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Conflict and Cooperation within European Composite Administration (Between Philia and Eris)

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Abstract

European composite administration has a complex pluralistic structure based on the interaction between national and EU authorities. As a consequence, disagreements between public bodies can arise in the execution of European norms. In order to keep the level of conflict under control, however, many settlement procedures are provided for in the EU legal system. This article illustrates how different administrative mechanisms are available for use in turning conflict into cooperation. To achieve this, the different types of disagreement will first be identified, after which administrative disputes will be defined and classified before being analysed in the light of the settlement mechanisms provided for in EU legislation. The disputes themselves will then be looked at, highlighting both their constitutional and functional aspects. Finally, we will examine how disputes affect the rights of private parties involved.

1 Introduction

The sharp contrast between direct and indirect enforcement of European law has long been discarded by scholars. Indeed, in many sectors the execution of EU norms occurs through forms of cooperation between national and European administrations.

For the purposes of this article, it is sufficient to state that Member States are, in principle, bound to implement European law (Article 291, para. 1 TFEU). However, where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in justified specific cases, on the Council (Article 291, para. 2 TFEU).[1] Increasingly, despite the ambiguity of the Treaty of Lisbon, forms of decision-making by European agencies are also provided.

The tension between national administrative jurisdictions and that of European authorities has not, however, resulted in the rigid division of admin-

* This paper represents a summary of the research activities that were conducted by myself in 2010 at the Max Planck Institute for Comparative Public Law and International Law, in Heidelberg. I would like therefore to express my gratitude for this opportunity to the director of the Institute Professor Armin von Bogdandy.

1 P. Craig, *The Lisbon Treaty* (Oxford 2010), 48 ff and 270 ff. See also the 'Explanatory memorandum to the proposal of the Commission to the regulation laying down the rules concerning mechanism for control by Member States of the Commission's exercise of implementing

istrative tasks. In many EU laws, this tension has led to organisational, procedural and information links between public bodies[2] whose purpose is to ensure the efficient and homogeneous execution of European law and mutual control between the public administrations involved.[3] These links have both a horizontal and a vertical dimension[4] and permit, through rules on the division of administrative tasks[5], the involvement of all the administrative bodies affected in the decision-making process.[6]

In this article, the forms of execution of EU laws based on cooperative tools will be called similarly either 'composite' or 'integrated' administration, although different terms have been used by other scholars of this subject.[7]

Several models of administrative decisions can be identified which could be regarded as typical of EU integrated administration. To give some examples: Commission decisions enacted according to comitology procedures (see § 3.2.); certain European Agency decisions;[8] common decisions (i.e. national decisions issued with the prior consent of other national authorities and at times of the

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powers' COM(2010) 83 final and the Communication from the Commission 'Implementation of Article 290 of the Treaty on the Functioning of the European Union' COM(2009) 673 final.

2 E.g. E. Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' [1999/31] *EuR* 270-301.

3 For a different viewpoint see R. Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' [2010/47] *CML Rev.* 1385-1427, 1400 ff.

4 H.C.H. Hofmann, 'Composite decision making procedures in EU administrative law', in: H.C.H. Hofmann & A.H. Türk (Eds.), *Legal Challenges in EU Administrative Law* (Cheltenham, UK/Northampton, MA, USA 2009), 136; H.C.H. Hofmann, G.C. Rowe & A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011), 4 ff.; M. Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum europäischen Verwaltungsverbund' [2007/60] *DÖV*, 761-770.

5 G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Tübingen 2004), 3-8.

6 S. Augsberg, 'Europäisches Verwaltungsorganisationsrecht und Vollzugsformen', in: Terhechte (Ed.), *Verwaltungsrecht der Europäischen Union* (Baden Baden 2011), 201-272; W. Kahl, 'Der Europäische Verwaltungsverbund: Strukturen – Typen – Phänomene' [2011/50] *Der Staat* 353-387; G. Britz, 'Vom Europäischen Verwaltungsverbund zum Regulierungsverbund? – Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei Telekommunikation, Energie und Bahn' [2006/41] *EuR* 46-67, 49.

7 E.g. S. Cassese, 'European Administrative Proceedings' [2004/1] *Law & Contemporary Problems* 21-36, talks about 'sistemi amministrativi comuni'; P. Craig, 'Shared Administration, Disbursement of Community Funds and the Regulatory', in: *Legal Challenges in EU Administrative Law*, op. cit. *supra* note 4, refers to 'shared administration'; L. De Lucia, *Amministrazione transnazionale e ordinamento europeo* (Torino 2009), where I use the expression 'unione amministrativa europea'; H.C.H. Hofmann & A.H. Türk, 'The Development of Integrated Administration in the EU and its Consequences' [2007/13] *ELJ* 253-271, talked about 'Integrated Administration'; E. Schmidt-Aßmann & B. Schöndorf-Haubold (Eds.), *Der Europäische Verwaltungsverbund* (Tübingen 2005) refer to 'Europäische Verwaltungsverbund'.

8 E.g. the decisions enacted by the so-called 'network agencies': see S. Lavrijssen & L. Hancher, 'Networks on Track: From European Regulatory Networks to European Regulatory "Network Agencies"' [2009/36] *LIEI*, 23-55.

Commission); national authorisations subject to recognition by the destination Member State; and national decisions with transnational effects.[9]

This institutional structure is derived from the nature of the European Union as a mixed polity, at the centre of which lies the representation of interests and the dialectic between authorities at both European and national level.[10] Often, one of the functions of EU integrated administration is to facilitate the balancing of the different public interests affected by various legal norms. From this perspective the involvement of national administrations in the execution of European law is clearly aimed at allowing national interests, or national characteristics, to come to the forefront[11] as can also be seen for European administrative bodies dealing with European public interests. This interpretation of EU composite administration does not of course imply that Member States can pursue policies prohibited by the Treaties. However, it does mean that they are entitled, within the discretionary power accorded to them by European norms,[12] to choose administrative strategies that best respond to their own national needs.

In order to further aid analysis of this subject, the concept of sectorial unions, which concern the set of cooperation mechanisms aimed at the execution of specific European sectorial norms, can be introduced here.[13] Each sectorial union is based on the following elements: The decision-making autonomy or joint decision-making of the authorities involved, the hierarchical or heterarchical position of the Commission, and substantive and procedural rules.[14] By examining the balance between these elements in each sectorial union is it possible to verify how the decision-making power of either a national or a European administration is counter-balanced by cooperative strategies in favour of other public

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9 L. De Lucia, 'Autorizzazioni transnazionali e cooperazione amministrativa nell'ordinamento europeo' [2010/20] *Rivista italiana di diritto pubblico comunitario* 759-788; S. Galera Rodrigo, *La aplicación administrativa del derecho comunitario* (Madrid 1998), 108 ff; H.C. Röhl, 'Procedures in the European Composite Administration', in: J. Barnes (Ed.) *Transforming Administrative Procedure* (Seville 2008), 92; Sydow, op. cit. *supra* note 5, 126 ff; G. Winter, 'Kompetenzverteilung und Legitimation in der Europaeischen Mehrebenenverwaltung' [2005/40] *EuR* 255-276.

10 J.P. Jacqué, 'The principle of institutional balance' [2004/41] *CML Rev.* 383-391; G. Majone, 'Delegation of regulatory powers in a mixed polity' [2002/8] *ELJ* 319-339; E. Vos, 'EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation,' in: C. Joerges & E. Vos (Eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford 1999), 33; P. Pescatore, 'L'exécutif communautaire: justification du quadripartisme institué par les traités de Paris et de Rome' [1978/14] *CDE* 387-406.

11 It can be noted that one of the genuine *raison d'etre* of the subsidiarity principle relating to European administrative activity is that of the protection of national interests. See, in general, A. von Bogdandy, 'Grundprinzipien', in: A. von Bogdandy & J. Bast (Eds.), *Europäisches Verfassungsrecht* (Heidelberg 2009), at 49 ff; P. Van Nuffel, 'What's in a Member State? Central and Decentralized Authorities before the Community Courts?' [2001/38] *CML Rev.* 871-901, at 876.

12 P. Craig, 'Community Administration, History, Tipology and Accountability', www.ssrn.com.

13 S. Cassese, 'La signoria del diritto comunitario sul diritto amministrativo', in: S. Cassese, *Lo spazio giuridico globale* (Roma-Bari 2003), at 291.

14 M. Ruffert, op. cit. *supra* note 4, 766.

bodies and, as a consequence, to understand the role and the weight of public authorities and that of their respective interests under each specific legal discipline.[15] In short, each sectorial union represents the outcome of the trade off between the need to protect national jurisdiction and the need to protect the unitary principle through cooperation.

However, the pluralistic nature of the EU composite administration (and that of the sectorial unions) can also, in itself, be a potential cause for disagreement between authorities.[16] Clearly, it is more likely for a plurality of public players to express contrasting points of view concerning the same administrative matters, depending either on their praxis, the interpretation of norms or conflicts of interest.

Thus it can be stated that there are two forces that characterise EU integrated administration. These two forces are at the same time both opposite and complementary and can be symbolised by the two divinities of ancient Greece *Eris* (Strife) and *Philia* (Friendship).[17] Whilst the plurality of public interests can easily generate conflict between public authorities, the fact that they belong to the same sectorial union can, by contrast, generate friendship and can highlight the need for coherence and unification.

This observation raises at least four fundamental questions, which need to be examined in order to reach a clear and realistic vision of European integrated administration.

In the first place, it must be understood how the European legislator regulates the potential conflict between administrations. In principle, such conflict could be dealt with in one of three ways: 1) by ignoring it; 2) by referring the solution to jurisdictional bodies; or 3) by permitting it.

Second, once the existence of conflicts within the EU composite administration has been verified, it is necessary to identify the tools established to resolve them, together with the roles played by the sectorial unions when dealing with disagreements.

Moving on from this – and here we come to the third problem – it is fundamental to identify the principles in the Treaties which have a bearing on this area and the characteristics of administrative conflict with respect to jurisdictional controversies.

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15 E.g. L. Saltari, *Amministrazioni nazionali in funzione comunitaria* (Milano 2007), who identified various typologies of sectorial unions. See also W. Kahl, op. cit. *supra* note 6.

