

CHAPTER II

PROCEDURES IN THE EUROPEAN COMPOSITE
ADMINISTRATION

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I
THE ROLE OF PROCEDURE IN THE LAW
OF THE EUROPEAN UNION

A. THE FURTHER DEVELOPMENT OF ADMINISTRATIVE
PROCEDURE LAW BY THE EUROPEAN UNION

ADMINISTRATIVE procedure law in the European Union absorbs the dominant tendencies of public law: external Europeanization and internationalization of the state as well as internal development of processes of coordination between public authorities and private persons. European administrative procedure law conveys new approaches of regulation to the law of the Member States and leads to a “re-orientation.”¹ At the same time it benefits the harmonization of enforcement in a federal European Administration.

1. NEW APPROACHES TO ADMINISTRATIVE PROCEDURE LAW

The innovations brought about by European administrative procedure law induce new outlooks in the Member States’ systems of administrative law, thereby contributing to a “re-orientation” of national concepts of administrative procedure. A primary component of the new European procedural orientation is the concept of an informed public or the involvement of private persons in the execution of administrative tasks (“Selbstverantwortung” – self-responsibility). One significant example of this is the strategic environmental assessment procedure introduced by the EC.²

1. Eberhardt Schmidt-Aßmann, *Der Verfahrensgedanke im deutschen und europäischen Verfahrensrecht*, in II GRUNDLAGEN DES VERWALTUNGSRECHTS § 27 MN. 71 (Hoffman-Riem et al., ed., 2008).

2. See Javier Barnes, *Collaboration among Public Administrations through Domestic Administrative Procedure*, in this Volume.

This innovative force of European Law is considerable and might be due to its character as new law. New law can more easily absorb the current state of debate and is less dependent on old concepts. In contrast, national law is sometimes resistant to novelty. German law's central focus on codification vividly illustrates how inertia may be inherent in a national legal system.

2. FEDERAL HARMONIZATION OF ENFORCEMENT THROUGH PROCEDURE

At the same time, European administrative procedure law is supposed to harmonize national administrative enforcement. The EC has entrusted the majority of the enforcement of Community Law to Member States' authorities.³ Administrative enforcement is "a momentous process of realization and above all a strong source of different results in the application of law."⁴ In any given area of administration, these varying results have to be harmonized, bearing in mind the interests of the Community as a whole. Therefore, it is not sufficient to enact uniform or harmonized substantive laws; European Law becomes concerned with rules of procedure and organization.

3. Reinhard Priebe, *Die Aufgaben des Rechts in einer sich ausdifferenzierenden EG-Administration*, in STRUKTUREN DES EUROPÄISCHEN VERWALTUNGSRECHTS 71 *passim*, (Schmidt-Aßmann & Hoffmann-Riem, eds. 1999).

4. Rainer Wahl & Detlef Groß, *Die Europäisierung des Genehmigungsrechts am Beispiel der Novel Food-Verordnung* in DVBl 2, 3 (1998); see generally Udo Di Fabio, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung* in 56 VVDStRL 235, 266 (1997); ARMIN HATJE, DIE GEMEINSCHAFTSRECHTLICHE STEUERUNG DER WIRTSCHAFTSVERWALTUNG 111-114 (1998). See GERNOT SYDOW, VERWALTUNGSKOOPERATION IN DER EUROPÄISCHEN UNION, 117 *passim* (2004), for extensive discussion of individual models of enforcement.

3. THE INTERACTION OF DIFFERENT FUNCTIONS

These different functions of European administrative procedure law as a requirement for the Member States' legal systems can be realized and reconciled by certain procedural rules, but they can come into conflict as well:

– The promotion of greater public participation or allocation of responsibility for the achievement of political objectives to private persons, as has been done in environmental law, is part of the modern understanding of administrative procedure. At the same time the movement toward inclusion offsets the self-interest of national administrations and directs them towards the achievement of European political objectives.

– Conversely, a modern understanding of procedure can lead to greater administrative discretion. However, if national self-interests regain priority in a system of localized discretion, the federal European system may be weakened.

