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Multilevel Administration and Composite Decision-Making

I. Introduction: What Makes Composite Decision-Making So Special?

The deepening of European integration required national and Union administrations to cooperate in many different ways to enforce a growing body of legislation. A complex multilevel system began to form.

Composite administrative decision-making is only one form of multilevel administration, though it is often conflated with others. This is no wonder given that, as political scientists have noted, the literature on multilevel administration still lacks a ‘differentiated analytical framework’ of generalisable, cross-sectoral typologies to capture the ways in which it works.¹

The chapter aims to contribute to filling this gap. It proposes a conceptual framework aimed at bringing greater clarity to the analysis of three crucial issues. The first issue concerns the structural features of composite decision-making. The second concerns how composite decision-making compares to other types of European multilevel administrative cooperation. The third concerns whether existing forms of multilevel administration can be reconciled with the dualistic divide of European Executive Federalism, between national and Union administration, as envisaged by the CJEU. Counterintuitively, most forms can. Composite decision-making, however, cannot.

Section II sets out the basic conceptual and contextual underpinnings of European multilevel administration. It contends that multilevel administration is too diverse to argue, as most of the literature does, that it renders the notion of separation between national and Union administration obsolete. The debate should rather refocus on whether *specific forms of cooperation* within multilevel administration contradict such a separation and on what test should be used to determine whether a contradiction exists at all. The proposed test is the CJEU’s own separation principle. Section III sets out the concept, structure, rationales and types of composite decision-making and explains why it is logically incompatible with the CJEU’s separation principle. The proposed typologies of

¹ A Benz, ‘European Public Administration as Multilevel Administration: A conceptual Framework’ in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan, 2015), 35 and 45.

composite decision-making will be applied throughout the remainder of the book's argument. Composite administrative procedures are characterised by decisional interdependence, ie they require joint decision-making between national and Union administration, and by the allocation, to one of the two levels, of decisional dominance, ie the ability to decide the procedure's final outcome. Section IV offers a typology of forms of multilevel administration from which composite decision-making should be distinguished in that they are not just compatible with, but indeed presuppose, the separation between national and Union administrative power.² This distinction is precisely what makes composite administrative procedures so unique. It is why the CJEU had to abandon its historical doctrine of European Executive Federalism in composite decision-making, whereas in other forms of administration it did not. Section V concludes by outlining how the mismatch between composite decision-making and European Executive Federalism raises two sets of rule of law problems – procedural and judicial. The CJEU's doctrinal answer to said problems will be considered in Parts II and III of the book, respectively.

II. The Concept(s) of Multilevel Administration

Some of ECJ Judges cautioned that the Court's principle of 'strict separation' should not be regarded as so strict after all. '[Where] the textbooks preached separation of legal powers and responsibilities', Judge Donner wrote, 'reality demonstrated that their cumulation and integration corresponded more to the facts of political life'.³ Similarly, Pescatore cautioned that the Court's reference to a principle of 'strict' separation seemed exaggerated given the extent of cooperation between national and Community bureaucracies.⁴

Indeed, already in its early years, intense cooperation occurred across all areas under the remit of the Community's competence. The High Authority of the ECSC relied heavily on flows of information from national bodies.⁵ The first antitrust enforcement Regulation required the Commission to act in 'close and constant liaison with the competent authorities of the Member States'.⁶ Though

² The categorisation draws on an earlier and more tentative version in F Brito Bastos, 'Composite Procedures in the SSM and SRM – an Analytical Overview' in C Zilioli and KP Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar, 2021). The categorisation, in turn, builds upon that proposed in E Schmidt-Aßmann, 'Strukturen des Europäischen Verwaltungsrechts: Einleitende Problemskizze' in E Schmidt-Aßmann and W Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Nomos, 1999), 9.

³ A Donner, *The Role of the Lawyer in the European Communities* (Northwestern University Press 1968) 14.

⁴ P Pescatore, 'Distribución de competencias y de poderes entre los estados miembros y las comunidades europeas' (1967), 1 *Derecho de la Integración* 108, 111.

⁵ E Reuter, 'L'engagement général de coopération des Etats Membres avec la Haute Autorité et les nécessités de contrôle dans le domaine des prix' (1966) *Cahiers de Droit Européen* 52.

⁶ Council Regulation (EEC) 17/1962 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty, Recital (7).

based on a 'rather rigid division of power between the national authorities and the Commission', the first anti-dumping Regulation 'worked out in practice through a spirit of cooperation'.⁷ Lastly, some authors writing on the cooperative administration of the Common Agricultural Policy noted that 'nothing would be more inaccurate than conceiving the relations between the Communities and their members in accordance to a scheme of dualistic inspiration'.⁸

Fifty years later, many scholars would subscribe to similar views. Yet, even the terminology of cooperative enforcement remains unsettled. Many legal scholars have opted for terms such as 'shared government';⁹ 'coadministration';¹⁰ 'intertwined administration';¹¹ 'shared administration';¹² 'integrated administration';¹³ 'composite administration';¹⁴ or 'shared management'.¹⁵ Political science literature, by contrast, has tended to locate cooperative administration in theories of 'multilevel administration' or 'multilevel governance'.¹⁶ Whereas both have the virtue of emphasising the involvement of subnational authorities,¹⁷ 'multilevel governance' proves less analytically appropriate. Rather than researching the dynamics specific to administrative *policy implementation*, the proponents

⁷I van Bael, 'The EEC Anti-dumping Rules – A practical approach' (1978) 12 *International Lawyer* 523, 530.

⁸JM Martinière, *Collaboration entre l'ordre juridique communautaire et les ordres juridiques nationaux dans le secteur de l'agriculture: rapport français présenté à la Commission I (Agriculture) du Vième congrès international de droit européen* (Fédération Internationale Pour Le Droit Européen (FIDE), 1970) 10.

⁹R Widdershoven, 'European Administrative Law' in R Seerden (ed), *Administrative Law of the European Union, its Member States and the United States* (Intersentia, 2012), 245 and 250.

¹⁰C Franchini, *Amministrazione Italiana e Amministrazione Comunitaria. La Coamministrazione nei Settori di Interesse Comunitario* (CEDAM, 1993).

¹¹P Chirulli, 'Amministrazioni Nazionali ed Esecuzione del Diritto Europeo' in L de Lucia and B Marchetti (eds), *L'Amministrazione Europea e le sue Regole*, (Il Mulino, 2015), 167 and J Ziller, 'Multilevel Governance and Executive Federalism: Comparing Germany and the European Union' in P Birkinshaw and M Varney (eds), *The European Union Legal Order after Lisbon* (Wolters Kluwer, 2010) 257–75, 257.

¹²C Harlow, 'Three Phases in the Evolution of EU Administrative Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011), 450.

¹³H Hofmann and A Türk, 'The Development of Integrated Administration in the EU Consequences' (2007) 13 *European Law Journal* 253, 253–54.

¹⁴D Curtin, *Executive Power in the European Union: Law, Practices, and the Living Constitution* (Oxford University Press, 2009) 65 ff; 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* (Intersentia 2011), 1–22; J Reichel, 'Communicating with the European Composite Administration' (2014), 15 *German Law Journal* 883, 886 ff.

¹⁵P Craig, *EU Administrative Law*, 3rd edn (Oxford University Press, 2018), 7.

¹⁶Respectively, J Trondal and M Bauer, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system' (2017) 9 *European Political Science Review* 73 and H Wockelberg, 'Why 'Multi-Level' and 'Governance' are Concepts of Relevance for our Understanding of Member State Implementation of EU Law' in AS Lind and J Reichel (ed), *Administrative law beyond the State: Nordic perspectives* (Martinus Nijhoff, 2013).

¹⁷L Hooghe and G Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield, 2002) and G Pagoulatos and L Tsoukalis, 'Multilevel Governance' in E Jones, A Menon and S Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press, 2012), 62–73.

of multilevel governance theory have a much broader focus; indeed, often even a primary focus on policy-making processes between the Commission and national or regional governments.¹⁸

For all their variation, the terminologies of law and political science all refer to the systemic cooperation in the exercise of distinct tasks by national and Union authorities across Union policy areas. Yet the remainder of this book will prefer the political science term ‘multilevel administration’ to describe that system. It does so despite acknowledging that ‘multilevel’ may be understood to have hierarchical overtones,¹⁹ and that networked administrative relations within the EU are usually not hierarchical. It does so because ‘multilevel administration’ is not a legal-normative concept, but an empirical-descriptive concept.²⁰ A purely empirical-descriptive concept seems more appropriate given that the Union’s system is, in its entirety, one of multilevel administration. Its shifting administrative practices are too diverse to raise identical legal issues; too elusive to be categorised exhaustively; too different to fit into an abstract, all-encompassing legal doctrine; and often too deprived of a firm legal basis to catch the eye of lawyers. Lastly, multilevel administration theory can be particularly helpful in explaining the contextual factors which determine the emergence and distinct shapes of cooperative relations between national and Union administration.

