

EUROPEAN ADMINISTRATIVE PROCEEDINGS

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I

INTRODUCTION

To enforce competition rules, to ensure the proper allocation of European social and agricultural funds, and to guarantee food safety, the European Commission (“Commission”) exercises powers of inspection, supervision, and monitoring. In this first arena—enforcing competition law—the Commission has the power to use its own agents to carry out inspections. But in other arenas, it cannot always act directly. Overseeing the proper allocation of European social and agricultural funds is, for example, the task of national administrations; the Commission’s role is only supervisory. And administrative tasks regarding food safety are shared: the Commission and national governments together monitor food safety according to principles and criteria established by the Commission. These three examples demonstrate how European administrative organs and procedures have adapted to the new administrative and legislative landscape of the European Union (“Union”).

Initially, only certain types of administration were handled exclusively by the European Community (“Community”)—specifically, competition law and state subsidies. This is what is known as “direct administration.” Implementation of agricultural measures, by contrast, fell to national authorities acting under Community control. Administration in the agriculture area is one example of what is known as “indirect administration.”¹

Later, other organizational models developed, based on collaboration between the Commission and individual national administrations. Only recently have scholars begun to identify and classify these forms of cooperation.²

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1. With reference to the United Kingdom, see IMPLEMENTING EC LAW IN THE UNITED KINGDOM: STRUCTURES FOR INDIRECT RULE (T. Daintith ed., 1995); J. STEINER, ENFORCING EC LAW (1995). With reference to Spain, see S. GALERA RODRIGO, LA APLICACIÓN ADMINISTRATIVA DEL DERECHO COMUNITARIO. ADMINISTRACIÓN MIXTA: TERCERA VIA DE APLICACIÓN (1998).

2. E. CHITI ET AL., L’INTEGRAZIONE AMMINISTRATIVA EUROPEA (2003).

The first form is *joint administration*. This form is characterized by a single policy objective, pursued within a supranational, Community legal framework and implemented by a hybrid—part supranational, part national—administrative apparatus. The administration of structural funds is an example of this form of cooperation.

The second form is *decentralized administration*. This is characterized by parallel, non-exclusive legal powers vested in both the Community and the Member States, together with a single administrative apparatus—a European agency. An example of this form of administration can be found in European efforts to combat drugs and drug addiction.

The third form is the *regulatory concert*—national and supranational authorities make up a common organization. In the telecommunications sector, for example, the heads of Member State regulatory authorities are members of a “European Regulatory Group” in Brussels.

The European Union is replete with many modes of combining organizations and activities, both vertically and horizontally. These forms of composition give rise to what has been termed “common systems,” which refers to the two levels of administration—the supranational and the national—taken together.³ This expression was used in Council Regulation 1334/2000 of 22 June 2000 on the export of dual-use items.⁴

Common administrative systems are first an administrative reflection of the collective,⁵ or consociational,⁶ nature of European government, whereby supranational administration enters national administrative activities, and national administrations likewise enter supranational activities. Second, common systems help to reconcile complicated, conflicting, but interconnected interests. Third, common systems perform the twofold mission of the Union. The Union serves, on the one hand, as an arm of national executives, which make their voices heard at the European level mainly through the Council of the European Union and the European Council. On the other hand, the Union operates as a mechanism for keeping national executives under control. This is mainly the concern of the Commission and the Court of Justice. Without common systems, this twofold mission of the European Union would be very difficult, if not impossible. Finally, common systems are specific to particular policy areas. This organization corresponds to the “sector-by-sector approach” to government,⁷ and

3. Or coordinated, as in the case of Regulation 1980/2000 of the European Parliament and of the Council of 17 July 2000, art. 11, according to which “[t]he Commission and the Member States shall act in order to ensure the necessary coordination between this Community Scheme and national schemes in the Member States.”

4. The term “common system” could by now replace both the noun and the adjective “Community”—terms destined to disappear when the “Treaty establishing a Constitution for Europe,” signed in Rome on the 29th of October, 2004, will be ratified and will enter into force (1st of November, 2006).

5. See H. Kassim, *The European Administration: Between Europeanization and Domestication*, in GOVERNING EUROPE (J. Hayward et al. eds., 2003); see also D.J. Elazar, *The United States and the European Union*, in THE FEDERAL VISION 31 (C. Nicolaidis et al. eds., 2001).

6. O. Costa & P. Magnette, *The European Union as a Consociation? A Methodological Assessment*, 26 W. EUR. POL. 1, n.3 (2003).

7. On this feature of the early phase of European integration, see M. Patrono, IL GOVERNO DELLA PRIMA

to the functionalism that has enabled the incremental, progressive development of the European Union.

