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Summary[1]

This book is analyzing cooperation procedures in between administrations, focusing on information exchange procedures within the European Union, thereby taking the provisions of European environmental law as a sample.

There is no special law of administrative cooperation in the sense of an independent legal order. The law of interstate administrative cooperation is part of the existing legal order of the European Community and public international law. There is an array of existing rules in those legal orders that can be applied to the legal evaluation of administrative cooperation in general and information exchange procedures in special.

1. The sovereignty of information and the legal basis for information duties

The sovereignty of states, the basic rule of public international law, does also set the legal framework for the collection and the exchange of information. On the basis of the concept of territorial sovereignty, states are vested with a sovereign right with regard to the collection of information, the so called "sovereignty of information". Like the domestic right of a landlord the principle of territorial sovereignty prohibits the unauthorized collection of information in the territory of one state for public purposes of another state or another organ of sovereign power like an International Organization. The Member States of the European Community did not give up their territorial sovereignty when joining the Community. The EC is not vested with the right of territorial sovereignty which still is vested in the Member States, nor with a so called competence-competence, that is the power to decide on the extend of its own legislative, administrative and judicial powers.

The European Community has been vested with enumerative powers, not with a general power law-making and acting power that is typical

[1] Summary by the author.

for states. In accordance with the principle of conferred powers, the European institutions may act only within the framework of the powers conferred to them. Therefore, the Community needs a specially conferred power as legal basis, provided for in the treaties on the foundation of the European Community, to be empowered to prescribe duties and procedures for the collection and the exchange of information. The Member States are not subject to implicit all-encompassing and directly applicable information duties, neither on the basis of the duty of loyalty, i.e. the principle of *bona fide* laid down in Article 10 of the EC Treaty, nor on the basis of Article 284 EC Treaty. Even less does there exist an unwritten, immediately applicable and all encompassing legal duty for the administrations of the Member States to mutually assist each other in all kinds of questions – in some Member States the so called administrative aid - that would imply the duty to collect and exchange information whenever the European Community or another member state requests so. Those duties have to be discerned from the legal provisions of the European Community with regard to the specific information requested, with most information duties having to be laid down in the secondary law of the EC, i.e. in directives, regulations and decisions.

There are various provisions in the EC Treaty that can serve as a legal basis for the enactment of duties on information collection and exchange, as, for instance, Article 284, Article 285 and Article 175 of the EC Treaty. Because of the unequal provisions on the enactment procedure, such as the majorities required, and the unequal requirements for an allowed deviation from those provisions by the Member States, the legal basis needs to be carefully chosen in each single case. Information procedures that are closely tied to the regulation of the material subject, e.g. the water or air pollution regime, have to be based on the legal basis that governs the respective community policy, such as Article 175 EC Treaty for the protection of the environment or Article 95 EC Treaty with regard to the free movement of goods, in order to prevent the circumvention of the procedural prerequisites laid down in the specific legal basis. This is predominantly the case for notification and permission procedures, identification and planning duties that are closely intertwined with the respective substantive provisions.

Article 284 EC Treaty, on the other hand, is a general provision – a *lex generalis* – that may be taken as legal basis for information duties whenever the information duty does not pursue one of the specially regulated community policies of the EC Treaty. It can serve as a legal basis in particular for information duties covering equally more than

one community policy. Most of those information duties that cover an array of subjects and purposes at the same time are statistics, being now covered by Article 285 EC Treaty as *lex specialis* that has been inserted by the *Treaty of Amsterdam*. Article 284 EC Treaty, however, does not serve as a legal basis to enact substantive law, i.e. provisions that go directly or indirectly beyond information duties and procedures. This would mean a circumvention of the more stringent prerequisites for law-making as set forth for the specific community policy in the respective part of the EC Treaty.

2. Duty of loyalty (Article 10 EC Treaty)

The duty of loyalty that is set forth in Article 10 of the EC Treaty does imply standards on the quality of the information to be delivered but also some specific information duties that have been recognized by the European Court of Justice in its judgments. In order to discern specific information duties that are immediately applicable, Article 10 EC Treaty needs to be complemented by a more concrete provision of community law, giving a guideline on the conditions and the extent of the information duty. Under certain circumstances these more specific guidelines can be taken from a provision on the political aims and tasks of the Community and the system of the Community law.

Completeness, clearness and trueness of the information provided are the *quality standards* that follow from the duty of loyalty, as well as that the information can be checked as to its source and the collection method. The European Court of Justice implicitly assumes those standards when reviewing whether Member States have fulfilled their obligations without giving any further legal reasoning. In addition, information obligations have to be fulfilled in a period of time that is adequate with regard to the respective problem. In case the European Commission is involved in the implementation of the information duty, it may set adequate time limits for the compliance of the Member States. The Commission may, however, not create information duties themselves solely on the basis of Article 10 EC Treaty. The duty of loyalty neither transforms non-binding acts of the organs of the Community into binding duties nor does it constitute a legal basis for the enactment of secondary law.

Specific information duties as laid down in the case law of the European Court of Justice are in particular a duty to provide information upon request in the course of a proceeding for breach of contract by the member state (Article 226 and 227 EC Treaty), a vertical - i.e. in between the member state and the European Community - consultation duty in case national measures have repercussions on the functioning of

the European Community, a one-sided consultation duty whenever a member state has difficulties with the implementation of community law and an information duty of the European Commission vis-à-vis the Member States when they need information in the course of the implementation of community law.

