



# SIGMA

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## **NATIONAL PUBLIC ADMINISTRATIONS AND EUROPEAN INTEGRATION**

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### **1. The issue of the convergence towards a common European Administrative Space**

#### *a) Background and prospects*

In recent years, scholars of public law have focused considerable attention on the concept of a “European *administrative space*”, to be constituted as administrative systems converge towards a common model—a European model<sup>1</sup>. The reason for all the interest stems from the fact that the realm of public law—at least as it was understood at the beginning of the 20<sup>th</sup> century—has traditionally been viewed as an area of divergence rather than one of convergence. Administrative law came into being in the 19<sup>th</sup> century and developed in a political-ideological context in which law was deemed a monopoly of the State, i.e., an outgrowth of sovereign power that precludes “interference” from any other jurisdictions. In this climate hostile to convergence,

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<sup>1</sup> On the subject of convergence in the European space, see S. CASSESE, “Towards a European Model of Public Administration”, in *Comparative and Private International Law*, Berlin, 1990, p. 353; J. SCHWARZE, *European Administrative Law*, London, 1992; Y. MENY, “Le système politico-administratif en Europe”, in *Riv. trim. dir. pubbl.*, 1992, p. 952; J.P. COSTA, “Les structures publiques”, in *Riv. trim. dir. pubbl.*, 1992, p. 970; G. CORSO, “Sistemi amministrativi europei e principio di autonomia”, in *Riv. trim. dir. pubbl.*, 1992, p. 978; V. WRIGHT, “The Administrative Systems and Market Regulation in Western Europe: Continuities, Exceptionalism and Convergence”, in *Riv. trim. dir. pubbl.*, 1992, p. 1026; S. CASSESE, “Il problema della convergenza dei diritti amministrativi: verso un modello amministrativo europeo?”, in *Riv. trim. dir. pubbl. comunitario*, 1992, p. 23; J. BELL, “Convergences and Divergences in European Administrative Law”, in *Riv. trim. dir. pubbl. comunitario*, 1992, p. 3; S. CASSESE, “Il diritto amministrativo comunitario e la sua influenza sulle pubbliche amministrazioni nazionali”, in L. VANDELLI, C. BOTTARI, D. DONATI, eds., *Diritto Amministrativo Comunitario*, Bologna, 1995, p. 17; M. CHITI, “Italian Report”, in *Das Verwaltungsrecht unter europäischem Einfluß*, Baden-Baden, 1996, p. 229; M. CHITI, “Towards a Common European Administrative Law”, in *IUSEF*, No. 21, Oslo, 1996, p. 11; E. CHITI, *The Emergence of a Community Administration: the Case of European Agencies*, forthcoming, CMLR, 2000.

administrative law and the associated systems of public powers were a solid bedrock for nationalism, with each system considered an idiosyncratic product of the history and tradition of a given society. For this reason, there was little interest in comparative analysis and no room for convergence. This state of affairs is reflected clearly in the classic contrast between the continental and Anglo-Saxon systems, and between countries with administrative law and those without it—countries in which the very existence of a body of special rules to govern public administration would be inconceivable.

In the latter half of the 20<sup>th</sup> century, however, there was a major reversal of this trend. The world, which until the 19<sup>th</sup> century had been made up of Nation-States, saw the creation of new supranational jurisdictions—new international public powers that did not replace States but co-existed alongside them. Examples of these would include the WTO and the European Community, which are not only fora for discussion and negotiation, but also official bodies vested with special jurisdiction and regulatory powers. These powers, which used to be wielded individually by States as an exercise of sovereign prerogatives, are now shared with other States. As a result, the emergence of international public powers is casting a shadow over the centralised, State-based model: the State’s monopoly on lawmaking is breaking down; the “market” is becoming a unifying benchmark, and the barriers of national confines are falling.

Let us take the case of the European Community. Economic aspects of the process of integration have been substantially settled, and the Union is now governed by common rules which range from broad regulation of trade flows to minute standardisation of food labelling. These rules must be implemented immediately by the administrations and courts of the Member States (under the “direct effect” principle<sup>2</sup>), and they take precedence over any conflicting domestic laws, whatever their rank in the hierarchy of sources (the “primacy” principle<sup>3</sup>). The need for national administrations to obey the same laws, and in the same manner, inevitably causes a major change in the way governments operate. For instance, an Italian firm can apply for and obtain licences to engage in telecommunications activities in France; a drug may be registered in the United Kingdom and then sold in Belgium; authorisation to operate banking services in Spain may be issued in Denmark (home country control); official records of an EU citizen issued by the competent authorities of one State must also be recognised in other States, and so on. Adding to this is the general principle of “mutual recognition” which has arisen through case law<sup>4</sup>: thanks to this principle, products sold legitimately in one Member State may be imported and marketed in any other State without impediments.