In what follows, the argument will consider how such factors are reflected in sectoral legislation. It will be argued that, given the diversity of forms of cooperation between national and Union administrations, it would be hasty to assume that *any* such form of cooperation is necessarily inconsistent with the powers of national and Union administration remaining separate.

A. Politics and Function

National administration (ministries, municipalities, directorates-general, regulatory agencies, regional bodies, just to name a few) and Union administration (the Commission, the EU Agencies, the ECB and occasionally the Council) constitute the building blocks of a complex European administrative system. That system may be broken down into discrete forms of administrative cooperation – into typical patterns of how the building blocks are arranged and fit with one another.

While there is no consensus in political science as to which factors are the more decisive,²¹ it appears clear that functional as well as political factors play a

¹⁸ A Benz, n 1, 35. See for instance N Bernard, *Multilevel Governance in the European Union* (Kluwer Law International, 2002).

¹⁹ G della Cananea, ‘The European Administration: *Imperium* and *Dominium*’ in C Harlow, P Leino and G della Cananea (eds), *Research Handbook on EU administrative Law* (Edward Elgar, 2017), 64.

²⁰ Similarly, G Britz, ‘Vom Europäischen Verwaltungsverbund zum Regulierungsverbund? Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei Telekommunikation, Energie und Bahn’ (2006) *Europarecht* 46, 47.

²¹ See M Blauberger and B Rittberger, ‘Orchestrating Policy Implementation: EU Governance Through Regulatory Networks’ in K Abbott, P Genschel, D Snidal and B Zangl (eds), *International Organizations as Orchestrators* (Cambridge University Press, 2015), 44–46.

role in the Union's legislative choices when selecting and shaping distinct forms of cooperation.²² Functional factors concern the institutional characteristics of national and Union authorities in view of, eg their resources and expertise. When designing European multilevel administration, the Union legislator will seek to exploit or mitigate the comparative institutional strengths and weaknesses specific to national or Union authorities – put differently, it will engage in what is termed 'comparative institutional analysis'.²³ National administration enjoys a much better grasp of relevant domestic circumstances, and is typically much better resourced. The Union administration, by contrast, is better placed to promote the exchange of national authorities' combined information and expertise; to advance the Union's own interests; and to make decisions without interference from parochial political pressures. Crucially, and unlike national authorities, whose powers are spatially confined within national borders, the Union administration may make decisions valid throughout the EU.²⁴ All these characteristics make the Union administration especially well-placed to ensure uniform enforcement of Union law,²⁵ as well as to pursue the Union's general interest and mediate between conflicting national interests.²⁶

Nevertheless, functional factors alone cannot explain all legislative choices made in the design of EU administrative governance. Political considerations become apparent when one form of multilevel administration is promoted over others even where no evident functional advantages exist.²⁷ Typically, such political factors concern the Member States' dilemma between, on the one hand, reaping the benefits of interdependent governance and common policies, and, on the other, protecting national control over administration,²⁸ historically regarded as the preserve of national sovereignty.²⁹

²² The following passages in the main text draw on F Brito Bastos, 'Repurposing Administrative Procedures to Meet Novel Challenges in EU Competition Law' in C Colombo and M Eliantonio (eds), *The Evolving Governance of EU Competition Law in a Time of Disruptions: a Constitutional Perspective* (Hart Publishing, 2023).

²³ See eg N Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1997), 3 and J Zgliniski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press, 2020), 162.

²⁴ M Scholten, 'Mind the trend! Enforcement of EU law has been moving to "Brussels"' (2017) 24 *Journal of European Public Policy* 1348, 1354.

²⁵ J Trondal, 'National Agencies in the European Administrative Space: Government Driven, Commission Driven or Networked?' (2009) 87 *Public Administration* 779, 789.

²⁶ E Grande and M McCowan, 'The Two Logics of Multilevel Administration in the EU' in M Bauer and J Trondal (eds), *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan, 2015), 50.

²⁷ A Tarrant and D Kelemen, 'Reconceptualising European Union Regulatory Networks: A response to Blauberger and Rittberger' (2017) 11 *Regulation & Governance* 213.

²⁸ For many, see E Mastenbroek and D Martinsen, 'Filling the gap in the European Administrative space: the Role of Administrative Networks in EU Implementation and Enforcement' (2018) 25 *Journal of European Public Policy* 422, 424 and T Bach and E Ruffing, 'The Transformative Effects of Transnational Administrative Coordination in the European Multi-level System' in E Ongaro and S van Thiel (eds), *The Palgrave Handbook of Public Administration and Management in Europe* (Palgrave Macmillan, 2017), 748–51.

²⁹ P Genschel and M Jachtenfuchs, 'Introduction: beyond market regulation: analysing the European integration of core state powers' in P Genschel and M Jachtenfuchs, *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford University Press, 2013), 2.

B. Multilevel Administration and ‘Strict Separation’ of Administrative Powers

One of the great debates in EU administrative law scholarship is whether the rise of multilevel administration has eroded the division between indirect (ie national) and direct (ie Union) administration. There have broadly been two views on the question. This section proposes a third.

The first, near-unanimous view is taken by some of the leading scholars of European administrative law. The view is that it is ‘necessary to bid farewell to the idea that there is a clear distinction between direct and indirect administration’;³⁰ that the distinction ignores or oversimplifies administrative reality;³¹ or that the distinction has been ‘abandoned’ and ‘hardly does justice’ to how intertwined national and Union administration have become.³²

The second, minority view is the opposite. Ziller, another leading scholar, contends that multilevel administration is ‘not exactly a third category of Community administration, which would have chronologically appeared after direct administration and indirect administration [but] rather the coordination of the two types of administration, direct and indirect’.³³ Similarly, von Danwitz points out that, despite extensive cooperation, any decision can be traced back to an administrative procedure concluded either by a Union or a national authority.³⁴

It is nonetheless submitted that the first as well as the second view overlook something fundamental. They seem to assume that multilevel administration, *in its entirety and in abstract*, can or cannot call into question the strict division between national and Union administrative power. A third, different view is taken here. This ‘middle way’, one could call it, can be summarised in two propositions.

First, European multilevel administration is too diverse and complex for any single, binary judgement to be made as to whether it may be reconciled with a dual

³⁰ See H Hofmann and A Türk, n 13, 254 and 270; and 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* (Edward Elgar, 2009), 137. For a similar view, see B Schöndorf-Haubold, *Die Strukturfonds der Europäischen Gemeinschaft: Rechtsformen und Verfahren europäischer Verbundverwaltung* (CH Beck 2005), 38 ff.

³¹ E Chiti, ‘The Administrative Implementation of European Union law: a Taxonomy and its Implications’ in H Hofmann and A Türk (eds), *Legal Challenges in EU Administrative Law: towards an integrated administration* (Edward Elgar, 2009), 9–34, 11.

³² M Eliantonio, ‘Judicial Review in an Integrated Administration: the Case of “Composite Procedures”’ (2014) 7 *Review of European Administrative Law* 66, and H Hofmann and A Türk, n 13, 255–56.

³³ J Ziller, ‘Introduction: les concepts d’administration directe, d’administration indirecte et de co-administration et les fondements du droit administrative européen’ in JB Auby and J Dutheil de la Rochère (eds), *Droit Administratif Européen* (Bruylant, 2007), 243. See also DU 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?’ (2009) *Rivista Italiana di Diritto Pubblico Comunitario* 1689, 1694–95.

³⁴ T von Danwitz, *Europäisches Verwaltungsrecht* (Springer, 2008), 612–13.

divide of administrative power. At best, one may only make such a judgement in respect of specific forms of cooperation.

Second, such a judgement requires clear yardsticks. Scholars risk talking past each other unless they agree on a test of what it would mean for the dual divide to be undermined. The yardstick proposed here is the separation principle – the key principle of Union Executive Federalism as crafted in the case law of the CJEU.

