

FROM ROME TO LISBON: “EXECUTIVE FEDERALISM” IN THE (NEW) EUROPEAN UNION

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1. Introduction

Is the European Union a legislative giant on clay feet? Is it true that “the EU has (with some specific exceptions) no original competence to implement EU law”?¹ This question is hardly ever raised in the European law literature.² Two federal designs for the distribution of “executive” powers exist,³ which – empirically – correspond to two constitutional orders. According to American federalism, the Union’s legislative and executive powers are co-extensive and the Union establishes its own executive infrastructure to enforce Union law. By contrast, German federalism insists that the Union’s executive competences are smaller than its legislative competences. The Union must therefore extensively rely on the Member States to administer federal law.

In the history of European integration, *both* federal designs emerged. The first was developed in the context of the European Coal and Steel Community,

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1. Dann, “European Parliament and Executive Federalism: Approaching a parliament in a semi-parliamentary democracy”, 9 *ELJ* (2009), 549, at 552. For a similar view, see also Schmidt-Aßmann, “Einleitung: Der Europäische Verwaltungsbund und die Rolle des Europäischen Verwaltungsrechts” in Schmidt-Aßmann and Schöndorf-Haubold (Eds.), *Der Europäische Verwaltungsverbund* (Mohr Siebeck, 2005), p. 1, at p. 2: “die Gemeinschaft selbst verfügt nur über wenige eigene Verwaltungskompetenzen”.

2. The interest in the constitutional foundations of European administrative law has significantly increased in the last decade. For general overviews of EU administrative law, see Klepper, *Vollzugskompetenzen der Europäischen Gemeinschaft aus abgeleitetem Recht: Zulässigkeit – Modalitäten – Rechtsfolgen* (Nomos, 2001); Craig, *EU Administrative Law* (OUP, 2006); Schwarze, *European Administrative Law* (Sweet & Maxwell, 2006); Chiti and Greco (Eds.), *Trattato di diritto amministrativo Europeo* (Giuffrè, 2007); Auby and Dutheil de la Rochère (Eds.), *Droit Administratif Européen* (Bruylant, 2007); von Danwitz, *Europäisches Verwaltungsrecht* (Springer, 2008); Dutheil de la Rochère (Ed.), *L’Execution du Droit de l’Union: Entre Mécanismes Communautaires et Droits Nationaux* (Bruylant, 2009); and Curtin, *Executive Power in the European Union* (OUP, 2009).

3. The notion of executive power typically embraces a “regulatory” and an “applicatory” dimension. The former is the power to “implement” abstract norms through secondary regulation; while the latter stands for the power to apply norms in individual situations. The following article analyses the Union’s executive power *sensu stricto*. It investigates the powers of the Union to itself apply European norms to individual situations.

which opted for the “American solution”. But this constitutional architecture was not originally chosen for the European (Economic) Community. The Rome Treaty expressly granted the power to adopt decision in very few areas; and therefore it seemed to follow the “German solution”. Was the Community thus constitutionally condemned to rely on the Member States to execute its law? And which of these two models has the Lisbon Treaty chosen for the European Union? What are the limits to the Union’s executive powers; and what is their nature?

This article analyses the *federal* constitutional principles governing the executive branch of the European Union. It hopes to show that the Union has taken a path that combines the American and German federal solutions. That is: the Union’s executive powers are co-extensive with its legislative powers; yet, the Union’s executive powers are only subsidiary to the Member States’ powers. In order to prove this thesis, we shall briefly look at the American and German solutions for the execution of federal law (section 2), before investigating the scope and nature of the European Union’s executive powers (section 3). The constitutional principles governing the Union’s species of “executive federalism” will be analysed in section 4.⁴ Here, we shall examine the federal restrictions imposed on the (relative) administrative autonomy of the Member States and highlight the constitutional limits imposed on the Union’s own executive powers. This section will also briefly engage with the phenomenon of “mixed administration” in the Union legal order. A conclusion will synthesize

4. The concept of “executive federalism” is ambivalent and has been defined in – at least – three ways. A first definition simply identifies “executive federalism” with the decentralized execution of federal law by the Member States according to a constitutional regime established by the Union (cf. Lenaerts and Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 2005), p. 607). A second definition has extended this idea to the existence of important “political” choices that the implementation of federal legislation leaves to State governments (cf. Frowein, “Integration and the Federal Experience in Germany and Switzerland” in Cappelletti, Seccombe and Weiler (Eds.), *Integration Through Law – European and the American Federal Experience*, Vol. I Book 1 (De Gruyter, 1986), p. 573, at pp. 586–587: “If one takes into account the important decisions which need to be taken at the level of execution, it becomes clear that this competence of the Länder is far from negligible. The notion of ‘*Vollzugsföderalismus*’ (federalism in the execution of laws, etc.) describes this important phenomenon.”) The problem with this definition is that it no longer corresponds to German constitutional reality (cf. Köttgen, “Der Einfluß des Bundes auf die deutsche Verwaltung und die Organisation der bundeseigenen Verwaltung”, 11 *Jahrbuch des öffentlichen Rechts* (1962), 173, at 187: “[D]as steigende Gewicht der allgemeinen Verwaltungsvorschriften der Bundesregierung in Verbindung mit den verschiedenen Varianten eines Weisungsrechts [hat] eine “politische Enteignung” der Länder zur Folge gehabt.”); and should, in any event, be better identified with “cooperative federalism”. A third definition of “executive federalism” associates the decentralized application of federal law with the composition of the second chamber of the federal legislature as well as a consensual decision-making mode (cf. Dann, op. cit. *supra* note 1). The following article chooses the first (restrictive) definition.

the various findings and evaluate the Lisbon Treaty's reform of the constitutional foundations of Union executive power.

2. Federalism and the executive function: Centralized and decentralized enforcement

The federal idea stands for *duplex regimen*: the duplication of governmental functions. This dualism typically extends to all three branches of government. Federal Unions will not only have two legislative branches; they will equally duplicate the executive (and judicial) branch.⁵ However, the scope of the federal executive may differ – depending on whether the Union prefers the centralized or decentralized enforcement of federal law. According to the “centralization model”, the execution of federal law is principally left to federal administrative authorities. In order to enforce its law, the Union establishes its own independent administrative infrastructure. By contrast, the “decentralization model” leaves the execution of federal law principally to the Member States of the Union. The Union's executive competences are thus smaller than its legislative competences.

The following section investigates the two models by looking at the constitutional experiences of the United States of America and the Federal Republic of Germany.

2.1. Executive centralization: The United States of America

American federalism considers the Union's executive powers to be co-extensive with its legislative powers. The 1787 Constitution expressly provided the legislature with the power “to make all laws necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States”;⁶ and vested the “executive” power in the American President.⁷ The legislative and executive spheres of the Union thus coincide. Federal executive competences are *not* exclusive competences. The States can autonomously execute federal law; and

5. The article will not deal with the judicial – federal – relations between a Union and its Member States. For a comparison between American and European judicial federalism, see Halberstam, “Gerichtliche Zusammenarbeit im föderalen System der USA: Ein rechtsvergleichender Beitrag zur Diskussion über die Gerichtsreform in der Europäischen Union”, 66 *Zeitschrift für ausländisches und internationales Privatrecht* (2002), 216.

6. Art. I, Section 8 – Clause 18 U.S. Constitution.

7. “The executive Power shall be vested in a President of the United States of America” (Art. II, Section 1, Clause 1 U.S. Constitution). According to Art. II, Section 3, Clause 4 the President must “take Care that the Laws be faithfully executed”.

the Union is allowed to “motivate” the States to implement federal standards.⁸ However, any decentralized administration must be entirely voluntary. In the executive sphere, the constitutional core of American federalism is the “non-commandeering” principle: the Union cannot “commandeer” the States to execute federal law. And because it cannot oblige the States to enforce its law, the Union has to use its own executive powers. These powers have, in the past, been extensively exercised to establish the Union’s own administrative infrastructure.

The principle that the Union cannot “commandeer” the States to enforce federal laws was clarified in *New York v. United States*.⁹ In creating the 1787 Union, “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States”. Thus “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts”. What was the principle behind this constitutional prohibition? “[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished[.]”¹⁰ But more importantly: “States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government.” Having retained a “residuary and inviolable sovereignty”, the Union cannot “compel the States to enact or administer a federal regulatory program”.¹¹ While federal legislation is supreme over State legislation,¹² the States – as corporate entities – are not “subordinate” to the Union.¹³

8. This has been clarified in Supreme Court jurisprudence, cf. *South Dakota v. Dole*, 483 U.S. 203 (1987) at 206: “Congress may attach conditions on the receipt of federal funds”. The Union can also “encourage” the States to regulate an activity themselves out of fear that federal standards will otherwise pre-empt State legislation (cf. *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 (1981)).

9. *New York v. United States et al.*, 505 U.S. 144 (1993). This claim is not uncontested (cf. Caminker, “State Sovereignty and subordinancy: May Congress commandeer State officers to implement federal law?”, 95 *Columbia Law Review* (1995), 1001, at 1059: “The Court’s formalistic claim in *New York* that State sovereignty entails legislative and executive freedom from federal coercion is thus fundamentally misconceived”). For a softer claim arguing that an original understanding of the U.S. Constitution supports the prohibition to commandeer the State legislatures, but not State executives, see Prakash, “Field office federalism”, (1993) *Virginia Law Review*, 1957, at 1961: “The Founding Generation, then, distinguished commandeering State legislatures from commandeering the magistracy (executives and judicial officers).”

10. *New York v. United States et al.*, cited *supra* note 9, paras. 166 and 169.

11. *Ibid.*, para 188 (with reference to the *Federalist No. 39*).

12. See Art. VI, Clause 2 (“Supremacy Clause”).

13. According to Caminker (op. cit. *supra* note 9), this formal understanding of the States as

This “non-commandeering” principle was specifically confirmed in relation to executive power *senso strictu* in *Printz v. United States*.¹⁴ Federal legislation tried to force State officers to apply federal law. The Supreme Court categorically rejected this form of involuntary decentralized enforcement. The Constitution established a system of “dual sovereignty”, according to which the States retained “a residuary and inviolable sovereignty”.¹⁵ “It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.” And it was not compatible with this independence “that their officers be ‘dragooned’ into administering federal law”. The ability of the Union “to direct the functioning of the state executive” would “compromise the structural framework of dual sovereignty”.¹⁶ The very idea of dual sovereignty required the organizational independence of the Union and the States.¹⁷ The States could not be reduced to mere “agents” of the Union; and this meant that the Union was not entitled to oblige the States either to legislate or execute in pursuance of federal law.

2.2. Executive decentralization: The Federal Republic of Germany

The “decentralization model” entrusts the execution of federal law principally to the Member States. This idea has become known as “executive federalism” (*Vollzugsföderalismus*). It characterizes German (and Swiss) federalism.¹⁸

The central pillar of Germany’s executive federalism is Article 83 of the German Constitution (GC): “The States shall execute federal laws in their own right unless this Constitution does provide or permit otherwise.” While there are indeed constitutional exceptions,¹⁹ the decentralized enforcement of federal law thus represents the constitutional rule. The German Constitution distinguishes between two regimes of decentralized execution, which differ as

institutionally autonomous entities is “quite new” (*ibid.*, 1015): “Until quite recently, the Supreme Court attempted to secure its view of the proper allocation of power between the two governmental systems through efforts to circumscribe the substantive content of enumerated federal power.”

14. *Printz, Sheriff/Coroner, Ravalli County, Montana v. United States*, 521 U.S. 898 (1997).

15. *Ibid.*, paras. 918–919 (with reference to the *Federalist No. 39*).

16. *Ibid.*, paras. 928 and 932.

17. This institutional understanding of “dual sovereignty” contrasts with a substantive reading of “dual sovereignty”. The latter has become known as dual federalism and is based on the existence of two mutually exclusive spheres of legislative competences (cf. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, 2009), esp. Ch. 2).

18. Cf. Frowein, *op. cit. supra* note 4; and Dubey, “Administration indirecte et fédéralisme d’exécution en Europe”, 38 CDE (2003), 87.

19. Cf. Art. 86 German Constitution. Fields of direct federal execution are enumerated in the Constitution. Art. 87 GC mentions, *inter alia*, the “foreign service”, the “federal financial administration”, and the “administration of federal waterways and shipping”.

to the degree of federal control over State administrations. The *ordinary* regime is set out in Article 84 GC. The States here execute federal law “in their own right”. The States are thereby “not only entitled but also obliged to implement federal law as their own executive responsibility”.²⁰ A *special* regime for the decentralized execution of federal law is established in Article 85 GC. The States are here acting on “federal commission”.²¹

What are the constitutional principles governing the State enforcement of federal law? Article 84 GC tells us that “[w]here the States execute federal law as their own affair, they shall provide for the establishment of the requisite authorities and regulate their administrative procedures.”²² Yet, the federal government is entitled to adopt “general administrative rules”;²³ and in exceptional circumstances, the Union may even “issue instructions in particular cases”.²⁴ These control mechanisms are even reinforced under Article 85 GC. The Union may establish *State* administrative organs to ensure an efficient execution of federal law,²⁵ and it is entitled to co-decide on the appointment of top *State* administrative officials.²⁶ It even enjoys a general right to issue “instructions” to State administrative organs.²⁷

20. BVerfGE 55, 274 (*Berufsausbildungsabgabe*), 317 (translation – RS): “The States have, to the extent that the Constitution does not state or permit otherwise, the comprehensive executive competence. It follows that they are not only entitled but also obliged to implement federal law as their own executive responsibility.”

