THE EUROPEAN UNION'S MIXED ADMINISTRATIVE PROCEEDINGS

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I

INTRODUCTION

Studies dedicated to European administration reveal a recurring tendency to draw analogies between the constitutional structure of the European Union (EU) and that of federal orders (the United States, in particular). In both types of structure, powers are separated rather than concentrated, thereby constituting a guarantee against an abuse of power, according to Alexis de Tocqueville's famous thesis.

However, of the numerous differences between nation states (including federal ones) and the European Union,[1] one concerns precisely the subject of executive power. The "*Tableau sommaire de la constitution fédérale*"[2] sketched by de Tocqueville is helpful to the work of identifying this difference, as it emphasized that the attributes of early American government were divided, including its executive function. That is to say, the executive function in the United States was not an exclusive prerogative of the several states, as had been the case in the pre-existing confederation. It was divided, in the sense that "*le gouvernement des Etats resta le droit commun, le gouvernement fédérale fut l'exception.*"[3]

This opinion has also long prevailed in studies of the constitutional structure of the European Community (EC) and of the European Union.[4] Its basis was two-fold. The Treaty of Rome does not confer the power to execute European laws on European administration: except in certain cases such as competition, execution is remitted to the national public authorities. In line with this choice, judicial review is within the jurisdiction of national judges.

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1. J.H.H. Weiler, *Europe: The Case Against the Case for Statehood*, 4 EUR. L. J. 43 (1998); *see also* G. DELLA CANANEA, L'UNIONE EUROPEA. UN ORDINAMENTO COMPOSITO (2003).

2. A. DE TOCQUEVILLE, DE LA DEMOCRATIE EN AMERIQUE 185 (F. Furet ed., 1981) (1835).

3. *Id*.

4. *Cf.* G. ISAAC, DROIT COMMUNAUTAIRE GENERAL 193 (3d ed. 1990). For an analogy with the British "indirect rule," see IMPLEMENTING EC LAW IN THE UNITED KINGDOM: STRUCTURES FOR INDIRECT RULE (T. Daintith ed., 1995). On recent trends toward decentralization, see A. von Bogdandy, *Legal Equality, Legal Certainty and Subsidiarity in Transnational Economic Law—Decentralized Application of Art. 81.3 EC and WTO Law:Why and Why Not*, *in* EUROPEAN INTEGRATION AND INTERNATIONAL COORDINATION, STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF C.D. EHLERMANN 13 (A. Von Bogdandy et al. eds., 2003).

Nevertheless, as illustrated by the procedure for preliminary references, national court systems and the European judicial system are not functionally separate.[5] Over the years, administrative power, too, has moved away from the initial model of European lawmaking and national implementation. To give just well-known examples, the European Commission in collaboration with committees composed of national government representatives have adopted countless pieces of administrative rules.[6] Moreover, the EU's decisions regarding national public budgets are taken within the framework of the multilateral surveillance procedure, which means that estimates and forecasts are submitted not only to the Commission, but also to all the national governments represented on the Council of the European Union.

Another trend in the administration of EU policies is that when making decisions in the traditional areas of EC intervention (like agriculture) and in the new ones (including the licensing of genetically modified organisms and the licensing of drugs), both national authorities and either the Commission or EU agencies take part in multiphase processes. These sequences of activities may be characterized more precisely as mixed administrative proceedings.[7] They do not mirror a constitutional structure based on separated powers but, rather, highlight the powers' interaction. They also raise new questions as far as judicial protection of individual interests is concerned. This became clear at the beginning of the 1990s, when an Italian agricultural firm challenged the validity of a Commission decision revoking the subsidies previously given to it. Unexpectedly, the Court of Justice of the European Communities (ECJ) refused to review the decision, arguing that the "real" decision lay in the initial opinion of the Italian agency, in favor of revocation.[8] The ECJ may be criticized for risking one of the fundamental principles of western constitutionalism: the right to judicial protection.[9] However, the underlying problem of the change in the way public powers are exercised within the EU must not be overlooked.

A primary aim of this Article, therefore, is to shed some light on administrative powers through an examination of mixed administrative proceedings. Another aim is to try to identify the common features of mixed administrative proceedings and, at the same time, those which differentiate them from other types of proceedings. Next, the problems that arise, not only in terms of judicial protection, but also in terms of trans-

5. *See generally* G.F. Mancini & D. Keeling, *Democracy and the European Court of Justice*, 31 COMMON MARKET L. REV. 243 (1994) (for the thesis that this constitutes the European order's "cornerstone"); R. Caranta, *Judicial Protection Against Member States: The Indirect Effects of Art. 173, 175 and 177*, *in* PUBLIC INTEREST LITIGATION BEFORE EUROPEAN COURTS 108 (H.W. Micklitz & N. Reich eds., 1998) (for the thesis that a new *jus commune* is emerging, at least as far as the standing of public interest bodies is concerned).

6. COMMITTEE GOVERNANCE IN THE EUROPEAN UNION (T. Christiansen & E. Kirchner eds., 2000).

7. S. Cassese, *Il diritto amministrativo europeo presenta caratteri originali?*, 53 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 35 (2003).

8. Curiously enough, few scholars have commented on this judgment. *See, e.g.*, R. Caranta, *Sull'impugnabilità degli atti endoprocedimentali adottati dalle autorità nazionali nelle ipotesi di coamministrazione*, FORO AMMINISTRATIVO 752-61 (1994); E. Garcia de Enterría, *The Extension of the Jurisdiction of National Administrative Courts by Community Law: The Judgement of the Court of Justice in* Borelli *and Article 5 of the EC Treaty*, 13 Y.B. EUR. L. 19 (1993).

9. TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, art. II-107, 2004 O.J. (C 130) 3; *see also* CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, art. 47, Dec. 7, 2000, O.J. (C 364) 1 (2000) [hereinafter CHARTER OF FUNDAMENTAL RIGHTS].

parency and accountability, will be taken into account. Finally, administrative proceedings will be analyzed in order to shed some light on the evolution of the legal order of the European Union.

II

A PHENOMENOLOGY OF MIXED ADMINISTRATIVE PROCEEDINGS

It is useful, though not uniformly applicable, to view the variety of mixed administrative proceedings as two general types: "top-down" proceedings, which end with measures taken by national authorities, and "bottom-up" proceedings—which end with measures taken by Community authorities. This distinction is not to be understood in a strict sense, however, because there also are mixed or hybrid models that present features typical of both types of processes.

A. "Top-Down" Proceedings

In top-down proceedings, the initial decision is made by European authorities. Among the proceedings of the first type is the one geared to granting eco-labels, which are EU product labels denoting compliance with environmental requirements. These labels serve to orient consumers toward products that have less impact on the environment. To achieve this goal, two kinds of administrative activities are provided: regulation and adjudication.[10] Regulation is carried out by the Commission, which is assisted by committees of national representatives. Before developing its triennial work plan, the Commission must consult the EU eco-label committee—composed of senior officers from the Member States—and consumers' associations. Before establishing the criteria for granting the labels, which are placed on products such as lamps, detergents, washing machines, and refrigerators, and issuing consumer information, the Commission has the duty to consult a regulatory committee.[11] Once the rules have been adopted and published in the Official Journal, they bind the conduct of private parties. When manufacturers and importers apply to national departments for the right to display an eco-label on their products, the latter are bound to carry out an assessment. They also must consult a special register and inform the Commission of the decisions they intend to make.[12] The Commission then passes that information on to the other national bodies, which can present reasoned objections to the grant of the eco-label. If the objections cannot be disposed of by way of informal consultation, the Commission makes a decision and the national department draws up a contract with the applicant regarding the eco-label's conditions for use.

