

ARTICLES

EUROPEAN ADMINISTRATIVE AND REGULATORY REFORM: INTRODUCTION TO THE SPECIAL ISSUE

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Regulatory policymaking in the European Union and in its Member States is a fruitful subject for comparative law. American lawyers can gain perspective from studying European administrative law, and comparative administrative law is of increasing practical importance to firms that sell and manufacture in Europe.

Europe is a rich subject for comparative analysis because the English legal tradition is quite different from that of the continent, and even within the civil law countries, French public law differs in important ways from the German model. When American law and practice are added to the mix, the result is an instructive canvass of present day options. The papers in this symposium provide an overview of some of this terrain. In one way or another, the papers touch on the major issues in administrative law:

- the division of authority between levels of government,
- the design of administrative and legislative procedures to assure both democratic accountability and technical competence,
- the political accountability of even highly sensitive executive branch activities,
- the role of science versus public opinion in setting substantive standards,
- the design and implementation of efficient regulatory techniques, and
- the use of private lawsuits to enforce public laws.

In the European Union much is made of the concept of subsidiarity. According to this principle, European Community institutions should regulate only in those areas where the Member States cannot achieve appropriate results because of cross-border effects or destructive interjurisdictional competition. Part of the skepticism about extending the reach of Community institutions, however,

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goes beyond the technical characteristics of policies. Instead, the worry is a lack of democratic accountability. In spite of recent increases in the power of the European Parliament, the Union still has some of the features of an intergovernmental agreement between sovereign states, as opposed to a federal state. The Council consists of government ministers, and the individual representatives change with the issues on the agenda. The Council continues to be more powerful as a legislative body than the directly elected Parliament. Furthermore, the Commission, as the EC's "executive" arm, is influential in shaping the agenda—legislative drafts originate in the Commission, and the Commission must respond to objections raised by Parliament. Critics worry not only about the undue influence of member governments relative to their citizens, but also the impact of organized lobbies for private interests.

One controversial response to this latter concern is the EC's creation of a number of committees that play an important advisory role. "Regulation and Comitology," by Michelle Egan, of American University in Washington, D.C., and Dieter Wolf, of the Center for European Law and Policy in Bremen, is a useful introduction to the EC committee process. Building on the work of the Italian scholar Nino Majone, the authors analyze the EC experience in the light of theories of regulation developed in the United States. The EC practice has the unfelicitous label "comitology," which sounds like a cousin of cosmology or cosmetology—perhaps the term has a better ring in German or French. In any case, it refers to the EC's use of specialized committees to assist in the drafting and implementation of directives and regulations.

Egan and Wolf offer an historical survey of the comitology process and its evolving implications for democratic accountability. According to the authors, the initial role of the committees was to facilitate the implementation of directives into national law by giving key officials in national governments a stake in the success of EC legislation. Because the EC does not have the authority or the capacity to implement directives, it must rely on the cooperation of the Member States. The committee system was one way to do this. The committees were criticized for their lack of transparency and democratic control but not for their dependence on special interests. In fact, in the early days of the EC most organized lobbying groups operated at the national level and played little role in the drafting of Community legislation. Eventually, transnational interest groups appeared. In time this led to the "regulatory capture" of certain committees. Lobbyists could promise to make life easy for the national officials serving on committees if the EC rules were to their liking. At present, capture is less of a problem since most important groups are organized and thus counteract each other. Instead, scientific reasoning has become increasingly important in setting standards. In fact, the authors suggest that the problem may now be too much regulation, not too little, as scientifically-oriented committees urge rules that adhere to the "state of the art." This outcome is especially marked in new fields, such as biotechnology, where few, if any, previous national laws exist. Thus the problem of democratic accountability remains. In spite of the growing role of Parliament, increased reliance on scientific expertise may make popular control harder. At the same time as some narrow interest groups lose influence

to those with stronger scientific claims, democratic control may also be on the wane.

The vexing conflict between popular habits and fears, on the one hand, and scientific expertise, on the other, is clearly illustrated in recent debates over food safety. Paradoxically in this sector, the United States, with its more open and democratic administrative process, has given science a stronger role in regulatory standards, compared with EC rules that have less scientific backing. The cynic might point out that the EU objections to United States rules have a protectionist feel, particularly in light of the fact that local European producers of cheese and cured meat are often protected, and some imports from outside the EU are banned. Although this is surely part of the story, Marsha A. Echols of Howard University argues that it is not the whole explanation. Her paper, "Food Safety Regulation in the European Union and the United States," emphasizes cultural differences. According to Echols, Europeans tend to favor traditional foods and minimal processing and are skeptical of new technologies. The safety of traditional foods in Europe is based on centuries of experience, not laboratory science. Americans, in contrast, are more willing to accept new technologies and are wary of traditional foods. In practice, this means that American public opinion is close to the consensus view among scientists. For example, opposition to genetically engineered products has been much less strong in the United States than in the EU, with most scientific evidence suggesting that the risks are minimal. But one may wonder if the difference between the EU and the U.S. on matters of food safety is not merely "cultural" but is also a response to a more open regulatory process in the United States that has reduced popular suspicion of scientific claims for food safety.

Regulation in the United States is not just scientifically sounder but also seems closer to the prescriptions of economists. U.S. regulation focuses on the product, while EU regulations focus on the production process. This looks like the familiar distinction between output standards and command-and-control regulation, with economists arguing for the superiority of the former on efficiency grounds. Perhaps, however, Europeans care about processes because they are proxies for the quality of certain foods. Maybe the difference is that Europeans will accept some health risk in return for a food's superior taste, texture, and aroma.