16 C. Joerges, 'Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance', in: *EU Committees*, op. cit. *supra* note 10, 10; E. Schmidt-Aßmann, 'Einleitung', in: *Der Europäische Verwaltungsverbund*, op. cit. *supra* note 1, 7; E. Vos, 'Regional Integration Through Dispute Settlement: The European Union Experience', Maastricht Faculty of Law Working Paper, n. 2005-7.

17 See, among others, J.P. Vernant, *Les origines de la pensée grecque* (Paris 1962); J.P. Vernant, *Mythe et société en Grèce ancienne* (Paris 1974).

Finally, the consequences that these conflicts can have on private parties must be taken into account.

This article aims to respond to these questions by analysing some of the EU norms, especially those regarding the internal market, which deal with administrative conflict. It must be noted here that many scholars have already, from various viewpoints, emphasised the fact that the European legal order in general contains many elements of conflict.[18] The subject of this paper is however more specific, as it concerns only administrative conflicts within the EU. Infringement procedure (Articles 258-259 TFEU) will therefore not be considered, nor will conflicts that may arise during a political decision-making or legislative process or during the adoption of non-legislative acts of general application (Article 290 TFEU) all of which are subject to specific provisions in the Treaties. Pure judicial disputes between public administrations and those mentioned in Article 263, paragraph 5 TFEU will not be examined either.

The paper is hereafter divided into the following sections: (2) The definition and classification of administrative conflict on the basis of current legislation; (3) An analysis of procedures and criteria for settlements; (4) The identification of the functional aspects of these mechanisms in the light of Treaty principles; (5) An overview of the effects that administrative dispute settlement has on private rights.

2 Definition and Classification of Administrative Disagreements

EU legislation presents many examples of disagreement between public administrations. In this section three basic models of administrative conflict will be identified (§ 2.1.). We will see that one of these (‘*real administrative disputes*’) has very particular characteristics, as the norms provide for specific tools for the resolution of conflicts and for maintaining an equal balance of power between the parties involved within the decision-making process. After presenting and analysing these real administrative disputes (§ 2.2.), they will be examined in light of the supervisory activity of the Commission towards state administrations, it will then be possible to distinguish between

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18 E.g. C. Joerges & J. Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’ [1997/3] *ELJ* 273-299; C. Joerges, ‘Rethinking European’s Law Supremacy’, Eui working paper n. 2005/12. From different perspectives, see F. Bignami, ‘The Challenge of Cooperative Regulatory Relations after Enlargement’, Duke Law School Legal Studies Research Paper Series Research, Paper n. 55 September 2004; D. Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’, in: J.L. Dunoff & J.P. Trachtman (Eds.), *Ruling the World? Constitutional, International Law and Global Governance* (Cambridge 2009) 326-355; M. Westalke, ‘Mananging Inter-institutional Conflict’ (2007) *Studi sull'integrazione europea*, 305-313.

'disputes under hierarchical settlement' and those 'under heterarchical settlement' (§ 2.3.).

2.1 Disagreements and Disputes

For the purposes of this article, conflict inside the European integrated administration can be described by distinguishing between three basic situations (although in European norms these are referred to differently).[19]

i) *Simple disagreements*. Although diverse in nature, what these cases have in common is the fact that it is the disagreement itself by one authority towards a decision or an action of another authority that concludes the matter.

One example of this can be found in Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.[20] If a Member State refuses the request from a private party for the recognition of a qualification issued in another Member State, this refusal can be considered as a disagreement, but – contrary to what happens in other cases of the refusal to recognise the administrative acts of other EU legal systems – no resolution mechanism is established.[21] Under these norms, the final and definitive decision is issued by the dissenting administration. Hence, the disagreement can only be settled in the national courts, if the private parties concerned put forward such a request. Nevertheless, following the general principle of sincere cooperation, the authorities involved can decide to cooperate spontaneously in order to find a solution. This is, however, a voluntary choice on their part.[22]

ii) *Qualified disagreement*. This second type of conflict follows on from the first. The disagreement between two authorities can trigger a complex procedure but no provision is made in European norms for settlement mechanisms. This procedural burden is aimed at restraining and steering the administrative activity of the competent authority through exogenous (argumentative) forms of conditioning without depriving them of autonomous decision-making power.

An example of this is Regulation (EC) n. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national

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19 For a different theoretical classification, see, for instance, T. Eckhoff, 'The Mediator, the Judge and the Administrator in Conflict-Resolution' [1966/10], 1/2 *Acta sogiologica* 148-172.

20 Consolidated version.

21 The same situation occurs when the host Member State refuses the recognition of a driving license issued by another Member State (Dir. 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences; O.J. 2006 L 403/18-60), according to recent rulings of Court of Justice Joined Cases C-329/06 & 343/06 *Wiedemann and Funk* [2008] ECR I-4635.

22 Court of Justice Case C-202/97 *FTS* [2000] ECR I-883 and Case C-178/97 *Banks and others* [2000] ECR I-2005; A. Keessen, *European Administrative Decisions* (Groningen 2009), 34 f.

authorities responsible for the enforcement of consumer protection laws:[23] One national authority, at the request of another national authority, must take all necessary enforcement measures to bring about the cessation or prohibition of the intra-Community infringement (Article 8). However, following consultation with the applicant authority, it may refuse to comply with the request if, *inter alia*, in its opinion no intra-Community infringement has taken place. This refusal here represents a conflict. In this case, the authority requested to take enforcement measures shall inform the applicant administration and the Commission of the grounds for the refusal and the applicant authority may refer the matter to the Commission, which shall issue an opinion in accordance with the regulatory procedure.[24] The provision made for an opinion from the Commission means that only the requested administration holds the competence to decide whether to accept or deny the request (Article 15).

Disputes between a national administration and the Commission concerning amounts which are to be excluded from the financing of the common agricultural policy can also be included in this group.[25] According to Article 31 of the Council Regulation (EC) n. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy, the two parties shall attempt to reach agreement on the action to be taken by the Commission before any decision to refuse financing is taken. If an agreement is not reached, the Member State may request the opening of a procedure, conducted by a conciliation body,[26] aimed at reconciling each party's position within four months. A report of the outcome of the procedure shall be given to the Commission, which shall examine it before deciding on any refusal of financing. Also in this case only the Commission itself retains the decision-making competence and it is not bound by the report of the conciliation body nor by the opinion delivered by the standing committee on agricultural funds (art. 41).

iii) *Real administrative disputes*. These have three very specific characteristics: First, that this is a disagreement between two or more authorities regarding an administrative act already issued, or to be issued. Second, that there is a provision for a specific settlement mechanism,[27] and third that the position of equality between the conflicting parties is maintained.

This article is devoted to the analysis of this final category of dispute.

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23 Consolidated version.

24 Art. 5, Council Dec. n. 468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (consolidated version).

25 Consolidated version.

26 Art. 12, Commission Reg. (EC) n. 885/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) n. 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and of the EAFRD (consolidated version.).

27 M.S. Giannini, *Diritto amministrativo*, II (Milano, 3rd ed., 1993), 95 ff.

2.2 Classification

The European legal system offers many examples of real administrative disputes and therefore a classification of these could be useful at this point in order to better analyse the normative material currently available.[28]

Disputes can first be classified in relation to the nature of the parties involved in the conflict. When a dispute concerns two or more national administrations or two or more European organisations, it can be defined as 'horizontal'. When it concerns a national body and a European institution or body, it is defined as 'vertical'. Vertical disputes are 'top-down' when the procedure is initiated by a European authority, or 'bottom-up' when initiated by a Member State.

Article 54, paragraph 4 Regulation (EU) n. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority),[29] regulates the settlement procedure for horizontal disputes between the European Banking Authority, the European Insurance and Occupational Pensions Authority[30] and the European Securities and Markets Authority.[31] In particular, Article 54 concerns disputes that can arise in the supervisory activity with regard to financial institutions stretching across different sectors. For this purpose, a joint committee has been established which serves as a forum in which the three authorities must cooperate in order to resolve disagreements by reaching joint positions.[32]

Examples of national horizontal disputes can be seen in decisions provided for by Article 8, Regulation (EC) n. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of

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28 For different classifications, see J. Sommer, *Verwaltungskooperation am Beispiel administrativer Informationsverfahren im Europäischen Umweltrecht* (Heidelberg 2003), 287; T. von Danwitz, *Europäisches Verwaltungsrecht* (Heidelberg 2008), 624 ff.

29 O.J. 2010, L 331/12-47.

30 Regulation n. 1094/2010 of the European Parliament and of the Council of 24 November 2010 (O.J. 2010, L 331/48-83).

31 Regulation n. 1095/2010 of the European Parliament and of the Council of 24 November 2010 (O.J. 2010, L 331/84-119).

32 A similar discipline is provided for by Art. 95 Reg. (EC) n. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (consolidated version): The European Chemicals Agency shall take care to ensure early identification of potential sources of conflict between its opinions and those of other European bodies, carrying out a similar task in relation to issues of common concern. See also Art. 30 Reg. (EC) n. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (consolidated version). However, the general formulation of these two norms raises the doubt that they do not discipline real settlement mechanisms, but contain specifications of the general principle of cooperation with regard to contrasting technical evaluations, that are aimed at preventing disputes in a proper sense. See E. Vos, op. cit. *supra* note 16, 56.

Energy Regulators.[33] For cross-border infrastructure, it is stated that the agency shall decide upon those regulatory issues that fall within the competence of national regulatory authorities, which may include 'the terms and conditions for access and operational security, (...) where the competent national regulatory authorities have not been able to reach an agreement within a period of six months from when the case was referred to the last of those regulatory authorities'. The disagreement between two national authorities therefore represents the condition for a settlement procedure to be carried out by the European agency.

