Sonderdruck aus:

Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts

herausgegeben von

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Mohr Siebeck 2008

Collaboration among Public Administrations through Domestic Administrative Procedure

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This paper deals with collaboration principle among public Administrations at the domestic level under European influence. It is based on the premise of a broad concept of administrative procedure understood as a communication system[1], and not only as a decision-making process or as an applying and enforcing law

[1] "Administrative procedures are structured processes of information procurement and information processing carried out under the responsibility of administrative authorities. They are designed to enable the administration to act rationally. Such procedures do not always result in a concrete legally binding decision. Direct administrative action, internal administrative coordination and (periodic) reporting duties independent of particular occasions can also be object and aim of administrative procedures". See *Eberhard Schmidt-Aßmann*, Structures and Functions of Administrative Procedures in German, European and International Law, in: Barnes, Javier (ed.), The Reform of Administrative Procedure, 2007/2008 (forthcoming). See

tool that resembles courtroom procedures. Firstly, it evaluates the link between the method of regulation and administrative procedure, and stresses that cooperative procedure is a hallmark of the new forms of regulation and government. Secondly, it holds that this cooperation between networked Administrations begins on a domestic level. Finally, it summarizes some elements of this collaboration. Beyond these questions lie two more fundamental issues: the collaboration strategy produces important consequences in administrative law and procedures design, and this new national-level collaboration by means of procedure requires techniques that are much more modern, flexible and open.

I. The connection between administrative procedure and methods of regulation. The cooperative procedure as means of a new regulation strategy

Our existing models of administrative law have largely developed in response to a single method of regulation: the command method. The adoption of entirely different methods of regulation will invite and require the development of new approaches to administrative law[2], even more so when the premises of the system of "command-and-control regulation" – the capacity of the law to control and steer a sector through material programmes of rules that are comprehensive, abstract, general and intended to be permanent – are questioned.[3]

In the debate on the new instruments that are needed to cope with shifting realities in a world undergoing rapid and profound changes, an intense connection between the diverse regulation strategies and the administrative procedures comes to light.

"Administrative procedure" and "method of regulation" (especially government regulation, broadly considered) are closely related questions. The analysis of the administrative procedure would be incomprehensible, if the various forms of regulation were not taken into consideration at the same time.

At first view, this interrelation comes about an immediate sense, as the procedure is present in and forms an integral part of the different methods of regula-

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also *Eberhard Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee, second edition, 2004, p. 305.

See also in Spanish: *Eberhard Schmidt-Aßmann*, El procedimiento administrativo entre el principio del Estado de Derecho y el principio democrático, in: Barnes, Javier (ed.), El procedimiento administrativo en el Derecho Comparado, 1993, p. 317; *Eberhard Schmidt-Aßmann*, La Teoría General del Derecho Administrativo como sistema, 2003, p. 358; *Javier Barnes*, Sobre el procedimiento administrativo: evolución y perspectivas, in: Barnes, Javier (ed.), Innovacion y Reforma en el Derecho Administrativo, 2006, p. 267.

[2] *Richard B. Stewart*, Administrative Law in the Twenty-First Century, 78 N.Y.U.L. Rev. 437, 2003, p. 454.

[3] See the series of books on the reform of administrative law edited by *Eberhard Schmidt-Aßmann* and *Wolfgang Hoffmann-Riem*, 1993–2000.

tion: traditional (e.g. current command-and-control system through regulations, permits or licensing authorizations), as well as alternative or additional methods (e.g., regarding the governance in EU, such as the comitology system, independent Agencies, the open method of coordination, etc.)[4]. The diverse regulation systems and instruments come into being through suitable procedure rules.[5]

On a second level, it takes on more profound and consequential implications, due to the fact that each method of regulation (command regulation and formal adjudication, negotiated rulemaking, agreements or "negotiated command and control", self-regulation in privatized sectors, economic incentive systems, etc.) describes and conditions the structure, nature and function of the resultant procedures that must follow the respective models.[6] For example, if the idea is to delegate decision-making to methods of governance because they have the ability to respond to legal diversity in the EU such as comitology and agencies[7], or if the aim is to make greater use of regulatory negotiations and other collaborative processes[8], the respective procedures should be adapted to reflect these schemas.

Many of the outstanding trends and features existent in administrative procedures on a regional, national or global level can only be explained within the framework of the distinct regulatory methods[9]. This relationship of instrumentality is very obvious in many cases. For example, the trend towards the regulatory negotiation that characterizes negotiated rulemaking requires a more cooperative process; it has to become more inclusive and less adversarial towards regulated parties and other stakeholders, such as environmental organizations and community groups[10]. In other cases, the regulatory system's influence on procedure design may not be easily apparent," but this does not mean that it is less important.[11]

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[4] Concerning these regulation methods see: *Alexandra Gatto*, Governance in the European Union: a Legal Perspective, 12 Colum. J. Eur. L. 487, 2006.

[5] For example, the application of regulatory choice methods is carried through special procedures. See e.g. *Martin Eifert*, Regulierungsstrategien, in: Hoffmann-Riem, Wolfgang/Schmidt-Aßmann, Eberhard/Voßkuhle, Andreas, Grundlagen des Verwaltungsrechts, Band I, 2006, p. 1309.

[6] For example, in order to achieve an environmental agreement, the government establishes a process of informal negotiation with the aim of securing agreements on individualized, hand-tailored rules or orders that are substitutes for those generally applicable. See *Richard B. Stewart*, A New Generation of Environmental Regulation?, 29 Cap. U.L. Rev. 21, 2001 p. 61.

[7] On administrative governance issues see e.g. *H. C. H. Hofmann, H. Türk*, EU Administrative Governance, 2006, p. 579.

[8] Regarding the implications for the contemporary US APA's role, as a result of the new regulatory negotiations method, see e.g. *C. M. Ryan*, Leadership in collaborative policy-making: an analysis of agency roles in regulatory negotiations, Policy Science 34: 221–245, 2001.

[9] For example, public participation in SEA procedures (see III.1), must be understood in the context of a way of regulation based on public-private cooperation.

[10] Another example from the US post-war order: a core principle of the transformation of U.S. administrative law was that new grants of governmental regulatory power should be accompanied by the extension of procedural, participatory rights to the relevant stakeholders – both the objects of regulation and the beneficiaries. See *Richard Stewart*, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975), p. 1670.

[11] For example, the extension of procedural rules into the private sector operating in areas in

Looked at from this perspective, the function of administrative procedure to promote cooperation between different public bodies can be better understood within the context of the new method of regulation and governance present in Europe today.[12]

One of the elemental consequences arising from this approach is the necessity to use the procedural rules and instruments that are considered to be the most suitable in each case *according to the model of regulation* for which the procedure in question is to be used. If that is not observed, the procedure can never meet the new reality. The features and techniques characteristic to the procedures in a command regulation model cannot be extrapolated to procedures designed to coordinate administrative action in the area of governance, unless this is carried out with notable adjustments and adaptations. Thus, the techniques of collaboration developed for procedures in the framework of command regulation (e.g., the delivery of non-binding statements or reports by one Administration for another concerning territorial planning regulations) prove to be inferior or deficient in the many other cases in which the collaboration is not limited to a precise connection based on a hierarchical relationship, or founded on the premises of an isolated position between Administrations.[13]

A problem with the regulatory body's current approach is in many cases that it is fragmented[14]. The lack of coherence, coordination and functionality begins within the legislative process, a point often made clear in the case of environmental matters[15]. However, it cannot be forgotten that the procedure can be conceived as a structural instrument of the direction and control of the Administration, a way to subordinate the Administration to the Law. If a statute is not able to establish beforehand in detail "what" the Administration is to do in each case, it should

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which the regulatory techniques are expressed by the so-called "public bodies-supervised industry self-regulation", in fields such as telecommunication or energy, etc., responds to a regulatory strategy based on cooperation between the State and society; the State ensures a final result, although it itself does not carry out the activity or service; This is delegated to the private sector," and carried out by means of a close relationship of cooperation. To this end, procedural rules must be established for the private operators in order to thereby ensure, among other things: the transparency, accountability and neutrality of their actions, the participation of experts and the public, proper conflict resolution methods, etc.

