New York University School of Law

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Jean Monnet Working Paper Series

JMWP 28/13

Karl-Peter Sommermann

Towards a Common European Administrative Culture?

Cover: *Upper East Side Family*, Diana Chelaru, USA

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THE JEAN MONNET PROGRAM

J.H.H. Weiler, Director

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NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

ISSN 2161-0320
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

TOWARDS A COMMON EUROPEAN ADMINISTRATIVE CULTURE?

By Karl-Peter Sommermann

I. European "integration through law" and the resistance of national substructures

European integration can be told as a story of the emergence and evolution of a new legal order.[1] The treaties of European integration have relied from the outset upon the integrating force of common legal rules. The European Coal and Steel Community was based on a treaty[2] with very specific and dense regulations ("traité loi"). Compared to this first instrument, the Treaty on the European Economic Community[3] represented an open framework ("traité cadre") which left more room for the realization of its objectives in the continuing political process.[4] The juridification of the process of integration now was strongly determined by secondary legislation (regulations and directives) on the one hand and by a dynamically evolving case law of the European Court of Justice on the other. This phenomenon has been succinctly summarised as "integration through law".[5]

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1 The legal nature of the European Union may still be debated, but not seriously the existence of EU law as a distinct new legal order with own characteristics (see already the judgement of the ECJ of 15 July 1964, case 6/64 *Costa v. ENEL*, ECR 585, 593, qualifying "the law stemming from the treaty" as "an independent source of law"). For the debate about the legal nature of the EU see Bruno de Witte, The European Union as an international legal experiment, in: Gráinne de Búrca/J.H.H. Weiler (eds.), The World of European Constitutionalism, Cambridge: Cambridge University Press, 2012, p. 19, 28 et seq., and the dialogue with Joseph Weiler, ibidem, p. 262-270. For the conceptualisation of Community law as an independent legal system see Werner Schröder, *Das Gemeinschaftsrechtssystem: eine Untersuchung zu den rechtsdogmatischen, rechtstheoretischen und verfassungsrechtlichen Grundlagen des Systemdenkens im Europäischen Gemeinschaftsrechts*, Tübingen: Mohr Siebeck, 2002.

2 Treaty establishing the European Coal and Steel Community of 18 April 1951. It expired 50 years after its coming into force, on 23 July 2002 (internet source: http://eur-lex.europa.eu/en/treaties/index.htm#founding).

3 Treaty establishing the European Economic Community of 25.3.1957 (internet source: http://eur-lex.europa.eu/en/treaties/index.htm#founding).

4 Cf. Werner von Simson/Jürgen Schwarze, *Europäische Integration und Grundgesetz*, Berlin/New York: de Gruyter, 1992, p. 26.

5 Joseph H.H. Weiler, The Community System: The Dual Character of Supranationalism, *Yearbook of European Law* vol. 1 (1981), 267-306; M. Cappelletti/m Secombe/J.H.H. Weiler (eds.), Integration Through Law – Europe and the American Federal Experience, vol. 1, The Hague: de Gruyter, 1986; for an evaluation of the "integration through law" approach see Antoine Vauchez, *'Integration-through-Law'. Contribution to a Socio-history of EU political Commonsense* (EUI Working Papers RSCAS 2008/10), San Domenico de Fiesole, 2008.

The fact that the concept of *acquis communautaire* as a prerequisite for the accession of a new Member State of the EU is exclusively discussed under the aspect of the attained legal standards[6] underlines this approach and fosters the perception of the European Community or European Union as being, in essence, a *Rechtsgemeinschaft*[7], a "community of law".[8]

However, practice has shown that common legal standards are implemented in the Member States quite differently.[9] Therefore, since the eighties of the last century, the EC has been intensifying its legislation concerning procedural standards which have to be applied by the Member States when implementing EU law. Since the nineties, provisions about institutional arrangements in the national administrations have increasingly been included in the regulations and directives. Furthermore, based on general law principles, the case-law of the ECJ as well has made more concrete procedural and organisational duties with which the national public administrations have to comply.

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6 See, e.g., the Strategy Paper and Report for the European Commission on the progress towards accession by Bulgaria, Romania and Turkey "Continuing Enlargement" of 5.11.2003, Doc. COM/2003/0676 final, and, the analysis in Heather Grabbe, European Union Conditionality and the Acquis Communautaire, in: *International Political Science Review* vol. 23 (2002), p. 249 et seq.; Milanda Anna Vachudova, *Europe Undivided. Democracy, Leverage, & Integration After Communism*, Oxford: Oxford University Press, 2005, p. 120 et seq.

7 The term was first used by Walter Hallstein, the first President of the European Commission, cf. Walter Hallstein, Die EWG – Eine Rechtsgemeinschaft, 1962, published in Walter Hallstein, Europäische Reden, edited by T. Oppermann and J. Kohler, Stuttgart: Deutsche Verlags-Anstalt, 1979, p. 343 et seq.

8 In the Case C-50/00 P *Unión de Pequeños Agricultores* (ECJ 25 July 2002), ECR 2002, p. I-6677, 6734 (para. 38) the European Court of Justice – in the English version - extended the connotation of *Rechtsgemeinschaft* (German) or *communauté de droit* (French) to the principle of the *rule of law* (which would in German parallelize *Rechts-gemeinschaft* and *Rechts-staat* and in French *communauté de droit* and *Etat de droit*): "The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights."

9 One of the first scientific inquiries into the implementation of Community Law (especially with regard to environmental standards) was the comparative study directed by Heinrich Siedentopf and Jacques Ziller *Making European Policies Work*, 2 volumes, Brussels: Bruylant, 1988 [Lib. Shelving Facility KJE5075.E97 1988]. The political discussion about the consequences of the asymmetrical implementation of EU law recently became virulent in the context of the financial crisis and the crisis of the Euro, in particular with regard to Greece where heavy shortcomings in the implementation of EU law and in the application of national law, caused by an ineffective and inefficient bureaucracy, became evident.

Despite the binding character of the regulations and despite more or less regular transposition of directives, the changes in the behaviour of national public administration often remained superficial, and path dependency seemed to prevail over the new approaches. Meanwhile, the EU-institutions are trying to find alternative ways to standardize the effectiveness of the implementation of EU law in the Member States. A "right to good administration" stands for the new approach. On the one hand, it confirms legal duties which can be derived from general principles of EU law; on the other hand, it opens up the transnational discourse about values and patterns of behaviour in Public Administration. The European Code of Good Administrative Behaviour (2001), which concretises the right to good administration and provides criteria for the examination by the European Ombudsman of a possible maladministration in EU institutions, fits in a general tendency to discuss ethics in the public service, thus touching upon essential questions of administrative culture.