Separation of administrative powers and cooperation are *both* ‘complementary constitutive principles’ of the Union’s administrative order.³⁵ Extensive cooperation between administrations does not deprive them of their own, exclusive competences.³⁶ The separation principle requires national and Union administration to be able to exercise their own powers, free from involvement or interference from one another. Separation thus remains intact for as long as either retains that ability. That is overwhelmingly the case in European multilevel administration. It is not the case in composite decision-making.

III. Composite Administrative Procedures: Conceptual Aspects

Composite administrative procedures can be defined as administrative decision-making procedures where national and Union authorities must exercise interdependent decisional powers in successive procedural stages in order for a final decision to be taken. Composite decision-making, thus defined, has existed for as long as multilevel administration itself has existed. Which is to say that it has existed since the very beginning of European integration. For example, under the first regulations of the Common Agricultural Policy, national administrations could, if faced with rapid fluctuations in agricultural produce prices, eg in the market for poultry, decide on the suspension of imports, subject to subsequent approval by the European Commission.³⁷ One Advocate General aptly characterised such administrative procedures as multilevel legal action (*mehrstufiges rechtliches Handeln*).³⁸ Nevertheless, the concept of composite procedure has largely remained elusive. The following subsections will attempt to clarify the constitutive characteristics of composite administrative procedures, to set out the

³⁵ See E Schmidt-Aßmann, ‘Cuestiones fundamentales sobre la reforma de la Teoría General del Derecho Administrativo. Necesidad de la innovación y presupuestos metodológicos’ in J Barnes (ed), *Innovación y Reforma en el Derecho Administrativo* (Global Law Press, 2006), 108. See in this sense also J Schwarze, ‘Europäisches Verwaltungsrecht, 2nd edn (Nomos, 2005) CII–CIII and ff and A von Bogdandy and P Dann, ‘International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority’ (2008) 9 *German Law Journal* 2013, 2016.

³⁶ Case T-273/03 *Merck Sharp & Dohme Ltd v European Commission*, ECLI:EU:T:2007:288.

³⁷ See Article 12 of Council Regulation 22/62/EEC of 4 April 1962 on the progressive establishment of a common organisation of the market in poultry.

³⁸ Joined Cases 106/63 and 107/63 *Alfred Toepfer and Getreide-Import Gesellschaft v European Commission*, ECLI:EU:C:1965:65, [1965] ECR 405, 411.

roles that national and Union administration typically exercise within them, and to sketch out some of their most common structural types.

A. What is Meant by ‘Composite’, ‘Administrative’, and ‘Procedure’?

The concept of ‘composite administrative procedure’ should be clarified by reference to its constituent operative terms. Composite procedures are *administrative* in the sense that they enforce, rather than define, Union policy priorities.

Composite procedures are administrative *procedures*. Like any administrative decision-making procedure, they consist of a legally prescribed order of stages, wherein different steps and preparatory acts lead to the adoption of a final decision.³⁹ The overarching function of administrative procedure is to promote decisional rationality. Procedural requirements limit authorities’ powers and prevent their arbitrary or ill-informed exercise,⁴⁰ oblige authorities to investigate and consider opposing interests,⁴¹ and steer them towards pursuing the policy goals determined by the legislator in an effective manner while respecting individuals’ rights.⁴² Such aims, which also pervade European administrative law,⁴³ illustrate why administrative procedure is indispensable to the process of ensuring that administrative decision-making observes the fundamental demands of the rule of law.⁴⁴

Lastly, composite administrative procedures are administrative procedures of a *composite* structure. National laws, as well as Union law, often provide for complex administrative procedures which require the involvement of several distinct authorities.⁴⁵ What sets composite procedures apart from other complex administrative procedures is that they involve *different jurisdictions*. The pre-established order of procedural stages that must be followed for a decision to be

³⁹ G della Cananea, *Due Process of Law beyond the State: Requirements of Administrative Procedure* (Oxford University Press, 2016), 22.

⁴⁰ Ibid, 34. See also S Cassese, *Le Basi del Diritto Amministrativo* (Garzanti, 2000), 307–9.

⁴¹ G della Cananea, n 39, 19.

⁴² See J Barnes, ‘Sobre el Procedimiento Administrativo: Evolución y Perspectivas’ in J Barnes (ed), *Innovación y Reforma en el Derecho Administrativo* (Global Law Press, 2006), 261; H Pünder, ‘Administrative procedure – mere facilitator of material law versus cooperative realisation of commonwelfare’ in H Pünder and C Waldhoff (eds), *Debates in German Public Law* (Hart Publishing, 2014), 240.

⁴³ HC Röhl, ‘Procedures in the European Composite Administration’ in J Barnes, *Transforming Administrative Procedure* (Global Law Press, 2008), 79 ff.

⁴⁴ See F Brito Bastos and A de Ruijter, ‘Break or Bend in Case of Emergency? Rule of Law and State of Emergency in European Public Health Administration’ (2020) 10 *European Journal of Risk Regulation* 611, 615 ff.

⁴⁵ Suffice it to mention that complex administrative procedures are well-known to German, Italian, and Portuguese administrative law. See S Detterbeck, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht*, 18th edn (CH Beck, 2020), 162–63; and E Casetta, *Manuale di Diritto Amministrativo*, 11th edn (Giuffrè, 2009), 487–88; and FP Oliveira and JE Figueiredo Dias, *Noções Fundamentais de Direito Administrativo*, 5th edn (Almedina, 2022), 227.

taken requires the cumulative involvement of both national and Union authorities, which are created by the legal systems of the Member States and of the Union, respectively.⁴⁶ Composite procedures may be ‘bottom-up’, ‘top-down’, or hybrid, depending on how such stages are organised – depending on whether a Union stage follows a national stage, a national stage follows a Union stage, or whether bottom-up and top-down elements are combined.⁴⁷

The concept of composite procedure adopted here requires one further clarification. Namely, that it differs from the substantive version of the concept followed by Hofmann and Lottini,⁴⁸ which includes information exchanges occurring outside of a pre-established procedure. A related version, supported by León, suggests a test based on a contribution by an authority being ‘so relevant that it has a decisive effect on the outcome’,⁴⁹ and that the core of the notion of composite decision-making is ‘intensive cooperation between national and European authorities [that] is reflected in a procedural arrangement with different degrees of formalism’.⁵⁰ Instead, this book adopts a purely formal version, drawing on the views of Mendes and Eckes, as well as Schütze.⁵¹ In that version, the defining test to identify composite decision-making is the presence of what this book’s author has previously termed as ‘decisional interdependence’.⁵²

Decisional interdependence means that the Union administration may not exercise its own competences within the administrative procedure before the national administration has exercised its own, or the other way around. Put differently, composite procedures require the joint exercise of decision-making powers by national and Union administration. The notion of decisional interdependence is present in the ReNEUAL Draft Model Rules on EU Administrative Procedures,

⁴⁶ Given that a plurality of distinct authorities may act within the same composite procedure, it may appear simplistic to refer simply to national or Union ‘authorities’, ‘procedural stages’, or ‘administration’. As the CJEU’s case law shows, however, the constitutional issues that composite decision-making raises, and which set it apart from other multi-stage but ‘single-level’ administrative procedures, all concern the interaction between levels of administration, rather than of authorities as such. For a distinct view, emphasising the distinct authorities involved at the Union level, see SA Alonso de León, *Composite Administrative Procedures in the European Union* (Iustel, 2017), 173 ff.

⁴⁷ The distinction can be traced to G della Cananea, ‘The European Union’s Mixed Administrative Proceedings’ (2004–2005) 68 *Law and Contemporary Problems* 193, 199.

⁴⁸ H Hofmann and A Türk, n 30, 141 and M Lottini, ‘From “Administrative Cooperation” in the Application of European Union Law to “Administrative Cooperation” in the Protection of European Rights and Liberties’ (2012) 18 *European Public Law* 127, 134.

⁴⁹ S Alonso de León, n 46, 153.

⁵⁰ *Ibid.*, 341.

⁵¹ See R Schütze, ‘From Rome to Lisbon: “Executive Federalism” in the (New) European Union’ (2010) 47 *Common Market Law Review* 1385, 1420–22 and 1426; C Eckes and J Mendes, ‘The right to be heard in composite administrative procedures: lost in between protection?’ (2011) 36 *European Law Review* 651.