[12] For example, collaboration takes on a lesser importance when the object of the procedure is to lay down a particular resolution which has a content that is already established "ex ante" by law and its application is limited to a single Administration (e.g., a municipal authorization to open a small business). On the contrary, collaboration is an essential part of the open method of cooperation, in as much as it deals with the cyclical benchmarking procedure which coordinates national policy, providing guidance and assessment at a European level.

[13] E.g. eGovernment. See below III.

[14] Regarding the US environmental regulatory system, see: *Stewart* (note 6), p. 153.

[15] For example, concerning US, the system seems to be a patchwork of detailed and rigid laws that are largely unrelated to each other and are lacking in any unified vision of environmental problems (see *Richard B. Stewart* (note 6), p. 153. Regarding Germany and EU, see e.g. *E. Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht (note 1). The fragmented nature of the system is mainly the responsibility of statutes.

at least set out "how" the decision-making process is to be carried out, that is, it must establish a proper procedure to direct the Administration's action (e.g., SEA procedure).[16]

The increasing need for collaboration among Public Administrations reflects a shift to principles and procedures at odds with those of the standard systems and procedures. A general emphasis on flexibility and cooperation in the procedure is needed.

In this article I will not assess the emerging new methods for achieving regulatory goals and the implications of these new methods in administrative law[17]. I will only briefly summarize some elements of the collaboration between Administrations through formal and informal administrative procedure at the national level under European influence. First of all, however, we must make a brief reference to the metaphor of a networked Administration in order to emphasize that the need for collaboration is not a phenomenon that occurs outside national borders.

II. The image of networked Administration

1. Networked Administration

Collaboration among public bodies has become a necessity. It could be argued that the future of the Administration depends on improved patterns of collaboration. Collaboration is a basic principle, a fundamental requirement of a networked Administration. At the core of Administrative Law, the image of a network is helpful when attempting to illustrate this phenomenon: a modern Administration must be conceived as a network of Administrations acting in cooperation with citizens and businesses.

Public Administration is now less hierarchical and isolated. It is increasingly networked. The distinction between hierarchy and network refers to the structure and mode of coordination within or between organizations. In principle, a hierarchy is a pyramid in which coordination is achieved through vertical chains-of-command, with higher-level units directing the behaviour of units below them. In contrast, network forms of organization operate horizontally as well as vertically and achieve coordination through mutual cooperation rather than through command.[18]

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[16] See *Barnes*, Sobre el procedimiento administrativo: evolución y perspectivas (note 1), pp. 267, 287–288. The law does not establish what is to be the best solution, but rather how that solution is to be found. This all remits to the procedure when understood to be a forum to promote convergence.

[17] On this issue, see e.g. *Richard B. Stewart*, (note 2).

[18] See e.g. *Chris Ansell*, The Networked Polity: Regional Development in Western Europe Governance 13 (2), 279–291, April 2000.

In Social Sciences, networks have become a powerful metaphor for explaining the social, economic, technological and political realities of our times. A network, defined minimally, is a system of interconnected elements or nodes, where each node represents an intersection of flows within the network. The topology defined by networks determines that the distance (or intensity and frequency of interaction) between two points (or social positions) is shorter (or more frequent, or more intense) if both points are nodes in a network than if they do not belong to the same network (M. Castells)[19]. Each node is connected to other nodes through some kind of exchange process. A bridge does not simply join two independent villages across a river; it creates a new city. For our purposes, i.e., from a jurist's viewpoint, a network of flows is a process that connects administrative actions (services, information, activities, decisions, etc.). In this narrower sense, administrative procedure is a tool of interconnection or interagency partnership. Cooperative procedure is a key constitutive part of the networked public Administrations (procedure's coordination task).

2. European and National network

The transnational or European dimension of such cooperation is often stressed (e.g., regarding composite or mixed procedures at European level)[20]. The phenomenon of administrative cooperation in the European administrative space had led to an intensive relation between *national* and *supranational* administrative actors and activities by means of exchange of information, collaboration in administrative procedures, new organizations, etc. Administrative procedure is one of these ways of increasing collaboration. The administrative procedure is thus not only a means for enabling the individual protection, the participation of the citizens or the efficiency in the decision-making process, but also a tool for the collaboration between public bodies.

Albeit the idea of a "networked Administration" and the cooperation principle seem to be in close association with the European system, this article argues that the network must not begin at the European or global level, but at the national one. On the one hand, national Public Administrations must participate in the formulation, development and implementation of the EU/EC Law. On the other hand, a network constitutes a unit and the European administrative network includes all public bodies, even though these only operate at a limited level. In addition, there is a variety of national administrative proceedings under international and European influence with a strong collaborative aspect (e.g. strategic environmental assessment procedure, eGovernment, regulatory or legislative impact assessments, etc.), in which the horizontal and vertical relations between local, regional and national Administrations *within* each Member State are deeply influ-

[19] E.g. in The Rise of the Network Society, 2000, p. 501.

[20] See *Sabino Cassese* e.g. in European Administrative Proceedings, 68 Law & Contemp. Probs. 21, 2004.

enced by the EU/EC system as well. Domestic collaboration is also needed when the national Administration does not act as "indirect Administration" of EC Law (which is already ruled by the basic principle of effective cooperation).[21] Harmonized national administrative legislation provides many examples of cooperation within the State. In some cases, cooperation is even required between specific authorities at national level.[22] The smooth operation of the internal market requires not only legal rules, but also close and consistent cooperation. The same can be said of environmental issues and other public policies. The European Union does not treat domestic collaboration between the various national Administrations with indifference.

Procedure, as we have noted, is one of these forms of collaboration. It carries out a strategy of integration through a stable and continuing, often long-term collaboration. In this context, the national administrative procedure is setting new patterns of collaboration under European guidance. Domestic administrative procedure is silently and progressively acquiring a growing importance as an instrument behind the driving force in European interagency partnership.

III. Domestic cooperative administrative procedures under EU influence. Two examples

1. A National Cooperative Procedure: the case of the strategic environmental assessment (SEA)

a) Introduction: the significance of the strategic environmental assessment on the National Administrative Law.

According to the European model[23], the administrative network is here fundamentally domestic, although in some cases it is transboundary[24]. A distinguishing characteristic of environmental problems – that they adhere to ecosystems and geographic features rather than political boundaries – often renders isolated actions ineffective and frequently necessitates cooperation at various levels. The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent frame-

[21] See, for example, Directive 2006/123/EC, of the European Parliament and of the Council of 12 December 2006, on services in the internal market, number 6, 7, 32, 74, 104, 105, 111–113; and Chapter VI: Administrative Cooperation.

[22] See, for example, Proposal for a Directive of the European Parliament and of the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services, Brussels, 18. 10. 2006, COM(2006) 594 final: the proposed amendment to Article 22, establishes the requirement for cooperation between national regulatory authorities and consumer protection bodies.

