Cross-Border Administrative Proceedings and Composite Procedures within the EU

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The Reality of Cross-Border Administrative Procedures – Transterritorial Effect and Composite Procedures

I will address the topic of ‘Cross border administrative procedures’ in the context today’s presentation in the context of the growing transnational effect of decisions by national administrations in the context of EU law, which follow mostly a transnational or ‘composite’ procedure.

Within the introduction, I will develop the concept, I will then turn to composite procedures more in detail before looking at ways to address some of the most troubling issues of current procedural law in the EU.

Transterritorial Administrative Activity

Since the early days of the single market European Union (EU) law stipulates that decisions taken in one Member State have to be accepted in another Member State.¹ Today, many areas are specifically regulated requiring for example, that Member States might be obliged to accommodate investigations on their territory carried out by Union officials or enforcement agencies from other Member States.² These various forms of decision have then, effect beyond the territorial reach of a Member State and are thus ‘trans-territorial’.

In many policy fields, EU law may establish that administrative acts adopted by an individual Member State enjoy legal effect beyond the jurisdictional territory of that Member State. This effect can thus be described as ‘transterritorial’.³ Such a transterritorial

1 In the area of product safety harmonisation Member States have to respect the presumption of conformity in respect of products produced in accordance with harmonised standards.


3 The terminology used here is slightly different from the literature which has explored the effects of such administrative activity, referring to it as ‘trans-national administrative acts’. That terminology has been developed in reflection to the public international law notion of transnational law (e.g. Philip C. Jessup, Transnational Law (New Haven: YUP, 1956)), who used the term to describe the law which regulates actions or
reach of national administrative decisions is contrary to the traditionally strict notion of the territoriality of sovereign activity under public international law.

Often, Union legislation orders Member States to mutually recognise the effect of administrative decisions of other Member States and thus overcome the territoriality principle within the EU.

There are countless examples of the such effect of administrative acts in the EU’s ‘common administrative space’. They stem mainly from provisions for the joint administration of the common market, for example the requirement of mutual recognition of diplomas and university degrees, under which national decisions are granted EU wide recognition. Another prominent example of this type of trans-territorial administrative activity can be seen in the area of European banking and insurance law.

National banking and insurance supervisory agencies of the ‘home’ Member State of a bank or insurance company which has established a branch or subsidiary in another Member State are granted under Union law the right to take supervisory decisions with effect in ‘host’ Member States. The authority of the ‘home’ Member State agencies even allows investigation within the ‘host’ Member State and the taking of decisions necessary to the exercise of their authority to investigate.4

Other examples from the single market stem from the ability of individual Member State agencies to make a decision to admit novel foods to the common market. The national decision-making authority, whose determination has EU-wide validity, is nevertheless part of a highly integrated structure of cooperation between national and European agencies.5 Such highly integrated administrative procedures are also seen in the regulation of the shipments of dangerous waste, where the authorities of several Member States need to give their consent to a shipment, often in the form of administrative decisions with trans-territorial effect.6

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Composite Decision Making Procedures

The discussion of transterritorial reach of administrative acts already indicates to a broader trend: administrative procedures in the sphere of EU law are increasingly integrated into multi-jurisdictional decision making procedures. In many cases, both Member State authorities and EU institutions and bodies contribute to a single procedure, irrespective of whether the final decision is taken on the national or the European level.

Such procedures are referred to here as composite procedures, that is, multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically (between EU authorities and those of a Member State), horizontally (between authorities in two or more Member States) or in triangular relations (involving authorities of different Member States and of the EU). Final measures or decisions, whether issued by a Member State or an EU authority, are based on procedures involving more or less formalised input of the participants from the different levels.

Procedural integration of administrations in the EU relies upon, or indeed creates, a network structure. Such networks are involved in particular in the joint generation and sharing of information which constitutes the backbone of cooperation within integrated administration.

