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The '*Costanzo* Obligation' and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?

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Abstract

*The '*Costanzo *obligation' implies that national administrative authorities are obliged to solve conflicts between provisions of national law and provisions of European law in favour of the provision of European law, when necessary by leaving the provision of national law unapplied. It is paradoxical that this obligation is directly addressed to administrative authorities, as European law is generally not concerned with the internal state structure of the Member States. This article investigates whether the key to solve this paradox may be found in the possibilities that the central governments of the Member States have to supervise their administrative authorities. This article focuses on supervision in France, Germany and the Netherlands by the central government with regard to acts or decisions, adopted by administrative authorities. The article aims to answer the question: can the current supervisory powers close the gap between the* Costanzo *obligation and the principle of institutional autonomy?*

1 Introduction

For cases in which a provision of national law is incompatible with European law, the European Court of Justice has imposed a very general obligation on the administrative authorities of the Member States. When a national administrative authority finds that a conflict exists between a provision of national law and a directly effective provision of European law – and thus cannot apply both provisions at the same time – it is obliged to solve this problem in favour of the provision of European law. If possible, the administrative authority may do so by interpreting the provision of national law in the light of European law. If consistent interpretation however is not possible, the administrative authority is obliged to set aside the incompatible provision of national law and eventually apply the directly effective provision of European law instead.[2]

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[2] See for example Case 103/88 *Costanzo* [1989] ECR 1839; Case C-224/97 *Ciola* [1999] ECR I-2517 and Case C-198/01 *Consorzio Industrie Fiammiferi* (*CIF*) [2003] ECR I-8055.

This obligation, which the European Court of Justice has clearly formulated for both primary European law[3] and secondary legislation,[4] is hereafter for reasons of convenience referred to as the '*Costanzo* obligation'. Although this obligation may seem entirely clear-cut and explicable from a European perspective, problems may occur from the point of view of national constitutional and administrative law. An important question is, for example, to what extent administrative authorities are entitled under national law to set aside provisions of national statutory law. For instance, in a recent case a German administrative authority in the German Saarland decided not to apply a provision of the (federal) law on Pharmacies, which it deemed incompatible with the freedom of establishment. This led to the granting of a license to operate a pharmacy, setting aside the provisions of national law which had violated European law. Although the Court unfortunately did not go into the preliminary question whether a national authority is 'entitled and obliged under Community law to disapply national provisions it regards as contrary to Community law even if there is no clear breach of Community law and it has not been established by the Court of Justice that the relevant provisions are incompatible with Community law', the case shows a good recent example of the *Costanzo* obligation in practise.[5]

This article focuses on the difficulties that the *Costanzo* obligation and other obligations that are directly imposed on national administrative authorities cause within the Member States. On the one hand, European law maintains the traditional rule of international law that the Member States must be regarded as entities in terms of the fulfilment of European law obligations. This means that the Member States have the responsibility towards the European Union for the correct application of European law. The European Union is not concerned with the internal state structure of the Member States, and which authority is assigned to each task: that is the principle of national institutional autonomy. On the other hand, however, the *Costanzo* obligation is addressed directly to the administrative authorities of the Member States, and not to the Member States.

These two basic assumptions of European law seem to be at odds with each other at first glance: in principle only being concerned with the Member State as an entity, but nevertheless addressing specific obligations to administrative authorities. The key to solve this tension or paradox[6] may

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3 Case C-198/01 *Consorzio Industrie Fiammiferi* (*CIF*) [2003] ECR I-8055.

4 For the instrument of the regulation, this obligation can be derived from its nature and character as laid down in Art. 288 TFEU (former Article 249 EC); for the directly effective provisions of directives that have not been correctly implemented in good time, this was decided in the *Fratelli Costanzo* case.

5 Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes* (*DocMorris)*, judgment of 19 May 2009, n.y.r.

6 J.H. Jans a.o., *Europeanisation of Public Law*, Groningen: Europa Law Publishing 2007, p. 18 ff.

be found in the possibilities that the central governments of the Member States have to supervise their administrative authorities. After all, if enough possibilities exist to instruct and supervise these authorities, it is easily explicable and acceptable that the Member State itself, is responsible towards the European Union for the correct compliance with the *Costanzo* obligation.

In paragraph 2, the relationship between European law and the internal state structure of the Member States will be discussed, with the principle of national institutional autonomy as general starting point. Paragraph 3 deals with the distribution of powers between the different administrative authorities in the national legal orders of the Member States, and the possibilities that exist for supervision by the central government. To limit the scope of this article to the specific topic of the *Costanzo* obligation, the discussion is focused on the possibilities of supervision by the central government with regard to acts or decisions, adopted by administrative authorities. In other words, the possibilities of supervision are discussed for cases in which the central government wants to oblige an administrative authority to change an adopted act or decision, in order to disapply national law in favour of a directly effective provision of European law with which the provision of national law is incompatible. Therefore, supervisory powers with regard to failure to act are left aside, just as methods to take recourse and other powers with financial consequences. Since it is hardly possible to discuss this internal state structure in general terms for all Member States, the paragraph focuses on France, Germany and the Netherlands as examples. In the final paragraph, then, the findings of paragraph 2 and 3 are combined to come to a conclusion: can the current supervisory powers close the gap between the *Costanzo* obligation and the principle of institutional autonomy?

2 The Principle of National Institutional Autonomy

European law maintains the traditional rule of international law that the Member States must be regarded as entities as regards to the fulfilment of obligations deriving from European law, as they are party to the treaties establishing the European Union. The Member State must ensure that the result sought by the relevant provisions of the Treaty or of secondary law is attained in the national legal order.[7] This also applies to federal states.[8]

Compare in this regard, the case law on liability for infringements of European law, which shows the traditional international law approach of the Court. When the obligations are not fulfilled, the state itself is liable, and not its individual organs, as the Court clearly observed in its ruling in *Brasserie*

[7] This is stable case law of the Court. See for instance Case 77/69 *Commission* v. *Belgium* [1970] ECR 237 or Case 17/85 *Comission* v. *Italy* [1986] ECR 1199. See also extensively the Conclusion of Geelhoed in Case C-129/00, *Commission* v. *Italy*, in particular p. 55.

[8] See for instance Case C-383/00 *Commission* v. *Germany*, par. 18.

du Pecheur.[9] The same idea clearly underlies the case law on the infringement procedure of Article 258 TFEU (ex Article 226 EC). The obligations on the Member States devolve upon the States themselves and 'the liability of a Member State under Article 226 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'.[10]

The reasons for the fact that the Member States are responsible for bringing European law into practice in their national legal order are multiple and of a political, legal and practical nature.[11] Apart from the fact that a concentration of powers on the level of the Member States may be preferred for political reasons, it is clear that the European institutions do not have the means at their disposal to apply and enforce all adopted measures themselves. Therefore the application of European law is generally done by the authorities of the Member States: a decentralised application of European law. As the latter also has adequate means at their disposal to use these powers, since an institutional and procedural structure already exists in each of the Member States, this is generally seen as the most realistic approach for practical reasons as well.[12] Hence, qualifying the Member State as most important entity in the application of European law leads to a practical use of already existing structures.[13] Moreover, it guarantees that, 'decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'.[14] The instrument of the directive is a clear model of this cooperation between the European Union and its Member States in this regard, as it only imposes an obligation with regard to the results, but leaves the precise means to the Member States that transpose the directive into their domestic law.

This choice for a decentralised application of European law does not mean that the contents of the institutional infrastructure of the Member States are determined on a European level. On the contrary, in principle, this is a matter of national law. European Union law is in principle not concerned with the question of which authorities take the required measures to fulfil the Member State's obligation under European law, or which procedures

9 Case C-46/93 and C-48/93 *Brasserie du Pecheur*, [1996] ECR I-1029, par 34.

10 Case 77/69 *Commission* v. *Belgium* [1970] ECR 237, paragraph 15. See also Case 93/71 *Leonesio* [1972] ECR 287, paragraphs 22 and 23.

11 L. Malo, *Autonomie locale et Union européenne: Thesis sous la direction de Henri Labayle*, Université de Pau et des Pays de l'Adour 2008, p. 270.

12 Malo 2008, p. 278; R. Mehdi, 'L'autonomie institutionnelle et procédurale et le droit administratif', in: J.B. Auby & J. Dutheil de la Rochère, *Droit administratif Européen*, Bruxelles: Bruylant 2007, p. 685-726, at p. 693.

13 M. Le Barbier – Le Bris, 'Les principes d'autonomie institutionelle et procédurale et de cóoperation loyale. Les États Members de l'Union Européenne: des États pas comme les autres', in: *Le droit et L'Union européenne en principes*, Apogée 2007, p. 419-457, at p. 422.

14 Preamble of the TEU.

of domestic law apply.[15] This is often referred to as the principle of national institutional and procedural autonomy: as a matter of principle, European law respects the institutional and procedural structure of the Member States. In the literature, this autonomy is even recognised as a fundamental right of each Member State, which shows the respect for the constitutional autonomy of each Member State, and which proves that the European Union is not a federal state in which such aspects are harmonised.[16] Hence, it can be held that the institutional and procedural autonomy of the Member States expresses the preserved sovereignty.[17]

The effect of European law in the domestic legal orders mainly takes place by the organs of the Member States. Their administrative authorities enforce regulations, their national courts guarantee the application of directives. This leads to the so-called *'dédoublement fonctionnel'* of national administrative authorities as their obligations now not only derive from national law, but also from European law.[18] This, however, does not directly influence the institutional structure of the Member States, which as a rule remains intact. The Member States have to decide themselves which administrative authority is empowered to exercise the powers provided by regulations, and thus fulfil the obligations of European law. That follows from the 'imperfection of Community law,'[19] as European law generally does not provide which national authority is competent. As a rule, regulations, directives and decisions only provide for powers, but refer to 'the competent national authorities' as actors.

It is up to the Member States, then, to distribute these powers among their authorities. The Court of Justice established this for the first time in *International Fruit Company*:

> 'Although under Article 5 of the Treaty the Member States are obliged to take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations of arising out of the Treaty, it is for them to determine which institutions within the national system shall be empowered to adopt the said measures. [...]
> When provisions of the Treaty or of regulations confer power or impose obligations upon the states for the purposes of the implementation of Community law the question of how the exercise of such powers and the fulfilment

[15] S. Prechal, *Directives,* Oxford: Oxford University Press 1995, p. 69.

[16] J.D. Mouton, 'Vers la reconnaissance de droit fondamentaux aux etats dans le systeme communautaire?' In: *Les dynamiques du droit européen en début de siècle, études en l'honneur de Jean-Claude Gautron,* Pedone, 2004, p. 463.

[17] Mehdi 2007, p. 687.

[18] Le Barbier – Le Bris 2007, p. 427.

[19] Mehdi 2007, p. 685.

> of such obligations may be entrusted by Member States to specific national bodies is solely a matter of the constitutional system of each State'. [20]

After *International Fruit Company*, the Court of Justice has reaffirmed and refined the principle. Compare for instance *Bozzeti*, in which the Court of Justice – building on *Salgoil*[21] – affirmed that as a rule, the distribution of powers among different national courts is a concern of the Member State, as long as the individual rights deriving from European law are effectively protected.[22] Hence, the European Union respects the state structure of its Member States, which may be organised federally, regionally or unitarily.[23] Moreover, the Treaty of Lisbon incorporated the respect for constitutional structures in Article 4 (2) TEU, which provides: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' Le Barbier – Le Bris argues that this makes clear that the European Union confers 'its letters of claim/ nobility to the principle of institutional and procedural autonomy, providing it a place next to the principle of sincere cooperation'.[24] Nevertheless, time will tell what the exact scope and importance of this new provision will be.[25]

Although it is clear that the principle of national institutional autonomy primarily provides a safeguard for the institutional structure of the Member States, this autonomy is not unlimited. The autonomy may pose a threat to the requirement of a uniform application of European law, as autonomy has the risk to lead to diversity.[26] Therefore, the Court has consequently ruled that national institutional autonomy should be reconciled with the need for uniform application.[27]

Moreover, several French authors have argued that the principle of sincere cooperation counterbalances the principle of national institutional autonomy in this regard.[28] That is to say, broad general obligations derive from this principle for the Member States to do their best with regard to

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[20] Joined Cases 51-54/71 *International Fruit Company II* [1971] ECR 1107, par. 4; Cf. also for example Case 96/81 *Commission* v. *Netherlands* [1982] ECR 1791.

[21] Case 13/68 *Salgoil* [1968] ECR 661.