[23] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[24] Ibid. art. 7.

work including the relevant environmental information into the decision-making process.[25] The European Directive is of a *procedural* nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures.[26]

The term "strategic environmental assessment" (SEA) is now widely used to refer to a systematic process of analyzing the environmental effects of policies, plans and programs. Increasingly, SEA is seen in the international arena as an entry point or stepping stone to integrated assessment or sustainability appraisal. It is a holistic, cross-sectoral approach to the implementation of sustainable development[27]. SEA promotes an integrated approach, taking into account economic, social and environmental dimensions of sustainable development.[28]

The mandate, institutional arrangements and scope of applications of SEA vary, in some cases significantly. In some developed countries, the SEA systems include coverage of policy and legal acts. Many SEA systems were instituted during 1990s or earlier in the case of the USA. Often, this process is equated with a formal administrative procedure based on environmental impact assessment (EIA), as set out in the European Union[29] and in the Kiev Protocol[30]. However, the SEA administrative procedure may be much more complex and interesting, particularly from the point of view of the collaboration between Administrations. According to their scope, aims and fields of application, impact assessment procedures and integrated assessment procedures differ also in their consequences on Administrative Law.

To better understand these deeper consequences in the different cases, we should consider that what SEA entails SEA is a systematic, on-going process for evaluating, at the earliest appropriate stage of publicly accountable decision-making, the environmental quality and effects of alternative visions and development intentions incorporated on policy, planning, or program initiatives, ensuring full

[25] (5) Directive 2001/42/EC.

[26] Ibid. (9) and article 4.2.

[27] *Barry Dalal-Clayton/Barry Sadler*, Strategic Environmental Assessment, A Sourcebook and Reference Guide to International Experience, pp. 1, 4.

[28] According to the Preamble of the Directive 2001/42/EC of the European Parliament and the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programes are taken into account during their preparation and before their adoption. The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework including the relevant environmental information into decision-making. The inclusion of a wider set of factors in the decision-making process should contribute to more sustainable and effective solutions.

[29] Directive 2001/42/EC.

[30] SEA Protocol to the UN Economic Commission for Europe, UNECE Convention on EIA in a Transboundary Context, agreed in 2003. Both instruments prescribe an EIA-based-procedure for SEA. See *Dalal-Clayton/Sadler* (note 27), pp. 1, 4, 36, 37.

integration of relevant biophysical, economic, social and political considerations.[31] In addition, policy-maker must empower the analyst to study alternatives that may be *broader* than the policy-maker's authority, i.e., to begin coordination with the public and other agencies before there is a firm proposal. It requires an efficient collaboration. The complexity of the processes associated with SEA is one of the difficulties that formal public adoption of the system has experienced. Procedural rules must overcome some challenges, such as: integrated views within the same Administration for all main policies; horizontal and vertical collaboration between different Administrations, transboundary cooperation, effective dialogue between Administrations and the public, good planning, etc. It implies, in other words, a closer *cooperation* in administrative procedure.

The dynamic nature of strategic decision-making means that no decision is ever *definitive*; in the case of plans or programs and in the case of bills, this implies amending or reforming plans, programs and bills that are not achieving the intended effect or are having unintended impacts. The SEA system is changing the traditional static concept of plans and programs. They become a process in constant change, a "moving picture" rather than a "snap-shot". The dynamic concept of both plan and program is based on the recognition that any policy and planning decision is bound to be characterized by uncertainty and openness. Cooperation has a strong *temporal* dimension; administrative procedure must establish a permanent collaboration among Administrations.

Regarding the complexities of the issues, environmental policy-making needs to be based on best available scientific and economic assessment, and on knowledge of the state and trends of the environment[32]. It must be recognized that many decisions are really made with imperfect information, despite the effort and resources spent to gather data and information. The SEA system calls for good communication mechanisms to ensure that all partners in the SEA process are adequately involved and their perspectives are taken into account, i.e., that there is an effective dialogue. Good communication is also needed in order to establish the articulation across sectoral policies and institutional contexts and to find credible and feasible alternatives that allow evaluation of a decision based on comparable rather than on absolute values. Communication is seen as a tool to achieve effective integration and effective influence. The best information can also help to provide the basis for policy decisions on the environment and sustainable development – the follow-up and review of sector integration strategies as well as of the sustainable development strategy – and information to the wider public.

Better planning and policy-making practises suggest flexibility as well. SEA is a decision-aiding process that can and should be applied flexibly to the decision cycle, recognizing that these terms mean different things and often cover differ-

[31] Maria Rosário Partidário/Ray Clarck (ed.), Perspectives on Strategic Environmental Assessment, 2000, p. 4.

[32] Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme.

ent types of decision-making processes. Depending on the circumstances, SEA must be absolutely tailor-made to the kind of decision at stake, and the nature of the decision-making process in place.[33] Every policy, plan and program is different. As a result, the methods of cooperation through procedure should also be flexible.

b) Administrative procedure as a tool for political steering and interests balancing

The SEA Directive is a framework law that establishes a minimum common procedure[34] for principal official plans and programs (which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use)[35]. The testing of certain internationally recognized elements of SEA (documentation; procedure; significance; alternatives; and involvement of the public) shows that these aspects may need to be adapted in order to maintain the flexibility of the legislative process; on the other hand, however, these aspects are a potential transformative factor for administrative procedure.

According to a traditional point of view, administrative procedure focuses mainly on the outcome and on the judicial review of that outcome, disregarding what takes place inside the administrative procedures and the cooperative activity leading to a final decision. The administrative procedure is associated with the implementation of policies defined in laws or other government programs. However, new administrative procedures, such as those concerning the SEA, do not look so much towards their outcome, but more so their internal structure. Here there is "nothing" to be implemented. The key role of the procedure lies in its internal phases. In the SEA system, intensive administrative cooperation and interaction does not take place only in the implementation phase, but also in the preparatory one, that is, in the phases of agenda setting and policy formulation.

The SEA Directive imposes a model of administrative procedure that goes well beyond the traditional conception of the adjudication or application procedures of the general statutes. The traditional approach views administrative procedure as the application and enforcement of the law in concrete circumstances, i.e., it resembles courtroom procedures and leaves other considerations outside its scope (e.g. administrative procedure as way of controlling and steering public bodies, as system of information exchange and information regulation, etc.). The SEA procedure is a procedure understood to be an instrument of balancing and political guidance. The implementation of this concept does not seem to be easy, if judged by the delayed transposition of the SEA Directive by many member

[33] Perspectives on Strategic Environmental Assessment (note 31), pp. 7, 19.

[34] According to the Directive, the different environmental assessment systems operating within Member States should contain a set of common procedural requirements necessary to contribute to a high level of protection of the environment.

[35] Sec. 3 Directive 2001/42/EC.

States[36] and the scant innovation carried out by the national legislations on the traditional techniques and tools used to ensure the consultation and participation of the public during the implementation process.

c) A collaborative administrative procedure

The strategic environmental evaluation system implies, among other things, a thorough collaboration and cooperation between public bodies. It is obvious that this must take place firstly within each individual Administration on a local, regional or national level, such as the collaboration between the different national Ministries, or the different organs and agencies that make up a local government, to give a few simple examples (intra-agency cooperation). Secondly, it is needed among all the involved public bodies that can be affected by the proposed plan or program, on both a horizontal as well as a vertical level.[37] Finally, the collaboration with the Administration responsible for environmental issues (or "consultant Administration") must be on a much more specific level, given that it has particular formal functions at various stages in the assessment procedure.

