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# Resistance to Transplants in the European Administrative Space

## An Open-Ended Reading of Legal Changes

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## 1. Introduction[1]

In 1992, a few years after the fall of the Berlin Wall and the beginning of the reunification of Europe, Fukuyama argued that the direction of history was towards the general advent of democracy and universal expansion of individual freedom.[2] At the time the European project was understood as integration through law. Academic enthusiasm rose to study the circulation of ideas and techniques – such as good administration, proportionality, legitimate expectations, and ombudsmen – which seemed to spread across the European continent. This trend seemed to hold the promise that a *jus commune*, a common core of administrative institutions and principles, could be identified in the European administrative space,[3] as had also been attempted in relation to private law.[4] Thirty years later the tide has turned, with Member States reclaiming the right to have different interpretations of shared values, such as the rule of law,

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1 This special issue is the outcome of discussions held on 7-8 November 2018 at the Centre de droit public, Université libre de Bruxelles (Belgium) by the Network *The Future of Administrative Law* (more information on this network is available on this website: <https://droit-public.ulb.ac.be/recherche/projets-specifiques/reseau-futur-du-droit-administratif/> accessed 17 March 2021) and of online discussions in July 2020. We thank our contributors for their stimulating engagement with this project, as well as the participants from the Comparative Law Section at the Society of Legal Scholars 2020 (online) for their comments and suggestions. We also acknowledge the generous funding provided by the Lehrstuhl Professor Stelkens (Universität Speyer) and the Université libre de Bruxelles.

2 F Fukuyama, *The End of History and the Last Man* (Free Press 1992).

3 G della Cananea, 'Beyond the State: the Europeanization and Globalization of Procedural Administrative Law' (2003) 9 European Public Law 563.

4 M Bussani and U Mattei, 'The Common Core Approach to European Private Law' (1997-1998) 3 Columbia Journal of European Law 339.

as well as legal principles, such as proportionality.[5] Even at EU level, the European Commission's white paper on the *Future of Europe* spells out five different models with varying degrees of differentiation.[6] What happened between the optimism of the nineties and the bleak picture of disintegration currently painted? If political science, economics, and sociology surely have part of the answer, lawyers – especially comparative public law ones – can also contribute to understanding the limits of the integration through law programme. Against this background, this special issue seeks to be more optimistic about the present diagnosis thanks to an analysis of the past. At no point in the last thirty years have transplants in administrative law been wholeheartedly and uniformly accepted. They have contributed positively to legal changes in the Member States thanks to on-going discussions, but there have always and everywhere been pockets of resistance against uniformity. Each administrative system seeks, to some extent, to make foreign ideas, techniques, and solutions its own in some way before fully embracing them. Time and patience are required to reap the benefit of the process of change triggered by transplants.

Thus, oscillations between convergence and divergence in European administrative law are no new phenomenon. The question arises on whether these oscillations are incrementally leading to the development of common principles of European administration, developments that would encapsulate a distinctive balance between rationality of administrative action, technical expertise, politics, and respect for individual entitlements. Identifying the contours of these principles is an ambitious project that goes beyond the scope of this special issue. Nevertheless, analysing some of their components, such as the legal changes brought about in national administrative institutions, techniques,[7] and procedures through transplants, can already contribute to the wider discussion. This special issue seeks to provide a distinctive perspective on this discussion thanks to a series of micro-case studies, thus illustrating the grey zone between convergence and divergence in administrative institutions, techniques, and procedures.

This special issue tests the hypothesis according to which the embeddedness of legal techniques and institutions in their social context may prevent them

5 J Ziller, 'L'insoutenable pesanteur du juge constitutionnel allemand – À propos de l'arrêt de la deuxième chambre de la Cour constitutionnelle fédérale allemande du 5 mai 2020 concernant le programme PSPP de la Banque Centrale Européenne' 2 Eurojus 151.

6 European Commission, 'White Paper on the Future of Europe' (White Paper) COM(2017)2025.

7 The expression 'technique' is used here as the legal equivalent for what is known in political and public management literature as 'tools': see e.g. C Hood and H Margetts, *The Tools of Government in the Digital Age* (Macmillan 2007) and L Salamon, *The Tools of Government: A Guide to the New Governance* (Oxford University Press 2002). In this literature, 'tools' are resources available to public authorities by virtue of being public authorities and upon which they can draw to carry out their policies (see Hood and Margetts, 5). For more detailed explanations of this notion, see Y Marique, *Public-private partnerships and the law – Regulation, institutions, and community* (Edward Elgar 2014) *passim*.

from being easily moved from one system to another.[8] This may be even more so as far as administrative law is concerned, given its intrinsic links with, in the words of Kahn-Freund, the prevalent power structure, 'whether that be expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic country play a decisive role in the law-making and the decision-making process and which are in fact part and parcel of its constitutional and administrative law'.[9] The aim of this special issue, however, is to go further than broad generalisations highlighting the difficulty of legal transplants succeeding when there is a 'lack of fit' between the transferred rule and local conditions.[10] Rather, all the case studies explore in detail the dynamics of legal change which result from an encounter between a transferred rule and the local context. Before administrative law transplants become embedded in their host system, a process of acclimatization happens with resistance along the way. In focusing on this resistance across our case studies (and not in comparing the transplanted technique in its original context and the host system), one gains new insights about the process itself, its possible variations, and the provisional result: one can identify these specific items that have proved 'transfer-resistant', the 'odd details' that 'are likely to encapsulate local traditions and experiences, social struggles, anxieties and visions'.[11] Identifying these 'odd details' contributes to understanding the current process of experimentation, disruption, and disengagement going on in Europe, as well as to exposing the political, social, and economic stakes underlying debates around the technicalities of the law. Furthermore, acknowledging events and facts that may have been hugely traumatising and challenging for some states and their administrations helps us understand their current position towards the political, social, and economic pressures they experience. In the editors' view, fostering such mutual understanding could also pave the way for developing normative and enforcement strategies at European level that are more tailor-made to the local contexts of the Member States. Finally, in not being limited to specific policy

8 M Siems, 'Malicious Legal Transplants' (2018) 38 Legal Studies 103; G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 11 and P Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 Maastricht Journal of European and Comparative Law 111.

9 O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 13. Bell also highlights the links between administrative law, constitutional values, and national traditions and institutions: J Bell, 'Comparative Administrative Law' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 1252-1273, 1262-1264.

10 M Graziadei, 'Comparative Law, Transplants, and Receptions' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 441-473, 472.

11 G Frankenberg, 'Constitutions as Commodities: Notes on a Theory of Transfer' in G Frankenberg (ed), *Order from Transfer – Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013) 1-26, 15.

areas, our case studies contribute to the wider debate on general administrative law within the European administrative space.

This introduction first provides a short contextual overview of the role of transplants in the European administrative space (section 2) and the channels facilitating – either mandating or enabling – the transplanting process (section 3). It then explains the selection process underpinning the cases presented in this special issue (section 4) and maps the resistance – i.e. the actors, factors, expressions, and outcomes – across the case studies gathered in this special issue (section 5). Based on this material, this introduction suggests one possible analytical lens for legal changes triggered by administrative transplants, following the stages that can be observed in these changes over time (section 6). This allows us to suggest that studying administrative transplants contributes to understanding the dynamics of the European administrative space, while also highlighting its limits and the ways in which they can be overcome over time (section 7).

## 2. Transplants in the European administrative space

Administrative law transplants are intrinsic to the development of the European administrative space. The notion of European administrative space is fluid: it can be formulated more or less narrowly. In its broader sense, the expression 'European administrative space' describes an increasing convergence of administrations and administrative practices at the EU level and various Member States' administrations towards a 'common European model',[12] as well as the Europeanisation of the Member States' administrative structures.[13] In a narrower sense, it refers to the coordinated implementation of EU law and to the Europeanisation of national administrative law.[14] Thus, in 2008 Hofmann could emphasize the integrated administration emerging from the joint exercise of powers in the EU and concretised in the 'intensive and often seamless cooperation between national and supranational administrative actors and activities'.[15] Nearly ten years later, the European administrative space seemed to have

12 JP Olsen, 'Towards a European Administrative Space?' (2003) 10 Journal of European Public Policy 506, 506.

13 E Page and L Wouters, 'The Europeanization of the National Bureaucracies?' in J Pierre (ed), *Bureaucracy in the Modern State* (Edward Elgar 1995) 185-204.

