

A Network of Social Security Bodies – European Administrative Cooperation under Regulation (EC) No 883/2004

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Abstract

The EU regime on the coordination of social security contains rules and principles on cross-border administrative cooperation. Using these legal mechanisms, a number of structures for cooperation have been established with the Administrative Commission taking a central role. Within these structures, national social security bodies provide assistance, directly communicate, solve conflicts of interpretation and exchange information, notably through the developing European Electronic Social Security Information (EESSI) infrastructure. The article explores this cooperation in the light of theories on administrative networks. It is concluded that the flexible network structures present within the field may increase efficiency and simplify the exercise of rights of free movement. At the same time, the complexity of the system raises questions of democratic accountability and legitimacy of the decision making. It is suggested that adhering to the principles of the allocation of decision making competence provided by the regulations may provide a partial solution to those concerns.

I Introduction

The coordination of social security benefits under European Union (EU) law calls for administrative cooperation between social security bodies in different member states. In order to take periods of insurance for social benefits in other member states into account, an exchange of information is necessary. Furthermore, these bodies may need to cooperate in order to solve problems arising in individual cases. There may also be advantages in social security experts from member states sharing experiences. For all of these kinds of cooperation, there are rules under the EU system of coordination of social

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security provided for in Regulations (EC) No 883/2004 and 987/2009.¹ The importance of administrative cooperation is made clear in the preamble to the latter regulation:

‘Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) No 883/2004 to access their rights as quickly as possible and under optimum conditions.’²

The regulations form part of a wider pattern under EU law and provide several examples of administrative cooperation structures.³ In social security law, good administrative cooperation has sometimes been labelled ‘the fifth principle of European Social Security law’, together with the four material principles of equal treatment (non-discrimination), aggregation of insurance periods, single applicable legislation, and exportability of social security benefits.⁴ At a general level, legal scholarship has increasingly identified administrative cooperation in the form of networks as an important feature of EU administrative law. Nevertheless, the administrative aspects of coordination of social security in Europe have often been overshadowed by the important and complex material rules, and there are few detailed accounts.⁵ This article aims to describe and discuss this cooperation within the framework of the regulations.

¹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, *OJ* 2004 L 166/1; Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, *OJ* 2009 L 284/1.

² Recital 2 in the preamble to Regulation (EC) No 987/2009.

³ See R. Pitschas, ‘Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft’, in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 130 and 162.

⁴ See Y. Jorens, & J. Hajdú, European Report 2008 – Training and reporting on European social security (Tress), European Commission/Ghent University, available at www.tress-network.org (accessed 19.4.2013), 9; S. Van Raepenbusch, ‘The role of the Court of Justice in the Development of Social Security Law of Persons Moving within the European Union’, in *50 years of Social Security Coordination, Past – Present – Future. Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security Prague, 7 & 8 May 2009* (Luxembourg 2010), 29-54, at 30; cf. recitals 8, 10, 18a, and 37 in the preamble to Regulation (EC) No 883/2004.

⁵ A thorough commentary in German to the relevant provisions is, however, found in the contributions by Cornelissen and Spiegel in M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), which has been an important source of information and argument for this article; in Swedish, concerning Regulation (EEC) No 1408/71, L. Westerhäll, *Social trygghet och migration. Kommentarer till förordningen 1408/71 om tillämpningen av systemen för social trygghet när anställda, egenföretagare eller deras familjemedlemmar flyttar inom Gemenskapen* (Stockholm 1995), 480-504 covers the relevant provisions of the previous regulation; see also R. Pitschas, ‘Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft’, in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169 discussing important elements of the administrative cooperation in the field.

As is well known, the concept of what exactly ‘administrative’ means is disputed and lacks a generally accepted definition in the international context.⁶ Furthermore, the organisational structure in the social security field differs considerably between, and even within the member states. Whereas some states in some areas of social security leave the decision making to public bodies, other states and areas organise social security administration through private or semi-private insurance funds.⁷ The organs of the national social security systems are referred to here as ‘social security bodies’, unless a more specific description is required. For the international interaction between social security bodies, public or private, the term ‘administrative cooperation’ is used.

The duties and forms of administrative cooperation between bodies of the member states is, to a large extent, dependent on the special structure of EU coordination of social security law. Although this is a field of indirect administration, there is practically no harmonisation of the material rules on social security. Instead, the EU regulations provide a division of competences between the member states, stating which social security legislation shall apply in a given situation.⁸ This model may be linked to the legal principles of subsidiarity and proportionality, as well as the political reality.⁹ Owing to the varying historical, economic, and societal developments, there are important differences between national rules and administrative structures concerning social security. The task of administrative cooperation is to ensure coordination between these different systems runs as smoothly as possible.

The administration of social security coordination provides an example of a rather complex form of multilevel or network governance, which, in addition, concerns possibly sensitive political issues. In this article, this cooperation is explored and discussed in the light of theories on international administrative networks. After some notes in part 2 on the scholarly discussions on international administrative networks, especially in the EU law context, the article looks into the organisational structure for administrative cooperation in EU social security law (part 3), and the different cooperation mechanisms in the field under Regulations (EC) No 883/2004 and 987/2009 (part 4). Lastly, some general topics against the background of the preceding discussions are highlighted in part 5.

⁶ See E. Loebenstein, *International Mutual Assistance in Administrative Matters* (Wien – New York 1972), 18-36; J. Schwarze, *European Administrative Law* (Revised 1st ed. London – Luxembourg 2006), 11-20.

⁷ See R. Pitschas, ‘Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft’, in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 146.

⁸ See F. Pennings, *European Social Security Law* (5th ed. Antwerp 2010), 6-7.

⁹ See the reference to the principles in recital 45 in the preamble to Regulation (EC) No 883/2004.

2 International Social Security Law and European Administrative Networks

As in other parts of public administration, social security law has been influenced by the phenomena commonly referred to as globalisation, internationalisation, or Europeanisation.¹⁰ The traditional territoriality principle (excluding administrative activities in relation to the territories of other states, for example in the form of cooperation between authorities or service of documents across borders) has gradually lost importance. This development, which is particularly clear in the cooperation within the European Union, has meant that administrative law and social security law have severed the traditional attachment to the nation state that has long been viewed as a cornerstone of public law.¹¹ In today's Europe, and in many instances, national administrative bodies in various fields must apply supranational rules in the form of EU law or national rules based on international agreements. They will also have to cooperate across borders.¹²

In the field of EU social security law, the Europeanisation takes place partly within the framework of the regulations on coordination of social security systems. The regulations provide rules and principles for determining the competent state in a given situation, as well as rules on the exclusive competence of this state. If a state is not competent in an individual matter, it remains passive. In contrast to regimes under private international law, a member state's social security body is never required to apply foreign social security legislation.¹³ The use of the coordination mechanism means that the member states, within certain limits concerning discrimination, may design their social security rules according to the economic, social, and political preconditions in their respective states, with the regulation merely distributing competence between the states.¹⁴ As will be dealt with in more detail below, social security bodies of different

¹⁰ See B. Kingsbury, N. Krisch & R.B. Stewart, 'The Emergence of Global Administrative Law', 68 [2005] *Law and Contemporary Problems*, 15-61, at 20.

¹¹ See J. Schwarze, *European Administrative Law* (Revised 1st ed. London – Luxembourg 2006), 1441; H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 785, see also concerning the historical context R. Schuler, *Das internationale Sozialversicherungsrecht der Bundesrepublik Deutschland* (Baden-Baden 1988) 152-160.

¹² See generally on the development of EU administrative law H.C.H. Hoffmann, G.C. Rowe & A. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011), 4-11.

¹³ Cf. K. Vogel, 'Administrative Law, International Aspects', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law, Volume I* (Amsterdam 1992), 22-27, at 25.

¹⁴ See recital 4 in the preamble to Regulation (EC) No 883/2004: 'It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.'; R. Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 139-142.

member states will then have to cooperate in various manners in order to make this system of coordination work in practice.

An important point of departure for discussions in EU administrative cooperation is the procedural and institutional autonomy of the member states. EU Law – as other forms of international cooperation – builds a great deal on the existence of established national administrative structures to enforce the legal rules in the cooperation. Thus, in the absence of EU rules on administrative procedure in a certain field, the member states may freely organise their public administration bodies and select the procedural rules that are appropriate to the national legal, historical, and social setting. However, through the principles of equivalence and effectiveness, as well as principles on fundamental rights, EU law places certain constraints on this freedom.¹⁵

The growing importance of international aspects of administrative law has led to scholarly discussions on international and European administrative law.¹⁶ Among other things, these discussions have highlighted the emergence of administrative networks. In legal discourse, the development of administrative networks has been identified as a part of the internationalisation of public law and social security law mentioned above. Thus, it has been argued, traditional hierarchical structures within the states are in part replaced by cross-border networks of parallel administrative bodies in different states.¹⁷

The concept of administrative networks in the EU context is rather vague, covering various aspects of cooperation structures between national administrative bodies but also between these bodies and EU bodies, including the Commission.¹⁸ According to Anne-Marie Slaughter, a network constitutes

¹⁵ See Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989; H.C.H. Hoffmann, G.C. Rowe & A. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011), 12.

¹⁶ For a German legal perspective ('Internationales Verwaltungsrecht') see C. Möllers, 'Internationales Verwaltungsrecht: Eine Einführung in die Referenzanalysen', in: C. Möllers, A. Voßkuhle & C. Walter (ed.), *Internationales Verwaltungsrecht* (Tübingen 2007), 1-7; in the same volume M. Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts', 395-419, at 397-402; in American legal scholarship ('Global Administrative Law'); B. Kingsbury, N. Krisch & R.B. Stewart, 'The Emergence of Global Administrative Law', 68 [2005] *Law and Contemporary Problems*, 7-61; in a Scandinavian (Swedish) perspective ('International Administrative Law') H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 760.