Common administrative systems however give rise to different types of problems. Some are common to other multi-level organizations: they do not have one, but many centers, among which structure must be established. Other problems are unique to common systems. “Legislative integration” in a common legislative system is advanced by grafting a supranational source of law—regulation and directive—onto national sources of law—legislation and regulation—with the supranational norm enjoying supremacy and direct effect in the national legal system. On the administrative plane, however, it is less clear whether the national or supranational orders enjoys superiority. For some purposes and in certain policy areas, national authorities prevail. For other purposes and in other policy areas, supranational authorities are superior. This organization creates a mutual interdependence, such that effective implementation will ultimately depend on the lowest level agency.

To confront these problems, a three-part strategy for administrative integration has been developed within the European legal system. This strategy is characterized, first, by a common, European notion of public administration, which avoids disparate national definitions in the promulgation of common rules. Following the “sector-by-sector approach,” Community law defines public administration in relation to particular policy areas and objectives. The concept of public administration is quite narrow for determining the public bodies allowed to exclude non-citizens from employment in derogation of the principle of the free movement of persons, but it is quite broad when establishing who must use competitive tendering in awarding public contracts to ensure the free movement of services and freedom of establishment.⁸

Second, the European legal order has created structural links among national administrative bodies, as well as between national administrative bodies and common, European public bodies. The Community legal system in fact teems with committees and groups made up of a mix of national representatives and representatives of the Commission.⁹

Third, Community law has linked the Commission’s administrative proceedings to national administrative proceedings, so much so that it is hard to keep the Community stage of a proceeding distinct from the national one.¹⁰ This interweaving is the most

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8. M. P. Chiti, *The EC Notion of Public Administration: the Case of the Bodies Governed by Public Law*, in 8 EUR. PUB. L. 473, n.4 (2002); S. Cassese, *La nozione comunitaria di pubblica amministrazione*, in *GIORNALE DI DIRITTO AMMINISTRATIVO* 920 n.10 (1996).

9. The literature on this topic is vast. Among the recent studies are, EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (C. Joerges et al. eds., 1999); K. Lenaerts et al., *Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision*, 37 COMMON MKT. L. REV. 645 (2000); M. Egeberg et al., *The Many Faces of EU Committee Governance*, 26 W. EUR. POL. 19, n.3 (2003).

10. There are still few studies of the European administrative proceeding. The best analysis and typology is G. della Cananea, *L'amministrazione europea*, in *TRATTATO DI DIRITTO AMMINISTRATIVO, DIRITTO AMMINISTRATIVO 1877* (S. Cassese ed., 2d ed. 2003). On the European administrative proceeding, see J. SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 1173 (1992); and M.P. CHITI, *DIRITTO AMMINISTRATIVO EUROPEO* 301 (1999) (see also the second edition in Spanish of M.P. CHITI, *DERECHO ADMINISTRATIVO EUROPEO* 237 (2d ed. 2002).

interesting aspect of the intersection of national and supranational levels of administration. It enables common principles to take root in the Member States' laws in the course of the decisionmaking process. Furthermore, through its administrative proceedings the Commission is able to make contact with the public, sometimes directly, other times through national administrative bodies.

This Article will focus on the third strategy of administrative integration, mixed or composite proceedings in which both Community and national authorities participate. Because the Community opted from the start for implementation by "indirect rule," these composite proceedings now make up the bulk of European administrative proceedings. This article will analyze how the common element takes root in the national part of the proceeding, what the national and supranational parts consist of, and the extent to which they remain distinct or appear instead as a single unit.

The purpose of this study is twofold. First, it will measure the degree of administrative interconnection in relation to so-called "constitutional" integration. Second, it will ascertain whether the Commission's activities reach the public and thus establish a relationship between the Union and its citizens.

The order of relations between the Community phase and the national one is expressed in a complex body of Community law made up of regulations and directives—statutory law—and the elaborate jurisprudence of the European Courts. The statutory law connects the common and the national stages of the proceedings in several different ways. This Article seeks to illustrate the main types, but does not claim to be exhaustive. The jurisprudence, by contrast, tends to elaborate common principles applicable to different kinds of proceedings. A preliminary assessment of the scope of these principles' application will be set forth below.¹¹

II

LEGAL PRINCIPLES GOVERNING MIXED PROCEEDINGS

A. Principles of Statutory Law Governing European Proceedings

First, the laws regulating mixed proceedings are European ones. Their rules determine not only what Commission officials or agencies must do, but also the procedural duties incumbent upon national administrative agencies.