[22] Case 179/84 *Bozzeti* [1985] ECR 2301, p. 17.

[23] Case C-8/88 *Germany* v. *Commission* [1990] ECR I-2321.

[24] Le Barbier – Le Bris 2007, p. 422: 'confère également au principe d'autonomie institutionnelle et procédurale ses lettres de noblesse, lui faisant une place, qouique moins explicitement, aux côtés du principe de cooperation loyale'.

[25] See Malo 2008, p. 289 several remarks in this regard.

[26] See extensively Le Barbier – Le Bris 2007, p. 432 ff.

[27] Cf. for instance *Deutsche Milchkontor*, with regard to the implementation of agricultural regulations in the Member States: Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633, p. 17.

[28] Mehdi 2007, p. 705; Le Barbier – Le Bris 2007, p. 429 Malo 2008, p. 294.

the application and enforcement of European law. It goes without saying that these obligations cannot be escaped by invoking national institutional autonomy.

Finally, the national institutional structure cannot be used as an excuse for misapplication of European law. Member States are not allowed to justify failures by relying upon national provisions, including for instance rules on the division of powers, the different competences of the organs.[29] The obligations for the Member State as an entity always apply, regardless of the institutional freedom.[30]

3 Supervision of Administrative Authorities in France, Germany and the Netherlands

3.1 Introduction

Bearing in mind the principle of national institutional autonomy, each Member State is free to determine its own internal organisation, including the division of powers and duties among its administrative authorities. The *Costanzo* obligation, however, applies to all administrative authorities in all Member States. As a consequence, every administrative authority is obliged to set aside provisions of national law in case of conflict with provisions of European law. Moreover, the Member States have the general obligation to actively promote the observance of European law.[31] The fact that the Member State is responsible towards the European Union for any violations of this obligation, however, leads to the question whether Member States are able to supervise their administrative authorities. If enough powers exist on the central level to supervise administrative authorities within the Member State in this regard, it can be more easily accepted that the Member State itself is responsible for the correct application of European law. If the possibilities for supervision are very limited, however, a clear tension may exist on the national level.

This article deals with the distribution of powers between the different administrative authorities in the national legal orders of Germany, France and the Netherlands, and the possibilities that exist for supervision by the central government. To limit the scope to the topic of the *Costanzo* obligation, the discussion is focused on the possibilities of supervision by the

[29] Case C-166/97 *Commission* v. *France* [1999] ECR I-1719, paragraph 13; Case C-274/98 *Commission* v. *Spain* [2000] ECR I-2823, paragraph 19; and Case C-212/99 *Commission* v. *Italy* [2001] ECR I-4923, paragraph 34. See also Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 24.

[30] Case 97/81 *Commission* v. *Netherlands* [1982] ECR 1819. Cf. also for instance Case C-419/01 *Commission* v. *Spain* [2003] ECR I-4947. See extensively in this regard Bris 2007, p. 430 ff.

[31] Cf. Case C-494/01 *Commission* v. *Ireland* [2005] ECR I-3331.

central government with regard to acts or decisions, adopted by administrative authorities. In other words, the possibilities of supervision are discussed for cases in which the central government wants to oblige an administrative authority to change an adopted act or decision, in order to disapply national law in favour of a directly effective provision of European law with which the provision of national law is incompatible. Therefore, supervisory powers with regard to failure to act are left aside, just as methods to take recourse.

This article discusses three different methods of supervision by the central government distributing powers among administrative authorities in the internal state structure. First, the federal nature of Germany will be discussed: to what extent is the federal government, who is the main contact of the federal state of Germany towards the European Union, empowered to supervise the administrative authorities in the different *Länder*? Secondly, attention will be paid to the system of decentralisation, which is present in all three Member States, and the extent of supervision allowed to the central government. In this regard, the focus will be on municipalities as an example. Finally, the position of independent administrative authorities will be addressed. As it is again impossible to provide a general overview, the national competition authorities and the postal and telecommunications authorities are discussed as examples, as they act in fields in which are to a great extent governed by European law.

3.2 German Federalism

3.2.1 Introduction

The main characteristic of the German legal system is obviously that Germany is a Federal Republic (*Bundesrepublik),* as is codified in Art. 20 I GG, consisting of the states (*Länder*) and the federal state itself (*Bund*).[32] This implies that state power is not centralised: the Federation is based on the joining together of the constituent *Länder,* which are all equal to each other and do also posses state quality, independent of the Federation. Ergo, the *Länder* do have their own constitutions and parliamentary systems. Their autonomy, however, is limited by the provisions of the federal *Grundgesetz*, as follows from Art. 28 I GG.[33]

The relationship between the *Bund* and the *Länder* is governed by the unwritten principle of federal loyalty (*Bundestreue* or the principle of *Bundes-*

[32] This provision is obligatory and unchangeable, because it is incorporated in the so-called *'Ewigkeitsklausel'* of Art. 79 GG. This does not guarantee the existence of the *Länder* in their current form, however; the territory of the *Länder* can be changed (see for example the creation of Baden-Württemberg in 1951).

[33] BVerfGE 36, 342/360f; BVerfGE 64, 301/317; BVerfGE 72, 330/388. Pieroth, in: H.D. Jarass & B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland; Kommentar,* München: Verlang C.H. Beck 2007, at p. 470.

freundlichen Verhaltens). Both *Bund* and *Länder* are obliged '*dem Wesen des sie verbindenden verfassungsrechtlichen ‚Bündnisses' entsprechend zusammenzuwirken und zu seiner Festigung und zur Wahrung der wohlverstandenen Belange des Bundes und der Glieder beizutragen.*'[34] In other words, the principle of federal loyalty prohibits every action that may harm the interests of the federation as a whole or one or more of the *Länder*.[35] Hence, this is a reciprocal obligation to consider each other's legitimate interests,[36] which underlies the whole system of German federalism.

The relationship between the *Bund* on the one hand and the different *Länder* on the other is a two-way relationship, in which the *Grundgesetz* of the Federation clearly sets the borders. The federation has several possibilities to influence the *Länder*. As said, Art. 28 I GG provides that the *Länder* constitutions have to comply with the federal *Grundgesetz*, thus setting a framework for the constitutions of the *Länder*. Moreover, the federal authorities may challenge *Länder* legislation before the *Bundesverfassungsgericht* on grounds of lack of competence (Art. 93 I 2 GG) or interference with its powers (Art. 93 I 4 GG).

The *Länder*, on the other hand, are also involved on the level of the *Bund* by means of the *Bundesrat*, which is composed of members of the governments of the different *Länder* (Art. 50 GG). In this way, they are involved in the process of legislation and administration of the *Bund*, as well as in matters concerning the European Union. Besides, they can also appeal to the *Bundesverfassungsgericht* when they fear that the federation is interfering with their powers.[37]

In this paragraph first the distribution of competences between *Bund* and *Länder* will be discussed, both with regard to legislative and executive powers. The current situation as described below was introduced by the *Föderalismusreform* which entered into force on the 1st of September 2006, and introduced a clearer distinction between the competences of *Bund* and *Länder*.

3.2.2 Distribution of Competences between *Bund* and *Länder*

Both the legislative and administrative competences are divided between the *Länder* and the Federation. The distribution of competences between the two levels is defined in the Basic Law (*Grundgesetz, GG)*. The basic principle is laid down in Art. 30 GG: the *Bund* only has those powers that it has been attributed by the *Grundgesetz*, whereas the *Länder* disposes of the residuum (all the unmentioned other powers). The explicitly

[34] BVerfGE 6, 309, 361.

[35] C. Trüe, 'Auswirkungen der Bundesstaatlichkeit Deutschlands auf die Umsetzung von EG-Richtlinien und ihren Vollzug', *Europarecht* 1996, p. 179-198, at p. 180.

[36] See for example BVerfGE 299 (31), 12 BVerfGE 248 (254).

[37] Art. 93 I 3/4 GG.

mentioned powers of the federation, however, are quite numerous in practice.[38]

Legislative powers

The division of legislative powers between *Bund* und *Länder* is governed by Art. 70-74 GG, as revised by the *Föderalismusreform*. Art. 70 I GG provides that the *Länder* have the right to legislate, unless the Constitution has attributed legislative powers to the Federation. The Constitution provides several such exceptions to the general rule with regard to specific subject matters.

Art. 71 GG provides that when the Federation has the power of exclusive legislation, the *Länder* cannot legislate, except when they are explicitly given the power to do so by federal law. Therefore, to this extent the starting point of Art. 70 GG is already reversed. Art. 73 GG, then, lists the topics which are exclusively legislated by the Federation, such as foreign affairs and defense, currency and citizenship.

In areas of concurrent legislation, some rather confusing rules apply, which differ from subject to subject. Firstly, Art. 74 GG provides the 33 topics which fall within the scope of concurrent legislation. Several of these topics may also concern European law, such as environmental topics like water management and protection of nature and landscape, but also labour law, and rules regarding the residency of foreigners in the country. According to Art. 72 I GG the *Länder* are competent to legislate on these topics as long as the federation has not done so. Statutes on the level of the *Länder* are automatically rendered ineffective when a federal statute is adopted. If the Federation has made use of its power to legislate, however, the *Länder* may still enact laws at variance with this legislation with respect to some specific topics. Several of these topics concern environmental law, which thus may hinder the process of implementation of European law in that field by the Federation. Finally, the use of the legislative powers by the Federation with regard to some of the subjects of concurrent legislation is limited to cases in which an establishment of equal living conditions or maintenance of economic or legal unity through federal law is required according to Art. 72 II GG.[39]

Any subject that is not listed in these constitutional provisions on exclusive and concurrent legislation falls within the legislative competences of the *Länder*, according to the rule of Art. 70 I GG. When a legal basis for a federal law cannot be found, the *Bundesverfassungsgericht* can repeal the federal law as unconstitutional due to a lack of competence. For example, the areas of policing or planning law and the law on the organisation of counties and municipalities (*Kommunalrecht*) falls within the exclusive scope of the *Länder* because it is not mentioned in Art. 73 nor 74 GG.

[38] Pieroth, in: Jarass & Pieroth 2007, p. 600.

[39] Art. 72(2) GG.

Finally it should be said that the case law of the *Bundesverfassungsgericht* shows that additional competences of the federation have been accepted if they are closely linked to a subject of exclusive competence (*Bundeskompetenz kraft Sachzusammenhangs*).[40] For example, legislation on cultural institutions abroad is provided by the federation, because of a link with foreign affairs, an area of exclusive competence according to Art. 73 I GG. This acceptation of 'implied powers' are at least questionable, because these competences are not expressly provided by the GG, despite Art. 70 GG requiring this.

The long list of areas mentioned in the provisions on exclusive and concurrent legislation and the acceptation of 'implied powers' with regard to legislation by the federation in related subjects, shows that – in spite of the character of Art. 70 1 GG – the power to legislate *de facto* lies primarily at the level of the federation. This dominant role is strengthened by Art. 31 GG, which ensures that in case of conflict between existing federal law and a law of a *Land,* the federal law will prevail and render the state law ineffective (*Bundesrecht bricht Landesrecht*).

Executive powers

Although legislative powers are thus primarily concentrated on the federal level, the *Länder* are the most important level with regard to the execution of law.[41] Art. 83 GG provides that as a rule, the *Länder* execute federal laws in their own right. Art. 84 (1) GG restricts the autonomy of the *Länder* in this regard , providing a detailed set of rules on how the federation can nonetheless provide rules on administrative procedures:

> 'Where the *Länder* execute federal laws in their own right, they shall provide for the establishment of the requisite authorities and regulate their administrative procedures. If federal laws provide otherwise, the *Länder* may enact deviating regulations. If a *Land* has enacted a law pursuant to sentence 2, subsequent federal laws regulating the organisation of authorities and their administrative procedure shall not be enacted until at least six months after their promulgation, provided that no other determination has been made with the consent of the *Bundesrat*. Sentence 3 of paragraph (2) of Article 72 shall apply accordingly. In exceptional cases, owing to a special need for uniform federal legislation, the Federation may regulate the administrative procedure with no possibility of separate Land legislation. Such laws shall require the consent of the *Bundesrat.* Federal laws may not entrust municipalities and associations of municipalities with any tasks'.

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[40] BVerfGE 3, 407, 421.

[41] M. Schröder, 'Administrative law in Germany', in: R.J.G.H. Seerden, *Administrative Law of the Europea Union, its Member States and the United States,* Antwerpen-Oxford: Intersentia 2007, p. 93-153, at p. 101.