The present paper will, in a first step, give a definition of the notion of administrative culture and look at the role of administrative culture for the behaviour of public administrators. In a second step, it will argue that legal instruments of the EU have contributed to the transformation of administrative culture in the Member States, but have faced significant difficulties in breaking the path dependency of national administrations in favour of common standards. In a third step, the paper will focus on complementary, soft mechanisms which foster the development of a European administrative culture. Finally, in a fourth step, we will ask whether the active promotion of the development of a common administrative culture is compatible with the respect for the national identities of Member States as set out in article 4 of the Treaty on European Union.

II. The role of administrative culture

European institutions to date have not developed an analytical framework for the role of administrative culture in the process of European integration, although they use the term sporadically in order to hint at non-legal prerequisites for an effective

implementation of Community law.[10] Apart from references to the situation of accession countries,[11] administrative culture is also invoked as a determining element of the functioning of the European institutions themselves or in the interaction with national administrations, often related to specific policy fields.[12] In this last sense, the development of a European administrative culture has been formulated as a goal of institutional policy,[13] leaving the definition of "administrative culture" up to the general understanding and intuition of the addressees.

The definition of administrative culture underlying the following considerations starts from a broad conception of culture, as it is commonly used in anthropology, ethnology and social sciences, and accordingly comprises the perception, interpretation and shaping of the reality of life which characterize a given society or community.[14] This definition of culture covers shared values, convictions, feelings, behaviour and customs

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10 See, eg., the Opinion of the European Economic and Social Committee on EU and national administration practices and linkages, Official Journal C 326, 30.12.2006, p. 3 (2.4.).

11 See, e.g., the 2001 Regular Report of the Commission on Bulgaria's Progress towards accession, Doc. SEC(2001) 1744 of 13.11.2001, p. 18: „Although some further steps have been taken towards establishment of a modern and open public administration, much remains to be done to develop the civil service and promote a new administrative culture so that it is ready to cope with EU membership. These include further efforts to implement the legal framework and strengthening procedures to ensure accountability." In the Special Report No 6/2003 (concerning twinning as the main instrument to support institution-building in candidate countries together with the Commission's replies), Official Journal C 167, p. 21, 30 (no. 31), the „interaction of the numerous public administrations involved in twinning (the Commission in Brussels, Commission Delegations, various public bodies in Member States and candidate countries) each with its own administrative culture" is deemed to create „administrative complexity that diminishes efficiency and effectiveness".

12 See, e.g., Communication from the Commission to the Council and the European Parliament "Integrating Migration Issues in the European's Relations with third Countries", Doc. COM(2002) 703 final, of 3.12.2002, p. 32 and 44; Opinion of the European Economic and Social Committee on the 'Proposal for a Decision of the European Parliament and of the Council on Interoperable Delivery of pan-European eGovernment Services to Public Administrations, Businesses and Citizens (IDABC)', Doc. COM(2003) 406 final, Official Journal C 80, 30.3.2004, p. 83, 86 („...to help the spread of a new 'pan-European' administrative culture of openness to the new reality of the enlarged internal market ...").

13 See, e.g., the Communication from the Commission „Progress Review of Reform", Doc. COM(2003) 40 final/2, of 7.2.2003 (with reference to the „change of administrative culture" [p. 25], „service-based culture" [p. 3 et seq.], "management culture" [p. 8 et seq.], "culture of change" [p. 12 et seq.] etc.), and the Resolution of the European Parliament accompanying the decision concerning discharge in respect of the implementation of the general budget of the European Union for the 2002 financial year (Commission), Official Journal L 330, 4.11.2004, p. 82, 89 (no. 34); see also Werner Jann, Verwaltungskultur, in: Klaus König (ed.), *Deutsche Verwaltung an der Wende zum 21. Jahrhundert*, Baden-Baden: Nomos, 2002, p. 425, 426.

14 See Karl-Peter Sommermann, Kultur im Verfassungsstaat, *VVDStRL* 65 (2007), p. 7, 8.

as well as language, artistic creations, law and other artefacts.[15] Applied to the definition of administrative culture, this would consequently include the legal determinants of administrative behaviour in the analysis. However, at least for the analytical purposes of this paper, this will only be done in a limited sense, excluding the analysis of the law itself but concentrating on the behaviour of an administrative system and its agents, be it under the influence of law or of other factors. It goes without saying that administrative culture is closely interrelated with the legal and political culture in which it is embedded. It reflects accumulated historical and political experiences. Administrative culture, then, will be understood here as *the values, convictions, attitudes and patterns of behaviour which are characteristic of a given administrative system*. This definition covers the aspects addressed by the European Commission under this term[16] and corresponds in essence to the definitions used by other authors as far as they explicitly define their terms.[17] It has rightly been said that administrative culture touches upon the "institutional subconscious".[18]

Administrative culture not only differs between nations, but also between different territorial levels, between branches and organizational types of public administration and even between authorities of the same branch ("organizational culture")[19] or between departments of the same authority.[20] However, it can be shown from the perspective of

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15 Cf. also Michelle Cini, Administrative Culture in The European Commission: The Cases of Competition and Environment, in: Neill Nugent (ed.), *At the Heart of the Union. Studies of the European Commission*, 2nd ed., Hondmills: Macmillan Press, 2000, p. 73, 74, and the references given there.

16 See above note 6.

17 See, e.g., Cini, Administrative Culture (note 15), p. 74; O. P. Dwivedi, Administrative Culture and Values: Approaches, in: Joseph G. Jabbra/O.P. Dwivedi (eds.), *Administrative Culture in a Global Context*, Wgitby (ON): de Sitter Publications, 2005, p. 19, 20 ("... administrative culture, understood here in its broadest sense as the modal pattern of values, beliefs, attitudes and predispositions that characterize and identify any given administrative system"); different concepts and distinctions of administrative culture for purposes of empirical social sciences are discussed in Jann, Verwaltungskultur (note 13), p. 429 et seq.

18 Cini, Administrative Culture (note 15), p. 90.

19 Cf. Edgar H. Schein, Organizational Culture and Leadership. A Dynamic View, San Francisco et al.: Jossey-Bass Publishers, 1985. His definition of culture as "a learned product of group experience" (p. 7) applies to individual units of Public Administration, too.

20 Cf. Klaus König, Verwaltungskulturen und Verwaltungswissenschaften, in: K. König/C. Reichard (eds.), *Theoretische Aspekte einer managerialistischen Verwaltungskultur* (Speyerer Forschungsberichte 254), Speyer 2007, p. 1, 2 et seq.; Keith M. Henderson, American Administrative Culture: An Evolutionary Perspective, in: Jabbra/Dwivedi (eds.), *Administrative Culture in a Global Context*

an international comparison that each national administrative culture, notwithstanding its internal heterogeneity, generally is marked by specific characteristics which form its identity. It is in this sense that this paper will discuss national administrative culture.