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10. Council Regulation 1980/2000, 2000 O.J. (L 237) 1.

11. In the EC, secondary rules are normally adopted by the Commission on the basis of the Council's delegation in collaboration with committees of national experts. While all these committees must be consulted and produce opinions, some of these opinions have no binding effect (because they are issued by advisory committees), some produce partially binding effects (because they are issued by management committees), and some have binding effects, meaning that they send the decision back to the Council.

12. Article 7 of Council Regulation 1980/2000 provides for a variation in this procedure if the product concerns more than one Member State. In such cases, the application may be made to one national organism, which then consults the others. Council Regulation 1980/2000, *supra* note 10, art. 7, at 4.

Another procedure of this type involves the awarding of subsidies, compensatory measures, and forms of aid in agricultural policy areas such as the sugar market. As is usually the case, the "basic" law (regulation) is adopted by the Council, whereas the Commission is responsible for the implementation, which implies the adoption of secondary rules.[13] The law provides for a system that compensates "storage" expenses. The activity may be carried out only by firms that have been specially authorized by their Member State. This measure is a declaratory one, issued by each national authority but devised in such a way as to be capable of recognition by other national authorities.[14] A firm authorized in one Member State to engage in storage operations can, upon the presentation of the national determination, immediately obtain authorization to engage in storage operations elsewhere. In this and other proceedings of the same type (such as that concerning the financing of professional education by way of the European Social Fund),[15] the funds are available under the budget of the EC, but are distributed by national, Member State authorities. National authorities receive the applications, give money to producers, and request reimbursement from the Commission. In other words, national authorities, not the Commission, are responsible for implementing the budget of the EC. As a result, there is a double legal relationship. The first is between the EU and each Member State, and the second is between each Member State and the firms receiving subsidies. Indeed, it is not the Commission, but national departments and agencies that carry out the checks aimed at ensuring that the duties and conditions attached to funding under European law are being observed. The Commission is responsible for checking that national authorities carry out their duty to monitor subsidy recipients by way of inspections performed with national administrations. National authorities also issue the documents testifying to the factual and accounting accuracy of the information set out in private parties' applications. For this reason, the rules saddle the Member States with responsibility for the "right outcome" of such interventions,[16] and, according to a consistent line of case law, national authorities bear the responsibility for recovering sums of money wrongly paid out.[17] However, sometimes when the Commission exercises powers in managing the EC budget and decides that the subsidies allocated must be reduced or eliminated because of illegal behavior, a "direct relationship [arises] between the Commission and the contribution's beneficiary."[18]

13. Commission Regulation 314/2002, 2002 O.J. (L 50) 40; Council Regulation 1260/2001, 2001 O.J. (L 178) 1.

14. Council Regulation 1260/2001, *supra* note 13, pmbl., § 2.

15. Council Decision 83/516, 1983 O.J. (L 289) 38; Council Regulation 2950/83, 1983 O.J. (L 289) 1.

16. *See* Council Decision 83/516, *supra* note 15, art. 2 (listing the European Social Fund's tasks); Case C-413/98, Directora-Geral do Departamento para os Assuntos do Fundo Social Europeu (DAFSE) v. Frota Azul, 2001 E.C.R. I-673, para. 3.

17. Case C-55/91, Italy v. Commission, 1993 E.C.R. I-4813; Joined Cases C-89 & 91/86, Etoile commerciale et CNTA v. Commission, 1987 E.C.R. 3005.

18. Case C-32/95, Commission v. Lisrestal, 1996 E.C.R. I-5373. *See* discussion *infra* Part IV. B.

B. "Bottom-up" Proceedings

In the second type of mixed administrative proceeding, the initial decision in the administrative sequence is made at the national level and the final decision rests with European administration. Perhaps the best known cases are those concerning the management of certain types of subsidies in the agricultural sector. Other equally interesting cases regard the registration of geographical information and "*appellation contrôlée"* details for agricultural produce and other foodstuffs (with the exception of wines) and the appointment of the Economic and Social Committee's members.

The provisions governing the European olive oil market provide that the application for financing be made by olive growers and processors to the appropriate regional administration (*Regioni* in Italy, *Länder* in Germany, and so on). The regional authorities conduct an initial examination of the application. However, contrary to the usual administrative procedure for distributing agricultural subsidies, the regional authority does not adopt the final measure. It only formulates an opinion and sends it to the Commission, which issues the decision containing the list of fundable projects. At first glance, therefore, it may be said that the Commission is responsible for balancing the EU's and individual farmers' interests, while the function of the national authority is to assist the Commission in what may be considered an activity of an auxiliary nature.

However, the ECJ made the opposite determination in a case decided in 1992, finding that the principal decision had been made by the national authority, not the Commission.[19] The case concerned Oleificio Borelli, an olive oil processing firm. In this case, the opinion of the regional administration (Regione Liguria) had been given and was favorable. Nevertheless, when Regione Liguria obtained further information from other regional administrations, it modified its opinion and the Commission refused funding. Oleificio Borelli then challenged this decision. It did not sue Regione Liguria in Italian courts, because jurisdiction to review EC acts rested exclusively with the ECJ. A challenge before the Italian courts also would have been futile, because, under Italian administrative law, anything short of a final administrative decision is not reviewable: opinions are conceived as ancillary to the final (reviewable) decision.[20] However, when the firm brought the case to the ECJ, the Commission argued that its decision only upheld or confirmed the national decision (i.e., the opinion) on the substance, without independently examining the facts, and the ECJ declined jurisdiction over the decision.

Under Article 230 of the Treaty Establishing the European Community (EC Treaty), only those Commission acts of "direct concern" to an individual may be challenged directly in the ECJ.[21] Otherwise the individual must seek redress through his

19. Case C-97/91, Oleificio Borelli v. Commission, 1992 E.C.R. I-6313.

20. 2 M.S. GIANNINI, DIRITTO AMMINISTRATIVO 563 (1993). Giannini is one of the few Italian scholars according to whom opinions (in the strict sense) must be kept distinct from binding opinions, "which are, in reality, decisional acts."