⁵² F Brito Bastos, ‘Derivative Illegality in European Composite Administrative Procedures’ (2018) 55 *Common Market Law Review* 105. This view has also been supported by S Röttger-Wirtz and M Eliantonio, ‘From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals’ (2019) 10 *European Journal of Risk Regulation* 393, 394.

where a ‘composite procedure’ is defined as ‘an administrative procedure where EU authorities and the authorities of a Member State or of different Member States have distinct functions which are inter-dependent’.⁵³ However, more importantly, the notion of decisional interdependence is clearly present in CJEU case law, even if expressed in other terms. The CJEU recognises that, in some administrative procedures, national authorities take measures which ‘constitute a necessary step in the procedure for adopting an EU act’;⁵⁴ that the Commission ‘is neither obliged nor authorised’ to exercise its powers until national authorities have previously adopted certain measures;⁵⁵ or that ‘national authorities adopt acts that are preparatory to a final decision of an EU institution’.⁵⁶ Composite administrative procedures ought to be distinguished from mere information exchange precisely because the CJEU treats instances of such decisional interdependence differently from mere information-sharing. The point will be taken further below, in subsection IV.C.

B. Decisional Interdependence and Decisional Dominance

Like any other aspect of multilevel administration, decisional interdependence is shaped by functional and political factors. From a functional standpoint, national and Union administration must intervene at the stages of a decision-making process that can best exploit their respective institutional advantages. From a political standpoint, decisional interdependence promotes an adequate balance of power between national and Union administrative power.

Decisional interdependence can exist in many forms. Functional and political factors may require different allocations of decisional power between national and Union administration. Such power is always allocated unequally. One of the two, depending on the relevant sectoral legislation, will exercise *decisional dominance*.

Decisional dominance means that, within different administrative procedures, a national or a Union authority has the power to define the content of the final decision. Such may occur at the conclusion of the administrative procedure, with the adoption of the final decision itself, but also at preparatory stages, if the authority adopts binding opinions which in effect predetermine the content of the procedure’s final decision. The following subsections will aim to offer an overview of how the roles played by national and Union administration may differ depending on which of the two exercises decisional dominance.

⁵³ See Article I-4 (3) of the Draft Model Rules.

⁵⁴ Case C-785/18 *GAEC Jeanningros v Institut national de l’origine et de la qualité (INAO)*, ECLI:EU:C:2020:46, para 25.

⁵⁵ Case C-31/13 P *Hungary v Commission*, ECLI:EU:C:2014:70, paras 61–62.

⁵⁶ Case C-414/18 *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d’Italia*, ECLI:EU:C:2019:1036, para 41.

(i) National Decisional Dominance

National decisional dominance is rare in composite procedures. In such cases, the Union administration is typically confined either to deciding in accordance with a binding national preparatory act, or to adopting non-binding instruments to guide national authorities in exercising their own powers. It is the national administration which takes a final decision or which, in the earlier preparatory stages, performs binding preparatory acts which predetermine the content of the final decision taken at Union level. The limitation of powers exercised by the Union administration may derive, eg from a lack of political will among the Member States to give up binding regulatory powers; or from a judgement that decisions will require the local knowledge of national authorities.

One example of the former concerns regulatory administrative procedures in telecommunications.⁵⁷ National regulatory authorities take decisions to impose specific regulatory requirements on operators with significant market power. The Commission's role, exercised in coordination with the Body of European Regulators for Electronic Communications (BEREC), is confined to giving national regulators recommendations as to how to proceed in a given case. Such must be understood in a context where Member States historically resisted extensive transfers of power to Union administration in the regulation of telecommunications.⁵⁸

National authorities also exercise decisional dominance at the preparatory stage of composite procedures for the registration of protected designations of origins (PDOs) or geographic indications (PGIs). National authorities, which are familiar with local production practices and traditions, receive applications from groups for the classification and registration of food products as PDOs or PGIs (eg Tuscan prosciutto or Lübeck marzipan). After they make a positive assessment of the products' compliance with the EU requirements for registration, and if no objection is raised by any legal or natural person, national authorities support the applications and forward them to the Commission. The Commission is then obliged to register the products for EU-wide protection, without enjoying any margin of discretion.⁵⁹ The CJEU justifies the preeminence of national authorities in the administrative procedure as a result of the fact that the registration of geographic indications 'requires, to a large extent, detailed knowledge of matters particular to that Member State, which the competent authorities thereof are best placed to check'.⁶⁰

⁵⁷ Article 33 of European Parliament and Council Directive (EU) 2018/1972 establishing the European Electronic Communications Code.

⁵⁸ See M Massaro, 'Between Integration and Protection of National Sovereignty in the European Union's Radio Spectrum Policy' (2019) 9 *Journal of Information Policy* 174, 191 and 193.

⁵⁹ The same obligation arises if there are objections but the persons raising them, and the applicants, come to an agreement. See Article 53(2)(a) of Regulation No 1151/2012 of 21 November 2012, on quality schemes for agricultural products and foodstuffs.

⁶⁰ Case C-53/20 *Hengstenberg GmbH & Co KG v Spreewaldverein eV*, ECLI:EU:C:2021:279, para 37.

(ii) Union Decisional Dominance

Decisional dominance overwhelmingly falls to the Union administration – eg the Commission, Union Agencies, or the European Central Bank. Union decisional dominance is often justified due to its comparative institutional advantages in respect of national administration, which are broadly the same ones that shape its place in the European administrative system as a whole.⁶¹ Such advantages include, for instance, the Union administration's independence from national parochial pressures,⁶² or its EU-wide jurisdiction when licensing certain products or the entire internal market.⁶³

Even in cases of Union decisional dominance, national authorities have a relevant role to play. That role varies both in terms of the stage of the procedure at which national authorities intervene and in terms of the influence that they may have within it.

In some composite procedures, the national administration is involved from the very beginning. It may have the sole competence to initiate the procedure, or serve as a 'reception desk' which receives applicants' requests and documents and forwards them to the Union authorities responsible for the final decision. It may also serve as a 'gatekeeper' with the power to filter – ie to reject – applications for decisions, such as licences, so that the Union administration only needs to engage with potentially successful applications. Just to give an example, this is a role that national competent authorities exercise in the licensing of new credit institutions by the ECB.⁶⁴

In other composite procedures, national authorities act as 'rapporteurs' by preparing draft measures, occasionally termed as 'proposals',⁶⁵ or as 'reports'.⁶⁶ While non-binding, such measures may serve as the basis for the Union administration's final decision. For instance, national authorities prepare reports on the environmental risks of detergents; but the Commission may make a very different assessment when authorising their placing on the market.⁶⁷ Occasionally, the Union administration itself designates a national authority as a rapporteur for

⁶¹ See section II.A. above.

⁶² For example, given its independence, the European Central Bank is considered sufficiently insulated from the influence of national 'champion' credit institutions to exercise supervisory tasks more effectively than national supervisors did in the past. See E Wymeersch, 'The European Banking Union, a First Analysis', *Financial Law Institute Working Paper Series* WP 2012-07, available at SSRN: <https://ssrn.com/abstract=2171785>, at 2–3.

⁶³ For instance, the Commission and the European Food Safety Authority, when authorising novel foods. See, in this regard, Recitals (20) to (24) of Regulation (EU) 2015/2283 of the European Parliament and Council on novel foods.

⁶⁴ See Article 14 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 (Single Resolution Mechanism Regulation).

⁶⁵ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran (OMPI) v European Council*, ECLI:EU:T:2006:384, para 76.

⁶⁶ See Article 13(1) of Directive 2001/18/EC of the European Parliament and Council on the deliberate release into the environment of genetically modified organisms.

⁶⁷ See Articles 5(3)–(4) and 6 of Regulation No 648/2004 of the European Parliament and the Council of 31 March 2004 concerning detergents.

a decision it must take (eg the European Chemicals Agency, when assessing the safety of chemicals).⁶⁸

Two other kinds of roles should still be mentioned. In certain composite procedures, national authorities must be consulted for an opinion before a final decision is taken.⁶⁹ Lastly, at the very conclusion of the administrative procedure, it may occur that national authorities are under a duty to merely implement – or as some authors suggest, ‘ratify’ – a prior Union decision into national law;⁷⁰ or even be limited in their role to simply notifying such a decision to affected parties.⁷¹

(iii) ‘Second Life’ Acts and Union Decisional Dominance

When considering decisional dominance, one should also mention a special class of composite procedures. Those are composite procedures where the national administration takes measures which, within the national legal order, are technically not preparatory, and indeed, not even necessarily administrative. Beyond their purely national existence, those measures are given a ‘second life’ as measures forming part of a European administrative procedure where the Union administration takes a final decision. Three examples may be given for this category.