All this shows that, within the European space, the activity of national administrations now has transcendent supranational impact. The State’s administrative structures are no longer worlds unto themselves within their respective national confines, but clearly are “communicating” realities integrated into the management of a common space. Reinforcing this, alongside the institutions proper, are a multitude of Community agencies and joint committees in which Community and national public officials work side by side, injecting an element of “natural convergence”. These bodies in fact foster the creation of increasingly stable links between the Community administration and national administrations, and between national administrations

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2. Judgement of 5 February 1963, Case 26/62, Van Gend en Loos, ECR, p. 1.

3. Judgement of 15 July 1964, Case 6/64, Costa/Enel, ECR, p. 1127.

4. Judgement of 20 February 1979, Case 120/78, Rewe Zentrale, ECR, p. 649, better known as the “Cassis de Dijon” judgement.

themselves. The groundwork has thus been laid for the regulation of government activities, which had once been dominated by divergence, to become highly conducive to convergence.

*b) Towards a common definition of the public sector in EU Member States*

Other factors for the convergence of national administrative systems involve instances in which Community law has redefined the scope and extent of the public sector. This has happened in a number of different ways<sup>5</sup>.

In some cases, the Court has intervened to define the very concept of “national public administration”. Let us look, for example, at the Community’s regulation of the freedom of movement for workers, which under Article 48.4 of the Treaty of Rome does not apply to “employment in the public service”. In order to prevent the concepts of public employment or public administration used in the various national legal systems from impeding uniform application of Article 48, the Court has established its own concept of employment in the public service<sup>6</sup>: the exclusion in Article 48.4 applies only to government jobs involving the exercise of public authority. Over the course of its rulings, the Court has enumerated the essential elements of “public power” that are tied directly to sovereignty and therefore justify a reservation in favour of national citizens.

In formulating a Community interpretation of the concept, which differs from those of the national courts, the Court has assumed what was once a State prerogative by stipulating—albeit for the sole purpose of applying Article 48.4—the nature of the ties that should exist between a public service and its employees.

In other cases, Community law, and case law in particular, has intervened even more tangibly to trace the boundaries of the public sector. It is, in fact, thanks to the Court’s case law that the regulation of national public services has shifted from a monopoly regime to one of free enterprise and competition. Organisations and activities that once had to be public and were accorded preferential treatment have now been privatised, or have at least lost their preferential treatment. Clearly, the Treaty does not challenge the property rights of enterprises, whether public or private. And the Court has always been sure to stipulate that Community law, in principle, does not preclude the creation of public enterprises nor the preservation of existing ones<sup>7</sup>. Such enterprises must, however, comply with the rules of the Treaty, and in particular those concerning

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<sup>5</sup> Concerning the impact of Community law on State intervention in the economy, see P.P. VAN GEHUCHTEN, “La notion d’entreprise publique selon la doctrine et la jurisprudence de la Cour et la fonction de l’article 90 du Traité CEE”, in *Interventions publiques et droit communautaire*, Paris, 1988; S. CASSESE, “State e mercato, dopo le privatizzazioni e deregulation”, in *Riv. trim. dir. pubbl.*, 1991, p. 378; A. PAIS ANTUNES, “Art. 90 of the EEC Treaty: the Obligations of the Member States and the Commission’s Powers”, in *Rev. trim. de droit européen*, 1991; M. WAELBROECK, “Le traité CE est-il neutre à l’égard des politiques économiques des États membres?”, in *Hacia un nuevo orden internacional y europeo*, 1993, p. 1297; AA.VV., *Les entreprises publiques dans l’Union européenne : entre concurrence et intérêt général*, Paris, 1995; A. GARDNER, “The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe’s Regulated Sectors”, in *ECLR*, 1995, p. 78; C. NIZZO, “La définition d’entreprise dans la récente jurisprudence de la Cour de justice et l’emprise croissante du droit communautaire de la concurrence”, in *Resp. com. impresa*, 1996, p. 73.