21. This argument has been used since the early 1960s. *See, e.g.*, Case 25/62, Plaumann v. Commission, 1963 E.C.R. 195. The ECJ later admitted actions against regulations of direct and individual concern to some firms. *See, e.g.*, Case C-309/89, Codorniu v. Council, 1994 E.C.R. I-1853, para 19. However, the ECJ has an-

or her national courts (which, of course, may ask the ECJ to issue a preliminary reference). Accordingly, the Commission argued that its decision was not of direct concern, since it was the national opinion that denied Oleificio Borelli the subsidy. Thus, the argument went, Oleificio Borelli had to proceed through the Italian courts. The ECJ held in favor of the Commission. However, the ECJ was aware of the prejudice caused to the applicant. Precisely in order to limit the impact of the prejudice, the ECJ decided that, if an Italian judge were to refer a question to the ECJ under the preliminary reference procedure, the ECJ would issue a ruling. Furthermore, the ECJ determined that the national judge was under a duty "to consider allowable an application made to this end, even if the national procedural rules do not provide for it in such a case."[22]

The complex allocation of powers just described is not unique. An even more complex one involves the registration of geographical information and "*appellation contrôlée*."[23] The administrative decision in these cases serves a double purpose in that it is both informational (because elements defining the product are acquired) and technical. A decision that an agricultural product or foodstuff is protected gives the producer legal certainty, with the further effect of creating a sort of monopoly. Precisely for this reason, disagreements arise fairly frequently, not only between economic operators, but also between national authorities. Some national authorities wish to protect their own national, regional, or local products (e.g., Italian *parmigiano* or Greek *feta*).[24] Other national authorities, on the other hand, oppose the registration of a product in an attempt to preserve the ability of their own economic operators to market the product using the same name and description. This implies that the Member State assumes the interest of the producing firm or firms as its own.

The proceeding begins with an application made by the interested party to the national department, which carries out an assessment. Because the process is often lengthy, EC rules allow Member States to grant "temporary national protection." The national authority ascertains that the presuppositions and conditions provided for by the Community laws have been satisfied in that the product already benefits from official protection nationally or in that it has an "exceptional reputation and renown." Furthermore, it checks that the product conforms to previously established specifica-

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nulled a judgment of the CFI that broadened the interpretation of the conditions set by the EC Treaty. Case C-50/00, Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-6677; *see also* Case Law, *Case T-177/01* Jégo-Quéré v. Commission *and C-50/00* Unión de Pequeños Agricultores v. Council, 9 COLUM. J. EUR. L. 141 (2002) (see the comments by T. Corthout); M.P. Granger, *Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts*: Jégo-Quéré et Cie SA v. Commission *and* Unión de Pequeños Agricultores v. Council, 66 MOD. L. REV. 124 (2003). An even more restrictive interpretation has been expressed, however, regarding actions brought by environmental associations, especially in the *Greenpeace* case. Case C-321/95, Stichting Greenpeace Council v. Commission, 1998 E.C.R. I-1651, 1702. For critical remarks, see N. Gérard, *Access to the European Court of Justice: A Lost Opportunity*, 10 J. ENVTL. L. 340 (1999).

22. Case C-97/91, Oleificio Borelli v. Commission, 1992 E.C.R. I-6313.

23. Council Regulation 2081/92, 1992 O.J. (L 208) 1, *amended by* Council Regulation 535/97, 1997 O.J. (L 83) 3.

24. *See e.g.*, Case C-108/01, Consorzio del Prosciutto di Parma v. Asda Stores Ltd., 2003 E.C.R. I-5121.

tions.[25] Once the assessment has been concluded, the national authority sends the application to the Commission, which carries out a further check. If the check has a positive outcome, the application is published. There then begins a complex phase during which both Member States and private parties with opposing interests may intervene. The latter apply to their respective Member States, and these can oppose the registration. In this phase, the Commission acts at first as a mediator, inviting the Member States to reach an agreement,[26] and then acts to ratify it. In the absence of an agreement, the Commission issues a decision conferring or denying an *appellation controlée* after submitting the proposed decision to a regulatory committee. If the opinion is favorable, the decision is enacted. If, on the other hand, the opinion is unfavorable or simply not forthcoming, responsibility for a decision lies with the Council, at the Commission's proposal. But if the Council has not decided within three months, Article 15 says the Commission must adopt the proposed measures.

While product registration involves a complex decisionmaking process, that for appointing interest group representatives to the advisory body known as the Economic and Social Committee (ECOSOC) is much easier. The ECOSOC was established by the Treaty of Rome. It is composed of representatives from various economic and social categories as well as "representatives of the general interest."[27] It must be consulted on all major legislative initiatives. Its members all are appointed by the Council based on proposals by the Member States. The decision of which groups to appoint, therefore, appears to be political. However, ten years ago, a national association of pensioners attempted to challenge the Italian government's proposal of a group of associations that did not include the pensioners' association. The Court of First Instance (CFI) denied *locus standi*, because no retiree or organization representing retirees would be distinctly and individually affected in a manner different from the rest of the class of retirees.[28] Unlike the *Oleificio Borelli* case, the applicant also challenged the decision before a national administrative court, arguing that even though the appointment was officially by the Council, decisionmaking power was effectively being exercised by the Italian authorities. The Italian court disagreed and denied jurisdiction.[29] Once again, therefore, the mixed character of the proceeding compromised judicial protection and individual rights.

C. "Hybrid" Proceedings

Other issues of effectiveness and accountability arise from other proceedings, which include some elements belonging to "top-down" proceedings and others be-

25. The Court of Justice has interpreted the regulation to mean that every modification of the specifications requires that the Community procedure be carried out. Joined Cases C-129/97 & C-130/97, Criminal proceedings against Yvon Chiciak and Fromagerie Chiciak (C-129/97) and Jean-Pierre Fol (C-130/97), 1998 E.C.R. I-3315.

26. Council Regulation 2081/92, *supra* note 23, art. 7(5).

27. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 257, 1997 O.J. (C 340) [hereinafter EC TREATY].

28. Case T-381/94, Sindacato pensionati italiani e altri v. Council, 1995 E.C.R. II-2741.

29. Trib. ammin. reg. Lazio, sez. 1, 10 jun. 1998, n. 1904, RIVISTA ITALIANA DI DIRITTTO PUBBLICO COMUNITARIO 193 (1999).

longing to "bottom-up" proceedings. They therefore may be labeled as "hybrid" proceedings.

One such proceeding is the one through which the marketing authorization for medicines is granted. It has become more and more important in view of the achievement of the single market. The EC establishes two alternative tracks for new drug approval. The first is the centralized procedure. The second, which is based on mutual recognition principles, begins with an application to one of the twenty-five Member State authorities.

The centralized procedure, which is obligatory for all biotech medicinal products and optional for others, leads to a single marketing authorization valid for all of the European Union. It is in the hands of three bodies: the European Agency for the Evaluation of Medicinal Products (Agency), a technical committee, and the Commission. Primary legislation assigns to the Agency the task of examining the products and formulating proposals, to the committee that of formulating opinions, and to the Commission that of issuing the final decision. In practice, the Commission limits itself to acknowledging the conclusions drawn by the Agency, often after a considerable period of time.