11. The word "integration" will not be used in this article. This term is widely employed to indicate the connection of national legal systems to the supranational one in Europe, but it would be better to use a different term to refer to the administrative sphere. One reason is that there can be integration of legal systems, but not of administrative systems. This was in fact the original design. Another reason is that the degree of administrative integration might be greater or lesser than the degree of legal integration. In this case, the term "integration" would point to a unitary outcome, which is far from the case. The reality instead consists of accommodations, juxtapositions, overlaps, assemblages, additions, and insertions—in other words, of forms of composition—and thus presents characteristics that are less organic and less unitary than the term integration would suggest. On the forms of composition in Europe, see SABINO CASSESE, *LA CRISI DELLO STATO* 67 (2002); and SABINO CASSESE, *LO SPAZIO GIURIDICO GLOBALE* 55 (2003). For a more general overview, see P. GROSSI, *DALLA SOCIETÀ DI SOCIETÀ ALLA INSULARITÀ DELLO STATO FRA MEDIOEVO ED ETÀ MODERNA* (2003), which picks up on J. E. M. Portalis's formula, "société de sociétés," with reference to the *Ancien Régime*, and S. Fabbrini, *Le istituzioni dell'Unione Europea in prospettiva comparata*, in *L'UNIONE EUROPEA* 3 (S. Fabbrini ed., 2002).

Second, this Community law has been set down policy area by policy area. At the European level there is no general administrative procedural law. However, numerous principles have emerged from the case law and have been applied to administrative proceedings: good administration; the duty to impartially, accurately, and comprehensively represent the facts; remedies against bureaucratic inertia; the duty to notify interested parties that an administrative proceeding has begun; interested parties' right to information and to be heard; the duty to exercise diligence; the duty to conclude the proceeding within a reasonable period of time; etc.¹²

Third, the proceedings serve to protect not only the Community's interests, but also the interests of the Member States. For this reason, the law provides for the Member States' participation in negotiations, agreements, and opinions. This helps to ensure the unitary, or at least joint, exercise of distinct and separated powers.

Fourth, many public actors participate in these proceedings. The more actors that intervene, the more it is essential to regulate the procedural steps. The Member States' respect for the principle of sincere cooperation established by Art. 10 of the EC Treaty, is therefore essential.

Fifth, the law governing composite proceedings casts individual actors in multiple roles. National governments, in particular, not only represent the national interest, and thus are parties to such proceedings, but also act as administrative bodies exercising decisionmaking powers.

Sixth, as a rule, the Commission bears ultimate responsibility for the proceeding. The final decision can be taken by the Commission itself or by other public actors, but it is the Commission's responsibility to make sure that the proceeding is completed.

Seventh, the mixed or composite proceeding, as a mechanism for bringing together public and private interests at the European level, unfolds in a vertical fashion: the proceeding initiates in the Commission and concludes in a national agency, or vice versa. On the other hand, the composite proceeding also works to reconcile or compose the interests of the fifteen Member States. In requiring this type of agreement among national administrations, composite proceedings operate horizontally. For this reason, the law enables national administrative agencies to lodge objections.¹³

12. CANANEA, *supra* note 10, at 1880. An earlier work is S. Muñoz Machado, *Los principios generales del procedimiento administrativo comunitario y la reforma de legislación básica española*, in REVISTA ESPAÑOLA DE DERECHO ADMINISTRATIVO 1992, at 329 n.75.

13. Council Regulation 2081/92 of 14 July 1992 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, art. 7(5), 1992 O.J. (L 208) 1. In other cases, both the Member States and the Commission may make objections (in this sense, of Directive 2001/18/EEC of the European Parliament and of the Council of March 12, 2001, art. 15(1), 2001 O.J. (L 106) 1).

B. Norms Linking the Commission Phase with the National Phase of Mixed Proceedings

Not all proceedings aim at joining Community and national administrations. Financial proceedings for example, newly regulated by Council Regulation 1605/2002 of June 25, 2002, unfold wholly in the Commission and do not require it to establish relationships with national governments. However, these types of proceedings are relatively few. Even in exercising many strictly Community competences, the Commission must establish relationships with national administrations, bringing together national and supranational administrative activity.

The first type of proceeding regards an area of Community executive power, vested by the EC Treaty in the Commission or other supranational body, in which the Commission is primarily responsible for enforcement but nonetheless relies upon assistance from Member State administrations. One example is enforcement of the prohibitions on anti-competitive agreements and abuses of monopoly position.¹⁴ The law empowers the Commission to inspect corporate premises and obligates firm to cooperate. Officials of the national competition authorities in whose territory inspections are to be conducted actively assist the Commission's agents. Should a firm oppose a Commission inspection, "the Member State concerned shall afford . . . the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection."¹⁵ While the EC Treaty confer exclusive executive powers upon the Commission in this area, should a firm oppose an inspection, it is the national authorities who will call in their law enforcement officers.

