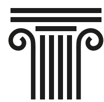
LUISS 

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Chapter I
Introduction

1. The EU civil service law as a neglected topic

Civil service law is seen as the ugly duckling of EU and comparative administrative law. In their introductory chapter to *Comparative Administrative Law*, Ackerman and Lindseth explicitly acknowledge that:

> «[a]dministrative law exists at the interface between the state and society – between civil servants and state institutions, on the one hand, and citizens, business firms, organized groups, and non-citizens, on the other. Civil service law and bureaucratic organization charts and rules provide an essential background, but our emphasis is on the law's fundamental role in framing the way individuals and organizations test and challenge the legitimacy of the modern state outside of the electoral process. There are two broad tasks – protecting individuals against an overreaching state and providing external checks that enhance the democratic accountability and competence of the administration»[1].

In his contribution to *The Oxford Handbook of Comparative Administrative Law*, Ruffert defines the law of administrative organization as the «poor cousin of comparative administrative law». Nonetheless, his main concerns are the legitimation of national bureaucracies and their independence from political influences. In other words, he does not conduct an all-encompassing analysis of the fundamental features of civil service systems around the world[2].

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[1] Ackerman and Lindseth, "Comparative administrative law: an introduction", in Ackerman and Lindseth (Eds.) *Comparative Administrative Law* (Edward Elgar Publishing, 2010), p. 1.

[2] Ruffert, "National Executives and Bureaucracies", in Can, Hofmann, Ip and Lindseth (Eds.) *The Oxford Handbook of Comparative Administrative Law* (OUP, 2021), p. 504–525.

In their recent overview of the trends in place within the field of comparative administrative law, Eliantonio and Marique outline a research agenda for this subject matter, which at first sight does not explicitly involve civil service issues though. By applying a «challenge-led» methodology, indeed, the two scholars argue that a fruitful research agenda

> «[…] would start with the identification of the most pressing challenges for administrative systems in Europe, such as threats to democratic pluralism and low social/political compromise, resistance to facing the hard social, economic, political and environmental reality and its conflicting truths, such as in the case of climate change, the ageing population, maintaining a sustainable level of healthy workers, the growing inequality among a population with very diverse needs and means, growing social injustice, threats to physical security and social wellbeing, digitalization and AI used in the administrative realm and the need for strengthening administrative coordination across countries and regions and across policy areas (e.g., taxation, social security, health care)»[3].

Looking at the EU law, the scenario does not change a lot. In his seminal *EU Administrative Law*, Craig does not assign any chapter to the study of the rules affecting the civil service of the European Union[4]. Indeed, the attention is mostly paid to the administrative activity and the review by EU courts. EU administrative organisation remains on the background.

All in all, although some works are about to being published[5], it seems that the civil service law, especially when it comes to the EU legal system, is still a neglected topic among scholars. This problem specifically affects legal scholarship, whereas among sociologists and political scientists a comparative analysis of «bureaucracies» has been effectively carried out[6].

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[3] Eliantonio and Marique, "Comparative administrative law in Europe: State-of-the-art overview and research agenda" (2023) in Maastricht Journal of European and Comparative Law, p. 702-703.

[4] Craig, *EU Administrative Law* 3rd ed. (OUP, 2019), *passim*.

[5] Sommermann, Fraenkel-Haeberle and Krzywoń (Eds.), *The Civil Service in Europe: A Research Companion* (Routledge, 2024 forthcoming).

[6] A recurrent topic is the «socialization» of national officials seconded to EU institutions; see Scheinman, "Some Preliminary Notes on Bureaucratic Relationships in the European Economic Community", (1966)

The aptitude to overlooking the issues surrounding the civil service system of the EU is the outcome of an ideological approach rather than a scientific reasoning. The agenda in administrative law (either comparative or European) roughly follows the footprints of the history of national legal scholarship that was dominant back in the late 19th century and the early 20th century. Back in the days, the main concern of administrative law as a branch of public law was to legitimizing the power of the Executives *vis-à-vis* the individuals. The main topics of administrative law were the scope and the effects of administrative decisions, the use of administrative power and the grounds of review by administrative courts. Administrative law, coupled with constitutional law, was expected to protect civil rights, so to say the main historical revindication of liberals. It has been only with the rise of social rights and the growing intervention of the States in the economy, in order to provide public services, that the interest for administrative organization flourished[7].