The decentralized procedure is instead based on the principle of mutual recognition.[30] More precisely, the procedure is in the hands of Member State authorities (either ministries or specialized new drug agencies). When a national agency receives an application, it must inform all the other ones. EC rules allow the national authority to suspend its consideration of the application received "[w]here [it] notes that an application for authorization is already under active examination in another Member State in respect of that medicinal product."[31] Once an authorization is issued, every other national authority may obtain the related documentation. Should a national authority deem that there may be a risk to public health, it has the power to ask the authorizing national authority within ninety days that the medicine be suspended, but it also must inform the Agency of its action. Such a request must be well-founded, refer specifically to inadequacies in the application, and indicate the corrective measures to be taken. The Commission intervenes only when the national authorities' decisions differ or in cases of "particular interest" to the Community. It does so by way of the regulatory committee procedure; in other words, it can make a decision if it obtains a favorable opinion from the committee. Otherwise, the decision lies with the Council. However, if the Council's decision is delayed, responsibility returns to the Commission.

A third new drug approval proceeding also exists: purely national decisionmaking processes are used if the medicinal product is to be marketed in only one Member State. The least that can be said is that the system as a whole is patchy.[32] Because this

30. This implies that some requisites must be observed. *See* Case C-94/98, The Queen *ex parte* Rhône-Pulenc Ltd. v. The Licensing Authority, 1999 E.C.R. I-8789.

31. Council Directive 2001/83, tit.

and other problems will be examined later, it may be observed now that the centralized procedure approximates top-down proceedings. It differs from them, however, to the extent to which it is simply an alternative to the decentralized procedure. The decentralized procedure, in turn, approximates bottom-up administrative processes. However, the intervention of Community institutions is not necessary unless national authorities do not reach an agreement. If they succeed in reaching the agreement, it is rather a "common" procedure in the sense that national authorities have the power to decide. Their decisions must be based, however, on EC rules and under the centralized supervision of the Commission and regulatory committee.

A similar procedural sequence is envisaged for the authorization to introduce genetically modified organisms (GMOs) into the environment.[33] The legal framework of the EC is based, from a substantive point of view, on the precautionary principle. From a procedural point of view, the process differs from the authorization of medicinal products because no centralized proceeding is provided. There is instead a national proceeding with an EC stage. Under Article 6 of the EC Directive, the private party must take the initiative by making an application (including providing all relevant information) to the national authority. The latter must examine the application and, through the Commission, inform the authorities of the other Member States.[34] The administration must make a decision within ninety days of receiving the application, taking into account all the observations received from other national authorities. It may, however, extend the ninety-day time limit by three months if it requires further information from the applicant or if it starts a public consultation.

While Article 6 of the Directive does not specify that the authorizing national authority must give weight to the observations received from the other national authorities, Articles 16 and 18 make it clear that for standard GMO approvals,[35] the reasoned objection of another national authority will block the decision. The Commission also can reject the application. If the objection comes from another Member State, it may be overcome by way of an agreement. Otherwise, the Commission decides through the regulatory committee procedure. Once again, if the committee's opinion is not favorable, the Council of the European Union may make the final decision but its inaction means that the responsibility returns to the Commission.

Thus, the authorization to introduce GMOs into the environment is based on two different decisionmaking models. Although it begins at the national level, it might end up with an EC decision, and thus involve a Community stage. However, it also might end up with an agreement between national authorities and thus involve a common stage. Interestingly, Article 11 of the Directive specifies that national authorities can send their observations either directly to the authorizing national authority or through the Commission, which acts as an intermediary between national authorities.

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33. Council Directive 2001/18, 2001 O.J. (L 106) 1.

34. The lack of compliance with the consultation requirement makes the final decision unlawful, as the ECJ has observed. Case C-6/99, Greenpeace France v. Ministère de l'Agriculture et de la Pêche, 2000 E.C.R. I-1651. Therefore, national courts must refer the case to the ECJ.

35. Special procedures are provided for some GMOs.

III

THE PROCEDURAL DIFFERENCES PRODUCED BY THE INTERESTS AT STAKE

The examples examined thus far show that mixed administrative proceedings resemble each other only in certain respects. Some proceedings take place on a yearly basis (in the agricultural field, for example); others happen only if a private party files an application. Most of them begin with an application of a private party, but the proceeding geared to appointing the members of ECOSOC is entirely in the hands of public authorities. While some proceedings are relatively easy because they are managed by the Commission and one national authority,[36] others are much more complex. In the EC phase the Council and other bodies (such as the Agency for the Evaluation of Medicinal Products) may intervene. A common, rather than Community, phase can make the proceeding even more complex; a good example is a situation in which national authorities are entitled to intervene, such as the cases of GMOs and medicinal products.

Three of these differences are particularly relevant, at least from a legal point of view. The first regards the distribution of powers between EC and national authorities. A distinction has been made in this respect between top-down and bottom-up proceedings. This distinction is both functional and organizational. Functionally, EC laws separate decisionmaking from the execution of decisions. They also assign these activities to different authorities. The decision may be assigned to the EC authority (the Commission, the Council, or an agency) and its execution to the national authority (as happens with the sugar market). Alternatively, the EC authority may intervene only after the national authority has dealt with private parties' applications (which is the case in the olive-oil market).

Second, the traditional distinction between the "supranational" body (the Commission) and intergovernmental bodies (the Council or committee of regulators) is overly simplistic. Although the Council decides on the basis of national interests, legal procedures mark a fundamental difference, because within the Council, national ministers must decide on the basis of the majority rule. Moreover, when national authorities are entrusted with submitting observations on the draft decisions that another state is planning to take, for example, in the cases of GMOs and eco-labels, each of them has the power to decide alone. However, EC rules oblige national authorities to make a decision within a given time limit and to support the decision with adequate reasoning. This implies a departure from merely diplomatic negotiations, in which one merely can say "no."

Last, the legal position of private parties differs, sometimes even remarkably. They do not negotiate only with their national administration, but with a plurality of

36. The question thus arises whether they both have discretionary powers. In *Oleificio Borelli*, the Court of Justice excluded the hypothesis that the Commission exercised a genuine capacity to choose and decide, held that such a function had been carried out by the regional administration, and declined jurisdiction. Case C-97/91, Oleificio Borelli v. Commission, 1992 E.C.R. I-6313. In *Frota Azul*, the Court instead concluded that "the Commission is the only body with the competence to suspend, reduce or withdraw a community subsidy." Case C-413/98, Directora-Geral do Departmento para os Assuntos do Fundo Social Europeu (DAFSE) v. Frota Azul, 2001 E.C.R. I-673.

authorities whose interests and techniques might differ.[37] Moreover, sometimes private parties do not have a legally recognized right to intervene in the process, although case law recognizes their right to challenge its outcome. On other occasions, however, private parties have the possibility of formally participating in the processes.

The differences just highlighted are not fortuitous. They derive rather from a general characteristic of administrative processes. These processes do not correspond to a unitary model, as is the case sometimes for the adoption of primary legislation or secondary rules. Their shape depends on the interests at stake. As far as mixed administrative proceedings are concerned, it easily may be said that they do not aim at protecting one single type of interest. Some are general interests, such as sustainable development. Others are interests that are particular to individual Member States. Still others are private interests, such as those of GMO and medicine producers, which Member States defend as if they were their own during the negotiations that take place at the Community level.