First, administrative procedures for the ‘blacklisting’ of individuals and entities supporting terrorism end with a Council Regulation freezing their assets within the EU. However, Council blacklists may only be adopted based on proposals by national authorities. Such proposals are final decisions that have already been taken by domestic authorities – which may even be judicial authorities.⁷²

Second, under procedures for state aid review, Member States cannot grant or implement aid unless notified and then approved by the Commission as compatible with the internal market. If granted without prior notification – and therefore unlawfully – the Commission may require Member States to recover aid. State aid is not granted by the Member States through preparatory acts, but

⁶⁸ See Articles 85 and 87 of 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.

⁶⁹ For instance, national governments must be consulted before the Union administration approves requests for access to documents which it originally received from the Member States. See Article 4(5) of 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. The composite administrative procedure in question has given rise to important case law on the duty to give reasons and is therefore analysed in greater detail in Chapter 6, section III.

⁷⁰ E Brosset, ‘The Prior Authorisation Procedure Adopted for the Deliberate Release into the Environment of Genetically Modified Organisms: the Complexities of Balancing Community and National Competences’ (2004) 10 *European Law Journal* 555, 565.

⁷¹ Article 5(2) of Council Implementing Regulation 2015/81, specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund.

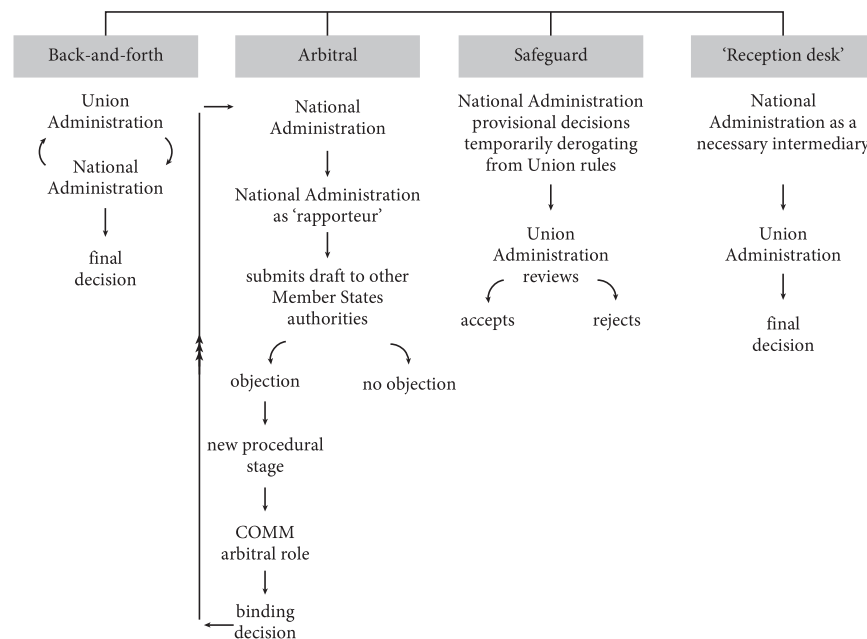
⁷² See Article 1(4) of Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism.

rather through final measures. Though often even of a legislative nature (eg tax exemptions), such measures are reviewed within an administrative procedure and cannot take effect before Commission approval.⁷³

Lastly, in certain composite procedures, the Commission has the power to convert provisional national decisions taken urgently to address immediate risks to public health – eg those potentially posed by a medicine – into final Union decisions. Such administrative procedures exist in many sectors under ‘safeguard clauses’, which will be analysed separately in the ensuing subsection.

C. Prototypical Procedural Models

The diversity of composite procedures does not lend itself to exhaustive taxonomies. Nevertheless, for analytical purposes, it is worth setting out some basic models of composite procedures which are especially pervasive across policy fields. The Union legislator often repurposes pre-existing types of administrative procedures and adapts them when introducing legislation in a different policy sector.⁷⁴ The most common procedural models will be termed ‘back-and-forth’ procedures; arbitral procedures; safeguard clause procedures; and ‘reception desk’ procedures.



⁷³ See Case T-103/14 *Frucona Košice a.s. v European Commission*, ECLI:EU:T:2016:152, para 52.

⁷⁴ See F Brito Bastos, n 22.

(i) *Back-and-forth Procedures*

Numerous composite procedures are ‘back-and-forth’ procedures, as Eliantonio has aptly termed them.⁷⁵ They begin and end at the level of national administration, with a procedural stage at the Union level in-between.

The rationale is that enforcement of Union law remains, to the greatest extent possible, in the hands of national authorities, and that the Union administration only intervenes to take binding decisions on the issues that it is best placed to address. In administrative procedures aimed at determining whether the conditions for repayment or remission of customs debt are met, the Commission intervenes to ensure that those conditions are interpreted uniformly by national customs authorities.⁷⁶ One prominent example of a back-and-forth composite procedure emerged during the Covid-19 pandemic. National authorities receive initial applications and take the final decision as to whether to authorise the export of vaccines to third countries. However, in the interest of consistent protection of public health, the Commission may issue binding opinions which, in effect, veto authorisations.⁷⁷

(ii) *Arbitral Procedures*

Arbitral composite procedures exist across several policy sectors.⁷⁸ In domains such as the regulation of financial markets,⁷⁹ biocides,⁸⁰ medicines,⁸¹ the cross-border transportation of waste,⁸² or data protection,⁸³ national authorities are required to refer to the Union administration if a legal, technical, or scientific disagreement emerges between them.

If intending to take a decision which will affect other Member States – eg licensing a drug or fining a data controller – a national authority (the rapporteur

⁷⁵ M Eliantonio, ‘Judicial Review in an Integrated Administration: the Case of “Composite Procedures”’ (2014) 7 *Review of European Administrative Law* 65, 73.

⁷⁶ See Articles 116, 119, and 120 of the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code) and Articles 98–102 of the UCC delegated act (Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015).

⁷⁷ See Recitals (5)–(7) and Article 2 of Commission Implementing Regulation (EU) 2021/111 making the exportation of certain products subject to the production of an export authorisation.

⁷⁸ On composite procedures of this type, see the analysis carried out by L de Lucia, ‘Conflict and Cooperation within European Composite Administration (Between Philia and Eris)’ (2012) 5 *Review of European Administrative Law* 49.

⁷⁹ See Article 19 of Regulation (EU) 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority).

⁸⁰ Article 36 of Regulation No 528/2012 of the European Parliament and the Council of 22 May 2012 concerning the making available on the market and use of biocidal products.

⁸¹ Article 29 of Directive 2001/83/EC of 6 November of the European Parliament and the Council on the Community code relating to medicinal products for human use; and Article 54 of Regulation (EU) 2019/6 of the European Parliament and of the Council of 11 December 2018 on veterinary medicinal products.

⁸² Article 11(3) of Regulation No 1013/2006 of the European Parliament and the Council of 14 June 2006 on shipments of waste.

⁸³ See Article 65(1)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free

authority) must first submit a draft decision to those states' competent authorities. Union legislation tends to entitle the authorities concerned to comment on or object to the decision, in what some have called a 'choral' procedure.⁸⁴ If no objection is made, then the rapporteur authority takes the decision as intended. If an objection is made and no compromise is reached, national authorities are required to initiate a new procedural stage which unfolds at Union level.⁸⁵ The Commission – often based on an Agency's opinion – will exercise an arbitral function by settling the disagreement with a binding decision, which the rapporteur national authority (and sometimes, the remaining authorities involved as well), is required to implement in the final decision of the administrative procedure.

(iii) Safeguard Clause Procedures

The oldest type of composite administrative procedure concerns so-called safeguard clauses. Under Article 114 TFEU, the Union legislator enjoys a general competence to establish such procedures when introducing harmonisation legislation. Safeguard clauses, which do not always bear that name in the legislation, constitute two-step administrative procedures. They enable national authorities to take provisional decisions that temporarily derogate from Union rules and are subsequently reviewed by the Union administration.

Safeguard procedures are available, for example, when data protection authorities need to take urgent measures to protect data subjects' rights.⁸⁶ Yet the bulk of such procedures can be found in economic sectors where immediate environmental or public health risks may arise. National administrations may, for instance, take urgent decisions to restrict the marketing of unsafe machinery,⁸⁷ foods,⁸⁸ medicines,⁸⁹ food supplements,⁹⁰ medical devices,⁹¹ or genetically modified organisms.⁹²

movement of such data (General Data Protection Regulation, henceforth 'GDPR'). See also the European Data Protection Board's (EDPB) Guidelines 03/2021 on the application of Article 65(1)(a) GDPR.

