

Editorial¹

Accountability and control *across* a changing, multilevel administration

The present special issue brings together a number of articles examining issues of control and accountability in the setting of European multilevel administration. European multilevel administration, often also described as European ‘composite’,² ‘shared’,³ ‘integrated’,⁴ or ‘intertwined’ administration,⁵ refers to the complex web of cooperative links that the European Union promotes both vertically, between EU and national administrative authorities, and horizontally, between national authorities of different states. Such cooperation in the implementation of EU laws and policies, besides having drawn the interest of much of EU administrative law scholarship, is currently at the centre of an increasingly rich strand of literature in political science.⁶

Perhaps the defining characteristic of EU multilevel administration is the way in which it disperses public power along multiple jurisdictions. This fragmentation makes it difficult to comply with the requirement, found in any polity committed to the ideal of the rule of law, that such power be accountable and controllable. Indeed, as Hofmann has emphasised, that difficulty can be seen as an overarching challenge of EU administrative law as a whole.⁷

The notion of accountability, in essence, requires a holder of public office to give account or explanations for a certain course of action. This is a notion that becomes easier to operationalize in light of the definition offered by Bovens, Curtin, and ‘t Hart. The three authors describe accountability as “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judg-

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² E. Schmidt-Aßmann, ‘Introduction: European Composite Administration and the Role of European Administrative Law’ in O. Jansen & B. Schöndorf-Haubold (eds.), *The European Composite Administration* (Intersentia 2011), 1-22.

³ P. Craig, *EU Administrative Law*, 2nd ed. (Oxford 2012), 27 ff.

⁴ H. Hofmann & A. Türk, ‘The Development of Integrated Administration in the EU and its Consequences’ *European Law Journal* 13:2 (2007), 253-271.

⁵ P. Chirulli, ‘Amministrazioni nazionali ed esecuzione del diritto europeo’ in L. de Lucia & B. Marchetti (eds.), *L’amministrazione europea e le sue regole* (Il Mulino 2015), 145-170, 167 and J. Ziller, ‘Multilevel Governance and Executive Federalism: Comparing Germany and the European Union’ in P. Birkinshaw & M. Varney (eds.), *The European Union Legal Order after Lisbon* (Wolters Kluwer 2010), 257-275, 257.

⁶ See for instance A. Benz, A. Corcaci & J.W. Doser, ‘Unravelling multilevel administration. Patterns and dynamics of administrative co-ordination in European governance’ *Journal of European Public Policy* 23:7 (2016), 999-1018; and J. Trondal & M. Bauer, ‘Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system’ *European Political Science Review* 9:1 (2017), 73-94.

⁷ H. Hofmann, ‘Seven Challenges for EU administrative law’ in K. de Graaf, J. Jans, A. Prechal & R. Widdershoven (eds.), *European Administrative Law: Top-Down and Bottom-up* (Europa Law Publishing 2009), 37-59.

ment, and the actor may face consequences”.⁸ Accountability, thus understood, is naturally a concept with a broader scope than ‘control’. Definitions of what control means in public governance differ, though they often include an element of formal authority, in the sense that one body will enjoy the power to restrict, investigate, or censure, another body or an official.⁹

Nevertheless, the dividing lines between accountability and control are often not clear-cut. It is not uncommon to see the term ‘legal accountability’ employed to allude amongst other things to judicial review, which in many Member States is associated to the control of administrative action by courts.¹⁰ However, adopting an ‘expansive’ understanding of accountability, as Carol Harlow does, may offer a particularly valuable perspective in EU administrative law. Many of the mechanisms enshrined in EU law to ensure good administrative governance are not of a formal nature and can therefore not be described with conventional notions of control. The procedures launched by the European Ombudsman, for example, constitute an important informal tool to ensure accountability in cases of maladministration and lack of transparency.

From the above, it should become apparent that the overarching topic of this special issue is not completely novel. Indeed, much of the literature in EU administrative law has highlighted for about two decades how the fragmented character of European multilevel administration poses significant problems from the perspective of both accountability and control. The purpose of the contributors is, nonetheless, to revisit those problems, and examine how they currently resurface with growing complexity in various policy fields.

The articles comprised in this special issue were presented at a doctoral and postdoctoral workshop on accountability and control in European multilevel administration that was organised jointly by the Amsterdam Centre for European Law and Governance and the Amsterdam Centre for European studies, and which took place in January 2019. The workshop brought together a number of excellent young scholars from all across Europe who conduct research in the field of EU administrative law, broadly understood. Its main purpose was to consider not only general legal issues, but to compare contemporary developments of European multilevel administration across policy areas.

⁸ M. Bovens, D. Curtin & P. 't Hart, ‘Studying the Real World of EU Accountability: Framework and Design’ in M. Bovens, D. Curtin & P. 't Hart, *The Real World of EU Accountability: What Deficit?* (Oxford 2010), 31-62, 35 ff.

⁹ C.L. Hood, ‘The Hidden Public Sector: The “Quangocratization” of the World’, in: F.X. Kaufmann, G. Majone & V. Ostrom (eds.), *Guidance, Control and Evaluation in the Public Sector* (De Gruyter 1986), 765-783.

¹⁰ C. Harlow, *Accountability in the European Union* (Oxford 2002), 10 and 17-18.