Emphasizing the plurality and differentiation of the interests involved is useful for more than one reason. It permits an understanding of the various processes' distinctive features, which are produced by the different interests protected. Furthermore, the plurality of interests involved makes recourse to negotiations between public authorities necessary. Indeed, the decisions are often negotiated. In the multilateral relationships, it is the legislative rules themselves that provide for a negotiation phase aimed at reaching an agreement. More often than not, this postulates reciprocal concessions within the Council (which enjoys a position of preeminence),[38] but at the Commission's initiative. Other negotiations take place between private parties and national administrations such as national customs authorities.[39]

IV

THE COMMON FEATURES OF MIXED ADMINISTRATIVE PROCEEDINGS

A. The Proceedings' Structure

Although mixed administrative proceedings are differentiated as a consequence of the variety of interests at stake, they have some common features. One similarity is the proceedings' structure—the legal connection between the activities carried out by both EC and national authorities. Another one is private parties' participation in administrative proceedings. Both imply a change of the traditional model of administrative action, as conceived by the first president of the ECSC High Authority, Jean

37. In a recent case, the firm that wanted to introduce a new veterinary medicinal product had to reply not only to the observations of the British Veterinary Medicines Directorate, but also to those of the Commission and of the Swedish and Spanish authorities. Case T-392/02, Solvay Pharmaceuticals v. Council, 2003 E.C.R. II-1825.

38. This is emphasised by intergovernmental theories of European integration. *See, e.g.*, A. MORAVCSICK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT (1999); H. WALLACE, NATIONAL GOVERNMENTS AND THE EUROPEAN COMMUNITIES (1973).

39. Case C-101/99, *ex parte* British Sugar, 2002 E.C.R. I-205, para. 63.

Monnet, who aimed at making the Community administration essentially a steering body, leaving the daily management of common policies to national bureaucracies. [40]

The structural element depends on the links EU rules establish between the activities the various administrations carry out, as well as the links between the acts they adopt.[41] The very first studies of these decisionmaking processes emphasized this characteristic, observing that such proceedings are not exhausted either in the Community sphere or in the national one.[42] To put this feature in positive terms, it may be said that these proceedings are composed of several phases, and these involve both the Community and the national administrations in different capacities and at different stages of the sequence.

The importance of the structural element is made manifest in several ways. The first regards the manner in which decisions are taken, as is demonstrated by the rules establishing duties to provide information and to collaborate. The rules also establish a legal connection between the activities carried out by EC and national administrations. For example, even if the Commission is responsible for the final check to ensure that financial aid allocated by the EC budget is distributed and managed in a correct manner, it may deem the checks carried out by the national authorities as sufficient.[43] In other words, it does not have a legal duty to carry out fresh checks.

The significance attached to the national administration's activity is reflected in the reasoning behind the Commission's measures. EC courts have held that a Commission decision to reduce a financial subsidy may be considered duly reasoned when it refers sufficiently clearly to measures taken by the national authorities, which, for example, have discovered irregularities or fraud. The only condition that must be satisfied is that the enterprise has been able to be acquainted with it.[44] This doctrine goes well beyond simply recognizing that an administration can provide the reasoning for its own decisions *per relationem*, as it is traditionally put in some continental adminis-

40. J. MONNET, MÉMOIRES 546 (1976). *See also* S. Cassese & G. della Cananea, *The Commission of the European Economic Community:The Administrative Ramifications of its Political Development*, *in* 4 EARLY EUROPEAN COMMUNITY ADMINISTRATION, Jahrbuch für Europäische Verwaltungsgeschichte 75 (E. Volkmar Heyen ed., 1992).

41. For a non-European reader it might be useful to know that European legal cultures have studied administrative proceedings in different ways. In France, the country in which administrative law developed first, the study of administrative proceedings, as distinct from the study of the final decision (*décision exécutoire*), took off later, even now, administrative proceeding are conceived in a similar vein to trials (*procédure administrative non contentieuse*). G. ISAAC, LA PROCÉDURE ADMINISTRATIVE NON CONTENTIEUSE (1968). In Germany and Italy, however, the study of decisionmaking processes began earlier, under the influence of both the case-law and the gradualist school of Kelsen and Merkl. But while German legal scholarship still holds onto the old theory of Otto Mayer, according to which administrative proceedings end up with individual decisions, W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, *in* 2 ADMINISTRATIVE LAW: THE PROBLEM OF JUSTICE 90 (A. Piras ed., 1977), in the second half of the twentieth century, Italian scholars have gradually moved toward the Anglosaxon distinction between administrative rulemaking and adjudication, which is now enshrined in the Italian basic law on administrative proceedings. Law no. 241/90 of Aug. 7, 1990 (It.), Gazzetta Ufficiale della Repubblica Italiana (Gazz. Uff.) No. 192 (Aug. 18, 1990). For a comparative analysis of European legislation in this field, see S. Cassese, *Legislative Regulation of Adjudicative Procedures: An Introduction*, 1993 special issue EUR. REV. PUB. L. 15 (1993).

42. M.P. CHITI, DIRITTO AMMINISTRATIVO EUROPEO 305, 331 (2000).

43. Case T-199/99, Commission v. Sgaravatti, 2002 E.C.R. II-3731, para. 103.

44. Case T-72/97, Proderec v. Commission, 1998 E.C.R. II-2847, paras. 104, 105; Joined Cases T-231 & 234/94, Industrias pesqueras campos v. Commission, 1996 E.C.R. II-247, paras. 142-144.

trative laws. It implies that private parties have the right to be heard, as will be discussed in the next section. In this way, the conditions allowing them to challenge administrative decisions through judicial review become a concrete reality.[45]

A still more important implication of the structural connection between the different stages of mixed administrative proceedings regards the relationship between public authorities and private parties. The traditional doctrine of the ECJ in this area was expressed ten years ago in the *Nutral* case.[46] The Commission suspected that Nutral, an agricultural producer that received EC subsidies to produce skim milk, did not respect Community rules. It asked national authorities to carry out a spot check with its agents. Once the check confirmed the suspected irregularities, the Commission asked the national administration to recover the subsidies. Nutral then challenged this request, but both the CFI and the ECJ dismissed the case on the basis of a two-fold argument. First, they argued that national authorities have the responsibility for the management of EC subsidies, as well as for ensuring the respect of EC rules. The Commission may not, therefore, issue decisions producing binding effects *vis à vis* private parties. Accordingly, the Commission's request lacks any binding effect and is not an act whose legitimacy may be challenged.

More recently, however, the autonomy of the legal relationships between the EU and the Member States, on one hand, and between each national administration and individuals, on the other, has been blurred by the European Courts. When *ex post* checks carried out by national agencies revealed irregularities either in the activities carried out by agricultural firms or in the documents produced, the Commission reduced the subsidies or even withdrew them. Businesses benefiting from financial aid went to European Courts, challenging the validity of the Commission's decisions. The national government involved in the case argued that the firms did not have *locus standi*. The government said that the checks carried out by the national authorities were not exhausted in an audit of accounts but rather were significant at a legal level. They implied a judgment as to the legitimacy of the expenses sustained by the private parties and their compliance with EC rules. The Commission, on the other hand, was of the opinion that the national decisions were capable of having a binding effect on the final choice. Both the CFI and the ECJ have endorsed this second argument.[47] The rationale for this partial *révirement* is the traditional concern about the uniform application of EC law, which would be jeopardized if firms were treated differently by different Member States. In order to avoid this risk becoming a reality, the courts define the effects of the national authority's intervention restrictively. The outcome of the national stage is downgraded from a decision to a simple "proposal," above all in the cases in which the proceeding modifies a prior decision and the Commission requires the recovery of the sums of money wrongly paid out. Although the underlying argument is not at all new, the implications are quite serious.