Laws of the *Länder* are obviously executed by their own authorities. With regard to federal law, Article 83 GG repeats the general rule of Art. 30 GG: the *Länder* execute federal laws in their own right, unless the GG provides exceptions. With regard to administration, Art. 86-90 GG provide only few exceptions in favour of the federation, so – as opposed to the legislative field – the general rule is also applicable in practise. Hence, the legislative competences of the *Bund* are clearly wider than its executive competences. The possibilities of supervision by the federation on the application of federal law by the *Länder* differ according to the subject.

The forms of execution by administrative authorities can be divided into three categories. First, the administration of the *Länder* apply their own *Länder* law. Secondly, the administrative authorities of the *Länder* are often also competent to apply and execute the law of the *Bund*, which the Constitution calls *Landesverwaltung*. Finally, in some areas the *Bundesrecht* is executed by the administrative authorities of the Federation itself (the so-called *Bundesverwaltung*, Art. 86 GG). In particular the *Landesverwaltung* and the *Bundesverwaltung* will be discussed below.

Administration on the level of the Länder

On the level of the *Länder*, the constitution and laws of the *Land* determine the administrative organisation, which is more or less comparable in all larger *Länder* [42] and is comparable to the federal hierarchy. Art. 28 GG guarantees this institutional autonomy with regard to administrative organisation. On the upper level are the principal authorities (*oberste Ländesbehörden*) such as the Government of the *Land* (*Landesregierung*), the minister-president and the ministries. This level has both governmental and administrative duties. The superior authorities of the *Länder* (*Landesoberbehörden*) are comparable to the Federal superior authorities, being subordinate to a ministry and competent for a particular subject on the whole territory of the state. Not every *Land* has intermediate authorities *(Landesmittelbehörden*), especially not smaller *Länder. Landesmittelbehörden* are subordinated to a supreme *Land* authority and are competent only on a part of the territory of the *Land*. As Schröder says, 'this level is characterised by horizontal concentration of administrative duties, reflecting the unity of administration'.[43] Finally, lower authorities of the *Länder* (*untere Landesbehörden*) like the chief executive of a county, cities not belonging to a district, etc., have jurisdiction for only a small part of the *Land* and are subordinate to an intermediate authority (or a superior authority, when the intermediate level does not exist).

As said above, Art. 83 GG presumes that the main responsibility of administration lies on the level of the *Länder*. In the first place, the administrative authorities of the *Länder* are competent to execute and apply the laws

[42] Schröder 2007, p. 103.

[43] Schröder 2007, p. 104.

that were adopted on their own level, in accordance with Art. 30 GG. In this regard, there is no supervision or control by the *Bund*.

On the application of *Bundesgesetze*, Art. 83 and 84 GG provide that the *Länder* apply and execute these 'in their own right' (*als eigene Angelegenheit*), unless the GG provides otherwise.[44] This administration *'als eigene Angelegenheit'* is called *Landeseigenverwaltung*. This implies that the *Länder* apply and execute the Federal laws as their own law. Moreover, the *Länder* decide themselves about the competent administrative authorities concerned and apply their own administrative procedural laws.[45]

Supervision of the *Bund* on the *Landeseigenverwaltung* of federal law by the *Länder* is only possible to a limited extent and, is governed by Art. 84 GG. That is to say, the federal government can only supervise to ensure that the execution of federal statutes is in accordance with the law (Art. 84 III 1 GG, the so-called *Rechtsaufsicht,* which concerns the lawfulness of the application*)*. When the *Bund* is of the opinion that the execution is not in accordance with the law, Art. 84 IV provides rules on how to solve this problem. Generally, no power exists to supervise the *Länder* with regard to how the federal laws should be executed in individual cases, or for example on the usefulness or effectiveness of the decisions of the administration of the *Länder* (the so-called *Fachaufsicht*, which concerns the effectiveness*)*. Art. 84 V GG provides an exception in which such instructions, but this provision is very rarely used in practise.

As said, an exception to the rule that the *Länder* execute federal laws as *Landeseigenverwaltung* can only be made in the *Grundgesetz*. This is the *Bundesauftragsverwaltung* (Art. 85 GG), which means that the *Länder* execute federal laws on federal commission. Also in this case, the authorities of the *Länder* execute federal laws, within the scope of the organisational and procedural law of the *Land* concerned, although Art. 85 GG provides the possibility for the *Bund* to limit this autonomy. Nevertheless, the main difference with *Landeseigenverwaltung* is that the competent federal minister is empowered to issue instructions on the effectiveness in practise of the implementation of the law concerned, and on specific cases. This is codified in Art. 85 III 1 GG, and means that the *Bund* then has, not only the possibility of *Rechtsaufsicht*, but also of *Fachaufsicht*. Moreover, according to the case law of the *Bundesverfassungsgericht*, the *Landesminister* is obliged to follow the instructions of the *Bundesminister,* even when it holds it unlawful.[46]

The power of Art. 85 III has in practise become important in the eighties, when the CDU-*Bundesregierung* had other plans with regard to nuclear politics than the SPD-*Landesregierungen*. This also happened after the elections of 1998, with inverse effects.[47] According to Art. 87c GG in conjunction with

[44] BVerfGE 55, 318.

[45] H. Maurer, *Staatsrecht I,* Verlag C.H. Beck: München 2007, p. 567.

[46] H. Maurer, *Allgemeines Verwaltungsrecht,* München: Verlag C.H. Beck 2006, p. 554.

[47] Maurer 2006, p. 554.

art.74 11a GG, the federal legislature can decide that federal laws on nuclear power are applied in *Bundesauftragsverwaltung*. This has been decided in §24 I AtomG, with regard to most provisions of this statute. Therefore, the *Bundesregierung* is allowed to supervise by both *Rechtsaufsicht* and *Fachaufsicht*, and can use the latter to force its views through.

Administration on the level of the Bund

The administration on the federal level is organised in a hierarchical way. On the upper level[48] are the ministries and supreme Federal authorities (*oberste Bundesbehörden*), such as the federal ministers with their ministries and the federal chancellor. They are competent for the whole territory and are vested with rights and duties by the Constitution. In some cases, these ministries also have divisions on the middle (*Bundesmittelbehörden*) or lower level (*untere Bundesbehörden*). The second level is a level for higher administrative authorities, which are intermediately subordinated to a supreme authority. They are vested with supervisory powers for the whole territory, without having a regional substructure. The third and last level is the executive level, in which the lowest administrative authorities are competent only for a certain region, where usually a regional structure exists.

Bundesverwaltung

As stated above, application of federal law by the *Bund* only exists in exceptional cases, and can only be decided upon in the Constitution. From Art. 87 GG onwards, the Constitution explicitly assigns the execution of legislation on several topics to the federal level: for example the federal border police authorities, armed forces and federal office of criminal investigation.

Federal administration can take place in a direct or an indirect manner. Direct federal administration takes place when the Federation itself enacts and executes its laws, (*Bundeseigene Verwaltung)* whereas indirect administration refers to execution by independent federal bodies or authorities (*unmittelbaren Bundesverwaltung*).[49]

In both forms of *Bundesverwaltung*, supervision is of course different than in the *Bund-Länder* relationship. Nevertheless, because of the hierarchical character of German administration, in the end there is always a minister that is responsible for the execution of the laws by the administrative authorities concerned. With regard to *Bundeseigene Verwaltung*, this concerns both *Rechtsaufsicht* and *Fachaufsicht*; with regard to administration by independent bodies or authorities, generally only the possibility of *Rechtsaufsicht* exists.

[48] Which Schröder 2007, p. 102 characterises as the policy-making level.

[49] 11 BVerfGE 105 (108) and 63 BVerfGE 1 (36); Maurer 2007, p. 604.

3.2.3 Supervision

The above makes clear that the federal system in Germany leads to concerted action of both the *Bund* and the different *Länder*. That also applies to EU law, which can be included in the general scheme on the *Bund-Länder* relationship, which has been drawn above. As far as European law requires implementation into national law by the national Member State, the rules on the division of legislative competences between *Bund* and *Länder* as codified in the German Constitution apply analogously to decide whether this implementation should take place on the federal or the state level.[50] This means that the subject matter concerned determines the level of implementation by the legislature on either the level of the *Bund* or on the level of the *Länder*. With regard to the execution of European law, Art. 83 – 89 GG are applied analogously.[51] This means that the execution and application of European law mainly takes place on the level of the *Länder*, just as the general rule is for the application of German law. Compare for instance the recent case *Docmorris*, in which a minister of one of the *Länder* decided that the *Bundesgesetz* he had to apply was incompatible with European law.[52]

Control by the Federation on the application of European law by the Länder

The GG does not include rules on supervision which are particularly intended for European law.[53] Therefore, the general provisions on the division of competences between the Federation and the *Länder* are applied, which implies that the possibilities of supervision differ from case to case.

Kössinger has described the possibilities in this regard, and has distinguished three methods by which the Federation can influence the application of European law by the authorities of the *Länder*: federal supervision (*Bundesaufsicht*), federal compulsion (*Bundeszwang*) and the possibility of a reference to the *Bundesverfassungsgericht*. The first option of federal supervision only applies with regard to cases in which the application of federal law by the administrative authorities of the *Länder* is concerned. When the application of European law concerns a subject which is part of the legislative competences of the *Länder*, the federation does not have any powers under Article 84 GG to supervise whether this *Länder* law is applied correctly – or for instance is incompatible with European law. Federal compulsion and a

[50] H.W. Rengeling, 'Europäische Normgebung und ihre Umsetzung in nationales Recht', *DVBl* 1995, p. 945-962, at p. 949; A. Weber, *Rechtsfragen der Durchführung des Gemeinschaftsrechts in der Bundesrepublik*, Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1987, p. 27.

[51] Maurer 2006, p. 558; Trüe 1996, p. 196.

[52] Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes*, judgment of 19 may 2009, not yet published.

[53] W. Kössinger, *Die Durchführung des Europäischen Gemeinschaftsrechts im Bundesstaat*, Berlin: Duncker & Humblot 1989, p. 150.

reference to the *Bundesverfassungsgericht,* however, are options regardless whether the administrative authorities of the *Land* concerned apply federal law or *Länder* law.

Finally, the possibilities for the recovery of costs because of the violation of European law will be briefly addressed.

Federal supervision

As stated above, the application of federal law generally has the form of *Landeseigenverwaltung:* the *Länder* apply and execute the federal law 'in their own right' (*als eigene Angelegenheit*). Supervision of the *Bund* is then governed by Art. 84 GG, and limited to the so-called *Rechtsaufsicht:* the federal government can supervise whether the execution of federal statutes is in accordance with the law (Art. 84 III GG). The *Bund* has a right of information (Art. 84 II and III GG) in this regard. In accordance with Art. 84 (5) GG, this supervision may include instructions in individual, specific cases, when this has explicitly been provided for in a federal law. This power, however, can only be granted to the *Bundesregierung* (as a college) in specific cases, and the instruction has to be addressed to the *oberste Landesbehörden*. It is hence meant to be an exception, because it creates a hierarchical relation and interferes greatly with the administrative powers of the *Länder*. It is only rarely applied in practise.[54]

Moreover, in the case of *Bundesauftragsverwaltung*, the competent federal minister has not only the possibility of *Rechtsaufsicht*, but as well Art. 85 III GG empowers him to issue instructions on both the lawfulness and the effectiveness of individual decisions (the so-called *Fachaufsicht); 'die Fachaufsicht is grundsätzlich total, und reicht also bis hin zur Revision einer Einzelentscheidung.'*[55]

When the *Bundesregierung* finds any shortcomings on the application of federal law by the *Land* authorities, and these shortcomings are not corrected and resolved, the case can be taken to the *Bundesrat* to decide whether the state concerned has infringed the law. Either of the parties can appeal to the decision of the *Bundesrat* at the level of the *Bundesverfassungsgericht*. Although this judicial method of dispute settlement, which is discussed in more detail below, is hardly ever been put to use, it makes clear that the *Bund* has a judicial means to ensure the correct application of European law in this field.

Federal compulsion

The instrument of federal compulsion or '*Bundeszwang*' is provided for by Art. 37 GG. On the basis of this article, the *Bundesregierung* can – after approval of the *Bundesrat* – in case of failure by a *Land* to fulfil its '*Bundes-*

[54] Examples: § 28 III LBG, § 6 I 2 BLG, § 15 III 4 WPflG, § 65 AuslG, § 29 Awg.