When the European Commission and other European institutions refer to the change of administrative culture, the underlying assumption is that administrative culture matters, i.e., that the effective implementation of EU law significantly depends on the attitude and behaviour of the public organs and officials concerned. It is evident, to take an extreme example, that in an administrative system where corruption has a long tradition,[21] the legal standards will not have the same binding force as in a system characterized by a high degree of objectivity and fidelity to the law. It equally goes without saying that individual rights vis-à-vis the State can be realised more effectively with the help of a service-oriented public administration than in a system of public officials who are still mainly attached to ideas of subordination of the citizens.

Considering the goal of effective application of Union law in all Member States, the interest to standardize the administrative cultures in the EU, at least as far as the implementation of EU law is concerned, thus becomes obvious. As was pointed out earlier, to date there has not been any explicit strategy of the European Community or Union, respectively, to promote such standardization. However, different approaches to steer or at least influence the behaviour of the national administrations can be observed. The first one, also driven by the insight in the general "endangerment of unity by executive pluralism",[22] relies on the steering force of legal standards; the second one can be characterised as the mobilization and further development of common behavioural standards which are complementary to the legal duties.

(note 17), p. 37, 51 et seq; for a comparison of two Directorates General in the European Commission see Cini, Administrative Culture (note 15), p. 73-90.

21 About „corruption as a cultural problem" see Susan Rose-Ackermann, *Corruption and Government. Causes, Consequences, and Reform*, Cambridge: Cambridge University Press, 1999, p. 89 et seq.

22 Wording used by Helmuth Schulze-Fielitz („Gefährdungen der Einheitsbildung durch Pluralisierung im Vollzug") with regard to the German executive federalism, see Schulze-Fielitz, Einheitsbildung durch Gesetz oder Pluralisierung durch Vollzug, in: Hans-Heinrich Trute/Thomas Groß/Hans Christian Röhl/Christoph Möllers (eds.), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, Tübingen: Mohr Siebeck, 2008, p. 135, 141.

III. The transformation of national administrative cultures by legal mechanisms

The legal approach follows two lines: first, the intensification of legislation concerning procedural and institutional aspects; second, the use of general principles for instigating processes of conceptual, mind-changing convergence. An instrument of a broad and general scope has been introduced with the recognition of an EU citizen's right to good administration.

1. Defining procedural and organizational standards

The greater focus of EU-legislation on procedural and institutional settings in the Member States has mostly taken place since the 1980's in policy fields in which the implementation of substantive Community standards requires especially qualified procedural and/or institutional arrangements. One may say that the EU has been discovering procedure and organization as a resource or means to achieve (material) policy-goals.[23] Only some select examples can be given here.

a) Procedure-oriented legislative activism can be observed in particular in the field of environmental policy. An outstanding example is the Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (Directive on Environmental Impact Assessment)[24] which has been amended several times.[25] The objective of this directive is to define procedural minimum standards[26] aimed at a decision-making process which ensures a high degree of rationality.[27] One central element is the provision of comprehensive information to

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[23] About the impact of procedure and organisation on the realisation of policy goals and their use as a „steering resource" see already the contributions in: Eberhard Schmidt-Aßmann/Wolgang Hoffmann-Riem (eds.), Verwaltungsorganisationsrecht als Steuerungsressource, Baden-Baden: Nomos, 1997; Christoph Möllers, Materielles Recht – Verfahrensrecht - Organisationsrecht, in: Trute/Groß/Röhl/Möllers (eds.), *Allgemeines Verwaltungsrecht* (note 22), p. 489 et seq.

[24] Official Journal L 175 , 5.7.1985, p. 40.

[25] See, in particular, Council Directive 97/11/EC of 3 March 1997, Official Journal L 73 , 14.03.1997, p. 5.

[26] See para 3 of the Preamble of the Council Directive 97/11/EC ("Whereas the main principles of the assessment of environmental effects should be harmonized and whereas the Member States may lay down stricter rules to protect the environment ...").

[27] See para 1 of the Preamble of the Council Directive 97/11/EC ("Whereas Council Directive 85/337/EEC ... aims at providing the competent authorities with relevant information to enable them

the public concerned which as a result is "given the opportunity to express an opinion before a project that might have an environmental impact is initiated",[28] i.e. to participate in the procedure. The material aspect lies in the improvement of fact-finding and the enhancement of a comprehensive consideration of ecological aspects.

Further examples of intense regulation of procedural standards are the Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code[29], that includes for the customs authorities specific provisions on the revocation and amendment of decisions, and the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive),[30] which combines institutional and procedural arrangements in order to foster the simplification of procedures[31] and administrative cooperation.[32]

In a broader sense, Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment[33] can also be counted among the legal acts on procedural aspects.[34] What is particularly remarkable about this directive is the fact that

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to take a decision on a specific project in full knowledge of the project's likely significant impact on the environment").

28 Article 6 of the Council Directive 85/337/EEC.

29 Official Journal L 302 , 19.10.1992, p. 1.

30 Official Journal L 376, 27.12.2006, p. 36.

31 See para 43 of the Preamble of the Services Directive ("One of the fundamental difficulties faced ... in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification").

32 See para 6 and 7 of the Preamble of the Services Directive ("... the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation ... Provision should be made for a balanced mix of measures involving targeted harmonisation, administrative cooperation, the provision on the freedom to provide services and encouragement of the development of codes of conduct on certain issues").

33 Official Journal L 158 , 23.6.1990, p. 56, reinforced by the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) of 25 June 1998, which was ratified by the European Community too.

34 However, it has to be noted that the access to information can be considered as an element of "democratic infrastructure" (a precondition for the possibility to form one's political opinion on the basis of a comprehensive information), to the extent that it does not only serve as an instrument related to the preparation or participation in an administrative procedure. Georgios Dimitropoulos, *Zertifizierung und Akkreditierung im Internationalen Verwaltungsverbund*, Tübingen: Mohr Siebeck, 2012, p. 338 note 486, even sees the general access to information in a context with

it triggered (although its scope of application is limited to environmental matters) a general tendency towards a more open access to information held by public authorities (spill-over-effect). Of course, freedom of information was recognized in several European countries before, especially in Scandinavian countries, but now nearly all European countries have joined the new freedom of information paradigm.[35] The transformation which has taken place can be demonstrated by taking the example of United Kingdom and Germany.[36] In the United Kingdom, where, under the influence of the Official Secrets Act of 1911, a „culture of secrecy and confidentiality" long prevailed,[37] the adoption of the Freedom of Information Act 2000[38] made the system shift to free access to official information as a rule. In Germany, access to files and documents was traditionally legally guaranteed only for the participants of an administrative procedure (*Prinzip der begrenzten Aktenöffentlichkeit* - principle of limited public access to files[39]) until, in 2005 (in some of the *Länder* earlier), a general right to access to information was established in the federal Freedom of Information Act[40].

It goes without saying that limitations of freedom of information on grounds of protection of personal data, prevailing business secrets, and certain public interests exist in all countries. The European Convention on Access to Official Documents of 18 June 2009,[41] which is open to ratification by the 47 Member States of the Council of Europe and –- upon invitation –- by other States, sets out "possible limitations to access

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democratic legitimation (referring to the World Bank Publication "The World Bank Policy on Disclosure of Information" of 2002).

