

# Information Exchange in the European Administrative Union: An Introduction

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This special edition of the European Public Law (EPL) contains contributions exploring the law of information in the EU. This is a key aspect of the reality of decentralized implementation of EU policies – the European administrative union. Therein, organizationally separate bodies from the EU and the Member States (MS) levels are linked by procedures to achieve the output provided for in the specific policies of the EU. The possibilities and role of information exchange are a little understood aspect of high relevance for all areas of what one might call the ‘administrative’ law of the EU. This covers implementation of EU policies not only in the more narrow sense of activities necessary to implement legislative acts issued on the EU level. It also contains implementation in the wider sense as the activity of the MS when acting in what the European Court of Justice (ECJ) calls the ‘scope’ of EU law.<sup>1</sup> The basis of this is circulation of information between national administrations, trans-border cooperation between local governments, and networks of national administrative bodies. Such activities have intensified since the past thirty to forty years, initially with support of the implementation of EU policies by ad-hoc exchange of information in the sense of mutual assistance. With more powerful means of computer-based information exchange, increasingly, the development of more structured forms of information networks has taken place in a wide spectrum of policy areas touched by EU law.

The central questions which the contributions to this special edition, therefore, address are: what is the legal framework for procedures based on inter-jurisdictional information exchange in the EU and What is the law governing the establishment of information exchange systems in the EU? These

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<sup>1</sup> The Court of Justice recently reconfirmed the relevance of EU law when Member States act in the scope of EU law i.e. the limitation of fundamental freedoms under the ERT case law (*ERT v. DEP*, C-260/89, para. 42 [ECJ, 18 Jun. 1991], ECR I-2925), or, like in *Akerberg*, addressing the question of sanctions for violation of harmonized EU law (see *Åklagare v. Fransson*, C-617/10, paras 19–21 [ECJ, 26 Feb. 2013], ECR I-nyr).

questions are key to the possibility of thinking about a system of de-central implementation of EU policies which not only concentrates on efficiency of decision-making but also looks at the protection of rights of individuals. Contributions to this special edition therefore are an attempt at examining procedures for developing of new or for modifying existing information systems, examining the architecture of some exemplary information systems for implementation of EU law and identifying specific legal arrangements or legal requirements with special relevance for information systems or informational mutual assistance. Also contributions discuss the question how a fair balance between effective information management, good administration, data protection and individual legal protection could be achieved. The methods are based on case-studies and normative assessments in which compliance with general principles of EU law and fundamental rights of individuals are the benchmarks for evaluation.

## 1 INFORMATION EXCHANGE AND INFORMATION SHARING AS CENTRAL FEATURES OF COMPOSITE ADMINISTRATIVE PROCEDURES IN THE EU

European administrative law consists to a large extent of legal arrangements for the management of information needed in administrative proceedings.<sup>2</sup> Such arrangements are essential elements of composite administrative procedures. They establish manifold horizontal interactions between authorities from different Member States as well as vertical interactions between national and European authorities, where these implement EU law collaboratively. The prevalence of the complex forms of policy implementation by administrative networks has made it increasingly difficult to identify cases in which ‘direct’ or ‘indirect’ implementation of EU law takes place without some form of joint procedure.<sup>3</sup> Increasingly, procedural integration of administrations from national and in some cases European levels takes place through shared implementing ‘composite’ decision-making procedures.<sup>4</sup> Such cooperation mechanisms have been labelled<sup>5</sup>

<sup>2</sup> Eberhard Schmidt-Aßmann, *Verfassung im Diskurs der Welt, Liber amicorum in Honour of Peter Häberle*, 395 (Tübingen: Mohr Siebeck 2004).

<sup>3</sup> See Jacques Ziller, *Les concepts d’administration directe, d’administration indirecte et de co-administration et les fondements du droit administratif européen*, 235–241, in Jean-Bernard Auby & Jacqueline Dutheil de la Rochère (eds.), *Droit Administratif Européen* (Bruxelles: Bruylant 2007).

<sup>4</sup> Herwig C.H. Hofmann, *Composite Decision Making Procedures in EU Administrative Law*, in *Legal Challenges in EU Administrative Law* 136–167, at 136 with further references in n. 1 (Herwig C.H. Hofmann & Alexander H. Türk eds., Edward Elgar 2009).

