts in the control of administrative cooperation may lead to problems of identifying which court has jurisdiction to review one or more steps of the cooperation, as well the extent of that jurisdiction. This concern is a recurrent theme in several policy areas, such as risk regulation, banking or data protection.

It is worth highlighting that, in certain specific sectors, national courts cooperate within networks, such as the European Judicial Network in the criminal sector. Cooperation mechanisms between judges and administrative authorities may also be foreseen. In the area of competition, for example, there is a mechanism that allows a national court to obtain information from the Commission on the existence of a possible procedure before the latter and on the likelihood that it will lead to a finding of an infringement of competition law.

## C. The individuals

Although the central players in administrative cooperation mechanisms remain the administrative authorities, individuals are the object and the very *raison d'être* of the relationships established within the framework of administrative cooperation. The purpose of administrative cooperation is to regulate certain sectors, and therefore ultimately the life of citizens, by means of decisions which may have either a general scope or identified addressees. The individuals involved do not, however, constitute a homogeneous category. Traditionally, in the field of Union law, economic operators have played an important role. However, individuals can also be taxpayers, migrants,



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consumers or persons involved in criminal proceedings. They may be the addressees of an act resulting from an administrative cooperation process, or they may be involved in a preparatory stage of the decision-making process, or they may be a third party to the decision. In the European administrative space, individuals may also act through organisations, such as NGOs (as is in the case in the environmental and risk regulation fields). It is only in the field of defence that individuals can be regarded as "recipients" who are far removed from the decision.

Under the influence of principles such as good administration contained in Article 41 of the Charter, or, specifically in the environmental field, the principles of environmental democracy stemming from the Aarhus Convention, greater consideration is given to individuals, whether by guaranteeing their rights, or greater involvement in the decision-making process, through the development of participation rights.

## *IV. The principles structuring administrative cooperation within the European Union*

As a means of implementing Union norms, the arrangements for administrative cooperation must comply with the fundamental principles of Union law. Beyond fundamental rights, which are binding on all administrative authorities when they implement Union law (on the basis of Art. 52 of the Charter), administrative cooperation should also respect certain principles of EU (administrative) law.

Firstly, the abovementioned principle of sincere cooperation, recognised in Article 4(3) TEU, is the guiding principle of administrative cooperation. It is the source of obligations imposed on national administrative authorities, but also on European authorities. These obligations are embodied both vertically and horizontally. The principle of loyal cooperation gives rise to various obligations, such as the obligation to provide information, notification and prior consultation, which are found in several of the sectors examined in this collection. In certain areas, the principle of loyal cooperation may have specific articulations. In the area of funds, for example, the partnership principle plays a role in all phases of fund management.

Secondly, the principle of mutual recognition, a central principle of the EU internal market, is widely used in the various sectors studied. Indeed, one of the effects of administrative cooperation is the adoption of acts, whatever their classification in the legal system in which they are produced, and their circulation. The operation of the principle of mutual recognition determines the legal effects these acts may have in other Member States and in the European area in general. The principle of mutual recognition is often provided for and organised



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by secondary law (as is the case, for example, in criminal matters), and provides, where necessary, for derogation mechanisms, *via* safeguard clauses or emergency measures (as is the case, for example, in environmental matters, or freedom of services and in the risk regulation area).

While these two principles relate to the articulation of institutional relations between the European and national levels, other principles aim at guaranteeing the fundamental rights of individuals who are involved in the relations established within the framework of administrative cooperation mechanisms. First of all, the principle of good administration plays an important role, because it provides a common procedural framework for acts and actions carried out in the context of administrative cooperation. The wording of Article 41 of the Charter of Fundamental Rights could have left some doubt as to whether the right to good administration could be invoked not only against the "institutions, bodies, offices and agencies of the Union", as explicitly mentioned in the provision, but also against national authorities, which are not explicitly referred to. However, based on the EU general principle of good administration, the requirements of the right to good administration, as detailed in Article 41(1) and (2), can be relied on against national authorities when they implement EU law. These requirements may also be specified by EU secondary legislation, referring, among others, to the right to be heard or the duty to act in a reasonable time (as, for example, in the case of customs, tax, Schengen or climate policies). Similarly, good administration guarantees may arise from the General Data Protection Regulation, which applies to all sectors because of the production and circulation of data generated by administrative cooperation.(15)

The existence of the principle of good administration therefore makes it possible to establish a common frame of reference for administrations in the European administrative area. This does not entail, however, a uniformity of administrative procedures within the European Union, as the latter does not have general competence in this area and this question continues to be governed at national level by the principle of procedural autonomy. The principle of good administration tends, however, to limit its scope, by encouraging convergence of the applicable procedural standards, even if some room for manoeuvre remains due to the formulation of procedural requirements. The existence of a certain degree of diversity can create difficulties, especially in areas where a double set of standards may be applicable, as in banking matters. Since both the ECB and NCAs, *i.e.*, EU and national administrative authorities, are involved in the SSM's decision-making procedures, both EU and national administrative

(15) It should be noted, however, that in criminal matters, because of the type of data involved, specific legal regimes may apply.