14 OECD-PUMA, 'Preparing Public Administration for the European Administrative Space' (1998) SIGMA Papers No. 23 <www.oecd-ilibrary.org/governance/preparing-public-administrations-for-the-european-administrative-space_5kml6143zd8p-en> accessed 17 March 2021; S Kadelbach, 'European Administrative Law and the Europeanised Administration' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 167-206 and E Chevalier, *Bonne administration et Union européenne* (Bruylant 2014) 34-39.

15 H Hofmann, 'Mapping the European Administrative Space' (2008) 31 West European Politics 662, 671; J Trondal and B Peters, 'The Rise of European Administrative Space: Lessons Learned' (2013) 20 Journal of European Public Policy 295 and A Von Bogdandy, 'European Law Beyond

become instead a superposition of overlapping circles with varying shared interests: there may be intensive cooperation indeed, but not quite as seamless as hoped.[16]

### 2.1. The Europeanisation of administrative law

The emergence of the European administrative space is linked to the broader project of European integration through law. [17] In the internal market context, for example, the crux of the matter has been to make sure that market operations could be carried out across the territory of all EU Member States.[18] This is achieved, first, through common standards adopted at EU level in the context of positive integration. Secondly, because of the legal principle of mutual recognition of goods and services legally brought to the market of one state, administrations of other states have to accept the effects of foreign acts on their own territory.[19] Administrative structures, processes, and techniques make the internal market a reality through the process of implementing EU law, controlling compliance with it, and enforcing it.[20] Some degree of coordination or convergence between administrative structures of the Member States is therefore necessary for creating and operating a functioning European internal market. However, this is not the only impact of the process of European integration on national administrative structures and processes. Market integration at the European level has gone along with increased competition in economic fields formerly dominated by state monopolies (e.g. gas, electricity, railways, and telecommunication). At the same time, EU Member States have strongly disengaged from directly providing public services or from their involvement in the economy at large (until the Covid-19 pandemic struck, at least). Once again, this change goes hand in hand with regulatory and administrative structures, processes, and institutions that ensure that the legal framework is implemented, complied with, and enforced – whether through hard law or soft law.

These changes in the administrative apparatus of EU Member States in the context of European integration have been labelled with umbrella concepts such

'Ever Closer Union' – Repositioning the Concept, its Thrust and the ECJ's Comparative Methodology' (2016) 22 European Law Journal 519.

16 European Commission, 'White Paper on the Future of Europe' (White Paper) COM(2017)2025, 7.

17 J Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

18 G Marcou, 'Introduction' in G Marcou (ed), *Les mutations du droit de l'administration en Europe – Pluralisme et convergences* (L'Harmattan 1995) 11-62, 21-25.

19 S Dorigo, M Eliantonio and R Lanceiro (eds), 'The Principle of Mutual Recognition in European Administrative Law' (2020) 13(2) Review of European Administrative Law 183.

20 cfr European Commission, 'Communication from the Commission. EU Law: Better Results through Better Application' [2017] OJ C18/10, 10-20.

as Europeanisation of administrative law,[21] Europeanisation of national legislation, or Europeanisation of administrative justice.[22] Indeed, institutions (e.g. regulatory authorities,[23] ombudsmen[24]), legal principles (e.g. legitimate expectations, proportionality, good administration)[25, 26] procedures (e.g. public participation, the right to be heard),[27] techniques (e.g. administrative sanctions, impact assessment or internal redress), and tools (e.g. codes of administrative procedure[28]) have spread across Europe in the last decades and, actually, across the world.[29] Administrative law transplants have played a constructive role in this diffusion. In Europe, administrative institutions, principles, procedures, techniques, and tools have been transplanted from one administrative system to another, regardless of whether a legal obligation to organize them existed under EU law or under the Council of Europe's instruments. Transplants have travelled horizontally, directly from one state to another,[30] or vertically (top-down) through EU law as states implement EU law requirements or voluntarily adopt EU law solutions, themselves often inspired by the laws of other Member States (vertical and bottom up).[31] As there have been situations of spillover when Member States have extended EU obligations outside their original remit,[32] the overall picture has become messy: it has become difficult to identify all the reciprocal

21 M Bobek, 'Europeanization of Public Law' in A Von Bogdandy, P Huber and S Cassese (eds), *The Administrative State* (vol 1, Oxford University Press 2017) 630-673.

22 M Eliantonio, *Europeanisation of Administrative Justice? – The Influence of the ECJ's Case Law in Italy, Germany and England* (Europa Law Publishing 2009).

23 e.g. A Psygkas, *From the "Democratic Deficit" to a "Democratic Surplus"— Constructing Administrative Democracy in Europe* (Oxford University Press 2017) and C Fraenkel-Haeberle, K-P Sommermann and J Socher (eds), *Die Umsetzung organisations- und verfahrensrechtlicher Vorgaben des europäischen Umweltrechts in ausgewählten Mitgliedstaaten* (Duncker & Humblot 2020).

24 e.g. R Kirkham and M Hertog (eds), *Research Handbook on the Ombudsman* (Edward Elgar 2018).

25 e.g. N Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (Palgrave 2018) and M Bucura, *The Right to Good Administration at the Crossroads of the Various Sources of Fundamental Rights in the EU Integrated Administrative System* (Nomos 2015).

26 See the research carried out by the Coceal project: <www.coceal.it/> accessed 17 March 2021.

27 G della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' (2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327934> accessed 17 March 2021 and C Fraenkel-Haeberle, K-P Sommermann and J Socher (eds), *Die Umsetzung organisations- und verfahrensrechtlicher Vorgaben des europäischen Umweltrechts in ausgewählten Mitgliedstaaten* (Duncker & Humblot 2020).

28 e.g. JB Auby (ed), *Codification of Administrative Procedure* (Bruylant 2014).

29 JB Auby, *La globalisation, le droit et l'État* (3rd edn, LGDJ 2020) 79-82.

30 J Bell, 'Mechanisms for Cross-fertilization of Administrative Law in Europe' in J Beatson and T Tridimas (eds), *New Directions European Public Law* (Hart 1998) 47-67.

31 J Schwarze, *European Administrative Law* (Office for official Publications & Sweet and Maxwell 1992).

32 P Birkinshaw, 'A Perspective on Cross-fertilization between European Legal Orders and UK Public Law' in B Bonnet (ed), *Traité des rapports entre ordres juridiques* (Lextenso 2016) 1287-1298, 1295.

influences on each other's legal systems.[33] There has been prior 'no rational conceptualisation'[34] of the process; there is neither a transplant strategy nor convergence by design.[35] On a positive note, this apparent 'Europeanisation of public law'[36] opens up the possibility that the administrative laws of EU Member States will become increasingly closer to each other, thus enabling smoother administrative cooperation across boundaries and removing administrative hurdles to freedom of movement.

### 2.2. Differences: moving beyond them or here to stay?

However, against this background of apparent administrative convergence, a contrasting picture can be depicted: multiple differences across Europe are emphasized in terms such as constitutional pluralism,[37] or differentiation in European policies.[38] Indeed, administrative law is often depicted as the product of the historical developments of each national administration.[39] In particular, the older Member States and the new Member States do not share the same historical experience and expectations when it comes to the role of administrative institutions and the law in the economy and in relation to civil society.[40] Procedural and organizational autonomy in Member States when EU law is implemented at national level has long been regarded as paramount, even though negative and positive integration have put pressure on this autonomy in order to facilitate the exercising of the four fundamental freedoms across the EU Member States and the fulfilment of European policy objectives.[41] Hierarchical relationships between national public organisations are replaced

33 See, for the same comment at constitutional level globally: G Frankenberg, 'Constitutions as Commodities: Notes on a Theory of Transfer' in G Frankenberg (ed), *Order from Transfer – Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013) 1-26, 9.

34 P Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge* (3rd edn, Kluwer 2020) 28.

35 ibid, 25.

36 To borrow the title of a book by J Hans, S Prechal and R Widdershoven (eds) (European Law Publishing 2007).

37 N Walker, 'Constitutional Pluralism Revisited' (2016) 22 European Law Journal 333.

38 e.g. M Markakis, 'Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles' (2020) 23 Journal of International Economic Law 489.

39 G della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' (2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327934> accessed 17 March 2021.