¹⁷ See B. Kingsbury, N. Krisch & R.B. Stewart, 'The Emergence of Global Administrative Law', 68 [2005] *Law and Contemporary Problems*, 7-61, at 21.

¹⁸ See H.C.H. Hoffmann, G.C. Rowe & A. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011), 307.

‘[...] a pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the “domestic” from the “international” sphere.’¹⁹

The key point of the definition is the network as a nexus of national administrative bodies, acting in a cross-border fashion. Discussions on international administrative networks have often focused on the informal and non-hierarchical aspects.²⁰ In a legal context, however, not least the formal and hierarchical elements of cooperation need to be highlighted. Therefore, and because of the indistinctness of the network metaphor, the alternative term *international composite administration* has been suggested.²¹ However, although the term *network* might be criticised for its vagueness, it seems to be too well established in legal discourse and other fields of research for it to be replaced with another term.²² The term *network* will be used below for discussing the cross-border legal relationships between administrative bodies.

Within the broad definition of international administrative networks, categorisation is needed in order to grasp legal phenomena related to such structures of cooperation. In this context, Slaughter discusses the three fundamental, and partly overlapping, categories of *enforcement networks* for carrying out the tasks of national authorities more effectively across borders, *harmonisation networks* for coordinating and adjusting national rules, and *information networks* for the exchange of data and ‘best practices’. Through these types of networks, national administrative bodies can work together and take advantage of the different experiences of national systems.²³

¹⁹ See A.-M. Slaughter, *A New World Order* (Princeton 2004), 14.

²⁰ See B. Kingsbury, N. Krisch & R.B. Stewart, ‘The Emergence of Global Administrative Law’ 68 [2005] *Law and Contemporary Problems*, 15-61, at 21: ‘*Transnational networks and coordination arrangements* [...] are characterized by the absence of a binding formal decision making structure and the dominance of informal cooperation among state regulators.’; (critical) A. von Bogdandy & P. Dann, ‘International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority’, 9 [2008] *German Law Journal* 2013-2038, available at www.germanlawjournal.com/index.php?pageID=11&artID=1052 (accessed 19.4.2013), at 2018.

²¹ See A. von Bogdandy & P. Dann, ‘International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority’, 9 [2008] *German Law Journal* 2013-2038, available at www.germanlawjournal.com/index.php?pageID=11&artID=1052 (accessed 19.4.2013), at 2018.

²² See further the arguments put forward in P. Craig, ‘Shared Administration and Networks – Global and EU Perspectives’, in: G. Anthony, J.-B. Auby, J. Morison & T. Zwart (eds), *Values in Global Administrative Law* (Oxford – Portland 2011), 81-116, at 102-103, mentioning the use of the network term in EU nomenclature.

²³ See A.-M. Slaughter, *A New World Order* (Princeton 2004), 51-61.

With respect to the EU, Paul Craig has further developed this categorisation. Looking at administrative network structures in the light of traditional discussions on the dichotomy of centralised and shared administration in the EU, Craig identifies several examples of administrative network structures in the EU. Most of these are found within the field of shared administration. It should be noted here that the coordination of social security falls within this field. Besides underlining the importance of Slaughter's *enforcement networks*, for example the combat of fraud, and *information networks*, for what he labels 'the efficient pooling of knowledge', he also discusses the use of *policymaking networks* such as comitology, *regulatory networks* such as the standard setting under the New Approach to Technical Harmonisation and Standards, and *support networks* helping individuals to safeguard their rights under EU law.²⁴ Other commentators have suggested somewhat different categories.²⁵ The different categorisations indicate that various aspects of networks may be discerned and that administrative networks in the EU are not a closed category.

Together with other legal mechanisms such as general principles of EU law and rules on coordination, harmonisation, and mutual recognition, the network structures contribute to the establishment of a common administrative space within the EU. Important features within this space are direct contact and the cooperation between national administrative bodies in different countries.²⁶ Some commentators have seen this development as an expression of federal structures of EU law in the administrative field.²⁷ Others have argued the contrary, that the EU's integrated administration replaces the hierarchical concepts of federalism.²⁸ International administrative networks may render cross-border cooper-

²⁴ See P. Craig, 'Shared Administration and Networks – Global and EU Perspectives', in: G. Anthony, J.-B. Auby, J. Morison & T. Zwart (eds), *Values in Global Administrative Law* (Oxford – Portland 2011), 81–116, at 84–101.

²⁵ See Eleanor D. Kinney, 'The Emerging Field of International Administrative Law', 54 [2002] *Admin. L. Rev.* 415–433, 425–427 discussing *networks of national regulators working in context of established public international organisations*, *networks of national regulators established pursuant to an overall agreement negotiated by heads of state*, and *networks of national regulators that evolve outside any formal framework*; H.C.H. Hoffmann, G.C. Rowe & A. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011), 307–311 discussing, among other categories, *planning networks* and *transterritorial administrative activity*.

²⁶ See H.C.H. Hoffmann, G.C. Rowe & A. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011), 4 (at footnote 4).

²⁷ See generally on executive federalism K. Lenaerts & P. van Nuffel, *European Union Law* (London 2011), margin number 17–002 (at 688); Cf. in the context of recognition of foreign administrative decisions S. Michaels, *Anerkennungspflichten im Wirtschaftsverwaltungsrecht der europäischen Gemeinschaft und der Bundesrepublik Deutschland* (Berlin 2004), 206–207; G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Tübingen 2004), 248; H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 768.

²⁸ See H.C.H. Hofmann & A. Türk, 'The Development of Integrated Administration in the EU and its Consequences' [2007] 13 *ELJ* 253–271, 262; C. H. Hofmann, C. Rowe & A. Türk *Administrative Law and Policy of the European Union* (Oxford 2011), 262; A. von Bogdandy & P. Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority', 9 [2008] *German Law Journal* 2013–2038,

ation more effective and flexible. At the same time, commentators have raised concerns regarding the legitimacy and accountability of network governance.²⁹ The clear allocation of responsibilities has been identified as a crucial factor for establishing structures for accountability.³⁰

3 Organisational Structure in EU Social Security Coordination

In order to understand the network structures in social security coordination within the EU, it is necessary to identify the administrative organs active in the field. Through Title IV of Regulation (EC) No 883/2004, an administrative structure within the EU is entrusted with certain tasks in the coordination of social security benefits, thus complementing the tasks of the member states and the EU Commission. The organisational structure and tasks of those national and European bodies is outlined below.

Since the EU legal regime in the field of social security is based on coordination, the national administrative bodies have a central function. Under the institutional autonomy touched upon above, the member states are free to organise their social security sectors in a way that reflects the national historical, economic, and societal development of the member states. As mentioned before, the administrative structures in the field of social security vary considerably between the member states. In addition, the organisation may differ between different fields of social security within a member state. To cope with these different structures, the regulations use the terms ‘competent authority’ and ‘competent

available at www.germanlawjournal.com/index.php?pageID=11&artID=1052 (accessed 19.4.2013), at 2013.

²⁹ See A.-M. Slaughter, *A New World Order* (Princeton 2004), chapters 5 and 6.; P. Craig, ‘Shared Administration and Networks – Global and EU Perspectives’, in: G. Anthony, J.-B. Auby, J. Morison & T. Zwart (eds), *Values in Global Administrative Law* (Oxford – Portland 2011), 81-116, at 109-116; R. Pitschas, ‘Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft’, in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 166.

³⁰ See E. Schmidt-Aßmann, ‘Verwaltungskooperation und Verwaltungskooperationsrecht in der europäischen Gemeinschaft’ [1996] *EuR* 270-301, at 296; idem, ‘The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship’, 9 [2008] *German Law Journal* 2061-2080, available at www.germanlawjournal.com/index.php?pageID=11&artID=1054 (accessed 19.4.2013), at 2076; R. Pitschas, ‘Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft’, in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 135.

institution', as defined in article 1 of Regulation (EC) No 883/2004.³¹ Furthermore, under article 1 of Regulation (EC) No 987/2009, the member states shall designate 'liaison bodies', as being responsible for responding to requests concerning information and assistance.³²

Despite the highly decentralised EU rules, the field still has an important EU body, namely the Administrative Commission. There was a provision for the establishment of such an organ as early as in Regulation No 3 from 1958, and in the subsequent Regulation (EEC) No 1408/71. This body has its roots in a planned European convention on social security for migrant workers, which predates the EEC and thus deviates from other established forms of cooperation within the EEC.³³ As early as 1967, the Administrative Commission was labelled an 'institutional curiosity' in legal scholarship.³⁴

Article 71 of the current Regulation (EC) No 883/2004 provides for the existence of this body, now named the Administrative Commission for the Coordination of Social Security Systems (Administrative Commission).³⁵ This body is composed of one representative from each member state and one EU Commission representative.³⁶ The Administrative Commission's main tasks are to clarify

³¹ In the French language version, 'autorité compétente' and 'institution compétente'; in the German language version, 'zuständige Behörde' and 'Träger'; see also article 1 of Regulation (EC) No 987/2009.

³² In the French language version, 'organisme de liaison'; in the German language version, 'Verbindungsstelle'; see R. Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 147.

³³ Articles 43 and 44 of Règlement no 3 concernant la sécurité sociale des travailleurs migrants, JO 1958 30/561 (French edition); articles 80 and 81 of Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ 1971 L 149/2, English special edition Series I Chapter 1971(II), 416; on the background, see R. Cornelissen, 'Artikel 72', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 6-11 (at 386-388); on the Administrative Commission in the light of the discussions on the institutional structure of the European cooperation in the 1950s, see C.-F. Bergström, *Comitology. Delegation of Power in the European Union and the Committee System* (Oxford 2005), 48.