⁸⁴ S. Cassese, 'European Administrative Proceedings' (2004–2005) 68 *Law and Contemporary Problems* 21, 28.

⁸⁵ The CJEU has emphasised that referral to the Union administration is mandatory. See Case C-452/06 *R (on the application of Synthon BV) v Licensing Authority of the Department of Health*, ECLI:EU:C:2008:565, paras 28–33.

⁸⁶ Article 66 GDPR.

⁸⁷ Article 11 of Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery.

⁸⁸ Article 54 of 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.

⁸⁹ Article 20 of 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. For a mechanism of this kind in the market of detergents, see Article 15 of Regulation No 648/2004 of the European Parliament and the Council.

⁹⁰ Article 12 of Directive 2002/46/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements.

⁹¹ Article 95 of Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices.

⁹² Article 23 of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms.

It was noted before that national safeguard decisions lead a sort of ‘double life’. Within the national legal order, a safeguard decision is the final decision in an administrative procedure, albeit one that is only intended to remain in force temporarily. However, it also constitutes a preparatory act at the conclusion of a European administrative procedure – a single administrative procedure which, in the CJEU’s own words, ‘takes place partly at national level and partly at European Union level’.⁹³ Indeed, the Union administration is in no way bound by national safeguard decisions and enjoys a wide margin of assessment.⁹⁴ It is empowered ‘to review whether [safeguard] measures are justified, by satisfying itself in particular of the merits of the legal and factual grounds for the adoption of the measures’, and ultimately to decide whether they should be rejected – in which case they must be disapplied and repealed⁹⁵ – or confirmed – and thus made definitive.⁹⁶

(iv) ‘Reception Desk’ Procedures

A fourth common model of composite decision-making barely involves national administration at all. In composite procedures leading to authorisations relating, eg to GMO food and feed,⁹⁷ smoke flavourings in food,⁹⁸ or the use of certain nutritional or health claims made on foods,⁹⁹ national administration merely acts as a kind of ‘reception desk’ for Union Agencies or for the Commission.¹⁰⁰ National administration performs a purely formal role. It forwards initial applications, documents and information to the Union administration, which is solely competent to decide on the substance of a case.

⁹³ See Case T-465/11 *Globula a.s. v European Commission*, ECLI:EU:T:2013:406, para 32 and Article 36(8) of Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas.

⁹⁴ Case C-236/01 *Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri*, ECLI:EU:C:2003:431.

⁹⁵ Case C-130/78 *Salumificio di Cornuda SpA v Amministrazione delle Finanze dello Stato*, ECLI:EU:C:1979:60.

⁹⁶ Joined Cases 106/63 and 107/63 *Toepfer*, n 38, [1965] ECR 405, at 411, and Cases T-152/19 *Brunswick Bowling Products LLC v European Commission*, ECLI:EU:T:2021:539, para 66; T-168/16 *Grizzly Tools GmbH & Co KG v DEuropean Commission*, ECLI:EU:T:2018:246, para 51; C-41/93 *French Republic v European Commission*, ECLI:EU:C:1994:196, paras 25–28, C-6/05 *Medipac-Kazantzidis* ECLI:EU:C:2007:337, paras 46 and 59; and C-120/14 P *Klein*, ECLI:EU:C:2015:252, paras 64 and 76.

⁹⁷ See Articles 5(2)(a) and 17(2) of Regulation 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.

⁹⁸ Regulation (EC) 2065/2003 of the European Parliament and of the Council on smoke flavourings used or intended for use in or on foods.

⁹⁹ See Article 15 of Regulation No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

¹⁰⁰ M Friant-Perrot, ‘The European Union Regulatory Regime for Genetically Modified Organisms and its Integration into Community Food Law and Policy’ in L Bodiguel and M Cardwell (eds), *The Regulation of Genetically Modified Organisms: Comparative Approaches* (Oxford University Press, 2010), 90.

The literature has rightly regarded national administration as serving as ‘no more than an intermediary’.¹⁰¹ The *Hagenmeyer* ruling has also made unequivocal that it constitutes a *necessary* intermediary. The Court held there that, contrary to what one of the parties had claimed, national authorities are more than a mere ‘post-box’ for applications and documents. They *do* enjoy a minimal degree of decisional power – to check if applications are in conformity with formal requirements, and can therefore be forwarded to the Union administration, as legally required, ‘in order to proceed to the next stage in the procedure’.¹⁰² Despite exercising decisional dominance, the Union administration may not take a final decision without the prior involvement of national authorities, formal as their role may be. ‘Reception desk’ procedures are thus just as based on decisional interdependence as any other instance of composite decision-making.

IV. Multilevel Administration: A Non-Exhaustive Typology

Multilevel administration raises a host of legal problems. Some such problems are systemic and pervade the EU’s entire administrative system. It becomes difficult to ensure the overall transparency and accountability of that system when a multitude of different authorities are involved, and often interact by informal and opaque means.¹⁰³ However, European multilevel administration also lends itself to a possible taxonomy of distinct forms of cooperation, each raising specific legal issues of its own.

The following subsections sketch out an updated version of taxonomy first proposed by Schmidt-Aßmann. It should be noted, however, that the various forms of cooperation are not mutually exclusive and, in fact, tend to coexist. This is particularly true in EU Agency networks, as will be explained in subsection IV.F. Most forms of administrative cooperation set out below confirm a finding made in empirical political science. All forms of multilevel administration discussed below – with the exception of composite decision-making and perhaps one more – confirm the finding made in empirical political science. The finding is that, for all their extensive cooperation, the relations between national and Union authorities ‘are characterised by a formal separation of powers’.¹⁰⁴

¹⁰¹ D Chalmers, ‘Risk, anxiety and the European mediation of the politics of life’ (2005) 30 *European Law Review* 649, 653.

¹⁰² Case T-17/12 *Hagenmeyer v European Commission*, ECLI:EU:T:2014:234, paras 133–36.

¹⁰³ For many, see M Scholten, ‘Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-Jurisdictional Setting’ (2019) 10 *European Journal of Risk Regulation* 538.

¹⁰⁴ A Benz, A Corcaci and JW Doser, ‘Unravelling multilevel administration. Patterns and dynamics of administrative co-ordination in European governance’ (2016) 23 *Journal of European Public Policy* 999, 1006.

A. Authentic Second-order Administration

National authorities are the primary enforcers of Union law. Yet the Union administration often performs a coordinating role with regard to them. In that role, Union administration may address binding measures to national authorities (such as decisions, implementing regulations, or instructions); it may adopt soft law acts (such as ‘interpretive guidance’ or recommendations);¹⁰⁵ or it may provide services of operational support (such as the management of information-sharing networks).¹⁰⁶

Chapter two noted that, from its early days, the European Commission was believed to be constitutionally required to function as a second-order administration. Rather than administering the everyday issues of businesses and citizens, the Union administration was intended merely to *administer national administrations*.

This account will often be simplistic and counterproductive. Union administrative decisions often require national authorities to take specific decisions with immediate detrimental effects to the legal position of individuals. Such decision-making processes, in fact, constitute composite administrative procedures. The final decision taken by national administration results from a prior binding measure taken at Union level. These are instances of *merely apparent* second-order administration which, as Part II will show, have raised numerous problems of their own in terms of the protection of procedural rights.

Nevertheless, there are *also* instances of *authentic* second-order administration. Quite often, the Union administration performs tasks and exercises powers which are only addressed to and only affect national authorities, without requiring the latter to adopt any specific measure in respect of private parties. In such cases – eg in the management of most EU funds – there is no composite administrative procedure.¹⁰⁷ Instead, there is an administrative procedure where the Union administration, alone, adopts decisions which do not need any subsequent national measure to produce legal effects. Those legal effects exhaust themselves in the legal position of the Member States or their authorities. The latter may initiate their own administrative procedures, but those will be autonomous from the first, Union procedure, and lead to entirely separate decisions. Only those national decisions, not the earlier Union decisions, will produce legal effects which may affect private parties.

¹⁰⁵ On interpretive guidance, see C van Dam, ‘Guidance documents of the European Commission: a typology to trace the effects in the national legal order’ (2017) 10 *Review of European Administrative Law* 75.

¹⁰⁶ The CJEU has recognised that Union bodies may be created with the purpose of adopting ‘non-binding supporting and framework measures’ as ‘services’ provided to national authorities (and operators) to facilitate uniform implementation. See Case C-217/04 *United Kingdom v European Parliament and Council*, ECLI:EU:C:2006:279.