In addition, the more concrete Article 284 EC Treaty can be used to concretize the duties resulting from Article 10 EC Treaty. Information obligations that are directly based on Article 10 and 284 EC Treaty are restricted to duties of the Member States, excluding duties of private individuals as they require a clear and more specific legal basis. Moreover, the information duty of Member States resulting immediately from those provisions is restricted to provide information upon a specific request of the European Commission, excluding, *inter alia*, notification duties and comprehensive reporting duties as Article 10 and 284 EC Treaty lack any indication on the subject that should be notified or reported about. Similarly, information obligations that are closely intertwined with material law as is the case for identification and planning duties, inspection rights, consultation duties and even comprehensive reporting duties need a more specific regulation in secondary law than is provided by Article 10 and 284 EC Treaty. Even notification duties need a more specific regulation as the trigger of such a duty has to be set forth clearly, i.e. the person or authority who has to fulfill such a duty needs to know which fact ignites the duty to notify another member state or the European Community upon it.

Given that the Member States enjoy a so called *institutional autonomy*, a request by the European Community to provide information is to be directed to the authorities that are in charge of representing the country vis-à-vis foreign countries and international institutions, i.e. the European Union. In most cases this is the respective representation of the Member States with the European Union or a specially appointed contact authority for requests in specific areas. Many directives and regulations oblige the Member States to appoint such contact authorities. The European Community may not directly address any authority within the state that may hold the information needed but that has not been appointed as contact for out-of-country requests, e.g. a down level water authority.

In addition, duties resulting from Article 10 EC Treaty are no strict duties. The duty of loyalty in first instance means that a member state or even the Commission has to endeavor and take care in fulfilling the request, giving some leeway to the special circumstances of the case.

3. The principles of *ex officio* investigation of the facts and administrative assistance

Information duties result even less from other equally broad legal concepts as the duty of loyalty, such as the principle of *ex officio* investigation of the facts or the principle of mutual administrative assistance, should those principles exist in European law at all. The principle of *ex officio* investigation of the facts that exists in some Member States does not imply information duties of the person that is subject to the investigation but rather describes the duty of the administration to base its decisions on thoroughly and unbiased investigated facts, taking into account all pros and cons. Respective information duties of the object of the investigation need to be drawn from more specific legal provisions. The principle of *ex officio* investigation of the facts is also known in European law but equally does not confer unwritten powers of investigation to the European Community vis-à-vis its Member States or even individuals.

It is already dubious whether European Law does contain the principle of administrative assistance or aid, i.e. the duty to assist upon request other parts of an administration with its own powers and means. This principle characteristically does not apply where a power to advise the other part of the administration exists, that is within a bureaucratic hierarchy, or where the assistance is rendered in order to fulfill its own legal duties and not merely in the interest of the other part. Moreover, it does not apply where the assistance is provided within a long-lasting, structural administrative cooperation. Administrative assistance is provided on a case-by-case basis upon a specific request. The *Zwartveld* decision of the ECJ does relate to such a case-based cooperation obliging the European Commission to provide a member state with specific documents it needed for the implementation of European law. The decision that has by some authors been taken as confirmation of a European duty of administrative assistance does not sustain such an overall principle. The court does not even mention this principle. It rather derives the information duty from the principle of loyalty (Article 10 EC Treaty). It is doubtful whether there is a need for a principle of administrative assistance beside the duty of loyalty. The duty of loyalty does even go beyond the principle of administrative aid at least with regard to the vertical relationship in between the Member States and the European Community.

Even with regard to the horizontal relationship, i.e. between the Member States themselves, information cooperation is shaped more by other provisions of community law. The ECJ has derived horizontal infor

mation duties from Article 28 and 30 EC Treaty, i.e. the rules on the *free movement of goods*, ensuring that this freedom is not disproportionately restricted by the Member States. For instance, administrations have to cooperate and exchange existing documents instead of forbidding the import of goods for missing documents as long this information exchange is not unreasonably burdensome. The administrations of the European Member States have to mutually exchange and recognize documents and administrative controls as equivalent as long as there is no indication that the standards differ substantially. Thus, the administration of the importing country may not demand from the importer to repeat costly controls that have already been carried out in the country of origin or to provide documents that could be more easily attained through the administration itself. After a series of respective judgments, i.e. *De Peijper*, *Denkavit*, *Biologische Producten*, *Brandsma* and *Harpegnies*, this can now be deemed to be established case law. Documents on the goods to be imported may only be rejected in case of material faults, not for minor problems with regard to the form. Systematic controls of the goods may only be carried through in case of suspicious facts. In addition, the Member States have to notify each other whenever they want to change a longstanding administrative practice regarding the importation of goods.

4. The specific information duties – a systematic inventory

The previous paragraphs used specific terms for information duties such as reporting duties, notification duties, identification and planning duties or the obligation to provide information upon request. Legal terms laying down details on the trigger of the duty, the time line, the extend and the medium to be used are crucial for legal certainty, thus promoting the implementation of Community law. Clearly specified legal terms are judiciable, making both law-making and judicial control more easy and hinting at possible information duties to be used when drafting a legal act. *De lege ferenda* the Community could prescribe certain types of information duties as a model for its own law-making by way of a decision such as it has done with the Council decision 1999/468/EC on the types of committees to be used in European law-making. A decision that binds only the organs of the EC internally would leave enough leeway to test new procedures and vary them according to the necessities of the case in question. The present analysis shall constitute a first step towards a systematization of the currently still very confusing and constantly proliferating array of information procedures.

Administrative information procedures can be divided up into the main categories of *communication procedures*, i.e. were information is passed on to another person and of *duties to collect information*, i.e. information procurement obligations. The structure of communication procedures can be *horizontal*, that is in between the Member States of the European Union, or *vertical*, that is in between a member state and an organ of the European Community. Communication duties consist, first, of the duty to provide information upon a specific request, a reactive information procedure that covers the inquiry on single events. Second, the more active notification duties fall hereunder. They are triggered through a certain event upon which the obliged administration or person has to pass on the respective information to another person or authority. Third, more comprehensive reporting duties that cover a longer time span belong to the communication procedures as a report has to be passed on to another person in the end. Forth, consultation duties imply a bi- or multilateral exchange of information to be used for problem solving. Last but not least, the obligation to passively endure an inspection of another authority on its territory also belongs to the procedures of passing on information, this time by allowing someone else to collect them.