³⁴ See H.H. Maas, 'The Administrative Commission for the Social Security of Migrant Workers. An Institutional Curiosity', 4 [1967] *CML Rev.* 51-63.

³⁵ In the French language version, 'Commission administrative pour la coordination des systèmes de sécurité sociale', in the German language version, 'Verwaltungskommission für die Koordinierung der Systeme der sozialen Sicherheit'.

³⁶ Cf. recital 38 in the preamble to Regulation (EC) No 883/2004, stating the necessity of establishing such a commission; see also article 1(n) of the same regulation concerning the abbreviated title. Under Regulation (EEC) No 1408/71, the official name was 'Administrative Commission on Social Security for Migrant Workers', on the policy changes reflected in the new name under the new regulation, see R. Cornelissen, 'Artikel 72', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 1 (at 385).

issues concerning the regulations' application and interpretation, to promote the exchange of experience, to make proposals to the Commission concerning amendments to the regulations, and to contribute to the development of administrative cooperation in other ways (article 72).³⁷ A central function is thus to support the cooperation between the national social security bodies.³⁸ In this capacity, the Administrative Commission issues decisions and recommendations on the interpretation of the regulations. Following this, the Administrative Commission, after referral from national organs, has the task of reconciling diverging views on interpretation by different member states.³⁹

Apart from its activity of issuing interpretative decisions, the Administrative Commission also lays down detailed provisions for the application of certain regulation rules.⁴⁰ In this way, the Administrative Commission has in practice a kind of delegated rule making or implementing power, based on Regulations (EC) No 883/2004 and 987/2009.⁴¹ It also decides on technical arrangements for exchanging data,⁴² establishes annual statements of claims between the member states,⁴³ presents studies,⁴⁴ and provides information for the public⁴⁵.

From an EU constitutional law perspective, the status of the Administrative Commission is far from clear. According to article 71 of Regulation (EC) No 883/2004, it shall be attached to the (EU) Commission with secretarial services provided by the Commission. Nevertheless, the Administrative Commission is independent from the Commission. Apart from the wording of article 71

³⁷ For detailed comments on the duties of the Administrative Commission under article 72, see Cornelissen, 'Artikel 72', in M. Fuchs (ed.), *Europäisches Sozialrecht* (2010) margin numbers 25-58 (at 390-398).

³⁸ See R. Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 145-146.

³⁹ Concerning the voting rules of the Administrative commission, see article 71(2) subparagraph 2 of Regulation (EC) No 883/2004 referring to the voting rules of the treaty; see article 48 TFEU; article 9 of the Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission of 16 June 2010, *OJ* 2010 C 213/20; European Commission, *Report on the Activities of the Administrative Commission for the Coordination of Social Security Systems 2010*, 6, remarking that the previous rules meant that unanimity was needed; cf. article 8 of the Rules of the Administrative Commission on social security for migrant workers attached to the Commission of the European Communities, *OJ* 2005 C 119/3.

⁴⁰ Articles 19(2), 33(2), and 34(2) of Regulation (EC) No 883/2004, and articles 31(4), 43(3) second subparagraph, 52(2), 61, 62, 64(6), 75(3), 88(3), and 90 of Regulation (EC) No 987/2009.

⁴¹ Cf. the possibilities of delegating rule making and implementing power to the Commission under articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU).

⁴² Articles 4 and 95 of Regulation (EC) No 987/2009.

⁴³ Article 69 of Regulation (EC) No 987/2009.

⁴⁴ Article 87(10b) of Regulation (EC) No 883/2004, and articles 64(5), 86, and 91 of Regulation (EC) No 987/2009.

⁴⁵ Article 89 of Regulation (EC) No 987/2009.

(‘attached to’⁴⁶), this is also clear from the rules on voting in the Administrative Commission. Although an EU Commission representative attends Administrative Commission meetings, this is, according to article 71, only in an advisory capacity. There are no direct counterparts to the Administrative Commission in other EU policy fields, and it does not fit into the categories of European agencies or comitology committees.⁴⁷ Conceptually speaking, the Administrative Commission has a *sui generis* character in the EU constitutional architecture. Thus, it might be compared to an international administrative union, although clearly within the framework of EU law.⁴⁸ As mentioned previously, this is also the background to the Administrative Commission.

The composition of member state representatives taken together with the attachment to the Commission means that the Administrative Commission will have to safeguard both the interests of the member states individually, and the interests of the EU as a whole.⁴⁹ In this context, the interests of individuals concerning free movement may be included in the latter category.⁵⁰ To a certain extent, the activities of the Administrative Commission will take place in the grey area between legal and political argumentation. When it comes to suggesting amendments to the regulations, the Administrative Commission has the complex task of proposing changes that are technically, legally, and politically acceptable for the member states and the EU as a whole. It is, however, for the Commission to submit proposals on amendments to the European Parliament and the Council.⁵¹

⁴⁶ In the French language version, ‘...instituée auprès de la Commission des Communautés européennes...’; in the German language version, ‘... bei der Kommission der Europäischen Gemeinschaften eingesetzt...’ Cf. article 1 of Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission of 16 June 2010, OJ 2010 C 213/20: ‘The Administrative Commission is a specialised body of the European Commission [...]’.

⁴⁷ Cf. R. Cornelissen, ‘Artikel 72’, in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 14 (at 388).

⁴⁸ See generally L. de Lucia, ‘Conflict and Cooperation within European Composite Administration (Between Philia and Eris)’, 5 [2012] *REALaw*, 43-77, at 45, discussing the concept of sectorial unions within the EU.

⁴⁹ Cf. the discussion in R. Cornelissen, ‘Artikel 72’, in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 12 (at 388); On the historical concept of administrative unions, see R. Wolfrum, ‘International Administrative Unions’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008), online edition, available at www.mpepil.com (accessed 19.4.2013).

⁵⁰ Cf. H. Wenander, ‘Recognition of Foreign Administrative Decisions’, 71 [2011] *ZaöRV* 755-785, at 761-762.

⁵¹ See R. Cornelissen, ‘Artikel 72’, in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 57 (at 397-398); articles 48, 289(1), and 294(2) TFEU.

The lack of clarity concerning the constitutional status of the Administrative Commission is reflected in the legally ambiguous character of its decisions on the interpretation of the regulations. Under the regulations, it is clear that the Administrative Commission has the role of issuing such decisions. Decision making, however, should be ‘without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the Member States, by this Regulation or by the Treaty’, according to article 72 (a) of Regulation (EC) No 883/2004. The Court of Justice of the EU (CJEU) has held that the interpretative decisions are not binding, given the treaty provisions on legislative power. However, the CJEU has also made clear that those decisions constitute an important aid for the national bodies.⁵² In light of the case law, the principle of sincere cooperation expressed in article 4(3) of the Treaty on European Union (TEU) demands that the member states take the decisions of the Administrative Commission into account when deciding individual matters of social security.⁵³ In this context, it should be noted that article 89 of Regulation (EC) No 987/2009 imposes a duty on the national competent authorities to ‘ensure that their institutions are aware of and apply all the Community provisions, legislative or otherwise, *including the decisions of the Administrative Commission [...]*’ (italics added).

Apart from the Administrative Commission, Regulation (EC) No 883/2004 provides for the establishment of a Technical Commission for Data Processing, attached to the Administrative Commission. The Technical Commission assists the Administrative Commission in the development of common (electronic) data processing services.⁵⁴ It also has important tasks in the development of the European Electronic Social Security Information (EESSI), i.e. the electronic

⁵² Case 19/67 *Bestuur der Sociale Verzekeringsbank v. J. H. van der Vecht* [1967] ECR English special edition 345, at 355; 98/80 *Giuseppe Romano v. Institut national d'assurance maladie-invalidité* [1981] ECR 1241 para. 20 where the court referred to articles 155, 173 and 177 of the EEC Treaty (now articles 17[1] TEU, 263 and 267 TFEU); C-238/81 *Raad van Arbeid v. Mrs Van der Bunt-Craig* [1983] ECR 1385 para. 24; C-102/91 *Doris Knoch v. Bundesanstalt für Arbeit* [1992] ECR I-4341 para. 52; C-202/97 *Fitzwilliam Executive Search Ltd v. Bestuur van het Landelijk instituut sociale verzekeringen* [‘FTS’] [2000] ECR I-883 para. 32; cf. R. Cornelissen, ‘Artikel 72’, in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 25-31 (at 390).

⁵³ See R. Cornelissen, ‘Artikel 72’, in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 28 (at 391).

⁵⁴ See article 73 of Regulation (EC) No 883/2004; recital 39 in the preamble to Regulation (EC) No 883/2004 (stating that the Technical Commission is created ‘under the aegis of the Administrative Commission’; in the French language version, ‘Commission technique pour le traitement de l’information’; in the German language version, ‘Fachausschuss für Datenverarbeitung’; cf. article 17c of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons, to self-employed persons and their families. The background and the tasks of the Technical Commission are discussed in R. Cornelissen, ‘Artikel 73’, in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010).

infrastructure for information exchange between national administrative bodies. The Technical Commission is composed of two representatives from each member state.⁵⁵

Alongside the Technical Commission's technical assistance to the Administrative Commission, a special Audit Board provides information and studies on financial aspects of the coordination rules, such as costs and claims of member states.⁵⁶ In the same way as the Technical Commission, the composition of the Audit Board is decided by the Administrative Commission, to which the Audit Board is attached.⁵⁷

Lastly, there is an Advisory Committee for the Coordination of Social Security Systems.⁵⁸ The Advisory Committee is composed of representatives of the governments and labour market parties from each member state, appointed by the Council of the EU. The Advisory Committee may address general issues and problems relating to the coordination regulation, either of its own initiative, or upon request by the EU Commission or the Administrative Commission. It may thus have an important role in EU social security policy development.⁵⁹ The legal construction of an advisory committee of this kind, as opposed to the Administrative Commission, is not unique to the field of coordination of social security.⁶⁰

⁵⁵ See article 3 of Administrative Commission Decision No H2 of 12 June 2009 concerning the methods of operation and the composition of the Technical Commission for data processing of the Administrative Commission for the coordination of social security systems, *OJ* 2010 C 106/17.