[55] M. Döhler, 'Das Modell der unabhängigen Regulierungsbehörde im Kontext des Deutschen Regierungs- und Verwaltungssystems', *Die Verwaltung* 2001, p. 59-91, at p. 77.

pflichten' – that is to say the obligations stipulated by the Constitution or any other federal law – take the necessary measures to compel the *Land* concerned to fulfil its duties. This is a discretionary power of the *Bundesregierung*. Although the wording of Art. 37 GG speaks of federal laws, it may be suggested that this power may also be applied for negligence of duties under European law, because the breach of European law can be seen as a violation of a *'Bundespflicht'*.[56] Some derive this from the wording of Art. 288 TFEU (ex Art. 249 EC) others argue that the principle of *Bundestreue* of the German Constitution suffices to see it as a duty of the *Länder* to ensure that Germany meets its European obligations. It can be argued, then, that the principle of loyal cooperation implies that the *Bundesregierung* is obliged to use the power of Art. 37 GG when the *Länder* do act contrary to European law. Nevertheless, the *Bundesregierung* can only use the instrument of federal compulsion when a violation has taken place, so not for instance, before the implementation period has ended.

It is clear that this power has enormous political and judicial consequences. Therefore, it is intended for very exceptional cases and has never been applied thus far.[57] The fact that approval of the *Bundesrat* – and thus the *Länder* themselves – is required may make it less powerful in practise. Nevertheless, it has to be said that this competence can be a good option for the federation to ensure that the administrative authorities of the *Länder* comply with European law, hence including the *Costanzo* obligation, albeit only after a violation of European law has taken place.

The possibility of a reference to the Bundesverfassungsgericht

Finally, when the *Bundesregierung* is of the opinion that the administrative authorities of one of the *Länder* have not complied with their obligations under European law, it can refer the case to the *Bundesverfassungsgericht*. An action for *Abstrakte Normenkontrolle* implies that the law of the *Land* is reviewed in light of the Constitution. However, one has to bear in mind that the Constitution and not European law is the standard of review,[58] and thus this action cannot directly solve problems with regard to the application of the *Costanzo* obligation on the level of the *Länder*. Although no case law exists, it can be argued that the *Costanzo* obligation can be 'translated' into a '*Bundespflicht*' or an aspect of the *Bundestreue*.[59]

The *Bundesregierung* can also start action under Art. 93, 1, 3 GG, the so-called *Bund-Länder-streit*, if it deems that one of the *Länder* violates one of its duties by acting contrary to European law, or refraining from acting as required. This is a rather drastic option, which is not used that often but still

[56] Kössinger 1989, p. 154.

[57] Kössinger 1989, p. 154.

[58] BVerfGE, 31, 145, 174 f.

[59] See with further references Kössinger 1989, p. 154.

sometimes with regard to cases which concern European law.[60] Nevertheless, it has never been used thus far with regard to the *Costanzo* obligation, but it is available in theory.

One has to bear in mind, however, that both options to call upon the *Bundesverfassungsgericht* are primarily focussed on the goal of ensuring the compliance with federal law, and have not been designed for the *Costanzo* obligation. The obligation to set aside national law (either federal or state law) and to apply European law instead, is of course an odd one, and is rather hard to fit into the picture of *Bund – Länder* relations. Nevertheless, as a '*Bundespflicht*' or an aspect of the *Bundestreue* the obligation to set aside national law in case of conflict and to apply European law instead, may be included in the German system. Nevertheless, this has never happened in practise thus far.

The recovery of costs because of the violation of European law

Until recently the *Länder* did not suffer any consequences when they violated European law. Since the *Föderalismusreform,* the German Constitution provides two provisions which allow the *Bund* to recover financial costs on the *Länder*. The most important provision is Art. 104a (6) GG,[61] which provides very specific rules in this regard. This provision comes down to the fact that in principle, costs which follow from non-compliance with supranational obligations are distributed along the internal division of powers. This applies, for instance, with regard to lump sums or penalty payments under Article 260 TFEU (ex Article 228 EC). For instance, the competent legislator has to pay when a directive has been implemented incorrectly. In cases of financial corrections by the EU with effects transcending one specific *land*, special rules apply. Moreover, Art. 109 (5) GG provides specific rules for financial sanctions following from the instrument of budgetary discipline. This, however, is not discussed here as it cannot be used with regard to the *Costanzo* obligation.

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[60] Cf. 2 BvG 1/04 and 2 BvG 2/04, which concerned the recovery of subsidies by the Commission from Germany. The federation wanted to recover the money from the *Länder* which were responsible. The *Bundesverfassungsgericht* concluded that Art. 104 a (5) GG provided a power to do so.

[61] In accord with the internal allocation of competencies and responsibilities, the Federation and the *Länder* shall bear the costs entailed by a violation of obligations incumbent on Germany under supranational or international law. In cases of financial corrections by the European Union with effect transcending one specific *Land*, the Federation and the *Länder* shall bear such costs at a ratio of 15 to 85. In such cases, the *Länder* as a whole shall be responsible in solidarity for 35 per cent of the total burden according to a general formula; 50 per cent of the total burden shall be borne by those *Länder* which have caused the encumbrance, adjusted to the size of the amount of the financial means received. Details shall be regulated by a federal law which shall require the consent of the *Bundesrat*.

3.3 Decentralised Administrative Authorities

3.3.1 Introduction

The system of decentralisation is present in all three Member States and incorporated in their Constitutions.[62] In general terms, decentralisation implies that not all governmental power is vested in the central government on a state level, but that decentralised authorities also have their own tasks, duties and powers to take their own decisions. Apart of these autonomous powers, decentralised authorities often perform tasks which have been assigned to them by the central government. Moreover, decentralised authorities have their own democratic legitimacy, independent of the democratic basis of the central government.

The fact that these decentralised authorities can also cause important problems with regard to the application of European law, is for instance shown by *Braunschweig*.[63] The Commission lodged this procedure against Germany because the City of Braunschweig and Braunschweigsche Kohlebergwerke concluded a contract under which the latter was made responsible for residual waste disposal by thermal processing for a period of 30 years. This was concluded without prior publication of a contract notice, although this was required by a directive relating to the coordination of procedures for the award of public service contracts.[64] Although Germany pointed out that the Government of Lower Saxony had instructed all local authorities to comply with the provisions on the awarding of public contracts, the Court ruled that the Member State Germany failed to fulfil its obligations under Directive 92/50/EEC. The imposition of a fine was narrowly escaped.[65]

This case shows the importance of decentralised authorities in the application of European law. Decentralisation can have a territorial character – such as for example, Regions, Provinces and municipalities, the so-called *collectivités territoriales* under French law. This is the original form of decentralisation, which relies on the difference between national affairs and local affairs.[66] Currently decentralisation also takes place with regard

[62] Art. 72 ff of the French Constitution, Art. 28 of the German Constitution, Chapter 7 of the Dutch constitution.

[63] Joined Cases C-20/01 and C-28/01 *Commission* v. *Germany* [2003] ECR I-3609. Cf. in this regard also Case C-387/97 *Commission* v. *Germany* [2000] ECR I-5047, in which Greece was ordered to pay a non compliance penalty as a decentralised authority failed to take the measures necessary to ensure that waste is disposed without endangering human health and without harming the environment, as required by a directive.

[64] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

[65] As the infringement was terminated in due time by Germany by terminating the illegal tender contract. See Case C-503/04 *Commission* v. *Germany* [2007] ECR I-6153.

[66] J. Rivero & J. Waline, *Droit Administratif,* Paris: Dalloz 2006, p. 36-37.

to a functional character (*les institutions spécialisées* or *établissement public* under French law), – such as the Commodity Boards for several branches in the agricultural sector under Dutch law. Finally, a combination of both territorial and functional decentralisation can also apply, such as the Dutch District Water Boards which all have their own region to govern on the subject of water management. As it is impossible to discuss the supervision on all these decentralised authorities in detail, this paragraph focuses on the supervision of municipalities. Municipalities can be found in all three countries discussed, and they act in fields in which the influence of European law is apparent. Besides, they have to respect important rules of European law in their day-to-day routine, such as, for instance, the rules on state aid and the Directive on the coordination of procedures for the award of public service contracts. Moreover, comparable discussions exist in Germany, France and the Netherlands with regard to the responsibilities of the central government concerning the application of European law by these municipalities. The outcome of these discussions, however, differs from Member State to Member State, as will be seen below.

3.3.2 France

Although some may still see France as a centralised state, the centralisation has been reduced to a great extent in the last decades. The power of annulment by the central government of regional decisions was removed in the first reform of decentralisation in 1982-1983, therefore the decentralised authorities gained several new powers in the field of economics, social policy, culture, education and environmental planning. Moreover, in the second decentralisation reform of 2003-2004, the constitutional protection of the system of decentralisation has been strengthened. Currently, the French Constitution guarantees the existence of territorial communities, such as the *Communes*, the *Départements* and the *Régions*, in its first article. Moreover, the Constitution even provides for a subsidiarity principle in Art. 72 (2) of the Constitution, albeit that the French decentralised authorities do not have their own autonomous tasks (as in Germany and the Netherlands), but only those tasks as assigned by the legislature.

Supervision is also already provided for in the constitution: all the territorial administrative authorities act under the supervision of a state representative, which exercises the so-called *'autorité de tutelle'* (guardianship).[67] This power of guardianship has to be attributed by law or *règlement*, and includes only those powers which have been granted explicitly by the law.[68] In practise the *autorité de tutelle* is exercised by prefects, as will be discussed below.

[67] See very extensively O. Gohin, *Institutions Administratives,* Paris: L.G.D.J. 2006, p. 742 ff and R. Chapus, *Droit administratif général – Tome 1,* Paris: Montchrestien 2001, p. 408 ff.

[68] CE 17 January 1913, *Congrégation des soeurs de Saint Régis*, p. 72; Chapus 2001, p. 409.

The prefect

The guardianship for communes, departments and regions is exercised by the prefect (*préfet*). The position of prefect was established by Napoleon Bonaparte in 1800, and a prefect still is a key figure in the French administration, as he is a representative of and part of the central government, responsible for the supervision of territorial authorities.[69] The powers of the prefect are specified in a *décret* of 2004[70] which reads:

> 'The prefect is the representative of state authority; this applies to the regional prefect in the regions, and the departmental prefect in the departments. They have the duty to protect national interests and respect for the law. They represent the prime minister and each of the ministers. They observe the execution of regulations and governmental decisions. They lead, under the authority of the ministers and under the conditions of this 2004 *décret*, the regional services of the state.'[71]

One of the main powers that the prefect has in his department or region is the power to control the legality of acts of local authorities. The acts of the authorities of the region are controlled by the *préfet de region*, those of the *département* by the *préfet de département* and those of the communes generally by the *sous-préfet*. Until the entry into force of the law of the 2nd of March 1982,[72] this control took place *a priori,* so before the act was adopted. Since this law entered into force, however, the control by the prefect takes place *a posteriori;* the acts of local authorities are immediately applicable and enforceable after publication (regulatory acts) or notification (individual decisions), without the requirement of an approval by the prefect. Moreover, an important change is that the prefect is no longer entitled to annul an act himself, but can only refer the act concerned to an independent court, as will be discussed below. This obviously limits the examination to the legality of the act, and excludes the examination of the motives of the decision,[73] which safeguards the principle of '*libre administration*' of the local authorities.[74]

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[69] From 1982 to 1988 prefects were called *commissaires de la République* (the Republic's commissioners.

[70] *Décret* n°2004-374 du 29 avril 2004 relatif aux pouvoirs des préfets, à l'organisation et à l'action des services de l'Etat dans les régions et départements.

[71] 'Le préfet de région dans la région, le préfet de département dans le département, est dépositaire de l'autorité de l'Etat. Ils ont la charge des intérêts nationaux et du respect des lois. Ils représentent le Premier ministre et chacun des ministres. Ils veillent à l'exécution des règlements et des décisions gouvernementales. Ils dirigent, sous l'autorité des ministres et dans les conditions définies par le présent décret, les services déconcentrés des administrations civiles de l'Etat.'

[72] *Loi* n°82-213 du 2 mars 1982 relative aux droits et libertés des communes, des départements et des régions.

[73] Before 1982, the préfet also examined the opportunity of the act in his *a priori* examination

[74] Gohin 2006, p. 748.