Another case in point is Regulation (EC) n. 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients.[34] This states that the person responsible for the placing of such products on the Community market shall submit a request to the Member State in which the product is to be placed on the market for the first time. The Member State shall then carry out an initial assessment (Articles 4 and 6). At this stage there are three possibilities: a) The requested authority decides that that the food or food ingredient requires an additional assessment; b) the requested administration proposes authorising the marketing of the food or food ingredient concerned and other Member States or the Commission present a reasoned objection to this proposal; c) the requested administration proposes authorising the marketing of the product and no objections are presented. In the latter case, the proceeding authority shall authorise the placing of the product on the market. In the first two situations a conflict exists. According to our classification above therefore, if the objection is presented by a Member State the dispute is horizontal, if it is presented by the Commission the conflict is vertical (top-down). In both cases, a decision shall be taken by the Commission with the assistance of the standing committee on the Food Chain and Animal Health, according to the regulatory procedure (Articles 7 and 13).

Article 5 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora,[35] represents a further example of a 'top-down' dispute. According to this Directive, on the basis of the specific criteria and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types and which species that are native to its territory the sites host (Article 4, para. 1). The list of sites of Community importance shall be adopted by the Commission in accordance with the regulatory procedure. Nevertheless, 'in exceptional cases where the Com-

33 O.J. 2009, L 211/1-14. L. Ammannati, 'L'agenzia per la cooperazione tra i regolatori dell'energia e la costruzione del mercato unico dell'energia' [2011/21] *Rivista italiana di diritto pubblico comunitario* 675-698; K.F. Gärditz, 'Europäisches Regulierungsverwaltungsrecht auf Abwegen' [2010/135] *AÖR* 251-288.

34 Consolidated version.

35 Consolidated version.

mission finds that a national list (....) fails to mention a site hosting a priority natural habitat type', a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each. If, within a period of six months, the dispute remains unresolved, the Commission shall forward a proposal to the Council relating to the selection of the site as a site of Community importance.

'Bottom-up' disputes, on the other hand, are initiated by a national administration with regard to a European act or activity. For instance, according to Article 51, Regulation (EC) n. 1907/2006 (REACH), if a state administration proposes amendments to the draft decision of the European Chemicals Agency (referring to examination texting proposals and with compliance check of registrations), the latter shall refer the draft decision itself, together with any amendments proposed, to the Member State committee (i.e. an office of the Agency, composed of Member State representatives). If the Committee fails to reach a unanimous agreement, the Commission shall decide according to the regulatory procedure.[36]

Disputes can also be classified according to the time frame in which they arise. Theyare 'pre-emptive' when they occur before the issuing of an administrative act and they concern, therefore, a draft decision. This is the case, for example, in the objection presented by a Member State (or by the Commission) to the proposal of an authorisation by another Member State to the placing on the market of a novel food (Regulation 258/97). 'Subsequent' disputes, on the other hand, arise after the issue of an administrative act. For example, when a Member State adopts a safeguard measure with regards to a novel food authorised by another Member State, according to the above mentioned Regulation 258/97, in presence of risks to human health or the environment, the Commission, in accordance with the regulatory procedure, must take the appropriate measures aimed at confirming, amending or repealing the safeguard decision (Article 12). The refusal to recognise some authorisations can also be mentioned here. According to Article 4 of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market,[37] where a Member State believes that a low-risk biocidal product which has been registered by another Member State does not comply with the definition provided for in the Directive, it may provisionally refuse registration thereof and shall immediately communicate its concerns to the home authority. If, within a period of 90 days, an agreement is not reached between the authorities concerned, the matter will be forwarded to the Commission for a decision in accordance with the management procedure.

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36 See also the ruling of Court of Justice, Case C-6/99 *Greenpeace* [2000] ECR I-1651, regarding the marketing of GMOs, that established a judicial form of bottom-up settlement procedure.

37 Consolidated version.

Some disputes are internal in character, meaning that they occur between offices of the same EU agency. For instance when the state committee of the European Chemical Agency fails to reach unanimous agreement on a proposal of the same agency formulated according to Article 51 of Regulation 1907/06. Here, the European Agencies themselves represent mechanisms that facilitate administrative cooperation and the dialectic confrontation between diverse public interests.[38]

The norms outlined above demonstrate first, that at times the dispute can lead to the sharing of the decision-making power between the administrations concerned, or, at other times, to the displacement of this power; and second, that the settlement mechanisms call for a new evaluation of the contested situation.

2.3 Disputes, Coordination and Hierarchy

According to the definition seen previously, a key element of the real dispute is the condition of equality, in terms of decision-making power, between the parties involved within the settlement procedure. Unlike in a qualified disagreement, a real administrative dispute is settled through a procedure in which no single authority involved has the competence to issue a decision on the matter autonomously.[39] In order to clarify this point it is important to distinguish between top-down disputes and cases where the Commission is entitled to exercise supervisory powers over state acts or activities, i.e. when it plays a hierarchical role.

This hierarchical position of the Commission can be found, for example, in 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.[40] According to Article 39 the Commission shall, following a complex procedure, require a national regulatory authority to withdraw a decision on the basis that the guidelines referred to in Directive 2009/72 itself (or in Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity),[41] have not been complied with. An analogous situation can be found in Article 15, Directive 2009/28 of the European Parliament and of the Council of 23 April 2009 on

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38 E. Chiti, 'An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies' [2009/46] *CML Rev.* 1395–1442.

39 See U. Mager, 'Die europäische Verwaltung zwischen Hierarchie und Netzwerk', in: H. Trute, T. Gross, H.C. Röhl & C. Möllers (Eds.), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts* (Tübingen 2008), 369.

40 O.J. 2009, L 211/55-93.

41 O.J. 2009, L 211/15-35.

the promotion of the use of energy from renewable sources:[42] When a Member State refuses to recognise a guarantee of origin of electricity issued by another Member State, if the Commission finds that the refusal is unfounded, it may adopt a decision requiring the Member State in question to recognise it.[43]

In the most recent legislation, supervisory powers are also provided in favour of European Authorities. According to Regulation 1093/10 the European Banking Authority, upon request from one or more competent (national) authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group, or on its own initiative, may investigate the alleged breach or non-application of Union law by national authorities. This procedure is similar to the one regulated by Directive 2009/72, with several significant differences however: First, here the European Authority, rather than the Commission plays a central role; Second, the powers recognised to the Authority are stronger and it may, in some cases, adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law (Art. 17). Identical powers are provided for in Article 17, Regulation n. 1094/2010 for the European Insurance and Occupational Pensions Authority and in Article 17, Regulation n. 1095/2010 for the European Securities and Markets Authority.[44]

In the norms mentioned above the analogy between supervisory function and top-down dispute settlement consists of the potential disagreement between the Commission, or the European Authority, and a national administration. However, there are also important differences between these two activities.[45]

First, supervisory power is held by the Commission (or a European Authority) alone, even when this activity is requested by a third party (either public or private) or when a European Agency or a standing committee plays an advisory role in the procedure.[46] These situations should therefore be placed in the area of 'simple' or 'qualified disagreements'. In situations of dispute, on the other hand, the conflicting parties are in a symmetrical position. This position of equality occurs also when the settlement decision is enacted by the Commission as a consequence of an objection presented by the Commission itself within

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42 O.J. 2009, L 140/16-62.

43 Supervision powers established by Art. 15 Reg. (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (O.J. 2008, L 293/3-20) and the control activity of the Commission provided by Reg. 1290/05 can be included in this group. See T. von Danwitz, op. cit. *supra* note 28, 626.

44 Cfr. P. Schammo, 'The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers' [2011/48] *CML Rev.* 1879-21914.

45 *Contra* G. Biaggini, *Theorie und Praxis des Verwaltungsrcehts im Bundesstaat* (Frankfurt am Main 1996), 133 ff.; M. Eekhoff, *Die Verbundaufsicht* (Tübingen 2006), 85; M. Vogt, *Die Entscheidung als Handlungsform des Europäischen Gemeinschaftsrechts* (Tübingen 2005), 145; T. von Danwitz, op. cit. *supra* note 28, 627 ff.

46 E.g. Artt. 31 and 41 Reg. 1290/05; Artt. 15, par. 3 and 25 Reg. 1008/08. M. Eekhoff, op. cit. *supra* note 45, 278.

the procedure. In these cases, it has to follow the rules of management or regulatory comitology procedure (e.g. Regulation 258/97 cit.).[47] As we will see, these decisions are, from a substantial point of view, the outcome of a highly complex balance between the Member States and the Commission where the latter cannot resolve the dispute alone (see § 3.2.).

Second, supervisory activity is aimed at checking the compliance of national acts or activities with European law. In a broad sense, therefore, it has a repressive nature. Here the repressive measure itself represents the disagreement.[48] For instance the request of the Commission to revoke a state act represents in itself one of the possible outcomes of the procedure, another of which could be the statement that the national act complies with the normative standard (e.g. Article 39, para. 5 and 6, Directive 2009/72). In disputes, on the other hand, settlement decisions are aimed at resolving a disagreement which has already arisen. The outcome of this type of procedure must necessarily be a settlement decision. To sum up, in a dispute the disagreement becomes a condition itself for the settlement procedure, whereas in the supervisory activity, a disagreement is one of the possible results of the repressive procedure.[49]

Third, the supervisory procedure has a bilateral structure, while the settlement procedure potentially has a multilateral one (see § 3.3.).[50]

In short, the Commission, when dealing with national administrations, either occupies a hierarchical position or alternatively holds a position of equality. Only in the latter case is a vertical top-down dispute conceivable. Treaties are very clear when they state that the Commission, on the one hand, shall ensure the application of the European law under the control of the Court of Justice of the European Union – a broad mandate which also encompasses the supervisory activity described above –[51] and on the other hand, that it shall exercise executive and coordinating functions, as laid down in the Treaties (Art. 17 TEU),[52] i.e. under control of the Member States (Art. 291 TFEU). The settlement activity that the Commission undertakes should be placed in this area. Indeed, scholars have already clarified that one of the constitutive elements of

47 See also Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms (consolidated version).

48 M. Eekhoff, op. cit. *supra* note 45, 164 ff; M.S. Giannini, *Diritto amministrativo*, I (Milano, 3rd ed. 1993), 327; T. Groß, 'Was bedeudet "Fachaufsicht"?' (2002) *Deutsches Verwaltungsblatt* 793-800.