45. Case C-32/95, Commission v. Lisrestal, 1996 E.C.R. I-5373, para. 46.

46. Case C-476/93, Nutral S.p.a. v. Commission, 1995 E.C.R. I-4125.

47. *E.g.*, Directora-Geral do Departmento para os Assuntos do Fundo Social Europeu (DAFSE) v. Frota Azul, 2001 E.C.R. I-673, para. 30.

The legal connection between the stages of administrative proceedings also might be relevant for judicial review in a different way. If, for example, the national administration verifies the regularity of agricultural firms' applications, the Commission sometimes adopts a decision on subsidies that is limited to reproducing choices already made elsewhere. It was for precisely this reason that the ECJ declined jurisdiction in *Oleificio Borelli*. That case also shows the error inherent in the traditional judicial habit of focusing on final formal administrative decisions instead of the proceedings leading up to the decision.[48] The traditional method does not adequately identify the stage in which interests are identified and evaluated.

Thus specified, the structure of mixed administrative proceedings is not only a common element; it also constitutes a distinctive feature in comparison with other kinds of administrative proceedings in a two-fold sense. First, it allows one to distinguish between mixed proceedings and those processes to which they are sometimes erroneously likened. Consider, for example, the proceedings through which the Commission monitors state aids to enterprises.[49] In these cases, the Commission lays down interpretative rules and carries out adjudicatory activities.[50] The latter are divided into several stages (the prior notification, the *prima facie* exam of the validity of the new aid schemes, and the adversarial phase, which culminates in the Commission's decision), but none of them is carried out by the Member States involved. During the proceeding, a Member State may provide information, but if it does not, the Commission may make its decision on the basis of available information.[51] In sum, the Member State is only a party to the proceeding, an addressee of both the administrative action and its final outcome, against which it has a right of action before the ECJ. Accordingly, no action may be brought before a national court before the Commission has made its decision on the legitimacy of the aid schemes.[52]

Second, once mixed administrative proceedings are identified on the basis of the structural element, they can be distinguished from other kinds of proceedings analyzed by legal scholars in the Italian and other continental legal traditions, such as linked proceedings and complex proceedings.[53] Linked proceedings are similar to mixed proceedings in that a legal connection is established between two or more administrative activities. The most well-known example is probably that of expropriation of private property, which in continental European countries is always regulated by legislation and statutes, and sometimes even by constitutional principles (such as the Italian and Spanish ones). The first step in these proceedings is a declaration of public purpose. This often occurs in municipal plans. Specific events, in which particular pieces of property are expropriated and the owner is compensated, follow. Although they are linked, the two processes and measures are nevertheless legally distinct. In

48. E. Garcia de Enterría, *supra* note 8, at 32.

49. EC TREATY art. 93; Council Regulation 659/1999, 1999 O.J. (L 83) 1.

50. *See generally* G. della Cananea, *Administration by guidelines: the policy guidelines of the Commission in the field of State aids*, *in* STATE AID: COMMUNITY LAW AND POLICY AND ITS IMPLEMENTATION IN MEMBER STATES 61, (I. Harden ed., 1993).

51. Council Regulation 659/1999, art. 13, *supra* note 49, at 6.

52. Case C-188/92, Textilwerke Deggenedorf Gmbh v. Germany, 1994 E.C.R. I-833.

53. *Cf.* 2 GIANNINI, *supra* note 20, at 650.

contrast, mixed proceedings have a unitary structure, contribute to producing the same effect, and are managed by two or more administrations. This feature differentiates them from complex proceedings, too. Complex proceedings are geared to forming a plurality of public interests, as normally happens with urban and industrial planning. They lack the structural element of mixed proceedings, because the process does not unfold in stages that are taken care of by different administrations.

Despite the distinctive features produced by the interests at stake, mixed administrative processes have a common structural element. This element gives rise to legally defined combinations of activities. It distinguishes such proceedings from other ones. And it generates new legal problems.

B. Private-Party Intervention

A first set of problems relates to the position of private parties. In the past, the private parties who had facts to expound, interests to assert, or objections to make could make themselves heard only in an informal manner.

The situation has changed, however, due to changing judicial attitudes. This may be illustrated by the CFI's judgment in *France-aviation*.[54] Once again, the proceeding at issue was divided into two stages, one at the national level and the other at the EC level. The CFI stated that in such a case, the Commission must give the interested party an opportunity to be heard. When this opportunity is denied, the decision issued by the Commission violates an essential procedural requirement. The same line of reasoning lies behind the ECJ's judgment in *Lisrestal*, mentioned earlier.[55] In that case, the European Courts tried to cope with the problems deriving from an unusually complex system of governance in which the Commission initiates administrative proceedings, but national authorities have responsibility for adopting measures and have a significant degree of discretion in determining which measures to adopt. Once the European Courts recognized that the Commission's decision had an impact on the national one, thus implicitly emphasizing the structural unity of the proceeding, they inferred that interested parties had the right to take part in the Commission phase of proceeding (and the right to challenge the Commission's decision in the European Courts).

In addition, recent laws strengthen private parties' rights of participation. A good example is that of the centralized procedure for the evaluation of medicinal products, described earlier. The interested party not only sends its application, but it also receives the reports prepared by the other Member States. The applicant firm may present its own point of view and send the information it has available. Pharmaceutical companies thus have formal standing in the administrative proceeding. In the field of telecommunications, too, the framework directive provides for the participation of regulated telecommunications enterprises and a "notice and comment" type of adversarial hearing following the U.S. model, as well as the right to challenge decisions is-

54. Case T-346/94, France-aviation v. Commission, 1995 E.C.R. II-2841.
55. Case C-32/95, Commission v. Lisrestal, 1996 E.C.R. I-5373.

sued by the regulatory authorities in court.[56] In sum, both the case law and the regulations aim at guaranteeing a certain degree of procedural fairness.[57]

In other proceedings, the participation of private parties does not have a rights-protecting purpose, but a collaborative or participatory (in the strict sense) one.[58] Consider proceedings concerning the EC eco-label. The Commission consults consumers' associations regarding the adequacy of the criteria on which the grant of the eco-label is based. The preamble to the Regulation expressly refers to the necessity that "environmental NGOs and consumer organisations play an important role and are actively involved in the development and setting of criteria for Community eco-labels" so that the public *may accept* the Community system of assigning such trademarks.[59] The Regulation governing eco-labels also covers national authorities. It also requires Member States to ensure that their respective authorities are regulated by procedural rules that guarantee "the *active* involvement of all interested parties and an appropriate level of transparency."[60]

The participation of consumers' associations clearly differs from that of agricultural or industrial producers to the extent that its purpose is not to defend against administrative action. It serves, rather, to counterbalance the dominant private interests (enterprises and enterprise federations) that otherwise would be able to unduly influence EU administration. Consumer associations supply the Commission with information (which the Commission often does not have in sufficient detail) and, more generally, public legitimacy and support (the *acceptance* to which the rules refer). In short, the participation of consumers' associations has a *raison d'être* that is both functional and legitimating.