In EU administrative law there are many examples of policy areas in which decisions and measures are taken on the basis of a procedure with composite elements. The forms of cooperation between Member States’ and EU agencies leading to a final decision differ considerably from one policy area to another. However, there is usually some form of

8 Member State decisions, under EU law, will often be given effect beyond the territory of the issuing state (referred to in the following as trans-territorial acts). Trans-territorial acts are also often referred to as trans-national acts. The latter term is slightly misleading since it is not the nation which is the relevant point of reference but the fact that generally under public law, due to the principle of territoriality, the legal effect of a decision under public law is limited to the territory of the state which issues the decision and the reach of its law. EU law allows for certain acts to have an effect beyond this territorial reach within the entire territory of the EU, and in the case of extra-territorial effect of an act also beyond the EU.
9 See for a detailed debate of these distinctions, e.g. Kerstin Reinacher, Die Vergemeinschaftung von Verwaltungsverfahren am Beispiel der Freisetzungsrichtlinie (Berlin: Tenea, 2005).
10 There is a clear dichotomy between separation and cooperation. The organisational — essentially historically and constitutionally determined — separation of administrations on the European and the Member State levels is balanced by intensive functional cooperation between the administrations on all levels. See also Eberhard Schmidt-Assmann, ‘Der Europäische Verwaltungsverbund und die Rolle des Verwaltungsrechts’, in: Eberhard Schmidt-Assmann, Bettina Schöndorf-Haubold (eds.), Der Europäische Verwaltungsverbund (Tübingen: Mohr Siebeck, 2005) 1-23.
12 EU administrative law is understood as the body of law governing administration by EU institutions and bodies as well as Member States administrations acting within the sphere of EU law, i.e. when they act either to implement EU law or when they are bound in their activity by general principles of EU law.
cooperation in regard to the establishment, generation, and sharing of information. It may be observed that, generally, the greater the complexity of a matter and the need for legitimacy, the more composite elements are included within a given procedure.

Composite procedural elements exist in many diverse policy areas, for example in:

- technical safety, product safety,\(^{13}\)
- standardisation and technical norms,\(^{14}\)
- the procedures leading to the admission of
  - medical products\(^{15}\) and
  - genetically modified organisms\(^{16}\)
- regulation of telecommunications,\(^{17}\)
- public procurement,\(^{18}\)
- asylum procedures,\(^{19}\)
- combating of money laundering.\(^{20}\)

Procedural provisions for the various policy sectors differ considerably in detail. The rules establishing composite procedures govern ‘who’ has to generate information by ‘which means’ and in ‘which quality’ from ‘which source’, as well as ‘how’ the information will be used prior to taking legislative or single-case decisions.

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\(^{15}\) Regulation 726/04 of the European Parliament and the Council laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ 2004 L 136/1, as amended.


Among the considerable variety, there are several basic constellations. In some policy areas procedures are relatively straightforward, insofar as they provide for an administrative procedure to be conducted essentially within one Member State, supported by information transferred to it from other Member States and European authorities.

In other policy areas, however, provision is made for a more complex, multi-step composite procedure. An illustration of this is the requirement that an authority of one Member State act as a reference body, taking the decision, for example, for the admission of certain hazardous products to the entire single market of the EU.  

In some policy areas, the composite nature of a procedure links different authorities, commencing in one Member State, continuing with input from an EU agency or agencies of other Member States, before then moving to the European Commission.

Such is for example the case in the procedure for the admission of novel foods to the single market. Other procedures are continuously undertaken on the European level with the possibility of Member State procedural input, for example, in the area of admission of medicines to the market.

Irrespective of the details of these different constellations, the various procedures have one thing in common. The composite nature of the procedure always involves, in one form or another, cooperation, either vertically between Member States and the European authorities or horizontally between different Member State authorities. As well, a mix between vertical and horizontal cooperation is possible. However, all such cooperative variants are essentially based on procedures jointly to obtain and assess information necessary for a final decision.

Information cooperation is, therefore, at the heart of rules and procedures governing EU administrative law. Understanding the legal challenges arising from composite procedures thus centrally requires an understanding of the vertical and horizontal — and indeed diagonal — cooperation obtaining in regard to information generation, collection, management, distribution, and access which leads to final administrative decisions and acts. The substance of composite procedures is thus rules and principles of EU

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24 Rules and principles on the substance of information exist. They are either specified in specific policy area related legislation, or exist as general principles of law, applicable throughout the EU by EU institutions and bodies as well as by Member States acting within the sphere of EU law. For example, general principles of EU law such as the duty of care or the duty to diligent and impartial examination require that all relevant information be collected and assessed as to its potential influence on a final decision prior to a final administrative decision or act being taken. (See, in particular, Case T-13/99 Pfizer Animal Health SA v Council [2002] ECR II-3305, paras. 170-172; T-211/02 Tieland Signal Ltd v Commission [2002] ECR II-3781, para. 37; C-
administrative law establishing the legal framework for the generation and sharing of information within administrative networks.