49 In general W. Kahl, *Die Staatsaufsicht* (Tübingen 2000), 403.

50 M. Eekhoff, op. cit. *supra* note 45, 104.

51 On herarchy in the European legal order, see, from a general perspective, F.W. Scharpf, 'The Joint-Decision Trap Revisited' [2006/ 44] *JCMS* 845-864, 851; J.H.H. Weiler, 'The Community System: The Dual Character of Supranationalism' [1981/1] *YEL* 268-306; on administrative supervision in the EU legal system, see H.C.H. Hofmann, G.C. Rowe & A.H. Türk, op. cit. *supra* note 4, 707 ff.

52 For different interpretation, see R. Schütze, op. cit. *supra* note 3, 1400 ff.

the EU integrated administration consists of the coexistence, in different contexts, of both cooperation and the hierarchical position of the Commission in relation to national authorities.[53]

This clarification aids the understanding of a specific category of dispute, namely when the disagreements between two administrations are settled by the Commission, or European Authorities, acting in a hierarchical position.

Although this situation occurs quite rarely under current legislation, it affects important economic areas, such as banking and insurance. According to the 2010 Regulations on the European Supervisory Authority, the authority, in case of disagreement between two or more national authorities on request or on its own initiative, in a first stage shall act as a mediator, assisting the national administrations involved in reaching an agreement. If the national authorities concerned fail to reach an agreement, the EU authority may take a decision 'requiring them to take specific action or to refrain from action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law' (Art. 19).[54]

These situations can be called 'disputes under hierarchical settlement'[55] in order to emphasise the difference between these and other forms of dispute, which can be called 'disputes under heterarchical settlement'. These two categories have two elements in common: First, that they permit (within certain limits) the use of negotiation as a solution mechanism and second, that the settlement decision has unitary effects. They also have one significant difference however, in that decisions regarding 'disputes under hierarchical settlement' represent a form of EU supervisory activity. These conflicts are aimed specifically at guaranteeing an effective protection of EU interests and state compliance

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53 S. Kadelbach, 'Verwaltungskontrollen im Mehrebenen-System der Europäischen Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (Eds.), *Verwaltungskontrolle* (Baden Baden 2001), 227 ff.; M. Ruffert, op. cit. *supra* note 4, 761 ff; E. Schmidt-Aßmann, op. cit. *supra* note 16, 6; J. Ziller, 'Multilevel Governance and Executive Federalism: Comparing Germany and the European', in: P.J. Birkinshaw & M. Varne (Eds.), *The European Legal Order after Lisbon* (Austin/Boston/Chicago/New York/The Netherlands 2010), 257-275.

54 Cfr. with regard to the European Security and Markets Authority, see Article 22, para. 2, of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, as amended by the Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 (O.J. 2010 L 331/120-161).

55 The hypothesis in which Member States can defer an act of a European Agency to the Commission for a review of its legality comes close to this model. See for example Art. 22, Council Regulation no. 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (O.J. 2003, L 11/1-8); Art. 18 of Regulation no. 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training (consolidated version). On the relationship between disputes (between private parties and executive agencies), settlement procedures and hierarchy (of the Commission), see P. Craig, 'Legal Control of Regulatory Bodies: Principle, Policy, and Teleology', in: *The European Legal Order After Lisbon*, op. cit. *supra* note 53, 93-116.

with EU norms. As a consequence, they strengthen unitary values.[56] In the following pages, these disputes will be considered only in order to highlight the differences that can be seen these and 'disputes under heterarchical settlement'.

3 Dispute Settlement Procedures

In the examples mentioned above settlement mechanisms can be, despite some possible overlap, either a negotiation between the parties involved or a binding decision enacted at European level.[57]

Negotiation ensures that the administrations involved have control over the disputes, but it also raises some delicate questions about the actual object under discussion (§ 3.1). A binding EU decision (e.g. of a European Agency or of the Commission according to the new comitology procedure) is complex in character: it presupposes the involvement of a wide range of public bodies and the convergence between State and European interests. To demonstrate this, it will also be necessary to touch on the tricky field of comitology in general and how the Lisbon Treaty and Regulation 182/11 have changed these procedures (§ 3.2.). It will then be possible to verify that in the majority of cases, the decisions issued on conflicts have a multilateral structure and have unifying effects which influence all the components of the sectorial union (§ 3.3.). Finally, the criteria within which this decision-making power must be exercised – whether through the logic of deliberation or negotiation – will be briefly discussed (§ 3.4.).

3.1 Negotiation

Negotiation, in this context, consists of communication with a view to reaching an agreement on the contested issue.[58] It therefore entails the sharing of decision-making power.[59] The parties themselves hold full control over the matter. Negotiation always admits the presence of the Commission, or another European body, as a mediator in an impartial position.[60]

In current legislation we can find both situations of negotiation without a time limit and those with a time limit. The former is quite rare, however, as it

56 In general, G. Sydow & S. Neiddhardt, *Verwaltungsinterne Rechtschutz* (Baden Baden 2007), 133 ff.
57 J. Sommer, op. cit. *supra* note 28, 287.
58 See, in general, J.G. Collier & V. Lowe, *The settlement of disputes in international law* (Oxford 1999), 19 ff.; K. Hakapää, 'Negotiation', in: *Max Planck Encyclopedia of Public International Law* (www.mpepil.com).
59 H.C.H. Hofmann, 'Agreements in EU Law' [2006/31] ELR, 800 ff.
60 E. Vos, op. cit. *supra* note 16, 54 ff; J. Sommer, op. cit. *supra* note 28, 287 ff.

can lead to the paralysis of public action. To give an example, according to Article 30 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles,[61] if a Member State demonstrates that new vehicles, components or separate technical units accompanied by a certificate of conformity or bearing an approval mark do not conform to the approved type, it may ask the Member State which granted the EC type-approval to verify that this product continues to conform to the approved type; The latter state shall take the requisite action as soon as possible. However, if the Member State that granted approval disputes the failure to conform notified to it, the Member States concerned shall endeavour to settle the dispute.[62] The Commission shall be kept informed and, where necessary, shall hold appropriate consultations with a view to reaching a settlement.[63]

Negotiation with a time limit is more common and exceeding this limit can lead to two different consequences. First, it can result in the procedure ending without any outcome having been reached. This happens in the case of a disagreement between two national administrations over shipments of waste.[64] Where a notification is submitted regarding a planned shipment of waste destined for disposal (or for recovery), the competent authority of destination and recovery may raise reasoned objections (Article 11 and 12). If the problems giving rise to the objections are not resolved within 30 days, the notification shall cease to be valid. Where the notifier still intends to carry out the shipment, a new notification shall be submitted, unless all the competent authorities concerned and the notifier agree otherwise (Articles 11, para. 5 and 12, para. 4).

Alternatively, exceeding the time limit without reaching an agreement determines the necessity for a decision by a third body. In addition to the dispute regarding the mutual recognition of medicinal products,[65] the example can be given of the disagreement over the recognition of the registration of a low-risk biocidal (Directive 1998/8). Where a Member State believes that a low-risk biocidal product which has been registered by another Member State does not comply with the definition provided for in same Directive, it may provisionally

61 Consolidated version.

62 See also Art. 12 Dir. 97/68 of the European Parliament and of the Council of 16 December 1997 on the approximation of the laws of the Member States relating to measures against the emission of gaseous (consolidated version).

63 Art. 60 Reg. 178/02 – with regard to horizontal disputes concerning the execution of the same Regulation – foresees, in case of conflict, in addition to the Commission's mediation, the possible opinion of the European Food Safety Authority.

64 Regulation n. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (consolidated version).

65 Articles 28 ff. of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (consolidated version).

refuse registration thereof and shall immediately communicate its concerns to the home authority. If, within a period of 90 days, an agreement is not reached between the authorities concerned, the matter will be forwarded to the Commission for a decision in accordance with the management procedure (Article 4, para. 3).

This consensual mechanism presents some practical problems, however. For example, in the presence of subsequent disputes, the exact item under negotiation has to be determined. In the case of the refusal of recognition of a registration of a low-risk biocidal product (or of a medicinal product), it has to be clarified whether the agreement to be reached concerns only the refusal of the host state or also the act of registration itself. The broader solution appears preferable in that the public administrations involved can choose to reconsider the entire situation, including the initial authorisation. Indeed, the items under dispute are not the opinions expressed by the authorities involved, but the material situation itself. This type of solution, by contrast, implies the sharing of public interests protected by the authorities involved, which constitutes one of the legal conditions of dispute to be provided for (see § 4.1.). Thus, in the case of the recognition of biocidal products, the joint examination of the disagreement can lead either to the host state reconsidering its position (i.e. by recognising the registration) or to the home state concluding that the registration is incorrect and that it has to be revoked or modified. Obviously, this interpretation can cause serious problems regarding the protection of the rights of the private parties involved (see § 5).

3.2 Settlement Decisions of European Agencies and of the Commission

The second mechanism consists of the enactment of a binding decision taken at European level. From secondary norms it can be seen that, in many cases, settlement decisions have to be enacted either by the Commission (according to management or regulatory comitology procedure) or, although more rarely, by the Council, or increasingly in recent legislation, by a European agency.

Notwithstanding the numerous differences between these decision-making models, in current legislation we can recognise two common elements; 1) These decisions are the result of the convergence between national and European interests; 2) They often have effects not only on the conflicting parties, but also on other public bodies.

Turning to the first element: In these cases the legislator involves all the public authorities who participate in the sectorial union in the decision-making process. These participatory mechanisms guarantee that the composition becomes a common concern (see § 4.1.). As a consequence, all public interests, not only the those of the administrations in conflict, but also those of all the other states and of the European Union, are represented in the decision-making

procedure. Without taking into account decisions of the Council, according to the norms mentioned above the settlement measure presupposes the agreement between an office that represents the European interest and a body which represents, in collective form, those of the Member States.