The collaboration among public Administrations is thus at the core of the policy, from the very beginning of the decision-making process, as it is needed in all procedural stages:

- *Screening of the plans and programs*, to consider their overall characteristics to see if it falls within the requirements of the SEA Directive, and their Environmental significance. The first output is the screening statement. Environmental authorities (or consultant bodies) must be consulted when undertaking case-by-case screening or when specifying certain types of plans and programs.[38]
- *Scoping the SEA*, to determine the key elements of the plans and programs to be assessed, the environmental issues to be evaluated, and to collect and report on relevant international, national and local plans, objectives and environmental standards (existing and emerging) that may influence or impact on the plans or programs; to develop draft environmental objectives, indicators and targets to allow the evaluation of impacts based upon the findings; to identify reasonable alternative means of achieving the strategic goals of the plans and programs; etc. The relevant aspects can only be identified by

[36] See e.g. Sixth Annual Survey on the Implementation and Enforcement of Community Environmental Law 2004, Commission of the European Communities, Brussels, 17.8. 2005, SEC(2005) 1055.

[37] The Directive refers only to consultation with the Consultation Bodies and with the public. Responsible Authorities will however normally consult a range of other bodies in the course of preparing their plans and programs (e.g. Local, Regional and national Authorities, Agencies, etc.) and information from these may be useful in SEA. Some statutes implementing the SEA Directive into national law have not taken into account this point of view. See e.g. Spanish Statute on SEA, number 9/2006, April, 28th.

[38] Sec. 3.6 Directive SEA.

The intention behind the screening provisions is to ensure that due and transparent consideration is given to the question whether an environmental assessment is required. Moreover, they are designed to ensure that the environmental assessment requirements of the Act are targeted effectively at plans and programs that are likely to have significant environmental effects. See e.g. sec. 9 (31), Explanatory Notes to Environmental Assessment (Scotland) Act 2005.

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discussing and consulting at this stage[39]. The second output is the scoping report. Environmental authorities must be consulted on the scope and level of detail to be covered by the SEA.[40]

Identification, prediction, evaluation and mitigation of potential impacts. The purpose of this stage of the procedure is to identify and address the likely environmental impacts of the plans and programs, establishing the environmental baseline (existing and future trends), predicting, evaluating and mitigating the impact, and justifying selected alternatives. The SEA report is the main output of the SEA procedure and will be the document that most stakeholders will review. An independent quality review of a draft SEA report is necessary as well. Environmental authorities must be given an opportunity to comment on the report.[41]

Consultation, Revision and Post-Adoption Activities. The procedural tasks here are to review comments for applicability to SEA or plans and programs, to undertake "fast-track" SEA on significant changes to the plans and programs, to elaborate a SEA statement, to commence environmental monitoring regarding the implementation of the plans and programs, to revise the monitoring program periodically and to report regularly on monitoring results.[42] The SEA statement must be made available to the relevant authorities.[43]

d) SEA procedure: some features

The emphasis is here on the processes of reasoned decision-making in relation to competing interests and values as well as the relevant options, information and evidence presented. An integrated view of making significant choices implies an integrated Administration and cooperative procedure.

Collaboration between Administrations during the assessment procedure is characteristically permanent and systematic:

- It is a cooperation that unifies in its procedure all implicated administrative units and levels (responsible authority, environmental or consultant body, other affected Administrations); it presumes the internal collaboration within the responsible authority;
- It covers all the procedural stages: from screening and staging to monitoring, i.e., the collaboration is on-going and accompanies all stages of the plan or program; the collaboration among domestic public bodies expands to administrative cooperation in agenda setting and policy making, and policy implementation.

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[39] Much baseline information will be generic to an area or sector, rather than specific to the particular plan or program on which SEA is being carried out. It could therefore be used to support assessments for a range of plans or programs prepared by one or more authorities. There are potential opportunities for sharing information and collaborating when information is collected. To get the best value from the baseline information, it is desirable to keep it up to date rather than leave it being a snapshot of the situation at a particular time. See *Practical guidance on applying European Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment"*, Office of the Deputy Prime Minister, London, 2005, p. 26.

[40] Article 5.4 Directive SEA.

[41] See article 6.5 Directive SEA. See also article 7 (Transboundary consultations).

[42] *P. Scott/P. Marsden*, Development of SEA methodologies for plans and programmes in Ireland, Environmental Protection Agency, 2003.

[43] See article 9.1.

- It covers multiple tasks, such as: handling information (gathering of the best information available, information exchange, information processing); regarding the balancing choice of alternatives and monitoring; etc.

These functions can be carried out through formal procedural rules subject to a detailed regulation of a sequential nature, such as occurs in the case of the delivery of reports at a given moment and within a stipulated phase of the procedure, or through informal procedural rules, which are implemented in a more flexible and open manner, setting the ends and guarantees by law and giving the Administration a greater leeway regarding the choice of means (focus groups, public meetings, Intergovernmental fora, consensus conferences, advisory committees/steering groups, etc.)[44]. When the national legislator in a member State lacking a previous SEA tradition has attempted to implement the Directive via a direct transposition without appreciable additions or adaptations, the resulting administrative procedure has proven to be poorly formulated through the former methods.[45] While in many cases national legislation seems not to have deeply understood the significance of SEA procedure, recommendations of good practice have ordinarily been able to offer innovative proposals[46]. In some cases, the national implementation of the SEA Directive regarding the establishment of a new and more sophisticated procedure could, on a whole, be considered to be lacking, simply consisting in the application of old techniques, better befitting traditional procedures than modern procedures.

2. *About the collaborative essence of eGovernment*

a) eGovernment and Administrative Law

eGovernment will have many consequences for modern Administrative Law. The organisational model of classical Administration can be profoundly changed as a result of a collaborative network of public bodies. It has implications for some conventional perspectives, which should be adapted and evolved[47]. Both the Eu-

[44] There are many procedural stages, tasks and tools, which are not a formal requirement of the SEA Directive, but are recommended as good practice and guidance (e.g. scoping report, at the second procedural step). See *Scott/Marsden* (note 35), The purpose of the Scoping Report is to *inform* stakeholders about the key environmental issues, the key elements of the plans and programs as well as alternatives within the plans and programs. It also aims to generate comment from stakeholders on the scope and approach to the SEA and on the plans and programs. Therefore it should be made freely available alongside any parallel documents such as Issues Papers or Discussion Papers that describe the plans and programs.

[45] Regarding proposed methods and tools for consultation and participation in the SEA procedure, see e.g. *Scott/Marsden* (note 42), p. 31. Furthermore, it should be noted that there are many informal procedural tools in order to achieve the collaboration and cooperation (see *supra* text and note 44).

[46] See, e.g., *P. Scott/P. Marsden*, (note 42).

[47] From a closed administrative organization to an open network public Administration; from a strict duality norm-application system to new models; etc. From a more concrete point of view, it must be noted that the on-line provision of services to the citizens presupposes,

ropean Union and its member States hold that a citizen-focused public Administration should be built on a close co-operation between the different government authorities and levels of government.[48] The notion "eGovernment" or "electronic Public administration" encompasses much more than simply offering better services to citizens and enterprises by new electronic channels for information and service delivery[49]. It is also an important political aim to strengthen democratic legitimacy through enhanced transparency and citizen participation in the policy-making and decision-making processes.[50] One of the aims of eGovernment (eServices, eParticipation, eConsultation, etc.) is to change the way the Administration works to serve citizens better and become more efficient.[51] Notwithstanding technology itself is not per se the saviour of such values, technological development is generating new challenges and opportunities.[52]

The term "eGovernment" covers, in fact, a broad field with rather uncertain contours. Here we will only focus on the administrative procedure as a mechanism for collaboration and dialogue among the responsible public bodies within the State in order to handle single and multiple, integrated transactions and developing intergovernmental projects, electronic rulemaking participation, etc.[53]

b) eGovernment and administrative procedure

The legal framework of eGovernment is not limited to procedural rules alone. In fact, the aspects and dimensions as well as the different sectors and branches of

among other aspects, the reorganization of existing administrative procedures, as well as new ones.