The *duty to provide information upon request* on a single event is the least intrusive and least burdensome form of an information duty. This duty can be implicitly derived from the duty of loyalty as laid down in Article 10 EC Treaty in conjunction with such provisions as Article 169 EC Treaty or Article 284 EC Treaty. As this duty requires an inquiry with regard to the information stating the exact subject and setting the time line there is no legal uncertainty as to the trigger and the extent of the information duty as would be the case with a not clearly specified notification duty.

The trigger of a *notification duty* often lays within the sphere of responsibility and (potential) knowledge of the obliged person. Sometimes, content and form of the information to be provided in a notification are precisely regulated and legal consequences are set forth that result from not fulfilling such a duty. This often is the case in international treaties involving the transfer of dangerous goods or the occurrence of an accident with repercussions on other states. Subsequently the respective provisions of the European Community that shall transpose those treaty provisions into European law also contain those formal procedures. There are administrative notification obligations that are triggered by a prior notification of third parties – mostly the population of the respective state – and therefore shall be called accessory notification

duties. They can be accessory in terms of time and/or extent, i.e. the other state or authority has to be notified at the same time or shortly after the population has been informed and the content of the communication has to encompass at least the information that has been forwarded to the third party, i.e. the population. The main versions of notification duties are warnings in emergency cases, the notification of statutory provisions of the Member States that either shall transform European law into national law or that might be considered to be an obstacle to the freedom of the movement of goods and services, as well as notification duties in the framework of registration and permission procedures that govern potentially dangerous activities.

Reporting duties imply a systematic observation covering a longer time period. They are very important for the control of the implementation of European law but also do imply the danger of a euphemistic description of the situation whenever administrations have to present their own activities. In addition, the costs can easily outgrow the benefits of a report.

Inter-administrative *consultation obligations* have their origin in public international law and often govern neighbor relationships. They exist where there is a lack of sovereign power to decide the problem in question with binding power for the parties involved and therefore are often horizontal in structure. In the framework of the European Union, the European Commission often is granted a right to join a horizontal consultation procedure, thus enlarging it to a triangle structure. The Commission then often has the task to ensure that the material standards of European law are met by the consulting parties when discussing the solution of the problem in question. The parties of a consultation procedure have much discretion with regard to the form, the extent and the timeframe of the information exchange implied in consultation procedures. The parties, however, have to ensure that they do not unilaterally produce given facts or *faits accomplis* before the end of the consultation procedure that would make the consultation process useless as the information exchanged and the solutions considered within this process could not be taken into account anymore. The parties of a consultation procedure have to seriously take account of the information provided by the other party.

Horizontal consultation obligations seem to be decreasing in the framework of the European Community in favor of either unspecific information systems and networks or a more centralized, detailed regulation of the specific topic and the respective dispute resolution procedures. In case there are gaps, neighboring States often can resort

to the duties and procedures provided by public international law. Consultation obligations are a steady part of international treaties and often are regulated in a more concrete fashion as in the respective European law. Some of the European directives even refer to the "bilateral relationships", i.e. international law, when its comes to the consultation procedure.

Increasingly set forth in Community law are *inspections* on the spot. They do not exist very often in the key areas of European environmental law but are proliferating in European fisheries law, in the control of state aid, in anti-fraud provisions and in European agricultural law. Inspection rights interfere strongly with territorial sovereignty and therefore have to meet high standards with regard to their appropriateness and proportionality. They can only be carried out in case where there is a factual basis for a suspicion of some wrongdoing, and not just randomly. Inspections of the territory can, to a certain extent, be substituted by satellite remote sensing, i.e. the observation of the soil and vegetation with satellites from outer space. Pictures taken by satellite can be very precise. They can also provide a factual basis for carrying out further controls such as in depth inspections on the spot.

The main type of the second category of information procedures, i.e. information procurement or collection duties, is the *environmental monitoring duty*. This duty encompasses the obligation to continuously observe and measure the environmental medium and its components such as air, water and soil, in order to gather data on the situation of the environment. To ensure the comparability and the objectiveness of the data gained, environmental monitoring duties are often accompanied with the regulation of so called *informational framework data* specifying the methods of measuring, analyzing and reporting on the data gained. Informational framework data counter the problem of an information overload. Such an overload appears when there is a lot of information on a topic but the relevance, the validity and the concrete message with regard to the problem in question is not clear, exceeding the capacity of the recipient to process this information.

Information collection is also done by obliging companies to deliver information in the course of a *registration or permission procedure*. Those obligations are part of the process of privatizing tasks that have formerly been fulfilled by the administration. Registration and permission procedures in particular are part of the environmental law concerning products and production facilities that are potentially dangerous for the environment. The respective preventive information procedures enable the national administration and the Commission to have

basic information at hand in case of a concrete danger, in particular in case of an emergency. In the framework of a permission procedure the obliged individual is highly motivated to fulfill its information obligations as it would not be granted the permission it seeks without rendering in all the information required. This mechanism counteracts the tendency to hide information, known as "hidden information" and "prisoners dilemma" from the economic game theory.

A third category of information procurement duties are the supervision or *control duties* of the Member States. Those obligations relate to potential sources of contamination, i.e. the pollutants released by a production facility, in contrast to the environmental monitoring obligations that relate to the potential object of contamination, that is the environmental medium such as soil, water or air. Control obligations have a trust-building function. Within the European internal market, product controls are primarily carried out by the country of origin. In a way the country of origin proceeds by proxy also for the other Member States that have to be able to rely upon the quality of those controls. The country of origin therefore bears a particular responsibility vis-à-vis the other Member States and the European Community for the investigation of the facts when it comes to the inspection and control of goods that will circulate freely within the European Community. Some of the European directives and regulations therefore request that the national control structures are made transparent to the other Member States and the European Community itself. They also lay down legal standards for the quality of the controls, such as frequency, methods and even the required personnel and technical means of the authority that is in charge of the controls. Some of the control standards can also be derived from Article 10 EC Treaty. According to the duty of loyalty, the Member States have to regulate the frequency and the modalities of the controls, the supervision of the authority in charge of controls as well as the necessity of drafting a report after the controls have been carried out.