This convergence of interests is evident in settlement procedures conducted by European Agencies: E.g. when the European Chemicals Agency has to settle a dispute originated by the opposition of a Member State to a draft decision under dossier evaluation, according to Articles 51 Regulation 1907/06, the unanimous agreement within the Member State committee on the draft decision proposed by the Agency itself is necessary. For settlement procedures conducted by the agency for the cooperation of energy regulators concerning a disagreement between national authorities regarding regulatory issues, Regulation 713/09 states that the agency shall adopt a decision only when two-thirds of the representatives of national authorities on the board of regulators have expressed a favourable opinion on the director's proposal (Articles 8, 14, 15 and 17). The same occurs for Europol. According to Article 52, of the Council Decision of 6 April 2009 establishing the European Police Office[66] any dispute between a Member State that has paid compensation (for damages caused to an individual as a result of legal or factual errors in data stored or processed at Europol) and Europol or another Member State over the principle or the amount of the reimbursement shall be referred to the Management Board (composed of representatives of all Member States), which shall settle the matter by a majority of two thirds of its members.

In these norms therefore, a great deal of weight is put on the positions expressed by the state administrations. This explains the differences between this form of dispute and those under hierarchical settlement provided for in the 2010 Regulations which state that members of the board of supervision of the European Authority – an office composed of heads of the national authorities, which shall also take decisions relating to horizontal disputes (Art. 19) – 'shall act independently and objectively in the sole interest of the Union as a whole'. In this case the convergence between national and European interests is not foreseen, as it is only the European interest which is important here.

Many European laws assign the task of issuing settlement decisions to the Commission, following management and regulatory comitology procedure.[67]

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66 O.J. 2009, L 121/37-66.

67 In addition to the norms mentioned in § 2.2., see also e.g., Articles 20 and 45 of Regulation no. 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (consolidated version); Articles 9 and 11, of Regulation no. 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods (consolidated version); Art. 54, of Regulation no. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (consolidated version).

The research begins to become more complex at this point, as it runs intothe complex theme of comitology.[68] Without going into greater detail on this particular issue, it can simply be noted that, under the previous legal discipline (and the previous Treaty), management and regulatory procedures were aimed at involving Member States in the exercise by the Commission of implementing powers delegated by the Council (Articles 202 and 211 TCE). As is well known, the Court of Justice has interpreted implementing powers quite extensively and their interpretations have included 'both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application', as well as measures of general scope designed to amend non-essential elements of the basic instrument.[69] The involvement of the standing committees had the function of aiding the execution of European law by the State administrations and moreover, it played a decisive role in the allocation of executive competences between the Commission and the Council.[70] Over the course of time, the EU Parliament has also gained a role in the comitology procedure (see Regulatory procedure with scrutiny).

In this context, management and regulatory procedures were, first and foremost, tools to obtain the committee's opinion on a draft measure proposed by the Commission. However, they also contain the discipline for eventual conflicts between the standing committee and the Commission.[71] A dispute arose when the committee delivered a negative opinion (or sometimes when no opinion was delivered). As a consequence, the Council and the Commission had to resolve the disagreement themselves, according to Article 4 or 5 of the Council decision 468/99.

It should be highlighted that at times a conflict between administrations (e.g. between Member States) had to be resolved by the Commission following the comitology discipline mentioned above. In these cases, the disagreement

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68 As is well known, the analysis of comitology is tricky as it has been studied from various legal and politological viewpoints and many divergent interpretations can be found on the matter: See e.g. K.F. Bergström, *Comitology* (Oxford 2005); J. Blom-Hansen & G.J. Brandsma, 'The EU Comitology System: Intergovernmental Bargaining and Deliberative Supranationalism?' [2009/47] *JCMS* 719-740; K. Caunes, 'Et la fonction exécutive eurpoéenne créa l'administration à son image ...' [2007/43] *RTDE* 297-346; P. Craig, *EU Administrative Law* (Oxford 2006), 99-142; R. Dehousse, 'Comitology: who watches the watchmen?' [2003/10] *JEPP* 798-813; I.P. Karolewski, 'Pathologies of Deliberation in the EU' [2011/17] *ELJ* 66-79; M. Savino, *I comitati dell'Unione Europea* (Milano 2005); R. Schütze, 'Delegated' Legislation in the (New) European Union: A Constitutional Analysis' [2011/74] *MLR* 661-693; M. Szapiro, 'Comitology: the ongoing reform', in: *Legal Challenges*, op. cit. *supra* note 7, 89; E. Vos, '50 Years of European Integration, 45 Years of Comitology', Maastricht Faculty of Law Working Paper n. 3, 2009, 29.

69 E.g. Court of Justice, Case C 23/75 *Rey Soda/Cassa Conguaglio Zucchero* [1975] ECR, 1279; Case C 16/88 *Commission/Council of the European Communities* [1989] ECR 3457; P. Craig, op. cit. *supra* note 1.

70 E.g. M. Szapiro, op. cit. *supra* note 68.

71 C. Joerges, op. cit. *supra* note 16, 10 s; E. Vos, op. cit. *supra* note 16, 55.

had already arisen, but a settlement had nevertheless to be reached through the same procedure.

In any case, the set of rules outlined above was indicative of the existence of two different centres of interests: that of the Member States and that of Europe. From a formal point of view, it could have been said that decision-making power was shared between the Commission and the standing committees. However, this interpretation was widely confuted, because the function of the standing committees was linked to the implementation role of the Commission and that of the Council.[72]

The Treaty of Lisbon has since simplified and clarified this area. Now, as well as having distinguished the procedures for the adoption of delegated acts (Article 290 TFEU) and implementing acts (Article 291, paragraphs 2 and 3 TFEU) by the Commission,[73] it has given the task of implementing European law above all to the states themselves. When implementing powers are conferred on the Commission, Member States have an autonomous power of control to exert in a collective form and they carry out these activities directly on the basis of the Treaty and not on behalf of the Council.[74] The Council now lacks power in these matters. The Member State power of control has a compensative function for the limitation of their areas of competence guaranteed by Article 291, paragraph 1.[75] In summary, under the Treaty of Lisbon the role of Member States carries greater weight over the implementing activity of the Commission than in the past (Art. 291 TFEU).[76]

Regulation n. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers[77] confirms this statement in full, as it now provides for the examination procedure instead of management and regulatory procedures (Article 13). According to Article 5, paragraph 3 of this Regulation where there

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72 See, for instance, Court of Justice, Case C-25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel/Köster* [1970] ECR, 1161; Court of First Instance, Case T-188/97 *Rothmans/Commission* [1999] ECR, II-2463.

73 R. Baratta, 'Sulle fonti delegate ed esecutive dell'Unione europea' (2011) *Il Diritto dell'Unione Europea*, 293-318; P. Craig, op. cit. *supra* note 1; B. De Witte, 'Legal Instrument and Law Making in the Lisbon Treaty', in: S. Griller & J. Ziller (Eds.), *The Lisbon Treaty* (Heidelberg 2007); H.C.H. Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality' [2009/15] *ELJ* 482-505; R. Schütze, op. cit. *supra* note 68.

74 R. Schütze, op. cit. *supra* note 68, 687 ff.

75 G. Sydow, 'Europäische executive Rechtsetzung zwischen Kommission, Komitologieauschüssen, Parlament und Rat' [2012/67] *JuristenZeitung* 157-165.

76 D. Curtin, *Executive Power of the European Union* (Oxford 2009), 117; H.C.H. Hofmann, op. cit. *supra* note 73.

77 (O.J. 2011, L 55/13-18). See R. Baratta, 'Introduzione alle nuove regole per l'adozione degli atti esecutivi dell'Unione' (2011) *Il Diritto dell'Unione europea* 255-281; P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', www.sssrn.com.

is a negative opinion from the committee, the Commission cannot adopt the measure (with the exceptions established in Articles 7 and 8). Where an implementing act is deemed to be necessary, the chair may either submit an amended version of the draft implementing act to the same committee within 2 months of delivery of the negative opinion, or submit the draft itself within one month of such delivery to the appeal committee for further deliberation (Article 5, para. 3). Following the negative opinion by a committee, the involvement of the Council is hence no longer foreseen.

The fact that the appeal committee – which should meet at the appropriate level (including Ministerial level) –[78]can play an important role in cases where there is dissent (Article 6), clearly demonstrates that in order to issue a measure the Commission must obtain the agreement of the majority of the Member States - either that of the representatives of the standing committees or those of the appeal committees (who as a general rule must be of a higher level than those on the standing committees). This means that the decision-making power has to stay inside the administrative sectorial unions and must be exercised following sectorial rather than political logic.

On the other hand, when the committee fails to deliver an opinion, the Commission itself can either adopt the implementing act or modify the proposal (see important exceptions set out in Articles 5, para. 4 and 5). As a general rule, therefore, the lack of expression of an opinion by the committee does not cause an administrative conflict. The position of the Commission is strengthened by this rule as the formation of a blocking minority preventing the committee from expressing an opinion, does not paralyse the implementing activity.[79]

Under Regulation 182/11 the Member States have a real function of co-decision making with the Commission.

Returning now to Commission decisions with the function of conflict resolution, it can be briefly noted that as the previously described regulation is also applied when the Commission must resolve an administrative conflict, which confirms that also in this case the settlement decision presupposes the convergence between state and European interests.

In the light of these considerations, the difference between the settlement activity of top-down disputes and the supervisory activity of the Commission and of European authorities should be clear. In the latter, all responsibility is placed at European level in accordance with this having a hierarchical position. In the former, on the other hand, the disagreement causes the displacement of the decision-making competence, which then has to be shared between the Commission and the standing committee. In this case the Commission and

78 Art. 1, para. 5 of Rules of procedure for the appeal committee (O.J. C 183/13-16).
79 Cfr. R. Baratta, op. cit. *supra* note 77.

the national authority involved remain on equal status, given that neither can resolve the problem autonomously.

3.3 Uniformity Effects inside the Sectorial Union

These settlement decisions, apart from involving a new exercise of administrative power regarding the same matter, have another important characteristic. They potentially have effects not only on the public parties in conflict, but on all the public bodies involved in the sectorial union.