The importance of both kinds of participation in decisionmaking processes is beyond any shadow of a doubt. They reduce the inherently "confidential" or secretive nature of Community administrative actions.[61] They realize the principle of participatory democracy enunciated in the Treaty Establishing a Constitution for Europe. By providing a sort of "interest representation model" based on the U.S. model, [62] administrative proceedings that include private-party participation may reinforce the legiti-

56. Council Directive 2002/21, arts. 4, 6, 2002 O.J. (L 108) 33, 40; S. Cassese, *Il concerto regolamentare europeo delle telecomunicazioni*, *in* LO SPAZIO GIURIDICO GLOBALE 107 (2003).

57. *See* H.P. NEHL, PRINCIPLES OF ADMINISTRATIVE PROCEDURES IN EC LAW 70 (1999) (who refers to the *audi alteram partem* "rule," which is rather a principle); S. WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 203 (1995) (who refers to procedural fairness); K. Lenaerts & J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 34 COMMON MKT. L. REV. 545 (1997) (for the observation that the Commission's proposals have extended the ECJ's jurisprudence).

58. *See* F. Bignami, *Three Generations of Participation Rights in European Administrative Proceedings*, Jean Monnet Working Paper No. 11/03, http://www.jeanmonnetprogram.org/papers/03/031101.html (distinguishing between defense, transparency, and "civil society's" participation); *see also* F. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L. L. J. 451 (1999) (for the thesis that notice and comment requirements ought to be adopted to improve the transparency of comitology procedures).

59. Council Regulation 1980/2000, *supra* note 10, pmbl., § 5, at 1.

60. Council Regulation 1980/2000, *supra* note 10, art. 14, § 2(b), at 6 (emphasis added).

61. E. STEIN, UN NUOVO DIRITTO PER L'EUROPA 71 (1991).

62. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1670 (1975).

macy of the EU, which many (if not most) lawyers and political scientists consider still weak. The other side of the coin must nevertheless not be forgotten. An administration that is "open" to particular or collective interests risks being dominated or captured by them. Such an administration exposes itself to the risks of not acting sufficiently promptly or efficiently and of finding itself involved in the task of mediating between interests. In any event, it is marked by a more accentuated sectionalism that puts the general principles developed through case law to the test.

The development of general principles of procedure also ought to be considered more carefully than sometimes happens. There are good reasons for desiring a common set of administrative procedures. Among them is the need to level the playing field. Market unification requires the harmonization of procedural rules as well as substantive ones. It can likewise be maintained that consolidation of the principles according to which private autonomy may not be limited without a fair process is in line with the shared constitutional traditions of the Member States' legal orders. One might nevertheless wonder whether a further, indefinite development of the principles established by the EU's legislation and case law is compatible with the principle that the EU is bound to respect the Member States' "national identity,"[63] and, more broadly, with the nature of the European legal order. Indeed, as will be argued in the concluding section, this development must respect the diversity of cultures.[64]

V

A LEGAL FRAMEWORK STILL TO BE PERFECTED

This last observation does not imply that the legal framework in which the EU's mixed administrative proceedings operate is a satisfactory one. Indeed, the inadequacy of the usual techniques of judicial protection has been emphasized ever since commentators first examined the ECJ's judgment in *Oleificio Borelli*.[65] However, it is necessary to make sure that the attention paid to the problems regarding judicial protection does not end up obscuring other, no less relevant, issues of efficiency, transparency, and accountability.[66]

On the need to guarantee parties effective judicial review, the problem does not appear intractable. At least for bottom-up administrative proceedings, judicial protection may work within the usual conditions. A problem arises if, as in the ECOSOC case, national courts deny review of administrative acts such as opinions. However, the duty of national courts to guarantee adequate means of protection to private parties

63. TREATY ON EUROPEAN UNION art. 6, para. 3; *see also* TREATY ESTABLISHING A CONSTITUTION FOR EUROPE , art. I-5, para. 1 ("The Union shall respect the equality of Member States before the Constitution as well as their national identities"); C. Harlow, *Voices of Difference in a Plural Community*, *in* CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 199 (P. Beaumont et al. eds., 2001).

64. CHARTER OF FUNDAMENTAL RIGHTS art. 21.

65. *See, e.g.*, Caranta, *supra* note 8; de Enterría, *supra* note 8; *see also* CHITI, *supra* note 4242, at 393.

66. The attention devoted by several academics to the problem of judicial protection regarding mixed administrative proceedings is influenced by the traditional paradigm of administrative law, which seen as a sort of "shield" for individual rights. This, of course, is still a fundamental function of administrative law, but it is no longer the only one, because issues of efficiency, transparency, and accountability are increasingly important for public lawyers.

(including atypical ones) has been constantly affirmed by the ECJ since the early 1990s. Therefore, although a drawback certainly exists, it can be resolved by revising the lines of interpretation followed by the national judges, and the ECJ has the power to require it.

In contrast, no quick fix exists for the shortcomings of the new, partly centralized regulatory frameworks in fields such as pharmaceutical products. In this respect, the question arises whether the authorizations of new medicinal products are efficient and effective. As was observed earlier, EC rules set up a centralized procedure as an alternative to the procedures existing at the national level.[67] Precisely because these national procedures have not been replaced entirely, European enterprises may choose, on each occasion, the Member State in which the administrative agency is deemed most satisfactory in terms of speed, efficiency, and value. In this respect, EU rules promote competition not only between companies, but also between regulators. National procedural autonomy, however, is limited by the rule that requires Member States to act in such a way that the authorization proceeding is concluded within 210 days from the date the application is made. This implies a modification of the national rules (such as, in Italy, those established by Law no. 241/1990) and reduces the room for competition between national regulatory frameworks. This partly explains why enterprises often prefer the centralized procedure. A better explanation, however, is that "the authorisations that are issued through the centralised process . . . are valid in all the Member States."[68] This stresses even more the need for efficiency and effectiveness in the administrative process. But the existing situation is far from satisfying. As a matter of fact, a comparison between the time it takes to authorize the same medicinal products in the EU and in the United States shows that they have been admitted in both, but the Food and Drug Administration has taken much less time.[69] This observation does not imply, of course, that the EU must evolve in the same direction as the United States or other federal states. The problem of efficiency nevertheless ought to be taken into serious account.