<sup>5</sup> For an overall critique of the ‘semantic chaos’ resulting from so many different notions see Diana-Urania Galetta, *Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di ‘cooperazione amministrativa’ dell’art. 10 TCE, per definire il fenomeno dell’amministrazione intrecciata?*, 6 *Rivista italiana di diritto pubblico comunitario* 1689 (2009).

as a form of European composite administration,<sup>6</sup> shared administration,<sup>7</sup> European administrative space,<sup>8</sup> multi-level and transnational governance,<sup>9</sup> joint European administration,<sup>10</sup> European administrative union,<sup>11</sup> integrated administration,<sup>12</sup> or, in German, as ‘*Verwaltungsverbund*’.<sup>13</sup>

A key instrument for ensuring the composite nature, i.e., the input into one single procedure from executive actors from different levels, is joint gathering and computation of the information necessary for final decision-making. Such information exchange networks exist in competition policy,<sup>14</sup> visa and immigration matters,<sup>15</sup> assessing product safety,<sup>16</sup> food safety,<sup>17</sup> or assessing fishing stocks<sup>18</sup> to name just a very few examples from a diverse range of policies. Obligations of cooperation in composite procedures arise from the principle of

<sup>6</sup> Oswald Jansen & Bettina Schöndorf-Haubold eds., *The European Composite Administration* (Cambridge, Antwerp, Portland: Intersentia 2011).

<sup>7</sup> Paul Craig, *EU Administrative Law* 79–108 (2d ed., Oxford U. Press 2011).

<sup>8</sup> Johan P. Olsen, *Towards a European Administrative Space?* 10 JEPP 506 (2003); Herwig C.H. Hofmann, *Mapping the European Administrative Space* 31 W. Eur. Pol. 662–676 (2008).

<sup>9</sup> Beate Kohler-Koch & Fabrice Larat (eds.), *European Multi-Level Governance – Contrasting Images in National Research* (Edward Elgar 2009); Liesbet Hooghe & Gary Marks, *Multi-Level Governance and European Integration* (Lanham, MD: Rowman & Littlefield 2001); Kristine Kern & Harriet Bulkeley, *Cities, Europeanization and Multi-level Governance: Governing Climate Change through Transnational Municipal Networks*, 47 JCMS 309 (2009).

<sup>10</sup> Jens-Peter Schneider, *Regulation and Europeanisation as Key Patterns of Change in Administrative Law*, 313–320, in Matthias Ruffert, *The Transformation of Administrative Law in Europe* (München: European Law Publishers 2007). See also, in the Italian Doctrine, the concept of ‘coamministrazione’ developed by C. Franchini: Claudio Franchini, *amministrazione italiana e amministrazione comunitaria. La coamministrazione nei settori di interesse comunitario* (Padova: CEDAM 1993, 2nd ed).

<sup>11</sup> Francisco Velasco Caballero & Jens-Peter Schneider (eds.), *La unión administrativa europea* (Madrid, Barcelona, Buenos Aires: Marcial Pons 2008).

<sup>12</sup> Herwig C.H. Hofmann & Alexander H. Türk (eds.), *EU Administrative Governance* (Edward Elgar 2006).

<sup>13</sup> Eberhard Schmidt-Aßmann & Bettina Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund* (Tübingen: Mohr Siebeck 2005); Matthias Ruffert, *Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund*, 60 Die Öffentliche Verwaltung (DÖV) 761 (2007); Jens-Peter Schneider and Francisco Velasco Caballero, *Strukturen des Europäischen Verwaltungsverbunds* (Berlin: Duncker & Humblot 2009); Wolfgang Weiß, *Der Europäische Verwaltungsverbund* (Berlin: Duncker & Humblot 2010).

<sup>14</sup> See Council Regulation (EC) n. 1/2003, of 16 Dec. 2002, *on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty*; Commission Notice, *on Cooperation within the Network of Competition Authorities*, OJ C 101/43 (27 Apr. 2004).

<sup>15</sup> Council Decision 2004/512/EC, of 8 Jun. 2004, *establishing the Visa Information System (VIS)*; Regulation (EC) n. 1987/2006 of the European Parliament and of the Council, of 20 Dec. 2006, *on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II)*.

<sup>16</sup> Directive n. 2001/95/EC, of 3 Dec. 2001, *on General Product Safety*.

<sup>17</sup> See e.g., Regulation (EC) n. 178/2002, of 28 Jan. 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*.

<sup>18</sup> Commission Regulation (EC) n. 1010/2009, of 22 Oct. 2009, *laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing*.

sincere cooperation (Article 4(3) TEU) or, where specifically established, also from European legislation containing detailed provisions in several policy areas.<sup>19</sup>

A special instrument in EU information management is an increasing number of so-called information systems,<sup>20</sup> which establish more or less integrated arrangements for the exchange of information between authorities from different Member States as well as from the EU level. Information technology used in such EU information systems assists in overcoming barriers created both by distance and language. Some actors even hope to overcome those impediments to cooperation which are caused by divergent administrative procedures, cultures in different countries or the coexistence of different administrative levels.