Some examples could help to clarify this point. When a national administration is required to authorise the placing on the market of a good with the previous consent of other national authorities, in presence of an objection of a Member State or of the Commission (i.e. in the case of a dispute), the Commission itself has to take a decision according to the above-mentioned comitology procedures (e.g. Regulation 258/97, Directive 2001/18). If the European measure consists of a refusal of authorisation, it will be binding on all Member States, who could refuse a new request which does not take into account the reasons behind the previous refusal, without starting a new European procedure.[80] If a Member State refuses to recognise the marketing authorisation of a medicinal product, a negotiation procedure is foreseen, andif this fails, a comitology decision of the Commission is required (Articles 27 ff., Directive 2001/83). The outcome of this complex procedure could be a decision that forces the reluctant Member State to grant the recognition of the authorisation for its jurisdiction. Naturally, in this case further national recognition acts should then take into account the European decision (for instance the technical opinions delivered in the procedure on absence of risk to public health). But the outcome could also be a decision that other national authorisations granted to the same product should be revoked by all the Member States (Article 34, para. 3).[81]

To cite a further example, once the Agency for the Cooperation of Energy Regulators has identified, as a result of a settlement procedure, the terms and conditions for access to cross-border infrastructure according to Article 8 Reg-

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80 See, for instance, Court of Justice, Case C-327/09 *Mensch und Natur AG v. Freistaat Bayern*, unpublished: 'a Commission decision taken on the basis of Article 7 of Regulation (EC) No 258/97 (...) refusing authorisation to place on the market of the European Union a food or food ingredient is not binding on any persons other than the person or persons whom that decision specifies as its addressees. By contrast, the competent authorities of a Member State must establish whether a product marketed in the territory of that Member State, the characteristics of which appear to match those of the product which was the subject-matter of that Commission decision, is a novel food or novel food ingredient within the meaning of Article 1(2) of that regulation and, where necessary, they must require the person concerned to comply with the provisions of that regulation'. Cfr. De Lucia, *Amministrazione transnazionale*, op. cit. *supra* note 7, 128.

81 For low risk biocidal products, the unitary effect of the settlement decision enacted by the Commission is, however, slightly weaker (cfr. Art. 4, para. 6, Dir. 1998/8).

ulation 713/09, these terms and conditions could be binding also for other national authorities when they have to negotiate on this item, as well as for the agency itself when it has to settle other cross-border disagreements. In fact, the Commission itself, according to Article 8, paragraph 4 of the Regulation, 'may adopt Guidelines on the situations in which the agency becomes competent to decide upon the terms and conditions for access to and operational security of cross-border infrastructure'. In other words, the Commission may define *ex ante* the criteria on which basis trans-national disputes shall be settled.

These examples demonstrate that settlement decisions can imply complex legal and technical issues, the aspects of which may have effects that extend beyond those of the specific conflict itself. Indeed, these decisions can contain points of evaluation which can subsequently be used to deal with future problems. In other words, they can take the form of binding acts, aimed not only at resolving a dispute, but also at creating a uniform approach to the future conduct of the European and national administrations who form part of the sectorial union. Such decisions, given their legal implications, could potentially affect all authorities, albeit in differing measures. Hence the participation of all Member States in the decision-making process, through the procedures described above, is fundamental.

In conclusion, settlement decisions contribute to the filling of the decision-making space accorded to each body of the sectorial union, ensuring – at times through decision chains – the uniformity of implementation of EU norms. It should be clear at this point that these legal relationships, unlike supervisory ones, have a multilateral structure. In this type of dispute, administrative activity is aimed at reaching a balance of opinions widely shared between all the public players involved.

There is a further element that needs to be considered, however, as the unifying effects of settlement decisions create a potential instability in previous public decisions and a subsequent instability in the rights of individuals affected by them, a matter which will be touched on later in this paper (§ 5).[82]

3.4 Decision-making Criteria: Brief Remarks

A number of considerations have now to be formulated on the decision-making criteria that must be followed in settlement activity within the EU integrated administration. In order to do this, disputes under heterarchical settlement need to be distinguished from those under hierarchical settlement.

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82 With different terminology, K.H. Ladeur, 'Die Zukunft des Verwaltungsakts' [1995] *Verwaltungsarch* 511-530.

Due to the characteristics of supervisory activity, the function of the decision maker is to verify that national administrations involved in disputes comply with European norms. This is expressly stated by Regulation 1093, 1094 and 1095 of 2010, according to which decisions of European Authorities are aimed at ensuring 'compliance with Union law' (Article 19).[83]

This statement does not apply to disputes under heterarchical settlement, for which other decision-making criteria are valid.[84] To identify these criteria we must return once again to the area of comitology in general, which deals with this issue. As is well known, two contrasting ideas have been formulated when talking about comitology. On one hand, there is the negotiation thesis in which standing committees represent a mini-Council of Ministers and where the decisional style is that of intergovernmental bargaining where 'Member State representatives are careful watchdogs of their national interests'.[85] On the other hand, there is the deliberative thesis according to which standing committees are conceived as tools to ensure optimal problem solving not through bargaining, but through the presentation of convincing arguments based on technical evidence. This obviously implies a certain independence of the administrative measure from national interests.[86]

It should be noted that, in principle, this issue could also be applied to the decisions and activities of the European agencies when they must issue decisions with the prior consent of composite bodies of representatives from all the Member States (e.g. the Agency for the Cooperation of Energy Regulators or at times the European Chemical Agency and Europol). Despite the inherent characteristics of the EU agencies, in these cases a dynamic is reproduced which is in part comparable to that of the Commission with respect to the standing committees, i.e. of the means of mediation between national and European interests.[87]

This is a problematic area. First, because the normative dimension and the reality of the committees do not always coincide.[88] Second, as it is possible for the two ideas outlined above to coexist – at times the deliberative pattern pre-

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83 See also the Regulations mentioned *supra* in the note 55.

84 *Contra* T. Groß, *Die Produktzulassung von Novel Food* (Berlin 2001), 299, with regard to Reg. 258/97.

85 J. Blom-Hansen & G.J. Brandsma, op. cit. *supra* note 68, 719.

86 J. Neyer, 'The Deliberative Turn in Integration Theory', in: C. Joerges & J. Neyer (Eds.) *'Deliberative Suprationalism' Revisited*, Eui working papers n. 2006/20; F.W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' [1988] *Public Administration* 239-728.

87 See, in general, E. Chiti, op. cit. *supra* note 38; S. Lavrijssen & L. Hancher, op. cit. *supra* note 8; M. Shapiro, 'Independent Agencies', in: P. Craig & G. De Burca (Eds.), *The Evolution of EU Law* (Oxford 2011), 111-120, 116.

88 C. Joerges & J. Neyer, op. cit. *supra* note 18, 279.

vails,[89] and at other times the bargaining pattern prevails.[90] Third, because both of these ideas have significant consequences on the accountability mechanisms of the decision making process.[91]

This debate obviously also concerns decisions either from the Commission or the Agencies which are issued in order to resolve an administrative conflict. This subject cannot be examined in depth in this article, however it can be briefly noted that the aim of these procedures is to help both national and European public interests to come to the forefront (see § 4.2.). Nevertheless, the legal regulation of these forms of settlement decisions (similar to other measures issued according to these procedures), in reality leaves open both the possibility of a resolution following deliberative logic and one founded on bargaining. The prevalence of one resolution or the other depends on various factors such as, for example, the area in which the conflict arises, the importance of the interests involved, or the priorities of the national governments and political contingencies.[92] In any case, both possibilities are compatible with the legal framework illustrated above.

It must not be forgotten that the aim of institutional cooperation (e.g. standing committees and agencies) is not to emphasise the antitheses between public interests, but rather to search for agreement between the subjects involved. The objective, therefore, is to transform conflict into cooperation, and the two patterns outlined above can be useful to this end. The most important consideration here is the fact that, from a strictly legal point of view, the decisions must be based on persuasive and reasonable legal and technical arguments. Many settlement decisions can in fact directly affect individual rights and wherethis reasoning is lacking, they can be challenged in the Court of Justice of the European Union.

4 Constitutional and Functional Aspects of Administrative Disputes

In this section we will take a closer look at the constitutional and functional aspects of administrative disputes. In particular, we will examine the influence of the subsidiarity principle on the political choices of the European legislator where it regulates administrative disputes and establishes the mech-

89 E. Vos, op. cit. *supra* note 68, 29.

90 J. Blom-Hansen & G.J. Brandsma, op. cit. *supra* note 68; M.A. Pollack, 'Control Mechanism or Deliberative Domocracy. Two Images of Comitology' [2003] *Comparative Political Studies* 125-155.

91 E.g. G.J. Brandsma, 'Accountability deficits in European "Comitology" decisionmaking', in: *European Integration online Papers* (EIoP) Vol. 11 (2007); D. Curtin, 'Holding (Quasi-) Autonomous EU. Administrative Actors to Public Account', www.ssrn.com.

92 E. Vos, op. cit. *supra* note 68.

anisms for their resolution (§ 4.1.). This analysis will also clarify the functional aspects of the administrative conflict, which represents a tool protecting dissenting authorities who can question a decision taken by another authority. This presupposes that the conflict spreads through the sectorial union rather than through the courts (§ 4.2.).

4.1 Dispute Settlement and the Subsidiarity Principle

As mentioned above, the provision for and the disciplining of settlement procedures depends on the political choices of the European legislator, which is not free to act as it wishes however. It is not possible here to analyse the influence of European constitutional principles on the structure of the various sectorial unions and on the mechanisms provided for in managing disputes, as possible solutions vary depending on a number of factors, such as the level of protection of fundamental rights and the type of interests affected.[93] Nevertheless, the role played by the subsidiarity principle in relation with a) the conditions for providing for and regulating disputes which involve State administrations and b) the structure of the settlement procedures themselves, can be touched upon.

a) In order to understand the conditions necessary in the provision for disputes, it must first be underlined that the subsidiarity principle protects individual Member State competences not only towards European institutions and administrative bodies (i.e. in a vertical direction), but also towards other state administrations (i.e. in a horizontal direction).[94] As a consequence, every displacement of the decision-making power resulting from the dispute must be supported by an important 'substantive' collective need, which must be perceived as such by at least two administrations or by the entire sectorial union. This interpretation implies, in general, that the EU legislator cannot provide for a 'dispute under heterarchical settlement' in order to contest purely the illegality of the action of another administration, in which case the supervisory activity of the Commission, or the start of an infringement procedure or a judicial action for the annulment of an EU decision can be justified.