Under certain circumstances – mostly when the Community could administer the respective European law by itself, such as in the areas of third country commerce or of fraud protection with regard to the Community funds – the European Commission is allowed to order that specific examinations be carried out by the authorities of the Member States. With regard to product controls, the Member States may even be allowed to request the Member State in charge that a certain product be examined. However, the European Commission does not have the power of a supervisory authority with regard to the authorities of the Member States. It does not have a general, unwritten power to order a

state authority to do what the Commission deems useful. In case the Commission shall be conferred this power with regard to a specific question, the power must be explicitly and clearly stated in the respective legal act. In addition, as the Member States principally enjoy institutional autonomy and have the right as well as the duty to implement and administer the provisions of Community law, they have to be left enough leeway with regard to the establishment of their own administrative structures and procedures even when implementing Community law.

Identification and planning duties as well as nominating duties also belong to the category of information procurement duties. *Identification duties* – predominantly the identification of environmentally sensible spots - and *planning duties* imply assessments and evaluations to be rendered by the Member States, thereby having a certain discretionary power. These duties afford a comprehensive and correct investigation of the facts and are judiciable mainly with regard to the correct restatement of the facts. Participation rights help to gather information from all parties concerned and compensate for the very broad discretionary power of the authorities. European law sometimes provides for a comparative evaluation of plans that have been set up by Member States. Member states frequently do not fulfill their planning obligations to the satisfaction of the Commission. Plans and programs often are not concrete enough and are rendered in too late. The lack of concreteness, however, is partly due to the instructions given by the respective European legal provisions. It is in particular this lack of concreteness and the broad discretionary power of the planning authority that is characteristic for identification and planning obligations. The European Court of Justice has given some guidelines with his recently rendered series of judgments on Article 7 of the *Water Protection Directive*. As a rule, plans and the more concrete programs have to contain a schedule, as well as concrete, quantified measures that are part of a coordinated context.

With the help of *nominating obligations* the Commission, the other Member States and individuals shall be informed of the authorities to contact with regard to specific questions and problems. Their objective is to help establish an administrative network and to foster the horizontal exchange of information. In case nominating obligations are a guised obligation to erect a particular authority, they can infringe upon the institutional authority of the Member States.

5. Implementation of the information duties

The transposition of European information duties into national law has to be done by a formal legal provision that is binding beyond the administration in case the information duty has a direct or indirect effect on individuals. This legal norm has to be at least as concrete as the underlying provision of Community law. In case the European provisions contain concrete standards for the investigation of the facts, the Member States cannot refer to a general principle in national administrative law requiring that all facts be investigated *ex officio* by the authority in charge, even if this principle is combined with yet more concrete, but only internal administrative orders that have no binding effect outside the administration. With regard to mere inner-administrative duties, however, an inner-administrative order should suffice, as it is binding upon the authorities in question. The rulings of the ECJ are not entirely clear in that respect. Often, the court just stresses the fact that rights and duties of individuals have to be foreseeable and actionable. But only the administrations are affected with regard to mere inner-administrative information duties, so there is no need for a formal legal transposition.

A formal legal transposition is necessary to enable individuals to institute judicial proceedings in case the authorities infringe upon their rights or impose duties. Individuals have, however, no judicial standing with regard to mere inner- or inter-administrative information procedures that have no effect upon them. Community law does not confer upon the individuals the status of an *advocatus populus* overseeing the correct transposition and implementation with regard to inner-administrative information procedures nor does it require the Member States to do so. The adversely effected other Member States or the Commission, on the other hand, can institute proceedings before the European Court of Justice for breach of the EC Treaty and its secondary law in case those information duties are not transposed or implemented. There is no need for a formal provision of national law in order to institute proceedings with the ECJ. The other Member States and the Commission have, acting as an authority that sues the Member State himself, no standing before the national courts anyhow.

It is, however, not always easy to distinguish mere inner-administrative information duties from those that have an effect upon individuals. Respective guidelines can be taken from the judgments *CIA Security* and *Enichem Base*.

6. Passing on of information by the European Commission

In the framework of a concrete administrative procedure the Commission often passes on information it did get from the Member States in a

starlike way, that is simultaneously to all other Member States. This is in particular the case when the administrative order in question has a transnational effect, i.e. has to be accepted as binding by the authorities of the other Member States. Starlike procedures shall promote administrative transparency. The European Commission has in this case the function of a service entity for the Member States, caring for the correct dissemination of the respective information. The most comprehensive rules on the respective information procedure are contained in administrative dispute settlement procedures.

On the basis of Article 10 EC Treaty, the European Commission is obliged to share its knowledge with the Member States when they are dependant on this knowledge for the implementation of Community law. This *information assistance obligation* of the Commission has been stated by the ECJ in his *Zwartfeld* ruling.

In addition, the Commission often has to aggregate national *reports* and publish a respective European wide report. It mostly has to forward the common report to the Council and the European Parliament as a feedback mechanism with regard to the effectiveness and the state of implementation of the respective directives. Reports of the Commission partly are dependant on the reports of the Member States, which are often rendered in too late and are not concrete enough as to its content.

Statistics of the European Community are another important means of information, in particular for the purpose of precautionary information gathering. The European Community has reinforced environmental statistics in the past ten years. Automatic *information systems* and personal *networks* also enable precautionary information gathering. Information systems frequently contain basic information on the state of the environment, the pollutants, potential counter measures and technical data. They often are combined with environmental monitoring obligations. The Commission repeatedly is in charge of organizing the procedures and of laying down informational framework data, i.e. the guidelines on how to gather, analyze, restate and interpret the data collected. A comprehensive information system has been established with the EIONET and is administered by the European Environmental Agency.