40 M Kryger, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' (2019) 15 European Constitutional Law Review 544.

41 E Slautsky, *L'organisation administrative nationale face au droit européen du marché intérieur* (Larcier 2018).

by (judicial) dialogue and (agency) networks spanning national and European levels.[42]

Tensions between unity and differences as well as between coordination and competition can, therefore, be observed in the European administrative space.[43] The complex administrative landscape resulting from these conflicting trends triggers practical questions – for instance, in terms of concrete implementation and enforcement of EU law[44] at national and sub-national levels, in terms of transnational administrative cooperation,[45] as well as in terms of accountability[46] – and theoretical questions – for instance, regarding the interpretation to give to administrative changes. At least two political theories, functionalism and historical institutionalism, provide a starting point for understanding changes in administrative institutions, processes, and techniques. On the one hand, functionalism considers that institutions are there to fulfil a social need and fundamentally have no way of doing things differently from how they have always been done: they remain trapped in their cognitive templates, unable to adapt them and change them as long as there is no major crisis (also called 'critical juncture'[47]) affecting the administrative system. In order for institutions to address new problems, they look for inspiration in solutions already developed successfully elsewhere. Competition leads to the adoption or survival of the fittest solution. This leads to isomorphism across administrative institutions over time.[48] On the other hand, historical institutionalism believes that institutions are the product of a delicate balance between power holders (e.g. interest groups or public bodies). This balance is constantly renegotiated and tweaked as new situations arise, with power shifting from the one to the other. Change is incremental over time, with no winner or loser.[49]

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42 A Arnull, 'Judicial Dialogue in the European Union' in J Dickson and E Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 109-133; M de Visser, *Network-Based Governance in EC Law. The Example of EC Competition and EC Communications Law* (Hart Publishing 2009) and H Hofmann, 'Seven Challenges for EU Administrative Law' (2009) 2 Review of European Administrative Law 37.

43 R Caranta, 'Pleading for European Comparative Administrative Law – What is the Place for Comparative Law in Europe?' (2009) 2 Review of European Administrative Law 155, 156-57.

44 M Smith and S Drake (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar 2016).

45 M Eliantonio, E Chevalier and R Lanceiro (eds), *Administrative Cooperation in Europe – A Sectoral Analysis* (forthcoming, Bruylant 2021).

46 S Röttger-Wirtz and M Eliantonio, 'From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals' (2019) 10 European Journal of Risk Regulation 393.

47 G Cappoccia, 'Critical Junctures' in O Fioretos, T Falleti and A Sheingate (eds), *Oxford Handbook of Historical Institutionalism* (Oxford University Press 2016) 90-106.

48 P DiMaggio and W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 American Sociological Review 147.

49 K Thelen and J Conran, 'Institutional Change' in O Fioretos, T Falleti and A Sheingate (eds) *Oxford Handbook of Historical Institutionalism* (Oxford University Press 2016) 51-70.

Combining these two theories, one hypothesis emerges: as administrative institutions in the EU have one major function – that of developing and implementing common policies, which include enabling the exercising of the four freedoms across Europe – they will have a tendency to opt for similar technical solutions (and, thus, for transplants), so the most successful solution is adopted everywhere. However, because administrative institutions are also rooted in the past and are the product of age-old socio-political bargains, any administrative change upsets these bargains and a process of re-balancing power between powerholders is set in motion.

### 2.3. Transplants and legal cultures

At the crossroads between these contrasting approaches to institutional changes, there arises resistance to change through the borrowing of foreign structures, processes, and techniques.[50] More precisely, this special issue seeks to distinguish between three different levels at which these pressures can happen: at the level of general ideas and the broad politico-legal agenda (e.g. good administration, administrative democracy); at the level of identifying technical solutions to practical problems; and at the level of the administrative machinery needed to deliver these ideas and solutions. In theory, transplants – looking for inspiration elsewhere to address domestic issues – can happen at each of these levels. However, in order to provide a detailed legal analysis of transplants, this special issue adopts a definition of transplants that is both narrower and broader in its remit. Borrowing from Saunders, it considers that transplants can be conceived of as 'deliberate movement of relatively structured legal phenomena across jurisdictional boundaries'.[51] This is narrow in the sense that it focuses the attention on relatively well-delineated technical phenomena. It excludes more diffuse cases, such as the circulation of mere ideas. However, this definition of transplants is also broad: it includes techniques that are not borrowed from one foreign national legal system, so as to include techniques channelled through European instruments. Furthermore, this special issue does not analyse the movement of ideas from one legal system to another, comparing *stricto sensu* the original model with the transplanted solution. It instead focuses on how and to what extent a foreign legal technique (by way of legal principle, test, institution, etc.) is processed inside an administrative system to become an integral part of it. This focus on the internal process is distinctive: in our case studies, there is not always a clear legal system of origin, since the

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50 For earlier discussions of these tensions, see C Himsworth, 'Convergence and Divergence in Administrative Law' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 99-110.

51 C Saunders, 'Transplants in Public Law' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018) 257-278, 258.

transplants exist widely and different processes (such as globalisation, and EU law transposition[52]) come together to foster circulation. This consequently blurs the possibility of comparing transplants in their system of origin and in the host system.

This link between ideas and legal techniques and between law and its wider context is a well-known question when it comes to transplants in general. Indeed, key proponents of transplants – such as Watson – suggest that transplants are ubiquitous.[53] Adopting the same approach as Watson, Birkinshaw suggests that '[i]t is simply that different systems have to work in ever-increasing proximity and borrowing or influencing are standard and universal characteristics'.[54] This would suggest that, over time, natural convergence happens as the most successful solutions should, rationally and 'self-evidently', be copied by other legal systems.[55] However, this position is far from being unanimously followed. From the beginning of the development of the transplant scholarship in the 1970s, discussions have arisen about this process. Kahn-Freund drew attention to the importance of the political context to make sense of a transplant, highlighting particular sensitivity when transplants are attempted in the constitutional and administrative law field.[56] Even more drastic in his opposition to the idea of transplants[57] and the convergence between systems,[58] Legrand contends that any transplant distorts the original technique. According to him, each rule is embedded in a specific legal culture and its context gives it its meaning. In Legrand's words: '[legal culture] is about collective mental programmes, [...] that have formed [...] as a function of the community to which we belong'.[59]

An alternative reading of legal culture is provided by Bell when he draws attention to the role of routines, and thus to the actual way in which the law is

52 See below section 3 on channels.

53 A Watson, *Legal Transplants. An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

54 P Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge* (3rd edn, Kluwer 2020) 25.

55 This self-evidence is prominent in the scholarship dedicated to proportionality: see e.g. B Schlink, 'Proportionality (1)' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 719-736, 729 and B Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here' (2012) (22) Duke Journal of Comparative & International Law 291, 296.

56 O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 13, 18.

57 P Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 Maastricht Journal of European and Comparative Law 111.

58 P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 International & Comparative Law Quarterly 52.

59 ibid, 56.

implemented and enforced day by day.[60] As the cognitive/legal mindsets[61] that constitute a legal culture are located at the level of training and intellectual understanding of administrative issues, they can be difficult to apprehend and identify directly: they depend on subjective interpretations by the observer. Routines, in contrast, are more easily objectively and empirically observable. One good example of the importance of these routines, encapsulating both meaning and power relationships, is provided by the role of the 'file' in the French administrative justice process, as Latour has documented in his ethnological research.[62]

Cognitive mindsets and administrative routines are rarely the object of transplants. Still, they shape how a foreign technique is transplanted into the host legal system and how it will be interpreted, understood, and implemented. This means that they act as a screen. They may be shaped by the transplant over time, but only in the long term. Recent systematic analyses of how administrative systems change illustrate this process. Stelkens and Andrijauskaitė have demonstrated the importance of administrative legal mindsets in the ways in which national administrative systems adopt principles of good administration under the impetus of the Council of Europe. Building on the work done by Bell[63] and Kischel,[64] they found that some systems were more prone to integrating these principles because there were pre-existing processes for receiving these principles in these systems; national systems without these paths of reception, on the other hand, struggled to see the mindsets of their actors being transformed by the principles of good administration. Stelkens and Andrijauskaitė closely connect these mindsets to the daily routines in administrative systems, i.e. those routines developed over generations in each administrative law community – namely, judges, lawyers, officials, and scholars working with national law on a daily basis, all of them together forming epistemic communities providing meaning to these routines – on how statutes, courts decisions, and scholarly work on administrative law should be written, read, and understood. Law drafters, civil servants, judges, lawyers, etc. often interact through these routines in their daily work on the basis of implicit knowledge. According to Stelkens and Andrijauskaitė, differences in these routines result from differ-

60 J Bell, 'Mechanisms for Cross-fertilization of Administrative Law in Europe' in J Beatson and T Tridimas (eds), *New Directions European Public Law* (Hart 1998) 47-67.