Regarding its vertical dimension in particular, the principle of subsidiarity requires that settlement mechanisms conducted at EU level be grounded in the need for uniform conditions across the sector. This rule, uncontested in the past, is today expressly confirmed by Article 291 TFEU for the implementing powers that the Commission has.[95] As a consequence, for example, the failure

93 G. Britz, op. cit. *supra* note 6, 49; M. Ruffert, op. cit. *supra* note 4, 761 ff.; in general M. Eekhoff, op. cit. *supra* note 45, 184 ff; R. Schütze, op. cit. *supra* note 3, 1400 ff; G. Winter, op. cit. *supra* note 9, 261 ff.; Ziller, op. cit. *supra* note 53.

94 G. Sydow, op. cit. *supra* note 5, 17 ff.

95 E.g. R. Schütze, op. cit. *supra* note 3.

of a negotiation (as a settlement mechanism) can represent in itself a reason to refer the decision-making power to European level, if only to ensure the efficient and uniform implementation of European norms.

According to the same principle in the horizontal direction, the interest of one Member State to have its own administrative act recognised by another state administration, is not, in the absence of other reasons, sufficient to justify the provision of a dispute. The following example can be used to illustrate this point: In light of a refusal of recognition of a host authorisation, as mentioned previously, some norms provide a settlement procedure (e.g. Article 4, Directive 98/8; Articles 28 ff., Directive 2001/83), whilst others do not (e.g. Directives 2005/36 and 2006/126). However, it would be inappropriate to affirm that in the former case the home administration is allowed to act in a protectionist way and is therefore able to negotiate a solution with the host state in favour of private companies in its own economic system.[96] Indeed, the dispute in the first case involves important common public interests (e.g. the environment and human health) and in order for an efficient resolution to be reached, the decision-making power must be displaced so as to allow the administrations directly involved or the entire sectorial union to give a coherent answer on the issue. This need is not perceived by the EU legislator in the second case, however problematic it may be, and therefore the mechanisms provided to resolve the disagreement are aimed solely at protecting the rights of private parties.

b) The principle of subsidiarity also affects the structure of settlement procedures. The displacement of decision-making power should be accompanied by an effective involvement of the parties involved. This corresponds, using the words of the Italian Constitutional Court, to a 'procedural and consensual' idea of subsidiarity.[97]

This dynamic is clear when the settlement mechanism is a negotiation. The same applies when the settlement function is to be passed over to the Commission. The involvement, also collectively, of all the administrations that participate in the sectorial union is indispensable here given the possible multilateral nature of the outcome (see § 3.3.). Moreover, it has to be noted that according to Article 197 TFEU, 'the effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest'. As a consequence, any significant pathologies in the cooperative mechanisms have to be confronted as a common concern by the entire sectorial union.

Clearly, the disciplining of all these procedures also has to comply with the principles of proportionality, efficiency and effectiveness. Given that in many cases these administrative activities are highly complex, the decision-making

96 C. Joerges & J. Neyer, op. cit. *supra* note 18, 288 f.
97 Italian Constitutional Court, decision 25 September 2003, n. 303.

process can become very lengthy as the EU legislator has to verify whether the benefits of an administrative solution prevail over that of a judicial solution, both in terms of resources and time and in compliance with the principle of effectiveness of EU laws.[98] In other words, the legislator has to ascertain whether the provision for the administrative dispute itself is worthwhile.

Different principles are valid for disputes under hierarchical settlement. In these cases the decision of the Commission or of the EU supervisory authority is based on their hierarchical position over national administrations. This therefore leads to the application of the normative pattern of supervision and not that of execution. The unitary principle here takes on a central role and, as a consequence, that of subsidiarity is sacrificed.

4.2 Functional Aspects

To fully understand the functional aspects of disputes within European composite administration, it is opportune at this point to return to the three forms of disagreement outlined above.

In 'simple disagreements', norms protect the interest of the dissenting administration, which can interfere with the activity of another authority. Only the competent court, called into action by the individual or public body concerned, has the power to resolve the matter. 'Qualified disagreement', on the other hand represents a tool to induce the proceeding authority to take into account the interests of another administration, without being deprived of its own decision-making power.

A 'real administrative dispute' (under heterarchical settlement) has more complex functional characteristics. On one hand, the possibility of raising a conflict means that the legal system intends to offer protection to the dissenting administrations, allowing them to stress the importance of a public interest affected by another public body's act or activity. On the other hand, the conflict forces the decisional power to be shared through negotiation or the use of the joint decision mechanisms discussed above.

The idea of a sectorial union is based both on rules on the division of administrative tasks as well as on cooperative links between the authorities concerned. In this context, the dispute presupposes the separation between the decision-making competence provided for in favour of a national or European office and the responsibility for the public interest involved which is shared between, or common to, a number of public bodies. Despite the fact that administrative competence is given to a single body, other administrations are in any case accountable to their communities for the protection of the same public interest. Conflict is, therefore, a tool to challenge an administrative act issued, or to be

98 In general, see A. Keessen, op. cit. *supra* note 22, 221 f.

issued, by a public body and can be used by Member States to achieve a different balance of interests. The raising of a conflict thus entails the activation of the responsibility of the dissenting authority.

Disputes represent tools which can be used to complete forms of cooperation by allowing deeper involvement on the part of the administrations who would otherwise be unable to exert any influence over the final decision; settlement mechanisms are forms of joint execution of European law. Sectorial unions, in these norms, allow important national or EU public interests to be represented in a pluralistic environment where they can be evaluated by every public administration involved. In contrast, 'disputes under hierarchical settlement' are based on the limiting of the autonomy of a national office so as to allow European bodies to impose their will on the case under consideration. These disputes here have the effect of making supervisory activity more efficient.

Clearly, in disagreements under heterarchical settlement the level of protection the administrations involved enjoy changes in relation to the structure of the sectorial union, the type of dispute and the settlement procedure concerned. The protection is more significant in a negotiation than it is in a decision taken by all bodies that make up the sectorial union. In pre-emptive disputes, the dissenting administration is in a stronger position as it can actually prevent the enactment of the decision itself. In subsequent disputes (e.g. safeguard measures), on the other hand, it is in a weaker position since an objection can only be brought up after the decision has been issued.

A further functional aspect should be considered here. Through the use of these mechanisms, disagreements can be kept within an administrative dimension. Settlement procedures exclude – at least initially – a judicial process.[99]

This characteristic is true above all in inter-administrative relations. In bottom-up disputes, conflict replaces a judicial action for the annulment of a European decision. For example, if a Member State is dissatisfied with a draft decision of the European Chemicals Agency enacted under Article 51 Reg. 1907/2006, it can challenge it by proposing an amendment and the subsequent referral of the matter to the Member State committee. In top-down disputes, conflicts are an alternative – besides the supervisory activity of the Commission – to infringement procedures. Since settlement decisions involve a new exercise of administrative power, here the jurisprudence of the Court of Justice on the compatibility between the control activities of the Commission and the infringement procedure seems not to be applicable.[100] In both situations then, the dis-

99 E. Vos, op. cit. *supra* note 16, 55.

100 E.g. Court of First Instance, Case T-461/93 *An Taisce and WWF UK v. Commission* [1994] ECR II- 733, § 35 f.; Court of Justice, Case C-325/94 P (same parties), [1996] ECR I-3727, § 22 ff. See also M. Eekhoff, op. cit. *supra* note 45, 184; A.J. Gil Ibàñez, *The administrative supervision and enforcement of EC law* (Oxford 1999), 115.

pute remains within an administrative dimension, to manage the disagreement according to the regulations illustrated above.

In horizontal relationships, real disputes go beyond the duty of mutual listening and impose the mediation of contrasting positions. They represent, therefore, an application of the general principle of sincere cooperation (Article 4 TFEU). The conflict here replaces the infringement procedure started by a Member State.

Furthermore, subsequent disputes in particular (e.g. the refusal to recognise a host authorisation) can have significant consequences for the private parties directly affected. The intention of the EU legislator is to prevent these parties from having to suffer the negative effects of disagreements between public administrations. It has therefore established that conflicts have to be kept within sectorial unions. They must, however, be settled maintaining a perspective where the main focus is on the balancing of public interests. As a result, the private parties involved play a recessive role (see also § 5).[101]

In order to better understand this matter, the following example can be given: If a Member State refuses to recognise a registration for the marketing of a low-risk biocidal product issued by another Member State, as mentioned above, negotiation between the dissenting authorities has to be carried out. In this case, the private interest is preserved first and foremost by the negotiation activity of the home administration.[102] The private party concerned can play an autonomous function only after the dispute is settled. Only at this point, if the outcome is unfavourable, can it be challenged in the competent court. Hence, these resolution procedures aim more towards helping public administrations to reach agreement on how to implement EU norms, than on protecting the private interests involved. However, in the case of a refusal of recognition where a settlement procedure is not established, the private party is in a central position as secondary law only allows for a national judicial process between the administration and the private individual concerned.

5 Consequences of Administrative Disputes on Private Parties

As mentioned above, settlement procedures can clearly have direct effects on the private sphere and when such interferences occur, many problems arise. This is the case with, for example, effective judicial protection or with private participation in settlement procedures. This matter has been studied by scholars over the last few years who have identified guiding principles

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101 In general E. Schmidt-Aßmann, op. cit. *supra* note 16, 22.
102 C. Joerges & J. Neyer, op. cit. *supra* note 18, 288 f.

on how to interpret the subject and how to cope with possible shortcomings in the legal system.[103] This section is devoted to a few considerations on the relationship between conflict within sectorial unions and private rights or, more specifically, the relationship between administrative pluralism and the stability of individual rights.

As previously mentioned, a settlement decision or the outcome of a negotiation can involve a certain flexibility in administrative acts, in order to permit a new balance of public interests to be reached. This flexibility is a consequence of the predominance of the organisational aspect over the substantive aspect which characterises European integrated administration.[104] This is a key issue for the protection of private rights and is true for all sectorial unions. However, it is particularly evident in the legislation on the internal market, where the activity of these unions allows the fruition of fundamental freedoms across the entire EU whilst at the same time protecting important public interests.