21. This special regime of decentralized execution applies whenever the Constitution so requires; or, where the Constitution entitles the federation to establish it on the basis of a federal law. For the former scenario, see Art. 90(2) GC (emphasis added): “The States, or such self-governing corporate bodies as are competent under State law, shall administer the federal motorways and other federal highways used by long-distance traffic on *federal commission*.”

22. Art. 84(1) German Constitution.

23. *Ibid.*, Art. 84(2).

24. *Ibid.*, Art. 84(5): “With a view to the execution of federal laws, the Federal Government may be authorized by a federal law requiring the consent of the *Bundesrat* to issue instructions in particular cases. They shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent.” The federal instruction is here an *internal* administrative command that has no external effect on third parties. While the instruction must – as a matter of principle – be addressed to the highest State (administrative) organs; in urgent situations, the federal command may even address the lower administrative echelons. The idea that the federal command should – in principle – be directed to the highest State administrative organs is designed to protect, to some extent, the administrative autonomy of the States. For examples of individual commands to State administrations, see Blümel, “Verwaltungszuständigkeit” in Isensee and Kirchhof (Eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland – Band IV* (C.F. Müller, 1990), p. 876.

25. Art. 85(1) German Constitution.

26. *Ibid.*, Art. 85(2).

27. *Ibid.*, Art. 85(3): “The Land authorities shall be subject to instructions from the competent highest federal authorities. Such instructions shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent. Implementation of the instructions shall be ensured by the highest Land authorities.”

How are we to characterize this German species of executive federalism? The German Constitutional Court has insisted on an “essentially uniform administrative practice” within the Union. “The uniform validity of legal norms within the federal territory would be made illusory, *where their decentralized execution through the states leads to significant differences.*”²⁸ The German federation has indeed extensively used its competences to adopt general administrative rules. Yet, the Union’s power to issue instruction to State administrations undermines their administrative autonomy much more fundamentally, because the federal “command” here pierces the “sovereignty veil” of the States. And since federal instructions are not addressed to the States as corporate entities but to the State administrative organs as such,²⁹ German executive federalism is characterized by two elements: hierarchical subordination and institutional integration. The federal power to “command” State administrations subordinates and integrates the latter into the federal administration.³⁰ The decentralized execution of federal law in Germany shows therefore strong elements of a “mixed administration” – despite an orthodox denial still cherished by German constitutionalism.³¹ This form of “integrated administration” is particularly evident where the State administrations act “on federal commission”.³² The – strong – unitary elements in the institutional dimension of German executive federalism correspond to the unitary nature of its

28. BVerfGE 11, 6 (*Dampfkessel*), 17 (emphasis added).

29. This was not (yet) the case under the 1871 Imperial Constitution. The Union was not allowed to command any organ or officer of the State administrations directly. Cf. Hänel, *Deutsches Staatsrecht* (Duncker & Humblot, 1892), p. 208 (translation – RS): “The States face the Empire as closed units.”

30. Blümel (op. cit. *supra* note 24, at p. 898 (translation – RS)): “Insofar, there exists not only a real hierarchical relation (superordination and subordination) between the federal and State authorities; the latter are in fact integrated into a unitary administrative structure.”

31. Orthodox German constitutionalism insists on the “separation of administrative spheres” between the Union and the States and thus generally affirms a “prohibition of mixed administration”. The German Constitutional Court has long tried to overcome this theoretical orthodoxy in BVerfGE 63, 1 (*Schornsteinfegerversorgung*), at 39–40 (emphasis added, translation – RS): “*There is no general constitutional principle according to which executive competences must be exclusively exercised by the Union or the States unless the Constitution expressly provides otherwise.* Such a general principle cannot be derived from the general structure of the Constitution.” However, more recent jurisprudence has revived this idea, see BVerfGE 108, 169 (*Telekommunikationsgesetz*), 182.

32. The State execution of federal law “on federal commission” has been characterized as “between” State and federal administration, cf. Stern, *Das Staatsrecht der Bundesrepublik Deutschland – Band 2* (Beck, 1980), p. 808: “ein ‘Mittelding’ zwischen landeseigener und bundeseigener Verwaltung.”; as well as: Trute, “Artikel 85” in von Mangoldt, Klein and Starck (Eds.), *Kommentar zum Grundgesetz – Band 3* (Vahlen, 2005), p. 72: “Zwischenform zwischen Landeseigenverwaltung und Bundesverwaltung”.

functional dimension. For decisions of State administrations will be valid throughout the territory of the Union.³³

3. The constitutional foundations of executive power: From Rome to Lisbon

The European Coal and Steel Community (ECSC) “was essentially an administrative organization”.³⁴ The ECSC Treaty had established a “High Authority”, which was – principally – to apply the ECSC Treaty in individual situations. The general instrument within the ECSC was the “decision”.³⁵ This instrument allowed the Community to adopt general rules as well as individual decisions.³⁶ The Community’s “legislative” and “executive” spheres did here coincide; and in this point the ECSC followed the American centralized solution.

In contrast to the “administrative system” established by the ECSC, the European (Economic) Community was conceived as a legislative system.³⁷ When the European Economic Community was founded, the 1957 Rome Treaty distinguished general applicable “regulations” from individually applicable “decisions” and specified – for the majority of legal bases – the exact instrument that could be used to intervene into the common market.³⁸ The vast majority of EC competences were “regulatory” or “legislative” competences.

33. BVerfGE 11, 6 (*Dampfkessel*), 18 (translation – RS): “The executive sovereignty of a State is principally confined to its territory. However, it is an essential characteristic of the State execution of federal laws that the state administrative act that implements federal law will enjoy validity in the entire federal territory.”

34. Chiti, “Forms of European administrative action”, 68 *Law & Contemporary Problems* (2004-5), 37, at 38.

35. Art. 14 ECSC stated: “(1) In order to carry out the tasks assigned to it the High Authority shall, in accordance with the provisions in the Treaty, take decisions, make recommendations or deliver opinions. (2) Decisions shall be binding in their entirety. (3) Recommendations shall be binding as to the aims to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed.”

36. Art. 15(2) ECSC distinguished between individual and general decisions.

37. Azoulai, “Pour un droit de l’exécution de l’Union Européenne” in Dutheil de la Rochère, op. cit. *supra* note 2, p. 1, at p. 2

38. Grabitz, “The sources of Community law: Acts of the Community institutions” in EC Commission (Ed.), *Thirty Years of Community Law* (EC Commission, 1981), p. 81, at p. 88: “As a rule, the Treaties establishing the European Communities leave the Community institutions with no choice as regards the legal form which their acts take; on the contrary, for each enabling rule they prescribe the form in which the required provisions must appear.” The European Community thus did not follow the ECSC “principle of minimum intervention”. For a discussion of this principle, see Schütze, “The morphology of legislative power in the European Community: Legal instruments and the federal division of powers”, 25 *YEL* (2006), 91, at 145.

Community executive power *sensu stricto* was attributed in – very – few areas.³⁹ The European Community thus appeared to follow the German federal solution of executive decentralization.

Would this theoretical solution be confirmed by constitutional practice? What exactly was the scope and nature of European executive powers? Were there general or implied executive powers? Let us look at these questions by analysing the – ambivalent – constitutional foundations of European executive power under the Rome Treaty (3.1.). It is only against this historical background that we can evaluate the textual reforms introduced by the Lisbon Treaty (3.2.).

3.1. *The “European Community”: Ambivalent foundations of executive power*

The “absence of a clear constitutional basis for public administration”⁴⁰ under the Rome Treaty was particularly pronounced as regards the vertical division of executive power. What was the Community’s executive sphere? Beyond the few express executive powers, were there general executive competences of the Community? Four potential provisions were ambivalent candidates.

Within the institutional powers, Article 202 EC called on the Council to “ensure that the objectives set out in this Treaty are attained”. To achieve this, the Council would “have the power to take decisions”. Was this a general power to take decisions? The wording of Article 202 EC tilted against such a view for it required the Council to take decisions “in accordance with the provisions of this Treaty”. This was a constitutional clarification that this clause was no executive competence reservoir. The third indent of Article 202 EC then obliged the Council to “confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down”. The provision was – again – not a legal competence.⁴¹ It allowed for the *delegation* of executive power from one Community institution to another; and what the Council did not have, the Commission could not receive.

39. The 1957 Rome Treaty only expressly mentions the power to adopt “decisions” addressed to individuals in three areas: agriculture (Art. 43 EEC), transport (Arts. 79 and 80 EEC) and competition (Arts. 85 et seq. EEC). The power to adopt decisions under the common commercial policy was implicit in Art. 113(2) EEC.

40. Chiti, *op. cit. supra* note 34, 37 at 42.

41. This followed from its place within the Treaty, which dealt with inter-institutional relationships (cf. Möllers, “Durchführung des Gemeinschaftsrechts: Vertragliche Dogmatik und theoretische Implikationen”, (2002) *EuR*, 483, at 498). It is confirmed by Case C-257/01, *Commission v. Council*, [2005] ECR I-345, para 66: “The provision does not concern the division of powers between the Community and the Member States.”

The second promising provision for a general executive power of the Community was Article 211 EC. The Article dealt with the powers of the Commission. The Commission was to “ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied”. It would thereby enjoy “its own power of decision”; yet – again – this power was restricted to “the manner provided for in this Treaty”. The competence to execute European law would therefore have to be granted elsewhere in the Treaty.⁴²

What about the general powers of the Community? Following the Single European Act, Article 95 EC allowed the Community to adopt “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States”. The power to adopt “measures” appeared to include the power to adopt decisions. But how could a decision “harmonize” national law or administrative action? Would Article 95 EC entitle the Community to go beyond “general administrative rules”?⁴³ In *Germany v. Council*,⁴⁴ this argument was placed on the judicial table in the context of the Product Safety Directive.⁴⁵ Germany argued that the power to “harmonize” precluded the executive power to adopt decisions;⁴⁶ and since Article 9 of the relevant Directive granted such a power in certain situations, the provision had to be void.⁴⁷ The Court held otherwise:

42. For a different view, see Biaggini, *Theorie und Praxis des Verwaltungsrechts im Bundesstaat* (Helbing & Lichtenhahn, 1996), p. 77, arguing in favour of a (limited) autonomous executive competence of the Commission under Arts. 202 and 211 EC. However, this view is hard to reconcile with Case C-303/90, *France v. Commission*, [1991] ECR I-5315, para 30.

43. For this excellent question, see Klepper, *op. cit. supra* note 2, pp. 72–73.

44. Case C-359/92, *Germany v. Council*, [1994] ECR I-3681.

45. Directive 92/59/EEC on general product safety (O.J. 1992, L 228/24). The Directive is now replaced by: Directive 2001/95/EC on general product safety (O.J. 2002, L 11/4).

46. Germany’s principal argument in this respect is quoted in para 17: “The German Government objects to that argument essentially on the ground that the sole aim of Article [94] et seq. of the [EC] Treaty, and of Article [95 (1) EC] in particular, is the approximation of laws and that those articles do not therefore confer power to apply the law to individual cases in the place of the national authorities, as permitted by Article 9 of the Directive. The German Government further observes that the powers conferred upon the Commission by Article 9 thus exceed those which, in a federal State such as the Federal Republic of Germany, are enjoyed by the *Bund* in relation to the *Länder*, since, under the German Basic Law, the implementation of federal laws rests with the *Länder*. Lastly, the German Government submits that Article 9 cannot be regarded as constituting an implementing power, within the meaning of the third indent of Article [202] of the [EC] Treaty, since that article does not embody a substantive power of its own, but merely authorizes the Council to confer implementing powers on the Commission where a legal base exists in primary Community law for the act to be implemented and its implementing measures.” This view was – partly – shared by A.G. Jacobs, cf. *Germany v. Council*, cited *supra* note 44, at 36, 93, esp. para 36.