⁵⁶ See article 74 of Regulation (EC) No 883/2004; see further articles 65, 67, and 69 of Regulation (EC) No 987/2009; in the French language version 'Commission des comptes'; in the German language version 'Rechnungsausschuss'; see also R. Cornelissen, 'Artikel 74', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 8-16 (at 404-406).

⁵⁷ See Administrative Commission Decision No H4 of 22 December 2009 concerning the composition and working methods of the Audit Board of the Administrative Commission for the Coordination of Social Security Systems, *OJ* 2010 C 107/3.

⁵⁸ Article 75 of Regulation (EC) No 883/2004; see also article 89(2) of Regulation (EC) No 987/2009; in the French language version 'Comité consultatif pour la coordination des systèmes de sécurité sociale'; in the German language version 'Beratender Ausschuss für die Koordinierung der Systeme der sozialen Sicherheit'.

⁵⁹ R. Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 146.

⁶⁰ See articles 21-28 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, *OJ* 2011 L 141/1, repealing Regulation (EEC) No 1612/68, cf. the discussion on merging those two advisory committees in R. Cornelissen, 'Artikel 75', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 4 and 5 (at 408).

Concerning the organisational structure, it should be remembered that actual decisions in relation to individuals are made by the various national bodies. Since the EU regulation in the field merely coordinates the existing social security rules, the EU bodies act only in relation to national organs, and not to individuals. There is no possibility for individuals to bring matters before the Administrative Commission or its specialised bodies.

There are also other relevant actors in the field who are partly outside the national and European public sphere. A prominent example is the Network for Training and Reporting on European Social Security (TRESS), funded by the EU Commission and providing a platform for discussions by independent experts on the coordination of social security in the EU. This network has the important task of identifying problems and suggesting solutions in the coordination of social security. Through annual reports, the TRESS network presents the Commission with a survey of current developments in the field.⁶¹

4 Forms of Administrative Cooperation under Regulations (EC) No 883/2004 and 987/2009

Under the principle of sincere cooperation enshrined in article 4(3) TEU there is a general duty for national administrative bodies to cooperate with each other, as well as with EU institutions for the implementation of EU law. The principle also entails a basic mutual trust between these bodies.⁶² In this way, the European Union structure resembles the rules in national administrative law that call for cooperation between national administrative bodies.⁶³ These cooperation mechanisms form an important backdrop to the network features of European administrative law discussed above. The general duty to cooperate according to the principle is also highly relevant in the field of social

⁶¹ See Y. Jorens & J. Hajdú, *European Report 2008 – Training and reporting on European social security (Tress)* (European Commission/Ghent University), 3.

⁶² See. J. Temple Lang, 'Community Constitutional Law', 27 [1990] *CML Rev.* 645-681, at 671; J. Schwarze, *European Administrative Law* (Revised 1st ed. London – Luxembourg 2006), CLXXV ff.; H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 767-769; Communication from the Commission to the Council and the European Parliament on the Development of Administrative Cooperation in the Implementation and Enforcement of Community Legislation in the Internal Market, COM(94) 29 final 1: 'Administrative cooperation between Member States, and between them and the Commission, is a requirement which flows from Treaty-based obligations, particularly article 5 [now article 4(3) TEU]. It is an essential working tool for the even and effective operation of the Community, and this communication concentrates on identifying the need and scope for practical action in ensuring that an effective degree of cooperation between Member States and between them and the Commission, is achieved.'

⁶³ See H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 768.

security coordination.⁶⁴ Duties of cooperation and mutual trust are concretised in a number of provisions on administrative cooperation in the regulations on social security coordination.⁶⁵ The basic provisions are found in article 76 of Regulation (EC) No 883/2004, supplemented by the rules in Regulation (EC) No 987/2009.⁶⁶ In the following, the specific duties of administrative cooperation in the field of social security coordination are discussed. This discussion roughly follows the structure of article 76 of Regulation (EC) No 883/2004.

4.1 Mutual Information on National Legislation

In some instances, the general duty of administrative cooperation in EU law may include a duty to exchange information on national legislation and practice that is relevant from an EU law perspective.⁶⁷ This is illustrated by Case 42/82 *Commission v. France*, on the free movement of goods and changes in the practice of a member state concerning the verification of certain import documents. The court held that the duty of cooperation inherent in the community system means that a member state must give notice of such changes to affected member states.⁶⁸ Furthermore, it has been argued that there is a general duty under EU law for the member states to designate national liaison bodies for maintaining contact with other member state authorities.⁶⁹

⁶⁴ See Case C-335/95 *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v. Michel Picard* [1996] ECR I-5625 para. 20; C-326/00 *Idryma Konoikon Asfaliseon (IKA) v. Vasileios Ioannidis* [2003] ECR I-1703 para. 51; cf. the opinion of AG Jacobs in Case C-202/97 *Fitzwilliam Executive Search Ltd v. Bestuur van het Landelijk instituut sociale verzekeringen* ['FTS'] [2000] ECR I-883 para. 56: 'Article 5 [now article 4(3) TEU] must be regarded as obliging Member States and their social security institutions in particular to cooperate in good faith to give full effect to the Community provisions on social security and to ensure fulfilment of the objectives of Articles 48 to 51 of the Treaty.'

⁶⁵ See also recital 5 in the preamble to Regulation (EC) No 987/2009: 'Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) No 883/2004 to access their rights as quickly as possible and under optimum conditions.'

⁶⁶ Previously in articles 84 and 84a of Regulation (EEC) No 1408/71 and in Regulation (EEC) No 574/72.

⁶⁷ See Communication from the Commission to the Council and the European Parliament on the Development of Administrative Cooperation in the Implementation and Enforcement of Community Legislation in the Internal Market, COM(94) 29 final, 4, discussing this as a matter of transparency.

⁶⁸ Case 42/82 *Commission v. France* [1983] ECR 1013 para. 56; see also J. Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty', 27 *CML Rev.* (1990), 645-681, 671.

⁶⁹ See F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Tübingen 2005), 282; cf. Communication from the Commission to the Council and the European Parliament on the Development of Administrative Cooperation in the Implementation and Enforcement of Community Legislation in the Internal Market, COM(94) 29 final, 4.

More specifically in the field of social security, article 76(1) of Regulation (EC) No 883/2004 requires the competent authorities to communicate to each other all information regarding measures taken to implement the regulation, as well as changes in their legislation that might affect the implementation of the regulation.⁷⁰ In the absence of more precise procedures prescribed in the regulations, this information is in practice disseminated through the Administrative Commission.⁷¹ The latter part of the provision, concerning 'legislation which may affect the implementation of the regulation', has a particularly broad scope. In light of the general duties of cooperation under EU law just mentioned, the national bodies should also update their EU counterparts on changes in administrative practice relevant to social security coordination. It is not possible here to assess to what degree the member states have met their obligations in this context. It has, however, been suggested that a more serious approach to the duty to provide information on legislation could help in finding quick and practical solutions when new categories of social security benefits are introduced.⁷²

Furthermore, the member states shall notify the Commission on the details of the relevant national bodies and provide electronic information on them.⁷³ The Commission uses this information for a database covering an electronic directory ('Master Directory') of the national bodies that form a part of the EESSI infrastructure.⁷⁴ This database, also available to the public, is intended to simplify contact between the social security bodies of the member states.⁷⁵

⁷⁰ A corresponding duty was found in article 84(1) of Regulation (EEC) No 1408/71 and in article 45(1) of Règlement no 3.

⁷¹ See further B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 5-7 (at 413-414) remarking that the information duty regulated in the first part of the provision (concerning 'measures taken to implement this regulation') generally is not fulfilled, which may be linked to uncertainty regarding what information should be given in this context.

⁷² B. Spiegel, 'Coordination of new Benefits', in: Y. Jorens (ed.), *50 years of Social Security Coordination, Past – Present – Future. Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security Prague, 7 & 8 May 2009* (Luxembourg 2010), 187-212, at 212.

⁷³ Article 88(1) of Regulation (EC) 987/2009.

⁷⁴ See Annex 4 to Regulation (EC) No 987/2009; Administrative Commission Decision No E2 of 3 March 2010 concerning the establishment of a change management procedure applying to details of the bodies defined in Article 1 of Regulation (EC) No 883/2004 of the European Parliament and of the Council, which are listed in the electronic directory that is an inherent part of EESSI, *OJ* 2010 C 187/5; B. Spiegel, 'Artikel 78', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 8-12 (at 428-429).

⁷⁵ Cf. recitals 4 and 5 in the preamble to Regulation (EC) No 987/2009. The database is available at ec.europa.eu/employment_social/social-security-directory (accessed 19.4.2013).