In this internal market legislation, the balance between these freedoms and public interests is potentially the result of either the convergence or the divergence between public interests – both outcomes very often originating from a dispute. In other words, many acts issued according to these norms do not represent a definitive regulation of the rights of private parties. They represent, in principle, elements of a complex system of European and national decisions and evaluations. A balance between a freedom and public authority can only emerge from the interconnection of these acts.[105] Norms on disputes attempt to resolve the contrast between public interests, potentially allowing progressive adjustment within sectorial unions. For this reason, these EU or national decisions produce a low level of stability for private rights.[106] The negative decision can be cited as an example of this. In some of the norms analysed above, the refusal to recognise a host authorisation is not definitive, but generates the start of a procedure to re-examine the matter.[107] The same occurs for safeguard measures.

The instability of administrative acts issued in this context obviously represents a reason for uncertainty for private parties. These EU laws, however, do not constitute a model of regulatory anarchy. The flexibility is not absolute in character, but is, rather, anchored to EU rules. In addition, the idea of sectorial

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103 See, for example, J. Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund* (Berlin 2004); A. Keessen, op. cit. note 22; A.H. Türk, 'Judicial review of integrated administration in the EU', in: *Legal Challenges*, op. cit. *supra* note 4, 218; F. Shirvani, 'Haftungsprobleme im Europäischen Verwaltungsverbund' [2011/46] *EuR* 919-635.

104 E. Schmidt-Aßmann, op. cit. *supra* note 16, 24.

105 In broader sense C.H. Ladeur, 'Towards a Legal Theory of Supranationality – the Viability of the Network Concept' [1997/3] *ELJ* 33-54, 43 ff.

106 In general, E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Heidelberg 2004), 335.

107 E.g. see Art. 4 Dir. 98/8 and Art. 14, par. 2. Dir. 2001/18.

unions should be instrumental in assuring a coherent and balanced implementation of EU law. It should also be considered that many of the norms mentioned above establish the fact that the private parties who are the beneficiaries of an authorisation have a duty to report the need to revoke or modify this act to the competent authority – for example, when there is a risk to public health.[108] This responsibility placed upon private undertakings can prevent instability from violating the principle of the protection of legitimate expectations.

This complex system represents a new field of investigation. One aspect in particular stands out, however: The fact that all these cooperative devices, despite their purpose being one of coordination, can, paradoxically, cause a potentially fragmentary situation. Safeguard measures are a good example of this. They almost always have a dual nature – first, as an administrative act that temporarily suspends, within a limited territory, a private activity and second, as an act which initiates a settlement procedure within a sectorial union. If the settlement procedure substitutes a judicial proceeding for the public administrations involved, individuals and firms, pursuant to the right to an effective remedy and to a fair trial may start a judicial proceeding in a national court against the safeguard measures themselves.[109] As a consequence, many public bodies, judges and administrations, may have the competence to take decisions regarding different aspects of the same activity carried out by a private party.

This situation highlights a fragmentary element of the system which is very difficult to govern. Pluralism, organised at an administrative level into sectorial unions, once again emerges in all its complexity and disorder with regard to judicial protection. This clearly generates important theoretical and practical questions.

To summarise, when examining European institutional pluralism traditional assumptions on national administrative law have been superseded. This is especially true for those assumptions which were widely accepted in continental countries postulating the centrality of administrative decisions as an expression of public authority. Once public authorities have been inserted into a pluralistic context, administrative decisions (including those of European nature) lose some of their authoritarian characteristics, allowing them to be adapted to socio-

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108 E.g. according to art. 20, para. 2, Dir. 2001/18, 'if new information has become available, from the users or other sources, with regard to the risks of the GMO(s) to human health or the environment after the written consent has been given, the notifier shall immediately take the measures necessary to protect human health and the environment, and inform the competent authority thereof'; see also Art. 14, Dir. 1998/8. J. Barnes, 'Reform and Innovation in Administrative Procedure', in: *Transforming Administrative Procedure*, op. cit. *supra* note 9, 1 ff. More in general on this issue see, for example, K.H. Ladeur, 'The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law', www.ssrn.com; R.B. Stewart, 'Administrative Law in the Twenty-First Century' [2003/78] *N.Y.L. Rev.*, 437-460.

109 See, as an example, the decision of the Administrative Regional Tribunal of Lazio, section I, 29 November 2004, n. 14477, that originated the interpretative decision of the Court of Justice Case C-236/01 *Monsanto Agricoltura Italy and others* [2003] ECR I-8105.

economic needs. They have lost their central role in the national legal systems and now have to be considered as segments of more articulated regulative systems.

6 Final Remarks

6.1 Brief Overview of Administrative Conflict

The aim of this article was to introduce and analyse administrative disputes within the EU integrated administration, by responding to the four questions formulated in the introduction.

With regards to the question of how the European legal system regulates administrative conflicts, the research conducted demonstrates that the legislator very often allows disagreement to assume a significant role in the administrative sphere. European legislation, however, regulates the disagreement between public authorities in different ways, evaluating the weight of the interested parties. At times, therefore, EU law allows the dissenting authority either to resolve the conflict autonomously or requires the administration in disagreement with a decision to follow a complex procedure. At other times the legislator attributes equal importance to the interests of the administrations involved, which is when 'real administrative disputes' arise. As has been seen, these are characterised, in addition to the disagreement itself, by the position of equality between the parties involved and by the provision of specific resolution mechanisms.

The differences between '*disputes under heterarchical settlement*' and the '*disputes under hierarchical settlement*' were also examined. In the former, the solution method is founded on procedures which allow for the balancing of the public interests involved. In the latter, the resolution of the conflict is expressed by the supervisory power of the Commission or of other EU authorities and therefore the European interest prevails over that of the national administrations.

In terms of the tools provided for the resolution of administrative disputes, the norms analysed provide for two mechanisms to resolve 'real administrative disputes'. The first is through negotiation between the administrations involved in the conflict. The second is that of the decision enacted at EU level. In 'disputes under heterarchical settlement' this tool leads to weaker protection for the parties concerned in favour of the involvement of the entire sectorial union.

Regarding constitutional principles, it has been seen that the subsidiarity principle plays an important role, requiring the legislator to provide for a conflict only when there is a real sharing of substantive interests between the public bodies involved or the entire sectorial union. Concerning the functional profiles of administrative conflict, this article demonstrates that the administrative dispute represents a tool for offering protection to dissenting administrations in the face of a decision issued or to be issued by another authority. The former,

through means of the activationof a conflict, can in fact solicit an administrative procedure in order to reach a different balance of interests.

Finally, conflict resolution mechanisms have been seen to have a potentially significant effect on private parties. For example, administrative conflicts cause a certain degree of flexibility and a consequent instability in administrative acts. Moreover, in certain cases, some overlapping can occur between the conflict resolution procedures and those for the jurisdictional protection of private parties. This can give rise to a form of fragmentation inside the whole system.

To sum up, it can be stated that the concept of sectorial unions is important in the understanding of the issue of conflict within European integrated administration in that very often they succeed in turning *Eris* (administrative conflict) into *Philia* (cooperation).

6.2 Future Perspectives

The subject analysed in this paper, together with that of European integrated administration, raises a number of issues concerning the future perspectives for the study of this branch of European law.

First, due to the fact that the issue of administrative disputes is likely to assume a more important role in the life of the European Union than the one it has had until today. This is for two reasons: 1) owing to the significant rise in the total number of Member States, which in turn could increase the level of conflict within the system,[110] and 2) due to the clearer role that the Treaty now assigns to national authorities in the implementation of European norms (Article 291 TFEU). Moreover, the Treaty of Lisbon seems to have consecrated the idea of integrated administration as one of the protagonists of European administrative law (see Article 197 TFEU). As a consequence it is important to abandon an idealised, peaceful vision of integrated administration in order to adhere to a more realistic vision which considers conflict between public interests as one of the founding elements of the European multilevel system.

Second, the subject of disputes highlights a gap between normative and judicial dimensions. In legal norms, many settlement mechanisms are foreseen, but judicial rulings referring to settlement decisions are far fewer. This situation could be interpreted as signifying that European composite administration has only potentially conflicting characteristics, but that in reality disputes do not play such an important role. The possibility itself of expressing disagreement may represent a tool to reassure national authorities and to make cooperation easier. There is, however, another possible explanation: That the settlement mechanisms which exist are efficient and allow conflict to remain within the

[110] F. Bignami, op. cit. *supra* note 18; T. Christiansen, M. Alfè & S. Piedrafita, 'Comitology Committees in the Enlarged European Union', ARENA working papers, n. 18/08.

administrative sphere, preventing it from assuming a judicial nature. This would mean that, in these cases, joint decision mechanisms do not represent a form of 'trap', as some have stated.[111]

In order to interpret the gap between these two dimensions and to really understand the functioning of this EU system, the administrative reality should be adequately studied from the point of view of data analysis as well as that of national and European administrative praxis knowledge.[112] However, this kind of analysis is particularly arduous, if only for the difficulties in gathering data and other pertinent information. In addition, any generalisations would be inappropriate due to the fact that the level of conflict can vary depending on many contingent factors. Nevertheless, these difficulties serve to heighten the necessity for further adaptation of legal method which should (especially in continental countries) exploit other sciences in order to conduct more complete research.

The final issue about the future perspectives of the material can be formulated as a question: Does European integrated administration with all its implications force us to rethink, or at least to update, traditional ideas about the relationship between private parties and public administrations? The research underlying this article consolidates the impression that, in the EU context, the unitary character which once pervaded the traditional concept of this relationship has undergone a profound change.

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111 F.W. Scharpf, op. cit. *supra* notes 86 and 51.

112 A. von Bogdandy, 'Verwaltungsrecht im europäischen Rechtsraum – Perspektiven', in: A. von Bogdandy, S. Cassese & P.M. Huber (Eds.), *Handbuch Ius Publicum Europeum* (Heidelberg 2011), 3-35.