[48] See reports on "EU: eGovernment in the European countries" (i.e. http://www.epractice.eu/document/3090, October 2007), e.g. *eGovernment in Sweden* (September 2007), p. 10, etc.

Although this article centres on Europe, it is not necessary to remember that this is a generalized outlook. See for example US E-Government Act of 2002, UN Global E-government Readiness Reports, etc.

[49] E.g.: according to the European Commission, "eGovernment" means the use of information and communication technologies (ICT) in public Administrations combined with organisational changes and new skills: the objective is to improve public services, democratic processes and public policies. See "The Role of eGovernment for Europe's future" COM (2003) 567 final.

[50] See, for example: eGovernment in Sweden (note 48).

[51] eGovernment makes government more focused on citizens and results. See, for example, the findings of US E-Government Act of 2002.

[52] E.g. to reach the EU policy aims for 2010 in regard to social inclusion and regional cohesion, research has to concentrate more on outward-facing aspects of eGovernment and the interface between government and citizens. The focus shall be on the development and delivery of appropriate content and services, and networked, coordinated and joined-up government. See: Bringing Together and Accelerating eGovernment Research in EU, FP6 Projects Reports, (prepared for the eGovernment and CIP Operations Unit DG Information Society and Media European Commission), March 2007, p. A-116.

[53] Collaboration may be not so necessary if eGovernment is reduced to less evolved states: simply providing information and online forms to the citizens, or accepting completed online forms. eGovernment services supporting everyday life (such as related to work, housing, education, culture, transport, etc.) are today the most popular and utilised (see report Bringing Together, note 52, p. A-8). However, much of this is about access of information.

the Law that must be considered and satisfactorily interlaced are manifold.[54] It is also obvious that not all questions related to the procedure necessarily refer to the aspects of coordination and collaboration. Nonetheless, it must be kept foremost in mind that collaboration between all of the Administrations represents a constituent and essential element in eGovernment. Secondly, it must be remembered that procedure, broadly understood, serves to give structure to many of the rules that derive from the diverse legal sectors aforementioned (data protection, right to access the information, e-procurement, etc.), and, more specifically, to the function of collaboration between Administrations (ways and occasions in which collaboration is to be carried out, its effects and consequences, etc.). Administrative procedure constitutes a core element of the "legal infrastructure" necessary to structure the relations of the several Administrations among themselves, and with the citizens and businesses as well. In the long run, a well-established collaborative administrative procedure is a basic legal tool.

eGovernment is presently "under construction". This means that the legal answers and solutions up until now have been, for the most part, of a sectoral character (e.g. data protection, e-procurement, e-signature, etc.), that pursue specific objectives (e.g. digitalization of some processes; digital inclusion; etc.), and are implemented in fixed stages or time periods[55]. In our opinion, procedure should serve to give form to many of the questions implicated[56], particularly to those concerning mutual tasks approached by various Administrations together[57]. All this finally shows not just the mere addition of new sections or provisions to

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[54] E.g. freedom of information and right to access Government information, data protection/privacy legislation, eCommunications legislation, re-use public sector information, eCommerce legislation, eProcurement legislation, eSignature, along with many other issues, such as public body organisation, digital inclusion, the use of proprietary software or open source solutions for Public Administrations, etc. See national reports on eGovernment in European countries at EU web. See also report *Bringing Together*, note 52.

[55] E.g. Spanish Act 11/2007, on access to the ePublic Services; at European level, see: i2010 – A European Information Society for growth and employment; etc.

[56] If we take administrative procedure in its broadest sense (note 1), and not merely as a sequence of acts organised according to a model of legal process, then the legislation for the procedure would suffice in order to explain the architecture and infrastructure of eGovernment (e.g., organisational, technical and semantic interoperability), to provide the software necessary (for example, the decision to adopt open source software and open standards, given its openness and cross-platform compatibility for the provision of eGovernment services), to define the methods to guarantee the rights relating to data access and how to guarantee free access to the information, and how to maintain the permanence of public data; it should contain the rights of the beneficiary of the eServices, etc.

Moreover, the procedure must take into account the regulatory powers in the field of software, both those concerning the actual design of the rights as well as the embodiment of the political values at stake. Because of this, the procedure must establish precise determinations, at least when objectives and guarantees are concerned.

[57] E.g. the manner in which the different Administrations participate and intervene, from a technical and material, as well as judicial standpoint.

existing legislation[58], but rather the implementation of an entirely new approach.[59]

It is a matter of fact that all Member States are updating their rules on administrative procedure. Many of them have foreseen requirements of the digital administrative procedures between Administrations and citizens. Frequently, the first national laws concerning electronic administrative procedure are restricted to the aperture of new channels of communication with the Administration, that is, to merely incorporate new technologies in administrative relations and resolve any problems of adaptation arising naturally in the new situation (digital signatures, electronic notification, personal data protection, etc). Still missing is a proper and innovative system of procedure and, as a consequence, both a modern model of Administration (new systems of work in common, etc.) and of governance (new regulatory methods, and interagency partnership, public-private collaboration, etc.).

Public Administrations will have to increase working together and co-operating more with each other. They will need e.g. to share and distribute information between themselves in a new way. The traditional structure of national administrative procedure does not encourage sharing and exchanging information between authorities, and participating in the administrative procedures carried out by other public bodies. If we take a look at the basic public services that the European Commission has defined as reference services in order to gauge the evolution of eGovernment in Member States, adopted by the Council of the EU in March 2001[60], it is easy to understand the need for intercommunication and collaboration between different administrative bodies.[61] The collaboration for transactional cross-agency services seems to be still far from a comprehensive solution.

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[58] The administrative procedure legislation should integrate many elements of these new phenomena in a systematic and coherent manner.

[59] *Javier Barnes*, Sobre el procedimiento administrativo: evolución y perspectivas (note 1), p. 267, 333.

[60] For citizens: Income Tax Declaration, Job Searches by labour Offices, Social Security Contributions, Personal Documents, Car Registration, Application for Building Permission, Declaration to the Police, Public Libraries, Certificates (birth, marriage) Request and Delivery, Enrolment in Higher Education, Announcement of moving (change of address), Health-related services (e.g. appointments for hospitals).

For businesses: Social security contributions for employees, Corporation Tax: declaration, notification, VAT: declaration, notification, Registration of a new company, Submission of data to statistical offices, Customs declaration, Environment-related permits, Public procurement.

[61] For example, in Spain, most of these twenty services, twelve for citizens and eight for businesses, have some component requiring the intervention of central Administration, autonomous government body and/or local Government. In any case, these services are only some of many examples present in the incipient phenomenon and the list needs to be extended to other activities and to more complex and interrelated administrative services.

c) Scope of the collaboration

eGovernment is a long-term project, which must be planned and developed in a co-ordinated and agreed manner.[62] A more co-ordinated effort is needed to establish common rules, main infrastructure components[63], and knowledge transfer systems between all administrative levels. These basic functions are necessary for the joined-up services based on networked public bodies, which is the first goal for a citizen-focused and efficient Administration[64]. Cooperation is clearly necessary at all levels: political[65], legal[66], technical[67], economical,[68] etc.[69]

[62] Bringing Together (note 52), A-24.