Similarly, nowadays the attention of comparative and EU administrative lawyers is mainly paid to the administrative activity, so to say to the plurality of legal relationships that occur between the public bodies and the individuals. Despite being historically understandable, this trend is scientifically questionable, because it completely overlooks a crucial part of the administrative realm. This work aims at contributing to fill this gap, drawing upon the past and current state-of-art.

International Organization, p. 750-773; see also Smith, "The European Economic Community and National Civil Servants of the Member States. A Comment", (1973) International Organization, p. 563-568. More generally, Bekke, Perry and Toonen, *Civil service systems in comparative perspective*, (Indiana University Press, 1996).

[7] Franchini, "L'organizzazione", in Cassese (Ed.) *Trattato di diritto amministrativo* I (Giuffrè, 2003) p. 254, pointing out that «concentrandosi l'attenzione sui servizi erogati dalla pubblica amministrazione piuttosto che sul rapporto autorità-libertà, ci si è accorti che anche le norme organizzative possono incidere sulle situazioni soggettive: esse, infatti, determinano la distribuzione di poteri tra gli uffici e quindi, condizionano la posizione giuridica che questi vengono ad avere tra loro e nei rapporti con i cittadini».

2. *State-of-art and research question*

Actually, the interest for EU civil service is not a novelty among lawyers. It is possible in fact to identify two strands in legal scholarship.

On the one hand, such a topic has been studied by international lawyers during the first decades after the establishment of the European Communities. This strand read the birth of this new civil service against the broader legal branch of the law of international organizations. In this regard, comparative analysis was aimed at shedding light on the similarities and differences between the (former) EEC and the other international organizations, such as the United Nations[8]. These studies have been progressively exhausted, partially because they achieved their objectives and partially because the EU became a *sui generis* organization on the international stage. Nonetheless, lately it is still possible to run across some works that analyse the EU civil service in light of the more general international civil service model[9].

On the other hand, also EU lawyers have shown some interest for this topic later on. In this regard, such contributions are either part of broader researches on the administrative law system as a whole[10] or are specifically aimed at providing an all-encompassing analysis of the rules applicable to the officials and the other servants working at the EU institutions and other bodies[11]. In both cases, this strand of studies

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[8] For example, Bowett, "Tenure, Fixed Term, Secondment from Governments: The United Nations Civil Service and the European Civil Service Compared", (1982) in New York University Journal of International Law and Politics, p. 799-806; Schwob, *Les organes intégrés de caractère bureaucratique dans les organisations internationales*, (Bruylant, 1987), p. 358.

[9] Ullrich, *The Law of the International Civil Service Institutional Law and Practice in International Organisations*, (Duncker & Humboldt, 2018).

[10] For French scholarship, see Blumann and Dubouis, *Droit institutionnel de l'Union européenne*, 6th ed. (LexisNexis, 2016), p. 345-346; Oberdorff, "Fonction publique de l'Union européenne" in Auby and Dutheil de La Rochère (Eds.) *Traité de droit administratif européen* (Bruylant, 2022), p. 229-246 ; in Italian, see Franchini, "La funzione pubblica comunitaria", in Chiti and Greco (Eds.) *Trattato di diritto amministrativo europeo*, (Giuffrè, 2007), p. 467-496; Id., "L'organizzazione amministrativa dell'Unione europea", in Chiti (Ed.) *Diritto amministrativo europeo*, (Giuffrè, 2018), p. 273.

[11] Rogalla, *Dienstrecht der Europäischen Gemeinschaften*, (Carl Heymanns Verlag, 1981); Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017); Pilorge-Vrancken, *Le droit de la fonction publique de l'Union européenne*, (Bruylant, 2017).

only delves into the civil service at supranational level, so to say on the officials, servants and other workers hired by the institutions and the other bodies of the Union. Moreover, may the comparison is carried out, it is mainly focused on the similarities and the differences between the EU civil service and the Member States' ones (in particular the French and the German)[12].

Hence, there are two shortcomings in the literature just reviewed, regarding the scope of the analysis and the scope of the comparison conducted. As regards the first point, from the legal scholarship it stands out that the civil service law is addressed either as a problem of EU law or national law, rather than an issue that could be tackled in an integrated manner. As regards the second point, it seems that the comparison conducted so far is either sporadic or only little fruitful, because it usually takes as *tertium comparationis* legal systems that are unlikely to provide any better understanding of the nature and the functioning of the European civil service.