The local authorities are obliged to submit some acts to the prefect which are specified in a limited enumeration; this concerns the acts 'with the most important consequences'.[75] For communes, for example, this obligation generally concerns all general applicable acts, except acts of the mayor in his capacity as representative of the State, decisions on the award of public service contracts, and private acts.[76] Moreover, some specific statutes also provide obligations to submit acts to the prefect: for example, the intention to provide state aid has to be referred to the prefect.[77] When submission is required, the control automatically takes place when the act is received by the prefect (and meanwhile the act concerned still is immediately applicable). All other acts also enter into force without being sent to the prefect.[78] However, the powers that the prefect has concerning the control of legality can also be exercised with regard to those other acts of which the prefect is informed.[79] This can for example be the case when the local authority voluntarily has submitted the act (although it is not obliged to do so) or when a third party has asked for legality control.[80] By a *loi* of the 13th of November 2004, the system has been further reformed, reducing the number of acts which are subject to control by the prefect.[81]

The instrument of legality control also contains an administrative, more informal option for the prefect. The intention of the legislature was that in cases in which the prefect judged an act of an administrative authority as illegal, he should first try to persuade the authority concerned by an informal procedure to modify the act. As stated in the *circulaire* which the minister addressed to the prefects:

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[75] Art. L-2131-2 and la circulaire du ministère de l'Intérieur du 22 juillet 1982 relative aux nouvelles conditions d'exercice du contrôle de légalité des actes administratifs des autorités communales, départementales et régionales, précise les conditions dans lesquelles s'exerce le contrôle de légalité en général et le déféré préfectoral en particulier.

[76] See more extensively L 2131-1 and L 2131-3 CGCT with regard to communes.

[77] Article L 1511-1 CGCT; the decentralised authority is moreover obliged to recover illegal state aid is a decision of the European Commission or the Court of Justice, *à titre provisioire ou definitif,* requires this. If the decentralised authority lacks to do so within a month, the prefect can start the recovery action on the basis of Art. L 1511-1 (2) CGT. Possible financial consequences of too late recovery are also for the decentralised authority concerned.

[78] Art. L-2131-3.

[79] CE, 4 novembre 1994, *Département de la Sarthe.*

[80] See with regard to the latter Art. L2131-8 CGCT with regard to communes, Art. L3131-3 for departments and Article L4142-3 for regions. Alternatively, third parties can also start an action for recours pour excès de pouvoir themselves, under the conditions of Art. 2131-8 and 2131-9 CGCT , Art. 3131-3 (départements) and, 4142-3 CGCT (régions).

[81] See L2131-2 and L2131-3 Code général des collectivités territoriales with regard to *communes*; Art. L3132-1 for *départements* and L4142-1 for *régions.*

> '(...) je vous demande (...) d'informer systématiquement l'autorité locale concernée avant de saisir le juge administratif lorsqu'un de ces actes vous apparaît entaché d'une illégalité et de lui communiquer toutes précisions utiles lui permettant de rendre légaux les actes concernés. Ce n'est que si l'autorité locale intéressée ne prend pas les mesures nécessaires qu'il vous appartient de saisir le juge administratif et d'informer alors l'autorité locale de cette saisine (...).'[82]

This is the so-called *'recours gracieux'* or *'régulation pré-contentieuse'*. The use of this procedure by the prefect is not strictly obligatory; he can, as well, directly take an alleged illegal decision to court. Moreover, when the prefect has already started action before an administrative court, he can meanwhile try to solve the matter outside court, and eventually withdraw his action in court.[83]

The most important power that the prefect has with regard to the control of the legality of local authorities' acts is that he is entitled to submit alleged illegal acts to a court, within two months of receiving the act.[84] This is the so-called action of *'déféré préfectoral'* or prefectoral referral, which resembles the well known French *recours pour excès de pouvoir*.[85] The power of '*déféré préfectoral*' also includes the possibility to ask for the suspension of the act concerned in case of serious doubts pertaining to its legality.[86] Where the budget is concerned, the prefect is obliged to use this power to refer alleged illegal acts to the regional audit office. With respect to administrative acts, however, the prefect has discretionary power; it is up to his evaluation whether or not to bring a case to the administrative court.[87] If, however, a prefect does not refer a illegal act to the court and the illegality eventually causes damages to the regional authority concerned – for instance because a private party suffers damages and successfully brings an action before court against the concerned municipality – the central state is responsible in case of a *faute lourde* of the prefect.[88]

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[82] La circulaire du ministère de l'Intérieur du 22 juillet 1982 relative aux nouvelles conditions d'exercice du contrôle de légalité des actes administratifs des autorités communales, départementales et régionales, précise les conditions dans lesquelles s'exerce le contrôle de légalité en général et le déféré préfectoral en particulier.

[83] CE 16 june 1989, *Préfet des Bouches-du-Rhône c/Commune de Belcodène*

[84] This time limit is extended in case of a recours gracieux; CE 18 avril 1986 *Commissaire de la République d'Ille-et-Vilaine*.

[85] CE 26 juillet 1991,*Commune de Sainte-Marie*.

[86] Art. 2131-5, par. 3 CGCT; this may be especially important in case of state aid and tender procedures to prevent the violation of European law; compare Conseil d'État, *Collectivités territoriales et obligations communautaires* (Paris: La Documentation Française 1994, p. 72.

[87] Gohin 2006, p. 750-751; see CE 25 janvier 1991, *Brasseur;* CE 28 february 1997, *Commune du Port* ; the Conseil then takes a different position than in its previous case law (see for example 18 novembre 1987, *Marcy*).

[88] CE 6 oktober 2999, rec. Lebon 395, *Commune de Saint Florent*.

A special procedure, which deserves mention, as it is very relevant in the field of tender procedures is the so-called *référé précontractuel*. According to Art. L 551-1 of the Code de Justice Administrative, this procedure can be used to force decentralised authorities to adhere to the European procedural rules on tender procedures. Either the prefect or another interested party can start the procedure at the administrative court before the contract is concluded. Moreover, Art. L 551 (4) explicitly mentions that the procedure can also apply when the European Commission has stated that the European rules on tender procedures have been violated.

Some figures should be mentioned showing the prefect as an inspector of the legality of local administrative authorities' decisions in a proper perspective. A recent report shows that the goal of the law of 2004, which aimed at reducing the number of acts which have to be submitted to the prefect by the local authorities, has been achieved. In 2006, approximately 6,000,000 acts were subject to control, while this number was still almost 8 million in 2003.[89] The *recours gracieux*, in which the prefect tries to persuade the administrative authority concerned to modify an alleged illegal act by giving his opinion, is applied in practise with less than 3 percent of the transmitted acts.[90] The use of the power of referral is even more limited; the prefect challenges only 0.016% to 0.033% of the transferred acts before court, which means 1,000-2,000 cases per year, of which in 80-90% of the cases the decision is in favour of the prefect.[91]

It is clear that the prefect has an important position, and has a high success rate when he brings an alleged illegal act before the administrative court. It is, however, of course unclear whether the non-contested acts are all compatible with European law.

To ensure the correct application of EU law, it is clear that good knowledge of European law at the level of the prefect is essential, as a research commission of the *Conseil d'État* also concluded.[92] At this point the circulaire of the minister for the interior should also be mentioned, as he orders the prefects to focus their control on the field of tenders, spatial planning

[89] 20ème rapport du Gouvernement au Parlement sur le contrôle a posteriori des actes des collectivités locales et des établissements publics locaux pour les années 2004-2005-2006.

[90] 20ème rapport du Gouvernement au Parlement sur le contrôle a posteriori des actes des collectivités locales et des établissements publics locaux pour les années 2004-2005-2006, p. 15.

[91] See Le 20ème rapport du Gouvernement au Parlement sur le contrôle a posteriori exercé sur les actes des collectivités territoriales pour 2004-2005-2006, p. 16-17.

[92] Conseil d'État, *Collectivités territoriales et obligations communautaires* (Paris: La Documentation Française 1994, p. 75-76.

of towns and environmental matters.[93] Comparable *circulaires* have been adopted in the field of state aid.[94]

Finally, it should be said that France does not have general rules on neglect of duty by decentralised authorities. Rules exist, however, with regard to specific cases. For instance, in the field of spatial planning[95] such powers exist. Sometimes such rules on neglect of duty are directly related to European law. For instance, after a condemnation of France due to not having plans on the control of waste for its entire area, specific rules on neglect of duty were adopted in this field. [96] In both cases, the rules on neglect of duty provide that if necessary the prefect as a last resort has powers to act in place of the municipalities in specific circumstances.

3.3.3 The Netherlands

Traditional instruments

The basis for supervision of decentralised authorities in the Netherlands is to be found in Art. 132 Gw, which provides for preventative supervision, ex post supervision and rules on the negligence of duty. Referring to preventive supervision or approval of decisions, Art. 132 (3) of the Dutch Constitution provides that this can only take place in cases specified by or pursuant to an Act of Parliament. Art. 253 (1) of the Act on provinces provides that prior supervision of the provinces has to be specified by an Act of Parliament. The system of prior supervision, however, runs counter to the non-hierarchical position of decentralised authorities. Therefore, in practise the number of cases for which prior approval has been required has decreased considerably in recent years, as, in the words of Hessel, 'it is considered too 'nanny-ish' towards the local and regional authorities, and it is too demanding on the supervising authority'.[97] Currently, this require-

[93] Circulaire du ministre de l'Intérieur et de l'Aménagement du territoire et du ministre délégué aux Collectivités territoriales sur la modernisation du contrôle de légalité, 17 january 2006 .

[94] For instance: circulaire du Premier ministre no 5132/SG du 26 Janvier 2006 'sur l'application au plan local des règles communautaires de concurrence relatives aux publiques aux entreprises; circulaire du ministre de l'intérieur du 3 juillet 2006 sur la mise en oeuvre de la loi du 13 août 2004 relative aux libertés et responsabilités locales en ce qui concerne les interventions économiques des collectivités territoriales et de leurs groupements et ses annexes.

[95] Article L 123-14 Code de l'urbanisme.

[96] L 541-15 Code de l'environnement; this was induced by Case C-292/99 *Commission* v. *France* [2002] ECR I-4097.

[97] B. Hessel, 'European integration and the superivison of local and regional authorities. Experiences in the Netherlands with requirements of European Community Law', *Utrecht Law Review* 2006, p. 91-110, at, p. 101; Cf. MvT Gemeentewet, Kamerstukken II 1985-1986, 19 403, nr. 3, p. 19.

ment can hardly be retraced in the Act on municipalities and the Act on provinces.[98] However, when approval is required, the minister is generally empowered to do so with regard to provinces; the provincial executive is empowered with regard to municipalities. General rules on preventive supervision have been incorporated in the tenth chapter of the General Administrative Law Act (GALA).

Art. 132 (4) of the Constitution provides ex post supervision, since 'decisions by the administrative organs may be quashed only by Royal Decree and on the grounds that they conflict with the law or the public interest.' Hence, quashing can take place for reasons of both lawfulness and effectiveness. This ex post supervision can take place in the form of suspension and annulment and is exercised by the Crown, on the initiative of the minister of the interior. The mayor and the Provincial Commissioner are obliged to refer administrative acts, which in their view qualify to be quashed, to the minister of the interior. General rules are provided in chapter XVII of the Municipality Act and chapter 10 of the GALA.

The rules on neglect of duty are governed by Art. 132 lid 5 Gw. To understand this provision, it is important that the Dutch doctrine distinguishes within the system of decentralisation between autonomous powers and co-administration.[99] Although these words are not explicitly used, this distinction can be found in Article 124 of the Constitution, which refers to autonomous powers in the first paragraph, and to co-administrative powers in the second:[100]

> *'Article 124*
>
> 1. The powers of provinces and municipalities to regulate and administer their own internal affairs shall be delegated to their administrative organs.
>
> 2. Provincial and municipal administrative organs may be required by or pursuant to Act of Parliament to provide regulation and administration.'

European law can be involved with both reference to autonomous powers and with regard to tasks on co-administration. An important field in which Dutch municipalities have powers of co-administration is environmental law and spatial planning. The European legislature is also active in this field, especially in European environmental directives such as the Habitats Directive, the EIA Directive, the IPPC Directive, etc. Autonomous tasks which involve European law are, for instance, the municipal subsidy policy: this has to be compatible with the European rules on state aid, and also with the

[98] C.A.J.M. Kortmann, *Constitutioneel Recht,* Deventer: Kluwer 2008, at p. 482; D.J. Elzinga & R. De Lange, *Van der Pots Handboek van het Nederlandse Staatsrecht,* Deventer: Kluwer 2006 at p. 877 ff, 919 ff.

[99] See extensively recently C.N. Van der Sluijs, *In Wederzijdse Afhankelijkheid,* Nijmegen: Wolf Legal Publishing 2008, at p. 23 ff.; Kortmann 2008, at p. 478 ff.