47. Art. 9 provided as follows: “If the Commission becomes aware, through notification given by the Member States or through information provided by them, in particular under Article

“The measures which the Council is empowered to take under that provision are aimed at ‘the establishment and functioning of the internal market’. In certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market. *Consequently, the concept of ‘measures for the approximation’ of legislation must be interpreted as encompassing the Council’s power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products.*

So far as concerns the argument that the power thus conferred on the Commission goes beyond that which, in a federal state such as the Federal Republic of Germany, is enjoyed by the *Bund* in relation to the *Länder*, it must be borne in mind that the rules governing the relationship between the Community and its Member States are not the same as those which link the *Bund* with the *Länder*. Furthermore, the measures taken for the implementation of Article [95] of the [EC] Treaty are addressed to Member States and not to their constituent entities. Nor do the powers conferred on the Commission by Article 9 of the directive have any bearing upon the division of powers within the Federal Republic of Germany.”⁴⁸

Article 95 EC thus entitled the Community to adopt executive decisions. Yet, since the ruling dealt with a State-addressed decision, its constitutional impact might be confined to that category. But could the provision also be employed for the establishment of a centralized authorization procedure operated by the Commission or even the creation of the Community’s own executive infrastructure? Subsequent jurisprudence has clarified that Article 95 EC could be used for both purposes. For the adoption of decisions addressed to individuals,

7 or Article 8, of the existence of a serious and immediate risk from a product to the health and safety of consumers in various Member States and if: (a) one or more Member States have adopted measures entailing restrictions on the marketing of the product or requiring its withdrawal from the market, such as those provided for in Article 6(1)(d) to (h); (b) Member States differ on the adoption of measures to deal with the risk in question; (c) the risk cannot be dealt with, in view of the nature of the safety issue posed by the product and in a manner compatible with the urgency of the case, under the other procedures laid down by the specific Community legislation applicable to the product or category of products concerned; and (d) the risk can be eliminated effectively only by adopting appropriate measures applicable at Community level, in order to ensure the protection of the health and safety of consumers and the proper functioning of the common market, the Commission, after consulting the Member States and at the request of at least one of them, may adopt a decision, in accordance with the procedure laid down in Article 11, requiring Member States to take temporary measures from among those listed in Article 6(1)(d) to (h).”

48. *Germany v. Council*, cited *supra* note 44, paras. 37–38, emphasis added. The Court also held Art. 9 of the Directive to be a “proportionate” executive power of the Community (*ibid.*, para 46): “Those powers are not excessive in relation to the objectives pursued. Contrary to the assertion made by the German Government, the infringement procedure laid down in Article [226] of the [EC] Treaty does not permit the results set out in Article 9 of the directive to be achieved.”

the *cause célèbre* is *United Kingdom v. Parliament and Council*.⁴⁹ The case concerned the validity of Regulation 2065/2003, which tried to ensure the effective functioning of the internal market through a Community authorization procedure. The legislative measure delegated the power to grant or reject authorizations to the Commission;⁵⁰ and its decisions were addressed to the individual applicant.⁵¹ The British government protested: “The legislative power conferred by Article 95 EC is a power to harmonize national laws, not a power to establish Community bodies or to confer tasks on such bodies, or to establish procedures for the approval of lists of authorised products.”⁵² Yet in its judgment, the Court confirmed this very power. Article 95 EC could be used as legal base for the power to adopt individual decisions.⁵³

An even more general legal basis was available to the European Community: Article 308 EC. The Article allowed the Community to “adopt the appropriate measures” where this was necessary to attain one of the objectives set out in the Treaties. Early on, the Court clarified that this clause allowed the Community to “imply” an instrument that was not expressly mentioned in a specific legal base.⁵⁴ The power to adopt individual decision could thus be derived – for every policy area within the scope of the Treaty – where this was deemed “necessary”. Article 308 EC thus provided an *executive* competence reservoir that coincided with the scope of the Community’s legislative powers. The EC Treaty thus followed the American constitutional solution. This conclusion has been – partly – qualified by the view that insists that the decentralized execution of European law reflects the “constitutional identity” of the European

49. Case 66/04, *United Kingdom v. Parliament and Council*, [2005] ECR I-10553. In relation to use of Art. 95 EC to create a Community body, see Case C-217/04, *United Kingdom v. Parliament and Council (ENISA)*, [2006] ECR I-3771, especially para 44: “The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate.”

50. According to the authorization procedure set out in Regulation 2065/2003 (O.J. 2003, L 309/1), an individual applicant would need to send his application to the competent national authority, which would send the application to the European Food Safety Authority (*ibid.*, Art. 7). The EFSA would then forward its opinion on the application to the Commission, the Member States and the applicant (*ibid.*, Art. 8). The Commission would take the final decision (*ibid.*, Art. 9), in accordance with the procedure set out in Art. 19(2) of the Regulation.

51. Art. 9(1)(b) of the Regulation; and see also Art. 11(1) of the Regulation.

52. *United Kingdom v. Parliament and Council*, cited *supra* note 49, para 18.

53. *Ibid.*, para 64.

54. On the constitutional availability of Art. 308 EC in this situation, see Schütze, “Organized change towards an ‘ever closer union’: Article 308 EC and the limits to the Community’s legislative competence”, 22 YEL (2003), 79, at 95: “The two dimensions of power: Regulatory instruments and Article 308 EC”.

Community.⁵⁵ From this perspective, executive federalism *as such* poses an external limit to the Community's power to establish its own executive machinery.⁵⁶

3.2. The "European Union" (after Lisbon): Solid foundations of executive power?

In what ways has the Lisbon Treaty changed the executive powers of the Union? The amendments introduced at Lisbon are novel and fundamental. The executive powers of the Union are given firmer constitutional foundations.⁵⁷ The new Article 291 of the Treaty on the Functioning of the European Union (TFEU) appears to textually confirm the connection between the legislative and executive powers of the Union. It states:

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers..."

Paragraph 1 confirms that the Member States will generally enjoy the power to execute legally binding acts of the European Union. The recognition of an autonomous national competence is couched in terms of a European obligation:

55. In this sense: Klepper, *op. cit. supra* note 2, p. 89 (emphasis added): "Beim Einsatz der Ermächtigung aus Art. 308 EGV muß der Gemeinschaftsgesetzgeber stets darauf achten, daß er die Grenze zur Vertragsveränderung nicht überschreitet. Art. 308 kann nur für solche Maßnahmen in Anspruch genommen werden, die sich in die vorgefundenen Grundstruktur des EG-Vertrages einfügen. Deshalb dürfen auf Art. 308 EGV keine Kompetenzzuweisungen gestützt werden, durch die die administrative Aufgabenverteilung zwischen Gemeinschaft und Mitgliedstaaten *grundlegend* verändert würde. *Insbesondere scheidet die Einführung einer allgemeinen Vollzugsbefugnis der Gemeinschaft aus.*"

56. For a discussion of the "external limits" of Art. 308 EC, see Schütze, *op. cit. supra* note 17, p. 140 et seq.

57. For the opposite view, Nettesheim, "Die Kompetenzordnung im Vertrag über eine Verfassung für Europa", 39 *EuR* (2004), 511, at 522: "Eine wirkliche Lücke weist der *Vertrag über eine Verfassung für Europa* insofern auf, als er sich der Frage der Verteilung der Verwaltungszuständigkeiten nicht annimmt." However, the Constitutional Treaty specifically dealt with the executive power of the Union in Art. I-37 entitled "Implementing Acts". The provision was equivalent to Art. 291 TFEU.

the Member States are under the obligation to use their competence to implement European law. This particular obligation specifies the general duty of “sincere cooperation” codified in Article 4 TEU, which obliges the Member States to “take any appropriate measure, general or particular, to ensure the fulfilment of the obligations arising out of the Treaty or resulting from acts of the institutions of the Union”.⁵⁸ The Lisbon Treaty here confirms and constitutionalizes the decentralized application of European law by the Member States – and with it the idea of executive federalism.

According to Article 291(2) TFEU the Union is entitled to implement its own law, “[w]here uniform conditions for implementing legally binding Union acts are needed”. Should we see Article 291(2) as an independent legal basis for Union executive action; or should we confine its meaning to an inter-institutional dimension? This is a difficult question. The wording of the provision provides an argument in favour of the latter view, as it textually resembles ex-Article 202 EC. However, systemic and teleological considerations lead to a different interpretation. Unlike Article 202 EC, Article 291 TFEU is not confined to regulating the horizontal relationship between Union institutions but refers in paragraph 1 to the *vertical relations between the Union and the Member States*. A systemic reading of Article 291 TFEU might thus suggest that while the Member States are principally responsible under paragraph 1, the Union will be competent under paragraph 2. The Union competence would thereby derive from Article 291(2) *as such*, while the specific Union act only regulates the *delegation* of implementing power to the Commission (Council).⁵⁹ This systemic interpretation is reinforced by teleological considerations. A competence reading of Article 291 TFEU would allow the Union to adopt any type of implementing act – including implementing decisions – without recourse to Article 352 TFEU.⁶⁰ This reading would thus provide the Union with solid legal foundation for its executive action.

If European constitutionalism came to accept Article 291(2) TFEU as the new executive reservoir of the Union, what would its legal characteristics be?

58. Art. 4(3) TEU (Lisbon).

59. Some have even claimed that the Commission enjoys an autonomous power under Art. 291(2) TFEU, cf. Jacque, “Le Traité de Lisbonne: Une vue cavalière”, 44 RTDE (2008), 439, at 480: “le pouvoir d’exécution appartient à la Commission qui ne dispose plus, comme dans la situation actuelle, d’un pouvoir délégué, mais d’un pouvoir propre”.

60. For example: Art. 207 TFEU only permits the Union to exercise its Common Commercial Policy competence by means of two instruments: regulations and international agreements. All internal “measures defining the framework for implementing the common commercial policy” must be adopted “by means of regulations” and “in accordance with the ordinary legislative procedure” (para 2). Art. 207 TFEU will not, as such, entitle the Union to adopt individual decisions. And this morphological limitation is to stay even if the Union legislator decides to delegate implementation power to the Commission, since Art. 290 TFEU specifies that the Commission can only adopt “non-legislative acts of *general application*” (para 1).

The provision would henceforth replace Article 308 EC as the Union's general executive competence, but like the latter it would only be a *lex generalis*. Wherever the Treaties establish a special regime for the implementation of European law,⁶¹ the latter will take constitutional priority over Article 291 TFEU. But while it thus shares a "subsidiary" character with Article 308 EC,⁶² the procedure according to which the Union may exercise its executive powers would have fundamentally changed. Whereas Article 308 EC required unanimity in the Council – giving each Member State a decisional veto over the adoption of a European executive act – the Lisbon Treaty continues the transformation of the executive function from decisional intergovernmentalism to decisional supranationalism. For while the powers of the Commission will be subject to "mechanisms for control by Member States", these control mechanisms will *not* give a veto power to each Member State.⁶³

What are we to expect from the control mechanisms under Article 291(3) TFEU? The paragraph refers to control by the *Member States* – not the Council or the Parliament. Are both Union institutions thus constitutionally excluded from controlling the Commission? The Commission has indeed made this argument.⁶⁴ It claims that Article 291 TFEU does "not provide any role for the European Parliament and the Council to control the Commission". "Such control can only be exercised by the Member States".⁶⁵ The Commission suggests replacing the existing management and regulatory procedures with a new "examination" procedure.⁶⁶ This new procedure would allow a qualified

61. We can identify an executive *lex specialis* in the context of competition law in Art. 105 TFEU. It provides that "the Commission shall ensure the application of the principles laid down in Articles 101 and 102". It shall thereby "investigate cases of suspected infringement of these principles" (para 1). Para 3 offers a specific legal base for implementing measures of a regulatory nature: "The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2) (b)." After the Lisbon Treaty, the basic Council Regulation in this context continues to be Regulation 19/65 on the basis of which the Commission has recently enacted Commission Regulation 330/2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (O.J. 2010, L 102/1).

62. On the "subsidiary" character of Art. 308 EC in the Community legal order, see Schütze, *op. cit. supra* note 54, 99 et seq.

63. Art. 291(3) TFEU provides that these control mechanisms have to be agreed by means of the "ordinary" legislative procedure. This makes it unlikely that the Union legislator will allow for a national veto power.

64. European Commission, Proposal for a Regulation laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM(2010)83 final.

65. *Ibid.*, 2.

66. The advisory procedure, by contrast, would continue to exist and only oblige the Commission to "take ... the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered" (*ibid.*, Art. 4(2)).

majority of *Member States* – not the Council – to prevent the adoption of a draft Commission measure.⁶⁷ It is hard to imagine that the Parliament or the Council will be pleased by this idea.⁶⁸

To conclude this section: regardless of whether Article 291 TFEU comes to be seen as a general executive competence, the Lisbon Treaty has consolidated the European legal order's own species of executive federalism. As with German federalism, the Member States are entitled and obliged to executive federal law; but unlike German federalism, the Union also enjoys general executive competence that matches its legislative competence. Wherever the decentralized execution proves defective and the uniform implementation of federal law is needed, the centralized execution of European law will be constitutionally possible. European constitutionalism thus partly follows the American federal design in which the Union's legislative and executive spheres coincide,⁶⁹ but unlike American federalism, these federal executive powers provide only a second-best solution. The Union's executive powers are subsidiary to the executive powers of the Member States. European constitutionalism thus combines the two federal traditions into its own constitutional brand.

This European species of "executive federalism" poses its own constitutional problems. What are the limits to the States' executive powers, and when will the Union decide to centralize the enforcement of its own law? What are the constitutional principles governing the Union's executive powers? Are there instances of "mixed administration"? These questions will be analysed in the next section.

4. "Executive federalism": Constitutional limits to the national and European enforcement of Union law

The European Union's solution to combine the American and German federal models has been placed on firmer constitutional foundations by the Lisbon

67. *Ibid.*, Art. 5(3).

68. For a taste of the Council's position on the issue, see Communication from the Commission to the European Parliament pursuant to Art. 294(6) TFEU, COM(2010)67 final, 5–6.

