CHAPTER 4

Europeanisation and German Public Administration

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1 Introduction

The European Union (EU) is not a (federal) state, but rather a union of states *sui generis* created by means of international treaties and having its own legal system. Within the EU, the Member States remain independent states and, in principle, retain their sovereignty. The Member States have defined the EU's competences and areas of activity in various treaties such as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), also known as the Treaty of Lisbon. These treaties are called primary law. According to the principle of conferral anchored in these treaties (Article 5 (1) and (2) TEU), the Union may legislate and adopt legally binding acts through its law-making organs only when primary law has conferred on it the competence to do so (Article 2 (1) TFEU). These legal acts constitute secondary law and are adopted above all in the form of regulations, directives and decisions (Article 288 TFEU). The national law of each Member State remains in force alongside.

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Primary law governs not only the division of competences between the EU and its Member States, but also the organs of the EU and their procedures, in particular the procedure for adopting legislation. Primary law can therefore be understood as the constitutional law of the EU. However, since its founding as a purely economic partnership of convenience, the EU has developed into a comprehensive union with state-like structures and is characterised by an increasing transfer of sovereign powers from the Member States to the Union.

2 The EU's Striving to Extend Its Jurisdiction

The division of competences between the EU and its Member States sketched out here is not static, nor is the co-existence of national and Union law entirely free of conflict. This relationship has evolved over time through primary law, often in connection with the admission of new EU Member States, but should also be regarded as an ongoing internal struggle over power and influence between the EU and Member States.

Therefore, it would be wrong to describe the division of competences as unquestioned or unchallenged. On the contrary, the Union is constantly striving to become an area of freedom, security and justice, which entails extensive harmonisation of the law. In the EU's multilevel system, harmonisation is brought about by the process known as 'Europeanisation' of the Member States' national legal systems. In this way, over the years, one field of national law after another has been taken into the EU's legal system with the aim of harmonisation (cf. Nemec 2016; Sturm 2017).

This is a comprehensive process encompassing not only individual fields of law, such as law on competition, consumer protection and the environment, but the entire legal system as well: civil law, public and administrative law, criminal law. The Europeanisation of the national legal systems also encompasses all dimensions of the law—law-making, administration and court rulings are all affected.

3 The Principle of Member State Responsibility for Administering and Enforcing EU Law

Although the EU now has extensive power to legislate, it is in principle not responsible for enforcing secondary law (Vincze 2017). For this reason, it does not have its own administrative apparatus comparable to those

of the Member States. According to the division of competences set out in primary law, the Member States are responsible for implementing the law (Article 4 (3) TEU).

Enforcement and application of the law has been conferred on the Union (as a rule, the European Commission) as executive in only a few areas, such as oversight of state aid. This is known as the direct implementation of Union law. Then there are other selected areas in which the EU's own agencies take action as legal entities of the Union under public law.

As a result, administration within the EU takes three different forms:

- implementation of national law by the public administrations of the Member States,
- implementation of EU secondary law by the public administrations of the Member States (indirect implementation of Union law) and
- implementation of EU secondary law by organs or agencies of the EU (direct implementation of Union law or EU self-administration) in exceptional cases.

4 To Avoid Discrepancies, Member States Implement EU Law to a Greater Degree than Is Actually Required

The fundamental division of administrative competences means that every Member State enforces Union law with its *own* administrative organisation and its *own* law on administrative procedures (see the chapter 11). The EU is not allowed in principle to intervene in the internal administration of the Member States. However, if the Member States' public administrations carry out the same EU law using different organisational units and under different law on administrative procedures, the problem of different standards arises.

This is why the Court of Justice of the European Union set a limit on the principle of administrative autonomy for the Member States. The administrative autonomy of the Member States 'must be reconciled with the need to apply Community law uniformly so as to avoid unequal treatment of producers and traders' (European Court of Justice, judgement of 21 September 1983, verb. Rs. 205–215/82, Slg 1983, 2633, Tz. 17—*Deutsche Milchkontor GmbH*).

In order to avoid disparities and conflicts in interpretation, national implementation must always obey two principles: the principle of effectiveness (*effet utile*) and the prohibition of discrimination. According to the principle of effectiveness, the application of national procedural law must not interfere with the scope or effectiveness of EU law. In particular, the modalities provided for in national law on administrative procedures must not make it impossible in practice for EU law to take effect.

As a result, national law which is applicable in principle is modified when it is necessary to ensure the uniform application of EU law in accordance with the principle of effectiveness.

The second principle is the prohibition of discrimination, which is also known as the principle of equivalence. This principle means that the procedural rules of national law must be no less favourable when implementing EU law than when ruling on similar but purely domestic legal disputes. The national authorities must proceed with exactly the same degree of care when someone claims a right based on EU law as in similar cases in which they apply national law to a right guaranteed by national law alone. This also means that the authorities must refrain from any differences in treatment which cannot be justified objectively.