6. Judgement of 17 December 1980, Case 149/79, Commission/Belgium, ECR, p. 3881.

7. Judgement of 30 April 1974, Case 155/73, Sacchi, ECR, p. 409.

competition. The relevant case law has spawned solutions leading to a substantial reorganisation of State intervention in the economy, i.e. intervention under which the State comes into the market as an active player, as an enterprise that delivers goods and services to its citizens in sectors considered of vital benefit to the community (transport, gas, electricity, water, and so on). Special or exclusive rights for public enterprises can be justified only insofar as the State's interests are consistent with those of the Community<sup>8</sup>. A further requirement is that public needs cannot be met more efficiently by private operators in a competitive regime, i.e. by the interaction of supply and demand<sup>9</sup>. Lastly, any restrictions on competition must go no farther than what is strictly necessary in order to attain the desired goal<sup>10</sup>.

It is for this reason that the Court, while not taking away the Member States' capacity for direct economic intervention through public enterprises, has imposed common principles and standards for public service administration. The apparatus of the State has grown accustomed to making economic calculations, and it now faces competition. This has created a major convergence factor for national administrations in a sector previously dominated by diversity and divergence. Of course, there are still major differences in how the Member States provide for vital societal needs. But there can be no doubt that the Court's case law has made a decisive contribution to scaling back the State's interventionist role, and to harmonising administrative practices, so that the European market could become genuinely unified. Today, while each national system still retains its particularities, the trend is clearly towards a common model characterised by the obsolescence of the traditional instruments of authoritarian, central-planning-oriented government and by the rise of "independent authorities", which are on the increase in all countries.

## **2. The role of national administrations within the European Administrative Space**

The above phenomenon is accentuated by something I would categorise as a structural factor resulting from the Community's particular institutional architecture. In point of fact, the Commission represents only a portion of the Community's administrative apparatus. To paraphrase Jean Monnet's well-known saying, the Commission does not actually do anything, but it arranges for things to get done. In other words, the Commission's main functions lie prior and subsequent to action: it adopts guidelines and then supervises, inspects and monitors. Only in a few domains, the European Commission has direct administrative responsibilities, as for example in the field of enforcement of competition law, where two levels of enforcement exist, one at the Community level, and the other at national administrations level, based on the principle of direct effect. But in general, implementation is carried out by national administrations, which become co-dependent organisations: structurally, they remain part of their respective national administrations; functionally, they form part of the Community administration. However, this is not to say that national administrations perform by virtue of a delegation of powers from Community institutions. National administrations are obliged to enforce EC law by virtue of the Treaties and not out of a de-concentration scheme whatsoever.

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8. Judgement of 18 June 1991, Case C-260/89, ERT, ECR, p. I-2925.

9. Judgement of 23 April 1991, Case C-41/90, Hofner, ECR, p. I-1979.

10. Judgement of 19 May 1993, Case C-320/91, Corbeau, ECR, p. I-2553.

How does this complex system, which is structured rather like a network, operate? More specifically, what are the principles of case law that make it possible to preserve the autonomy of national administrations and at the same time ensure that the Community's rules are administered properly and uniformly? The solution stems from the combination of two complementary principles.

The first principle is the *autonomy* of national administrative systems, and thus “structural subsidiarity”<sup>11</sup>. Day to day management of Community law—its concrete application—is conveniently entrusted to the appropriate national administrative laws and relevant authorities, which become the outer branches of the Community's administration.

Only in a limited number of cases does Community law have a direct impact on national systems by regulating the activity of the authorities (e.g. by imposing an obligation to monitor given procedures) or calling for the institution of appropriate bodies (and in some cases even stipulating their composition). Clearly these are isolated examples, but their importance should not be underestimated. Consider, for example, the matter of government procurement. Lawmakers have repeatedly intervened in this area by adopting uniform rules that public officials must obey when granting contracts. Thus, in an area as central as government spending, national administrative law must defer to a common administrative law from the Community.

Apart from such cases, the general rule is that the Community legal system should leave the institutional and administrative organisation of the Member States intact. Therefore, without specific harmonisation guidelines setting uniform rules of procedure, the enforcement of Community law is entrusted to national administrations, which function in accordance with rules dictated by their respective domestic administrative laws<sup>12</sup>.

The second principle complements the first. While it is true that Community law as a rule is not concerned with how national administrative systems are set up, it still requires *results*: i.e. efficient, effective and uniform enforcement of Community provisions. Domestic administrations, by virtue of a duty of loyal co-operation<sup>13</sup> under the Treaty (article 10), are required to take all

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<sup>11</sup> On the meaning and implications of the principle of subsidiarity, see R. DEHOUSSE, “Does Subsidiarity Really Matter?”, *EUI Working Papers*, No. 92/93, p. 10; S. CASSESE, “L'aquila e le mosche. Principio di sussidiarietà e diritti amministrativi nell'area europea”, in *Foro it.*, 1995, V. p. 373; J. SCHWARZE, “The Distribution of Legislative Powers and the Principle of Subsidiarity: The Case of Federal States”, in *Riv. it. dir. pubbl. Com.*, 1995, p. 713.