[100] Cf. also Art. 108 Act on municipalities and Art. 105 Act on provinces.

rules of the European structural funds if the subsidies are financed by these funds. Another important subject in which European law is important for municipalities, is the fact that their entering into contracts has to meet the directives on tender procedures.

Returning to the rules on neglect of duty. For tasks in co-administration, specific rules are provided in Art. 123 and 124 of the Municipal Act. When the democratic body (the Municipal Council) does not perform or performs inadequately its tasks in co-administration, the Municipal executive board is empowered to act in the name of, and for the Council.[101] If the Board neglects its duties, the executive of the Province is allowed to take decisions on behalf of the province or municipality. The rules of the Municipal Act do not apply to autonomous tasks, for which Art. 132 (5) of the Constitution requires a specific statute. Hence, in the case of negligence of duty of autonomous powers, the action of parliament is required, which has to adopt a statute adapted to the specific situation concerned. That rarely happens in practise, the last case was in 1951.

The statutory proposal for new instruments intended for European law

The question of whether the traditional supervisory instruments suffice to guarantee the correct application of European law has been discussed extensively in the last decade. Two interdepartmental committees wrote extensive reports on the subject,[102] and it was discussed in literature as well.[103] The general view is that the traditional supervisory instruments are not sufficient to ensure the correct the application of European law, due to certain restrictions. For instance, the rules on neglect of duty only offer a solution in the area of co-administration, and in the case of municipalities this system empowers the province, and not the minister. The instruments of ex post control can only be applied after incorrect legal action by a decentralised administrative authority, not when it fails to act. Moreover, no statutory tools existed to recuperate money which had to be paid to the European Union by the central government, for instance when subsidies had to be paid back, or in case of financial penalties under Article 260 TFEU (ex Article 228 EC). In 2002, the '*Wet TES'* (Statute on the supervision on European subsidies) was introduced, which provided the central government with the power of recovery in the field of the repayment of subsidies, in case

[101] See Art. 120 and 121 Provinces act and Art. 123 and 124 Municipalities act.

[102] Interdepartementale Commissie voor Constitutionele Aangelegenheiden en Wetgevingsbeleid (ICCW), *Communautaire verplichtingen van decentrale overheden,* september 1999; Interdepartementale Commissie Europees Recht (ICER), *De Europese dimensie van toezicht*, ICER 2000-56 (6 oktober 2000).

[103] See for instance Hessel 2006, p. 101; See for an extensive list of literature C. de Kruif & W. den Ouden, 'Over voorkomen en verhalen. Uitbreiding van de Awb-bepalingen over bestuurlijk toezicht?' in: T. Barkhuysen, W. den Ouden & E. Steyger, *Europees recht effectueren,* Alphen a/d Rijn: Kluwer 2007, p. 233-256.

the obligation to repay is the consequence of the behaviour of a decentralised authority.[104] It has to be said, however, that this power has never been used thus far.[105]

Recently the Dutch government introduced a statutory proposal on the supervisory rules on the application of European law by 'public entities'.[106] This proposal provides the power for ministers to give instructions to administrative authorities, which do not adequately meet their obligations under European law, and administrative authorities which fail or are about to fail, to perform adequate control and supervision of European subsidies.[107] Moreover, it includes the power to recover money from decentralised authorities when they are to blame for the violation of European law, for instance, the repayment of subsidies or in case of a penalty under Article 260 TFEU: the above mentioned *Wet TES* is incorporated into this proposal. These powers should, however, only be used after consultation between the minister and the authority concerned, except in case of urgency. Moreover, the power of instruction is meant as an addition to the already existing supervisory powers for the neglect of duty as discussed above. If these provide enough possibility to repair the situation concerned, these should be applied; it is stressed that the new power of instruction should only be used in exceptional cases as a last resort.[108] When the administrative authority concerned does not follow the instruction, the minister is allowed to take the necessary actual and legal actions on behalf and on account of the administrative authority.

The statutory proposal has received a mixed reaction in the Netherlands. On the one hand, scholars support the proposal as it provides the central government with the necessary tools to guarantee the correct application of European law.[109] On the other hand, it should be noted that the traditional supervisory instruments are also currently being re-evaluated. The core of this re-evaluation is that the supervisory instruments should, as much as possible, be incorporated in a statute of a very general nature, instead of the

[104] See extensively on the *Wet TES* Van der Sluijs 2008.

[105] Cf. Communication from the Commission – Application of Article 228 of the EC Treaty (SEC (2005)1658), which shows that the Court had thus far only three times condemned a Member State under Article 228 EC. None of these three cases concerned decentralised authorities.

[106] Kamerstukken II 2009/2010, 32 157, nr. 2; 'Wet Naleving Europese regelgeving publieke entiteiten'. See extensively M.J.M. Verhoeven, Wetsvoorstel Naleving Europese regelgeving publieke entiteiten: overbodig of onmisbaar in de praktijk?, to be published in *NTER* (4) 2010.

[107] With regard to the latter, this statute proposal replaces an earlier statute on the supervision of European Subsidies.

[108] Cf. TK 2009/2010, 32 157, nr. 3, p. 11.

[109] See for instance Hessel 2006, who is very positive about the instruments proposed in the reports which eventually lead to the statutory proposal as it is.

existing jungle of specific rules in each and every area.[110] How does the statutory proposal on the supervision of the application of European law fit into this idea? The cabinet has argued that this statute provides instruments of a general nature;[111] others, however, argue that the supervisory powers do not have the very general nature required, as these only concern the European law aspects of administrative decisions.[112] Secondly, an important outcome of the re-evaluation is that the general rules on supervision should be focused on three instruments: the quashing and suspension (possibly including the power for the central government to adopt its own decision instead of the quashed decision) and the rules on neglect of duty. The power of instruction is explicitly not included, as it doesn't seem to fit in the Dutch decentralised system. The introduction of the power of instruction in the statutory proposal for new instruments intended for European law seems, thus, at odds with the choices made in the light of the re-evaluation of supervisory instruments.[113] The government, however, persists as it deems the instrument indispensable.

3.3.4 Germany

Just as in France and the Netherlands, the autonomy and self-administration of municipal authorities is a constitutional principle under German law.[114] The municipalities are part of the *Länder*, and hence do not form their own, separate level within the federal state structure. The *Länder* are also competent to legislate on municipal law.[115] Hence, this paragraph only contains rather general observations, which may differ however from *Land* to *Land*.

Two main models can be distinguished in the municipal laws of the different *Länder*. On the one hand, the dualistic model, which distinguishes between the autonomous powers and duties of the *Land* (*Selbstverwaltungsaufgaben),* and powers and duties which are assigned by the *Bund* or the *Länder (Staatsaufgaben)*. On the other hand, the monistic model, which starts on the presumption that all tasks performed by the municipalities are municipal duties – instead of distinguishing between autonomous and assigned powers and duties. Nevertheless, within the municipal tasks, a

[110] Commissie Doorlichting Interbestuurlijke Toezichtsinstrumenten, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, *Van Specifiek naar generiek, doorlichting en beoordeling van interbestuurlijke toezichtsarrangementen,* Den Haag, 2007.

[111] Kamerstukken II 2009/10, 32 157, nr 4, p. 4.

[112] S.E. Zijlstra, *Bestuurlijk organisatierecht,* Deventer: Kluwer 2009, at p. 288.

[113] Kamerstukken II 2009/10, 32 157, nr 4, p. 4.

[114] Art. 28 (2) GG See more extensively on this guarantee M. Burgi, *Kommunalrecht,* München: Verlag C.H. Beck 2008, at p. 47 ff; M.E. Geis, *Kommunalrecht,* München: Verlag C.H. Beck 2008, at p. 38 ff.

[115] Burgi 2008, p. 80.

distinction is made between *Weisungsfreie aufgaben* and *Weisungsaufgaben*. Broadly speaking this distinction corresponds to the distinction of *Selbstverwaltungsaufgaben* and *Staatsaufgaben* in the dualistic *Länder.*[116] The dualistic model applies in Bayern, Niedersachsen, Rheinland-Pfalz, Saarland, Sachsen-Anhalt and Thüringen.[117] Baden-Württemberg, Brandenburg, Hessen, Mecklenburg-Vorpommern, Nordrhein-Westfalen, Sachsen and Schleswig-Holstein have a monistic system.

The supervision of German municipalities is also a responsibility of the *Länder*; supervision by authorities of the *Bund* does not exist,[118] although it can be held in specific circumstances that the supervising authorities of the *Land* concerned are held to act in a case concerning federal legislation because of the duty of *Bundesfreundlichen Verhalten*.[119] Because legislation on municipalities is a competence of the *Länder,* it differs from *Land* to *Land* which authority is competent to supervise the municipalities.

Just as with the supervision of the *Länder* by the *Bund,* the supervision can be divided into two types: *Rechtsaufsicht* on the one hand, which is aimed at the review of legality, and the more extensive *Fachaufsicht* on the other, which also includes questions of effectiveness and appropriateness. This distinction applies in a comparable way in both monistic and dualistic systems of municipal law, because of the similarity of the different types of duties.

With regard to the autonomous powers and duties of the municipalities (either *Selbstverwaltungsaufgaben* in a dualistic system, or *Weisungsfreie aufgaben* in the monistic system) the supervision of *Land* authorities is limited to *Rechtsaufsicht*[120]. This can take place in a preventive or ex post manner. A preventive means is the offer of advice to the municipalities; in most *Länder,* the supervisory authorities have specific public servants assigned to this task. Moreover, in some specific cases municipal authorities are obliged to submit specific decisions to their supervisory authorities for approval. When this approval concerns the autonomous powers of municipalities, the assessment is limited to control of legality; with regard to *Weisungsaufgaben*, the control also concerns effectiveness.

Apart from these preventive means of supervision, the supervisory authority also has several powers with regard to ex post supervision of legality.[121] The supervisor has a right to information on all affairs of the municipality. When an act or decision is illegal, the supervisory authority has the so-called *Beanstandungsrecht*. This means that it can adopt a decision which establishes the illegality of the act or decision concerned. It then requires

[116] Burgi 2008, p. 90.

[117] Burgi 2008, p. 87.

[118] Geis 2008, p. 205 ff ; BVerfGE 8, 137; 26, 181.

[119] BVerfGE 8, 137.

[120] See extensively Geis 2008, p. 206; Burgi 2008, p. 96.

[121] See extensively on all these powers Geis 2008, p. 209 ff and Burgi 2008, p. 98 ff.

municipal administrative authorities to change or repeal these acts and decisions within a reasonable time limit.

Another supervisory power is the so-called *Anordnungsrecht*. When a municipality fails to act, and by doing so violates its statutory duties, the supervisory authority is empowered to oblige it to take the required actions, again within a reasonable time limit. If the municipal authority fails to do so, the supervisory authority can act on behalf of and at the expense of the municipality or order a third party to do so; this is the *Ersatzvornahme*. As a last resort, the supervisory authority can appoint a representative, when the acts of a specific municipal authority continue to be illegal, and other methods of supervision prove to be unsatisfactory. The representative replaces a specific organ of the municipality, at the expense of the municipality concerned.

The issue of instructions is the typical method of supervision for *Fachaufsicht*.[122] As it does not concern autonomous tasks, the supervision of *Weisungsaufgaben* may be more intrusive than the autonomous tasks. Therefore, these instructions may concern points of legality as well as effectiveness. Acting contrary to instructions means that the municipal authorities act illegally.[123] The authorities competent to exercise *Fachaufsicht* can then turn to the general supervisory authorities which exercise *Rechtsaufsicht* to apply the above mentioned methods of supervision.

4.4 Independent Administrative Authorities

3.4.1 Introduction

Independent administrative authorities are – just as any other administrative authority – obliged to set aside national law when it is not compatible with European law. *CIF* may serve as an important example in this regard; in this case the Court obliged the Italian competition authority to set aside national legislation which was incompatible with Art. 81 EC.[124] The specific character of independent administrative authorities, however, may cause particular tensions, because their independent nature automatically limits the possibilities of the central government to supervise their application of European law.

All three Member States have independent administrative authorities at the level of the central government. The Dutch constitution has no general provisions on independent authorities. In practise, however, they function nevertheless since the list of public authorities provided by the Constitution is not limited; the legislator is free to introduce new ones. In 2006, the *Kaderwet Zelfstandige Bestuursorganen* (Framework statute on

[122] Geis 2008, p. 212.

[123] Burgi 2008, p. 98.