In general, EU law now exerts much greater influence in the Member States than can be directly derived from the provisions of primary and secondary law. This is partly due to pressure, not directly from EU or national law, but from administrative logic. If the Member States strictly conformed to the limited scope of EU law when implementing it, doing so would result in two different legal regimes in many areas. One regime would continue to be oriented on the existing national laws, as far as the EU has no legislative competence for the matter, while the second legal regime would be oriented on EU law and would be limited to its scope of application. Having two different legal regimes at the same time would necessarily create much more work for the administration and would be difficult to explain to the public. In order to avoid these difficulties, there is a strong tendency when implementing EU law to make national law conform to it, sometimes well beyond the actual scope of EU law. One example is the implementation of the EU Services Directive (see the chapter 11).

For the EU, this tendency represents a simple way to expand its own influence and is further reinforced by the trend towards greater networking among Member States' public administrations in the European

association of public administrations, and by administrative acts having a transnational effect.

5 EU Court Rulings

According to Article 19 (1) TEU, the Court of Justice of the European Union makes sure that both the Member States and the EU organs themselves uniformly comply with EU law. As a result of the Member States transferring sovereign powers to the EU, the courts of the Member States are not allowed to rule on the lawfulness of legal acts or administrative actions of the EU. Because the Court of Justice regards both written law (primary and secondary legal acts) and unwritten legal principles (often of its own creation) as EU law, in its rulings, it claims very extensive competences which are not entirely based directly on the Treaties. In this context, the Court argues that the uniform application of Union law is a fundamental principle of the EU, thereby attempting to legitimise a 'Europeanisation' of the Member States' legal systems. This position can lead to conflicts over competence, especially with the constitutional courts of the Member States.

6 Legal Remedy Provided by the National Administrative Courts

In Germany, judicial remedy against measures taken by the public administration is provided in accordance with the individual's right vis-à-vis the public authorities (*subjektives öffentliches Recht*). For this reason, only those persons are entitled to recourse to the courts who can claim that the measure taken by the public authorities has violated their individual rights (see the chapter by Mehde). The legal principle the public authorities are alleged to have violated must therefore at least serve to protect the individual (*Schutznormtheorie*). However, in Germany, unlike other countries, administrative procedures have the nature of a service and usually do not bestow direct individual rights. Simple procedural breaches therefore do not automatically lead to annulment of the decision and can only be challenged together with the substance of the decision. The German system of legal remedy thus does not provide for popular action (*actio popularis*) or collective action against the public administration. However, when there are grounds for recourse to the administrative courts, the court's review is

much more thorough than in many other Member States, because the principle of ex officio investigation applies: the court itself must investigate the facts of the case (see the chapter 12). The court thus examines not only the arguments and the evidence provided by the parties themselves; it also conducts its own thorough investigation of the facts of the case and the lawfulness of the administrative measure. This very thorough legal remedy often results in extremely arduous and time-consuming legal proceedings, especially in legal challenges to complex, large-scale projects.

In the field of environmental protection, EU law in particular has expanded recourse to the courts in cases in which the claimant is not directly affected by the alleged violation of rights. A limited right of associations to bring collective action was introduced to implement EU law and intergovernmental agreements (the Aarhus Convention). With this right, recognised environmental protection organisations (associations) can bring legal actions against violations of environmental law that do not violate their own individual rights (see the chapter 12). Such collective actions are extremely important in practical terms for the implementation of EU law. Because the EU does not have an administrative apparatus comparable to those of the Member States, it can monitor the Member States' application of the law in individual cases only to a limited degree. Along with the recourse of individual Union citizens and companies to the Court of Justice and the Member States' extensive reporting obligations vis-à-vis the European Commission, the right of associations to bring collective action is an effective instrument for indirect oversight of the Member States' authorities. Because of the principle of ex officio investigation and the thoroughness of the review in German administrative court proceedings, such collective actions contribute to the much-lamented length of major proceedings in Germany.

7 Lessons Learned

The division of labour between the EU and its Member States actually provides for Union law to be enforced solely by the Member States through their public administrations and in accordance with their administrative law. It has become clear that this principle is not (or no longer) applied consistently. The EU's own agencies enforce Union law in some areas, and Union law is constantly being added to, not only providing for substantive regulation, but also increasingly determining the administrative practices of the Member States. This also has an indirect effect on

national administrative procedures outside the immediate scope of Union law, thus reinforcing the latter's impact on public administration in the Member States. At the same time, however, consistent law on administrative procedures is lacking at EU level (see the chapter 11). Although the EU has no general competence to legislate enforcement of such law by the Member States, codification for the area of the EU's own administration would send a strong signal.

The Member States are called on to take a serious and, where necessary, critical look at how Union law is increasingly permeating their national law. Germany has a great interest in supporting to guide future developments and in making a contribution to these developments. Community and national administrative law have a steadily growing influence on each other. Increasing convergence between the two in future could offer an opportunity to address the codification of European law on administrative procedures.

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