B. THE ROLE OF ADMINISTRATIVE PROCEDURE IN THE FEDERAL ADMINISTRATIVE STRUCTURE OF THE EUROPEAN UNION

The harmonization of the Member States' administrative activity also takes place through the medium of procedure, by judicial minimal harmonization with the aid of the legal concept of "effet utile," by legislative harmonization of procedural rules and finally by the involvement of member states' administrations in an composite administration.

1. BASIC HARMONIZATION BY THE ECJ: "EFFET UTILE"

The current state of Community Law provides for the application of general national administrative law and national law on administra-

tive justice when national administrations are used for the enforcement of European Law.⁵ It is obvious that due to the different systems and needs of any particular national administration, these areas of law must be subject to change.⁶ Therefore, the requirements of European Law go beyond precise requirements derived from secondary legislation and include general unwritten principles of administrative law and the law on administrative justice.⁷

Through the application of these general principles, the Community Law perspective has often revealed inherent weaknesses in the doctrines of national general administrative law.⁸ This development is less an innovation than a critical scrutiny of traditional doctrines triggered by Community Law.⁹ In known cases regarding interim relief, implementation of directives by administrative guidelines, and standing,¹⁰ the requirements of community law have acted as a rationalizing element and have thereby caused a “productive irritation” of national administrative law.¹¹ Such change does not, however, amount to uncritical adoption of Community Law ideas. The case law of the European Court of Justice may well be at the limits of its jurisdiction.¹² Its decisions are not always of a precision capable of convincing practi-

5. Another solution is conceivable in a federal system: see the provision of § 1 Abs. 2 S. 1 BVwVfG (Federal Administrative Procedure Act), which is not to be applied because of the exclusion clause of § 1 Abs. 3 BVwVfG.

6. See GIOVANNI BIAGGINI, *THEORIE UND PRAXIS DES VERWALTUNGSRECHT IM BUNDESS-TAAT...*, summary 308 *passim*. (1996), *in re a parallel “blindness towards federalism” regarding general administrative law in the European Union, as in the case of Switzerland*.

7. See ROBERTO CARANTA, *Judicial Protection against Member States: A New Jus Commune Takes Shape in 32 CMLR 703*(1995), *in this context*.

8. See also Jean-Marie Woehrling, *NVwZ* 462-467 (1998) ; Karl-Heinz Ladeur, *EuR* 227 *passim* (1995); Friedrich Schoch, *2 DV Beih.* 135, 144 (1999).

9. Schoch, *Auflösen von Verkrustungen, also gleichsam ... die Beseitigung eines rechtlichen Reformstaus DV Beih.* 2, 135, 144 (1999).

10. Ladeur, *EuR* 227 *passim* (1995); Schoch, *supra* note 9, 144.

11. Ladeur, *supra* note 8, 229 *passim*, *in re: the implementation of directives through administrative provisions*.

12. See SCHOCH, *DIE EUROPÄISIERUNG DES VERWALTUNGSGERICHTLICHEN RECHTSSCHUTZES* 47 *passim* (2000).

tioners and academics.¹³ To meet these concerns regarding general administrative law, legal concepts must be scrutinized in advance for their persuasive force on the European level and must contain clear points of reference and reasonable patterns of thought.¹⁴

2. HARMONIZATION OF ADMINISTRATIVE PROCEDURE IN THE MEMBER STATES

Fewer legal challenges are created by the requirements of secondary legislation that reshape the administrative procedure law of the Member States or—as in the cases of the Community Customs Code¹⁵ and the Schengen Borders Code¹⁶—even replace it completely.

3. COMPOSITE ADMINISTRATION

The last step of federal harmonization of enforcement is reached by the composite administration. Composite administration is the community's response to the need for a coherent European administration. It is mainly created and safeguarded by procedure. The need for a composite administration grows proportionately to the increase in transnational administrative activities of the member states ("Entgrenzung"). The administrations in Europe come together to form networks of public authorities and thereby take over tasks and functions which could have been carried out by a different and more unified organization.¹⁷ The processes described below take place