Another set of problems has to do with transparency. We have seen earlier that private parties can in most cases exercise the right to be heard. However, before they can do so, they must obtain access to the documents held by public administration. In a fragmented constitutional structure like that of the EU, the right of access to documents contributes to guaranteeing public authorities' transparency.[70] But transparency is jeopardized by the (sometimes marked) differences between national systems. Some draw their inspiration from U.S. legislation promoting transparency, whereas others follow the opposing principle of confidentiality. Consider a case in which, in a matter similar to *Oleificio Borelli*, the enterprise intends to challenge the negative

67. Council Regulation 2309/1993, 1993 O.J. (L 248) 1. The alternative nature of the centralized procedure also means that the Commission cannot revoke an authorization issued at a national level. Case C-39/03, Commission v. Artegodan, 2003 E.C.R. I-7883, para. 52.

68. Case C-433/00, Aventis Pharma v. Kohlpharma, 2002 E.C.R. I-7761, para. 20.

69. According to a former Italian minister of health, Umberto Veronesi, the authorization of the drug Glivec took 224 days in the EU and only seventy-two in the United States, while approval of Erceptin took 551 days in the EU and 144 in the United States. CORRIERE DELLA SERA, June 24, 2004, at 16.

70. J. Lodge, *Transparency and Democratic Legitimacy*, 32 J. COMMON MKT. STUD. 343 (1994).

opinion formulated by the regional administration and requests documentation of its reasoning for this purpose. In such a situation, is the administration bound to apply the national rules (which may not provide for access to the documents or may make obtaining access to them extremely difficult)? Or should it apply the EU's more favorable rules (which are interpreted more broadly by the European judges)? While these remarks are not intended to solve the problem just mentioned, they are useful to show that even for those who stick to the traditional paradigm of administrative law, which emphasizes the protection of individual rights against administrative action, judicial review is not the only concern.

Finally, issues of accountability must not be neglected.[71] To the extent to which the substantive decision about the interests at stake does not necessarily coincide with the final measure (as in the *Oleificio Borelli* case), a serious question arises. Indeed, the Commission answers for its actions to the European Parliament. If, however, it limits itself to executing decisions taken elsewhere, it cannot be censured for a possible failure to pursue the goals set by EC rules.[72] Nor is it answerable for prolonging the procedure at the national level, even though the principles of efficiency and saving money that inspired the Community rules are thereby compromised.

VI

MIXED ADMINISTRATIVE PROCEEDINGS AND THE LEGAL ORDER OF THE EUROPEAN UNION

Two conclusions can be drawn from the analysis carried out so far. One concerns the mixed administrative proceedings of the EU and the other, more generally, from the evolution of its legal order.

The analysis of mixed administrative processes from a phenomenological and morphological point of view allows, first, their common feature to be identified—namely, the structural element deriving from the involvement of both Community administrations (in the strict sense) and national ones in the various stages of a proceeding. The structural element is at the same time a distinctive one in the sense that it differentiates mixed processes from other types. Accordingly, the notion of mixed administrative proceedings has a cognitive value. However, its importance is limited insofar as there are no rules or remedies that are characteristic of and exclusive to this type of process. In other words, it does not have its own legal framework, distinct from that of the entire universe of European administration. The notion is nevertheless useful, not only for referring to a distinct group of proceedings, but also for signaling that the corresponding legal regime presents imperfections, giving rise to the need for a set of rules capable of altering or perfecting the current rules. This conclusion recalls the one drawn by Massimo Severo Giannini in 1950 in relation to administrative procedures:

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71. For a general analysis of this problem, see C. HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION 144 (2002).

72. As regards the problem of infranationalism, see J.H.H. WEILER, THE CONSTITUTION OF EUROPE 341 (1999).

> [T]he typifications we obtain are simply scientific constructions by means of which syntheses *are attempted*, anticipating future legislators . . . . For all that, not wishing to proceed to such syntheses on account of the limited nature of their normative value would constitute a renunciation of science's work: through the work of generations of academics, perhaps one day (by following this path) it will be possible to endow administrative law with certainty and therefore see justice done.[73]

The study of mixed administrative proceedings is also useful for the purposes of better understanding the way in which public authorities act within the European legal order. Attention to legislation has prevailed among administrative law scholars, and it has also constituted the most striking feature of the complex process that is usually called European integration. The normative conception of law (by which the legal order is first and foremost a set of rules) has also had an influence here. And yet the limitations of this notion were already being indicated at the beginning of the twentieth century by Maurice Hauriou and Santi Romano.[74] The latter, above all, demonstrated the logical (long before the historical) defect inherent in equating law with the state, highlighted the organizational and social dimension of legal orders, and emphasized that they do not end in a "series of rules" in the sense of volumes of official collections of laws and decrees. Every order, according to Romano, is "an entity that acts partly in accordance with the law." However, first and foremost, it is the entirety of "numerous and complex mechanisms or workings, the connections between authority and power, that produce, modify, apply and guarantee legal rules but do not identify themselves with them."[75]

Although the study of these "mechanisms, workings, and connections" has been undertaken only recently, it has allowed a study of the European order to be put on a sounder footing. Initially, the scholarship emphasized mixed elements of an organizational nature that serve to unite Community and national public offices. One example is that of the intergovermental committees set up by the Council since the 1960s both to assist the Commission in the exercise of its delegated powers and to check it. Another, more recent example is that of the networks of European and national agencies, such as those existing in the fields of telecommunications and electricity.[76] Only in recent years have the mixed elements concerning the activity been identified. The new method of open coordination is perhaps the most studied by both lawyers and political scientists. Mixed administrative proceedings, too, reveal the innovative features of the European Union. Unlike the United States, it does not aim at replacing entirely local structures and decisionmaking processes. It rather absorbs them in a new legal framework, of which it sets the fundamental principles. The traditional theories, based on the experience of nation-states, cannot therefore merely be transposed to the EU. Although we do not know and cannot predict what will be the conclusion of the process begun in 1950 with the Schuman Plan, historic and comparative analysis may

73. M. S. GIANNINI, LEZIONI DI DIRITTO AMMINISTRATIVO 430-31 (1950).

74. M. HARIOU, THÉORIE DE L'INSTITUTION ET DE LA FONDATION (1905); S. ROMANO, L'ORDINAMENTO GIURIDICO (2d ed., 1946).

75. ROMANO, *supra* note 74, at 15. It is a real pity that few Anglosaxon academics have duly considered this seminal essay, unlike French ones (like Auby).

76. *See* Edoardo Chiti, *Administrative Proceedings Involving European Agencies*, 68 LAW & CONTEMP. PROBS. 219 (Winter 2004).

help us in rescuing European Union studies from the heavy shadow of the old "doctrine of the State" (*Staatslehre*).[77]

This implies a change for the theories of the state, too. As a matter of fact, states do not act as a unit anymore, but are fragmented because their authorities take part in EU decisionmaking processes without passing through diplomatic channels. Moreover, the powers of all public authorities are, to a certain extent, downgraded (or perhaps demoted). They have to negotiate in decisional processes that are open to the intervention of other subjects. They also must expound the reasons for their action or inaction. Last but not least, they are exposed to actions brought by private parties before European Courts. Hence, the problem is not so much whether the old paradigms of the state can be used for the new phenomena that take place within the EU, but rather whether those theories are adequate for the new social and legal order.

77. See DELLA CANANEA, *supra* note 1, for a critique of the widespread idea according to which the EU is a "multi-level" organization.