Another tension in administrative law is between the executive's need for secrecy and its accountability to the legislature and the public. This tension is raised in particularly stark form in "Parliamentary and Administrative Reforms in the Control of Intelligence Services in the European Union." In this paper, Shlomo Shpiro of the Konrad Adenauer Foundation discusses the accountability of intelligence services in the United Kingdom and Germany. Intelligence remains the responsibility of the Member States, not the EU. Yet membership in the Community has influenced recent developments in the United Kingdom. The example of the more accountable intelligence services in Germany has helped the United Kingdom open its own service to limited scrutiny in the aftermath of the Cold War. In the past, Britain had handled the difficult issue of public accountability by formally denying that special intelligence services existed. This

neatly resolved the obvious tension between an apolitical intelligence service and accountability to the elected representatives of the people. If an agency does not legally exist, it cannot be subject to oversight.

Germany has a nine member Parliamentary Control Commission, with five members from the governing coalition, that focuses on political and operational issues. It operates in secret and must not reveal the information it receives, but it does issue periodic public reports. The secrecy of its meetings, however, does not distinguish it from other German parliamentary commissions. The Commission members believe that they are kept well informed in spite of the fact that the intelligence services themselves do not view the Commission as leak-proof. Another commission deals with issues specifically affecting individual privacy—an issue of great concern in Germany in the aftermath of the Nazi period.

The British intelligence system has historically been much more secretive and tightly controlled from the top. Recruiting was based on “Oxbridge” circles and social connections more than personal qualities and operational needs. Not until two acts of 1989 and 1994 were the British intelligence services placed on a legal footing. The reforms established a parliamentary oversight committee and a new tribunal to hear complaints against the services. The British oversight committee seems modeled after the German Commission—it has nine members with five from the governing party and has similar functions. The German commission, however, has stronger rights to require the government to disclose information to it. Under the British law, the Committee can request information relevant to its work, but the request can be denied if the information is “sensitive.” The government has no obligation to disclose information on its own. Furthermore, the German Commission has a tool unavailable to the British Committee—it can threaten to make an issue public so long as two-thirds of the membership approves. This voting rule, of course, gives the governing coalition a veto but could be a potent check in extreme cases, especially under a coalition government.

Neither system possesses an effective vehicle for individual complaints, but paradoxically it may be the British system that is ultimately more open to public pressure. German democracy rests on the principle that elected representatives are the primary route for the public to influence government behavior. Under such a view, there is no need for a separate route for individual complaints. Individuals can write letters to the Chancellor’s office but will never be informed of any actions taken. In contrast, once Britain admitted the existence of its intelligence services, it felt the need to institutionalize complaint procedures similar to those available for other services. The tribunal that hears such complaints is too new to have a track record, but it might end up being a model for other Member States such as Germany if these countries begin to acknowledge the legitimacy of individual complaints not filtered through electoral politics.

In the final article in this section of the symposium, Barry J. Rodger of the University of Strathclyde and Angus MacCulloch of the University of Manchester provide a different angle on the role of the public in a modern

regulatory state. In "Community Competition Law Enforcement Deregulation and Re-regulation," they consider the role of private individuals in antitrust law enforcement. This is a longstanding feature of American antitrust law, but it is an innovation in the EU context. The issue is discussed in the context of the enforcement of EC antitrust policy in national courts. For all the talk of intrusive "Eurocrats," the Commission is understaffed. It cannot carry out all the enforcement responsibilities entrusted to it. Consequently, many regulatory policies are enforced by Member States. Competition policy has always been a central EC responsibility, but the Commission's growing inability to detect and pursue infringements has led to a devolution of powers to national competition authorities. At present, the national authorities mostly carry out administrative tasks with little court involvement. However, over time, the growing role of national authorities can be expected to lead to cases where national courts apply EC law. It may encourage individuals to bring lawsuits in these courts alleging violations of EC rules. In the United States such private actions are common but are usually an adjunct to government actions. They are encouraged in the U.S. by the possibility that successful plaintiffs can win treble damages.

The authors use the case of the United Kingdom to illustrate the way Member States are beginning to harmonize their laws and to provide a stronger role for private plaintiffs. The British law has not yet passed Parliament, but it is clearly designed to bring U.K. law closer to that of the EC, albeit without entirely eliminating inconsistencies. A major departure from prior law is the possibility that private parties will be able to sue for breaches of the statute. This follows recent trends in the jurisprudence of the European Court of Justice, which has emphasized the need for national courts to make remedies available for rights established under EC law. However, the statutory language is restrictive, and private lawsuits are unlikely to be an important deterrent in the United Kingdom unless several other fundamental features of British law are modified. The law of standing restricts private plaintiffs, and even if they can get into court, no analog to U.S. treble damages awards is available. Fewer potential plaintiffs will sue if expected damages are low. Fee-shifting rules that require losers to pay winners' legal fees also discourage suits. Even if treble damages are not available, suits might be encouraged by one-sided fee shifting on the model of American citizen suit provisions in U.S. environmental laws. Since the plaintiff can be viewed as attempting to further public values, he or she could be reimbursed in the event of victory but not be required to pay the defendant's legal fees in the event of a loss.¹

Of course, no symposium can do justice to the range of issues raised by its overall theme. Nevertheless, this collection of very interesting papers, further complemented by the government perspectives that follow, manages in its scope and depth to highlight most of the major issues in administrative law and to suggest areas for further research. The contributions demonstrate the promise of comparative administrative law and policy as a field for productive future

¹ See Susan Rose-Ackerman, *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States* 129-30 (1995).

scholarship. They contain many insightful observations on the difficult task of creating a responsible administrative state in a world of esoteric scientific knowledge and organized political pressure groups.