13. For example the decisions in Emmott (Rec.1991,p.I-4269) and Ciola (Rec.1999,p.I-2517).

14. See ANDREAS VOSSKUHLE, *KOMPENSATIONSPRINZIP* 86 *passim* (1999), *for a national perspective on such developments*,

15. Regulation (EC) 2913/92.

16. Regulation (EC) 562/2006.

17. See Schmidt-Aßmann, in HOFFMANN-RIEM ET AL, *I GRUNDLAGEN DES VERWALTUNGSGRECHTS* § 5 Mn. 25 ff. (2006); *for a more concise account*, see also Helmuth Schulze-Fielitz,

under the cover of administrative procedure law because in this instance we are dealing with the cooperation of organizationally separate administrations. But they essentially approximate a single organization, as the involved parties, i.e. the Commission and some or all member states, are determined in advance and do not change depending on the subject matter. Because of administrative procedure law, a *unified structure of enforcement* is developed.

Something like this is to a large degree unknown to current German legal thinking, which is rooted in the idea of a federal state. Here, there are hardly any federal mechanisms of control of the state administration.¹⁸

Die Verwaltung im europäischen Verfassungsgefüge, in VERWALTUNG UNTER DEM EINFLUSS DES EUROPARECHTS 91 *passim* (Wilfried Erbguth & Johannes Masing eds., 2006).

18. Möllers, GVwR I, § 3 Mn. 27.

II PROCEDURES IN THE EUROPEAN COMPOSITE ADMINISTRATION

A. FUNDAMENTAL STRUCTURES OF THE EUROPEAN COMPOSITE ADMINISTRATION

“THE administration of the area of the Union is carried out in a composite of information, decision making and control between the executives of the member states and the Union.”¹⁹ This section addresses the links between decision-making and administrative procedure law.²⁰ We find such connections in varying intensity throughout the European Composite Administration. Most obvious are the cases in which the Commission acts as supervisory authority towards the member states. Supervision may be on a case-by-case basis or may in some areas be extended to continuous control.

Most cases involving planning take place in a vertical relationship of supervision and control. The Member States’ authorities which apply European Law are connected to a genuine composite administration where their decisions, particularly about the common area of competition, have sustained effects on the other Member States. Finally, special procedural requirements ensure that decisions which apply throughout the Community will be structured and legitimized.

19. Schmidt-Aßmann, GVwR I (note 17), § 5 MN. 16.

20. See V. Bogdandy, GVwR II § 25, *supra* note 1., for further discussion of informational interlocking (the informational relationships between different branches of the European Administration).

1. VERTICAL ADMINISTRATIVE LINKS

a) Case-Related Supervision

Case-related supervision is the situation where the lawfulness of a measure of a member state depends upon the cooperation or approval of the European Commission.²¹

– *Customs Procedure*: In principle, customs authorities of the member states are responsible for the enforcement of the customs provisions of Community law.²² Certain decisions which are significant for tax law or are likely to have sustained effects on the Community budget (additional charges, refunds, or remissions) demand a prior decision of the Commission.

– *Supervision of State Subsidies*: Subsidies by national governments are determined according to national administrative procedure law. However, if state aid falls into the scope of Article 87 EC, the Member State is under an obligation to stay the allocation proceedings and to notify the Commission of the subsidy in question.²³

– *Control of Individual Decisions in Commercial Law*: The Commission has a right to determine cases which are of relevance to the Common Market. Examples are decisions concerning *traffic or energy infrastructure*.

– *Competing Permissions*: A similar structure can be found in merger control law in the case of competing permissions under the EC Merger Regulation.²⁴ The Commission has exclusive jurisdiction to allow a merger which is of relevance to the whole Community, under Article 21 of the Merger Control Regulation. Member States cannot prevent such a merger by reference to their own national

21. See MEIKE EEKHOFF, DIE VERBUNDAUFSICHT 15 *passim* (2006), for extensive discussion of modern control mechanisms.

22. Regulation 2913/92 (Community Customs Code); Regulation 2454/93 (Implementation Regulation).

23. Art. 88 s. 3 EC; Art. 2 and 3 Regulation 659/99 (detailed rules for the application of Article 93 of the EC Treaty), OJ 1999, No. L 84, p. 1; see Markus Ludwigs, *Die Verordnung (EG) Nr. 659/1999 und die neuere Rechtsprechung der Gemeinschaftsgerichte zum Beihilferechtsrecht*, in Jura 2006, 41 *passim*.