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standards may be applicable to one and the same decision-making procedure. The choice for the application of EU administrative standards may eventually need to be adhered to by the ECB and NCAs given the cooperation arrangements in place within the Single Supervisory Mechanism.

Finally, the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights (and the principle of effective judicial protection) also play a central role. In this context, several chapters highlight how the judicial control of acts resulting from administrative cooperation processes may be challenging because of the composite nature of the decision-making process. The first problem which emerges is that of the court which has jurisdiction to review an administrative act: this question is resolved by reference to the principle of territoriality of administrative law. At the same time, however, in the context of the implementation of Union law, any solution devised with a view to reviewing administrative acts resulting from co-administration processes must respect the principle of effective judicial protection and the right to an effective remedy, as well as the case law of the Court of Justice of the European Union.(16) The latter has had opportunity to intervene in several policy areas covered in this collection, such as tax matters,(17) the banking sector(18) or funds.(19) However, in this respect, important questions remain, and even when the Court has intervened, not all the questions have been resolved, as it is noticeable in the case of the banking, data protection, risk regulation or environmental policies.

Finally is it interesting to note that, in addition to the courts, depending on the sector, there may be other forms of control of administrative cooperation. These include the Court of Auditors of the European Union, the Ombudsman (who has been active, for example in the context of the Schengen policy) or the Data Protection Officer.

## *V. Perspectives and challenges*

Administrative cooperation is a key element in the organisation and development of the European administrative area. While indirect administration continues to exist, co-administration has become increasingly present, creating

(16) See, for example, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, case C-432/05, EU:C:2007:163; *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, case C-222/86, EU:C:1987:442.

(17) *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*, case C-682/15, EU:C:2017:373.

(18) See in banking sector, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, case C-219/17, EU:C:2018:1023.

(19) See *Oleificio Borelli SpA v. Commission of the European Communities*, case C-97/91, EU:C:1992:491.



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a horizontal and vertical web of relations involving different legal orders even beyond the EU itself. This web can be characterised as a manifestation of both regulatory diversity and regulatory complexity.

On the one hand, administrative cooperation processes are diverse and are capable of leaving more or less room to national regulatory choices. These depend on the content of EU secondary legislation, the degree of precision of the obligations formulated therein, the room for manoeuvre left to national authorities, and the place given to certain fundamental principles of the Union, such as the principle of mutual recognition. The use of administrative cooperation and the definition of its procedures are thus primarily the product of political choices. As the various analyses have shown, one characteristic of administrative cooperation is its flexibility and adaptability.

On the other hand, these characteristics may also be regarded as increasing the complexity of the organisation of the European administrative area, and that of the European Union more generally. Such complexity may create difficulties not only for the national administrations, but also for citizens. Sometimes it may be hard to understand which authority has which competence, contributing to what appears to be less transparent decision-making procedures. Admittedly, it can be argued that these mechanisms are often developed to respond to already existing transnational issues (a person arrested in one Member State and prosecuted in another, a medicine authorised in one State and circulating in another, and so on) and to provide solutions to remove obstacles generated by the crossing of borders. However, the regulatory complexity of the decision-making process may slide into regulatory "opacity", which might eventually undermine the legitimacy of the solutions which these mechanisms are meant to provide.

While the contributions in this book have shown that administrative cooperation patterns are present in virtually all EU policy fields, the legal-doctrinal nature of our investigation has not allowed us to tackle the important questions of the practical operation and effectiveness of administrative cooperation within the European Union. Administrative cooperation can be seen as a way of strengthening the effectiveness of the enforcement of Union law, including in areas that are not characterised by supranationality (such as the defence sector). Further empirical work should seek to uncover which mechanisms of administrative cooperation (and under which conditions) seem to be better suited to fostering effective implementation and enforcement of EU law, as well as the extent to which the operation of these mechanisms provides for effective judicial control and overall respect for the rule of law.



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