Information systems can replace the more traditional information duties of notifying the other party or providing information upon request, in particular when the information systems are combined with electronic data processing. Information contained in those systems can increasingly be downloaded *online* by all the Member States, the Com

mission and sometimes even affected interest groups in business and society.

7. Informal information cooperation

A big part of the information exchange occurs informally. In particular, it takes place inside *committees* and during the course of other meetings, including outside experts, thus internalizing external expertise. In the form of personalized *networks* committees help to coordinate numerous actors in situations of insufficient information, building up a generalized trust that, in turn, will reduce the necessity of controls and the related transaction costs. Networks counter the problems of lack of information and lack of motivation that occur, according to the findings of the organizational theory, in particular in hierarchical organizations. Networks can develop a quasi common administration through the easy and flexible exchange of information and the structures of mutual trust. Network structures, however, are not suited for constant routine tasks.

Informal bilateral talks and so called "package meetings" between the Member States and the Commission often precede a formal procedure for breach of the EC Treaty. They support the investigation of the facts. There are also unspecific cooperation duties set forth in European secondary law. Those cooperation duties contain, as a minimum, the exchange of information and can be specified by the European Commission, laying down the procedures to be followed. Training and the exchange of the servants of the Member States also foster trust among the administrations of the Member States by generating some understanding of the circumstances and the background of other national authorities.

In addition, the European Union helps to finance the communication infrastructure under the topic "information society" and "Trans-European networks". The focus of the European Union has in particular been the establishment of *Trans-European telematic networks for the interchange of data between administrations* (IDA).

8. Mixed national-European administrative procedures

Mixed national-European administrative procedures are based on the above described "simple" information duties. They reinforce information cooperation to a stronger form of administrative cooperation, which is a participatory cooperation. The European Community, in particular the Commission, then takes over the function of a supervisory authority without having the general status of such an authority by regulating questions that would normally by regulated by a superior

authority through binding orders and administrative directives. For instance, the Community compensates the lack of an administrative hierarchy with lower Community authorities in the Member States by instructing the Member States in detail on the collection, analysis and description of data in the form of so-called *informational framework data* that are set forth in directives, regulations and decisions.

Mixed inspections are based on national investigation procedures and powers in order to compensate for a lack of European investigation powers or, in case the Commission has or could be conferred the power to investigate, in order to ease the administrative burden of the Commission that is ill-equipped for such tasks.

Via *approval procedures* in the context of national administrative procedures the Community gets informed on the implementation of Community law and can participate in the – national - decision-making. Through the means of interpretation and implementation guidelines the Commission in fact does take over the function of a supervisory authority in the guise of so-called "information memos".

Administrative dispute settlement procedures are embedded into comprehensive information procedures which often consist of a series of notification duties and the starlike passing on of the information by the Commission to the other Member States. They often exist in connection with transnational administrative orders, i.e. orders that have a Transboundary effect.

All of the above described procedures are subtle ways to influence and steer the implementation of Community law in the Member States.

9. Standard situations and procedures

All the above mentioned information procedures appear in typical combinations with respect to specific situations. Certain procedures or combinations of procedures are suited for certain objectives or objects of information. The identification of standard procedures is useful not only for systematizing the information procedures but also to help interpret the extent of an information duty as well as to help select the best suited duty in the law-making process. The main standard situations and procedures, that can be discerned are as follows.

Implementation control systematically employs notification duties, having the Member States to notify the Commission on the measures taken with respect to the transposition of Community law into national law and reporting duties on its actual implementation by the respective authorities. The latter ones have been laid down in a specific directive that harmonizes all reporting duties on the implementation of Euro

pean environmental law. In addition, the Member States sometimes are obliged to set up national implementation programs and – of course – to report on those programs to the Commission. Environmental monitoring obligations, controlling obligations of the Member States and inspection powers of the Commission complete the instruments used for implementation control.

The *precautionary collection of information* aims at providing a set of data that is ready to use in case it is needed by the Commission or the Member States. Besides statistics, research projects and experience reports, electronic data collection and information systems are the main means used to set up a data base ready to use. This information – as well as the information collected for implementation control - is also used as feed-back in order to evaluate the effectiveness of existing community law and to modify it if necessary, thus creating a so called "dynamic legal regime". With the establishment of the European Environmental Agency the precautionary collection of information has been institutionalized.

The status of soil, air and water are controlled by the means of so called *environmental monitoring* duties. The environment shall be protected and rehabilitated in the framework of rehabilitation plans and programs, whereas *product or facility related environmental protection* predominantly employs notification obligations in the course of registration and permission procedures. Administrative dispute settlement procedures and notification procedures also appear typically in connection with product or facility related environmental protection. As soon as third countries or the ex- and import of products in and out of the European Community is affected, the Commission often is equipped with far reaching administrative powers, including inspection rights and the direct information exchange with companies.

In contrast to the vertical information procedures predominantly employed so far, *transboundary pollution* between two neighboring states is characterized by horizontal information procedures, in particular consultation procedures. Often they are intertwined with procedures laid down in international public law, mainly in multilateral environmental treaties that contain detailed provisions on the consultation and dispute settlement procedures.

In case the Community financially supports environmental protection measures, the European Commission is regularly conferred inspection rights and the Member States are obliged to conduct controls and report on the results back to the Commission.

In general, there is a tendency to employ more and more personalized or electronic *information networks*. They imply comprehensive but legally unspecific information procedures and partially replace formal information duties that were once laid down in older directives and regulations of the EC. Sometimes information exchange procedures are called "information system" in order to leave the details of the procedure unspecified. The organization of those procedures is then sometimes conveyed to the European Commission. It remains to be seen as to what extent unspecific systems are more useful for the exchange of information then concrete information obligations. During the discussion program on the management of the internal market some of the national authorities raised that there is a need for concrete procedural rules with regard to the exchange of information. The Commission also identifies such a need in the Report on the Internal Market of 1994. But even this unspecific information exchange does not happen outside of a legal order. Those procedures are governed by the legal guidelines that can be derived from the duty of loyalty (Article 10 of the EC Treaty), as well as by the general principles of European law, among others the principle of subsidiarity and proportionality, the protection of business secrets and personal data. As outlined above, Article 10 EC Treaty is the basis for specific information duties and quality standards. It also happens that specific information procedures, which are finally fixed into law, develop out of a formerly unspecific information exchange process.