24. Regulation 139/2004, OJ 2004, No. L 24, p. 1.

competition law. Nonetheless, Article 21 §4 enables the Member States to place a hold on the merger by reference to other national law, e.g. media law. Since such a hold can effectively prevent the merger, Article 21 § 4 stipulates that the Community will supervise this application of national law. Article 21 § 4(2) acknowledges certain interests as being legitimate: public security, plurality of the media, and prudential rules.²⁵ If national law intends to prevent the merger for reasons other than those mentioned, the “public interest” in question must be recognized by the Commission according to Article 21 § 4 (3).

b) Continuous Supervision: “Common Administration”

A more intensive form of continuous supervision can be observed in the institution of “shared management” of funds according to EC Financial Regulation Art. 53 §§ 1, 3,²⁶ by which the Commission controls the proper use of funds in the fields of financing the agricultural market and structural funds.

– *Clearance of Accounts Procedure*: Clearance of accounts is the starting point for this supervision of the European Agricultural Guarantee Fund (EAGF)²⁷ financing of the agricultural market.²⁸ In the agricultural common financing framework, measures such as refunds for exportation of agricultural products to third countries and intervention in agricultural markets are financed centrally from the Community budget, Regulation 1290/2005 Article 2 § 2.²⁹ These measures are implemented by the Member States by means of so-called paying agencies, Article 6 § 1. At first the Member States receive reimburse-

25. This refers particularly the provisions about the control of banks, the stock market and insurance companies.

26. Regulation 1605/2002, OJ 2002, No. L 248, p. 1. See BETTINA SCHÖNDORF-HAUBOLD, DIE STRUKTURFONDS DER EUROPÄISCHEN GEMEINSCHAFT 143 *passim* (2005); Wolfgang Schenk, *Die Leistungsverwaltung der EG als Herausforderung für den Europäischen Verwaltungsverbund*, in DER EUROPÄISCHE VERWALTUNGSVERBUND 265, 286 *passim* (Eberhard Schmidt-Aßmann & Bettina Schöndorf-Haubold eds., 2005).

27. European Agricultural Guarantee Fund (EAGF), before: Guarantee Section of the European Agricultural Guidance and Guarantee Fund.

28. See RUDOLF MÖGELE, DIE BEHANDLUNG FEHLERHAFTER AUSGABEN IM FINANZIERUNGSSYSTEM DER GEMEINSAMEN AGRARPOLITIK (1997); WOLFGANG SCHENK, STRUKTUREN UND RECHTSFRAGEN DER GEMEINSCHAFTLICHEN LEISTUNGSVERWALTUNG 242 *passim* (2006).

ments in anticipation of the tasks to be financed under Article 14 § 1. At the time of clearance of accounts at the end of the payment period, the Commission decides which expenditures are to be excluded from Community financing because they are inconsistent with Community law, under Regulation Article 30 et seq. Prior to a decision to exclude certain expenditures, a procedure of negotiation with the Member State takes place.³⁰ The Commission has no formal authority to give instructions while Member States are actually spending Community reimbursements. Nonetheless, this *ex post* control becomes a continuous supervision since the Commission, during the financing of funds, expresses its view on what expenditures may be financed in non-binding communications. In effect, these communications are close to commands: according to the ECJ,³¹ expenditures cannot be regarded as inconsistent with Community law if the Member State abides by these non-binding instructions.³² Thus, a continuous hierarchy between the Commission and national administrations develops in the area of indirect implementation.³³

– *Structural Funds (Implementation Period)*: using the mechanisms of financial control in the legal framework for structural funds, the Community co-finances national state subsidies from the Community budget.³⁴ Community funds are passed on to the final beneficiary by the Member States, who make the concrete allocation decision. In a system of “control of control,” the Commission controls the administrative systems of the Member States. The Commission can sanction misconduct by the Member States by cutting their share of the funds.³⁵ In this area the density of administrative instruments has become so intense that we must talk about a “Common Administration” rather than administrative cooperation.³⁶

29. Regulation 1290/2005 on the financing of the common agricultural policy, OJ 2005, No. L 209, p. 1, replaced on 01/01/2007 by Regulation 1258/1999, OJ 1999, No. L 160, p. 103.