Therefore, this research is aimed at coping with these two problems, both by extending the scope of the analysis and by refining the methodology of the comparison. The subject of the analysis is thus not simply the civil service of the European Union (hereafter also «EU civil service»), but rather the European civil service, as it results from the integration of the former with the bureaucracies of the Member States. Hence, the research is aimed at better outlining and defining the legal nature of the European civil service, seeking to understand whether it is still necessary to keep the EU civil service distinct from the one of Member States or it is rather possible to frame them within an integrated system which somehow resembles a federal model. To get an answer to these questions, it is necessary to give some accounts on the scope of the following analysis and the legal systems that have to be considered to conduct a fruitful comparison.

3. The European civil service at supranational level

As anticipated, the existing researches in this field usually have a narrow scope: they focus on the civil service of the EU institutions and other bodies without considering the national level; moreover, they only take into account its officials and other servants in a narrow sense, leaving aside other forms of jobs that have some

[12] For example, Coombes, *Towards a European Civil Service*, (Chatham House, 1968).

relevance within the EU administrative framework. By contrast, this research aims at outlining the concept of «European civil service», which results from the progressive integration of the EU and the national civil service systems.

To this end, it is first necessary to identify the boundaries of the EU civil service, so to say the group of workers employed at supranational level. Scrolling through the website of the EU, it stands out that the EU institutions employ roughly 60.000 individuals[13]. This staff is in charge of several tasks under EU law, the outcomes of which are enjoyed by more than 448 million citizens.

At first sight, such an amount of personnel seems to be much fewer than that employed in other states or international organisations[14]. For instance, in January 2024 the U.S. Federal Government handled roughly 2,9 millions of employees, covering a population of more than 330 millions of citizens[15]. Similarly, within the Federal Republic of Germany work more than 156.000 servants at federal level, against roughly 84 millions of people[16].

On the other side, looking at the international landscape, the United Nations' network employs several thousands of workers all around the world. In 2022, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), one of its most known programmes, had more than 30.000 servants «on the ground», providing services for 5,9 millions of Palestine refugees[17].

It goes without saying that such a difference in statistics reflects different institutional settings, administrative choices and divisions of competences among the several levels of government in each legal system. It would thus be incorrect to reach any conclusion on these premises. However, this short array of numbers raises the

[13] See <https://european-union.europa.eu/live-work-study/jobs-traineeships-eu-institutions_en> (last visited 1 May 2024).

[14] Oberdorff, "Fonction publique de l'Union européenne" in Auby and Dutheil de La Rochère (Eds.) *Traité de droit administratif européen* (Bruylant, 2022), p. 230.

[15] See <https://fred.stlouisfed.org/series/CES9091000001> (last visited 1 May 2024).

[16] See <https://www.destatis.de/EN/Themes/Government/Public-Service/Tables/public-service-personnel-type-employment-contract.html> (last visited 1 May 2024)

[17] See <https://www.un.org/unispal/document/unrwa-in-action-statistics-on-unrwa-response-as-of-1-january-2022-publication/> last visited 1 May 2024).

question of how to trace the boundaries of the EU civil service and how its servants have to be counted.

In this respect, scholars have been divided into two approaches to the problem, a formalistic and a functionalistic one. Following the former, an employee belongs to the EU civil service when it falls within the scope of application either of the Staff Regulations (SRs) or the Conditions of Employment of Other Servants (CEOS)[18]. By this, it is easier to identify a precise amount of workers employed by the EU as a whole, because every EU "agent" (whatsoever status they have, either officials or other servants) is paid with a fixed amount of funds reserved in the EU annual budget[19]. This happens in two ways: on the one hand, because EU officials cover posts expressly provided by the budgets of each EU body; on the other hand, because the costs to hire and manage the other servants are borne by the funds specifically addressed to the missions whereby the servants have to be employed.

To put it shortly, then, the above mentioned 60 thousands employees are the result of this first approach. However, despite being an easy way to operatively circumscribe the area of the EU civil service, and for this reason being commonly used to deal with this subject matter, it seems at the same time that such a narrow approach is unsatisfactory. By doing so, in particular, some pivotal actors are completely overlooked, such as national experts and diplomats working as State representatives (but not solely) in the policy making of the EU.