This law also offers an example of a second type of proceeding. The law requires that national competition authorities apply Articles 81 and 82 of the EC Treaty against agreements or practices that may affect trade between Member States. Competition law remains an area of supranational executive power. But here, instead of holding this power exclusively, the Commission shares its powers with the national authorities. For this reason, the law provides that, when acting under Article 81 or Article 82 of the Treaty, national competition authorities must inform the Commission that they have initiated an investigation and must inform it of their decision.¹⁶ The information regarding initiation must be given before, or immediately after, the first formal investigative measures are issued. National competition authorities must inform the Commission thirty days prior to adopting a decision. The Commission may decide to initiate proceedings of its own after having consulted with the national authority. The initiation

14. Council Regulation 1/2003 of December 16, 2002, Regarding the Implementation of Competition Rules Laid Down in Articles 81 and 82 of the EC Treaty, 2003 O.J. (L 1) 1.

15. *Id.* at art. 20(6).

16. *Id.* at arts. 11(3), 11(4).

of a proceeding by the Commission “shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty.”¹⁷

The same law provides that Member States may also furnish information on the initiation and completion of a proceeding to competition authorities in the other Member States.¹⁸ Furthermore, a national authority may suspend proceedings or reject a complaint if another national authority is already dealing with the case.¹⁹

Although in the first type of proceeding, national administrations and courts may be called upon to carry out a supranational proceeding, the second type of proceeding is national, but ultimately subject to supranational control. In the second type, the Commission can always withdraw executive powers from the national authority by initiating a proceeding of its own, and thus step in for the national authority. Moreover, while the first type has a simple vertical quality—Commission–national competition authority—the second type also incorporates a horizontal dimension, as information is made available to the other state authorities.

A third type of proceeding arises out of areas of concurrent—partly supranational, partly national—executive powers. The difference between this and the previous type is that, in the previous type, executive power was supranational but shared with national authorities. The Commission let the Member State authorities exercise this power at the national level, but could divest them of it at any moment. Here, the EC Treaty allocates executive power to both the Member States and the Community, who exercise it cooperatively. This proceeding is divided into two phases: first a *national* and, second, a *supranational* phase. Even at the supranational stage, national administrations play multiple role: they can be adverse parties, parties to an agreement, or supranational decisionmakers (as members of the committee or the Council).

An example of this are proceedings for the protection of geographical indications and designations of origin for agricultural products and foodstuffs.²⁰ This legislation was designed to harmonize national procedures for awarding geographical indications and designations of origin. The concurrent-powers proceeding unfolds in an ascending fashion. The application for registration is presented to the national authority, which may reject it as unjustified, or which may conclude that it satisfies the law’s requirements. In the latter case, the Member State forwards the application and other relevant documents to the Commission. If the Commission’s investigation leads it to approve the registration, it publishes these findings. At this point, any interested party or any Member State may object (to the national authority and to the Commission respectively). If the objection is admissible, the Commission asks the concerned Member States to seek an agreement within three months. If such agreement is not reached, the

17. *Id.* at art. 11(6).

18. *Id.* at art. 11(3), (4).

19. *Id.* at art 13.

20. Council Regulation 2081/92, *supra* note 13, at arts. 5-7, 15.

Commission decides with the help of a special committee of Member State representatives, chaired by a representative of the Commission. If the committee fails to deliver an opinion, or its opinion differs from that of the Commission, the Council decides by a majority vote. If there are no objections, when an agreement is reached, or after the decision of the Commission or the Council has been made, the name is entered in a register of protected designations of origins and protected geographical indications, which is then published.

A fourth type of proceeding regards still other areas in which the Community and the Member States exercise concurrent executive powers. This time however, the proceeding starts at the European level and flows downward to the Member States. An example is the Community eco-label award scheme, which seeks to induce consumers to purchase products with a reduced environmental impact.²¹

In this type of proceeding, an initial supranational phase is followed by a second, national one. The first phase aims at defining the eco-label criteria. It is instituted at the initiative of the Commission, or at the request of the European Union Eco-Labeling Board (“Board” or EUEB), which is made up of the responsible national bodies and a consultation forum representing interested parties. The criteria are drafted by the Board and sent to the Commission, which, after sending them to a comitology committee, publishes them.²² The second, national phase is initiated on an application of a manufacturer, importer, service provider, trader, or retailer to the competent national body. The national authorities verify that the product complies with the criteria and that the application conforms with the assessment and verification requirements. They then award the label.

This type of proceeding, like the previous one, has two phases. Here, however, the supranational phase *precedes* the national one. The national phase then serves to apply the criteria set forth by the Commission. But this should not be taken to mean that the competent national bodies play merely an executive role. Indeed, they sit on the two committees that assist the Commission (EUEC and comitology committee). Additionally, interested parties who could raise objections in the previous type of proceeding can also do so here in a “consultation forum.”