69. For a similar conclusion, see Dubey, *op. cit. supra* note 18, at 97: "Mais, contrairement à une idée assez largement répandue, la dissociation fréquente entre compétence exécutive et compétence législative ne résulte pas directement du caractère fonctionnel de ce principe [d'attribution]. En réalité, lorsque son attribution à l'un ou l'autre des niveaux de pouvoir ne ressort pas expressément d'une prescription des traités, la compétence d'exécuter le droit communautaire adopté en conformité avec les traités appartient aussi, sur le principe, à la collectivité titulaire de la compétence législative." However, the author arrives at this conclusion by means of a different and – in my view – mistaken path. For it is claimed that Arts. 202 and 211 EC and Art. 6(4) TEU (Maastricht) provide the Community with general executive competences.

Treaty. In the enforcement of European law, the Union's shared executive powers are subsidiary to the executive powers of the Member States.⁷⁰ Article 291 TFEU thereby continues a position traditionally taken by the Court of Justice. The Court has long found "that according to the general principles on which the institutional system is based and which govern the relations between the [Union] and the Member States, it is for the Member States, in the absence of any contrary provision of [European] law, to ensure that [those rules] ... are implemented within their territory".⁷¹ The Union legal order therefore principally enlists the Member States to enforce European law (section 4.1.), and only where the latter encounter constitutional limits that affect the uniform application of European law will it centralize the enforcement of European law (section 4.2.). After a discussion of both enforcement methods and the constitutional principles that guide them, we shall – thirdly – look at situations of "mixed administration" (section 4.3.).

70. Are there exclusive executive competences of the EU? Textually, Art. 2 TFEU applies the category of exclusive competence to areas in which the Union "may legislate and adopt *legally binding acts*" (Art. 2(1) TFEU – emphasis added). The possibility of executive measures falling within this category is recognized. Has the Treaty tied the categorization of all "non-legislative" competences to the classification of the Union's "legislative" competences? Let us look at this question in the context of the Common Commercial Policy. This is an area of exclusive Union power (cf. Art. 3(e) TFEU). Will this mean that the Member State authorities can only enforce common commercial policy law on the basis of an authorization by the Union? This is not the case; and there are constitutional reasons for this state of affairs. Indeed, Art. 207 TFEU only permits the Union to exercise its CCP competence by means of general measures (*supra* note 60). While we can identify an exclusive competence of the Commission to implement the CCP through acts of general application under Art. 290 TFEU, the provision cannot be the source of an exclusive competence to adopt individual decisions. The executive competence to apply Union law to specific cases will thus have to be founded in a general competence of the Union to execute its own law, that is: either Art. 291 or Art. 352 TFEU. But this provision only grants a *shared* power to implement European law to the Union. Moreover, Art. 2(1) TFEU appears to recognize autonomous implementing powers of the Member States within the exclusive competences of the Union, since it seems to drop the requirement of a Union empowerment for national implementing actions. This theoretical result – exclusive legislative competence flanked by a shared executive competence – reflects past constitutional practice, cf. Regulation 2913/92 establishing the Community Customs Code (O.J. 1992, L 302/1).

71. Joined Cases 89 & 91/86, *L'Étoile Commerciale and Comptoir National Technique Agricole (CNTA) v. Commission*, [1987] ECR 3005, para 11. See also Case C-476/93 P, *Nutral v. Commission*, [1995] ECR 4125, para 14: "according to the institutional system of the Community and the rules governing relations between the Community and the Member States, it is for the latter, in the absence of any contrary provision of Community law, to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory."

4.1. *The Member States (primary) executive powers and their constitutional limits*

4.1.1. *Substantive limits: Union pre-emption of national enforcement*

Where shared executive powers exist, two independent administrations may enforce legal norms autonomously. In the European legal order, the shared powers of the national administrations will however be subject to the principles of supremacy and pre-emption.⁷² The substantive limits thereby created for national administrations depend on the extent to which the European administration chooses to “pre-empt” the Member States. It may thereby limit the substantive discretion of national authorities in two ways: either the Union itself adopts an executive decision and requires national authorities to respect it; or, Union legislation requires national authorities to take into account a decision issued by an administrative authority of another Member State. In the first scenario, a European decision *directly* limits the discretion of a national administration; in the second situation European law only exercises an *indirect* pre-emptive effect on national administrations through the principle of mutual recognition.⁷³

72. On the two principles in the context the Union’s legislative (regulatory) sphere, see Schütze, “Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption”, 43 CML Rev. (2006), 1023.

73. The (European) obligation to – in principle – recognize the decisions of “sister” State administrations may follow directly from the Treaty’s free movement provisions, such as Art. 35 TFEU. In Case C-390/99, *Canal Satélite Digital SL and Administracion General del Estado*, [2002] ECR 507, paras. 35–36, the Court thus held: “First, it is settled case law that a system of prior administrative authorization cannot legitimize discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, particularly those relating to the fundamental freedoms at issue in the main proceedings”. “Therefore, if a prior administrative authorization scheme is to be justified even though it derogates from such fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities’ discretion, so that it is not used arbitrarily”. “Second, a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State.” Alternatively, European obligations to recognize administrative decisions of another Member State may be established in secondary law. For an illustration of the mutual recognition of State administrative action established in European legislation, see Directive 2001/83 on the Community code relating to medicinal products for human use (O.J. 2001, L 311/67). Following Art. 111(1) of the Regulation, the competent authority of the Member State concerned shall ensure, by means of repeated inspections that the legal requirements governing medicinal products are complied with. The conclusions reached by the competent national authority shall thereby “be valid throughout the Community” (Art. 122(3) of the Regulation). However, in exceptional cases relating to public health, a Member State may demand a second independent inspection.

Let us concentrate on the direct pre-emption of national administrations. The degree of executive pre-emption by the Union may thereby differ. In the most extreme situation, national administrations are completely pre-empted from applying European law. This happened in the area of competition law through the first enforcement regulation: Regulation 17/62.⁷⁴ According to the Regulation, Articles 101 and 102 TFEU needed to be applied “in a uniform manner in the Member States”;⁷⁵ and to achieve this result, it required undertakings that sought application of Article 101(3) TFEU to notify their agreements to the Commission. The Commission was thus granted the “sole power to declare Article [101 (1)] inapplicable pursuant to Article [101(3)] of the Treaty”.⁷⁶ Compared to other areas of European law, Regulation 17/62 established “an unusual degree of centralization”.⁷⁷ It reserved to the Commission the ability exclusively to apply the Treaty to particular cases.⁷⁸ This executive monopoly reached, after almost forty years, its natural limits. In the 1990s, the Commission began to consider a new executive framework. It suggested that “[a]pplication of the rules will have to be decentralized more to the Member States’ competition authorities”.⁷⁹ This would “make better use of the complementarity that exists between the national authorities and the Commission”.⁸⁰

74. Regulation No. 17: First Regulation implementing Arts. 85 and 86 of the [EEC] Treaty (O.J. English Special edition: Series I Chapter 1959–1 962, 87).

75. *Ibid.*, Recital 1.

76. *Ibid.*, Art. 9(1). However, national competition authorities were entitled to apply Art. 101(1) subject to Art. 9(3) of the Regulation: “As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article [101 (1)] and Article [102] in accordance with Article [104] of the Treaty[.]”

77. Ehlermann, “The modernization of EC antitrust policy: A legal and cultural revolution”, 37 *CML Rev.* (2000), 537, at 540.

78. Explanations for this high degree of executive uniformity are given in the Commission’s White Paper on Modernization of the Rules Implementing Arts. 85 and 86 of the EC Treaty (O.J. 1999, C 132/1), para 24: “The authorization system provided for in Regulation No 17 met the three main requirements identified at the time by the Commission (provision of information to competition authorities, uniform application of the competition rules in the Community and legal certainty for undertakings). It allowed a coherent corpus of rules to be developed and applied uniformly in the Community, thus contributing significantly to the completion of the internal market.”

79. White Paper, para 46: “Application of the rules will have to be decentralized more to the Member States’ competition authorities and to the national courts. The competition authorities are well placed to take effective action in certain types of case: they are normally well acquainted with local markets and national operators, some of them have an infrastructure covering the whole of the relevant country and can carry out investigations rapidly, and most of them have the human and legal resources needed to take action against infringements whose centre of gravity is in their territory. Lastly, they are closer to complainants, who will more readily turn to a national authority than to the Commission.”

80. White Paper, para 91. This point is further explained in paras. 96–97.

Regulation 1/2003 ultimately introduced a revolutionary new administrative regime for the enforcement of European competition law.⁸¹ The total pre-emption of national administrations with regard to Article 101(3) TFEU was replaced by a system of shared executive competences.⁸² Under the new system, both the Commission and the national competition authorities can enforce European law.⁸³ However, the “pre-eminence” of the Commission is established in Article 11(6) of the Regulation: “The initiation by the Commission of proceedings for the adoption of a decision shall relieve the competition authorities of the Member States of their competence to apply Articles [101] and [102] of the Treaty”. The idea of executive pre-emption is designed to protect the special role of the Commission in the application of European competition law. The Commission – as guardian of the Treaties – is entitled to trigger the centralized enforcement mechanism to ensure the uniform application of European law.⁸⁴ Through executive pre-emption, national competition authorities are prohibited from exercising their competence *in this case*.⁸⁵ However, this *substantive* limit will not as such interfere with the procedural autonomy of the national authorities. Article 11 does not entitle the Commission to issue binding instructions to national competition authorities, let alone to veto their decisions.⁸⁶ National competition authorities are therefore

81. Regulation 1/2003 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the [EC] Treaty (O.J. 2003, L 1/1).

82. Reg. 1/2003 claims to establish a system of “parallel competences” (*ibid.*, preamble 22). See also Commission Notice on Cooperation within the Network of Competition Authorities (O.J. 2004, C 101/43), esp. para 5: “The Council Regulation is based on a system of parallel competences”. The problem with this categorization is that it cannot account for the ability of the Commission to “pre-empt” national competition authorities. The executive competence is therefore of a shared (or even better: concurrent) nature.

83. Art. 5 of Reg. 1/2003 states: “The competition authorities of the Member States shall have the power to apply Articles [101 and 102] of the [FEU] Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions”. It is important to remember that this is not an “enabling” provision or a delegation of European executive power to national authorities. Regulation 1/2003 simply clarifies that the national competition authorities will be able to enforce EU law in their own right.

84. White Paper (cited *supra* note 78), para 83.

85. They are also subject to Art. 16(2) of Reg. 1/2003. The Article states: “When competition authorities of the Member States rule on agreements, decisions or practices under Article [101] or Article [102] of the [FEU] Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.”

86. Art. 11 of Reg. 1/2003 lays down the rules of cooperation between the Commission and the national competition authorities. According to its para (3), the national authorities must inform the Commission of their decision to commence a formal investigation. Para 4 even obliges them “[n]o later than 30 days before the adoption of a decision” to forward the draft decision to the Commission. However, there is no obligation to consult the Commission on the case (cf. Art. 11(5): “The competition authorities of the Member States *may* consult the Commission on any case involving the application of Community law.” Emphasis added). More importantly,

not integrated into or hierarchically subordinated to the European Commission.⁸⁷

In conclusion, the current enforcement system in the area of competition law – and beyond – is based on the idea of shared competences. National executive action may be “pre-empted” by the decision of the Union to apply the law itself. Yet, executive pre-emption is only a substantive and external limitation on the discretion of national authorities. It “interferes much less with the autonomy of national competition authorities than the requirement of Commission consent or the right of the Commission to annul a national decision”, since the latter would “introduce an element of administrative hierarchy that is conspicuously absent in the EC Treaty”.⁸⁸ This administrative hierarchy and integration is – as a matter of principle – not part of Europe’s executive federalism.⁸⁹

4.1.2. *Procedural limits: Inroads into national administrative autonomy*

Classic international law leaves the enforcement of its norms to the States themselves. The national administrative structure is beyond its reach. When founded in 1957, the European legal order followed this logic. While it would “centralize” the question of direct effect, it appeared to leave the administrative autonomy of the Member States untouched. Article 5 of the original Rome Treaty simply stated: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.” This general duty would become known as the duty of loyal

the Commission will not have the right to provide a binding interpretation on the application of Arts. 101 and 102 to the national competition authorities or to veto their decision (cf. Bardong, “Article 11 of Regulation 1/2003” in Hirsch et al. (Eds.), *Competition Law: European Community Practice and Procedure* (Sweet & Maxwell, 2008), at p. 1658). The administrative cooperation between the Commission and the national authorities thus contrasts with the constitutional principles for the judicial cooperation between the ECJ and the national courts under Art. 267 TFEU. However, national administrative authorities will also be subject to special duties *vis-à-vis* the European judiciary, cf. Case C-453/00, *Kühne & Haitz*, [2004] ECR 837, para 27: “In such circumstances, the administrative body concerned is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review that decision in order to take account of the interpretation of the relevant provision of Community law given in the meantime by the Court. The administrative body will have to determine on the basis of the outcome of that review to what extent it is under an obligation to reopen, without adversely affecting the interests of third parties, the decision in question.”