Alongside the duties under the regulations, the member states and the Commission collect information on the different social security systems through the Mutual Information System on Social Protection (MISSOC). This cooperation, funded by the Commission, is organised through a special MISSOC secretariat under the Commission.⁷⁶

Given the structure of the coordination regime as a means of distributing competence between the states, the provision of information on national legislation might seem superfluous. After all, the social security bodies of the member states only apply the domestic social security legislation. Nevertheless, in order to simplify things for individuals in cross-border situations, the social security administrations of the member states also need to have a certain degree of knowledge of the foreign social security systems.⁷⁷ From this practical perspective, the duty of mutual information is an important network feature of social security coordination. This duty has no impact on the distribution of competence between the member states, and may therefore be seen as an unproblematic rule. However, if taken seriously, it could entail substantial work for the national and EU social security bodies.

4.2 Administrative Assistance

A traditional tool of international cooperation is mutual legal or administrative assistance.⁷⁸ Through this mechanism, a state may request another state to provide help in an individual matter, concerning for example, the provision of information or service of documents.⁷⁹ Whereas international legal aid is well developed in criminal and private law, the structure for international assistance in administrative law is less so. Some issues are regulated in

⁷⁶ See further the information provided at www.missoc.org (accessed 19.4.2013); B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 5 (at 413).

⁷⁷ See B. Spiegel, 'Coordination of new Benefits', in: Y. Jorens (ed.), *50 years of Social Security Coordination, Past – Present – Future. Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security Prague, 7 & 8 May 2009* (Luxembourg 2010), 187-212, at 212.

⁷⁸ See R. Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 136.

⁷⁹ See the definition provided in E. Loebenstein, *International Mutual Assistance in Administrative Matters* (Wien – New York 1972), 11: 'Assistance may be defined as an act performed by one government agency on the request of another government agency in order to enable or to facilitate the execution of the functions of the requesting agency.'; H. Damian, 'Mutual Legal Assistance in Administrative Matters', in: R. Wolfrum (ed.), *MPEPIL*, 2008, online edition, available at www.mpepil.com (accessed 19.4.2013), margin number 2.

conventions within the framework of the Council of Europe, but many EU member states do not take part in this cooperation.⁸⁰

In the context of the EU, the principle of sincere cooperation is important as a background to the more specific duties set out in the regulations.⁸¹ In Regulation (EC) No 883/2004, a basis for administrative assistance is found in article 76(2). Through the provision, the social security bodies of the member states are requested to 'lend one another their good offices and act as though implementing their own legislation'.⁸² This makes it possible for a social security body of member state A to ask its counterpart in member state B for assistance in a social security matter, for example concerning the service of documents on a person covered by the social security legislation of state A. According to the wording of the provision under the definitions set down in article 1 of Regulation (EC) No 883/2004, this obligation would seem only to apply between social security bodies. Tax authorities would thus not be obliged to cooperate, e.g. they would not have to provide information on the income of an individual.⁸³ However, the general duty of cooperation under article 4(3) TEU is relevant for assessing situations outside the scope of the regulations.

There are certain limits to the member states' duty to assist. As indicated by the wording of the provision, the state receiving the request must provide assistance in the same way it would within its own domestic legal system. Put differently, the states apply their own rules of administrative procedure when assisting foreign social security bodies.⁸⁴ From the perspective of international adminis-

⁸⁰ See European Convention on the Service Abroad of Documents relating to Administrative Matters, Strasbourg 24.11.1977, ETS 94, commented in Council of Europe, *Explanatory report on the European Convention on the Service Abroad of Documents relating to Administrative Matters* (Strasbourg 1977); European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, Strasbourg 15.3.1978, ETS 100; F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Tübingen 2005), 32; F. Wettner, 'The General Law of Procedure of EC Mutual Administrative Assistance', in: O. Jansen & B. Schöndorf-Haubold (eds), *The European Composite Administration* (Cambridge 2011), 307-333, at 307.

⁸¹ See T. von Danwitz, *Europäisches Verwaltungsrecht* (Berlin/Heidelberg 2008), 614-616; F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Tübingen 2005), 234-243.

⁸² Compare the French and German language versions; 'se prêtent leurs bons offices et se comportent comme si l'agissait de l'application de leur propre législation'; 'unterstützen sich die Behörden und Träger der Mitgliedstaaten, als handelte es sich um die Anwendung ihrer eigenen Rechtsvorschriften'; see R. Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 147.

⁸³ For an example on obtaining information on the income of a person through administrative assistance, see further B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 8 (at 414).

⁸⁴ See B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 9 (at 414-415).

trative law, this reflects a general principle of cross-border administrative assistance, meaning that as a rule, states will apply their own legal rules provided that nothing else has been agreed upon between the states, or is required from EU legislation.⁸⁵ This may be linked in turn to traditional ideas on the territoriality of public law, which have served as a basis for the view that national bodies may only apply domestic public law, including social security law.⁸⁶ The rule makes the scope for administrative assistance dependent on the structure of national administrative and social security legislation of the requested member state.⁸⁷ Especially the national rules on confidentiality between national bodies may impose limitations on administrative assistance concerning the transfer of information.

Administrative assistance in the EU builds on the idea of the various systems working as one unit, as if they were within a single state.⁸⁸ This idea is expressed through the wording of article 76(2) ('as though implementing their own legislation'), as well as through the main rule that the provision of administrative assistance shall be free of charge. The latter reflects a common principle in secondary legislation concerning the distribution of costs in administrative assistance within the EU.⁸⁹

To conclude, the administrative assistance within the system of coordination of social security is a more traditional part of the administrative network in the field, using structures also present in cooperation outside of the EU. Although administrative assistance constitutes close cooperation, with features also found within states, this mechanism leaves the principle of territoriality untouched. Instead of acting in relation to individuals in the territory of another member state, the requesting body asks the institutions of that state to carry out the measures in question.

⁸⁵ See E. Loebenstein, *International Mutual Assistance in Administrative Matters* (Wien – New York 1972), 41, 69; F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Tübingen 2005), 155.

⁸⁶ See K. Vogel, 'Administrative Law, International Aspects', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law, Volume I* (Amsterdam 1992), 22-27, at 25; E. Loebenstein, *International Mutual Assistance in Administrative Matters* (Wien – New York 1972), 51; S. Devetzi, *Die Kollisionsnormen des europäischen Sozialrechts* (Berlin 2000), 141-143.

⁸⁷ See further E. Loebenstein, *International Mutual Assistance in Administrative Matters* (Wien – New York 1972), 41.

⁸⁸ Cf. F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Tübingen 2005), 233-234.

⁸⁹ See F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Tübingen 2005), 274-276; F. Wettner, 'The General Law of Procedure of EC Mutual Administrative Assistance', in: O. Jansen & B. Schöndorf-Haubold (eds), *The European Composite Administration* (Cambridge 2011), 307-333, at 321.

4.3 Direct Communication

Under general EU administrative law, any possible limitations under national and public international law to direct contacts with foreign administrative bodies must be set aside.⁹⁰ In article 76(3) of Regulation (EC) No 883/2004, this principle is codified for the administrative cooperation within social security coordination. The provision makes possible direct communication between authorities and institutions, as well as with individuals who fall within the scope of the regulation. In the *Athanasopoulos* case, the CJEU affirmed the importance of this provision.⁹¹

According to the wording of the article, there are no limitations as to which bodies are allowed external contact and consequently, member states may not limit contact between social security bodies. However, this right of contact applies to the authorities and institutions as such. The principle of national procedural and institutional autonomy gives the member states the possibility to decide at which level *within* the institutions and authorities such contacts is possible. Given the purpose of making efficient contact possible in order to simplify for individuals, direct contact at all levels within the hierarchy may be desirable.⁹² Indeed, such contact may contribute to flexibility in individual cases within the framework of the regulations, for example by simplifying the transition for a person obtaining benefits leaving one social security system and entering another.

The more personal networks between civil servants working for the various social security bodies are probably, in practice, crucial for the use of this direct communication.⁹³ Apart from such contact being based on personal knowledge, the electronic directory of national bodies is an important tool for finding a relevant counterpart in another member state. The informal cross-border bonds between colleagues in separate social security bodies in different member states are thus linked to the formal, legal provision on direct communication.

⁹⁰ See H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 769; P. Mengozzi, *European Community Law from the Treaty of Rome to the Treaty of Amsterdam* (2nd ed. The Hague 1999), 88.

⁹¹ C-251/89 *Nikolaos Athanasopoulos and others v. Bundesanstalt für Arbeit* [1991] ECR I-2797 para. 57, concerning article 84(3) of Regulation (EEC) No 1408/71.

⁹² Cf. recital 2 in the preamble to Regulation (EC) No 987/2009, quoted in the introduction to this article.

⁹³ Cf. R. Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-170, at 151-152.

The possibility for social security bodies to maintain direct contact across borders also relates to contact between such bodies and individuals. Accordingly, a social security body of state A may contact a citizen of state B, who resides in the latter state, but falls under the social security legislation of state A. In this way, traditionally perceived territorial limitations of administrative activity outside the own territory are clearly set aside.

4.4 Mutual Information and Cooperation in Individual Cases

4.4.1 General Remarks

The duties of cooperation between national public bodies when applying EU law in individual cases are relevant in the handling of individual administrative matters. In particular, the exchange of information is important.⁹⁴ In its case law concerning the internal market, the CJEU has stressed the importance of the principle of sincere cooperation and the possibility for national authorities to exchange information in order to simplify administrative procedures.⁹⁵ If this case law is taken to its extreme, the individual need only provide information to a single authority instead of sending technical or scientific data to the authorities in each relevant country. This one authority should then submit this information to other national authorities as required. Consequently and in an ideal situation, the individual need do nothing while the administrative machinery operates across borders and exchanges the information necessary to decide on authorisations, licenses, or other favourable decisions.