Procedural Solutions to Cross-Border, Composite Procedures

These procedural constellations in composite decision-making raise specific problems for the supervision of administrative activity, especially for maintaining the rule of law through judicial review.

The composite nature of many procedures and the often informal nature of the exchange of information, make supervision and the enforcement of standards difficult. The legal framework for composite procedures emerges from EU law. However, there exist very few provision in that body of law which are generally applicable across all or even a larger group policy sectors, most such rules being policy-specific. It should be noted that EU administrative law of general character, except for the Comitology Regulation, typically does not establish any specific procedural rules on supervision and review. Policy-specific law in some cases leaves the establishment of the procedure, as well as the conditions for supervision and judicial control of administrative action, to the legal orders of the Member States (or to EU law where EU institutions and bodies are concerned). This leads to enhanced problems of legal certainty and review within Member States legal systems when judicial review is sought before a national judge.

I will discuss certain elements of decision making procedures to highlight the necessity of critical review of composite decision making structures.

Information-based Procedural Rules

Because information management is a core feature of any administrative procedure, information-related activities are unsurprisingly also the essence of composite decision-making procedures. Accordingly, rules on information gathering, inspections, hearings, participation of third parties and consultation of other authorities (either ad-hoc or in structured mutual assistance programmes) are core elements of procedural law structuring
composite decision making procedures. Cooperation procedures on the horizontal (between Member States) and vertical relations (between Member States and EU institutions, bodies and agencies) allow establishing and generating of the necessary information for final decision making. These procedures also allow for the participation, or at least acknowledgement, of interests located in another Member State which touched by a final decision. They are also in particular designed to enhance the mutual acceptability and applicability of decisions created in the European administrative network applicable throughout the EU as a whole.

In this respect, it is in the nature of trans-territorial administrative activity that rules on information management in composite procedures de facto require either mutual recognition or their regulation on a European level. Mutual recognition between legal systems however raises considerable problems in the context of composite procedures for accountability and final judicial review of decision making. Therefore, a legal framework for composite information management activities should also overcome the traditional horizontal and vertical split of supervisory competences. It should provide a solution adapted to the multi-level integrated nature of composite information management activities in addition to securing the effectiveness of judicial protection.

Some key thoughts on this have been formulated especially in the context of the work on Book VI of the ReNEUAL model rules on EU administrative law: Therein it is argued that a legal framework for composite information management is necessary. The supervisory and judicial procedures should ensure the efficiency of administrative action while at the same time guaranteeing that concerned persons are in a position to obtain enforcement of their rights. With regard to multi-jurisdictionalism, it is also essential to reduce the potential for horizontal and vertical conflicts of laws to a minimum.

Such a legal framework must also ensure the transparency of composite information management actions. The objective must be that natural and legal persons which are confronted with such composite administrative procedures, should be in a position to identify the actors, their duties and to allocate responsibility accordingly.

Further, a legal framework needs to exist that ensure that the various stages of the composite information management activities comply with the procedural rights afforded to concerned persons and third parties in EU administrative procedures. The complexity of composite procedures enhances the quality of administration in the common interest. At the same time, such complexity should not come at the cost of complying with procedural rights.
Compromise with Basic Procedures

Other procedural principles of administrative law need to be adapted to the notion of multi and cross-jurisdictional decision making procedures. For example the right to a fair hearing and to access to the documents regarding a file are central to this.

The right to be heard must be respected at all stages of a composite procedure between the EU and the Member States leading to a decision. The application of the right to be heard will depend on the division of responsibility in the decision-making process. In a case of composite procedure, where a binding decision is made by a Member State authority it must comply with some generally applicable rules even if a national authority will apply national rules of administrative procedure. These national rules should, in order to ensure legal certainty in multi-jurisdictional situations, comply with general principles of EU law concerning fair hearings.

Approaches could be structured in the following way: In a case of composite procedure, the form and content of the hearing by the public authority that makes the decision will be affected by the extent to which the rights of the defence were adequately protected at a prior stage in the administrative proceedings by another public authority. And, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles.

In a case of composite procedure, where the EU authority’s decision is predicated on a recommendation made by another public authority and where there was no opportunity for a hearing before such a public authority, the right to be heard before the decision is taken should include knowledge of the recommendation and the ability to contest its findings.