35 See Karl-Peter Sommermann, La exigencia de una Administración transparente en la perspectiva de los principios de democracia y del Estado de Derecho, in: R. García Macho (ed.), *Derecho administrativo de la información y administración transparente*, Madrid: Marcial Pons, 2010, S. 11 et seq.

36 For further examples see infra note 55.

37 Patrick Birkinshaw, *Freedom of Information. The Law, the Practice and the Ideal*, 4th ed., Cambridge: Cambridge University Press, 2010, p. 83 et seq. (quotation at p. 84).

38 2000 chapter 36.

39 Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz (IFG) of 5.9.2005 (BGBl. I, S. 2722).

40 For the background see Martin Ibler, Zerstören die neuen Informationszugangsgesetze die Dogmatik des deutschen Verwaltungsrechts?, in: C.-E. Eberle/M. Ibler/D. Lorenz (eds.), *Der Wandel des Staates vor den Herausforderungen der Gegenwart*. Festschrift für Winfried Brohm, München: Beck, 2002, p. 405 et seq.

41 Council of Europe Treaty Series No. 205.

to official documents",[42] this excluding restrictions on other grounds and thus reflecting a common minimum standard. For the institutions of the European Union, the "right of access to information" is set out in Article 42 of the European Charter of Fundamental Rights[43] and specified by secondary legislation.

b) Not only procedural, but also institutional prerequisites can be decisive for effective implementation of substantive standards of Community law. In a judgment of 12 June 1990, the European Court of Justice emphasized corresponding organizational duties of the Member States. On the one hand, it reconfirmed the autonomy of the Member States in organizing their administrations, especially in terms of distribution of competences.[44] On the other hand, the Court made clear that Member States are under the obligation to provide institutional arrangements that "are in their entirety sufficiently effective to enable the Community requirements to be correctly applied".[45]

More or less since then, an increasing endeavour of EU legislators to fix essential organisational prerequisites when dealing with law-making in important policy fields can be observed. This is especially the case when regulatory functions of the Member States are defined. The field of telecommunications services may serve as an example. The existence of a regulatory body could already be derived from the Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP-Directive).[46] However, in a more explicit way, Directive 97/51/EC[47] states that "in order to guarantee the independence of national regulatory authorities ... national regulatory authorities shall be legally distinct from and functionally independent of all

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42 Article 3 of the Convention.

43 See infra note 59.

44 For an analysis of the case law of the Court and an assessment of the still remaining scope of "procedural autonomy" cf. Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?*, Berlin/Heidelberg: Springer Verlag, 2010.

45 ECJ, Case C-8/88 *Federal Republic of Germany v Commission of the European Communities*, para 13.

46 Official Journal L 192 , 24.07.1990, p. 1.

47 Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, Official Journal L 295 , 29.10.1997, p. 23.

organizations providing telecommunications networks, equipment or services".[48] In the Preamble of the directive, this requirement is explained with the underlying objective to "guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions, and ensure that the national regulatory authority or authorities of each Member State will play a key role in the implementation of the regulatory framework set out in relevant Community legislation". At the same time, it is assured that "this requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States".[49]

However, in a similar case in another policy field (data protection), where the relevant directive required that the national supervisory authorities "shall act with complete independence in exercising the functions entrusted to them",[50] Germany claimed that this functional independence could not be understood as excluding each external influence. It invoked the democratic principle of accountability of the executive power before Parliament which required, in its opinion, that a parliamentary accountable member of government could supervise the functionally independent authority as long as constitutional law does not admit another solution.[51] The European Court of Justice

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48 Article 5a of Directive 97/51/EC. In the same sense Article 3 of the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Official Journal L 108 , 24.4.2002, p. 33, which adds: „ Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently. For an analysis of the Framework Directive as a „new model of an europeanized administration" and „regulatory union" see Hans-Heinrich Trute, Der europäische Regulierungsverbund in der Telekommunikation – ein neues Modell europäisierter Verwaltung, in: L. Osterloh/K. Schmidt/H. Weber (eds.), Staat, Wirtschaft, Finanzverfassung. Festschrift für Peter Selmer zum 70. Geburtstag, Berlin 2004, p. 565-586; cf. also Gabriele Britz, Vom europäischen Verwaltungsverbund zum Regulierungsverbund? Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei Telekommunikation, Energie und Bahn, in: EuR vol. 41 (2006), S. 46-77.

49 Preamble para 9.

50 Article 28 para 1 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23.11.1995, p. 31.

51 For the concept of legitimacy and accountability of Public Administration in the German constitutional system cf. Eberhard Schmidt-Aßmann, Legitimacy and Accountability as a Basis for Administrative Organisation and Activity in Germany, in: Matthias Ruffert (ed.), *Legitimacy in European Administrative Law: Reform and Reconstraction*, Groningen: Europa Law Publishing, 2011, p. 49 et seq. The volume contains studies on various European countries; a comparative analysis by Matthias Ruffert can be found ibidem, p. 351 et seq.

in a decision of 9 March 2010 dismissed this argument, proposing other institutional arrangements of accountability.[52]

These examples as well as the emergence of numerous more or less[53] isomorphic agencies in the Member States –- even without explicit prescription by EU law, just by influence of the agency building at EU-level[54] –- demonstrate a piecemeal transformation of the organisation of national administrative systems.

c) However, the question remains: Do these procedural and institutional transformations lead to a convergence of the national administrative cultures? There are some indicators. We know from research about corruption that institutional arrangements at least can foster or reduce abuse of public power.[55] This means for our question that the behaviour and perhaps even the values and attitudes of the public agents who work in the new institutional structures and have to apply the new procedures will change -- but to what extent? A clear picture of the transformation process would need extensive empirical research which, given the complexity of the phenomena, is difficult to carry out. For the time being, we have to work with plausible assumptions and revealed-evidence. Thus we can observe that the development of isomorphic networking regulatory authorities has to a certain degree led to a common

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52 ECJ, Case C-518/07, para 30. The concept of independence upheld by the ECJ might be applicable to regulatory authorities provided for in other directives. For the controversy about the scope of independence before the background of German constitutional thinking see Daniel Couzinet, Die Legitimation unabhängiger Behörden an der Schnittstelle von unionalem und nationalem Verfassungsrecht – Zur Zulässigkeit der unionsrechtlichen Verpflichtung der Mitgliedstaaten zur Errichtung unabhängiger Behörden, in: A. G. Debus/F. Kruse/A. Peters/H. Schröder/O. Seifert/C. Sicko/I. Stirn (eds.), *Verwaltungsrechtsraum Europa*, Baden-Baden: Nomos, 2011, p. 213-238, with a critical appraisal of the traditional German conception of democratic legitimation

53 For a comparison of the institutional preconditions and characteristics of independent regulatory agencies in France and in Germany see Johannes Masing/Gérard Marcou (eds.), Unabhängige Regulierungsbehörden. Organisationsrechtliche Herausforderungen in Frankreich und Deutschland, Tübingen: Mohr Siebeck, 2010, especially the contribution of Gérard Marcou and the comment by Georg Hermes (p. 99 et seq. and 135 et seq.).