61 This introduction uses 'cognitive mindsets' and 'legal mindsets' interchangeably throughout the following lines.

62 B Latour, *La fabrique du droit: une ethnographie du Conseil d'État* (La Découverte 2002) 83-118 and G Tanguy, 'Les préfets et l'application de la loi. Des interprètes exigeants? L'exemple de la législation du 13 juillet 1906 sur le repos hebdomadaire' (2014) 1 Droit et Société 77, 84 (for administrative processes).

63 J Bell, *Judiciaries within Europe – A Comparative Review* (Cambridge University Press 2006).

64 U Kischel *Comparative Law* (Oxford University Press 2019) ch 5 para 41ff (common law), ch 6 para 104ff (civil law), and ch 7 para 106ff (Nordic).

ent objectives in national systems of legal education, the different national training – most notably in the civil service – recruitment and career systems for the civil service, and the varying degrees of legal training for both civil servants in management positions and in street-level bureaucracy. They distinguish West and Nordic mindsets from post-socialist mindsets, where formalism is more strongly embedded, especially when it comes to judicial control over administrative action.[65] Such an analysis may be a possible approach to help explain the tension between path dependency and legal development, namely that 'the paths on which legal systems have been travelling will help to explain why they do not approach similar, new problems in the same way".[66] Yet, "the law does develop by breaking out of the mould cast by the past'.[67] There are changes (transplants are one factor in these changes), but change is slow and aligned in some way with the past.

## 3. The case studies selected for this special issue

To analyse this phenomenon of resistance to administrative law transplants outside the framework of the Council of Europe, and to switch the focus from analysing the transplanting process from the foreign to the domestic by analysing more deeply the internal process of resistance itself, we selected seven countries. We sought to achieve a balance between Western countries (Belgium, England, France, and Germany) and former Eastern countries (Hungary, Lithuania, and Romania), testing further the idea Stelkens and Andrijauskaitė developed that a post-socialist legal administrative mindset remains distinctive in the latter. We also sought a balance between Southern (France) and Northern countries (Lithuania), and between the usual suspects (England, France, and Germany)[68] and smaller jurisdictions, usually more open to learning lessons from comparative law (Belgium,[69] Hungary, and Lithuania). We also aimed to balance importers of legal concepts (Belgium, Hungary, Lithuania, and Romania) and exporters of legal concepts (England, France, and

65 U Stelkens, A Andrijauskaitė and Y Marique, 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration – Overall Assessment' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 755-820, para 31.32ff (West and Nordic) and para 31.59ff (post-socialist).

66 J Bell, 'Path Dependence and Legal Development' (2013) 87 Tulane Law Review 787, 788.

67 ibid.

68 For one illustration of the focus dedicated to comparing these three systems: see M Ruffert (ed), *The Transformation of Administrative Law in Europe – La mutation du droit administratif en Europe* (Sellier 2007).

69 D Heirbaut and M Storme, 'The Belgian Legal Tradition: From a Long Quest for Legal Independence to a Longing for Dependence?' (2006) 5-6 European Review of Private Law 645.

Germany) in order to test whether resistance would differ depending on the traditional 'prestigious' status of an administrative system. Additionally, we aimed to get examples of transplants from different parts of administrative law, hence using illustrations drawn from the field of good administration (the right to be heard and ombudsmen), administrative justice (protection of legal certainty and proportionality), and the interface between the state and the market (independent economic regulators, the leniency programme, and competitive procedures). Put together at their best, these administrative institutions, techniques, procedures and principles may suggest a model for European administrations where rational decision-making and behaviour apply for both the administration and the administration's addressees.

Therefore, this special issue revisits some old friends in the debates on legal transplants in the European administrative space – in particular legitimate expectations, proportionality, and the ombudsman – providing the latest state of art in the studied legal systems, a point especially relevant in the case of proportionality at a time when the UK has just left the EU. The issue adds to this up-to-date information an original analysis of the situation in countries rarely included in previous studies of legal transplants, such as Belgium, Hungary, Lithuania, and Romania. In addition, we seek to give an overview of legal transplants in different dimensions of administrative law, including the relationships between state and market, contributing to identifying specificities of this legal field.

This special issue does not build primarily on empirical investigations, although the contributions on Romania (**Dragos**) and Hungary (**Láncos**, **Horváth** and **Szemesi**) rely on empirical research undertaken over fifteen years on the Romanian ombudsman and on interviews with key actors in the Hungarian leniency programme, respectively. Thus, due to the transplanting of administrative techniques across the administrative systems covered, this special issue cannot provide systematic new information on changes in administrative practices. However, the contributions included in this special issue give us a privileged insight into the legal reasoning and cognitive mindsets of the most relevant actors in the different administrative systems. In particular, they reveal in fascinating ways how the law (its normativity), its linkages to politics (meaning that the law is not conceived of as a mere neutral and logical tool, but is collectively accepted as a tool encapsulating power), and the reasoning and type of arguments convincing the various actors have some bearing on how an administrative system changes and how changes are – or are not – made efficient and effective.

## 4. Channels for transplants

According to Miller's typology, four types of legal transplant can be identified from looking at an importer's perspective: (i) cost-saving

transplants (i.e. the transplant saves time and costly experimentation when a new problem arises);[70] (ii) externally-dictated transplants (i.e. the transplant is made a condition for doing business with a country or for allowing the dominated country a measure of political autonomy);[71] (iii) entrepreneurial transplants (i.e. the transplant is the outcome of groups that reap benefits from promoting its adoption);[72] and (iv) legitimacy-generating transplants (i.e. transplants linked to the prestige of the foreign model).[73] Specific legal transplants often belong to several categories at the same time. This typology can be applied to legal transplants between countries, but also to top-down/bottom-up circulation of techniques or instruments between states and international organisations.[74] As Graziadei observes, 'some of the problems that are discussed with respect to the enactment and implementation of EU law, or more generally of uniform or harmonized norms, reflect the same concerns that often emerge with respect to legal transplants'.[75]

Administrative transplants in Europe are fuelled by a variety of factors and actors. Overall, all four rationales for transplants identified by Miller are illustrated in our case studies. For instance, EC law was perceived – if only by one academic writer – to be 'occupation law' in Germany in the 1990s.[76] Our Hungarian and Belgian cases illustrate that sometimes economic performance does not seem to be the most prevalent factor in underlying changes. This is even though leniency programmes and independent regulators should contribute to improving economic performance in theory. Belgium, for example, created independent regulators mainly as the result of the need to implement the (far-reaching) requirements of EU law. Legitimacy-generating transplants can be identified, for instance, with examples of the ombudsman in Romania and the law on administrative procedure in Lithuania. These are intrinsically linked to the aspiration of these countries to join the 'club' of liberal democracies after the fall of the Soviet Union rather than to a specific European requirement. In the UK and France, discussions regarding the need to extend the scope of the principles of proportionality, legal certainty, or legitimate expectations beyond

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70 J Miller, 'A Typology of Legal Transplants – Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 American Journal of Comparative Law 839, 845.

71 ibid, 847.

72 ibid, 849.

73 ibid, 854.

74 ibid, 848.

75 M Graziadei, 'Comparative Law, Transplants, and Receptions' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 442 - 473, 458 (footnotes omitted). See also M Mota Prado, 'Diffusion, Reception, and Transplantation' in P Cane and others (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 255-273, 256.