A fifth type of proceeding regards executive powers that are again concurrent but that are “distributed” among the Member States and carried out by them in concert. This produces a *choral* proceeding, taking place among multiple national administrations, rather than between the Commission and a particular

21. Regulation 1980/2000 of the European Parliament and of the Council of July 17, 2000, on a Revised Community Eco-label Award Scheme, arts. 6,7, 2000 O.J. (L 237) 1.

22. A comitology committee is composed of specialized national bureaucrats, representing each of the Member States, and must be consulted by the Commission. The influence of the comitology committee depends on the procedural sequence and voting rules governing the legal relationship between the Commission, the committee, and the Council. There are three basic types of committees, listed in order from least influential to most influential: advisory committees, management committees, and regulatory committees. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 150-53 (3d ed., 2003). In the eco-labelling area, the comitology committee is a regulatory committee.

Member State. In this case, decision-making power rests primarily with the Member States, acting in concert, rather than supranational authorities, although the Commission and Council may step in as a matter of last resort in the event of disagreement.

A good example of this type of proceeding is provided by the mediation and consent procedure for the deliberate release of genetically modified organisms into the environment.²³ The law in this case provides that notification be submitted to the competent authority of the Member State. This national authority then forwards the summary of the dossier to the competent authorities of the other Member States and the Commission, and verifies whether the notification is in accordance with the law. It then forwards a copy of the notification to the Commission, which in turn forwards it to the other Member States. At this point, another proceeding gets under way, which is not national as such, but rather involves the cooperation of national authorities and the Commission. Both the national authorities and the Commission may request information, make comments, or present reasoned objections, which the Commission circulates, along with the responses, among the national authorities. This is followed by a discussion and an agreement. If there are no objections and an agreement is reached, the competent authority that prepared the report gives its written consent for placing the item on the market and transmits its consent to the notifier, the other Member States, and the Commission.

Failure to reach an agreement, however, will trigger an elaborate comitology procedure. The Commission sends its draft measure to the regulatory committee; if the regulatory committee issues no opinion or a negative one, the Commission then sends its proposal to the Council and informs the Parliament; the Council deliberates, and if it decides to oppose the proposal, the Commission will then re-examine it; finally, the Commission re-submits its proposal or submits an amended proposal or a legislative proposal. Should the Council fail to act, the Commission adopts the decision itself.

This peculiar proceeding is fundamentally non-hierarchical, requiring mediation and agreement among the national bodies. It unfolds, as it were, horizontally. If, however, an agreement is not reached, a final stage follows: the decision gets sent back to the Commission and the Council.

A sixth type of proceeding concerns areas that are still largely intergovernmental under the EC Treaty. Although executive powers fall primarily to the Member States, as in classic international organizations, national administrations nonetheless have an interest in fixing common general criteria.

An interesting example of this type of proceeding is the Community protocol controlling exports of dual-use (civilian and military) technologies.²⁴ This law touches on an important area of national interest, the defense industry. The law con-

23. Directive 2001/18/EC of the European Parliament and of the Council of March 12, 2001, arts. 13-15, 18, 30.

24. See Council Regulation 1334/2000 of 22 June 2000, Setting up a Community Regime for the Control of Exports of Dual-Use Items and Technology, arts. 3, 6, 9, 10, 2000 O.J. (L 159) 1.

tains a list of items whose export is subject to authorization. For some of these items, the law requires a general export authorization issued by the Community. For others types of dual-use technology, the Member States must supply the Commission with a list of domestic administrative authorities empowered to grant the export authorizations. The Community law requires the Member States to provide information and imposes duties of mutual consultation, mutual assistance, and cooperation among the competent national authorities. The authorizations are issued on forms based upon the model form attached to the law. In some cases, a Member State's objections will block the Member State where the export application was filed from granting the authorization. This type of proceeding, although structured by a Community law, does not have a common, supranational phase. Still, by virtue of European legislation, the authorities of one Member State intervene in and even thwart the national proceedings of another Member State.

The above examples demonstrate how connections are established between the Commission—the European executive—and national administrations. This typology has been organized by reference to treaty allocations of executive and legislative power, proceeding from areas of supranational power to concurrent and then national power. Even if it cannot be said that there is a necessary correspondence between the kind of treaty allocation and the procedural forms, there is nonetheless a shift in decision-making power from the Commission to national administrations, tracking the passage from supranational to concurrent and national competences. Moreover, (1) frequent recourse is made to committees made up of national representatives; (2) Member States designate the competent national authorities; (3) relationships between the competent national administrations are established at the Community level; and (4) the Member States play multiple roles, acting in the proceedings as initiators, parties, consultants, and decisionmaking bodies.