10. The institutions

When considering the institutions of the European Community that have some role in the collection and dissemination of information one should think that the main role lays with the *European Environmental Agency* (EEA). The Agency, however, is only equipped with very narrow powers relating to the management of environmental information. She has been conferred neither law-making nor implementation powers fixing or relating to information duties of the Member States. In particular, the repeatedly requested inspection powers have so far not been conferred to the EEA. With the revision of the statute in 1999, the Agency can at least participate in the monitoring of the implementation, but only upon request of the respective Member State. The Agency has to rely on the information that is passed on to it by the Member States on the basis of specific legal provisions or voluntarily. The modalities can be laid down in administrative agreements. Therefore, the EEA is more a service institution for the European Union and the Member States than a real administrative authority. The EEA also serves as a

contact point between the European Union and third countries or other international organizations and bodies. The main purpose of its activities is the precautionary collection of information. The EEA serves as a symbol for the environmental competence of the European Union and the legitimacy of its environmental law-making. According to *March* and *Feldman*, such an institutionalized symbol can develop its own dynamic and emerge into a strong player that can force its "parent organization" to adopt stricter rules by disseminating information. Whether this will happen with the EEA remains to be seen. As for now, the Agency at least constitutes a forum to establish a network between the authorities of the Member States and can help establish so called epistemic communities through the analysis and interpretation of the collected environmental data.

The main organ for the management of information within the European Union still is the *European Commission*. This is confirmed by newly enacted directives and regulations which all assign the collection, management and law-making with regard to information procedures to the Commission, not the EEA. The Agency is barely mentioned therein. But even the Commission has no general law-making power with regard to the management of information. The Commission often tries to direct the application of Community law by the Member States through so called "communications". As only the European Court of Justice has the power to interpret the law of the European Community those communications are unbinding or can be challenged before the Court who annuls them in case the Commission intended to enact a binding directive for lack of a legal basis. The Commission, however, can enact binding rules in case it has been conferred respective regulation and implementation powers by the directive or regulation in question. This is done increasingly explicitly with regard to the details of the administrative information procedure. Those powers can also be conferred implicitly by assigning a general competence to the Commission as to the implementation of the directive, as well as by naming the Commission as the body in charge of the organization of the procedures resulting from the rules of the directive or regulation. In addition, the Commission can request information by the Member States on the basis of Article 10 EC Treaty in connection with Article 284 or Article 226 EC Treaty as outlined above. The Commission thereby has to act within the legal boundaries that are drawn by the respective directive or regulation as well as by the general principles of Community law. Inspection powers, as a rule, are to be interpreted restrictively and are accessory to the national procedural law.

Besides the Commission, the *committees* play a big role in administrative information cooperation. They form personalized networks and have been described by the ECJ as a collective consultation mechanism, allowing the Member States to voice their interests. The Commission tries to alleviate conflicts of interest in between the Member States interests and the collective interest of the Community, bearing the correct implementation of community law in mind and acting as a mediator or arbitrator. The expert knowledge of the national servants enhances the quality of Community law. The Commission, while trying to make the national servants sensitive to the needs of the Community, to a certain degree even depends on their knowledge. The Commission, again, has no supervisory powers with regard to the members of those committees in the sense that it could order them to pass on certain information that is available in the Member States. The Commission can revert to the general duty of the Member States to pass on requested information on the basis of Article 10 and Article 284 EC Treaty, but has to do so vis-à-vis the Member State itself and the authorities that are in charge of external contacts, such as the permanent delegations of the Member States with the European Union. The national servant in the respective committee could, of course, also pass the information on to the competent authorities but is not himself obliged – sometimes not even empowered - to answer the Commission directly. The most decisive factor for a fruitful exchange of information within those committees is, however, not the question of an obligation to provide information but rather a trustful and open working climate.

11. The general legal framework

In case there is a lack of explicit and specific rules on the extent and procedure to be followed for the exchange of information the European Community does not act in a lawless field. The so called general principles of Community law also apply to administrative cooperation and specifically the exchange of information. In particular where the Community disposes of a wide discretionary power those principles show off the legal boundaries to be respected by the Community. This does not only apply to the execution and implementation of powers that already have been conferred to the Commission but also to the law-making activity of the EC itself, i.e. information procedures *de lege ferenda*. In case the legal positions in play in a concrete situation are colliding they have to be weighed and consoled with each other to the best extend possible.

In particular, the *principle of proportionality* has to be respected in favor of the Member States, as well as, in favor of eventually effected indi

viduals. The aspect of cost efficiency can be allowed for but only to the extent as the costs are disproportionately high in relation to the benefits to be expected. This is not easy to prove for the Member States, on which the burden of proof falls, as both positions are not easily quantified in financial terms. In case of doubt the European Community can divert the objection of unreasonable cost burdens by granting funds for the installation of data collection and dissemination equipment. Provided that the respective Community directive or regulation sets out uniform procedures and standards for the collection and analysis of data, the Member States are not allowed to deviate from those standards on the grounds of the costs involved.

The principle of proportionality, however, does not yield a fixed scale for the different information obligations in the sense that the least intrusive would have to be applied first before reverting to a more burdensome form. The appropriateness of the information duty and procedure that is applied is subject to a case by case consideration of all circumstances. Even inspections can be employed in first instance without having to issue a request for information before. In case there are reasons to believe that there are irregularities and the issue is sufficiently important for the Community it may even set forth and subsequently execute inspections without any warning up front at all. However, under regular circumstances, the case by case consideration of all circumstances often leads to the result that the less intrusive information requests, i.e. the notification and reporting duties, are the appropriate means to be applied in first instance. Inspections depend in any case on the existence of concrete facts that establish a well founded suspicion on irregularities. In addition to the principle of proportionality, the European Union has to observe the *principle of subsidiarity* that is explicitly laid down in the EC Treaty.