76 Stelkens below 145.

what is required under EU law or under the European Convention on Human Rights have mostly revolved around arguments related to the advantages of such extensions. Economic efficiency was, for instance, a key concern behind thinking more creatively about legal certainty in France. However, there was also a concern that France should keep its edge in the globalized economy by providing a welcoming legal environment to investors, pointing more to a case of an externally-dictated transplant. Proportionality and legal certainty are, furthermore, also entrepreneurial transplants to the extent that they were strongly lobbied for by certain segments of the legal profession, such as academics and judges. For example, when discussing the transplantation of legal certainty in France, **Chevalier** lists all the efforts by legal scholarship and various practitioners in France to create a 'favourable context for its future recognition'[77] as a first preparatory step for the transplant. A similar type of outpouring of writings[78] can be found in relation to proportionality and global constitutionalism,[79] in relation to the right to be heard and codification of administrative procedure,[80] or in relation to the ombudsman.[81]

Our case studies further highlight the role played by the EU, the Council of Europe, and other organisations – such as the Organisation for Economic Co-operation and Development (OECD) or the World Bank – in the circulation of administrative techniques and institutions within Europe. Even when techniques and institutions have their (distant) origins outside of Europe (independent regulators and the leniency programme in the United States) or in a specific European country (legitimate expectations and proportionality in Germany; ombudsmen in Sweden), these organisations have been instrumental in spreading them on the continent. Often, they have also combined forces to support similar legal developments. This is perhaps not entirely surprising: the role played by the EU[82] and the Council of Europe[83] in the 'Europeanisation' of the administrative laws of Europe is well documented. The OECD,[84] for its part, spread, for instance, good practices and administrative techniques to Eastern Europe as a way of helping these countries join the EU. Finally, the

77 Chevalier below 104-105.

78 For an early awareness of the role of scholarship in the imitation of administrative solutions, see J Rivero, 'Les phénomènes d'imitation des modèles étrangers en droit administratif' *Miscellanea WJ Ganshof van der Meersch* (Bruylant 1972) 619-639, 620-630.

79 Boyron and Marique below 65.

80 Andrijauskaitė below 167.

81 Dragos below 185.

82 J Schwarze, *European Administrative Law* (Sweet & Maxwell 2006).

83 U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020).

84 J Bell, 'The Importance of Institutions' in M Adams and D Heirbaut (eds), *The Method and Culture of Comparative Law – Essays in Honour of Mark Van Hoecke* (Hart 2014) 207-219, 218-19.

*Doing Business Reports* adopted by the World Bank in 2004 were key drivers in the French debates regarding the scope of the principle of legal certainty.[85]

## 5. Mapping resistance across our case studies

The case studies gathered in this special issue illustrate the diversity that resistance towards foreign techniques can take. Resistance can be overcome, as in the case of legal certainty in France, or it can be on-going, as in the case of legitimate expectations, again in France. It can further have won whilst leaving imprints elsewhere, as in the case of proportionality in England, or it can be more formalistic than substantive, as in the case of the right to be heard in Lithuania. The transplant can have creative effects in either generating new administrative processes, as in the case of independent economic regulators in Belgium, or in spilling over to other fields, as in competitive procedures in Germany. The transplant can be met with practical indifference, as in the case of leniency in Hungary, or the institution can become subverted by its own success, as in the case of the ombudsman in Romania. This diversity of resistance can be further analysed by looking at its loci (5.1), expressions (5.2), main factors (5.3), and concrete outcomes (5.4).

### 5.1. Locus of resistance: who is resisting? And what?

Legal reforms can result from the actions of various social, legal, economic, or political groups and entrepreneurs. Some of them may advocate for reform, while others may resist the changes, as when their interests, powers, or positions would be directly or indirectly harmed by the transplant. If the administration is often reproached for inertia,[86] our case studies cover a broad range of possible loci of resistance, well beyond the administration itself.

In some cases, one actor can be identified clearly as resisting a change. For instance, **Andrijauskaitė** identifies the locus of the resistance towards the right to be heard within the Lithuanian legislature, whereas the judges are more

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85 A Nicita and S Benedettini, 'Towards the Economics of Comparative Law: The Doing Business debate' in P Monateri (ed), *Methods of Comparative Law* (Edward Elgar 2012) 291-305.

86 At least in political discourses. In the years when this project has been carried out (2019-2020), French president Macron has invoked the 'deep state' (*état profond*) to explain slow reforms: M Endeweld, 'Emmanuel Macron et l'" État profound"' (*LeMondeDiplomatique*, September 2020) <www.monde-diplomatique.fr/2020/09/ENDEWELD/62194> accessed 17 March 2021. Dominic Cummings, former special advisor to the British prime minister Boris Johnson, equally blamed the civil service for inertia: A Hill, 'The Dominic Cummings Guide to Management' (*FinancialTimes*, 30 December 2019) <www.ft.com/content/02179112-2311-11ea-92da-f0c92e957a96> accessed 17 March 2021.

welcoming.[87] Equally, **Láncos, Horváth** and **Szemesi** do not identify the administration or the competition authorities as the actors resisting the leniency programme, but the economic actors.[88] Resistance from mainstream political actors can be traced in **Stelkens**' contribution on competitive procedures in Germany.[89] In the case of Belgian economic regulators, **Slautsky** identifies the political actors as being the most reluctant concerning the independence of these agencies, although legal actors such as the Council of State have showed reluctance as well.[90] Noteworthy in this case, where we are in the presence of a multi-government state, is that this resistance cannot be ascribed to one specific executive but to all of the executives competent for the matter. This moves us to confidently say that, in this case, resistance is really of a political nature across the board and not linked to, for instance, a Dutch-speaking or French-speaking preference.

However, in other cases, resistance is more diffused across different actors. In the case of the Romanian ombudsman, **Dragos** highlights that resistance was of a more systemic nature because there was uncertainty as to how the ombudsman would play between the administration and civil society and disturb political factors embedded in 'patron-client relationships'.[91]

In yet other cases, resistance can cross the neat dividing line between legislature, government, judges, administration, and scholarship. For instance, **Boyron** and **Marique** explain that, although some English judges were more inclined to accept proportionality as a ground for review in domestic judicial review cases (those involving neither EU law nor the ECHR) – either in their judgements or extra-judicially – the UK Supreme Court (UKSC) as a whole remained hesitant to take the ultimate step of merging proportionality and reasonableness. It consequently delayed as much as possible the time when it would decide either way. Scholarship was equally divided. The executive did not explicitly resist proportionality as such, but it did express profound resistance to any expansion of judicial power, and thus indirectly to proportionality, which would just contribute to such an expansion.

### 5.2. Expressions of resistance

Each transplant of a foreign technique needs to be assessed according to the parameters of its host administrative system; for instance, to

87 Andrijauskaitė below 167.
88 Láncos, Horváth and Szemesi below 121.
89 Stelkens below 141.
90 Slautsky below 37.
91 Dragos below 193.

see whether it will have a '*malicious*'[92] or an '*irritant*'[93] effect. However, success is only partial as long as a foreign technique remains identified as being a transplant and foreign, yet it may be exhibited in practical and formal expressions (e.g. the law has been changed, administrative routines are being changed). In the face of the otherness of transplants, our case studies illustrate different forms of resistance.

First, silence and non-responsiveness to the transplant can be noted. This is most frequent in the early days of the discussions and/or formal implementation of the transplant. Examples of this can be found in Romania, after the ombudsman was introduced in the Constitution of 1991. The institution only became operational six year later when, in 1997 the Parliament adopted the law organising its function.[94] In Hungary, non-responsiveness has lasted for a longer period of time, as the leniency programme is still barely relied upon nearly twenty years on since its formal implementation.[95] The resistance can be less dramatic, yet some form of absence of buying-in from the main actors can also be detected when the practical implementation of a principle, technique, or institution remains confined to a 'bare minimum', in either practical or legal terms. **Andrijauskaitė**, for instance, writes that procedural rights in administrative procedures do not 'permeate the whole system of public administration',[96] remaining limited to procedures leading to administrative decisions (e.g. sanctions). In a different way, a form of legal bare minimum appears in France: while the French administrative judge recognized legal certainty in 2006, the French Constitutional Council did not recognise it as a constitutional principle.[97] As legal certainty is usually linked to the '*État de droit*' or 'rule of law', this stance of the French Constitutional Council strikingly betrays that French administrative categories should not be too upset by a foreign principle.