12. See, for example, the judgement of 21 September 1983, Cases 205/82 to 215/82, *Deutsche Milchkontor*, ECR, p. 2633.

<sup>13</sup> On the obligation of “loyal co-operation” to which national administrations are subject, see A. BLECKMANN, “Art. 5 EWG-Vertrag und die Gemeinschaftstreue”, in *DVBI*, 1976, p. 483; R. SOLLNER, *Artikel 5 EWG-Vertrag in der Rechtsprechung des Europäischen Gerichtshofes*, Munich, 1985; J. TEMPLE LANG, “Article 5 of the EEC Treaty: the Emergence of Constitutional Principles in the Case Law of the Court of Justice”, in *Fordham Int. Law Journal*, 1987, p. 503; V. COSTANTINESCO, “Art. 5 EEC. From Good Faith to Community Loyalty” in *From International Law to the Right to Integration: Liber Amicorum Pierre Pescatore*, Baden-Baden, 1987; K. LENAERTS, “Le devoir de loyauté communautaire”, in *Mélanges offerts à Etienne Cerexhe*, Brussels, 1996, p. 229; C. NIZZO, “Art. 5 of the EC Treaty and the General Clause of Good Faith in European Integration”, in *Dir. dell'Unione Europea*, 1997, p. 381.

necessary steps to ensure full implementation of these provisions<sup>14</sup>. Effective implementation of EC Law (the principle of effectiveness) is an obligation imposed to Member States by the Treaties and its fulfilment is verified by the European Court of Justice on a case-by-case basis. The case law of the Court of Justice with regard to Member States liability for failing on implementation of EC Law reflects this result-oriented attitude, i.e. the focus is more on the end result than on how the result is achieved. In general the Court assumes an approach based on the notion of “strict liability” of a Member State that fails in implementing EC Law, and as a consequence causes damage to an individual. Two examples can illustrate this approach.

First, any breach of Community law is attributed to the State in question, which may not claim that the alleged failure does not fall within central government jurisdiction, but rather is a matter for decentralised entities (regions, autonomous local authorities, etc.). This applies, for example, to disputes over the transposition of directives, which in many cases—depending on the internal constitutional division of powers—is assigned to autonomous territorial entities. The Court’s case law has clearly established that the State has control over the internal division of powers and may therefore delegate implementation of Community provisions to decentralised administrations, but even so, it is the State that is held accountable for the acts of those administrations<sup>15</sup>.

Second, the Court judges any justifications of an infringement in a highly restrictive manner. *Inter alia*, a breach may in no event be justified by administrative difficulties at the implementation stage, or by impediments arising from domestic law, even if they are constitutional in nature<sup>16</sup>. Infringement is assessed objectively; and the consequences—including any payment of compensation<sup>17</sup>—are incurred from the moment at which application of Community law by a national administration no longer meets the effectiveness standard set by the Court, or if it is not consistent with the body of common principles that characterise EU legislation. Thus, a government crisis or suspension of parliament could not be invoked to justify delay in adopting provisions necessary for compliance with Community law<sup>18</sup>.

Taking a closer look, then, at the enforcement of Community law, there is no convergence on the means of application, which in fact may differ from one State to another, but there is a more fundamental convergence concerning the end result. How national constitutional and administrative systems work matters very little; what counts is to ensure that application meets certain standards of effectiveness. That this is both a radical approach and an effective one hardly needs emphasis.

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14. Judgement of 17 December 1970, Case 30/70, Scheer, ECR, p. 1197.

15. Judgement of 14 January 1988, Cases 227-230/85, Commission/Belgium, ECR, p. 1.

16. Judgement of 21 June 1973, Case 79/72, Commission/Italy, ECR, p. 667.

17. Judgement of 19 November 1991, Cases C-6/90 and C-9/90, Francovich, ECR, p. I-5357.

18. Judgement of 21 June 1973, Case 79/72, ECR, p. 667.

### **3. The impact of Community Law upon national administrations commits them to abide by a number of administrative standards**

We have seen that the theme of convergence cuts across the phenomenon of European integration, and that Community law is clearly making its way inside national administrative systems. In some cases the impact is a direct one, having a direct effect on how public administrations function: the institution of new bodies; stipulation of the composition of such bodies; imposition of clearly defined procedures (e.g. for public procurement); redefinition of the very concept of public administration in order to apply certain Community provisions.