30. Art. 8 § 1 Implementation Regulation 1636/95.

31. *ECJ*, Case 11/76, 245 *passim* European Court Reports 1979, ; *ECJ*, Case 18/76, 343 *passim*, European Court Reports 1979.

32. Ines Härtel, Handbuch Europäische Rechtsetzung, 2006, § 13 MN. 34.

33. See Hatje, WIRTSCHAFTSVERWALTUNG 167, *supra* note 4.

34. For further discussion of the planning stage, see *infra* this Part. See also SCHÖNDORF-HAUBOLD, *supra* note 27.

35. The legal foundation for cutting Member States' funds is Regulation (EC) 1083/2006, laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund.

36. SCHÖNDORF-HAUBOLD 37 *passim*, *supra* note 26.

c) Planning in the Composite

The planning procedures in the European Composite Administration are also mostly vertically structured. This vertical structure presumably occurs because institutions are not yet strong enough to delegate distributive decisions. The most important example of such planning takes place in the context of the European Structural Funds,³⁷ by which approximately a third of the Community budget is distributed. The EC has installed a model of “Common Administration”³⁸ wherein planning is controlled by intense and formal normative development as well as by effective informal instruments.

2. THE COMPOSITE ADMINISTRATION IN COMPETITION LAW AND THE LAW OF REGULATION

An exclusively vertical perspective, with its connected legal concepts, is no longer sufficient where the legal and factual effects of enforcement of EC law are not limited to one Member State. In an increasing number of policy areas, the enforcement of Community Law requires only that administrative decisions of the Member States are legally valid in one or perhaps a few Member States. However, the practical effects of most decisions will reach farther, particularly in the common area of competition. Decisions by national authorities in competition law or regarding the regulation of telecommunications have broad effects throughout the Community. Therefore, in addition to the legal instruments described above, *administrative mechanisms of standardization* are necessary. Such mechanisms include the right of the Commission to be informed, to supervise, or even to carry out

37. See SCHÖNDORF-HAUBOLD, *supra* note 26. For more recent discussion, see Christian Konow, *Europäische Strukturpolitik*, ZG 2005 328 *passim*, p. 328. Further examples of common planning can be found in environmental law, like the sanctuary network “Natura 2000” based on the FFH Directive (92/93/EEC).

38. This term was coined by Bettina Schöndorf-Haubold.

a measure itself, as well as the issuance of general guidelines and the creation of complicated consolidation procedures, as in the new legal framework for telecommunications.³⁹

In the installation of a highly integrated European Composite Administration⁴⁰ through Implementation Regulation 1/2003 (regarding EC Articles 81 and 82), the European legislator has chosen a model of application of legal norms in *competition law* which compared to previous mechanisms constitutes a new level of administrative cooperation.⁴¹ The Commission and national authorities are connected in a new style of unified application of competition law,⁴² in which national authorities are to an extent made into an administrative substructure of the Commission. They are removed from the national hierarchy and are integrated into a network of information, action, and decision-making.

Parallel developments can be observed in *telecommunications law*. Because of the dynamism of the market, the new legal framework for telecommunications emphasizes more flexible regulation, i.e., greater discretion for national regulation authorities.⁴³ At the same time, Article 95 EC in general and

39. See *infra* note 45.

40. See Alec Burnside & Helen Crossley, *Co-operation in Competition: a New Era?*, 30 E.L. REV. 234 (2005); James S. Venit, *Brave New World: the Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty*, 40 CMLR 545 (2003); Heike Jochum, *Das Bundeskartellamt auf dem Weg nach Europa*, 94 VERWARCH 512 (2003).

41. The contents are for the most part sketched out in the “White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty,” COM 99 (101) final, OJ 1999, No. C 132, p. 1. The draft of the Commission dates from 27/09/2000, COM (2000) 582 final, OJ 2000, No. C 365 E, p. 284. See Claus Dieter Ehlermann, *The modernization of EC antitrust policy: A legal and cultural revolution*, 37 CMLR 537 (2000).