## 2 INFORMATION MANAGEMENT AS A SAFETY NET FOR THE EUROPEAN INTEGRATION

European information procedures and systems have evolved in the process of establishing a single market process and the harmonization of several policy areas without the creation of a centralized administration. Information systems have become the default approach to the European integration process which at its core has been about abolishing limitations to movement of persons, goods, services and capital.<sup>21</sup> These developments have increased the need of the competent authorities for cross-border information and have led to the development of a multitude of information networks which compensate for the abolishment of limits on cross-border traffic. They are thus an important foundation for the on-going process of European integration.

For instance, the Schengen Information System (SIS) is the basic security mechanism to compensate for the abolition of border controls within the European Union.<sup>22</sup> It was enacted in order to implement the freedom of movement, a right which Union citizens are guaranteed by the European treaties.

<sup>19</sup> See Schneider, *Basic Structures of Information Management in the European Administrative Union*, in this special edition 89, at 99-101.

<sup>20</sup> Kristina Heußner, *Informationssysteme im Europäischen Verwaltungsverbund* (Tübingen: Mohr Siebeck 2007); Jens-Peter Schneider, *Informationssysteme als Bausteine des Europäischen Verwaltungsverbunds*, 31 *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 65 (2012); see also Armin v. Bogdandy, *Informationsbeziehungen innerhalb des Europäischen Verwaltungsverbundes*, § 25, paras 106-107, in Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts II* (München: Beck, 2012, 2nd ed); Eberhard Schmidt-Aßmann, *Einleitung: Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts*, 16-17, in Schmidt-Aßmann and Schönendorf-Haubold (eds.), *supra* n. 13.

<sup>21</sup> See Jens-Peter Schneider, *European Information Systems and Data Protection as Elements of the European Administrative Union The Right to Privacy in the Light of Media Convergence – Perspectives from Three Continents* 376-377 (Dieter Dörr and Russel Weaver eds, Walter de Gruyter 2012); Hofmann, *supra* n. 8; Herwig C.H. Hofmann, Gerard C. Rowe & Alexander H. Türk, *Administrative Law and Policy of the EU*, 8-11 (Oxford 2011).

<sup>22</sup> von Bogdandy, *supra* n. 20, at § 25 para. 79.

Likewise, the Member States could only agree to open their borders for cross-border services (e.g., in health care or services by craftsmen) on the condition that measures for a cross-border information exchange system (like the Internal Market Information System, IMI) would be established. Information systems also address the problem of potentially dangerous products, which may circulate freely within the European Union due to the free movement of goods but are later found to be hazardous. In those cases, information systems constitute alert mechanisms and function as a safety net.

The establishment or development of such information systems is a key element of many recent EU legislative acts or initiatives and thus highly relevant for European legal scholarship. Examples are security related information exchanges in the area of freedom, security and justice,<sup>23</sup> with global partners, especially the United States,<sup>24</sup> or the development and extension of the Internal Market Information System (IMI).<sup>25</sup> A general feature of these initiatives is the linkage of different data resources which, prior to this event, have merely been stored and used for sector-specific purposes. In some cases they even are to be integrated into a uniform data base, accessible to an ever-increasing number of actors for a growing number of purposes. This is an obvious challenge for data protection principles, especially those which demand purpose limitation, data minimization, data security and the clear allocation of data responsibilities. Additional legal issues concern the acceptable degree of, or time-frame for, an informal development of innovative information exchange mechanisms,<sup>26</sup> networks of supervisory authorities<sup>27</sup> as well as the effectiveness of administrative or judicial appeal and review procedures.<sup>28</sup>

<sup>23</sup> See COM (2010) 385, of 20 Jun. 2010, *Overview of Information Management in the Area of Freedom, Security and Justice*; s. also Art. 29 Data Protection Working Party & Working Party on Police and Justice, *The Future of Privacy*, WP 168 (1 Dec. 2009): [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp168\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp168_en.pdf) (accessed 9 Apr. 2013), paras 105–112.

<sup>24</sup> Marie McGinley, *Die Verarbeitung von Fluggastdaten für Strafverfolgungszwecke*, 34 *Datenschutz und Datensicherheit (DuD)* 250 (2010); Marina Tamm, *Rückwirkungen des gescheiterten SWIFT-Abkommens auf das Abkommen über Fluggastdaten?*, *Verbraucher und Recht (VuR)* 215 (2010); Proposal for a European Parliament and Council Directive COM (2011) 32, of 02 Feb. 2011, *on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*.

<sup>25</sup> See Lottini, *An instrument of intensified informal mutual assistance: the internal market information system (IMI) and the protection of personal data*, in this special edition 107–125.

<sup>26</sup> See Galetta, *Informal information processing in dispute resolution networks: informality versus the protection of individual's rights?*, in this special edition 72–88.

<sup>27</sup> See Marsch, *Networks of supervisory bodies for information management in the European Administrative Union*, in this special edition 127–145.

<sup>28</sup> See Hofmann/Tidghi, *Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks*, in this special edition 147–163.