Information obligations, moreover, should be sufficiently *clear and concrete*, a principle that has not been observed by the European Community itself very tightly, given the enormous amount of unclear and unspecific provisions on the collection and exchange of information. In addition, as already mentioned, the Community may only act in cases where it has been conferred a special power and has to respect the institutional autonomy of the Member States.

Furthermore, the Member States as well as the individuals have a *right to be heard* before any obligation is imposed on them. The right to be heard is not only a means of legal protection in favor of the Member States and the individuals but also a means of the Commission to collect

information and clarify the facts. It does imply an exchange of information.

Business secrets and personalized data are protected under the concept of *confidentiality*. As a rule, there is no right to refuse forwarding such secrets and data. Instead, there is an obligation of the servants that have to work with the respective data to keep them secret even within their own authority and not to use them for other purposes then the one they have been requested for. There is, on the other hand, no general legal obligation to *transparency* in the sense that all data that is available within the Member States has to be passed on to the Commission or the other Member States, even if no specially protected secrets are affected. Such a general legal obligation can neither be drawn from Article 10 EC Treaty nor from a general duty of administrative assistance. Even the – mostly non-binding - acts of the Community that mention the principle of transparency contain broad secrecy clauses to protect business secrets, personal data or secrecy interest of the Member States. The "slogan" transparency is, at least as of now, a political objective with the aim to enhance openness and to describe all the measures the European Community has taken in this respect. Transparency does foster mutual trust and enables a wide participation of individuals and other Member States in the control of the implementation of Community law, thus enabling informal peer control and reducing transaction costs that are linked to controlling measures.

12. The international public law framework

European administrative cooperation stands in a broader international context which is governed by international public law and the respective international bodies. International environmental law can fill in gaps in Community law – in particular with regard to horizontal cooperation, i.e. cooperation among the Member States - or inspire and ignite changes in European Environmental Law. Predominantly with regard to horizontal cooperation and specially horizontal consultations international treaties can even be more specific then European law.

Community law exists within the framework of public international law and has to be interpreted in accordance with it, as the ECJ noted in the judgments *Safety Hi-Tech* and *Racke*. Existing networks and systems of cooperation on the international level have to be born in mind when establishing cooperation mechanism on the European level, in particular in case the European Union wants to participate in those international mechanisms and intertwine its own systems with them, thus avoiding frictions and to some extent the duplication of work. International bodies constitute a forum for the exchange of information and

help establish so called *epistemic communities*, i.e. communities with a common knowledge and belief in times of uncertainties about the facts.

International information procedures and institutions are numerous and are often older then the ones established by European law. Interstate cooperation on the international level is predominantly conceived as information exchange procedures. International customary law yields, as of now, a warning obligation in case of an accident with transboundary effects, a preventive notification obligation on potentially harmful transboundary effects arising from facilities and – not yet undisputed but maintained by some – a consultation obligation with regard to shared natural resources.

Environmental treaties contain an endless number of information obligations and procedural rules that are constantly growing at a high speed. Often, the information obligations that the Member States and the European Community are subject to in a particular case can only be discerned when looking at both international and Community law. Both legal layers have often inspired each other. With regard to information exchange procedures, European law is not always the more progressive one. It serves quite often to transpose international treaties into Community law, even in cases where the Community itself is not party to the treaty. This is especially true in cases where the Community wants to participate in the international information exchange procedures. The Community then serves as a link between the Member States and the international bodies, bundling their efforts.

The examples are numerous and often concern trade relations with third countries. The Regulation on the ozone layer, the CITES-Regulation, the Regulation on the transfer of waste and the Regulation on the import and export of chemicals with their extensive information procedures are all based on respective international treaties and are directly implemented by the European Community, excluding to a large extend the Member States and their administrations from the direct contact with the third country counterparts and the respective international bodies. The same is true for a number of information systems. After the Decision on the observation of greenhouse gases has been aligned to the Protocol of Kyoto, it is now a role model for the interplay of international, European and national law. In part, the European Community even stands proxy for the Member States with regard to their voting rights in the respective international bodies.

Through the integration of public international law into Community law those obligations can be effectively enforced by the mechanisms which are provided by the legal system of the European Community.

International treaties that have been concluded by the European Community rank higher then European secondary law, i.e. directives and regulations. They thus have to be respected by secondary law and are subject to the direct effect doctrine as is all Community law.

Last but not least, *remote sensing*, the data collection by satellites, also touches on international law. Remote sensing increasingly is employed by the European Community in the fields of environmental monitoring, the protection of fisheries resources and agriculture, thus replacing or preparing inspections on the spot.

13. The political and functional dimension of information procedures

The political impetus with regard to information procedures and cooperation comes from the effort to ensure a – more – effective and at the same time efficient implementation of Community law that has not been the best until now in particular in the area of environmental law. As the Community lacks its own lower implementation authorities it tries to fill in this gap by creating numerous and detailed information cooperation procedures, thus creating subtle control mechanisms and replacing its missing formal powers to direct the authorities of the Member States as a supervisory authority would do. However, the implementation of legal norms appears to be a continuing communication and negotiation process even within a formal bureaucratic hierarchy, with the lower authority pondering its better knowledge with regard to the situation on the spot.