European administrative proceedings not only contain ascendant and descendant phases, but also spread from one national administration to another. Employing the terminology introduced at the beginning of this Article, the Community phase runs parallel to a common phase.

III

SEPARATION AND COMPOSITION OF THE PROCEEDING ACCORDING TO THE JURISPRUDENCE

Community laws establish many links between national and supranational decisions, so much so that the national and the supranational decisions can be characterized as phases of a single proceeding. But how are these relationships viewed by European jurisprudence? Do Community judges recognize a unified proceeding? What law do they apply to it?

When Community law does not regulate procedure, the Court of Justice has held that national authorities are bound by the principles of equivalence and ef-

fectiveness.²⁵ It falls to the various national legal systems to set forth the governing rules, provided that they are not less favorable than the rules governing similar domestic actions, and provided that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. When multiple domestic rules exist, the Member State is not required to apply the most favorable one. With equivalence and effectiveness, the Court of Justice established a supranational principle, that of respect for the national legal system, while at the same time, adapting the principle to the diversity of national laws.

A second, more interesting case concerns the right of defense. According to this procedural principle, any party that may be adversely affected by a decision must be given the opportunity to present its case. The party must have access to the documents on which the decision is based and it must have the opportunity to present its position. The European Courts regard this right as a principle to be respected, even in the absence of an express statutory provision to that end. The right of defense, as a supranational, legal principle, must be guaranteed not only in proceedings involving only the Commission, but also in mixed proceedings. In some cases, the European Courts have declared that it must be ensured at the national phase of the mixed proceeding. In other cases, they have declared that it must be ensured in the supranational phase.

An example of the protection of this right in the national phase is *France Aviation v. Commission*,²⁶ in which the Court of First Instance reviewed an application for repayment of import duties. The initial stage, before the French administration, had concluded in the applicant's favor, but the Commission subsequently decided against the applicant. It was hard for the Commission to allow the applicant to present its case, as required under the right of defense, because the European legislation only provided for contacts between the applicant and the national administration, and between the national administration and the Commission, but not between the applicant and the Commission.

The Court of First Instance could have required the Commission to hear the parties directly. Instead, the Court affirmed the right of defense, but held that the Commission could guarantee that right by requiring the French authorities to hold an additional hearing to ensure that the individual applicant had an opportunity to respond to all the factual allegations relied upon by the Commission. This decision, however baroque, is interesting. First, it recognizes customs proceedings as a single proceeding, composed of a national and a supranational phase. Moreover, it applies the supranational, legal principle of the right of de-

25. Case C-231/96, *Edis v. Ministero delle finanze*, 1998 E.C.R. I-4951; Case C-228/96, *Aprile srl in liquidazione v. Amministrazione delle finanze dello Stato*, 1998 E.C.R. I-7141. These cases dealt with the issue of the appropriate procedural rules in strictly judicial proceedings but the principles of Community law apply equally to administrative proceedings. The decisions that preceded these are discussed by G.C. Rodríguez Iglesias, *Sui limiti dell'autonomia procedimentale e processuale degli Stati membri nell'applicazione del diritto comunitario*, in 5 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 12-20, n.1 (2001). A more recent decision is Case C-472/99, *Clean Car Autoservice GmbH Stadt Wien v. Austria*, 2001 E.C.R. I-9687.

26. Case T-346/94, 1995 E.C.R. II-2841.

fense to national administration precisely by virtue of the unitary nature of the proceeding.

The European Courts have affirmed the right of defense in other forms of mixed proceedings. In *Technische Universität München v. Hauptzollamt München-Mitte*,²⁷ a preliminary reference involving a request for an exemption from customs duties, the national authorities and the Commission had decided against the applicant. The Court of Justice held, however, that “the right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances and, where necessary, on the documents taken into account by the Community institution.”²⁸

Similarly, *Commission v. Lisrestal*²⁹ involved a demand for repayment of Community subsidies. The order for repayment was addressed by the Commission to the national authority, and by the national authority to the beneficiaries. The Court of Justice recognized that although the Commission’s decision was addressed exclusively to the national authorities, the Commission “named and expressly referred to the applicants as direct beneficiaries of the assistance granted. The Court therefore considers that the applicants are directly and individually concerned by the contested decision to reduce that assistance.”³⁰ Thus, even though technically, the Commission’s order was directed at the Member State, there was a “direct link between the Commission and the recipient of the assistance” and therefore the recipient had the right of defense.³¹

The Court of First Instance applied a similar logic in *Eyckeler & Malt AG v. Commission*.³² This case involved the same type of proceeding as *France Aviation v. Commission*: an application for repayment (the duty has already been paid) or remission (the duty is owed but has not yet been paid) of a customs duty. The proceeding in question is subdivided into two phases. The first takes place before the national administration. If the national administration has doubts concerning the remission (requested by the importer in this case) or believes that it should be granted, it submits the file to the Commission, which consults with a group of experts and makes a decision.