In other cases, the impact stems from the need to conform to a common model. Take the relationship between the State and the market: Community law does not strip States of all control over the economy, but it does require that government intervention be compatible with the requirements of a market economy (provisions on State subsidies; public services; reorganisation of public enterprises). On this model, while the peculiar features of each country's legislation may be taken into account, there is an inevitable process of natural convergence.

There are also convergence factors of a more general nature, i.e., ones that do not affect periodic and specific aspects of the activity of national public administrations, but which are due to the particular structure of the Union's legal order. On the one hand, the Court has established a body of common principles which constitute the so-called "European administrative law": this does not replace national administrative laws, but works in parallel with them, constituting a superstructure to which national laws must conform. On the other hand, there is no Community administration that takes the place of its national counterparts: the national administrations themselves act as the Community administration. This results in a fairly major shift in perspective: while government previously tended to the interests of its citizenry alone, it must now work to promote a common interest transcending that of the State. As a result, there is more than a mere convergence of interests: there is a common interest.

In conclusion, a "European administrative space", in which the areas of convergence exceed the divergences, does now exist. The role of the Court of Justice has been paramount in building a system which leaves the autonomy of national administrative systems intact and, at the same time, ensures that Community law will be implemented in full. Autonomy is preserved because the European administration, as stated above, is constituted by national administrations. The requirement that Community law be applied properly is satisfied by compelling the Member States to achieve a convergence of results—assurance that EU law will be applied in such a way as to meet the standard of effectiveness defined, at a uniform level, by the case law of the Court.

All this would suggest that the organisation of an "effective administration" is essential if Member States are to reap the benefits of European integration. The term "effective administration" signifies an institutional structure capable of ensuring that Community obligations are discharged properly.

This entails considerable effort on the part of all public bodies. National jurisdictions are called upon for routine administration of Community justice and must ensure that the rights of individuals under Community law are upheld. Of course, national courts may avail themselves of the invaluable assistance of the Court of Justice through referrals for preliminary rulings; *inter alia*, they may submit questions about cases that involve interpretation or application of

Community law. But despite the availability of assistance from the Court of Justice, national courts must still be capable of administering Community law independently, just as they would administer their own national law.

For their part, public administrative bodies, in the strict sense of the term, find themselves in a new context: not only must they apply—and conform to—Community law, like all courts, but they must adapt to a vision of policy-making in which the centre of decision-making has to a large extent been shifted to Brussels. Consequently, a public administration that is not in line with Community standards and not hooked up to the network of European administrations would run the risk of transforming the Member State into a passive spectator of the European decision-making process. In other words, the Member State might well bear the consequences of integration without being able to influence its course.

As a result, without an “effective administration”, accession to the Union may well be fraught with unfavourable consequences.

First, liability for breaches of Community law by national administrations is strictly objective; no domestic difficulties encountered during implementation may be invoked as a justification. But above all, the “direct effect” principle means that individuals seeking remedy in national courts may avail themselves of Community provisions, which take precedence over conflicting national rules or administrative practices. However, it is not the prerogative of the Commission or of the other Member States to find that a State is in breach, or to establish its material responsibility, but that of individuals or companies, which thus become the true driving force of integration.

Second, a deficient public administration could create conditions detrimental to a country’s socio-economic development and thus drive it away from the process of integration. Repeated infringements and jurisdictions with scant concern for upholding Community law may trigger distortions of competition and divert trade flows to the detriment of the Member State in question. National firms would be prompted to make use of their freedom to provide services and freedom of establishment to focus their business on other Member States where the institutional climate is more conducive to exercising the economic freedoms guaranteed by the Treaty. Moreover, foreign firms would have no incentive to invest in the country, because a lack of reliability on the part of a government inevitably discourages economic development.

#### **4. Conclusion**

One conclusion to be drawn from the above is that national administrations should have the sufficient capacity to implement the EC Law, known as the *acquis communautaire*, with an acceptable standard of effectiveness, as defined by the jurisprudence of the ECJ, with a view to achieving the integration results sought by the Treaty of the European Union. Failures of a Member State would be detrimental firstly for their own citizens’ rights and secondly for the common interest of all Member States represented by the institutions of the European Union.