[63] E.g., portal, eAuthentication infrastructure, network, e-procurement infrastructure, eInvocing, Knowledge management infrastructure, etc. Joint eGovernment infrastructures have to be established and developed in order to facilitate the exchange of data and to avoid parallel developments.

[64] I.e., the development of integrated eServices for citizens and businesses in order to make available online the most important cross-level administrative services (e.g. unemployment and social and welfare assistance). See eGovernment in Sweden (note 40), pp. 11–12. It also means, for example, that the legislator must decide the basic guidelines for organizational development (new net-worked administrative structures); coordination of the public procurement in the area of information and communication technology; training and education; creating knowledge about best practices; the creation of an internal strategic coordination function in Government offices for a policy for an IT society from a holistic perspective; the creation of coordination channel between public bodies at national level and business sector with the support of public eServices, etc. (ibid).

[65] The design of an administrative architecture of a cooperative nature is a necessity. To this end, it must take into account very diverse questions relating to collaboration and joint-effort tasks. For example, how to integrate local government with centralised eGovernment processes and services; whether a local government acts as a Front Office for delivering eGovernment services regardless of the administrations actually involved (Back-Office); the creation of new organizations (e.g. a centralized Data Handling Service); certain inter- and intra-enterprise organizational aspects; how to respect security, privacy protection and autonomy of each institution involved in the process; etc. (see, e.g., Bringing Together, note 52, pp. 23–24).

[66] See e.g. below d).

[67] Technical Interoperability covers the technical issues of linking computer systems and services. E.g. interfacing heterogeneous existing IT systems; dealing with information as a strategic resource, i.e., information modeling. See, for example: Communication from the Commission to the Council and the European Parliament – Interoperability for Pan-European eGovernment Services, COM/2006/0045 final.

[68] The scope of the eGovernment program with the large number of public authorities involved, the large number of eGovernment services to be expanded and, last but by no means least, the scope of investment required to implement the goals calls for efficient organisation and cost-effective implementation of the measures. The cost-effective implementation of the eGovernment program comprises the key requirements for closer cooperation between all public authorities, provision and use of joint solutions for similar tasks and safeguarding existing investments made by the Government in eGovernment services. See e.g. *Focused on the Future: Innovations for Administration*, The Government's Programme, Federal Ministry of the Interior, Germany, 1st Edition (November 2006) (see e.g. at www.bmi.bund.de/.../Pogramm_Zukunftsorientierte_Verwaltung_en.pdf).

[69] In different extra-legal terms, it can be said that the prerequisites for an *e*-Government enactment strategy are the achievement of a technological interoperability of platforms and a deeper cooperation at organizational level. See *M. Contenti, M. Mecella, A. Termini, R. Baldo-*

Therefore, changes, such as the replacement of the manual procedure with an electronic one, should integrate all available levels (legal framework, ICTs, processes, re-organisation, human capital, etc.) within a context of strong coordination at central, regional and local levels. In order to achieve the eGovernment infrastructure it is necessary to increase collaboration and interoperability among information systems of agencies and Public Administrations. Principles must be set up to ensure the interoperability and scalability of the various IT systems and the reusability of their services and components.[70] Modern public Administration has to be built upon sophisticated ICT infrastructure and streamlined eGovernment processes. However, eGovernment is not only a technological issue, but more importantly, a conceptual one[71]. The most basic problem is not how those procedural rules have to be modified in order to use the computer and the Internet to their best advantage,[72] but a previous question of political design[73]: what type of Administration do we want to set up? As a consequence, what model of electronic procedure should we choose to follow, and what guidelines for collaboration amongst the various public Administrations should we establish?[74] As noted before, it is not a question of translating or simply transferring the paper-based Administration's pattern to the ethereal world of bits and bytes.[75] It must be decided beforehand what shape the technical architecture is to take. A new

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ni, A Distributed Architecture for Supporting *e*-Government Cooperative Processes, 2005, pp. 181–192, 2005, p. 182.

[70] See, for example, *KBSt, Bundesministerium des Innern*, IT-Architekturkonzept für die Bundesverwaltung, 24 July 2007 (http://www.epractice.eu/document/3727).

[71] See *Javier Barnes*, Sobre el Derecho Administrativo de la Informacion, Revista Catalana de Dret Public, núm. 35, 2007, p. 121; also *Javier Barnes*, Sobre el procedimiento administrativo: evolución y perspectivas (note 1), p. 302.

[72] E.g. how should traditional rules to solicit public comment and to take that comment into consideration before promulgating rules of general applicability, be adapted to the new media of electronic communication?; how to redesign the administrative rulemaking as "e-rulemaking"?; etc.

[73] E.g., the integration of information technologies in general, and the Internet in particular, into the rulemaking process could take myriad forms. Even among technologies designed to enhance participation by any and all interested citizens, there are many possible variations (see e.g. *Stuart Minor Benjamin*, Evaluating e-rulemaking: Public Participation and Political Institutions, 55 Duke L.J. 893, 2006, p. 898). This implies necessarily a previous political debate.

Another example: If we want to ensure a more deliberative and democratic process and make deliberative dialogues between citizens and public bodies work and increase, it will require more than finding the right tool and the right method of discussion, it also requires connecting the deliberative process to real world decision-making.

This is first a question of process and second of technology.

Citizen participation processes should be reviewed in multiple contexts of political life, including rulemaking, government enforcement functions, and where authorities provide information, planning and review procedures. See *Beth Simone Noveck*, Designing Deliberative Democracy in Cyberspace: the Role of the Cyber-lawyer, 9 B.U.J. SCI. & TECH.L. 1, 2003, p. 89.

[74] See e.g. *Javier Barnes*, Sobre el procedimiento administrativo: evolución y perspectivas (note 1), pp. 302–310.

[75] Ibid. See also *Barnes* (note 71), p. 149.

concept of networked Public Administration is also needed. A policy of "rethinking things before automating them" must be implemented. The influence of the principles of the rule of law, democracy and efficiency must be taken into account when establishing new procedures to be used in eGovernment.

d) The perspective of the principles of rule of law, democracy and efficiency

The multi-organizational model of cooperation needs rules on administrative procedure to develop a framework for new working processes, both inside and outside the organization concerned; that is, not only interdepartmental and inter-administrative or interagency partnership, but also cooperation with the private sector.

eGovernment demands a structural reform of the work process. The approval of new procedures within the framework of eGovernment must come about along the coordinates made up by the mentioned principles of rule of law, democracy and efficiency.

From the viewpoint of the rule of law, some needs and requirements to be met in new administrative procedures among Administrations are:

- Identification of responsibilities and duties of every involved Administration within every administrative procedure (for the purposes of responsibility sharing, liability, accountability, political control, judicial review, etc.);[76]
- Making competences for administrative procedures transparent, regardless of the administrative level involved (by means of portals, networks, etc.);
- Common rules and standards of procedure (infringement, liability, claims, equal treatment of the citizens, etc.);
- Interoperable, inclusive, and transparent ICT solutions; initiatives relating to collaborative management and development at central, regional and local level;
- Achieving through procedural rules an appropriate balance between individual privacy and government needs to gather information, to avoid the risk that the government itself will abuse its data collection powers in the exercise of e-surveillance;
- Recognizing the highly networked nature of the current computing environment and providing effective government-wide management and oversight of the related information security risks, including coordination of information security efforts throughout the civilian, national security, and law enforcement communities;
- Equilibrium between the automation of existing manual procedures and the recognition of a margin to be allowed for the individualization of the circumstances in each case (a serialized or automatic response can be unjust in concrete cases);
- Etc.

eGovernment allows the use of administrative procedure as a tool to strengthen the democratic legitimacy of the regulatory State[77]. From the standpoint of the

[76] Indeed, an important requirement is the need, for each of the public Administration involved, to maintain, not only the autonomy, but also a well defined authority and responsibility on those steps and sub-processes each public agency is entitled for.