¹⁰⁷ Differently, León appears to consider *all* administrative procedures in EU funding to represent composite decision-making, whereas in the view supported here this is generally not the case given that decisional interdependence is typically lacking. See generally S Alonso de León, n 46.

The Recovery and Resilience Facility Regulation (RRFR) provides a good example.¹⁰⁸ The RRFR was adopted to address the economic fallout of the Covid-19 pandemic. It establishes an authentic second-order administrative procedure. National recovery and resilience plans (RRPs) are submitted by the Member States, then assessed by the Commission, and then finally approved (or rejected) by the Council. RRP's foresee large-scale investments and reforms which certainly require countless national administrative procedures – eg for the allocation of subsidies or for public procurement. However, the Council decision as such does not condition the independent power of national authorities to decide on the outcome of those procedures. It only affects the financial legal relations between the Member State and the Union.

B. Institutional Cooperation

Institutional cooperation, also referred to as organisational cooperation, concerns the creation of Union administrative bodies, where representatives of national, and sometimes also Union, authorities meet and deliberate. This is the case with Union Agencies – such as the European Data Protection Board,¹⁰⁹ or the European Union Agency for the Cooperation of Energy Regulators –¹¹⁰ and the plethora of specialised comitology committees in the orbit of the European Commission.

The composite nature of institutional cooperation has tended to be overestimated. What *is* composite, if anything, is the diversity of national administrations represented in comitology committees and Agency boards. However, both kinds of administrative bodies are *bodies established by the European Union itself*. Their decisions are not imputed individually to each of the represented national authorities, but rather to the relevant Agencies or committees as such, subject exclusively to the EU's own rules on administrative procedure and to judicial review by the CJEU.

To put it perhaps provocatively, comitology committees and Agency boards are no more 'composite' than the Council, the legal status of which as an institution *of the EU* cannot be seriously disputed. Indeed, as Schütze has pointed out, the decisions of Agencies and comitology committees result from the exercise of power at Union level *only* and 'will be fully assimilated to European law'.¹¹¹ In short, even though they serve as a forum of multilevel administrative cooperation, Agency boards and comitology committees exercise powers separately from national administration.

¹⁰⁸ See eg Article 24 of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

¹⁰⁹ See Article 68 GDPR, n 83.

¹¹⁰ See Article 18 of Regulation (EU) 2019/943 of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators.

¹¹¹ R Schütze, n 51, 1424.

C. Informational Cooperation

It has been rightly pointed out that European administration is increasingly an ‘administration of information.’¹¹² The European Union’s administrative system is characterised by pervasive informational cooperation – ie information-sharing between the different levels of administration involved.¹¹³

The Union’s own authorities, and Agencies in particular,¹¹⁴ often serve as a hub for information gathered by national administrations to be received, stored and disseminated back to the Member States or to Union institutions. Yet the forms of information-sharing vary significantly.¹¹⁵ Information may be exchanged vertically, between national and Union authorities, or horizontally, between authorities belonging to various Member States, as when potential cross-border effects are disclosed in environmental impact assessment procedures.¹¹⁶ Information may be shared in a spontaneous and informal manner,¹¹⁷ or shared to fulfil a specific legal obligation of mutual assistance.¹¹⁸ Increasingly, information is shared within highly structured interoperable information systems, managed by Union Agencies as a service to competent national authorities in law enforcement, asylum, and internal border protection.¹¹⁹

Informational cooperation promotes effective enforcement without expanding Union administration or removing power away from national administration.¹²⁰ For this reason, Member States often favour informational cooperation as an approach to administrative integration, which is typically only abandoned if mere information exchanges prove ineffective (as for example when the European Markets and Securities Authority was created).¹²¹

¹¹² H Hofmann, G Rowe, and A Türk, *Administrative Law and Policy of the European Union* (Oxford University Press, 2011), 411.

¹¹³ H Hofmann, ‘Seven Challenges for EU administrative law’ in K de Graaf et al (eds), *European Administrative Law: Top-Down and Bottom-up* (Europa Law Publishing, 2009), 53.

¹¹⁴ E Chiti, ‘An important part of the EU’s institutional machinery: features, problems and perspectives of European agencies’ (2009) 46 *Common Market Law Review* 1395, 1403.

¹¹⁵ For an overview of European information-sharing mechanisms, see JP Schneider, ‘Basic Structures of Information Management in the European Administrative Union’ (2014) 20 *European Public Law* 89.

¹¹⁶ See Article 7 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

¹¹⁷ DU Galetta, ‘Informal Information Processing in Dispute Resolution Networks: Informality Versus the Protection of Individual’s Rights?’ (2014) 20 *European Public Law* 71.

¹¹⁸ See Article 12 of Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹¹⁹ See F Brito Bastos and D Curtin, ‘Interoperable Information Sharing and the Five Novel Frontiers of EU Governance: A Special Issue’ (2020) 26 *European Public Law* 59. For the view that interoperable data-sharing systems constitute composite procedures, rather than, as argued here, an altogether distinct form of administrative cooperation, see S Alonso de León, n 46, 209.

¹²⁰ See DU Galetta, H Hofmann, and JP Schneider, ‘Information Exchange in the European Administrative Union: An Introduction’ (2014) 20 *European Public Law* 65, 68 and D Curtin, n 14, 106 ff.

¹²¹ See Recital (8) of founding act of the European Security Markets Authority (ESMA) (Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010).

The distinction between informational cooperation and procedural cooperation (ie composite administrative procedures) has remained rather blurry. Hofmann considers information-sharing to be ‘the substance’ of composite decision-making.¹²²

The view supported here, however, is very different from Hofmann’s. Hofmann adopts a substantive conception of composite decision-making, where the use of information shared by another administration suffices for a decision-making process to qualify as composite. The version of the concept of decision-making endorsed in this book, by contrast, is formal in nature. It requires authorities to interact within an administrative procedure, in the sense previously described of a legally predefined sequence of steps and stages; and that those authorities exercise interdependent decisional powers. Hofmann writes that the *Tillack* case showcases the legal problems raised by composite procedures.¹²³ However, if one takes a formal conception, then the case concerned mere information-sharing rather than composite decision-making. In fact, *Tillack* illustrates precisely why the two are different and ought to be clearly distinguished.

The facts surrounding *Tillack* can be summarised as follows.¹²⁴ OLAF (the EU’s anti-fraud office) forwarded a report to German and Belgian prosecuting authorities in which it claimed that Tillack, a journalist, had obtained OLAF confidential information with bribes. The Belgian federal police opened an investigation which ultimately led to Tillack’s home being searched and to some documents and belongings in his possession being seized. Tillack brought an action for annulment of the decision to send information from OLAF to the national prosecuting authorities.

The General Court dismissed the action. It held that, because it does not entail binding legal effects, the mere forwarding of information cannot qualify as a reviewable decision under Article 263 TFEU. But even more importantly, the ruling emphasised that national authorities exercise their powers independently from interference from the EU administration. National authorities ‘*remain free*, in the context of *their own powers*, to assess the content and significance of that information’; and the ‘*only authorities* having the power to adopt decisions capable of affecting [an individual’s] legal position’. Accordingly national decisions were ‘the *sole and entire responsibility* of the national authorities’ (emphasis added).¹²⁵

In short, *Tillack* shows that, rather than requiring it to take any specific decisions, mere information-sharing simply provides the recipient authority with an adequate factual basis to take its own decisions.¹²⁶ A formal conception of

¹²² H Hofmann and A Türk, n 30, 136, 141.

¹²³ H Hofmann, ‘Decision-Making in EU Administrative Law – The Problem of Composite Procedures’ (2009) 61 *Administrative Law Review* 199.

¹²⁴ See Cases T-193/04 R *Tillack v Commission*, ECLI:EU:T:2004:311; C-521/04 P(R) *Tillack v Commission*, ECLI:EU:C:2005:240; and T-193/04 *Tillack v Commission*, ECLI:EU:T:2006:292.

¹²⁵ Case T-193/04 R *Tillack v Commission*, ECLI:EU:T:2004:311, paras 69 and 70.