87. There is no “appeal” procedure to the European Commission from a national competition authority. If an undertaking wishes to challenge an administrative decision by a national competition authority, it will need to do so in the national courts. From there, a preliminary reference procedure may bring the issue before the ECJ.

88. Ehlermann, *op. cit. supra* note 77, 578.

89. On possible forms of mixed administration, see section 4.3. *infra*.

cooperation and can today be found – in slightly amended form – in Article 4 TEU (Lisbon).⁹⁰ The duty limits the procedural autonomy of the Member States, where this procedural freedom leads to significant differences in the application of substantive European law.

How has the Court of Justice interpreted this duty in the context of the Union's executive federalism? The Court started out by recognizing, in principle, the procedural autonomy of the Member States in the enforcement of European law: "Where national authorities are responsible for implementing a [Union] regulation it must be recognized that in principle this implementation takes place with due respect for the forms and procedures of national law."⁹¹ "Although under Article [4 of the TEU] the Member States are obliged to take all appropriate measures whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty, it is for them to determine which institutions within the national system shall be empowered to adopt the said measures."⁹² More than that: "the national authorities when implementing [European] regulations act in accordance with the procedural and substantive rules of their own national law".⁹³ However, according to the Court, this procedural autonomy was not absolute. The administrative autonomy of the Member States had to be reconciled with the need to apply European law uniformly. The European legal order has thus also imposed procedural limits on the executive powers of the Member States. These procedural limitations make the decentralized application of European law by the Member States a form of executive *federalism*.

What are these procedural limits? National administrative rules are subject to the constitutional principles of equivalence and effectiveness.⁹⁴ And if these

90. After the Lisbon amendments, Art. 4(3) TEU now states: "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."

91. Case 39/70, *Norddeutsches Vieh- und Fleischkontor GmbH v. Hauptzollamt Hamburg-St. Annen*, [1971] ECR 49, para 4.

92. Joined Cases 51-54/71, *International Fruit Company NV and others v. Produktschap voor groenten en fruit*, [1971] ECR 1107, para 3.

93. Joined Cases 205-215/82, *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany*, [1983] ECR 2633, para 17.

94. Discussion of these two constitutional principles is typically confined to the context of *judicial* remedies. However, they equally apply – *mutatis mutandis* – to *administrative* remedies. The Court thus confirmed the principles of effectiveness and equivalence in *Deutsche Milchkontor* (ibid., paras. 22–23) as well as Case C-201/02, *The Queen on the application of Delena Wells v. Secretary of State for Transport*, [2004] ECR I-723: "[U]nder Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337. The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favour-

negative limits are not sufficient, the Union can harmonize national administrative procedures.⁹⁵ What legal bases will the Union dispose of to adopt common administrative procedures? The power to harmonize national administrative law has always been part of the Union's harmonization power. The original Rome Treaty already allowed the Community to "issue directives for the approximation of such provisions laid down by law, regulation or *administrative action* in the Member States".⁹⁶ The competence to harmonize national administrative procedures has been widely used in the past.⁹⁷ The Lisbon Treaty has now inserted a new special constitutional base: Article 197 TFEU. This Article constitutes by itself Title XXIV dealing with the "Administrative Cooperation" between the European Union and the Member States. The provision states:

- “1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.
2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonization of the laws and regulations of the Member States....”

The decentralized implementation of European law is – unsurprisingly – of central interest to the Union. To guarantee an effective implementation, the

able than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).”

95. *Deutsche Milchkontor*, cited *supra* note 93, para 24: “if the disparities in the legislation of Member States proved to be such as to compromise the equal treatment of producers and traders in different Member States or distort or impair the functioning of the Common Market, it would be for the competent Community institutions to adopt the provisions needed to remedy such disparities”.

96. Art. 100(1) EEC (emphasis added).

97. For a good illustration of this, see Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (O.J. 2006, L 93/12). According to its Art. 5(5) “the Member State shall initiate a national objection procedure ensuring adequate publication of the application and providing for a reasonable period within which any natural or legal person having a legitimate interest and established or resident on its territory may lodge an objection to the application”. Moreover: “The Member State shall ensure that its favourable decision is made public and that any natural or legal person having a legitimate interest has means of appeal.” See also Directive 2002/21 on a common regulatory framework for electronic communications networks and services (Framework Directive) (O.J. 2002, L 108/33), esp. Arts. 3(2) and 4(1).

Union may decide to “support the efforts of Member States to improve their administrative capacity to implement Union law”. But this Union support is entirely voluntary and the European legislation adopted under this competence must not entail “any harmonization of the laws and regulations of the Member States”. This constitutional limitation is to be regretted. The trimming of the power to a “complementary competence” may well have an ironic effect.⁹⁸ In blocking the European streamlining of (inefficient) national administrations, the provision protects their formal organizational autonomy.⁹⁹ However, the refusal to allow for the harmonization of national administrative capacities through Union legislation may indirectly favour the centralized intervention by the Union under Article 291(2) TFEU. Thus, in excluding the Union’s competence to harmonize national administrative law, the authors of the Lisbon Treaty placed procedural autonomy over substantive autonomy. This constitutional choice may – ironically – *reduce* the scope of the decentralized execution of Union law by the Member States.¹⁰⁰

4.1.3. *Morphological limits: Beyond the territoriality principle?*

Within the German species of “executive federalism”, each State executes federal law and a State’s administrative decision has legal validity within the entire federation.¹⁰¹ State administrations, while acting “in their own right” operate – even territorially – as decentralized federal authorities.

Has the European Union followed this species of “executive federalism” and acknowledged the decentralized execution of federal law with a centralized

98. The competence is mentioned as a complementary competence in Art. 6(g) TFEU.

99. However, this protection will not be absolute: see Art. 197(3) TFEU: “This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.”

100. To add a footnote to this conclusion: Article 114 TFEU may – after Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising)*, [2000] ECR I-8419 – still provide a legal basis for the harmonization of national administrative provisions despite the existence of a “saving clause” under Art. 197(2) TFEU. (On the status of these “saving clauses” and their relation to Art. 114 TFEU, see Schütze, *op. cit. supra* note 56, at p. 149 et seq.) However, it may be doubted whether Art. 114 could ever be used to adopt a comprehensive “European Administrative Code”. It may thus be far too early to proclaim that it is “time to re-examine the considerations for establishing an administrative code for administrative procedures in the sphere of EU law” (Hofmann and Türk, “Legal challenges in EU administrative law by the move to an integrated administration” in Hofmann and Türk (Eds.), *Legal Challenges in EU Administrative Law* (Elgar, 2009), p. 379). For a similar conclusion, albeit in the context of Art. III-285 of the Constitutional Treaty, see Schwarze, *EU Administrative Law* (Sweet & Maxwell, 2006), ccxix: “a long way from being a possible future legal base for the creation of a comprehensive European administrative law or even just serving as a tool for the development of a general administrative procedural code”.

101. See section 2.2. *supra*, esp. note 33.

effect? Is there, in other words, a State execution of European law *pro unione*?¹⁰² With the EU's international origin, the European treaties started from the idea of an indirect execution *pro statu*. This followed from the territoriality principle, according to which national powers can only unfold effects within the national territory. Administrative decisions within the Member States, even when executing European law, would therefore be adopted in complete isolation and independence. The administrative decision within one Member State would have no effects within another. This "morphological" limitation of national action stemmed from their territorially limited validity.

The potential difficulties resulting from diverse national administrative practices were soon realized. In the context of competition law, the Union was thus given the power to centralize the application of European law if there was a danger of administrative inconsistency. In other policy areas, the Union legislator began to build cooperative horizontal relationships between national authorities. These horizontal relationships were to facilitate the mutual recognition of their administrative acts.

While not required automatically to give validity to administrative decisions of other Member States, national authorities are nonetheless subject to procedural and substantive duties imposed by European law.¹⁰³ In some areas, the Union even grants automatic *trans*-national validity to national administrative acts.¹⁰⁴ An illustration of this technique can be found in the Union Customs Code.¹⁰⁵ Its Article 250 – entitled "Legal effects in a Member State of measures taken, documents issued and findings made in another Member State" – reads as follows:

- "Where a customs procedure is used in several Member States,
- the decisions, identification measures taken or agreed on, and the documents issued by the customs authorities of one Member State shall have the same legal effects in other Member States as such decisions, measures taken and documents issued by the customs authorities of each of those Member States

102. The terminological dichotomy between the application of European law "*pro communitate*" and the application "*pro statu*" was introduced by Winter, "Kompetenzverteilung und Legitimation in der europäischen Mehrebenenverwaltung", 40 *EuR* (2005), 255, at 256. The formulation "*actio pro unione*" has been developed by Bast, "Transnationale Verwaltung des Europäischen Migrationsraums", 46 *Der Staat* (2007), 1.

103. This idea has been named "reference model" and is extensively discussed by Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck, 2004).

104. The term has been coined by Schmidt-Abmann, "Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Verwaltung," 31 *EuR* (1996), 270, at 301, distinguishing between "true" and "mediated" transnationality.

105. Regulation 2913/92 establishing the Community Customs Code (O.J. 1992, L 302/1).

- the findings made at the time controls are carried out by the customs authorities of a Member State shall have the same conclusive force in the other Member States as the findings made by the customs authorities of each of those Member States.”

We find similar investitures of transnational effects to national executive acts in other areas of European law.¹⁰⁶ However, the national execution of European law *pro unione* constitutes an exception. Could the European legislator decide to give such transnational effects to all national administrative acts? Article 291(2) TFEU could not be used as a legal basis for such a – radical – decision, for it only entitles the Union to *replace* the Member States’ indirect execution of European law by means of its direct involvement. Neither does Article 114 TFEU seem apposite for a decision to generally grant transnational effects to national executive action, as the latter would not “harmonize” national laws or administrative actions. The only possible contender is Article 352 TFEU. However, even this provision would find an external limit in the (present) constitutional identity of the Union; and this identity would be changed if the Union were to move – wholesale – from the decentralized enforcement of European law *pro statu* to the decentralized enforcement of European law *pro unione*.

4.2. *The Union’s (subsidiary) executive powers and their limits*

4.2.1. *The principle of subsidiarity as a constitutional safeguard*

The national execution of European law has “the invaluable advantage of bringing citizens closer to the still strange and new European order by employing the authority and familiar garb of their national order – and not to forget: by speaking their own language”.¹⁰⁷ Ever since the Maastricht Treaty, the Union legal order has emphasized the constitutional nexus between the principle of

106. For example: Regulation 116/2009 on the export of cultural goods (Codified version) (O.J. 2009, L 39/1) makes the export of cultural goods outside the customs territory of the Union subject to an export licence and decrees that this licence shall be issued “by a competent national authority” defined in Art. 2(2). Art. 2(3) then “Europeanizes” this national decision: “The export licence shall be valid throughout the Community.” See also Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (O.J. 2009, L 134/1), whose Art. 9(2) states: “For all other exports for which an authorization is required under this Regulation, such authorization shall be granted by the competent authorities of the Member State where the exporter is established. Subject to the restrictions specified in paragraph 4, this authorization may be an individual, global or general authorization. All the authorizations shall be valid throughout the Community.”

107. Hallstein, *Der unvollendete Bundesstaat. Europäische Erfahrungen und Erkenntnisse* (Econ, 1994), p. 59 (translation – RS).

subsidiarity and “executive federalism”.¹⁰⁸ The Amsterdam Protocol on Subsidiarity pointed out that “care should be taken to respect well established national arrangements and the organization and working of Member States’ legal systems”.¹⁰⁹ The Declaration relating to the Subsidiarity Protocol was even more direct. It confirmed that “the administrative implementation of Community law shall in principle be the responsibility of the Member States in accordance with their constitutional arrangements”.¹¹⁰ The Lisbon Treaty “continue[s] the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity”.¹¹¹

The subsidiarity principle is now defined in Article 5(3) TEU:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

The wording of the principle covers to any action by the Union. This has – from the very beginning – been understood to include *executive* action.¹¹² The principle of executive subsidiarity asks whether the Member States or the European Union will better achieve the implementation of European law. Executive subsidiarity thereby operates *independently* from the principle’s application in the legislative sphere. Thus: even when *centralized legislative* action by the Union is justified under the subsidiarity principle, the latter may nonetheless mandate the *decentralized execution* of European legislation by the Member States.

108. Commission, Communication on the Principle of Subsidiarity, EC Bulletin 10-1992, 116 at 117: “[T]here should be careful examination of the possibilities of decentralizing the management of Community action ... This corresponds to the need to maintain such actions, as close to the citizen as possible.”

109. Protocol on the Application of the Principles of Subsidiarity and Proportionality (1997), point 7.

110. Declaration relating to the Protocol on the Application of the Principles of Subsidiarity and Proportionality. The *Laeken* Declaration was less committed and simply asked: “should not the day-to-day administration and implementation of the Union’s policy be left more emphatically to the Member States and, where their constitutions so provide, to the regions?”

111. Treaty on European Union (Lisbon), Recital 13.

112. Ehlermann, “Quelques réflexions sur la communication de la Commission relative au principe de subsidiarité”, (1992) *Revue du marché unique européen*, 215, at 218: “le test de la subsidiarité ne se limite pas à l’action législative. Il s’applique également au niveau de l’action administrative, c’est-à-dire de l’exécution de la réglementation communautaire et du contrôle de l’exécution”.