[77] In the field of the administrative governance, some of the central challenges for national and European Administrative Law now involve controlling heterarchic structures. "These heterarchic structures arise when Administrations are required to merge the input from adminis-

principle of democracy, the law must make use of new technologies to set up procedures that are more transparent (available information, monitoring, tracking, etc.) and channels of citizen participation that are more intense, fluid, and effective.

According to the principle of efficiency, other requirements can be highlighted. For example:

- Simplification of administrative procedures (quicker and simpler procedures) in order to lighten the weight borne by citizens and business; this requires a global revision of the public Administration's work processes, based on a cooperative model within which each internal service delivered by each sub-administration is clearly defined;
- Effective procedures for reaching consensus rapidly;
- Compatibility of procedures;
- Reduction of the costs of administrative procedure;
- Identification of respective competences and activities for working collaboratively and avoiding overlaps;
- Reciprocal access to administrative information among Administrations, based on shared rules and following standard modalities;
- Surveillance of the quality of the internal administrative processes aimed at supplying services;
- Design of end-to-end electronic procedures which link up all the Administrative levels involved.
- Etc.

Collaboration begins, therefore, at the legislative level in the statutes that must be enacted in order to establish the necessary rules of acceptable procedures.

e) eGovernment procedures: some features

We return to our starting considerations to emphasize two points. On the one hand, eGovernment makes it clear, as in so many other cases[78], that networking begins at a domestic level, as a part of a whole.[79] On the other, in as much as an instrument of the new methods of regulation and governance are concerned,

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trative agencies and private sector as well as scientific expertise from multiple levels into one single administrative procedure." See *H. C. H. Hofmann, H. Türk* (note 7) p. 580/581.

[78] Consider, for example, the administrative procedures for scrutinizing regulatory policy; and especially the EU policy on better regulation, regulatory management, regulatory impact assessments, policy planning system, among many other variables. See the European Commission Staff Working Paper on Impact Assessment and ex ante evaluation, COM (2005)119 final, 2005. See also "Regulatory Management Capacities of Member States of the European Union that Joined the Union on 1 may 2004", Sigma Paper no. 42, pp. 26–29.

Effective structure to coordinate policy planning and procedures to resolve conflicts between priorities and to identify problems, to ensure the consultation and cooperation, etc. are needed.

[79] Naturally, if it is intended that eGovernment services are to be delivered at all levels of government, the network must extend along all superior levels, both European and global.

"Interoperability must be ensured between local, regional, national and European administrations to provide seamless service." See Communication from the Commission to the Council and the European Parliament – Interoperability for Pan-European eGovernment Services, COM/2006/0045 final, 1.2. Cooperation is required to develop pan-European services; it de-

eGovernment demands the design of appropriate cooperative procedures that are adapted to the new needs.[80]

eGovernment holds an enormous potential to transform the face of Administration, given that it is capable of changing its structure and organization, as well as the responsibilities that are to be taken on and the relations with the other public authorities and with society.

The underlying concept of eGovernment and the user-centered online public services approach permits collaboration to be exponentially increasing in both intensity and extension to limits unknown until now. Keep in mind that cooperation, in any of its aspects, can be:

- Horizontal and vertical at once;
- "ad intra", within the same public body, and "ad extra" (interagency partnership)[81];
- national and supranational;
- systematic, comprehensive and permanent; or specific and sporadic;
- oriented towards the citizen, and the other Administrations[82];
- of both sectoral and transversal character[83];
- geared towards the provision of government service[84], and to strengthen participation and representation of interests.[85]
- Etc.

eGovernment is therefore not limited to a particular type of administrative activity or a determined sector, but, on the contrary, extends throughout the entire existence and all the actions undertaken by the Administration. eGovernment allows horizontal cooperation, multilevel cooperation and cross-sectional cooperation. The reticular architecture that must be formed in conjunction by the multiple Administrations via eGovernment is not ephemeral. This governmental

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pends partly on the interoperability of information and communication systems used at all levels of government. Ibid. 1.1.

[80] Collaboration thus becomes a key element of the new regulatory strategy. See "supra" I.

[81] E.g. to facilitate the announcement of moving by offering an online interface that will enable the citizen to provide only once the needed information and the system will propagate this information to all concerned actors (see the Swiss "Announcement of Moving" service A-40).

[82] eGovernment makes many government processes available to other administrations as eGovernment services, e.g., access to existing legacy information systems and databases from multiple administrations. See report on Impact of eGovernment on Territorial Government Services, e.g. at http://www.terregov.eupm.net/my_spip/index.php.

[83] The delivery of cross-border public sector services constitutes a more advanced stage of eGovernment.

[84] E.g. articles 6, 7.3, 7.4, 8, and 34.1 of the Directive 2006/123 /EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[85] The providing of government e-services is not the only objective of eGovernment, UE insistence in this area notwithstanding, although as a consequence of its presently limited competences in the material this belief is easily formed. The competences of the EU/EC are based on two fundamental freedoms (freedom of establishment and freedom to provide services) enshrined in the EC Treaty.

Apart from this area, eGovernment can serve to reinforce the citizen's participation in administrative procedures on government regulation, town planning, environmental issues, and, in general, in the procedures set up for policy-making.

architecture has relevant procedural aspects, not only organizational, technical and operational aspects.

Joint effort through eGovernment makes it obligatory to redefine or remodel numerous paper-based administrative procedures, with the aim to use new technologies more advantageously, to ease the collaboration between the Administrations involved in each case, and to meet the objectives each procedure requires.[86] Simplifying administrative procedures for the citizens means much more sophisticated and collaborative administrative procedures.

The participation of various Administrations can be carried out through staggered and formal procedures. Nevertheless, this collaboration does not necessarily entail the transformation of the procedure into a "composite" administrative procedure with formal procedural stages and input during specific phases from several different Administrations[87]. For example, cooperation, within the framework of eGovernment, can consist of the simple rendering of information services to another Administration[88] or the usage of a common knowledge management infrastructure.[89] "Co-operative procedures" does not necessarily mean "composite procedures", nor does it imply establishing standardized and formalized procedures. They may have a non-linear structure.

In summary, it can be said that administrative procedure, broadly understood,[90] and within the framework of eGovernment, comprises a particularly apt instrument to set up the legal dimensions of the new work processes[91]; to rationalize the system of both intra- and inter-administrative relations and communications[92], as well as those between the Administration and the citizens (information exchange system, rights and duties, sharing of responsibilities, etc.); and

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[86] E.g. modeling the different phases of the public eProcurement lifecycle, aiming to create a better open competition. See, for example, *European Commission*, State of the Art Report, volume I, Cases Studies on European Electronic Pubic Procurement Projects, July 2004, p. 26. In this sector, procedural eProcurement practises should strength equal treatment, transparency, effectiveness, interoperability, security, general availability, confidentiality (ibid. p. 47).