42. See Schmidt-Aßmann, GVwR I, , § 5 MN. 26 f, *supra* note 1, for further discussion of the development of networks.

43. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, OJ No. L 108 of 24/04/2002, p. 33 (Framework Directive); Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, OJ No. L 108 of 24/04/2002, p. 7 (Access Directive); Directive 20/2002/EC on the authorisation of electronic communications networks and services, OJ No. L 108 of 24/04/2002, p. 21 (Authorisation Directive); Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, OJ No. L 108 of 24/04/2002, p. 51 (Universal Services Directive); Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ No. L 201 of 31/07/2002, p. 37 (Directive on privacy and electronic communications);

the European law of telecommunications in particular seek to establish a level playing field for competition. To avoid conflict with regulation of competition, regulatory decisions which are highly relevant to the Common Market must be increasingly focused on a common European interest. From the European point of view, national administrations, tied to their respective national government, are seen as potentially biased toward national interests. To control bias, the Framework Directive creates the European regulatory composite administration in the guise of European regulatory authorities under the auspices of the Commission, a network of European administrations.⁴⁴ In this regulatory composite, we find an independent concept of European law whose task it is to safeguard the uniform application of law and to prevent distortions of competition. A network of administrations designed in this way in the European administrative area evades exclusively national statutory control and judicial review by national administrative courts.

3. COMMUNITY-WIDE ADMINISTRATION

Special links between administrative procedure law and structure are necessary where decisions are supposed to be made uniformly for the whole administrative area. In addition to centralized decision-making procedures, there are increasing contexts in which single national authorities are given community-wide decision-making responsibility.

Directive 2002/77/EC on competition in the markets for electronic communications networks and services; OJ No. L 249 of 17/09/2002, p. 21 (Competition Directive).

44. Karl-Heinz Ladeur & Christoph Möllers, *Der europäische Regulierungsverbund der Telekommunikation im deutschen Verwaltungsrecht*, in DVBl 2005, 525 *passim*; Hans-Heinrich Trute, *Der europäische Regulierungsverbund in der Telekommunikation*, in FS PETER SELMER 565 *passim* (2004). For analysis distinguishing between other network areas, see Gabriele Britz, *Vom Europäischen Verwaltungsverbund zum Regulierungsverbund?*, 41 EuR 46 (2006); Felix Arndt, *Vollzugssteuerung im Regulierungsverbund*, 39 DV 100 (2006). See also Hans C. Röhl, *Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden?*, JZ 2006, 831, 837.

d) Central Administration

Central administrative competences on the European level exist only in selected fields and to a limited extent. For our purposes, such procedures are of little interest. This is because a procedural ability to explicitly create coherence and legitimize results is not as relevant when the centrally legitimated Commission makes uniform decisions at the end of the procedure.

Some typical examples are the central authorization of medicinal products according to Regulation (EC) 726/2004⁴⁵ and the authorization of genetically modified food and feed according to Regulation (EC) 1829/2003.⁴⁶ Such central authorization procedures are based on an informal and tight-knit network woven around the central information processing organ, typically a European authority or agency.⁴⁷ In close contact with the national administrations and their accumulated expertise, these European authorities contribute to the creation of a European repository of information as a foundation of decisions valid throughout Europe. The core of this informational composite is formed by the particular committee responsible for the decision.⁴⁸

e) Community-Wide Active Administration of the Member States

More interesting from an administrative procedure law perspective are Community-wide administrative competences of national authorities.⁴⁹ For decisions which are valid Community-wide, admin-

45. See BRIGITTE COLLATZ, DIE NEUEN EUROPÄISCHEN ZULASSUNGSVERFAHREN FÜR ARZNEIMITTEL (1996); Oliver Blattner, Europäisches Produktzulassungsverfahren 2003; Sydow, Verwaltungskooperation 223, *supra* note 4.

46. For additional information, see Sydow, Verwaltungskooperation 232, *supra* note 4.

47. Bogdandy, GVwR II, § 25, *supra* note 1. A particularly good example is Daniel Riedel, *Die Europäische Agentur für Flugsicherheit im System des Gemeinschaftsrechts*, in DER EUROPÄISCHE VERWALTUNGSVERBUND 103 (Eberhard Schmidt-Aßmann & Bettina Schöndorf-Haubold, eds., 2005)..