Equally, the duty to give reasons are especially important in the context of composite administrative procedures. Here it will be most important that reasoning of an act takes due account and explicitly outlines the various procedural steps undertaken by individual administrations. It must outline which elements of the decision including which information was used from which source. Only such transparency as to what was undertaken and decided where will allow for a the beginning of a possibility of judicial review.

Outlook and the Problem of Judicial Review in Composite Procedures

Cross border administrative activity in the EU takes place often and importantly in the context of multi-jurisdictional procedures. The effect of the outcome of such procedures are often acts with trans-national or trans-jurisdictional (or trans-territorial) effect.
Although necessary in a legal system such as the EU, where de-central administration is the norm, these procedures and effects pose problems. They result in a procedurally highly integrated administration, which is controlled by organisationally separate Courts which undertake judicial review.

Procedural integration of administrations is undertaken in the context of composite procedures. Such procedures are, as noted, multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically between EU institutions and bodies and Member States’ institutions and bodies, horizontally between various Member State institutions and bodies, or in triangular constellations involving different Member States’ and EU authorities, the final acts or decisions emanating from them being issued by a Member State or EU body. Such composite procedures are made increasingly necessary by the complexity of regulatory demands, which often exceed the limits of competence of individual regulatory levels and individual Member States. The emergence of composite procedures involving vertical and horizontal administrative cooperation gives rise to many legal problems, especially for the protection of rights and the supervision of administrative action. Appropriate solutions to these problems might include the construction of a control network, that is, a network of accountability and supervision, including particularly control of legality, maybe even a curial network. This seems especially necessary in the EU legal system, in which harmonisation of procedural law is undertaken not systematically but in bits and pieces throughout the highly diverse regulation of various substantive law provisions.

However, currently the procedural integration of administrations in Europe is not matched by the possibilities of cooperation between courts in charge of ensuring review of legality of administrative acts. Judicial supervision of action of the integrated executives in the EU is undertaken either by courts on the Member State level or those on the EU level. Judicial review of actions at first sight seems to be well coordinated across the various dimensions of the EU. Many important cases in the CJEU’s history came before it as references for a preliminary ruling under what is now Article 267 TFEU. This procedure, involving as it does the request by any national court, assured that the relations between the courts were non-hierarchical in so far as Member State law could not demand the exhaustion of national

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26 Deirdre M. Curtin, ‘Holding (Quasi-)Autonomous EU Administrative Actors to Public Account’, ELJ 13 (2007) 523-41 at 540: ‘One of the main problems regarding the checks and balances under construction in the ‘undergrowth’ of legal and institutional practice is the chronic lack of transparency of the overall system. It is not that there is no public accountability (…) it is rather that it is not visible and often not structured very clearly.’
The result is a system in which the national judge has also become in effect a Union judge.

Problems with this form of cooperation, in view of the highly integrated EU executives, arise from the fact that the cooperation structures provided through Article 267 TFEU operate in only one direction. They allow only for ‘vertical’ cooperation initiated by national courts. Other dimensions characteristic of a genuine network, such as vertical cooperation initiated by the CJEU or horizontal cooperation between Member State courts, are not provided for. The latter might be especially useful in the context of judicial review of the increasing amount of measures created in composite procedures in the areas of implementation of policies and executive rulemaking.

A possible approach might seek to build on the exceptional success of the preliminary reference procedure. This could consist of extending the possibilities of preliminary review in two dimensions: The first would be the vertical dimension between the CJEU and the national courts. As noted already, this vertical dimension presently runs in only one direction under Article 267 TFEU. This is a powerful procedure for review of certain types of composite procedures. It allows, for example, for national courts to request the CJEU to review the legality of the input from a European institution or body into a final administrative decision taken by a national administration. It can be sought in cases in which the national administration takes a final decision both under national substantive and procedural law, or under European law.

Composite procedures can however, also lead to the inverse situation: A European authority may take a final decision with input from a national administration. In such cases, only the European courts are authorised to review the legality of such a final decision. There may be the need incidentally also to review the legality of the national administration’s decision as an element of the final European decision. In these cases, the preliminary reference procedure as formulated in Article 267 TFEU provides no help.

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27 The procedure serves to protect the interests of Member States, but in some respects, individuals are put on the same level. Article 267 TFEU provides individuals with a procedural avenue, which, in combination with the principles of supremacy and direct effect, allows them to have Union law enforced through a request for the review of the compliance of national legal provisions with Union law.