What criteria have the European legislator or the European Courts developed to clarify the contours of executive subsidiarity? Let us first look at *legislative* definitions. We find such a legislative expression of executive subsidiarity in the European framework governing the authorization of medicinal products.¹¹³ The authorization procedure follows – with the exception of certain products¹¹⁴ – a decentralized mechanism.¹¹⁵ The competent national authority must verify whether the application submitted fulfils the European rules, and if this is the case issue a marketing authorization.¹¹⁶ However, for parallel applications in two or more Member States, the national administrative procedure is abandoned and a “[m]utual recognition and decentralized procedure” applies. The applicant thereby requests one Member State to act as “reference Member State”.¹¹⁷ The reference Member State will prepare a draft assessment report; and if all the concerned Member States approve the assessment report, each Member State in which the application has been submitted adopts an authorization decision for its territory.¹¹⁸ However, where a Member State disapproves of the assessment report on the ground of a potential serious risk to public health, the matter is referred to the European Medicines Agency and the Commission will finally decide.¹¹⁹ The disagreement of a single Member State will thus be enough to trigger the central execution of European law by the European administration.¹²⁰

113. Directive 2001/83 on the Community Code relating to medicinal products for human use (O.J. 2001, L 311/67).

114. In addition to the decentralized authorization procedure established by Directive 2001/83, this area also has a centralized authorization procedure, cf. Regulation 726/2004 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicine Agency (O.J. 2004, L 136/1). This form of direct European administration applies for certain products defined in Art. 3 of the Regulation.

115. Cf. Arts. 3 and 8 of Directive 2001/83.

116. *Ibid.*, Arts. 19 and 21.

117. *Ibid.*, Art. 28(1) and (2).

118. *Ibid.*, Art. 28(4) and (5).

119. *Ibid.*, Arts. 33 and 34. The opinion of the agency is prepared by the “Committee for Medicinal Products for Human Use”.

120. We find a similar mechanism in Regulation 258/97 concerning novel foods and novel food ingredients (O.J. 1997, L 43/1). According to its Art. 4, the application will need to be submitted to “the Member State in which the product is to be placed in the market for the first time”. This Member State will then be asked under Art. 6(3) to draft an “initial assessment report”. The report is subsequently forwarded to the Commission and the Member States, which “may make comments or present a reasoned objection to the marketing of the food or food ingredient concerned” (*ibid.*, Art. 6(4)). Where there are no objections, the Member State can issue the authorization (*ibid.*, Art. 4(2)). By contrast, where an objection is raised and an additional assessment is required, it is the Commission (subject to the relevant comitology procedure) that will decide (*ibid.*, Arts. 7 and 13(2)).

We find a second legislative definition for executive subsidiarity in the context of European competition law.¹²¹ The enforcement of European competition law is based on a system of shared competences. It entitles the European Commission as well as the national competition authorities to apply European law; but “the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings”.¹²² Has Regulation 1/2003 subjected the discretion of the Commission to centralize enforcement to a subsidiarity analysis? Article 4 and Article 11(6) of the Regulation are devoid of any substantive criteria in this respect; and Article 10 of the Regulation simply refers to the Union’s “public interest relating to the application of Articles [101 and 102]”.¹²³ The principles governing the exercise of the Commission’s executive competences were partly clarified by its “Notice on Cooperation within the Network of Competition Authorities”.¹²⁴ The Commission here specified when it considers pre-empting decentralized execution:

“The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, *have effects on competition in more than three Member States* (cross-border markets covering more than three Member States or several national markets). Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision *to develop Community competition policy* when a new competition issue arises or *to ensure effective enforcement*.”¹²⁵

121. On the application of the principle of subsidiarity generally in the context of EC competition law, see Idot, “L’application du principe de la subsidiarité dans le droit de la concurrence” in Ress and Stein (Eds.), *Vorträge, Reden und Berichte aus dem Europa-Institut – Sektion Rechtswissenschaft* – Nr. 300 (Europa-Institut, 1993); Editorial: Subsidiarity in EC competition law enforcement, 32 CML Rev. (1995), 1; as well as: Wesseling, “Subsidiarity in Community antitrust law: Setting the right agenda”, 22 EL Rev. (1997), 35.

122. Reg. 1/2003, *cited supra* note 81, Recital 17.

123. *Ibid.*, recital 14: “In exceptional cases where the public interest of the [Union] so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article [101] or Article [102] of the [FEU] Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the [Union], in particular with regard to new types of agreements or practices that have not been settled in the existing case law and administrative practice.”

124. Commission Notice on Cooperation within the Network of Competition Authorities (O.J. 2004, C 101/43). The Notice is a “soft law” measure that, as such, only binds the Commission. However, according to its para 72, Member States’ competition authorities may sign a statement that they will abide by the principles set out in the Notice; and the Notice has indeed been signed by all national competition authorities.

125. Commission Notice (*ibid.*), paras. 14–15.

The centralized execution of European law would consequently be mandated, where one of three – alternative – criteria is met. The first criterion relates to the *geographical scale* of the competition law problem. Where more than three Member States are concerned executive centralization is deemed to be justified. This trans-border element has close subsidiarity overtones in that it is associated with the “national insufficiency” test.¹²⁶ The second criterion is, by contrast, of a *political* nature. Since the Commission is responsible for the development of European competition *policy*,¹²⁷ it must be able to decide important cases itself. Is this political guidance function in accord with the idea of subsidiarity? Doubts may be raised. The Commission’s ability to adopt regulatory measures – as opposed to executive decisions – could offer the desired political guidance.¹²⁸ The third criterion concerns the *effectiveness* of the competition law execution. This criterion is reminiscent of the “comparative efficiency test” in Article 5(3) TEU. What efficiency gains warrant executive centralization? We find some tentative answers in a later part of the Network Notice. The Commission may centralize decision-making, where the national administrative authorities envisage conflicting or substantively wrong decisions; or, where a national authority unduly draws out proceedings in the case.¹²⁹

The two legislative mechanisms for executive subsidiarity discussed above provide the Commission with an extremely favourable prerogative over the Member State administrations. In the light of these generous legislative interpretations of the subsidiarity calculus, have the European Courts insisted on an independent judicial control of the constitutional principle? In the past, the Courts have often deferred to the “political” nature of the subsidiarity analysis and thus recognized a wide discretion for the European legislator.¹³⁰ Have the Courts extended this *laissez-faire* approach to the European executive? Or, have the Courts insisted on a strict(er) judicial review of executive subsidiarity?

The issue arose in *France Télécom v. Commission*.¹³¹ The French undertaking had been subject to a Commission investigation under Regulation 1/2003

126. On the two tests within the legislative principle of subsidiarity, see Schütze, *op. cit. supra* note 56, at p. 250.

127. Commission Notice (cited *supra* note 124), recital 43: “Within the network of competition authorities the Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law.”

128. On the subsidiarity analysis as regards the choice of legal instrument, see Schütze (*op. cit. supra* note 54, at 144).

129. Commission Notice (cited *supra* note 124), para 54.

130. On this point, see Schütze (*op. cit. supra* note 56, at p. 253 et seq.).

131. Case T-339/04, *France Télécom SA v. Commission*, [2007] ECR II-521. The case is extensively discussed by Rizzuto, “Parallel Competence and the Power of the EC Commission under Regulation 1/2003 according to the Court of First Instance”, (2008) ECLR, 286.

and challenged its legality on the ground that the French competition authority would have been better able to deal with the case. The Commission, on the other hand, insisted that Regulation 1/2003 “preserve[d] the Commission’s power to act at any time against any infringement of Articles [101 and 102]”. Moreover, “where the Commission has competence to apply the [FEU] Treaty directly in individual cases, the principle of subsidiarity cannot be interpreted in a manner that deprives it of such competence”.¹³² In its judgment, the Court – rightly – distinguished the Commission’s (preliminary) power to undertake inspections from the formal initiation of proceedings for the purposes of Article 11(6) of the Regulation.¹³³ Yet, it – wrongly – held that the subsidiarity principle could never limit the Commission’s power to enforce the competition rules.¹³⁴

The General Court’s judgment represents a serious blow to the idea of an independent judicial review of executive subsidiarity. The Court appears to leave the principle of executive subsidiarity completely in the hands of the other European institutions. This reliance on the political safeguards of federalism is misplaced,¹³⁵ especially in the context of the executive function. For while Article 291(3) TFEU envisages “mechanisms for control by Member States” as a general rule, these may not apply in specific executive regimes – like competition law. Indeed, the idea of an independent subsidiarity analysis for the executive function has been reinforced under the Lisbon Treaty. According to Article 291 TFEU, the Commission will only possess implementing powers “[w]here uniform conditions for implementing legally binding acts are needed”. While this provision concerns the *competence* of the Commission to adopt executive acts, it betrays the clear intention to subject the executive function to a subsidiarity rationale. This idea would be undermined if the European legislator could transfer wide implementing powers to the Commission, the exercise of which would not be subjected to judicial review. The European Courts should therefore look beyond the legislative expressions of subsidiarity and apply an independent judicial review of the question of executive subsidiarity.

132. *France Télécom SA v. Commission*, cited *supra* note 131, paras. 72–73.

133. Bardong (op. cit. *supra* note 86, at p. 1645): “As was the case under Art. 9(3), Regulation 17/62, Art. 11(6) is not triggered when the Commission merely initiates work on a case, or when it takes investigatory measures. It is clear that the Commission can exercise its powers of investigation before it formally opens proceedings.”

134. *France Télécom SA v. Commission*, cited *supra* note 131, para 89.

135. For an elaboration of this point in the legislative sphere, see Schütze, op. cit. *supra* note 56, at p. 261.

4.2.2. *Morphological limits: Safeguarding national administrative independence*

The constitutional pillar of Union executive power after the Lisbon Treaty states: “Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission”.¹³⁶ Assuming that the Union is entitled to exercise its executive powers under the subsidiarity principle, will these implementation powers encounter additional constitutional limitations? An argument to this effect has been made by pointing to possible limitations inherent in the various types of “binding Union acts”.¹³⁷ The problem is said to be twofold. First, can a directly applicable “regulation” ever confer implementing powers to the Commission? If all provisions of a regulation were automatically directly effective, there would be no need for Article 291(2) TFEU.¹³⁸ Second, since directives must “leave to the national authorities the choice of form of methods” can they ever delegate, and thus reserve, implementing power to the Commission?¹³⁹ What are, in general terms, the constitutional implications flowing from the use of a particular type of legal instrument for Europe’s executive powers? This question concerns the “morphological” limits imposed on the European Union.¹⁴⁰

The European legal order defines a “regulation” as an instrument of direct applicability.¹⁴¹ However, this must not be taken to mean that all provisions within a regulation need to be self-executing. Direct applicability is not direct effect.¹⁴² Regulations may thus contain provisions that leave their future implementation to the Member States.¹⁴³ And assuming that a Member State fails to implement these European obligations properly, Article 291(2) TFEU

136. Art. 291(2) TFEU.

137. Craig, “The Role of the European Parliament under the Lisbon Treaty” in Griller and Ziller (Eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008), p. 109.

138. *Ibid.*, pp. 120–121: “It is therefore difficult to see how the need for ‘uniform conditions for implementing legally binding acts’ justifying conferral of implementing powers on the Commission would be of relevance in relation to such legislative acts themselves, given that they are directly applicable. ... Where a legislative act is a regulation there is therefore no need for recourse to Article 291 in relation to implementation of that legislative act itself.”

139. *Ibid.*, p. 121: “It would therefore be odd, to say the least, to enact a directive, but to empower the Commission to impose uniform conditions for implementation. The reality is that if the Commission’s power to impose uniform conditions for implementation were to be used in relation to directives it would radically alter their nature.”

140. On the “morphological” limits of the instruments listed in Art. 288 TFEU generally, see Schütze, *op. cit. supra* note 38, 91.

141. Art. 288(2) TFEU.

142. On the distinction between the concepts of “direct applicability” and “direct effect” in the context of regulations, see Schütze, *op. cit. supra* note 140, at 112–4.

143. See only: Case 403/98, *Azienda Agricola Monte Arcosa Srl*, [2001] ECR I-103, paras. 26 and 28. For a recent overview of non-directly effective provisions in regulations, see Král,

would henceforth entitle the Union to apply its centralized executive machinery. However, in order to satisfy the instrumental format defined in Article 288(2) TFEU, the Court ought to insist that the majority of a regulation's provisions are directly effective.

The situation with regard to "directives" is slightly more complex. The Treaty seems indeed to "reserve" their implementation to the Member States. However, the Court has long ago clarified that where a State fails to implement a directive, the latter can have – vertical – direct effects within the national legal order. The self-executing provisions of a directive will nonetheless only be enforceable after the implementation period granted to the Member States has passed. Moreover, where its provisions are not sufficiently clear and precise, the latter can only become effective when clarified by national implementing legislation.¹⁴⁴ Article 291(2) TFEU appears to change this dramatically. On its face, it entitles the Union to adopt "implementing regulations" (or "implementing decisions") for a directive's non-directly effective provisions.¹⁴⁵ If this is indeed the case, should there be constitutional limits to this power? Two such limits may indeed flow from the nature of the "directive" as a legal instrument. First, the Courts could decide that the centralized implementation of directives must remain the exception. To satisfy its instrumental format, a directive must leave the majority of its provisions to the implementation by

"National normative implementation of EC Regulations: An exceptional or rather common matter?", 33 *EL Rev.* (2008), 243.