¹²⁶ Similarly, R Schütze, n 51, 1421.

composite decision-making prevents such information-sharing from being confused with the very different scenario where national and Union authorities decide interdependently and within a single administrative procedure. In that scenario, the sole one that falls under a formal conception of composite decision-making, the preparatory acts taken by one administration condition the exercise of decisional power by another administration. On the one hand, the administration that receives a preparatory act from another is required to take specific steps, like initiating a new procedural stage or adopting a final decision that implements that preparatory act. On the other hand, the final decisions in a composite procedure may not be validly adopted by one administration unless they are preceded by legally mandated preparatory acts issued by another administration. In short, and unlike composite decision-making, information-sharing does not deprive national or Union administration from the ability to exercise their own powers independently.

Lastly, the issues of judicial control raised by information-sharing and composite decision-making are also entirely different. A complex, nuanced body of case law emerged from the CJEU's attempt to square composite decision-making with the EU's dual system of judicial review. By contrast, the CJEU straightforwardly strikes down Union decisions based on flawed information provided by national authorities.¹²⁷

This is not to say that judicial control of information exchanges is simple – indeed, it is not.¹²⁸ But this has little to do with composite decision-making, or indeed with multilevel administration more generally. The EU's judicial system revolves around the review of binding legal acts. It is entirely inadequate to scrutinise factual conduct, such as information exchanges.¹²⁹ Indeed, it is as ill-equipped to review information exchanges taking place exclusively within Union administration as it is to review information exchanges between national and Union administration.

D. Teamed-Up, Seconded and Collegial Cooperation

Three more forms of cooperation must be added. Though still underexplored, all three are of growing practical importance.¹³⁰ One may term as 'teamed-up' cooperation the practice of instituting informal, ad hoc teams of officials from different levels of administration. The role of teams is to assist other authorities

¹²⁷ Case C-375/96 *Zaninotto*, ECLI:EU:C:1998:517, paras 34 ff.

¹²⁸ H Hofmann and A Türk, n 30, 137; and M Eliantonio, 'Information Exchange in European Administrative Law: a Threat to Effective Judicial Protection?' (2016) 23 *Maastricht Journal of European and Comparative Law* 531.

¹²⁹ See N Xanthoulis, 'Administrative factual conduct: Legal effects and judicial control in EU law' (2019) 12 *Review of European Administrative Law* 39.

¹³⁰ The analysis in the main text draws on F Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the "Touch of Stateness"' (2021) 22 *German Law Journal* 593.

in taking their own decisions. For instance, the European Central Bank (ECB) is assisted in the supervision of each significant bank by a Joint Supervisory Team, composed of staff members of both the ECB and national supervision authorities.¹³¹ In other areas of EU law, one also finds Migration Management Support Teams, and Asylum Support Teams.¹³²

Seconded cooperation consists in the temporary deployment of individual national officials to the functioning of other authorities. Seconded national experts within the framework of European Union Agency for Law Enforcement Cooperation (Europol).¹³³

Lastly, one can describe as ‘collegial cooperation’ those instances where representatives of different national administrations decide jointly within a single body which *is not* a body that belongs to the Union’s own administration (a feature which distinguishes them, for example, from comitology committees). In the Single Resolution Mechanism, regulators from national resolution authorities convene in so-called resolution colleges to adopt a single resolution plan for a credit institution with cross-border activities.¹³⁴ In the framework of European Territorial Cooperation (Interreg), Member States create joint inter-state committees to manage applications for structural funds financing in border regions.¹³⁵

Neither teamed-up nor seconded cooperation interfere with the autonomy of other levels of administration in taking their own decisions. Both are therefore compatible with the separation principle. The same cannot be said, however, of collegial cooperation. Instances of such cooperation, albeit rare, raise entirely new legal issues that emerge from the inability to ascribe colleges’ decisions to any single administration – be it the Union administration or any of the national administrations involved in them.

E. EU Agency Networks as Cooperation Clusters

The forms of cooperation set out above are not mutually exclusive and in fact often coexist within the same policy field. Administrative networks – typically

¹³¹ Regulation (EU) No 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, Articles 3 ff.

¹³² Article 18 of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and Articles 13 ff of Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

¹³³ See Article 56 of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016.

¹³⁴ Article 88 and ff of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

¹³⁵ For a case illustrating the doubts posed by these committees, see Case C-562/12 *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007–2013 Seirekomitee* ECLI:EU:C:2014:2229.

regulatory agency networks – do not constitute a form of cooperation of their own. Rather, such networks combine clusters of distinct forms of cooperation.

The network of national data protection authorities (DPAs) governed by the General Data Protection Regulation (GDPR) provides a good illustration. The European Data Protection Board (EDPB) is an instance of institutional cooperation – it is a Union agency where DPAs are represented.¹³⁶ DPAs, in turn, are responsible for national implementation of the EDPB's guidelines and recommendations (ie the EDPB fulfils a role of second-order administration in assisting DPAs).¹³⁷ Informational cooperation is required of all DPAs.¹³⁸ Lastly, the GDPR establishes a composite administrative procedure (ie procedural cooperation) where the EDPB decides to settle a disagreement between DPAs.¹³⁹

V. The Road to Unitary Protection

Cooperation between national and Union administration is as old as European integration itself. The Union's administrative system, in that sense, has been a multilevel administrative system from its very beginning. The cooperative relations between national and Union authorities became ever more complex and intertwined. This process occurred just as the CJEU proceeded in crafting its constitutional doctrine of European Executive Federalism. Besides setting out their rationale and variety, the present chapter sought to show that practically none of the EU's forms of multilevel administration actually calls into question the separation between national and Union administration which that doctrine aims to uphold.

Composite procedures represent the exception, even if future additional exceptions cannot be ruled out. Indeed, because they are based on decisional interdependence of national and Union administration, composite procedures 'do not mirror a constitutional structure based on separated powers'.¹⁴⁰ Composite administrative procedures are diverse in their structure – in how they connect national and Union authorities in interdependent decision-making. Their typologies illustrate the scale of difference between the roles of national and Union administration, depending on how decisional dominance is allocated. The role of national authorities ranges from adopting binding opinions to serving as mere reception desks; the role of Union administration ranges from the merely advisory to the exercise of arbitral powers over national authorities. Admittedly, one finds the occasional interpretive doubt as to whether Union legislation, in defining their respective roles, aims to confer decisional dominance to the national or

¹³⁶ Article 68 GDPR.

¹³⁷ Article 70(1) GDPR.

¹³⁸ Article 60(1) GDPR.

¹³⁹ Article 65(1)(a) GDPR.

¹⁴⁰ G della Cananea, n 47, 199.

the Union administration.¹⁴¹ Nevertheless, what all such roles have in common is that they are not exercised in isolation by national and Union authorities, in discrete administrative procedures, but within the context of one and the same administrative procedure – of a unitary administrative procedure, as Gaztea rightly points out.¹⁴² In short, in one form or another, composite decision-making involves joint, not separate, decision-making.

Composite decision-making thus represents a form of administration which the doctrinal framework of European Executive Federalism is not designed to regulate. This mismatch between composite decision-making and European Executive Federalism raises two sets of rule of law problems – procedural and judicial. In addressing them, the CJEU came to gradually develop a novel doctrine, unitary protection, which accordingly entails procedural as well as judicial aspects. The rise of unitary judicial protection, analysed in Part III of this book, was extraordinary in its own right. Even though many of its solutions proved counterintuitive, the CJEU surprisingly never hesitated to set aside the same strict division between national and Union courts that still applies to the judicial review of any administrative decision-making that does not occur within composite procedures. As Part II will show, however, the CJEU proved far more reluctant to compromise the strict federal separation between the powers of national and Union administration in the name of individuals' procedural rights.

¹⁴¹ Under Article 6(10) of Regulation 2019/942 of the European Parliament and of the Council, ACER, the European Union Agency for the Cooperation of Energy Regulators, is 'competent to adopt individual decisions on regulatory issues having effects on cross-border trade or cross-border system security which require a joint decision by at least two regulatory authorities'. In Case T-607/20 *Austrian Grid*, ECLI:EU:T:2023:65, the General Court was called upon to determine whether ACER is free to decide independently from the national regulatory authorities' requests (in which case it would enjoy decisional dominance) or bound to decide in conformity to them (in which case it would not). In para 50 of the Case, the General Court took the former view: 'ACER exercises its competence independently and on its own responsibility ... it cannot be bound by the position taken by the competent NRAs on some of the regulatory issues ... in particular where it considers that that position is not in conformity with EU energy law'.

¹⁴² J. Fernández Gaztea, *Cooperación Procedimental en la Unión Europea: Límites Jurisdiccionales* (Tirant lo Blanch, 2020), 163 ff.

PART II

Good Administration Rights