Secondly, resistance can take less drastic expressions in more differentiated ways, with some degree of non-responsiveness among relevant actors yet more positive welcome among other actors. In Germany, for instance, resistance against offering judicial protection to unsuccessful bidders for contracts falling within the EU remit lasted a few years – up to the prospect of an infringement procedure becoming more pressing. Now this technical resistance has been overcome, and a range of competitive procedures have been adapted to include a similar form of judicial protection for disappointed candidates as the one organised in the Remedies Directive 89/665/EEC. However, disappointed bidders

92 M Siems, 'Malicious Legal Transplants' (2018) 38 Legal Studies 103.
93 G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 11.
94 Dragos below 185.
95 Láncos, Horváth and Szemesi below 121.
96 Andrijauskaitė below 167.
97 Chevalier below 95.

who participate in procurement procedures falling below the thresholds of the EU directives still do not unambiguously enjoy judicial protection. According to the Constitutional Court this does not breach their constitutional rights. Hence, indifference to the trend towards increasing judicial protection for unsuccessful bidders for public contracts persists at the highest level – if only in a '*niche*' area.[98]

Thirdly, explicit legislative measures contradicting the supposed transplant can be taken, expressing direct opposition to the transplant. The best illustration of this blunt attitude is provided by the various pieces of legislation adopted in Belgium that were in breach of Belgian commitments under EU law to respect the independence of its economic regulators.[99]

Fourthly, mental frameworks and cognitive mindsets may not have been adapted to assimilate the foreign and make it national. For instance, **Andrijauskaitė** partly attributes the Lithuanian resistance to extending procedural rights more widely to a '*mental leftover*' from the times when it was part of the Soviet legal and administrative system.[100] Similarly, **Chevalier** notes that the principles of legal certainty and legitimate expectations did not fit French administrative culture, and especially the objective perspective taken by the French Administrative Supreme Court in the protection of administrative legality.[101] Changing these cognitive mindsets represents a momentous turning point. We consequently find, in our case studies, that judges seek to signal the significance of these changes in certain ways. For instance, the French administrative judge accepted legal certainty in the most solemn formation – that of the General Assembly.[102] The UKSC has never come to adopt proportionality outside EU law and human rights cases, yet UK judges repeat that such a change could only be made by a full panel of the UKSC.[103]

Finally, resistance can be ambiguous – a suspension of any definitive confirmation or rejection of the transplant, awaiting a time when the answer becomes ripe. This is best illustrated with the proportionality principle in England. The UKSC has never clearly rejected proportionality in matters where the principle does not have to be relied on (i.e. in cases without EU law or human rights dimensions). Moreover, in a first step, the Court re-moulded the domestic ground of review, i.e. *Wednesbury* unreasonableness, to make it a more structured test for controlling administrative action and for making it closer to proportionality. In a second step, some of the UKSC judges repeated that the outcomes of the proportionality test and the reasonableness test were similar.

98 Stelkens below 141.
99 Slautsky below 37.
100 Andrijauskaitė below 182.
101 Chevalier below 95.
102 Chevalier below 95.
103 Boyron and Marique below 65.

Therefore, hesitations were expressed, with the door towards the merger of the two criteria being kept half-open and never really formally shut.[104]

### 5.3. Factors of resistance

Our case studies highlight three main noteworthy phenomena when it comes to factors of resistance: the first one pertains to the constitution, the second one to time, and the last one to the interactions between legal and extra-legal factors.

When it comes to the constitution and constitutional values, comparative law scholarship such as Kahn-Freund[105] and Bell[106] has highlighted their relevance in providing the context and making meaningful comparative law analysis. This makes full sense: the administration functions within the parameters of the domestic constitution, which frames its key functions and powers either explicitly or implicitly. However, the constitutions in the countries considered in our case studies do not provide detailed regulations or provisions about how the administration should work, apart maybe from general principles enshrined in the constitutional text or derived from it, such as the rule of law (*État de droit* or *Rechtsstaat*) or power separation. This is not surprising in a comparative perspective.[107] In none of our case studies was the formal constitution mentioned as being a factor of resistance against the foreign transplanted technique. Moreover, the Romanian Constitution was the first part of the legal system to welcome the ombudsman in 1991,[108] and the Lithuanian Constitution includes a very broad provision relating to the administration, namely article 5(3) specifying that 'State institutions shall serve the people', on which judges relied to broaden the remit of the right to be heard. In other cases, resistance can be linked to constitutional aspects outside the formal constitution, thus more to its operations and interpretation. The best examples of this are drawn from Belgium[109] and England.[110] In addition, the silence of the French Constitution about legal certainty led to arguments against this principle.[111]

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104 Boyron and Marique below 65.

105 O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 13, 13.

106 J Bell, 'Comparative Administrative Law' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 1252-1273, 1262-64.

107 M Ruffert, 'National executives and bureaucracies' in P Cane and others (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 505-525, 506.

108 By contrast, the French Constitution devotes one provision to the ombudsman, which was introduced in 2008, well after the ombudsman had been transplanted into the French administrative system in 1973.

109 Slautsky below 37.

110 Boyron and Marique below 65.

111 Chevalier below 95.

When it comes to the time factor,[112] an area where, according to Cohn awareness is needed when analysing transplants,[113] our case studies illustrate the many facets it can take. Indeed, we can see time as a *succession of stages*, as **Chevalier** does (e.g. preparation, reception, adaptation).[114] In this vein, **Dragos** especially highlights resistance at the preparation stage of transplanting the ombudsman into Romania.[115] However, more generally, resistance may happen at any stage. Time can also be conceived of as *speed*. Indeed, one strategy in relation to transplanting foreign legal techniques is to seek to shape the timing and speed of transplantation. Our contributors mention delay (**Chevalier**),[116] 'postponement' (**Boyron** and **Marique**),[117] 'a long time' (**Stelkens**),[118] or 'instability and hesitations' (**Slautsky**).[119] Time can also be linked to *specific events* (or so-called critical junctures) and their consequences for the transplanted technique. One can think here about Brexit in relation to proportionality in English administrative law. **Dragos** identifies two such '*defining moments*' or '*turning points*' with regard to the Romanian ombudsman, namely the rule of law crisis in 2018-2019 and the Covid-19 pandemic in 2020,[120] and how the latter affected the ways in which national administrations dealt with massive risks for the population and emergency regulations.[121] Finally, time can be seen as a *duration*, as in 'this takes time'. **Dragos** minutely details this dimension. He writes that the Romanian ombudsman went from initial 'acculturation' to 'many challenges over time', including a 'slow change in perception' – the overall process 'took a great amount of time'.[122] This progressive acceptance not only applies to the institution of the ombudsman as a whole, but also to some of its powers; in particular, the power of the ombudsman to lodge a court action in the plaintiff's name. This power was left unused for many years, but it all changed in 2015 when a first judicial challenge was brought, followed by a number of other similar procedures.

When it comes to the interactions between legal and non-legal factors, examples abound, as the literature would suggest it does.[123] **Stelkens** insists on the

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112 Section 6 below analyses the time dimension of legal changes in more details.

113 M Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 American Journal of Comparative Law 583, 596-97.

114 Chevalier below 95.

115 Dragos below 185.

116 Chevalier below 95.

117 Boyron and Marique below 80.

118 Stelkens below 164.

119 Slautsky below 49.

120 Dragos below 195.

121 See contributions on this topic forthcoming in (2021) 2 Review of European Administrative Law.

122 Dragos below 191 and 193.

123 T Goldbach, 'Why Legal Transplants' (2019) 15 Annual Review of Law and Social Science 583.

(sometimes only alleged) economic pressures to speed up investments to the detriment of judicial protection of disappointed bidders in Germany in the 1990s. **Chevalier**'s paper on legal certainty in France provides a good example of this interaction between different factors – namely the historical structure of administrative law, the Europeanisation process, the weight of the Council of State in the development of French administrative law, and the ambivalent role of the action of the judicial authorities) – [124] as does **Slautsky**'s paper on economic regulation in Belgium. There, the creation of independent regulators challenged assumptions about the respective roles of the State, the market, and social partners in the regulation of the economy. These assumptions are widespread in Belgian political and economic circles, and they have been translated into legal arguments raised against independent regulators. Protecting the constitutional powers of the executive against encroachment from independent regulators made it possible to protect the range of interests associated with the decision-making process within the executive and, in particular, the role of social partners and of other public bodies – such as municipalities – in this decision-making process.[125] **Boyron** and **Marique** flag the specific political context connected to Brexit and the increasing wish of the UK government to limit judicial review as contextual factors contributing to explaining the resistance to proportionality in England.[126]