48. See, e.g., Art. 61 Regulation 726/2004.

49. See Dieter H. Scheuing, *Europarechtliche Impulse für innovative Ansätze im deutschen*

istrative procedure law must ensure the coherent application of law in order to enable widespread acceptance of such decisions as binding on other Member states. Different models are described below:

– *Reference Decisions*: After a medicinal product is authorized in one Member State the product is authorized in the other Member States through a simplified procedure.⁵⁰ The original decision, called the reference decision, determines the authorization procedure. Indirectly, it also determines the decision in the other Member States: If divergent outcomes occur, the Commission decides whether other Member States have a duty to authorize the medicinal product. The ability to make an independent national decision is replaced by the opportunity to participate in the comitology procedure.

– *Transnational Decisions with a Duty to Cooperate*: Where there is a duty to cooperate, the decisions of a Member State have Community-wide effect.⁵¹

Verwaltungsrecht, in INNOVATION UND FLEXIBILITÄT DES VERWALTUNGSHANDELNS, 289, 331 (Hoffmann-Riem & Schmidt-Aßmann, eds., 1994); Eberhard Schmidt-Aßmann, *Verwaltungs-kooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, EuR, Vol. 31, 270 *passim* (1996); EBERHARD SCHMIDT-ASSMANN., ORDNUNGSDIEE, Ch. 7 MN. 18 *passim*; Gernot Sydow, “Jeder für sich” oder “einer für alle,” in PLURALITÄT DES RECHTS 9 (Bauschke, Gabriele et al. eds., 2003); Gernot Sydow, *Vollzug des europäischen Unionsrechts im Wege der Kooperation nationaler und europäischer Behörden*, DÖV 2006, 66 *passim*; DANIEL RIEDEL, DIE GEMEINSCHAFTSZULASSUNG FÜR LUFTFAHRTGERÄT 152 (2006).

50. For example, a simplified procedure is the rule in cases of the authorization of medicinal products according to art. 28 et seq. Directive 2001/83/EC. See Jens Hofmann, RECHTSSCHUTZ UND HAFTUNG IM EUROPÄISCHEN VERWALTUNGSVERBUND 110 *passim* (2004). A similar instance is the recognition of authorizations granted by another Member State according to art. 4 Directive 98/8/EG (Biocidal Products).

51. For discussion based on the Novel Food Regulation 258/97, see Wahl & Groß 2, *supra* note 4; DETLEF GROSS, DIE PRODUKTZULASSUNG VON NOVEL FOOD 133 (2001); Sydow, *Verwaltungs-kooperation* 174 *passim*, *supra* note 4; Hermann Pünder, *Verwaltungsverfahren*, VerwR, § 14 MN. 51 *passim* (Erichsen & Ehlers, eds.) The Regulation (EC) 1829/2003 on genetically modified food and feed has excluded essential areas from the scope of the Novel Food Regulation and has made them subject to a centralized authorization regime. However, the Novel Food Regulation has not been repealed. The Community-wide authorization of the release of genetically modified organisms according to Article 12 *passim* Directive 2001/18/EC is styled like the Novel Food Regulation. See Hofmann, *Rechtsschutz und Haftung* 116 *passim*, *supra* note 50. The same principle is applied to the administrative procedure for the release of dangerous substances according to Directive 67/548/EEC (in the version of 92/32/EEC): Here, only a notification is provided for (art. 5, 7 Directive). However, the competent Member State may prohibit the release (art. 10 Directive) and is under an obligation to

The participation of the other Member States is guaranteed by giving them veto power. In case of a veto there will be a decision by the Commission. The Member States participate through the comitology procedure in the Commission's decision.

– *European Administration*: A third degree of common administration is reached when a national authority can make decisions on the basis of EC law which enjoy Community-wide validity without the external participation of the other Member States. Such an arrangement can so far be found primarily in the field of authorization for the provision of services, and less often in the field of authorization of products. We also find the recent European driving license within this category.