[124] Case C-198/01 *CIF* [2003] ECR I-8055.

independent administrative authorities) was introduced.[125] In this statute, the concept of an 'independent administrative authority' is defined in more detail, and general rules are provided, also with regard to supervision by the central government. More specific rules or deviations from the *Kaderwet* are provided in the specific act establishing the independent administrative authority concerned.

The number of independent administrative authorities in France has grown in recent years; it is not possible to provide an exact list nowadays.[126] Neither is it possible to give an exact definition of the concept of 'independent administrative authority' due to the diversity and heterogeneity of their powers and objectives.[127] Some of these authorities have been qualified as independent by the law, particularly in the fields of the rights of citizens, economic regulation and information and communication. Moreover, several administrative authorities have been qualified as independent in case law, such as the former *Autorité de regulation des telecommunications*.[128] Recently, the *Office parlementaire d'évaluation de la legislation* of the both chambers of the French parliament have advised on adopting a framework statute on independent administrative authorities, to provide general rules.[129]

Compared to the other two Member States, Germany is very cautious of setting up independent administrative bodies, due to the constitutional principle of democracy.[130] This principle, as codified in Art. 20 (2) GG, requires for all powers 'a continuous chain of legitimacy between the sovereign people and state power,'[131] and is by the *Bundesverfassungsgericht* interpreted as requiring a parliamentary legitimacy.[132] Hence, in view of the limits set by the *Grundgesetz*, the independence of administrative bodies under German law can never be absolute, but can only be relative.[133] Döhler adds to this that

[125] See more extensively: Zijlstra 2009, p. 204 ff.

[126] G. Braibant & B. Stirn, *Le droit administratif Français,* Paris: Presses de Sciences Po/Dalloz 2005, p. 79. See for an impression of a list A.W. Heringa, 'Agencies in France. Autorités Administratives Centrales Indépendantes/National Independent Administrative Authorities', in: L. Verhey & T. Zwart, *Agencies in European and Comparative Perspective,* Antwerp: Intersentia 2003, p. 37-58, at p. 43-45.

[127] G. Dupuis , M.J. Guédon & P. Chrétien, *Droit administratif*: Sirey 2007, at p. 201 ff.

[128] CC 23 July 1996, Réglementation des télécommuncations, dec. 96-378 DC., Rec. 99.

[129] Rapport de l'Office parlementaire d'évaluation de la législation sur les autorités administratives indépendantes, par M. Patrice Gélard, Sénateur, Tome 1, p. 82.

[130] A. van Aaken, 'Independent Administrative Agencies in Germany', in: M. Andenas & D. Fairgrieve R. Caranta, *Independent Administrative Authorities,* London: British Institute of International & Comparative Law 2004, p. 65-91.

[131] Van Aaken 2004, p. 65

[132] BVerfGE 83, 60 (72f), BVerfGE 91, 228 (244), BVerfGE 93, 37 (66 ff.), BVerfGE 107, 59 (87 ff).

[133] J. Masing, 'Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden?', in: *Gutachten D. zum 66. Deutschen Juristentag,* München: Verlag C.H. Beck 2006b, at p. D 74.

the federal character of the German state, in which the Federation is dominant in legislating, but the state level is the primary level of execution, also complicates the development of independent administrative bodies on the level of the federation.[134]

However, limitations may also follow from European law. Compare, for instance, recently the statement made by the Court of Justice in an infringement procedure against Germany on the independence of the supervisory authorities responsible for ensuring the protection of personal data.[135] Article 28(1) of Directive 95/46/EC[136] provides: 'Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive'.

German law, however, makes a distinction depending on whether or not that processing is carried out by public bodies. The supervisors of processing of data by public bodies are solely responsible to their respective parliament and are not normally subject to any scrutiny, instruction or any other influence from the public bodies which are their supervisors. The organisation of the authorities responsible for supervising the processing of data by non-public bodies varies among the *Länder*. However, all the laws at *Länder* level expressly subject those supervisory authorities to State scrutiny.

The Court ruled on this system of organization:

> 'The guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the supervision of compliance with the provisions on protection of individuals with regard to the processing of personal data and must be interpreted in the light of that aim. It was decided not to grant a special status to those authorities, as well as their agents, in order to strengthen the protection of individuals and bodies affected by their decisions. It follows that, when carrying out their duties, the supervisory authorities must act objectively and impartially. For that purpose, they must remain free from any external influence, including the direct or indirect influence of the State or the *Länder*, and not only that of the supervised bodies.'

Furthermore, the Court ruled that this does not pose a threat to the principle of democracy, as Germany argued:

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[134] M. Döhler, 'Das Modell der unabhängigen Regulierungsbehörde im Kontext des Deutschen Regierungs- und Verwaltungssystems', *Die Verwaltung* 2001, p. 59-91, at p. 60.

[135] Case C-518/07 *Commission* v. *Germany*, judgment of 9 march 2010, n.y.r.

[136] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

'[...] That principle does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts. Such independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts. That is precisely the case with regard to the tasks of the supervisory authorities relating to the protection of data.

Admittedly, the absence of any parliamentary influence over those authorities is inconceivable. However, it should be pointed out that Directive 95/46 in no way makes such an absence of any parliamentary influence obligatory for the Member States.'

3.4.2 Supervision in General

In all three Member States, independent administrative authorities by definition do not fall within the hierarchical control of a minister.[137] This, however, does not imply that they are totally unsupervised. Apart from the fact that their decisions can be challenged before the judiciary, in most cases possibilities of redress within the administration also exist.

In Germany and France, no general statutory rules exist on the supervision of independent administrative authorities, so the possibilities of supervision differ for each independent administrative authority. To a certain extent, that also applies to the Netherlands, since general rules are provided in the framework statute, but deviation is possible in the specific act in which the independent administrative authority is established. To provide more specific examples, the competition authority and the telecommunications authority of the three Member States will be discussed. These authorities are chosen since they are particularly involved with subjects concerning European law.

3.4.3 The Examples Competition Authorities and Telecommunications Authorities

Both the competition authorities and telecommunications authorities have an important role in the application of European law in the national legal order. Already at first glance, an interesting difference exists between the two: competition authorities mainly apply primary European law (Article 101 TFEU and following (ex Art. 81 EC)) and regulation 1/2003,

[137] Gohlin 2006, p. 248; Kortmann 2008, p. 294.

whereas the telecommunications authorities mainly apply national law in which the telecommunications directives have been implemented. In the context of their independent position in the national legal order, it could be argued that European law provides more specific requirements for the telecommunications authorities. For instance, whereas the telecommunications directives now only require independence from market parties, it seems that political independence is increasingly seen as desirable as well, not only in the legal literature[138] but also in Commission proposals.[139] Moreover, although never explicitly recognised by the Court of Justice with regard to telecommunications supervisors, the above mentioned recent case on the independence of the German supervisory authorities responsible for ensuring the protection of personal data also shows the increased importance given to political independence.

In Germany, the Federal Competition Authority (*Bundeskartellamt*) is responsible for the enforcement of European competition law and German competition law in cases that have effect beyond one of the federal states. Where only one state is concerned, the *Landeskartellbehörde* of that State is competent. The Federal Telecommunications Authority (*Bundesnetzagentur*) was established in the summer of 2005 as a separate higher federal authority within the scope of business of the German Federal Ministry of Economics and Technology. The *Bundesnetzagentur* is subject to the control of several ministries. For the *Bundeskartellamt* this is the Federal Minister for Economics, which only indirectly supervises the federal cartel office through its ministerial duties.[140] This means, amongst others, that policy decisions are usually made by the Federal Competition Authority, but when direct political responsibility for a decision is considered desirable, the *GWB* codifies that the minister is competent to exercise the authority to assess cartels.[141]

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[138] Cf. A.T. Ottow, *Telecommunicatietoezicht,* Den Haag: SDU 2006 at p. 65; S.A.C.M. Lavrijssen, *Onafhankelijke mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen voor good governance,* Den haag: Boom Juridische Uitgevers 2006, at p. 64-68.

[139] For instance in Article 1(12) of a Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity COM (2007) 528 Final. The requirement of political independence, however, was amended by the European Parliament and the Council in the directive. See Article 35 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211/55).

[140] Klaue, in U. Immenga & E.J. Mestmäcker (red.), *Gesetz gegen Wettbewerbsbeschränkungen; Kommentar,* München: C.H. Beck'sche Verlagsbuchhandlung 1992, at p. 1782.

[141] These situations are: 1) when a cartel agreement which is prohibited by s 1 of the *GWB* does not fall within one of the exceptions in ss2-7 and the minister finds that 'the restraint of competition is necessary for overriding reasons concerning the general economy and the common wellfare', 2) when an export cartel is an agreement or resolution which 'serves to protect and promote exports, provided that they are limited to the regulation of competition

In the Netherlands, both the Competition Authority *NMa* (*Nationale Mededingingsautoriteit*) and the independent post and telecommunications authority *OPTA* (*Onafhankelijke Post en Telecommunicatie Authoriteit*) work, regulating in the field of business for the minister of economics. Both authorities also fall within the scope of this Framework statute on independent administrative authorities, albeit that for both authorities an important exception exists regarding general rules, which will be discussed below in more detail.[142]

The French *Autorité de la concurrence* also works within the scope of the minister for Economics. It was established in 2009 as successor to the *Conseil de la concurrence*, which was created in 1987, and carries out all activities of competition regulation, replacing several different authorities. The independence of the authority is provided for by statute.[143] *L'Autorité de régulation des communications électroniques et des postes (ARCEP*) is the French independent post and telecommunications authority.[144]

Several possibilities exist for the central government to supervise the independent administrative authorities. In particular, the supervision of the French competition authority, in which the central government is represented in each meeting by a *'commissaire du Gouvernement'* which is appointed by the minister for economics. This representative gives its opinions at sessions of the board of the Competition Authority, but does not take part in the decision making.[145] Several other independent French administrative authorities have a *commissaire du Gouvernement* as well, whose powers differ from authority to authority. Moreover, in a recent report the *Office parlementaire d'évaluation de la legislation* of the both chambers of French parliament advised on the presence of a government representative with regulatory powers at each independent administrative authority.[146] This would facilitate the conciliation of the authorities' regulatory powers with the executive branch, and ensure that the general interest is taken into account. The French post and telecommunications authority does not have a

in markets outside the territory in which this Act applies', 3) when ministerial authorization is allowed because 'the restraint of competition is compensated by the overall economic advantages'.

[142] TK 2007-2008, 25 268, nr 53. See on those two independent administrative authorities very extensively L.F.M. Verhey & N. Verheij, 'De macht van de marktmeesters – Markttoezicht in constitutioneel perspectief', in: *Toezicht – Preadviezen NJV,* Alphen a/d Rijn: Kluwer 2005, p. 135-332.

[143] Article 95 de la loi n°2008-776 du 4 août 2008 de modernisation de l´économie (=Art.L. 461-1.-I. du Code de Commerce).

[144] Its independence is based on décision du Conseil constitutionnel n° 96-378 DC du 23 juillet 1996.

[145] Art. L. 461-2 Code du Commerce.

[146] Rapport de l'Office parlementaire d'évaluation de la législation sur les autorités administratives indépendantes, par M. Patrice Gélard, Sénateur, Tome 1, p 9.

representative of the government in its board, nor do the Dutch and French independent administrative authorities.

Apart from this French concept of having a representative of the government present at some of the independent administrative authorities' board meetings, two important methods of supervision are the issue of instructions – both in general and in individual cases – and the annulment of decisions in individual cases by the central government. The French system generally does not allow such control. In the words of the *Office parlementaire d'évaluation de legislation:*

> 'L'indépendance à l'égard du Gouvernement est une des raisons d'être des autorités administratives independentes. Elles ne reçoivent ni ordre, ni instruction du pouvoir executive et ne sont pas contrôlées par lui'. [...] Les autorités administratives independentes n'étant pas placées sous l'autorité du Gouvernement, leur contrôle démocratique ne peut s'effectuer, comme pour les autres autorités administratives, par la voie de la responsabilité du Gouvernement devant le Parlement'.[147]

Hence, the control of French independent administrative authorities is in the hands of parliament, which receives annual reports and frequently hears the boards of the independent administrative authorities on several subjects. Although democratic control thus exists, the central government seems to play no supervisory role whatsoever.

The power to issue general instructions is available with both the competition authorities and the post and telecommunications authorities in both Germany and the Netherlands. This can be explained by the fact that the reason of their independence in both countries is that an institution, independent from the government, is required to take individual decisions in the field. The competent minister, however, decides on the general policy in the field.