In *Eyckeler & Malt AG v. Commission*, the Court of First Instance observed that the governing law only provided for contact between the person concerned and the national administration on the one hand, and between the national administration and the Commission on the other. The Commission’s only interlocutor was thus the Member State. Still, the Court found that the importer requesting the remission had the right of access to the Commission’s file and the right to present its case to the Commission. It

27. Case C-269/90, 1991 E.C.R. I-5469.

28. *Id.* at n.25.

29. Case C-32/95, *Commission v. Lisrestal*, 1996 E.C.R. I-5373 (upholding Case T-450/93, *Lisrestal v. Commission*, 1994 E.C.R. II-1177 (judgment of the Court of First Instance)).

30. Case T-450/93, *Lisrestal v. Commission*, at n.45.

31. *Id.* at n.47.

32. Case T-42/96, 1998 E.C.R. II-401.

observed that the Commission, when it contemplated diverging from the position taken by the national authorities, had a duty to arrange for the applicant to be heard. The Court concluded that the Commission violated essential procedural requirements in not letting the applicant present its case and make its views known.

This decision is interesting for two reasons. On the one hand, it applies principles drawn from an area of exclusive Community executive power (the right of defense was first established in competition law) to an area of concurrent, national and supranational executive power. On the other, it holds that a right of access and a right to defense arise at the moment in which the facts—in this case, negligence—giving rise to the adverse decision—denial of the remission of import duties—are determined. Thus, the formal absence of relations between the applicant and the Commission does not determine the applicant's procedural rights. What matters instead is the forum in which the factual allegation is first made—where “it is alleged for the first time in the contested decision that the applicant failed to exercise due care.”³³

These cases illustrate how the European Courts conceptualize mixed proceedings and the relationship between the national and supranational phases of such proceedings. The right of defense applies. But when the right of defense applies depends. What matters, as the Court in *Eyckeler* observes, is who determines the facts giving rise to an adverse decision.³⁴ A national administration arriving at a provisional adverse decision must respect the right to defense, as must the Commission in determining the facts that lead to a definitive adverse decision.³⁵

The supranational affirmation of the right to defense³⁶ was easy, because this right was already guaranteed by national legal systems. Still, the scope of the right in Community law might differ from its scope in domestic systems. The Court of Justice recognizes the right of defense as a general right, while some national legal systems limit the right to certain types of proceedings. In such cases, national law must change to accommodate the more extensive Community principle.³⁷ The emergence of uniform procedural guarantees, especially if they

33. *Id.* at n.83.

34. *See also* Case T-215/00, *La Conquete Scea v. Commission*, 2001 E.C.R. II-181, *aff'd* by the European Court of Justice in Case C-151/01P, *La Conquete Scea v. Commission*, 2002 E.C.R. I-1179. In this case, the Court of Justice held that procedural safeguards must be in place and must be guaranteed, under Community law, either by the Member State or by the Commission.

35. Almost all of the decisions cited in this section were made in the course of a challenge to the legality of a Community act, based on Articles 230 and 233 of the EC Treaty. Only a few cases have arisen out of an Article 234 preliminary reference.

36. Here, the right of defense is understood as the right to intervene in the course of an administrative proceeding and is quite different from the right of defense that can be raised at the conclusion of the proceeding, by challenging the administrative decision before a judge. *See* Case C-78/01, *Bundesverband Güterkraftverkehr und Logistik v. Bundesrepublik Deutschland*, 2003 O.J. (C 275) 8.

37. Similar observations in K. Michelet, *La Charte de droits fondamentaux de l'Union européenne et la procédure administrative non contentieuse*, in ACTUALITE JURIDIQUE—DROIT ADMINISTRATIF 949 (2002). On the compatibility of the Spanish law on the administrative proceeding, No. 30 of 1992, with Community law, see A. GARCÍA URETA, *PROCEDIMIENTO ADMINISTRATIVO Y DERECHO COMUNITARIO* (2002).

can be raised directly before the Commission, narrows the distance between the Commission and European citizens.

The effect of these judgments has been described as “vertical convergence.”³⁸ The protection of the individual should not suffer as a result of the division of the proceeding between two different administrations. It is for this reason that the European Courts, in the face of procedural defects, will annul the decision of the Commission, even though the responsible administration might be the national one, before whom the first phase of the proceeding was held.³⁹

Rather than seeking to extend judicial review to non-final, preparatory acts, the European Courts appear to be motivated by the goal of safeguarding the integrity of the proceeding taken as a whole. Under the case law, citizens are guaranteed the right to raise their arguments at the stage when the factual grounds for granting an adverse decision are established.⁴⁰ Finally, the European Courts have recognized the legitimate and unitary nature of the composite proceedings in two areas, revenues (repayment or remissions of import duties and customs exemptions) and expenditures (Community subsidies) that are typical of government powers.