In the context of the administration of EU social security coordination, a corresponding obligation is embodied in article 76(4) of Regulation (EC) No 883/2004. Under the provision, there is a duty of cooperation and information exchange.⁹⁶ This duty applies to the relationship between the various social

⁹⁴ Cf. Communication from the Commission to the Council and the European Parliament on the Development of Administrative Cooperation in the Implementation and Enforcement of Community Legislation in the Internal Market, COM(94) 29 final, 3.

⁹⁵ See Cases 104/75 *Adriaan de Peijper, Managing Director of Centrafarm BV* [1976] ECR 613 para. 27; 272/80 *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV* [1981] ECR 3277 para. 14; C-293/94 *Criminal proceedings against Jacqueline Brandsma* [1996] ECR I-3159 para. 13; C-201/94 *The Queen v. The Medicines Control Agency, ex parte Smith & Nephew Pharmaceuticals Ltd and Primecrown Ltd v. The Medicine Control Agency* [1996] ECR I-5819 para. 28; H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 769.

⁹⁶ See R. Pitschas, 'Strukturen des europäischen Verwaltungsrechts – Das kooperative Sozial- und Gesundheitsrecht der Gemeinschaft', in: E. Schmidt-Aßmann & W. Hoffmann-Riem (eds), *Strukturen des Europäischen Verwaltungsrechts* (Baden-Baden 1999), 123-169, at 148-151; B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 17-22 (at 416-418).

security bodies, as well as between these bodies and the individuals concerned. The provision makes a special reference to the principle of good administration, which is relevant in both types of relationship. Key aspects of this principle are laid down in article 41 of the Charter of Fundamental Rights of the European Union (CFR).⁹⁷ Further, article 2(1) of Regulation (EC) No 987/2009 establishes – for the exchange of information – the principles of public service, efficiency, active assistance, rapid delivery, and accessibility, including electronic accessibility.⁹⁸

4.4.2 The Relationship between Social Security Bodies

Under article 76(4) of Regulation (EC) No 883/2004, there is a duty of mutual information and cooperation between social security bodies of different member states. This cooperation could deal with the same issues as administrative assistance under article 76(2). The duty of mutual information and cooperation can, however, be carried out less formally than the administrative assistance. They thus provide a possibility for practical and effective measures in individual matters. Both mechanisms, as well as the functions of the Administrative Commission, may be seen as complementary features of the network structures in the field.⁹⁹

The regulations envisage the information exchange between the member states' social security bodies being carried out electronically.¹⁰⁰ To this end, the electronic infrastructure EESSI mentioned above is currently (2013) under construction. The system, consisting of a central, European node connecting member state access points shall operate primarily through the exchange of the so-called Structured Electronic Documents (SEDs), i.e. standardised, computerised

⁹⁷ See further K. Lenaerts & P. van Nuffel, *European Union Law* (London 2011), margin number 22-039 (at 854-857) seeing the provision of the Charter as a part of a wider principle of sound administration.

⁹⁸ In the French version '[...] les principes du service public, de l'efficacité, de l'assistance active, de la fourniture rapide et de l'accessibilité, y compris l'accessibilité en ligne [...]'; in the German language version '[...] auf den Grundsätzen öffentlicher Dienstleistungen, Effizienz, aktiver Unterstützung, rascher Bereitstellung und Zugänglichkeit, einschließlich der elektronischen Zugänglichkeit [...]'. The provision especially mentions the interests of certain vulnerable groups, see critical remarks on the selection B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 16 (at 416).

⁹⁹ See, e.g. Case C-251/89 *Nikolaos Athanasopoulos and others v. Bundesanstalt für Arbeit* [1991] ECR I-2797 paras 57 and 58, where the court held that a national competent institution, apart from consulting an official list of institutions drawn up by the Administrative Commission, also may contact the Commission or authorities of another Member state in order to obtain information on which foreign member state institution is competent in a certain respect.

¹⁰⁰ See recital 40 in the preamble to Regulation (EC) No 883/2004 concerning the replacement of previously used paper forms; recital 3 in the preamble to Regulation (EC) No 987/2009.

forms.¹⁰¹ Certain documents, however, will in the future be available in paper form too, viz. the so-called portable documents. In this category, the European Health Insurance Card is a good example with practical importance. The card functions as proof of entitlement to sickness benefits during a temporary visit to a member state other than the competent state, according to article 19 of Regulation (EC) No 883/2004.¹⁰²

The cross-border transfer of social security information on individuals demands the protection of personal data. It may be recalled here that the right to such protection is already laid down in article 16(1) TFEU and article 8 CFR. As in other fields within the scope of EU law, the duties on the protection of personal data are laid out in Directive 95/46/EC (in relation to member states) and Regulation (EC) No 45/2001 (in relation to EU institutions). Article 77 of Regulation (EC) No 883/2004 lays down rules on the applicable national data protection law when information is transmitted and received.¹⁰³

According to the wording of the provision of article 76(4) of Regulation (EC) No 883/2004, the aim of mutual information sharing and cooperation is to ‘ensure the correct implementation of this Regulation’. In light of the case law concerning the internal market referred to above, the national authorities need to make an effort to process as much as possible between them. The administrative cooperation should involve substantial efforts to simplify matters for individuals.¹⁰⁴ If information on employment or benefits is available to a social security body in one member state, an authority in another member state should

¹⁰¹ See article 78 of Regulation (EC) 883/2004; article 4 of Regulation (EC) No 987/2009; for transitional provisions, see Administrative Commission Decision No E1 of 12 June 2009 concerning the practical arrangements for the transitional period for the data exchange via electronic means referred to in article 4 of Regulation (EC) No 987/2009 of the European Parliament and of the Council, *OJ* 2010 C 106/9; see further B. Spiegel, ‘Artikel 78’, in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 1-27 (at 423-432).

¹⁰² See further article 25 of Regulation (EC) No 987/2009; Administrative Commission Decision No S1 of 12 June 2009 concerning the European Health Insurance Card, *OJ* 2010 C 106/23.

¹⁰³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* 1995 L 281/31; Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ* 2001 L 8/1; see also the Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (COM(2006)16 final), *OJ* 2007 C 91/15 paras 44-48; B. Spiegel, ‘Artikel 77’, in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 1-6 (at 422-423); H.C.H. Hoffmann, G.C. Rowe & A. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011), 480-487.

¹⁰⁴ Cf. Recital 2 in the preamble to Regulation (EC) No 987/2009, quoted in the introduction to this article.

obtain this information from that body, rather than requiring it from the individual concerned. Ideally, the individual involved in a cross-border social security matter should be able to rely on the social security bodies cooperating smoothly with each other, exchanging relevant information and resolving possible disagreements. Since the national legislations and the EU coordination regime make up a complex legal structure, the direct exchange of information between social security bodies in different member states might be more efficient than contacting individuals with a limited understanding of what kind of information a foreign social security body requires. However, the exchange of information between social security bodies may also be delayed, owing to administrative deficiencies.¹⁰⁵

The duty of cooperation also entails a duty to maintain quality in decision making. This is a crucial aspect of international administrative cooperation generally, since errors in interpretation may lead to diminished trust of foreign social security bodies potentially undermining the whole coordination framework.¹⁰⁶

In this context, it is relevant to briefly touch on the duty social security bodies have to recognise documents relating to an individual's social security position, as issued by bodies of other member states. Already under the principles of sincere cooperation (article 4[3] TEU) and equal treatment (article 18 TEU and other more specific provisions in the treaties), there are certain duties for national administrative authorities to recognise foreign administrative decisions and documents in individual administrative matters.¹⁰⁷ In the light of those principles, the CJEU has held that social security bodies are bound by assessments made by social security bodies in other member states.¹⁰⁸ This duty is

¹⁰⁵ See, e.g. the decision by the Swedish Parliamentary Ombudsman, registration number 2250-1996, concerning undue delay in the handling of a Swedish social security matter involving certificate E 301. A summary of the decision is published in English in R. Lavin, *The Parliamentary Ombudsman on Administrative Procedure. Division 'Red' 1997* (Lund 1997), 187.

¹⁰⁶ See Case C-202/97 *Fitzwilliam Executive Search Ltd v. Bestuur van het Landelijk instituut sociale verzekeringen* ['FTS'] [2000] ECR I-883 paras 51-54; C-326/00 *Idryma Konoikon Asfaliseon (IKA) v. Vasileios Ioannidis* [2003] ECR I-1703 para. 51; C-115/11 *Format Urządzenia i Montaże Przemysłowe sp. z o.o. v. Zakład Ubezpieczeń Społecznych*, judgement 4.10.2012, not yet reported, para. 47 on the duty to reconsider and, if necessary, withdraw a E 301 certificate if there are doubts as to its factual or legal content; H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 769; cf. J. Temple Lang, 'Developments, Issues, and New Remedies – The Duties of National Authorities and Courts under Article 10 of the EC Treaty', 27 [2003-2004] *Fordham Int'l L.J.* 1904-1939, at 1938.

¹⁰⁷ See H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 770-773.

¹⁰⁸ See the case law on the binding force of form E 101 Case C-202/97 *Fitzwilliam Executive Search Ltd v. Bestuur van het Landelijk instituut sociale verzekeringen* ['FTS'] [2000] ECR I-883 paras 51-59; C-178/97 *Barry Banks and Others v. Theatre royal de la Monnaie* [2000] ECR I-2005 paras 38-48; C-2/05 *Rijksdienst voor Sociale Zekerheid v. Herbosch Kiere NV* [2006] ECR I-1079 paras 22-33; cf. on practical problems in relation to this case law Y. Jorens & J. Hajdú, *European Report*

now codified in article 5 of Regulation (EC) No 987/2009, which states that documents issued by an institution of a member state shall be accepted as long as they are considered valid by the issuing state. For example, portable documents issued under the regulations, and excerpts from public population registries should be recognised in this way.¹⁰⁹ If the receiving state suspects that there are inaccuracies in a document received from another member state, it should contact the issuing body under the mechanism for conflict solution discussed below. This cooperation and mutual trust is essential for the functioning of the social security coordination within the EU.¹¹⁰

4.4.3 The Relationship between Social Security Bodies and Individuals

When it comes to mutual information sharing and cooperation between social security bodies and individuals, there is an obvious need on the part of individuals for clear information on relevant legislation and procedures.¹¹¹ At the same time, the social security bodies have a clear interest in having correct and complete information. Avoiding fraud and mistakes is, quite naturally, of great importance for the social security bodies of the member states. Against this backdrop, the regulations specify reciprocal duties of information between social security bodies and individuals.