– *Private Community Administration/Notified Bodies*: The so-called Notified Bodies, which act for the EC in the framework for product authorization, constitute an alternative to national administration. Notified Bodies are primarily private persons who have been authorized by the Member States (“accredited”) and to product authorizations (“certifications”). The system of Notified Bodies is an administrative solution which can operate without national administrations. By choosing this solution, the EC has created a genuinely European administrative structure.⁵²

B. CONCEPTS OF JUDICIAL REVIEW AND MECHANISMS OF LEGITIMATION IN THE COMPOSITE ADMINISTRATION

1. CONCEPTS OF JUDICIAL REVIEW

The diffusion of responsibility in a composite administration leads to problems regarding the principle of the rule of law, because of the

do so if, due to an objection of another Member State, the Commission has decided thus (art. 18 Abs. 2, 29 Directive). For more discussion of the transnational administrative act, see *Bumke*, GVWR II, § 35 MN. 119 *passim*, *supra* note 17.

52. See RÖHL, AKKREDITIERUNG UND ZERTIFIZIERUNG IM PRODUKTSICHERHEITSRECHT 22 *passim* (2000); Hermann Pünder, *Zertifizierung und Akkreditierung*, ZHR, Vol. 170, 567 *passim* (2006).

confusing system of judicial review in Community law characterized by the principle of separation. The jurisdiction to review and declare a legal act inapplicable is strictly divided in the judicial review system of the EC Treaty according to the European or national levels of the courts. In the judicial review system of the composite administration, relief is granted either by the European courts or by the national courts acting as Community courts, based on the subject matter of the complaint.

Gaps in legal protection can initially arise due to the requirement of clear jurisdiction of the courts. If the various administrative contributions are not made sufficiently transparent this may hinder judicial review by the competent court.⁵³ Additionally, there is the requirement of coherent judicial review:⁵⁴ Doctrines such as administrative finality and rules of preclusion, acceptable in a one-dimensional law of procedure, may adversely affect effective judicial review of cross-border and multidimensional administrative action.⁵⁵ Deficits in legal protection are particularly problematic in the cracks between the connected instruments of judicial review.

2. DEMOCRATIC LEGITIMATION AND THE COMPOSITE ADMINISTRATION

Administrative legitimation in the European Composite Administration is based on the principle of separation as well: National and European contributions are independently legitimized. For this rea-

53. See Hofmann, *Rechtsschutz und Haftung* 241-99, *supra* note 50. For more discussion of the requirements of transparency, see Schmidt-Aßmann, *GVwR I*, § 5 MN. 54; V. Bogdandy, *GVwR II*, § 25 MN. 33; Gerd Winter, *Kompetenzverteilung und Legitimation in der Europäischen Mehrebenenverwaltung*, 40 *EuR* 255, 271 (2005).

54. Schmidt-Aßmann, *supra* note 53.

55. Hofmann, *Rechtsschutz und Haftung* 266, *supra* note 50; for further analysis, see David, *Inspektionen* 338, 350 *passim*; Wolfgang Weiß, *Schnittstellenprobleme des europäischen Mehrebenenverwaltungsrechts*, 38 *DV* 517, 536 (2005).

son, administrative legitimation in the European Composite Administration is necessarily multidimensional. European and national systems of legitimation must be connected.⁵⁶

Therefore, sufficient clarity in decision-making has to be emphasized.⁵⁷ As far as possible, the responsibility for respective contributions must be attributable to the individual administrations involved. This enables parliaments and citizens, the sources of democratic legitimacy, to reliably assess the effects of their own administration's contributions. However, the influence, in some areas intense, of other Member States' administrations and particularly of the Commission makes the responsibility of individual administrations indistinct. The interconnections and linking of administrations in Europe makes identification of the way that any given individual contribution affects a particular decision significantly more difficult. In the long run it will be necessary to consider additional mechanisms of legitimation, in which transparency and participation will have a significant role to play.⁵⁸

56. Trute, GVwR I, § 6 MN. 102 *passim*.

57. SCHMIDT-ASSMANN., ORDNUNGSDIEE, chapter 7 38, 43.

58. See also Groß, VVDStRL 66 (2007), at IV 2.