Cross-sectoral analysis in EU administrative law is growingly recognized to constitute an important means to ensure that legal scholarship can keep up with the changing scenario of Europe's administrative system.¹¹ This is a concern very much in line with current methodological debates in national administrative law, and more particularly with the notion of 'subjects of reference' that has been developed by the so-called New Science of Administrative Law Movement. The analysis of 'subjects of reference' focuses on identifying structurally comparable legal problems across different domains of special administrative law, in order to expand the theoretical and doctrinal frameworks of general administrative law.¹² Rather than operating deductively, beginning in general theory to then descend towards the more concrete issues found in sectoral legislation, the approach of 'subjects of reference' operates inductively, by considering whether those issues are not in fact representative of broader developments in administrative law as a whole. As Eberhard Schmidt-Aßmann points out, this is a methodical process that can be usefully exploited in the doctrinal analysis of EU administrative law.¹³ Indeed, given the fact that EU administrative law is *overwhelmingly* legislated on a sectoral basis, careful analysis of sectoral development is crucial to keep track of its overall evolutionary trends.

The special issue begins with Joseba Fernández Gaztea's contribution. Given the recurring challenges posed by multilevel administration to judicial control, especially in fields of joint decision-making by national and EU authorities, Fernández Gaztea makes the case for a jurisdiction of jurisdictions, whereby coordinated judicial competences would be coextensive the existing relations of intensive cooperation between different levels of administration.

Napoleon Xanthoulis offers a careful analysis of the justiciability of purely factual conducts under EU administrative law; a category within the realm of administrative action that is of particular relevance in the domain of European multilevel administration, where not all interactions between the various levels of authority translate into the sort of binding administrative act that historically stood at the centre of many of Europe's traditions of administrative doctrine.

¹¹ C.M. Colombo & M. Eliantonio, 'The Changing Nature of Public Administration: Innovations and Challenges for Public Lawyers', *European Public Law* 24:3 (2018), 403, 405.

¹² See M. Eifert, 'Das Verwaltungsrecht zwischen klassischem dogmatischen Verständnis und steuerungswissenschaftlichem Anspruch', *Vereinigung der Deutschen Staatsrechtslehrer* 67 (2008), 288-333, 298-299 and A. Voßkuhle, 'Neue Verwaltungsrechtswissenschaft' in W. Hoffmann-Riem & E. Schmidt-Aßmann/Andreas Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts*, I, 2nd ed. (C.H. Beck 2012), 1-64, 39 ff.

¹³ E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik* (C.H. Beck 2013), 9.

In her contribution, Annalisa Volpato considers the exercise of atypical, or *de facto* implementing powers in multilevel administration. Instances of that phenomenon are found for example in private standardisation and in the administrative activity of EU agencies. Besides evading the apparent simplicity of the regime for implementing powers located in Article 291 TFEU, atypical implementing powers represent significant challenges from the point of view of democratic accountability and judicial control.

The sequence of articles that follows turns to three critically important 'subjects of reference' in contemporary EU administrative law: migration, competition law enforcement, and the Banking Union. Jonas Bornemann's contribution analyses different patterns of indirect review of national authorities' discretion by the Court of Justice in the context of preliminary rulings. The article illustrates in particular the varying extent to which the Court influences judicial review at national level, depending on the specificity or abstractness of the answers it provides to the questions submitted by national courts.

Naida Dzino and Catalin Rusu offer an important analysis on the topic of trust between authorities in European multilevel administration. They do so against the backdrop of competition law enforcement, but pursue a line of argument that must certainly lead to an important reflection on the role of reciprocal trust in any area characterised by cross-jurisdictional administrative cooperation.

The Banking Union has recently given rise to especially difficult doubts as to how the control and accountability of administrative power should be ensured. Jolien Timmermans considers the issues of control posed by the Single Resolution Mechanism, the governance of which has proven unusually complex even for the standards of EU multilevel administration. As Timmermans convincingly illustrates, the SRM's convoluted structure, characterised by numerous cooperative links both between national resolution authorities and the Single Resolution Board, and between multiple authorities at EU level, gives rise to significant problems of judicial and administrative review.

Considering the other existing pillar of the Banking Union, the Single Supervisory Mechanism, Barbora Budinska analyses the constitutional challenges of judicial control in the revocation of national administrative decisions by the European Central Bank. The legal issue at stake, which could well affect other areas of European multilevel administration beyond banking supervision, is intricate from a theoretical point of view, especially so in light of the traditional conception of strict separation between national and EU administrative power.

The various articles are joined by two interesting case-notes on recent CJEU judgments considering distinct issues in the practice of European multilevel

administration. Nicole Lazzerini offers readers a timely annotation to *Garda Síochána*, a ruling of the Court of Justice that clarifies critical aspects of the relations between national administrative law, the primacy of EU law, and the power of national courts and tribunals to set aside national legislation. Simona Demková offers an illuminating analysis of the CJEU's recent *Berlusconi & Fininvest*. Though delivered in the context of the Single Supervisory Mechanism, the ruling is bound to have profound implications well beyond the Banking Union, and to become – as the Advocate General himself recognized in the case – a landmark judgment for composite administrative procedures altogether. Indeed, it is a ruling which showcases how the perennial problems of accountability and control in European multilevel administration remain topical and, far from being solved, call for even further research.

Lastly, Luis Arroyo Jiménez offers a book review of the third edition of Professor Paul Craig's *EU Administrative Law*. In its latest edition, the book considers recent legal developments and literature published since 2012. Its significance to the field is certain to remain at least as fundamental, if indeed not more, than it has been for already well over a decade.

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