54 A striking example constitutes the establishment of the European Food Safety Authority in the year 2002 as a consequence of food safety problems, especially in the context with BSE (mad cow disease), by Regulation (EC) No 178/2002 of 28 January 2002, Oficial Journal L 31, 1.2.2002, p. 1, which led to the creation of corresponding national authorities, thus ensuring a high degree of interoperability between the Member States and the EU.

55 See Susan Rose-Ackerman, *Corruption. A Study in Political Economy*, New York: Academic Press, 1978, p. 167 et seq.

esprit de corps of the regulators and though they belong to different national administrations their organisational cultures might converge more among one another than in relation to the traditional administrative authorities of their specific country.
However, the emergence of comparable specialized agencies does not yet lead to a generalized change of administrative culture. A greater impact, also because of spill-over-effects, seems to result from the introduction of procedural elements based on fundamental concepts like citizens' participation (model of the environmental impact assessment directive) and access to information (model of the environmental information directive). Such procedural requirements may gradually change the relationship between public officials and citizens.

2. Using general concepts and principles of law as "sluice-mechanisms"

A change of attitudes and behaviour often presupposes the adoption of new ideas, concepts and convictions. Despite the application of tools of "change management", it may take time until new orientations reach the members of an administrative system at large.

In the European Union, the great concepts such as "democracy" and "rule of law" have stimulated a debate which goes to the core of the ideas and values that underlie European integration[56] and more precisely should serve as a general orientation of the action of the EU as well as of its Member States. Article 2 of the Treaty on European Union conveys legally binding character to both concepts, alongside other "values", and instigates a process of discussion and concretisation of the concepts in the light of the different traditions and historical experiences of the Member States. Since the concepts are open and not defined once and for all, they can serve as *Schleusenbegriffe* ("sluice-mechanisms")[57] which foster in an institutionalized transcultural process the generation

[56] Armin von Bogdandy, Basic Constitutional Principles. In: A. von Bogdandy/ J. Bast (ed.), *Principles of European Constitutional Law*. *Modern Studies in European Law*, 2nd ed., Oxford: Hart Publishing, 2010, p. 11 et seq.

[57] The expression was coined by Ernst-Wolfgang Böckenförde, cf. his article „Entstehung und Wandel des Rechtsstaatsbegriffs" (1969), contained in *idem*, Recht, Staat, Freiheit, Frankfurt: Suhrkamp Verlag, 1991, p. 143 et seq.; for he „sluice-function" of principles see also Armin von Bogdandy,

of conceptual and "constitutional" compatibility between the Member States and the European institutions, i.e. in the vertical and in the horizontal relations.[58]

For the practical work of national administrations, it is primarily the principle of the rule of law that conveys concrete standards of action. The rule of law is a concept in which the continental European tradition of the *Rechtsstaat, État de droit, Stato di diritto, Estado de Derecho* etc. (generally translated today as "rule of law" or "rule of law-based State"), on the one hand, and the Anglo-Saxon tradition of the *rule of law* in the original British sense on the other hand are merging.[59] Having served for years as a starting point for the elaboration of concrete common standards by the European Court of Justice, various sub-principles or related principles of the rule of law are now explicitly enshrined in Union law. In the EU-enlargement process, the rule of law and its core elements, such as effective protection of individual rights by independent courts, legal security, and the existence of institutional arrangements that prevent arbitrary use of public power, have generally been checked –- as part of the *acquis* –- mainly by looking at formal indicators (existence of a system of independent courts, of an administrative procedure law which sets out the necessary guarantees like the right to be heard, etc.). Often, however, the countries in transition which at first seemed to comply with all relevant requirements revealed after the accession a quite different reality. Therefore, the Commission now seems to turn to a more substantive approach, taking into consideration in its assessment and transformation policy the development

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Grundprinzipien, in: A. von Bogdandy/J. Bast (eds.), *Europäisches Verfassungsrecht*, 2nd ed., Heidelberg: Springer 2009, p. 13, 22.

58 Cf. Armin von Bogdandy, Prolegomena zu Prinzipien internationalisierter und internationaler Verwaltung, in: Hans-Heinrich Trute/Thomas Groß/Hans Christian Röhl/Christoph Möllers (eds.), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, Tübingen: Mohr Siebeck, 2008, p.683, 684. See also Linda Senden, Conceptual Convergence and Judicial Cooperation in Sex Equality Law, in: S. Prechal/B. van Roermund (eds.), *The Coherence of EU Law – The Search for Unity in Divergent Concepts*, Oxford: Oxford University Press, 2008, p. 363 et seq.

59 Cf. Karl-Peter Sommermann, Entwicklungsperspektiven des Rechtsstaates: Europäisierung und Internationalisierung eines staatsrechtlichen Leitbegriffs. In: S. Magiera/K.-P. Sommermann (eds.), *Freiheit, Rechtsstaat und Sozialstaat in Europa*. Berlin: Duncker & Humblot, 2007; for the differences between both traditional concepts see also María Luisa Fernandez Esteban, *The Rule of Law in the European Constitution*, The Hague et. al.: Kluwer Law International, 1999, p. 66 et seq.

of an administrative culture that would correspond to the values which underlie the manifestations of the rule of law.[60]

In this brief appraisal of the mediative-transforming power of general concepts and their concretisation, the increasing influence of the principle of transparency has to be pointed out. Rooted in the idea of democracy and rule of law,[61] its programmatic scope goes far beyond the right to free access to official documents which is at its legal core. Invoked by numerous national laws[62] and European documents,[63] it has become a general guideline for administrative action and contributes to a discourse on open government and corresponding transformations in the public sector, linked also to a change in administrative culture. In line with the demand for more transparency, decisive steps of realisation can be observed in all European countries, although the

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60 Cf. Kalypso Nicolaidis/Rachel Kleinfeld, *Rethinking Europe's „Rule of Law" and Enlargement Agenda: The Fundamental Dilemma* (SIGMA-Paper No. 49), Paris: OECD, 2012. This paper, initiated by the EU and the OECD, underlines the necessity of a new approach.