Thanks to their various empirical studies and in-person-interviews, **Láncos, Horváth** and **Szemesi** demonstrate that the failure of the leniency programme is primarily due to extra-legal factors – especially the socialist history of the country, as well as the business structure and culture because Hungary is a small market where business owners and managers know each other well – and not the legal design of the programme itself.[127] At the same time, this lack of take-up of the option offered by the leniency programme is not due to ignorance of the legal obligations of economic actors, but much more to the underlying logic of snitching. There is, thus, a differentiated level of legal awareness between illegal practices and possibilities of opting out from these illegal practices across the economic actors. Beyond this, **Láncos, Horváth** and **Szemesi** suggest that the specific mindsets forged under a planned economy cannot be wiped out easily, and even a new generation of economic actors reproduces the same mindsets because routines and the general economic environment have not undergone any major change.[128] This confirms what Stelkens and Andrijauskaitė found in relation to administrative legal mindsets in the context of

124 Chevalier below 95.
125 Slautsky below 37.
126 Boyron and Marique below 65.
127 Láncos, Horváth and Szemesi below 121.
128 Láncos, Horváth and Szemesi below 121.

the Council of Europe.[129] Culture is not only the product of one – even if major – feature in a given legal system: it is much more a combination of interlocking factors feeding into each other, making it highly challenging to break a social pattern even when legal tools seem to call for such a break or when some form of training or different education is provided.[130] **Andrijauskaitė** makes a similar point in relation to the 'socialist mentality' still prevailing in the Lithuanian administration, which does not seem to be moved to table any bill modernizing administrative procedures any time soon. This leads to the consequence that Lithuanian judges seem to be the ones moved to adapt their legal categories, becoming more flexible in terms of the legal authoritative sources which allow them to expand the scope of the right to be heard:[131] an observation that would seem barely noticeable for Belgian, English or French administrative lawyers – but one that does not sit well with the interactions between the legislature, the executive and the judge in Lithuania. Hence, if convergence there is, it is not only in terms of contents of rights, but also in terms of constitutional relationships. As noted in **Boyron** and **Marique**, focusing on changes through foreign transplants in administrative systems highlights the relational dynamics within which the key actors are embedded.[132] Here, legal cultures are not only about cognitive mindsets for applying legal techniques to solve legal problems, but also about cognitive mindsets concerning each other's expected constitutional roles in general. These are in flux and never fully settled.

### 5.4. Outcomes of the resistance

In Cohn's typology of outcomes for transplants, seven types are suggested – from full convergence to minimal fine-tuning, pro-transplant transposition, contra-transplant transposition, distortion, mutation, and rejection.[133] Cohn focuses on rule transposition in general, while our case studies rely on a wider range of transplants and start from a narrower focus, namely that of resistance, meaning that the first two and the last options Cohn identifies are not relevant here. This allows our case studies to be fleshed out with more details and nuances of what happens in the zone between the extremes. One

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129 See U Stelkens, A Andrijauskaitė and Y Marique, 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration – Overall Assessment' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 755-820, para 31.32ff (West and Nordic) and para 31.59ff (post-socialist).

130 Láncos, Horváth and Szemesi below 121.

131 Andrijauskaitė below 167.

132 Boyron and Marique below 65.

133 M Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 American Journal of Comparative Law 583, 593, figure 2.

striking feature, however, across our case studies, is that the host system seeks to develop control over the transplanted foreign technique in some way (the major outlier being the Hungarian leniency programme, but its voluntary nature may explain the special outcome of this technique, namely its lack of effective implementation). This means that the host system is creative in its approach to the transplanted technique.

First, we find a minimalist approach where the host system contains the transplanted technique and re-interprets it in some way to align it with its own categories. For instance, the French administrative judge remains in control of legal certainty. It limits its scope to its objective components (i.e. accessibility, simplification and quality of legislation), thus excluding its subjective components (i.e. protection of legitimate expectations).[134]

Secondly, the host system may undergo legal changes down the line as a consequence of the transplanted foreign technique. This leads to second-order differentiation. Formal law and/or case law are adapted to include the transplant, but the consistency of the overall administrative system requires other adaptations elsewhere. This overspill can take the form of logical legal consequences resulting from the transplant itself – like the development of parliamentary accountability procedures for independent economic regulators being a substitute for the previous governmental control over these regulators in Belgium.[135] This overspill can go a little outside the transplanted technique to reach a contiguous technique. So, in England, proportionality was unambiguously introduced in the field of human rights with the formal enactment of the Human Rights Act 1998. The UKSC was then influenced by this principle when redefining its otherwise classic *Wednesbury* test.[136] This overspill may even stretch outside the natural scope of the transplanted technique, as in the case of German competitive award procedures and the judicial protection used not only in public procurement, but also in the recruitment of civil servants and decisions to allocate scarce goods.[137]

Finally, the transplant can be subverted, as **Dragos** explains in the case of the Romanian ombudsman and his increasing powers, with some of these powers being seldom recognised to other ombudsmen elsewhere. The two best illustrations of these extensive powers are the ombudsman's power to initiate judicial proceedings *pro bono* for plaintiffs and to raise exceptions of unconstitutionality in the Constitutional Court. These more extensive powers can bring the ombudsman into political debates and weaken their independence, regardless of whether the ombudsman actually decides to act or not. The ombudsman's

134 Chevalier below 95.
135 Slautsky below 37.
136 Boyron and Marique below 65.
137 Stelkens below 141.

concrete inaction whilst enjoying legal powers to act signals where their preferences lie. This shift towards an arbiter between political actors – illustrated by a crisis over decriminalizing corruption in Romania where the executive and civil society were opposed – disturbs the 'standard' role of the ombudsman, conceived primarily as focusing on good administration carried out by public bodies in the general interest.[138]

## 6. Resistance and legal changes – an open-ended reading

From the foregoing description of forms of resistance towards foreign techniques and their many factors and expressions, a picture of complexity emerges. To make sense of this complexity,[139] one may focus on the process of legal change over time thanks to such resistance. Change did not happen in our case studies overnight. In all cases, change occurred over a relatively long period,[140] often more than ten years (e.g. the Hungarian leniency programme), sometimes twenty years (e.g. Belgian independent economic regulators; legal certainty in France), sometimes thirty years (e.g. Romanian ombudsman) and even longer (e.g. proportionality in England). It is thus possible to divide this process of legal changes into stages that recur across our case studies and suggest possible options that emerge over time. An overview of these stages is provided in *Figure 1: An open-ended model of legal change for administrative transplants – getting to grips with the foreign* on page 34.

At the outset (i.e. stage zero) new problems or challenges arise, and some types of reaction to deal with them gain prominence, suggesting they are successful or important. They can be techniques (e.g. the independence required by economic regulators or a leniency programme); a judicial technique (e.g. proportionality); a legal principle (e.g. legal certainty); a type of right (e.g. the right to be heard); an institution (e.g. the ombudsman); or a fully-fledged judicial review technique (e.g. judicial protection in competitive procedures). Legal ob-

138 Dragos below at 185.

139 i.e. providing an interpretation and analytical tool for legal entrepreneurs interested in understanding which options lie ahead when faced with apparent resistance. This does not mean that we adopt a determinist approach to legal changes or that we seek to suggest a grand theory for transplants, providing predictions as to how a foreign technique will be received in the transplanting country: cfr U Kischel, 'Theorising Legal Transplants?' (BACL Seminar, Preston, 3 September 2019) <https://british-association-comparative-law.org/2020/01/27/account-u-kischel-theorising-legal-transplants-bacl-seminar-preston-3rd-september-2019/> accessed 17 March 2021. For one thing, our sample is far too Euro-centric for us to have that ambition.

140 At least if we consider the lifetime of the European Union. Of course, taking a longer perspective would already greatly mitigate the idea of 'resistance' when compared to the actual results. It may be that over longer periods of time one could observe branching out and recursive loops between different phases.

ligations or other incentives to include them in the national system may or may not exist.