To start with, persons covered by Regulation (EC) No 883/2004 are entitled to information from the relevant social security bodies in their individual case.¹¹² National bodies and the Administrative Commission, with the support of the

2008 – *Training and reporting on European social security (Tress)* (European Commission/Ghent University 2008), 26-27.

¹⁰⁹ See B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 23-28 (at 418-420), remarking that the provision limits the importance of Case C-336/94 *Eftalia Dafeki v. Landesversicherungsanstalt Württemberg* [1997] ECR I-6761, where the court held that there is an option to refuse recognition when there is concrete evidence in the individual case that seriously undermines the accuracy of the documents at issue (in the case Greek civil-status documents showing birth date, which were relevant concerning early retirement benefit for a person of Greek origin having worked in Germany).

¹¹⁰ Cf. GA Lenz in Case C-425/93 *Calle Grenzshop Andresen GmbH & Co. KG v. Allgemeine Ortskrankenkasse für den Kreis Schleswig-Flensburg* [1995] ECR I-269 para. 61; GA Jacobs in Case C-202/97 *Fitzwilliam Executive Search Ltd v. Bestuur van het Landelijk instituut sociale verzekeringen* ['FTS'] [2000] ECR I-883 para. 54.

¹¹¹ See recital 22 in the preamble to Regulation (EC) No 987/2009, calling information to persons concerned 'a crucial component of a relationship of trust'.

¹¹² See article 76(4) second subparagraph of Regulation (EC) No 883/2004; article 3(4) of Regulation (EC) No 987/2009.

Advisory Committee, also provide general information on the coordination of social security.¹¹³

Furthermore, the individuals concerned are obliged to provide and update information on their personal or family situation relevant to benefits.¹¹⁴ Article 76(5) of Regulation (EC) No 883/2004 provides a reminder of what would have been the case anyway, which is that proportionate measures under national law may be taken against a person failing in this respect, but that those measures must fulfil the requirements of the principles of equivalence and effectiveness.¹¹⁵ In this context, the possibility for social security bodies to request information from other member states should be emphasised. If a social security body in state A needs a document that is available to the authorities of state B, it should request it from the body in state B, instead of requiring the individual to approach those authorities and then send the document to the body in state A.

As discussed above, contact between social security bodies and individuals – apart from situations of administrative assistance – generally take place directly, also in situations where the individual in question resides in another member state. Dependent on the situation, the individual may also maintain direct contact with the social security bodies of the state of residence. In such situations, it cannot be guaranteed that the authorities involved will not provide contradictory information to the individual. Such situations will need to be addressed through the mechanisms for direct contact, and perhaps even for conflict resolution.

The requirement under article 76(4) of Regulation (EC) No 883/2004 to provide a response within a reasonable length of time reflects, as indicated in the wording of the provision, an aspect of the principle of good administration. This provision is relevant in relation to inquiries from both individuals and social security bodies of other member states. There are, however, no fixed time limits under the coordination rules of the regulations, meaning that existing national rules and principles on this topic prevail within the limits of procedural autonomy.¹¹⁶ A special problem of accountability could arise in situations of

¹¹³ Article 87(11) of Regulation (EC) No 883/2004; articles 3(1) and 89 of Regulation (EC) No 987/2009; B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 29 and 30 (at 420).

¹¹⁴ Article 76(4) third subparagraph of Regulation (EC) No 883/2004; article 3(2) of Regulation (EC) No 987/2009.

¹¹⁵ See B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 22 (at 418).

¹¹⁶ See Joined cases C-52/99 and C-53/99 *Office national des pensions (ONP) v. Gioconda Camarotto and Giuseppina Vignone* [2001] ECR I-1395; further B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin number 14 (at 416); cf. recital 7 in the preamble to Regulation (EC) No 987/2009 stating, rather remarkably, that it would be desirable for member states without such time limits to consider adopting them.

delayed information, since it is not always clear who has caused the delay; the individual or one of the involved social security bodies. Such issues would probably rarely be examined by the Commission or the CJEU. Rather, it would be national supervisory bodies and courts that will have to oversee this requirement. In the preamble to Regulation (EC) No 987/2009, it is assumed that information exchanged by electronic means should solve some of the problems concerning slow responses.¹¹⁷

A particular problem regarding the position of individuals concerns knowing which social security body to turn to with material in their individual matters. Quite naturally, the complexity of the regime for coordination of social security systems within the EU may be confusing, which may result in an individual approaching the wrong member state and, in unfortunate circumstances, losing rights to benefits.¹¹⁸ Against this background, article 81 of Regulation (EC) No 883/2004 and article 2(3) of Regulation (EC) No 987/2009 provide that a social security body of a member state should forward incorrectly submitted claims, information, or documents to the competent social security body or court of another member state.¹¹⁹ According to those provisions, the date of submission to the first social security body shall be considered to be the date of submission also in relation to the competent body.

The forwarding of claims and documents under the provision is purely procedural, and does not influence the assessment of the substantive issues covered by the regulations.¹²⁰ The competent authority, which is the correct recipient for a claim or other material, is thus bound by the assessment of the date of submission by the foreign body.¹²¹ It is, however, for the competent authority to decide on admissibility issues according to its domestic provisions on time limits.¹²² This mechanism makes the various social security bodies act as part

¹¹⁷ See recital 3 in the preamble to Regulation (EC) No 987/2009.

¹¹⁸ Cf. the reasoning in Cases 40/74 *Kingdom of Belgium, Henri Costers and Marie Vounckx v. Berufsgenossenschaft der Feinmechanik und Elektrotechnik* [1974] ECR 1323 para. 5; 92/81 *Antonia Caracciolo (née Camera) v. Institut National d'Assurance Maladie-Invalidité and Union Nationale des Mutualités Socialistes* [1982] ECR 2213 para. 7.

¹¹⁹ See Case 287/92 *Alison Maitland Toosey v. Chief Adjudication Officer* [1994] ECR I-279 paras 22-25, especially concerning the scope for assisting the individual also in other ways than provided for in the articles (para. 24); See further on problems in relation to the provisions and special rules concerning forwarding of claims, e.g. in article 45 of Regulation (EC) No 987/2009 B. Spiegel, 'Artikel 81', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 8 and 9 (at 437).

¹²⁰ See Case 92/81 *Antonia Caracciolo (née Camera) v. Institut National d'Assurance Maladie-Invalidité and Union Nationale des Mutualités Socialistes* [1982] ECR 2213 para. 8.

¹²¹ Cf. Case C-335/95 *Institut national d'assurances sociales pour travailleurs indépendants (Inasti) v. Michel Picard* [1996] ECR I-5625 paras 18-20.

¹²² See Case 143/79 *Margaret Walsh v. National Insurance Officer* [1980] ECR 1639 para. 11.

of a common administrative system.¹²³ The EU legislation reflects a division of competences, which to a certain extent must build on mutual trust between the social security bodies.

An important provision concerning the contact between individuals and social security bodies in other member states is found in article 76(7) of Regulation (EC) 883/2004. It precludes national authorities, institutions, and tribunals from rejecting documents written in an official language of the EU institutions.¹²⁴

4.5 Conflict Resolution

As in other parts of EU law, national administrative bodies in different member states may differ in their interpretation of the complex rules of social coordination.¹²⁵ Such divergences may mean that individuals are confronted with legal or practical difficulties in exercising their rights under EU law. Furthermore, the content of documents issued by other member states may be contested. Whereas national courts may refer questions of interpretation to the CJEU under article 267 TFEU, most social security bodies of the member states would not qualify for such referral, not being courts or tribunals within the meaning of the provision. Pursuant to the case law of the CJEU, conflicts between national administrative authorities should primarily be addressed through direct contact between the relevant administrative bodies, acting with mutual trust.¹²⁶ Moreover, in certain fields of law, there are rules involving the

¹²³ Cf. Case 92/81 *Antonia Caracciolo (née Camera) v. Institut National d'Assurance Maladie-Invalidité and Union Nationale des Mutualités Socialistes* [1982] ECR 2213 para. 9: 'The answer should therefore be that Article 83 of Regulation No 4 [now article 81 of Regulation (EC) No 883/2004] must be interpreted as meaning that the submission of a claim to an authority, institution or agency of a Member State other than the Member State called upon to pay the benefit has the same effect as if that claim had been submitted direct to the competent authority of the latter State. Moreover, such an interpretation is in keeping with the scheme of Regulation No 4 which, on that point, seeks simply to avoid the loss of rights by migrant workers owing to mere administrative formalities.'

¹²⁴ See B. Spiegel, 'Artikel 76', in: M. Fuchs (ed.), *Europäisches Sozialrecht* (Baden-Baden 2010), margin numbers 31-36 (at 420-421). The predecessor of this provision has been relevant in some cases concerning the Belgian language regime, see C-55/77 *Marguerite Maris, wife of Roger Reboulet v. Rijksdienst voor Werknemerspensioenen* [1977] ECR 2327 para. 18, stating that the provision rules out contrary national legislation; C-153/91 *Camille Petit v. Office national des pensions* [1992] ECR I-4973 para. 10, excluding situations that fall outside of the scope of the regulation.