61 Sommermann, La exigencia de una Administración transparente (note 35), p. 11 et seq.

62 For **France** cf. the Loi n°2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations, Journal Officiel du 13 avril 2000 (first heading: „Dispositions relatives à l'accès aux règles de droit et à la transparence"); for **Italy** see Art. 22 of the Legge 7 agosto 1990 n. 241 „Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi" (Gazzetta Ufficiale n. 192 serie generale parte prima del 18.08.1990), amended by law no 15 of 11.2.2005.: „L'accesso ai documenti amministrativi ... costituisce principio generale dell'attività amministrativa al fine di favorire la partecipazione e di assicurarne l'imparzialità e la trasparenza."; for the Netherlands cf. the Wet van 31 oktober 1991, houdende regelen betreffende de openbaarheid van bestuur (Stb. 1991, p. 703); for **Portugal** see Art. 65 of the Código do procedimento administrativo de 1991, Decreto-Lei no. 442/91, de 11 de novembro (Diário da República, I Série-A, N.º 263 — 15-11-2001), where the „princípio da administração aberta" is adressed, and Art. 1 of the Lei n.º 65/93 vom 26.8.1993 on „Acesso aos documentos da Administração", amended by Lei n.º 46/2007 of 24. 8. 2007 (Diário da República, I Série-A, N.º 163 — 24-8-2007): "O acesso e a reutilização dos documentos administrativos são assegurados de acordo com os princípios da publicidade, da transparência, da igualdade, da justiça e da imparcialidade."; for **Switzerland** (not EU) see Art. 1 of the federal Law on the principle of publicity of Public Administration (Öffentlichkeitsgesetz) of 17.12.2004 (SR 152.3): „Dieses Gesetz soll die Transparenz über den Auftrag, die Organisation und die Tätigkeit der Verwaltung fördern. Zu diesem Zweck trägt es zur Information der Öffentlichkeit bei, indem es den Zugang zu amtlichen Dokumenten gewährleistet"; for **Spain** cf. Art. 35 et seq. of Ley 30/92, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (B.O.E. of 27.11.1992, núm. 85/1992), amended by Ley 4/1999, as well as the grounds given in para 5 of the Preamble where the „transparencia de la actuación administrativa" is invoked, furthermore the draft law on transparency, freedom of information and good government (Proyecto de Ley de Transparencia, Acceso a la Información Pública y Buen Gobierno), adopted in the Council of Ministers on July 7, 2012. For **Germany** and the **United Kingdom** see above sub III 1 a.

63 See, in particular, the emphasis put on the principle of "openness" in the Commission's White Paper on "European Governance" of 25.7.2001, Doc. COM(2001) 428 final.

levels of transparency still vary considerably. The legal comparativist can confirm this tendency by a diachronic observation of the accessibility of information about administrative rule-making and other activities of public administration in European countries. It goes without saying that this tendency has been fostered particularly by the new techniques of e-government and e-administration.

3. Opening up a new approach: the right to good administration

Hard (legal) and soft (programmatic or ethical) elements are equally required for the "right to good administration", which, at EU-level, is laid down in Article 41 of the European Charter of Fundamental Rights.[64] Although, in principle, only the EU-institutions are bound by this provision,[65] the concept has been spreading over nearly all European countries.[66] Its establishment in EU law arose out of an initiative of the former European Ombudsman Jacob Söderman whose home country, Finland, had already introduced the principle of good administration in its Constitution of 1999.[67] Furthermore, the British Parliamentary Commissioner had traditionally scrutinized the behaviour of civil servants by applying a range of criteria of "maladministration".[68] However, a common point of reference for the reform debates in the European countries

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64 First adopted as a common declaration of the European Parliament, the Council and the Commission on 7.12.2000 (Official Jounal C 364, 18.12.2000, p. 1), then raised to the status of primary law by the Treaty of Lisbon of 13.12.2007 (Official Journal C 83/13, 30.3.2010, p. 389), see Article 6 para 1 TEU.

65 This can be deduced from the fact, that "the institutions, bodies, offices and agencies of the Union" are explicitly mentioned in Article 41, thus deviating from the general rule of Article 51 para 1 that the rights set out in Charter are also applicable to Member States when they are implementing Union law.

66 Cf.. Lord Millett, The Right to Good Administration in European Law, in: *Public Law* 2002, p. 309 et seq. (at p. 320 et seq. about points of reference in the british law); Martina Lais, Das Recht auf eine gute Verwaltung unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs, in: *ZeuS* 2002, p. 447 et seq.; Rhita Bousta, *Essai sur la notion de bonne administration en droit public*, Paris: L'Harmattan, 2010. Beatriz Tomás Mallén, *El derecho fundamental a una buena administración*, Madrid: Instituto Nacional de Administración Pública, 2004 (with an analysis of the corresponding principles in Spanish law); under the heading "Dret a una bona administració" (right to good administration) a number of rules and principles is enumerated in Article 22 of the new Catalan Law on Administrative Procedure of 2010 (Llei 26/2010, del 3 d'agost, de règim jurídic i de procediment de les administracions públiques de Catalunya, Diari Oicial de la Generalitat de Catalunya Núm. 5686, 5.8.2010, p. 61261).

67 See Art. 21 para 2 of the Constitution of 11 June 1999. The unofficial translation of the Finnish Ministry of Justice (available in the internet under http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf) uses the term "good governance" which does not correspond to the original text and to the translations given in other languages.

68 See A. W. Bradley/K. D. Ewing, *Constitutional and Administrative Law*, 14th ed., Harlow: Longman, 2007, p. 719 et seq.

has only come up with the conceptualisation of the right to good administration at EU-level.

The right to good administration, as it is conceived in Article 41 of the Charter comprises on the one hand traditional sub-principles of the rule of law such as impartiality, fairness (including the right of every person to be heard and the obligation of the administration to give reasons for its decisions) and making decisions within a reasonable time. On the other hand, the enumeration of principles is not conclusive, or, at least, has not been interpreted this way by the European Ombudsman and the other institutions of the EU. Thus, there is room for further refinements. The European Ombudsman has taken advantage of this and stimulated a debate on the extension of the concept to questions of conduct and ethics of public officials (see infra sub IV), thus aiming at influencing the administrative culture in the institutions of the EU and, indirectly, in the Member States.

IV. The complementary function of soft mechanisms in creating a European administrative culture

The discussion around the right to good administration highlights how legal concepts and their implementation in the public sector can be interwoven with extralegal standards and determinants of administrative action. Hence, a strategy to change the mind-set of public officials and other elements of administrative culture becomes attractive if one intends to make the legal standards more effective. But before the techniques aiming at a convergence of the national administrative cultures will be dealt with, other factors of transformation will be considered, which can be summarised as unintentional mechanisms of cultural convergence.