Stage one starts the process of transplantation. Foreign techniques are transplanted into the host country and come into contact with the domestic institutions encapsulating compromises. For instance, economic regulation in Belgium was very much the product of corporatism, whereby key socio-economic actors had been institutionally included in administrative decision-making since the early 20th century. Requiring economic regulation to be decided independently – i.e. outside this historic structure – challenged this socio-economic compromise and disrupted vested economic and political interests.[141] The Romanian ombudsman did not challenge economic interests so much as the 'patron-client' relationships between politicians and civil society.[142] The principle of legal certainty and its sister principle of legitimate expectations challenged the way in which the French administrative judge had, over time, balanced the interests of the administration against those of users.[143]

This leads to stage two, i.e. the short-term reactions to these disruptions. In particular, two reactions can be identified. In one scenario, significant actors (those who are relevant to ensuring the implementation of the foreign technique in the host system) whose interests are disrupted or threatened with disruption by the foreign technique flee: they do not engage with the transplant, resulting in the absence of practical implementation. A good example in our project is the fact that economic actors have not heeded the leniency programme in Hungary.[144] In the second scenario, significant actors put up a fight against the foreign technique and rely on legal tools and concepts – for instance, constitutional principles such as political accountability in the case of the Belgian economic regulators.[145] Of course, significant actors may first adopt one attitude only to shift it later on. The Romanian ombudsman was not used at first, whereas later it gained visibility yet lost credibility.[146]

Over time stage three is kicked off, with more sophisticated strategies being deployed. Again, two types of scenarios can be distinguished. On the one hand, some strategies are soft and diffuse, consisting of incremental changes. For instance, English judges have slowly – one case after another – adopted proportionality in some areas and then put in some framing for the subsequent development of proportionality. There may be some testing of the ground. For instance, English judges have called for comparative studies of proportionality in the common law world, maybe in an attempt to elicit arguments drawn from

141 Slautsky below 37.
142 Dragos below 193.
143 Chevalier below 95.
144 Láncos, Horváth and Szemesi below 121.
145 Slautsky below 37.
146 Dragos below 185.

outside too European-centric case law.[147] The French Supreme Administrative Court tested the water, slowly preparing its audience (e.g. 2006 annual report, a case where the claim was rejected) before jumping into legal certainty.[148] On the other hand, strategies of resistance can be bluntly upfront, formal and focused: they involve looking for judicial solutions where there is a loser and a winner at the end of the journey. This was clearly the choice made by the Belgian economic regulator, which took the Belgian government to court to force the adoption of its preferred solution.[149]

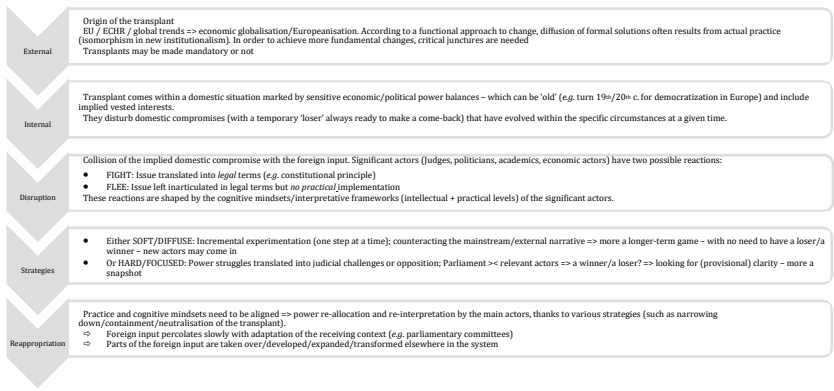
Finally, one can take a step back and assess the longer-term effects of foreign techniques on the host administrative system. Here, our case studies show how national actors have started acclimating to the transplants to some extent, leading to administrative changes. Creativity emerges. One such acclimatation is the narrowing down of the transplant and its scope, maybe even reinterpreting it in a way consistent with the domestic cognitive mindset. For instance, legal certainty is understood in France only in its objective aspect; the subjective dimension – that of legitimate expectations – is neutralised.[150] This leads to maintaining internal consistency within the legal system. Another type of creativity is that observed in Belgium, where new administrative procedures (parliaments are now involved in monitoring regulators' activities) have been developed in order to flesh out the principle of political accountability.[151] Once again, this contributes to maintaining the internal consistency of the system. Furthermore, there is no loser or winner: the opponents of independent economic regulators can claim that (some form of) control is maintained; its proponents can claim that the executive has nothing to say any longer about economic regulation carried out by regulators. Yet another form of creativity appears when other dimensions of the administrative system are transformed. This happened in Germany with the alignment of judicial protection in competitive procedures in procurement and civil service matters,[152] and in England with proportionality leading to the redefining of the *Wednesbury* ground of review into a new standard of review.[153] In short, creativity can emanate from the judge (as in England, France, and Lithuania), from the legislature (as in Belgium, and Romania) or from economic actors (as in Germany).

This time-oriented approach to the internal process of acclimating to the foreign to make it more domestic leads to a questioning of the assumption that

147 Boyron and Marique below 65.
148 Chevalier below 95.
149 Slautsky below 37.
150 Chevalier below 95.
151 Slautsky below 37.
152 Stelkens below 141.
153 Boyron and Marique below 65.

decentralisation increases the effectiveness of EU law.[154] Indeed, a range of internal processes are set in motion with transplants. It may become possible over time to develop some form of typologies for these developments, reactions, and courses of acclimation. The overall picture, however, is likely to be anything but homogenous, not to mention the real risk that some significant actors may just leave the law aside. This risk seems to be especially present if the logic behind the transplanted technique goes too far against culturally ingrained ideas (such as a distaste for snitching). If we expand this to the European administrative space, this means that differentiation will keep flourishing for the foreseeable future, and that the same legal rules at EU level may need different supportive techniques at national level in order to be concretely implemented. In more general terms, more attention needs to be devoted in comparative terms to these 'odd details' in the legal design of rules, institutions, principles, and other techniques. They are the ones making a difference in the day-to-day functioning of the administration. Indeed, the devil is in the detail.

*Figure 1: An open-ended model of legal change for administrative transplants – getting to grips with the foreign*




*Source: Yseult Marique*

## 7. Looking into the future of a pluralistic European administrative space?

Administrative law transplants are ubiquitous in the European administrative space. Yet, the case studies collected for this special issue illustrate that transplants have encountered resistance from various actors – the administration but also the legislature, judges, and economic stakeholders. Cognitive

154 See also F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 Modern Law Review 19.

mindsets and daily routines cannot be changed overnight. Patience and time are needed. Nonetheless, transplants have contributed to legal changes and innovation in administrative practices and thinking. This introduction has suggested a way to analyse how the transplanting system – and its most significant actors – seeks to accommodate transplants over time. Although this process is open-ended, the very awareness that transplants are processes can contribute to understanding the dynamics of the European administrative space, its limits, and the ways in which they can be overcome. This requires acknowledging the proper extent of top-down Europeanisation of administrative law across Member States and the distinctive role of administrative law.

On the one hand, the limits to Europeanisation of administrative law are threefold. First, EU law is often only one of the conduits for spurring a country to start the process of transplanting a foreign technique into its system. Secondly, the modalities of the transplanted technique can vary widely from the archetype technique(s) and over time. Thirdly, even when the transplanted technique corresponds to the archetype technique it does not guarantee uniformity, because the scope of the transplant may either remain narrow (France, England, Lithuania – to the point even of being non-existent in practice, as with leniency in Hungary) or trigger deeper structural changes (Belgium with respect to controls over economic regulators or the specific powers recognised to the Romanian ombudsman) or in collateral fields (e.g. judicial protection for disappointed candidates in the civil service in Germany or revisiting *Wednesbury* in England).

On the other hand, isomorphism in administrative law needs to be strongly qualified – even when administrative law serves as a conduit for facilitating the four European freedoms and the realisation of the internal market. Indeed, even when economic factors have been pressing in a country, the domestic legal preferences associated with economic growth have differed from the European ones. The best example is the wish and need to speed up investments in Germany in the 1990s, while the EU wanted to develop the internal market thanks to increased judicial protection for economic actors. In addition, administrations may often have priorities other than only supporting (European or national) economic objectives, priorities shaped by their distinctive historic choices and compromises. Finally, European law and policies can also seek to balance economic and non-economic objectives. Administrative law is not only a legal field for limiting administrative powers: it is also a legal field facilitating the development and implementation of public policies – with all their diversity.

Put together, the balance between these factors (i.e. cognitive mindsets shaping preferences about administrative action and techniques, tools, and/or processes to implement these preferences through daily routines) specific to each legal system points to the administrative cultures within each of these legal systems. Changing these cultures is more complex than what can be accomplished with a one-day event like the one that happened on 9$^{th}$ November 1989. Before changing them, one needs to first understand them in

depth. Time and patience are key to identifying the 'odd details' that provide unique keys to administrative cultures and that unlock their creativity to answer new issues as they arise. The coronavirus has, sadly, brought immense coordination and financial challenges for our domestic administrations. This may be one of those critical junctures when leaps of innovation and experimentation are attempted to expand and reshape our cognitive mindsets and daily routines, trusting that this will contribute to better days to come, and building on the specific strengths of each administrative component.