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

Herwig C.H. Hofmann and Alexander H. Türk

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

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

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

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

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


3 Many of the developments of administrative cooperation across jurisdictions have certain parallels in some federal legal systems. Despite this, the EU legal system has taken such a specific evolutionary path that many of the problems arising are distinct and require specific understanding from an EU, a constitutional and an administrative point of view.
forms and procedural models of integrated administration. The third part then looks at more specific questions of assuring accountability and quality of decision-making in integrated administration through various forms of judicial and administrative supervision, as well as ensuring elements such as transparency and participation. In the concluding chapter, we then seek to summarize and further develop solutions for the legal challenges arising from integrated administration.

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

The first part of the book focussing on concepts thus gives an impression of the multiple forms in which issues of integrated administration are discussed in current legal debate. The legal challenge consists in structuring the procedures to allow for, on the one hand, an effective discharge of public tasks without a large central European bureaucracy, as well as, on the other hand, establishing an effective system of transparency and accountability through forms of judicial, administrative and political supervision. These problems arise in all forms of integrated administration, whether they are called bottom-up or top-down procedures or are referred to as shared administration. The difficulties often arise from the specific mixes of policy tools such as mutual assistance, comitology committees, agency networks, multi-stage composite procedures and the like in the different policy areas.
These topics are largely the subject of the second part of the book, which opens with two contributions to the continuing debate about the system of comitology, one of the central structures for cooperative administrative rulemaking and decisionmaking. Christine Neuhold looks at the role and possibilities of parliamentary supervision through the European Parliament of EU-specific developments in the field of comitology over time. Political supervision of integrated administration in the form of interaction between the Commission and comitology committees is one of the central issues of the accountability of these structures. Such supervision is situated not only at the interface between national and European decisionmaking but also between scientific expertise and political as well as executive decisionmaking. Neuhold sets out to explore avenues of increasing modes of accountability of comitology procedures which will be interesting also with respect to the post-Lisbon debate. This analysis is followed by Manuel Szapiro’s outlook on the future of comitology, especially the 2006 comitology reforms and consequences of the Lisbon Treaty. His evaluation begins, like that of Neuhold, with the observation that despite considerable efforts towards increasing transparency since 2000, there are serious structural problems to allocating responsibility, especially within the more complex comitology committee procedures. The evolutionary nature of EU administrative law and policy nowhere becomes more evident than with respect to comitology. Changes within the constitutional framework will impact on the conditions for administrative cooperation as well as the forms of accountability and supervision of comitology, which has developed as a major structure of vertical cooperation between Member States and the Community executive as well as a structure of horizontal cooperation between Council and Commission, and to a certain degree the European Parliament. This will have profound consequences for the debate on accountability and legitimacy of the EU executive and its integration with Member State administrations.

Next to comitology, agencies are a central form of integrating administrations in the EU into administrative networks. Michelle Everson’s contribution to this book analyses the development of agencies mainly from a perspective of whether they represent a ‘considered and appropriate response to the technical demand for EU regulatory action’ or whether they ‘might also go that one step further, promising a significant renewal in Monnetist integration methods’. Thereby she touches upon the very discussions which have bedevilled the issues of comitology for the past half century such as accountability of network actors in non-hierarchic relations. She enquires how to achieve the balance between independence and accountability cumulating in the demand that ‘no one party controls the agency, yet the agency is under control’. The additional problem vis-à-vis
comitology is that agencies have not yet benefited from the more systematic approach in the field of comitology as reflected in the comitology decisions of 1987, 1999 and 2006. Everson concerns herself however not only with organizational aspects but with the very nature of a broad delegation of powers to technocratic executive bodies acting within a network. She warns against an all too powerful political administration arising not least due to the impossible task of distinguishing ‘technical’ risk evaluation and assessment from ‘political’ risk management decisions.

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

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

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

This discussion leads to Alexander Türk’s analysis of judicial review of integrated administration. Therein he looks at the forms of remedial action and the lacunae of judicial supervision of administrative activity within the network structures prevalent in EU administrative law. His topic and his analysis reveal that the underlying concept of judicial review in EU law is based on a traditional quasi-federal two-level model in which a neat separation between the European and the Member State levels, each
with distinctive responsibilities, was possible. The chapter shows that the reality is far more complex and that means of judicial review in the EU have not been adapted to meet the challenges posed by the fast-paced evolutionary development of integrated administration in the EU.

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

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

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

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