1. Unintentional mechanisms of cultural convergence

Driven by the insight that the economic development of a country in a globalised world also depends on a well-performing administrative system and that therefore the

national administrations find themselves in an international competition,[69] many States have made great efforts to modernise their public sector. Moreover, the increasing scarcity of public finances has enhanced privatisations and reform projects which would reduce public expenditure. In a general view, the European States have been strongly by influenced by managerialist concepts like the NPM since the 1980's. While in the United Kingdom the reforms could be perceived as a further development of its managerialist administrative culture, the integration of instruments like contract management or benchmarking caused more difficulties on the continent where a legalist administrative culture has prevailed.[70] The situation was even more complicated after the collapse of communism in the Middle and Eastern European countries, where the application of managerialist concepts sometimes led to legal insecurity and corruption because an effective, rule of law-oriented institutional framework was still lacking or not developed in step with the transformation of the economic system.[71]

As can be seen from the discrepancy of administrative efficiency in the Member States, reforms often failed because of resisting substructures or because of a lack of seriousness in the implementation. This statement does not put into question the necessity to consider and discuss carefully the extent to which managerialist approaches are appropriate for complying with the special functions of a public administration which is not profit-oriented but rather instituted to fulfil public tasks for the common good to and respect and protect individual rights. However, it can be said that public management reforms have left visible traces in all European administrative cultures. These include a simplification of procedures, more service-orientation and, apart from privatisations, an increasing number of public-private partnerships. The EU-Service

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69 Veith Mehde, *Wettbewerb der Staaten*, Baden-Baden: Nomos Verlag, 2006. See already Manuel Ballbé/Carlos Padrós, *Estado competitivo y armonización europea: los modelos norteamericano y europeo de integración*, Barcelona: Ariel, 1997.

70 König, Verwaltungskulturen und Verwaltungswissenschaften (note 20), p. 5 et seq.; idem, Moderne öffentliche Verwaltung, Berlin 2008, p. 117 et seq.

71 See the assessment of Anna Vladlikowa, quoted in: Karl-Peter Sommermann, The Rule of Law and Public Administration in a Global Setting, in: International Institute of Administrative Sciences (ed.), *Governance and Public Administration in the 21st Century: New Trends and New Techniques*, Athens: IIAS, 2002, p. 67, 74; about the difficulties of institution building and overcoming distrust towards Government institutions in two of the transitional countries see Susan Rose-Ackermann, *From Elections to Democracy. Building Accountable Government in Hungary and Poland*, Cambridge: Cambridge University Press, 2005, especially p. 24 et seq.

Directive,[72] with all its inconsistencies[73] which are partly a consequence of a contentious framing process,[74] can be regarded not only under the perspective of the completion of the internal market, but also as a manifestation of common conceptual changes in the shaping of administrative settings. The implementation of the directive made it necessary that all EU-Member States identified in a sophisticated screening process the national legal provisions which had to be changed. Since this change often could be attained only through a new conceptual approach, the implementation of the directive led in several countries to important law reforms.[75]

The Service Directive also enhances transnational co-operation which, had already intensified considerably[76] over the years. Many secondary legislative acts, for example in the field of product approvals, provide for procedures that combine vertical as well horizontal cooperation in the EU.[77] Furthermore, the increasing number of boards, councils, and commissions, which are composed of national representatives, such as the management boards of the European agencies, contribute to an intensive exchange between national civil servants. That means that a constant adjustment of mind-sets can be experienced in the daily work of a still relatively limited, but steadily increasing, number of civil servants.

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72 See supra note 31.

73 Cf. Alba Nogeira López, La termita Bolkestein, in: *El Cronista del Estado social y democrático de Derecho* 2011, No. 22, p. 58, 60 et seq.

74 Armin Hatje, Die Dienstleistungsrichtlinie - Auf der Suche nach dem liberalen Mehrwert, in: *Neue Juristische Wochenschrift (NJW)* 2007, p. 2357 et seq.; Xosé Manuel Carril Vázquez, Derechos sociales y de los trabajadores - ¿Dónde queda el principio del país de origen?, in: A. Nogueira López (ed.), *La termita Bolkestein – Mercado único vs. Derechos ciudadanos*, Cizur Menor: Aranzadi, 2012, p. 251, 254 et seq.

75 Country reports in Ulrich Stelkens/Wolfgang Weiß/Michael Mirschberger (eds.), *The Implementation of the EU Services Directive: Transposition, Problems and Strategies*, The Hague: T.M.C. Asser Press, 2012. See also Karl-Peter Sommermann, Das Verwaltungsverfahrensgesetz im europäischen Kontext: eine rechtsvergleichende Bilanz, in: H. Hill/K.-P. Sommermann/U. Stelkens/J. Ziekow (eds.), *35 Jahre Verwaltungsverfahrensgesetz – Bilanz und Perspektiven*, Berlin: Duncker & Humblot, 2011, p. 191, 201 et seq.

76 In the wake of the implementation process, the German legislator included a new chapter on European administrative cooperation in the Administrative Procedure Act (Articles 8a-8e), see federal law of 14.8.2009 (BGBl. I, p. 2827).

77 For an in-depth analysis see Gernot Sydow, *Verwaltungskooperation in der Europäischen Union: Zur horizontalen und vertikalen Zusammenarbeit der europäischen Verwaltungen am Beispiel des Produktzulassungsrechts Verwaltungskooperation in der Europäischen Union*, Tübingen: Mohr Siebeck, 2004.

2. The intentional use of soft instruments

As has been demonstrated, the establishment of a right to good administration in EU primary law has stimulated a discourse on legal and extralegal rules and principles which should guide the activities of the EU institutions and of the national administrations. In 2001 the European Parliament adopted a Code of Good Administrative Behaviour[78] which had been elaborated by the European Ombudsman and contained, together with a reproduction of "hard" rule of law requirements such as lawfulness, impartiality, objectivity, proportionality and respect of legitimate expectations, also soft principles like fairness and courtesy, service-mindedness, and correctness. Although the Code is directed at the European institutions only, it soon became a model for national standard-setting and also stimulated discussions in the Council of Europe, where in 2007 a Recommendation on Good Administration was adopted.[79]

The Code and the Recommendation are characterized by a mixture of hard and soft elements, by the interconnection of recognized legal principles and programmatic guidelines. Similar combinations emerge at the national level. A good example is the Spanish Basic Statute for the Civil Service of 2007, which in a specific chapter of the law (!) sets out a detailed *Código de conducta* (Code of Conduct).[80] A different, more traditional, technique has been followed by the British Constitutional Reform and Governance Act 2010,[81] which does not lay down rules of behaviour itself, but prescribes the adoption of a Code of Conduct of the Civil Service, thus separating clearly the legal obligation from the soft law instrument.

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78 See The European Ombudsman, The European Code of Good Administrative Behaviour, Luxembourg: Office for Official Publications of the European Communities, 2005. Already before, in the year 2000, the European Commission had adopted a Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public (Official Journal L 267, 20.10.2000. p. 63).

79 Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration.

80 See Articles 52 et seq. of Ley 7/2007, de 12 de abril, del Estatuto Básico del Empleado Público, B.O.E. núm. 89 v. 13.4.2007.

81 2010 Chapter 25.

As a general observation, one might say that the discussion about ethics in the public sector, which had already been started in the 1990's (much later than in the United States and never with the same intensity),[82] has been shifting, under the influence of the discourse on the right to good administration to a matter of European administrative culture.