144. A directive may also sometimes reserve a future decision to the Union. For example, Art. 2 of Directive 85/73 on the financing of health inspections and controls of fresh meat and poultrymeat (O.J. 1985, L 32/14) provided: "The Council, acting by a qualified majority on a proposal from the Commission shall, before 1 January 1986, take a decision on the standard level or levels of the fees referred to in the first two indents of Article 1 (1) and on the detailed rules and principles for the implementation of this Directive, and on possible exceptions." This implementation was subsequently effected by Council Decision 88/408 on the levels of the fees to be charged for health inspections and controls of fresh meat pursuant to Directive 85/73/EEC (O.J. 1988, L 194/24).

145. A proposal in this direction has been made a long time ago, cf. Gaja, Hay and Rotunda, "Instruments for Legal Integration in the European Community – A Review" in Cappelletti, Seccombe, Weiler, *Integration through Law: Europe and the American Federal Experience* (Volume 1, Book 2: Methods, tools and institutions), pp. 113 at 134–135 "A directive could be accompanied by a regulation which may be designed to become applicable only with regard to the Member States which fail to implement the directive." "In order that "action" be viewed as "necessary" under Article [308 EC], failure on the part of the Member States must have been previously established. This does not mean that a regulation could only be adopted after the deadline fixed by the directive has expired; at that time the non-fulfilling Member State would probably make it difficult for the Council to enact the regulation. Rather, this regulation could be issued at the same time as the directive, but clearly state that it becomes applicable only on condition that some time after the deadline fixed by the directive has passed and the Commission has ascertained – with a decision subject to review by the Court – that the directive as not been adequately implemented in one or more Member States."

the Member States. Second, to comply with Article 288(3) TFEU, the Courts could insist that centralized implementation ought only be activated after the time limit for national implementation has passed. This temporal limitation would reinforce the subsidiary nature of the Union's executive power under Article 291 TFEU.

Are there also morphological limits inherent in Union "decisions"? "A decision which specifies those to whom it is addressed shall be binding only on them."¹⁴⁶ The wording of the provision is ambivalent as to a decision's potential addressees. Constitutional practice has acknowledged decisions addressed to individuals as well as "State-addressed" decisions. But can a decision be addressed to national *administrations*?¹⁴⁷ Put differently: may the Union "instruct" or "command" national executive officers directly; or, will the instrument "decision" not allow the Union to penetrate the sovereignty veil of the Member States?

A number of provisions in secondary Union law superficially appear to address national administrative authorities directly.¹⁴⁸ However, in the past, the Union judiciary has steered against this position. The Court thus held that where a decentralized execution of European rules is chosen the Member States are entitled autonomously to interpret these European rules, since "the Commission has no power to take decisions on their interpretation but may only express an opinion which is not binding upon the national authorities".¹⁴⁹ Textual ambivalences in European legislation provide the national administrations – not the European administration – with the power to decide on meaning

146. Art. 288(4) TFEU. Constitutional practice has also developed "decisions" without addressee. On this point: see the brilliant analysis by Bast, *Grundbegriffe der Handlungsformen der EU: entwickelt am Beschluss als praxisgenerierter Handlungsform des Unions- und Gemeinschaftsrechts* (Springer, 2006). Famous illustrations of a decision without addressee are the Comitology decisions.

147. For arguments in favour of this position, see Biaggini, *op. cit. supra* note 42, at pp. 109–111.

148. Cf. Directive 2002/21 on a common regulatory framework for electronic communications networks and services (Framework Directive) (O.J. 2002, L 108/33). Art. 7(4) of the Directive seems to give "strong" control rights over national regulatory authorities. The Commission is granted the right to "take a decision *requiring* the national regulatory authority concerned to withdraw the draft measure" (emphasis added). A slightly less commanding tone can be found in Art. 22(2) of Regulation 1/2003 (cited *supra* note 80, emphasis added): "At the *request* of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4)." For a similar formulation, see also Art. 7(5) of Regulation (EC) No. 1228/2003 on conditions for access to the network for cross-border exchanges in electricity (O.J. 2003, L 176/1): "the Commission may request that the regulatory authority or the Member State concerned amend or withdraw the decision to grant an exemption".

149. Case 133/79, *Sucrimex SA and Westzucker GmbH v. Commission*, [1980] ECR 1299, para 16. See also Case 74/69, *Hauptzollamt Bremen-Freihafen v. Waren-Import-Gesellschaft Krohn & Co.*, [1970] ECR 451, para 9.

of these provisions. This negative signal may indeed be seen as evidence of a general constitutional rule that prohibits the Commission from issuing formal commands to national executives: while materially targeted at national authorities, the formal addressee of a Commission decision thus always remains the *Member State as such*.¹⁵⁰ It follows from this view that national administrative organs are not part of a hierarchically structured “integrated administration”.¹⁵¹ There is no hierarchical subordination of national administrations under the Union administration. If a national administration fails to execute European law, the Commission will have to initiate proceedings under Article 258 TFEU against a *Member State*.¹⁵²

4.3. “Mixed administration”: Institutional integration of Union and State administrations

As said above, federalism means *duplex regimen*. Applied to the executive function we will typically find two autonomous executive branches within federations. These two executives will normally be institutionally autonomous (American solution).¹⁵³ However, a federal constitution may also allow for forms of co-administration, whereby the State administrations are subordinated and integrated into the federal administration (German solution).¹⁵⁴

Traditionally, the European Union has been closer to the American solution. While the European legal order may insist on changes in the institutional or

150. For an excellent analysis of this point, see Constantinesco, *Das Recht der Europäischen Gemeinschaften* (Nomos, 1977), p. 299; and more recently: Vogt, “Rechtsform der Entscheidung als Mittel abstrakt-genereller Steuerung” in Schmidt-Aßmann and Schöndorf-Haubold (Eds.), op. cit. *supra* note 1, p. 213, at pp. 219–220 and 227. For the opposite view, see von Danwitz, op. cit. *supra* note 2, at p. 626, whose empirical examples do not prove his point as they mention – with the exception of Directive 2002/21 (cited *supra* note 148) – the Member State, and not its administrative organs, as the formal addressee of the Commission decision.

151. On the conceptual relation between the power to issue administrative instructions and an integrated administration, see the brilliant analysis by Biaggini, op. cit. *supra* note 42, at p. 115: “Die instruierende Einzelweisung ... trägt unverkennbar den Charakter der *Mitentscheidung*. Der Rahmen des delegierten Vollzugs wird gesprengt. Die Vollzugsstruktur nähert sich derjenigen des direkten Vollzugs an. Es entsteht ein verwaltungsmässiges ‘Kondominium’”.

152. Kadelbach, “European administrative law and the law of a European administration” in Joerges and Dehousse (Eds.), *Good Governance in Europe’s Integrated Market* (OUP, 2002), p. 167, at pp. 175–176: “If it comes to violations of EU law, the Commission, according to Article 226 EC, will initiate infringement procedures by contacting the government of the state concerned which, in turn, will go through the internal administrative hierarchy in order to assess whether the complaint is considered well founded. Supervision by the Commission, as it was originally designed in the Treaties, thus largely follows the logic of state responsibility in public international law.”

153. Cf. section 2.1. *supra*.

154. Cf. section 2.2. *supra*.

procedural architecture of national administrations, it has acknowledged a significant degree of national administrative autonomy. This administrative autonomy is protected by the constitutional inability of the Union to “commandeer” national executive officers. Union commands are addressed to the Member States “in their collective capacity”. From this point of view, it is misleading to typify the relation between the European and the national administrations as an “integrated administration”.¹⁵⁵ While connected in a number of formal and informal ways, the European and the national administrations do not generally form a “unitary administration” that is juxtaposed to executive federalism.¹⁵⁶ The Union and State administrations generally constitute only “integrated administrations” – organizationally autonomous entities that cooperate in a *federal* relationship. However, in this final subsection we look at a number of legal phenomena in which the institutional cooperation between the Union executive and the national administrations has condensed to such an extent that they have to act jointly to enforce European law. Following the German terminology – and referring to European terminology in a different context¹⁵⁷ – we shall refer to these special forms of cooperation as “mixed administration”.¹⁵⁸

Mixed administration represents an *institutional* expression of cooperative federalism as regards the executive function. What are potential instances of “mixed administration” within the European legal order? This depends on our

155. *Contra*, Hofmann and Türk, “Conclusions: Europe’s integrated administration” in Hofmann and Türk (Eds.), *EU Administrative Governance* (Elgar, 2006), p 573, at p. 582: “The model of executive federalism is no longer applicable to the complex interactions between supranational and national administrative bodies in the enforcement of EU law, as it no longer adequately addresses administrative co-operation in a multi-level system of governance.”

156. *Contra*, Chiti, “Decentralisation and integration into the Community administrations: A new perspective on European agencies”, (2004) ELJ, 402, who expressly identifies “integrated administration” with “unitary administration” (*ibid.*, 415–417). He confirmed this position in later writings, see Chiti, “The Administrative Implementation of European Union law: a taxonomy and its implications” in Hofmann and Türk, *op. cit. supra* note 100, p. 9, at pp. 11 and 30: “[C]o-operation among national administrations and among national administrations and European authorities in the implementation of EU law has assumed such a quantitative and qualitative challenge to be no longer captured within the traditional model of executive federalism”. “[O]ne should certainly confirm that the notion of executive federalism has become inadequate to explain the overall features of the process of administrative implementation of European Union law”.

157. On the phenomenon of external “mixity” and mixed agreements in the EU legal order, see only: Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart, 2010).

158. Cf. Schmidt-Aßmann (*op. cit. supra* note 104, at 4): “Mischverwaltung”. For alternative labels, see *inter alia*: Winter, *op. cit. supra* note 102, at 258: “Mehrebenenverwaltung”; Cassese, “European Administrative Proceedings”, 68 *Law & Contemporary Problems* (2004-05), 21, at 22: “joint administration”; Ziller, Franchini and Chiti in Auby and Dutheil de la Rochère (Eds.), *op. cit. supra* note 2: “co-administration”.

definition. The phenomenon of mixed administration has been defined as the “principle of ‘acting together’ [and] entails a complex sequence of [Union] and national *determinations* in a single administrative proceeding”.¹⁵⁹ This restrictive definition allows us to exclude instances of administrative cooperation that are *prior* to an administrative determination. Thus, the (mutual) obligation to exchange information should *not* be seen as a manifestation of the idea of mixed administration.¹⁶⁰ This form of cooperation takes place at the *preparatory* stage and simply improves the ability of either administration better to *decide* autonomously. The Commission’s ability to monitor national administrations should also not be seen as a form of mixed administration. Administrative supervision is not administrative determination. The European legal order indeed allows the Commission to monitor all national activities falling within the scope of the Treaties.¹⁶¹

What phenomena should be considered as expressions of administrative mixity? Mixed administration can be seen at work where the national and European administrations are cooperating in “mixed or composite proceedings”.¹⁶² The latter will have two stages: a “national” and a “European” stage,¹⁶³ in which both levels must make decisions that *formally* co-determine the final outcome. We find an illustration of *procedural* administrative mixity in the context of the protection of geographical indications and designations of origin for agricultural products and foodstuffs.¹⁶⁴ The relevant European Regulation *combines* a national authorization procedure with a European authorization procedure. The former is set out Article 5(4) of Regulation 510/2006: “Where

159. Chiti, *op. cit. supra* note 34, 37, at 45 (emphasis added).

160. This form of administrative cooperation is as old as European integration itself, see only: Regulation 17/62 (cited *supra* note 74), Art. 10 (Liaison with the authorities of the Member States) and Art. 11 (Requests for information).

161. Cf. Art. 334 TFEU: “The Commission may, within the limits and under conditions laid down by the Council acting by a simple majority in accordance with the provisions of the Treaties, collect any information and carry out any checks required for the performance of the tasks entrusted to it.” Where the Commission believes that a Member State (administration) has violated the Treaties it will initiate proceedings under Art. 258 TFEU. On the various forms of administrative supervision in the EU legal order, see Rowe, “Administrative supervision of administrative action in the European Union” in Hofmann and Türk, *op. cit. supra* note 100, at p. 179.

162. Cassese, *op. cit. supra* note 158, at 24. see also Franchini, *Amministrazione italiana e amministrazione comunitaria: La coamministrazione nei settori di interesse comunitario* (Cedam, 1993), p. 174.

163. Depending on whether the European level precedes the national level or vice versa, one may distinguish between “top-down” and “bottom-up” proceedings, see della Cananea, “The European Union’s Mixed Administrative Proceedings”, 68 *Law & Contemporary Problems* (2004-05), 197, at 199 and 201.

164. Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (O.J. 2006, L 93/12).

the registration application relates to a geographical area in a given Member State, the application shall be addressed to that Member State. The Member State shall scrutinize the application by appropriate means to check that it is justified and meets the conditions of this Regulation.”¹⁶⁵ If the Member State considers that the requirements of the Regulation are *not* met, it rejects the application and adopts a national decision to that effect. By contrast, where it considers that the requirements are met, it must forward its favourable decision to the Commission for a final decision. This second stage of the mixed administrative procedure is set out in Article 6 of the Regulation: “The Commission shall scrutinize by appropriate means the application received pursuant to Article 5 to check it is justified and meets the conditions laid down in this Regulation”. Where this is not the case, the Commission will reject the application.¹⁶⁶ Where it believes the European rules are met, it will take a decision and grant the designation of origin.¹⁶⁷ An authorization thus requires *two* positive executive determinations. Only where the national authority decides that the Regulation’s conditions are met will the European executive come into play. Both administrative levels may veto the application, and only the joint positive decision of the national and the European level will lead to a final authorization.¹⁶⁸

Beyond forms of joint administrative determinations, should we associate other phenomena with the concept of “mixed administration”?¹⁶⁹ Should an organic dimension be added to the procedural aspect of co-administration discussed so far? And if so: what are the instances in which the European and the national administrations are united in an administrative organ that forms an “integrated administration”? Two phenomena have been discussed under the idea of “organic” mixed administration: comitology and agencies. The first

165. The subsequent paragraphs then “commandeer” the Member State to structure its national administrative procedure in certain ways; e.g. para 5: “As part of the scrutiny referred to in the second subparagraph of paragraph 4, the Member State shall initiate a national objection procedure ensuring adequate publication of the application and providing for a reasonable period within which any natural or legal person having a legitimate interest and established or resident on its territory may lodge an objection to the application.”

166. *Ibid.*, Art. 6(2).

167. *Ibid.*, Art. 7(5).

168. For a similarly “compound” administrative procedure, see (amended) Regulation 258/97 concerning novel foods and novel food ingredients (O.J. 1997, L 43/1), especially Art. 4(2).

169. For example: the concepts of “additionality” and “co-financing” within structural programmes could be identified with this phenomenon, cf. Regulation 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Reg. (EC) No. 1260/1999 (O.J. 2006, L 210/25), especially Art. 15(1): “Contributions from the Structural Funds shall not replace public or equivalent structural expenditure by a Member State.”

has been characterized as “a fundamental structure of integrated administration”.¹⁷⁰ In the past, this view was very problematic. While it may have been debatable whether comitology committees were formally Commission committees,¹⁷¹ these committees do *not directly* co-determine the substantive European decision; they only decide which combination of *European* institutions decides.¹⁷² However, the Lisbon Treaty may strengthen the view that sees comitology as a form of mixed administration. Article 291(3) TFEU now expressly refers to “mechanisms for control by Member States of the Commission’s exercise of implementing powers”. And if the Commission’s vision of what this formula constitutionally requires were to succeed,¹⁷³ comitology may come to represent the *direct* decisional input by the Member States into the Union administration.

Finally, what about European agencies? The rise of agencies in the European legal order has been phenomenal in the last two decades.¹⁷⁴ While their decision-making powers continue to be trimmed by the *Meroni* doctrine,¹⁷⁵ they have become important auxiliary organs in the direct administration of European law. Should agencies be seen as forms of mixed administration? The position has been voiced. European agencies have been viewed as “a joint

170. Hofmann and Türk, *op. cit. supra* note 100, at p. 359: “Comitology is a fundamental structure of integrated administration.”

171. The constitutional nature of Comitology committees was discussed by the General Court in T-188/97, *Rothmans v. Commission*, [1999] ECR II-2463, where the Court held that these committees have their origin in Art. 202 EC and concluded “that, for the purposes of the Community rules on access to documents, ‘comitology’ committees come under the Commission itself.” (paras. 58–62).

172. For recent literature on comitology, see Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (OUP, 2005). The comitology system was reformed in 2006, cf. Council Decision 2006/512 amending Decision 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission (O.J. 2006, L 200/11). For an analysis of this reform, see Schusterschitz and Kotz, “The Comitology Reform of 2006: Increasing the Powers of the European Parliament without changing the Treaties”, 3 *EuConst* (2007), 68.

173. For the Commission’s institutional view of the meaning of the control mechanisms required by Art. 291(3) TFEU, see the discussion above at *supra* note 64.

174. While a few agencies already emerged in the 1970s, there has been a phenomenal “agencification” of the European legal order since the 1990s. Today, almost forty European Agencies exist in the most diverse areas of European law. For an inventory and functional typology of European Agencies, see Griller and Orator, “Everything under control?: The ‘Way Forward’ for European Agencies in the Footsteps of the Meroni Doctrine”, 35 *EL Rev.* (2010), 3 – Appendix. On the rise and functions of European Agencies, see also Chiti, “The emergence of a Community administration: The case of European agencies”, 37 *CML Rev.* (2000), 309 as well as “An important part of the EU’s institutional machinery: Features, problems and perspectives of European agencies”, 46 *CML Rev.* (2009), 1395.

175. Case 9/56, *Meroni & Co., Industrie Metallurgiche, SPA v. High Authority of the European Coal and Steel Community*, [1958] ECR 133. On the “*Meroni* doctrine” in the European legal order, see Lenaerts, “Regulating the Regulatory Process: ‘Delegation of Powers’ in the European Community”, 18 *EL Rev.* (1993), 23 and Griller and Orator, *op. cit. supra* note 174.

organization, which is partly national and partly Community”.¹⁷⁶ Where can we find such “mixed bodies”? One illustration could be seen in the “Trade Marks and Designs Registration Office of the European Union”. Despite its formal status,¹⁷⁷ the latter shows elements of organic mixity in relation to the composition of its administrative board.¹⁷⁸ However, even if one sees these types of agencies as a manifestation of mixed administration,¹⁷⁹ the decisions they adopt will be fully assimilated to European law.

5. Conclusion

The E(E)C Treaty – even after fifty years – was criticized for the “absence of a clear constitutional basis for public administration”.¹⁸⁰ This absence was particularly marked in relation to the *federal* dimension. Who was to enforce European law: the Community or the Member States? In the original Rome Treaty very few legal bases expressly granted the Community the right to adopt individual decisions. The application and enforcement of European law in individual situations seemed to be left to the Member States. The latter were entitled and obliged “to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of th[e] Treaty or resulting from action taken by the institutions of the Community”.¹⁸¹ The European Community thus appeared to be implicitly based on the German idea of executive federalism: the Community *legislates* European law and the Member States *execute* European law. Was the European Community thus bound to be a legislative giant on clay (executive) feet? Or, would the subse-

176. Chiti (2004), op. cit. *supra* note 156, at 434.

177. The “Trade Marks and Designs Registration Office of the European Union” is formally defined as a European body, cf. Regulation 207/2009 on the Community Trade Mark (O.J. 2009, L 78/1). Its Art. 115(1) states: “The Office shall be a body of the Community. It shall have legal personality.” According to Art. 116(1), the Staff Regulations of officials of the European Communities shall apply to staff of the office.

178. *Ibid.*, Art. 127(1): “The Administrative Board shall be composed of one representative of each Member State and one representative of the Commission and their alternatives.”

179. For another example, see Community Plant Variety Office established by Regulation 2100/94 on Community Plant Variety Rights (O.J. 1994, L 227/1). Art. 37(1) of the Regulation deals with the composition of the administrative Council. It states: “The Administrative Council shall be composed of one representative of each Member State and one representative of the Commission and their alternates.”

180. Chiti, op. cit. *supra* note 34, at 42; and continues (*ibid.*, 57): “What is lacking in Community administrative law is a complex of original principles similar to those worked out for the ‘constitutional’ dimension of the Community legal order, principles such as supremacy of Community law, direct effect”. “Thus, the task awaiting scholars is the creation of new principles appropriate to the administrative law of European integration.”

181. Art. 5(1) of the 1957 EEC Treaty.

quent constitutional evolution of the Community reveal unknown executive reservoirs? What have the Lisbon amendments meant for the constitutional foundations of Europe's executive powers? This article has tried to investigate these questions and thereby reached the following conclusions.

First, it is not true that "the EU has (with some specific exceptions) no original competence to implement EU law".¹⁸² The E(E)C Treaty provided the European Community with two general *executive* competences: Articles 95 and 308 EC. The two Articles could be employed where uniform conditions for the implementation of European law were necessary in the course of the internal market and a specific legal basis in the Treaty did not provide the power to adopt individual decisions. Moreover, both provisions were extensively used in the past to establish the Community's own executive infrastructure.¹⁸³ As regards the scope of its executive competences, the European Community thus came close to the American solution. Nonetheless, the constitutional foundations of European executive power were highly ambivalent. The Lisbon Treaty now consolidates these foundations through the introduction of Article 291 TFEU. The new provision clarifies that the primary responsibility for the implementation of European law lies with the Member States. However, it hastens to add that whenever uniform conditions for the implementation of European law are needed, implementing powers will be conferred on the Commission (or the Council). If Article 291(2) TFEU were seen as a legal basis, the Lisbon Treaty could represent a nocturnal revolution. The Article would replace ex-Articles 95 and 308 EC as executive competence reservoirs and would continue the transformation of the executive branch from decisional intergovernmentalism to decisional supranationalism.

Second, the European Union has created its own species of executive federalism. It follows American federalism in granting the Union executive competences that are co-extensive with its legislative competences. But in generally leaving the execution of federal law to the Member States, the European Union follows German federalism. Behind this "European" brand stands the principle of subsidiarity: the Member States are in principle responsible for the execution of European law, while the European executive stands in the background. The EU will only interfere where the Member States fail to establish uniform conditions for the implementation of European law and where therefore implementation is "better achieved at Union level".¹⁸⁴ Importantly: the European Union has generally *not* chosen to subordinate and integrate national administrations into the European executive. Unlike German federalism, the European Union is not constitutionally able to "commandeer" national

182. Dann, *op. cit. supra* note 1.

183. For literature on the rise of European Agencies, see *supra* note 174.

184. Art. 5(3) TEU (Lisbon).

authorities or their executive officers. It can only “commandeer” the Member States *as States*. This means that it is mistaken to speak of a “unitary administration” as opposed to “executive federalism”.

Third, European law has imposed a number of constitutional limits on the Member States’ executive powers. If entitled to act, the Union executive may pre-empt the national authorities or otherwise limit their *substantive* discretion by imposing mutual recognition duties. The Union has also limited the *procedural* autonomy of national administrations. This is done either through the judicial principles of equivalence and effectiveness or through positive harmonization. As regards the latter, the Lisbon Treaty has introduced a new legal base: Article 197 TFEU. This is to be lauded in providing clearer constitutional foundation for “administrative cooperation” between the Union and the Member States. However, in excluding the Union’s competence to harmonize national administrative law, the Article protects procedural autonomy over substantive autonomy. This choice may, ironically, actually reduce the material scope of decentralized execution of European law by the Member States.

Fourth, the Union’s executive powers are subject to the principle of subsidiarity. The analysis of *executive* subsidiarity is independent of an analysis of *legislative* subsidiarity: even when the Union is entitled to legislate, the execution of the legislation may *not* be better achieved by the Union. We analysed a number of legislative mechanisms that presently define when executive action is better achieved at the European level. One of the most elaborate legislative definitions of executive subsidiarity can be found in the context of competition law. Here, the Commission has tied its decision to centralize execution under Article 11(6) of Regulation 1/2003 to something akin to a subsidiarity test. However, as we saw above, the test is very generous and provides the Commission with an extremely favourable executive prerogative over the national competition authorities. Have the European Courts thus insisted on a judicial review of executive subsidiarity? The answer, at the moment, must be in the negative. This is to be seriously regretted. Indeed, even if the Courts eventually rely on the idea of the “political safeguards of federalism” – now codified in Article 291(3) TFEU – the argument is not itself conclusive, and worse: it may not work within a special executive regime (like competition law).¹⁸⁵

Fifth, the European and national administrations occasionally engage in forms of “mixed administration”. According to our restrictive definition, mixed administration exists where the Union and the Member States act jointly either procedurally or organizationally. The former could be seen in the context of the protection of geographical indications and designations of origin for agri-

185. Art. 291 TFEU constitutes a *lex generalis* that will give way to special regimes within the Treaty, such as Art. 105 TFEU (*supra* note 61).

cultural products. Here, only *two* positive determinations by the national and the European administration respectively will lead to an authorization. In this “compound” procedure, the agreement of both administrative levels is required. Are there also instances of organizational mixity? To answer this question, we first looked at the phenomenon of comitology and found that – at least until now – it may be misleading to consider it as a form of mixed administration. However, if the Commission is able to push its vision on Article 291(3) TFEU, the new “mechanisms for control by Member States” may indeed turn comitology into a form of mixed administration. But in any event, we may already find examples of organic mixity in the composition of some European Agencies.

In conclusion, European administrative law suffered from an impressive lack of clear constitutional foundations in the past. The Lisbon Treaty will remedy this to some extent. As regards the federal dimension, much depends on how Article 291 TFEU is interpreted in the future and this will – undoubtedly – be a constitutional task for the European Court of Justice. If the Court grasps the textual nettle, the Lisbon Treaty will consolidate the constitutional foundations of the Union’s own brand of executive federalism.