The creation of a common, single market necessarily depends on the existence of information from all of the participating states. Not only the European Community but also the Member States depend on information provided by other Member States in particular when it comes to administrative procedures and acts with a Transboundary effect. The existence of mutual trust is a prerequisite for the application of the principle of control at the country of origin, replacing renewed controls in all of the Member States where the product is sold. Trust, in turn, is fostered by open communication structures – communication is the minimum ingredient of cooperation and at the same enhances the willingness to cooperate. Communication itself depends on the usage of a mutually understood language, i.e. the terms and notions used by the communicator and the recipient must have the same meaning to them. Such a mutual understanding is created by fixing informational framework data, i.e. the ways to measure, analyze and describe environmental data. They foster, together with freely accessible data bases and personalized networks, a common perception of the reality.

An administrative procedure has been described by *Schmidt-Assmann* and *Schoch* as a procedure of information collection and analysis that serves to balance and structure the interests involved. Information procedures are the basis of administrative cooperation. They can be very costly in regards to the resources time, personal means, as well as, financial means. According to the findings of the institutional economy, information costs constitute the main part of transaction costs, that is the costs involved in economic transactions. Transaction costs make up for 50 to 70 % of the gross national income.

Transparency enhances the willingness to cooperate and enables the coordination of independent actors, such as states. Transparency is in particular important with regard to the management of shared natural resources, i.e. resources that are used by more than one party but do not belong to neither of them exclusively, as parties then orient their actions predominantly on the actions of the other side. The demand for more information, however, can also reinforce itself: the more information that is available, the more questions arise and the more the parties get the impression that there is a lack of important information. Information then loses its function as decision making basis but rather hinders the parties to come to a substantive decision at all. The collection of information starts sometimes only after the decision has in principle already been taken or serves to distract from the fact that no decision as to the substance of the problem shall be taken (yet). Then in a way, information is misused as a signal and symbol for the political will to act or, in the first case, to prove the legitimacy of the decision taken.

14. Sanctions

In the light of the lacking implementation of European environmental law, in particular with respect to information obligations, the European law-maker should always consider the possibilities to impose sanctions for the non-implementation of the different types of duties and procedures.

Self-implementing sanctions like the direct applicability of community law can only be employed where individuals are effected and could sue the Member States in case they are disrespecting their obligations. This is not possible with regard to merely inner-administrative information procedures that have no effect on individuals. With regard to such provisions Member States can only be sued before the ECJ by the Commission or another Member State. Directly applicable are, as a rule, merely the duties to provide information upon request and specific notification duties as only they are sufficiently clear and unconditional as demanded for by the doctrine of the direct effect of Community law.

State liability, the second by the ECJ widely used means to penalize the disrespect of Community law, hardly is applicable with regard to information procedures as only rarely will there be a quantifiable material damage caused by violating information obligations.

A potential means to punish the non-notification of norms and measures taken or planned by the Member States is to declare them inapplicable as long as they have not been notified. The inapplicability can either be peremptory or, in the form of stand-still obligations, dilatory. In any case, this effect has to be laid down clearly in the respective legal provisions. With the judgments *PCB*, *Enichem Base*, *Prodifarma* and *CIA Security* there is now sufficient legal certainty with regard to stand-still clauses and its legal implications. The ECJ has, for instance, rejected to reverse the burden of prove at the expense of the Member States with regard to national norms and measures that have not been notified in the sense that the non-notification does not allow the Commission to assume that they have not taken the measures at all. Therefore, the respective Member State is not sentenced for having failed to implement the substantive community law, rather they are sentenced for non-notification of the measures taken.

The anti-dumping law and the law on state subsidies make use of such punitive measures as allowing the administration to decide merely on the basis of the facts known by it without any further investigation in case the party concerned does not provide further information. In addition, time-limits for an administrative decision may be extended and the standard for the reasoning that is to be laid down in the decision by the authorities may be lowered. Those sanctions are part of the prohibition of *venire contra factum proprium*. The Highest Administrative Court in Germany, the *Bundesverwaltungsgericht*, did argue similarly in the case of the highway A 20 which was planned by the authorities to cross a potential nature reservation area that possibly would fall under the special protection of the *Flora-Fauna-Habitat Directive* but up to then had not yet been implemented in Germany.

Financial punitive measures are particularly effective, such as the exclusion from refunds and the forfeiture of a security as known in European agriculture law. Those measures could in particular be used with regard to information procedures that are intertwined with the funding of environmental measures. The Community has, however, neither the power to set out its own criminal sanctions nor to set up its own police force with the respective powers to employ measures of constraint. The European Community has only in singular cases been granted the power to impose coercive measures, such as the penalty payment pro

vided for in Article 228 para.2 EC Treaty. The threat of such a penalty payment has proved particularly effective in order to force the Member States to implement European environmental law.

With regard to environmental pollution two or even more spheres of competence and responsibility often get intertwined. This is the concept of the so called shared natural resources. With regard to transboundary air pollution, e.g., the sphere of responsibility of the State that emits the pollutants and of the State where the pollutants have their harmful effects fall together. The same is valid for transboundary water resources. Thus, there is a necessity to demarcate the respective areas of responsibility, competence and freedom to act or even to combine those areas of responsibility. This demarcation is traditionally done by public international law. Community law and public international law are developing more and more ways for cooperation and the sharing of responsibilities. The European Community is particularly well equipped to develop those forms of cooperation where the spheres of responsibility get closely intertwined. Information procedures are a key area, i.e. the basis of this cooperation.

In a ruling concerning the fisheries regulations of the European Community the ECJ has sanctioned the imposition of horizontal information and controlling duties such as a horizontal duty to provide information upon request, a duty to coordinate the monitoring and controlling activities among the effected Member States as well as the duty to regularly exchange information on the experiences made, stating that the Member States have thus been imposed a common responsibility for the implementation and control of the respective provisions.[2] According to the judgment the Council may impose a cooperation structure in between the Member States in the form of closely intertwined controlling duties and mutual information obligations with regard to the implementation of Community law. There is a wide discretionary power of the European Community with regard to the law-making in this area.

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[2] ECJ, judgement of 27 March 1990, C-9/89 (Spain/Council), p. I-1383(1408 ff.) regarding the cooperation in between the port authority and the member state in which the vessel is registered.