[87] Concerning the theme on a European level, see *Sabino Cassese*, (note 20).

[88] Collaboration can be limited to providing information to other Administrations, as a government eService, using agreed procedures for exchanging information, without taking part in the final outcome or in the decision making process at all.

Each cooperating public body can act both as provider of its own services and as requestor for services available on other organizations.

[89] The ICT allows the simultaneous participation of different Administrations and also of the public in the information gathering process required in each case. In this case, the rigid order of procedure, common in judicial processes, is not followed.

[90] See note 1.

[91] The delivery of eGovernment services "requires the availability of efficient, effective and interoperable information and communication systems between public administrations as well as interoperable administrative front and back office processes in order to exchange in a secure manner, understand and process public sector information". See, in relation to the Pan-European eGovernment services, Decision 2004/387/EC of the European Parliament and of the Council, of 21 April 2004 on interoperable delivery of pan-European eGovernment services to public administrations, businesses and citizens (IDABC), 14.

[92] For example, the administrative procedure should be able to provide support in the man-

finally, to establish principles of collaboration between public authorities at all levels.

IV. Final considerations

The examples used (SEA procedure and eGovernment) suggest that domestic administrative law is prone to be strongly transformed through European influences on the administrative procedure's functions, scope and structure. The functions of administrative procedure in the European space and even in the international sphere – efficiency, transparency, usage as a tool of political guidance, etc. – are strongly reflected in the internal features of the incipient domestic procedures.

"Networked Administration" and "collaboration among Administrations" (through administrative procedures) are not terms restricted to the European scenario. The EC/EU itself extends the phenomenon to the national level, directly (e.g. SEA procedures)[93], implicitly (e.g. simplification of procedures regarding services in the internal market)[94], or via other means of regulation or influence (e.g. eGovernment procedures)[95], all these beyond the scope of the indirect Administration of Communitarian Law. Having said all this, the cooperation necessary at a national level far exceeds the scope of cooperation the EC/EU can demand or promote by virtue of the limited competencies it has been endowed with.[96] Collaboration is an obligatory response to globalisation and to new methods of regulation.

The characteristic European administrative model of *separation* of the different Administrations on an organizational level, and *cooperation* amongst all of them on a functional level[97] can also be reproduced nationally (local government, regional and national). As a consequence of the collaboration propelled by each State, this happens in accordance to the respective constitutional structures. The public bodies become more dependent on each other by setting common goals for their partnerships to achieve. Administrative procedural rules must reflect the several aspects of *functional* cooperation.

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agement of inconsistencies in the legal and administrative semantics that can occur in the cross border exchange of data, terms and concepts.

[93] "Supra" at III.1.

[94] Even though the Directive 2006/123/EC on services does not call into question the allocation of the competences, at local or regional level (e.g. article 10.7), it implicitly requires a strong internal coordination and cooperation at all levels between the Administrations involved (see e.g. articles 6, 7.3, 7.4, 8, 34.1, etc.).

[95] "Supra" at III.2.

[96] Ibid.

[97] See *Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht (note 1), p. 381–384.

Each form of cooperation generates specific problems. In fact, it provides an interface or functional connection between the different areas or spaces in which the different actors play out their roles.

The requirement for the collaboration among local, regional and general public bodies in the domestic administrative procedure is not always sufficiently or adequately understood and developed by the Member States[98]. On the one hand, the cooperation techniques ordinarily contained in the general rules on national administrative procedure are outdated and meagre. On the other, the national legislator shows an excessive dependence on EC/EU initiatives and, in consequence, a scarce autonomy to establish new cooperative procedures in other areas. This article argues for a paradigmatic shift away from the traditional (sporadic and non systematic) cooperation among Administrations by written quasi-judicial procedures towards new collaborative practises, new formal and informal procedural rules, understood as flexible and fluent communication systems, aimed to promote less hierarchical, more sustained forms of participation and cooperation among all public bodies involved at national level. The use of technology can improve and make this model more effective.

The traditional core of administrative law has focused on securing the rule of law and protecting liberty by ensuring that public bodies follow fair and impartial decision-making procedures, act within the bounds of the statutory authority delegated by the legislature, and respect the rights of the individual. Here the function of administrative law is primarily negative: to prevent unlawful or arbitrary administrative exercise of power.[99]

In recent decades, administrative law has also assumed affirmative tasks. Through new procedural requirements, among other approaches, it ensures that Administrations exercise their policymaking discretion in a manner that is reasoned and responsive to the wide range of social and economic interests affected by their decisions.[100] It is to develop an administrative law for these new scenarios that will serve both the negative (power-checking) and affirmative (power-directing) functions of administrative law.[101]

The collaboration principle among Administrations belongs to the positive or affirmative dimension of administrative procedure: its primary objective consists

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[98] In some cases, like in Spain, the collaboration's approach among Public Administrations, generally speaking, is surprisingly too narrow, as a result of the cumulative effects of the decentralization process of the State started in 1978 (Constitution of 1978, Statutes of Autonomy, laws, regulations and practice) that is still in some ways focused on the "isolated" or individual action of the Public Administration at local and regional level; and the misunderstanding of the Constitutional Case-Law on the field (cooperation and coordination doctrine), frequently interpreted out of context, namely the first 1978 pre-constitutional years in which they were produced. See also i.e. text and note 44.

[99] See *Richard B. Stewart* (note 2) p. 439.

[100] Ibid. See also *J. Barnes*, Sobre el procedimiento administrativo: evolución y perspectivas (note 1), p. 267.

[101] *Richard B. Stewart*, (note 2) p. 457. Also *E. Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee (note 1) p. 16–26.

in the guarantee of the efficiency and quality of the final product (decision, regulation, providing services, etc.), a better representation, participation and cooperation of society as a whole. The affirmative side of administrative law in structuring discretionary lawmaking will increasingly rely on structures that are not centered on courts and thus will conserve scarce judicial resources.[102]

In general term it can be said, for present purposes, that numerous national procedural laws are "out of date", because they fail to recognize the new modes and methods of governance that characterize the administrative state, such as priority setting, resource allocation, research, planning, targeting, guidance, strategic enforcement, etc.[103] They fail to craft requirements that are appropriate to these activities, either leaving them essentially unregulated or subjecting them to inappropriate procedural rigidities[104]. In this context, the new features of the modern administrative cooperation, beginning at the domestic level, must establish new national statutes of administrative procedure. Among other tasks, these statutes should address the administrative process itself, the distinctive mode of governmental action that arises from the new ways of regulation.

To understand the range and complexity of interdependent relationships to which administrative law must respond is the first step towards developing a new collaborative administrative procedure among public bodies.

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[102] *Richard B. Stewart* (note 2) p. 454.

[103] See *E. Rubin*, It's Time to Make the Administrative Procedure Act Administrative, Public Legal and Legal Theory Research Paper Series, Research Paper 30, 2003 (Conell Law Review, vol. 89, 2002), p. 2, regarding the US APA. This consideration may be extended to many other national statutes. See on this issue from a European continental perspective, *W. Hoffmann-Riem / E. Schmidt-Aßmann*, Verwaltungsverfahren und Verwaltungsverfahrensgesetz, 2002; *Javier Barnes*, Sobre el procedimiento administrativo: evolución y perspectivas (note 1), p. 333–341; *Javier Barnes*, The Reform of Administrative Procedure (note 1). See also *supra* text and note 44.

[104] See *E. Rubin*, (note 103) p. 2. This consideration may be extended to many other national statutes.