IV

A COMMON ADMINISTRATIVE LAW

National administrative activity and Community administrative action are connected in various ways. There is no hierarchy among national and Community authorities; rather, the relationship is designed to ensure effective policy implementation.

The proceedings can be broken down into three components: the national, the supranational, and the infranational. The first two are the more familiar. The third, infranational element, which is constituted by the horizontal dialogue among national administrations,⁴¹ is less well known. This dialogue can take many forms. Each national administration may, first of all, initiate the proceeding. Second, each administration may intervene in the proceeding. Finally, national administrations cooperate in reaching the final decision.⁴²

38. H. P. NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW* 7 (1999).

39. *Id.* at 80-81, 88-95, 135-36, 164-65.

40. On access to courts to obtain judicial review in mixed proceedings, see Case C-97/91, *Oleificio Borelli spa v. Commission*, 1992 E.C.R. I-215 and Case C-188/92, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland*, 1994 E.C.R. I-833.

41. This aspect is usually neglected by the studies of Community law. *But see* J.H.H. WEILER, *THE CONSTITUTION OF EUROPE* 98-99 (1999) (on infranationalism); J.H.H. Weiler, *La Comitologia: infranazionalismo, costituzionalismo e democrazia*, in *LA COSTITUZIONE DELL'EUROPA* 597 (2003); H. Siedentopf et al., *The European Administrative Space From a German Administrative Science Perspective*, in 69 *INT'L REV. OF ADMIN. SCI.* 9 (2003); F. Bignami, *The Challenge of Cooperative Regulatory Relations after Enlargement*, in *LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION* 97 (George A. Bermann & Katharina Pistor eds., 2004) (unpublished manuscript, on file with the author).

42. Besides these forms of collaboration in the proceeding, organizational and functional forms of cooperation must be added. An example of the former can be seen in the committees in which national administrations are represented. An example of the latter is mutual recognition—by recognizing the regulatory standard

Composite proceedings, which are the most common type of proceeding in which the Commission takes part, are considered, for some purposes to be unitary. This helps to ensure respect for the rights of citizens. Though structurally distinct, the Commission and national administrations constitute a procedural whole for purposes of judicial review and safeguarding individual rights.

Finally, this connection furthers not only the diffusion of legal principles from the Community to national administrations⁴³ and vice versa, but also the migration of principles from certain national legal systems to others.

The European administrative proceedings analyzed above have one great advantage: they are choral and thus enable cooperation among national authorities and between national authorities and the European Commission. They also remain very complicated and rather closed, since the need to ensure the participation of national authorities marginalizes the participation of private actors. These features explain the proposals for codification and simplification that have been advanced in the last two decades.⁴⁴

What distinguishes this common administrative law, and thus administrative integration, from legislative and judicial integration in Europe? European legislative power is superimposed upon corresponding national powers; national legislatures are bound to respect Community legislation. The Community judicial power is hierarchically superior to national courts; national judiciaries are bound to respect Community law as interpreted by the Court of Justice. The relationships between supranational legislative and judicial powers and national legislatures and judiciaries follow a single model.

As we have seen, the Treaties do not set forth a single prescription for integrating the European executive power. Rather, the relationship among administrations is ordered according different models, all based on cooperation.

What drives the choice of executive relationship? The important variables seem to be two: the particular nature of each sector or policy area, and the allocation of tasks between the Community and the Member States.

Understandably, the role of national administrations varies considerably in these different forms of executive integration. They act as parties, representing national interests, and as decisionmakers, responsible for regulating in the Community interest, either alone or in collaboration with other administrations. The explanation for this variation is that administration and executive powers lie at the heart of state sovereignty and therefore the Community has moved slowly and cautiously in the domain of executive integration. Nonetheless, one single law of administration is developing, composed of as many parts as there are Member States with their respective, competing and converging, national laws of ad-

of another state as valid in her own state, a regulator allows another state administration to substitute, functionally speaking, for her own.

43. See the comment of D. Costa in *Conseil d'Etat*, 29 juillet 2002, n. 232829, in ACTUALITÉ JURIDIQUE – DROIT ADMINISTRATIF 1395 (December 9, 2002). See also C. Hilson, *The Europeanization of English Administrative Law: Judicial Review and Convergence*, in 9 EUR. PUB. L. 125 n.1 (2003).

44. On these, see CANANEA, *supra* note 10, at 1890.

ministration.