Another soft instrument for the convergence of administrative structures and cultures can only be mentioned shortly here: the *open method of coordination*. Used in intergovernmental cooperation, this approach is based on parallel non-binding declarations of intention. Nevertheless, it has turned out to be a most powerful tool. The process of Bologna, which brought about the most profound changes in decades in nearly fifty European University systems, has been based on this method, with all the problems of adaptation and critical questions concerning the democratic legitimation of the initial decisions taken by the Governments. The high degree of implementation is impressive, given that the open method of coordination does not provide for (legal) sanctions.[83]

V. European administrative culture and the respect for "the national identities" of Member States

Once having identified strategies or approaches to make national administrative cultures converge, it has to be asked whether the application of promotional instruments is legally admissible and, if so, whether it is desirable with regard to European integration.

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82 See Nathalie Behnke, *Ethik in Politik und Verwaltung. Entstehung und Funktionen ethischer Normen in Deutschland und den USA*, Baden-Baden: Nomos, 2004; Karl-Peter Sommermann, Brauchen wir eine Ethik des öffentlichen Dienstes?, in: *Verwaltungsarchiv* vol. 89 (1998), p. 290, 292 et seq.;

83 On the open method of coordination as part of a tendency of "the softening of constraint" cf. Renaud Dehousse/Laurie Boussaguet/Sophie Jacquot, From Integration through Law to Governance – Has the Course of European Integration Changed?, in: Henning Koch/Karsten Hagel-Sørensen, Ulrich Haltern/Joseph H.H. Weiler (eds.), *Europe. The New Legal Realism. Essays in Honour of Hjalte Rasmussen*, Copenhagen; Djøf Publishing, 2010, p. 153, 162.

For a legal assessment, Article 4 para 2 of the Treaty on European Union has to be taken into consideration. It provides for the respect of the "national identities" of the Member States, "inherent in their fundamental structures, political and constitutional". Although the administrative structures are not explicitly mentioned, one could discuss whether they belong to the political or at least fundamental structures. Furthermore, Article 4 could be interpreted in the light of Article 3 of the Treaty which sets out the obligation of the Union to respect "cultural diversity".[84]

It is most doubtful whether the administrative culture falls under the scope of protection of Articles 3 and 4. But even if one would assume that it does, Articles 3 and 4 cannot convey a legal justification for a deficient implementation of EU law; the same Article 4 states that "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". Furthermore, the Union is entitled by numerous Treaty provisions to prescribe national procedural and even organisational standards if it is necessary for the implementation of the policies falling in its competence.

The obligation to respect rule of law standards, as far as the application of Union law or of national law that implements Union law is concerned, derives from the European Charter of Fundamental rights (especially Article 41) and (for the Member States) from equivalent general principles of the EU as determined by the case-law of the European Court of Justice. Some of the standards can also be deduced from the European Convention of Human Rights which is deemed to be part of the primary Union law according to Article 6 of the Treaty on European Union. Considering that Article 2 of the same Treaty provides that the rule of law is a value "common to the Member States" and that it belongs to the foundations of the Union, there is no doubt that the institutions of the European Union are entitled to lead a discourse on the concretisation and further development of the rule of law and to adopt corresponding recommendations or other "soft" instruments.

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[84] Article 22 of the European Charter of Fundamental Rights equally guarantees the respect of cultural diversity, but clearly in a individual rights context.

The limit would be reached when the adopted measures focus on the transformation of cultural particularities which neither jeopardize an effective implementation of EU law nor contradict the common values and principles of the European Union. A mere recommendation of fair and courteous behaviour, as it is set out in the European Code of Good Administrative Behaviour, with regard to the officials of the EU-institutions, would not yet amount to a transgression of competences even with regard to national civil servants.

The legal considerations have to be distinguished from the more general question to what extent an active steering of the convergence of administrative cultures in Europe is desirable. In the final resort, this question deals with the conception of European integration. Starting from the ideas contained in the Treaty on European Union, guiding principles are not only goals like "an ever closer union among the peoples of Europe",[85] but also the principle of cultural diversity, the obligation to respect the national identities and the principle of subsidiarity.[86] From these general ideas, it follows that the more European institutions tend to influence and transform the political and administrative culture in the Member States, the more sound reasons for justification have to be invoked. In their programmatic dimension, which goes beyond their legal content, these principles stand for a concept of European integration which does not strive for uniform structures and cultures in the Member States, but for political and cultural pluralism in a common institutional, legal and axiological framework that facilitates the realisation of common economic goals and common political aspirations. The discussion about a common administrative culture can foster more sensibility for the question to which extent the European institutions should take an active part in the transformation of social, cultural, and political conditions in the Member States.

VI Conclusion

The persistent asymmetry in the implementation of EU law –- despite the growing density and specificity of legal standards – has drawn the attention to the administrative

85 See Preamble of the Treaty on European Union.
86 Article 5 para 1 and 3 of the Treaty on European Union

cultures of the Member States. Two strategies of the European institutions to adapt national institutional and cultural prerequisites to the requirements of an effective implementation of EU law can be observed: on the one hand, a new focus in EU-legislation on organisational and procedural aspects; on the other hand, the establishment of new –- extralegal –- mechanisms aiming directly at the transformation of the administrative culture.

These strategies are not yet explicitly formulated or systematically developed, but become more and more visible in practice. Alongside with other factors like transnational cooperation and international modernization concepts, they contribute to the emergence of a European administrative culture. With regard to the scope of the instruments used by the institutions of the EU, one can distinguish a (still) piecemeal legal approach in organisational matters (examples: creation of independent regulatory agencies; organisational settings to facilitate the free movement of services), a broader legal approach in procedural matters (examples: participation of the public in procedures of environmental impact assessment; generalized basic standards derived from the rule of law) and a holistic approach based primarily on extra-legal mechanisms (examples: programmatic extension of the principles of good administration and transparency; definition of ethical standards).

The development of a common European administrative culture is an incremental process which confirms, on the one hand, the integration through law approach, and reveals, on the other hand, the necessity at the same time to place more emphasis on complementary soft factors that influence the administrative culture. However, it should be clear from the outset that the use of transformative instruments should not aim at the creation of a uniform European administrative culture. These instruments should be limited to functional necessities with regard to the implementation of EU law and to the respect for the common values set out in the Treaty on European Union. A uniform European administrative culture is not desirable in a normative sense and will not succeed in an empirical perspective. There are numerous examples where “legal

engineering"[87] failed or had to cope with long-lasting transitional problems.[88] It would be even more difficult and daring to embark on a systematic "cultural engineering".

[87] Expression borrowed from Giovanni Sartori, *Comparative Constitutional Engineering. An Inquiry into Structures*, Incentives, and Outcomes, 2nd ed., New York: New York University Press, 1997.

[88] See Karl-Peter Sommermann, Institutionengeschichte und Institutionenvergleich, in: Arthur Benz/Heinrich Siedentopf/Karl-Peter Sommermann (eds.), *Institutionenwandel in Regierung und Verwaltung. Festschrift für Klaus König zum 70. Geburtstag*, Berlin: Duncker & Humblot, 2004, p. 61, 66 et seq.

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