The *Bundesminister* can issue general instructions to the federal cartel office in accordance with § 52 *GWB*, as dictated by the hierarchy.[148] These general instructions have to be published in the '*Bundesanzeiger*'. The power to issue general instructions is rarely used: Klaue counted 5 general instructions until 1992,[149] Becker counted only 4 cases until 2006.[150] It is accepted in the literature that the *Bundeskartellamt* is not bound by general instructions that are unlawful. This is due to the fact that the *Bundeskar-*

[147] Rapport de l'Office parlementaire d'évaluation de la législation sur les autorités administratives indépendantes, par M. Patrice Gélard, Sénateur, Tome 1, p 115.

[148] Schultz, in: Langen & H.J. Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*: Luchterhand, p. 1136.

[149] Klaue, in: Immenga & Mestmäcker 1992, p. 1782.

[150] Becker in: U. Loewenheim , K. Meessen & A. Riesenkampff, *Kartellrecht; Band 2: GWB,* München: Verlag C.H. Beck 2006, p. 825.

tellamt, as any other administrative authority, is bound by the law and the *'Gesetzmäßigkeit'* of the Administration.[151] The competent ministers also have the power to issue general instructions for the *Bundesnetzagentur*. Just as in case of the *Bundeskartellamt*, these instructions have to be published in the *Bundesanzeiger*,[152] whereas the Energy law (EnWG) also requires that the reason for the issuning of the general instructions is published.[153]

In the Netherlands, the fact that the *NMa* and the *OPTA* are independent administrative authorities implies that both authorities operate fairly freely of the responsible minister. Both authorities are not embedded in the hierarchical structure of the Ministry of Economic Affairs. The competent minister has the power to issue general instructions for the authorities for the exercise of their powers,[154] a right to receive information[155] and specific rules on neglect of duty.[156] He also has several more specific powers, for example, the appointment of new members of the board. Moreover, the minister does bear political responsibility ex post for the use (or non use) of his powers. Hence, he is responsible as far as he has powers to influence the independent administrative authority concerned.[157]

Although it is thus clear that the competent ministers in both Germany and the Netherlands have the power to issue general instructions to both the competition authority and the post and telecommunications authority, this does not analogously apply to instructions in individual cases. In the Netherlands this power is clearly refused: the minister has no direct say in the individual decisions made by the *NMa* and *OPTA*. Not only does he not have the power to issue instructions in individual cases, the power to annul decisions – as provided for as a general rule by Art. 22 of the framework statute on independent administrative authorities – does not apply on the *NMa* and *OPTA*, because such political influence on individual decisions is considered undesirable.

In Germany, it is unclear to what extent the *Bundesnetzagentur* is subject to instructions from the relevant minister in individual cases. It is debated in the literature whether such a power exists at all.[158] The same applies to

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[151] Klaue in: Immenga & Mestmäcker 1992, p. 1781.

[152] § 4 III BWEEVG, § 44 PostG jo. § 66 V TKG 1996, § 117 TKG.

[153] § 61 EnWG.

[154] Art. 19 OPTA-wet.

[155] Art. 18 OPTA-wet.

[156] Art. 23 OPTA-wet.

[157] Zijlstra 2009, p. 166.

[158] J. Masing, 'Die Regulierungsbehörde im Spannungsfeld von Unabhängigkeit und parlamentarischer Verantwortung', in: H. Bauer a.o., *Wirtschaft im offenen Verfassungsstaat (Festschrift Reiner Schmidt)*, 2006, p. 521-534. See more extensively J. Masing, ‚Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden?', in: *Gutachten D. zum 66. Deutschen Juristentag*, München: Verlag C.H. Beck 2006, p. D 26.

the *Bundeskartellamt*;[159] where this question has been fiercely debated in the German literature.[160] Although it is still unclear whether in Germany the power to issue instructions individual cases exists at all, in practise such instructions have never been issued. The President of the *Bundeskartellamt* has even explicitly stated that he would not feel himself subject to such instructions, because in his view the minister does not have this power.

With regard to individual decisions, § 42 *GWB* provides the so-called *'Ministererlaubnis'*, which implies that the Minister is competent to replace decisions of the *Bundeskartellamt* by his own decisions. Although this power is limited to some extent by requiring that the restraint of competition is compensated by the overall advantages, these wordings leave a lot of room for interpretation to the minister to decide whether or not to exercise his power. The existence of this power renders the discussion on individual instructions less important in practise, since the minister has the power to correct decisions in individual cases.[161] Nevertheless, no such ministerial power exists to quash a decision made by the Ruling Chambers of the *Bundesnetzagentur*. This is a major difference with the *Bundeskartellamt*, where the minister does have this power in theory.

Therefore, to conclude, we can see that the possibilities of supervision of independent administrative authorities differ to a great extent. On the one hand the French system doesn't allow any form of instruction in general, let alone in individual decisions. On the other hand in Germany, there is quite the opposite approach as the minister can overrule decisions of the *Bundeskartellamt* in specific circumstances. The position of the Netherlands is a mixture of the two, although more close to the German system.

4.5 Conclusion

The combination of the principle of national institutional autonomy and the *Costanzo* obligation leads to an interesting paradox with regard to supervision of administrative authorities in the national legal order. On the one hand, the European Union has a relationship with its Member States, and respects the internal state structure. On the other, obligations such as the *Costanzo* obligation are not addressed to the Member States themselves, but to the administrative authorities within these states. Nevertheless, the Member State as such is answerable to the European

[159] See for further references Trute W. Hoffmann-Riem , E. Schmidt-Assmann & A. Vosskuhle, *Grundlagen des Verwaltungsrechts*, München: Verlag C.H. Beck 2006, p. 353; see for example Becker in Loewenheim & Meessen & Riesenkampff 2006, p. 825, Klaue, in: Immenga & Mestmäcker 1992, p. 1780.

[160] See for more references in this regard, Becker in: Loewenheim & Meessen & Riesenkampff 2006, p. 825.

[161] S. Bredt, *Die Demokratische Legitimation unabhängiger Institutionen*, Tübingen: Mohr Siebeck 2006, at p. 56.

Union for the correct application of this obligation by its administrative authorities. Therefore, the question is posed of to what extent the application of the *Costanzo* obligation by these administrative authorities can be controlled or supervised by the central government. Therefore this article has focused on the possibilities of supervision with regard to federalism, decentralised administrative authorities and independent administrative authorities in Germany, France and the Netherlands.

In the German federal system, the implementation of European law takes place either on the level of the *Bund* or of the *Länder*, depending on which of the two is competent to legislate. The application of European law takes place mainly on the level of the *Länder*, as that is the main level for execution of laws. Although no examples are known with regard to supervision by the *Bund* of the application of the *Costanzo* obligation at the level of the *Länder*, *DocMorris* shows that problems may occur in practise.

Three forms of supervision by the central (federal) government are available: federal supervision (*Bundesaufsicht*), federal compulsion (*Bundeszwang*) and the possibility of a reference to the *Bundesverfassungsgericht*. However, each of these methods of supervision has its own limits and difficulties. In brief, federal supervision and federal compulsion are only available with regard to federal law, and provide no solution when rules of law within the legislative competences of the *Länder* are concerned. Federal compulsion, moreover, is such a drastic and far-reaching power that it has never been used thus far. When the problem concerns the law of one of the *Länder*, and both federal supervision and federal compulsion do not provide a solution, a reference to the *Bundesverfassungsgericht* may serve as a solution. One has to bear in mind, however, that this court uses the German constitution as a standard for legal review, and not European law. Although a violation of European law maybe translated into a violation of a *Bundespflicht*, it is still questionable whether the *Bundesverfassungsgericht* would in practice be able to solve problems with regard to the *Costanzo* obligation. Apart from these three supervisory methods, the German Constitution provides provisions which allow the *Bund* to recover financial costs from the *Länder*. This is an important addition, which complements the relationship between the *Bund* and the *Länder* within European law: the *Länder* preserve their independent position, but also have to bear the following possible, financial consequences.

The position of decentralised administrative authorities is comparable in the three countries: to a greater or a lesser extent, these authorities have autonomous tasks. The possibility of supervision by the central government, however, differs greatly in nature between Germany and the Netherlands on the one hand, and France on the other. In France, the *préfet* – as a representative authority for the central government – has a central role in the supervision of decentralised authorities. Several of the decisions and acts made by these authorities must be submitted to him, which he has to bring before a

court in case of illegality, including possible incompatibility with European law. In the Netherlands and Germany, such a specific supervisory figure, acting as a representative authority for the central government and with special powers to bring cases before the court, does not exist. The system of prefectural supervision has advantages and disadvantages: it works very well if the supervisory body has a good knowledge of European law and sufficient capability for adequate review of the high numbers of acts which are submitted. In practise, however, it may be an enormous burden for the supervising authority.

In all three countries, the traditional system of supervision of decentralised authorities has for a long time provided the only available instrument to ensure the correct application of European law. Currently, however, instruments especially intended for the supervision of European law come into use. A good example in the Netherlands, for instance, is the statute governing the recuperation of unlawful subsidies from the European Union which have to be repaid by the central government, but the law was broken by the decentralised authority. This is comparable to the German provision with regard to the *Länder* as discussed above. Moreover, in the Netherlands a statutory proposal for more supervisory instruments for the central government is pending. This concerns instruments of a general nature, which can be applied to every act taken by a municipality, regardless of the topic concerned. In France, a different approach is being taken, as specific new supervisory tools are introduced on specific fields. Hence, these instruments only can be applied in those specific fields. This allows the French legislator to only introduce more control where it is needed, for instance, with regard to procedures on the award of public contracts or the control of waste. In Germany, the introduction of new supervisory instruments may differ from *Land* to *Land*.

The various possibilities for supervision of independent administrative authorities also differ to a great extent. In Germany and the Netherlands, ministers' general instructions are allowed – which may suffice in cases where national statutory law is incompatible with European law, and the central government wants to prevent the authorities from applying the former. In the French system, the *commissaire du Gouvernement* can give the government's opinion in such cases – although he has only an advisory function, and moreover is not present at all independent administrative authorities. Supervision of specific individual decisions by the central government is absent to a great extent. This, however, is the rationale for the independence of these administrative authorities. Moreover, as shown in the case law of the Court and in the literature, greater political independence is advocated more and more. They should be able to take decisions on their own account, without (possible) influence of the central government.

A more practical point which diminishes the risk of violations of European law in practise is the very specific task of both the competition and

the telecommunications authorities. The scope of their work is not only limited to a very specific subject – as opposed to, for instance, decentralised administrative authorities – moreover this subject is, to a very high extent, governed by rules of European law. Hence, authorities such as the competition authority and the post and telecommunications authority may be expected to be able to provide very specialised personnel with a great knowledge of the specific subject, which, of course, includes European law.

Hence, we can conclude that several methods of supervision exist within the German, French and Dutch system. Most of these methods were introduced primarily for the supervision of the application of national law. Nevertheless, to a certain extent they may be adapted to the European obligation administrative authorities have, to set aside provisions of national law which is incompatible with European law. In some cases, there is discussion on whether the available methods of supervision suffice, or whether new ones should be introduced, such as in the Netherlands with the supervision of decentralised authorities. It should be said, however, that instruments intended for European law may be more important due to their deterrent effect than for their practical use: the powers of the Dutch central government provided by the statute with regard to the recovery of unlawful subsidies, for instance, have never been applied in practise. This opinion seems to prevail in general with regard to ex post supervisory powers, as the supervisory powers in the German federal system also are hardly ever used in practice. With ex ante supervisory powers, things are different by nature, as is for instance shown by the practice of the French *préfet*. Nevertheless, although supervisory powers may often prove to be more effective as a deterrent, that does not mean that they are superfluous. Not only may it provide the central government of the Member State with an effective means of supervision for cases in which this may be inevitable, more importantly the deterrent may prevent violations of European law. This means that the supervisory instruments can fulfil the goal for which they were intended, despite not being applied in practice. In that regard, the possibilities of supervision, even if they are hardly ever used in practice, may be called a bridge to close the gap.

Finally, to end this article, the point already made in the introduction should be emphasised: the supervision by the central government of compliance with the *Costanzo* obligation by national administrative authorities is often very peculiar by nature. That is to say, the *Costanzo* situation obliges the administrative authorities to set aside provisions of national law, often adopted by the central government. In other words, it is often the central government that has violated European law in the first place, by not having brought its legislation in line with European law. Of course the situation is less complicated when the administrative authority itself is the author of the provision which violates European law, but if not, it is in fact often supervised by the primary violator of European law. In such cases, supervision can hardly be called a bridge to close the gap...