¹²⁵ See generally L. de Lucia, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris)', 5 [2012] *REALaw*, 43-77.

¹²⁶ See Cases 130/88 *C. C. van de Bijl v. Staatssecretaris van Economische Zaken* [1989] ECR 3039 para. 24; C-5/94 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996] ECR I-2553 paras 18-20; C-110/01 *Malika Tennah-Durez v. Conseil national de l'ordre des médecins* [2003] ECR I-6239 (all concerning contested accuracy of documents issued by other member states); H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 776.

Commission in the resolution of conflicts between national administrative bodies.¹²⁷

Regulation (EC) No 883/2004 includes explicit rules for dealing with differing interpretations in the field of social security coordination. For these situations, article 76(6) provides that the institutions involved shall contact each other in order to find a solution. Concerning the legal force of foreign documents, conflicts shall be resolved in the same fashion, according to article 5 of Regulation (EC) No 987/2009. Solutions may consist of the revision or annulment of a decision, or the withdrawal of a contested document. Under both provisions, if the institutions are unable to find common ground, they may call on the Administrative Commission. Through a formalised dialogue procedure in two stages, the involved social security bodies then shall continue their efforts to resolve the issue. If an agreement is still not reached, the Administrative Commission shall attempt to reconcile the views of the institutions. Within the Administrative Commission, a special Conciliation Board may be established.¹²⁸ As a last resort, a member state may initiate proceedings under article 259 TFEU against another member state, thus bringing the issue before the CJEU.¹²⁹

An important feature of the administrative cooperation under the regulations in the context of conflict solution is the provision in article 6 of Regulation (EC) No 987/2009. This rule deals with the provisional granting of benefits in situations of differing interpretations of the regulations, thus avoiding situations

¹²⁷ See articles 18 and 30 of 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 and repealing Council Directive 90/220/EEC, *OJ* 2001 L 106/1; article 37 of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, *OJ* 2012 L 167/1; T. von Danwitz, *Europäisches Verwaltungsrecht* (Berlin/Heidelberg 2008), 630-632.; A. M. Keessen, *European Administrative Decisions: How the EU Regulates Products on the Internal Market* (Groningen 2009), 34-35; H. Wenander, 'Recognition of Foreign Administrative Decisions', 71 [2011] *ZaöRV* 755-785, at 780; L. de Lucia, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris)', 5 [2012] *REALaw*, 43-77, at 57-64.

¹²⁸ See further Administrative Commission Decision No A1, concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council, *OJ* 2010 C 106/1; see article 5 of the Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission of 16 June 2010, *OJ* 2010 C 213/20 on the setting up of a Conciliation Board.

¹²⁹ See Case C-202/97 *Fitzwilliam Executive Search Ltd v. Bestuur van het Landelijk instituut sociale verzekeringen* ['FTS'] [2000] ECR I-883 para. 58.

whereby individuals are left without social security benefits when social security bodies in different member states are in disagreement.¹³⁰

5 Social Security Administrative Cooperation as a European Network

The preceding discussion has focused on the legal aspects of the administrative European network inherent in the organisation of social security coordination under the regulations. As has been shown, several aspects of network cooperation are present within the field. A point of departure for discussions on administrative networks in general is the principle of sincere cooperation under article 4(3) TEU. In the social security sector, this principle is concretised through more detailed rules in the regulations and in the decisions of different types by the Administrative Commission. The principle may also have an independent function as a general framework for assessing situations that fall outside the scope of the regulations, for example concerning administrative cooperation with national bodies outside the social security sector, e.g. tax authorities.

Within the field of social security coordination, it is possible to identify several types of networks under the categorisations suggested by Slaughter and Craig discussed above. To start with, there are several mechanisms aiming at the improvement of EU legislation, thus constituting a *policymaking network*. In this category, we find the *sui generis* body of the Administrative Commission, with its task of presenting studies and suggesting amendments to the regulations. Although the EU Commission is responsible for proposing new legislation to the European Parliament and the Council, the national experts in the Administrative Commission have the important preparatory role of seeking compromises between the conflicting interests within the technical, legal, and political framework. Also important in this context is the more traditional Advisory Committee, with its counterparts in other sectors of EU law.

Concerning the administration of the existing regulatory framework at a general level, the cooperation within the Administrative Commission, as well as the direct cooperation between national social security bodies, might be categorised as an *enforcement network* that is essential for the coordination of social security systems to work in practice. Here, the more traditional form of cooperation in the form of administrative assistance is combined with the possibilities of direct

¹³⁰ See on the previous situation, where there was no possibility of granting certain benefits provisionally, e.g. Case 287/92 *Alison Maitland Toosey v. Chief Adjudication Officer* [1994] ECR I-279 para. 23.

communication and mutual information sharing and cooperation in individual cases. The administrative networks foreseen in the regulations here contribute to the effective enforcement of EU law and the free movement of persons. At the same time, the administrative cooperation could help to avoid fraud and administrative errors.

Furthermore, although EU social security law builds on coordination of national legislations, there are some elements of *harmonisation networks* in the field. In particular, this is the case concerning the work of the Technical Commission and the development of the EESSI system, which involves adjustments of the national systems. However, this technical harmonisation would not seem to automatically imply a corresponding harmonisation of the substantial social security law. This aspect of the cooperation would also qualify as a *regulatory network* under Craig's categorisation, related to technical standard setting.

The work of the Administrative Commission and the contact between the national social security bodies also makes up an important element of the sharing of experience and 'best practices'. In this way, an *information network* is established under EU social security coordination law. The exchange of information, which will take place through the planned electronic infrastructure EESSI, is also an important part of this. The EESSI system thus constitutes a network in both the technical and the administrative sense. These information networks between the national and EU bodies are complemented by the cooperation within MISSOC and the expert network TRESS, which illustrates the 'pooling of knowledge', highlighted by Craig as an important feature in information networks. As demonstrated by the TRESS network of social security experts, the information network structures in part reach beyond the governmental sphere. Lastly, concerning the information networks, the mutual information sharing on national legislation, coordinated through the EU Commission, is probably a crucial factor for the administrative cooperation to work in practice.

Concerning the contact between social security bodies and individuals, there are some elements of a *support network*, which assists individuals in exercising their rights to free movement under the regulations. In this context the respective roles of the Administrative Commission and the national social security bodies in cooperation with the Advisory Committee in providing information to the public may be mentioned. In addition, the work of MISSOC and TRESS is important for the actual exercise of these rights under the regulations.

Certain features of the administrative cooperation do not neatly fit into the categorisations suggested by Slaughter and Craig. First, one might consider the mechanisms for conflict resolution, involving both the affected member states, the Administrative Commission and, possibly, a Conciliation Board within the latter. This might be seen as a *conflict resolution network*. Second, the

rules concerning the forwarding of claims to the competent social security body, and the provisional granting of benefits may be seen as elements of a *network of administrative procedure*, making the involved agencies and institutions act as part of one common system.

The various network aspects described show that cooperation in the field takes place at many levels. It ranges from everyday contact between national officials solving practical problems in individual cases, to high-ranking representatives of national social security agencies or ministries meeting in the Administrative Commission dealing with policymaking issues. In this way, a rather dense web of cooperation structures concerning EU social security coordination is maintained. The vagueness of the network concept and the role of the Administrative Commission with its constitutionally ambiguous status may provide efficient and flexible cooperation, making it possible to uphold subsidiarity in the politically sensitive field. A crucial factor would seem to be the mutual trust between the involved social security bodies. The network structures may also contribute to promoting this trust between national officials.

From the perspective of the individual, the administrative cooperation in the field means that, ideally, he or she should be able to apply for benefits from a national social security body and then simply wait for the cooperative mechanisms to run its course and to sort out any difficulties. The duty of national social security bodies to simplify the exercise of rights is important in this sense. However, legal and practical administrative problems may arise, not least concerning delayed information across borders.

From the individual's point of view and from a democratic perspective, social security administration may already be opaque at the national level. Undoubtedly, the European network structures involved in social security coordination may be even more confusing. The various levels of cooperation with EU organs 'attached to' each other, such as the Administrative Commission and the EU Commission, and their having similar names, such as the two just mentioned, or the Administrative Commission and the Advisory Committee, do not simplify things. Of course, direct contact between individuals and the EU bodies in the field are not foreseen, and the networks are intended to be flexible in favour of individuals when providing social benefits. However, also concerning these favourable decisions, issues related to accountability and to the legitimacy of decisions made in network systems are important.

From a legal point of view, one way of dealing with the problems described here may be to adhere to the clear allocation of competences existing in the current coordination regime. Then, the body responsible for a certain decision could be identified, and thus held legally accountable under national law or EU law. However, also with this view, there might be difficulties in situations of

passivity, for example concerning the delayed exchange of information between member states.

Through the existence of the Administrative Commission, the network structure in the field combines features of administrative cooperation under an international convention with legal mechanisms under EU law. This is explained by the legal history of coordination in EU social security. The formal administrative network described here thus constitutes a special case in European administrative law. Nevertheless, the provisions of the regulations express and concretise general tendencies and principles, for example concerning direct communication between administrative bodies across borders, or conflict resolution. The multi-level character of the networks in the field shows an alternative to both purely international cooperation and to a hierarchical federal system. In certain aspects, therefore, the networks of social security coordination could serve as sources of inspiration in other sectors, showing the possibilities of interplay of several kinds of networks in creating a common administrative space within the EU. At the same time, the cooperation structure in the field gives rise to important questions of legitimacy and accountability in European administrative networks.