This suggests to adopt another method, that is the functionalistic one. According to this, a worker has to be considered part of the EU civil service regardless the fulfilment of the requirements set out above (SRs, CEOS, budget), but rather because it concretely works for EU bodies (for whichever reason) and, thus, it performs EU tasks[20]. Thanks to this approach it is thus possible to encompass not only officials and other servants, but

[18] Regulation (EEC, Euratom, ECSC) No. 259/68 of the Council of 29 February 1968.

[19] Molina del Pozo and Molina del Pozo Martín, "EU Officer" in Bartolini, Cippitani and Colcelli (Eds.) *Dictionary of Statuses within EU Law* (Springer, 2019), p. 230;

[20] Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, (OUP, 2009), p. 106-107; Tofan, "European civil service. The principles of the legal framework in force", (2013) Juridical Tribune, p. 250-258; Stirn, *Vers un droit public européen*, 2nd ed. (LGDJ, 2015), p. 145-148.

also Seconded National Experts (SNEs) from Member States, diplomats and other experts involved in the vast amount of EU committees and collegial bodies, or even the so called “temporary workers” (better known by the French lemma *intérimaires*), that are concretely employed by EU bodies through external agencies all around Europe. An important *caveat* though is that, by preferring this definition, national officials working for national administrations are not considered within the EU civil service (see next paragraph).

This second approach is adopted in this research for several reasons. The first one is regulatory in nature and relies on the fact that the legal framework of EU civil service is much less monolithic and homogeneous than how it is usually presented by scholars. Besides SRs and CEOS, there are other legal sources that apply both to officials/other servants and to the other categories just mentioned (NSEs, diplomats etc.). For instance, article 339 TFEU provides a broad conception of civil service, gathering together «[t]he members of the institutions of the Union, the members of committees, and the officials and other servants of the Union», who are subject to the obligation of professional secrecy when it comes to sensitive information acquired under their duties[21]. Moreover, for the purposes of combating frauds against the financial interests of the EU, legislation has laid down a broad definition of “Union official”, which encompasses not only those covered by the SRs and the CEOS, but also a person «seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants»[22]. Last, the Code of good administrative behaviour for staff of the European Commission in their relations with the public applies not only to officials and other servants, but also to «persons employed under private law contracts, experts on secondment from national civil services and trainees, etc. working for the Commission should also be guided by it in their daily work»[23].

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[21] Geiger, “Article 339 [*Professional Secrecy*]” in Geiger, Khan and Kotzur (Eds.) *European Union Treaties. A Commentary* (Beck, 2015), p. 1022-1024.

[22] Art. 4(4), Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law.

[23] C(2000) 3614, “Rules of Procedure of the Commission”.

The second argument is financial. It is undoubtedly true that all the officials and other servants draw funds from the EU budget; however, even «external» employees working for EU bodies do the same. This is the case for the *intérimaires*, whose selection and recruitment are outsourced by EU institutions via public procurement tenders with external agencies. By doing so, of course, each EU body uses its own funds provided by the budget according to the financial rules of the EU[24].

Finally, there is a systematic reason for preferring the functionalistic approach. No matter how they are labelled, workers of EU bodies effectively contribute to the fulfilment of the tasks specifically attributed to the latter. In other words, a national official seconded to an institution of the EU does not perform national tasks, but rather EU ones. It is thus more straightforward to deal with the organic and functional regime of this staff at the same time. The alternative would be to merely consider this «external» workers as national officials and thus to stick them into the civil service at national level. However, a part from being paid by their home administrations, these workers are subject to the direction of EU institutions.

Thus, the notion of EU civil service encompasses those working for EU bodies, regardless their formal link with the latter. However, this raises the question of which bodies have to be taken into account. Nowadays, the organisation of the EU is indeed composite, so along with the institutions in a narrow sense, there are several other bodies still performing EU tasks. To this end, a major distinction can be traced between those bodies that, on the one hand, fall within the scope of application of the SRs and CEOS and those, on the other hand, that are simply devoted to furthering the EU's interests.

To the first category belong the seven institutions (accordingly to their internal rules), the agencies and the other bodies enlisted in art. 1b SRs, which is to say the European External Action Service (EEAS), the European Economic and Social Committee, the Committee of the Regions, the European Ombudsman, and European Data Protection Supervisor. Conversely, the second category encompasses those bodies enlisted in a regulation passed by agreement between appointing authorities and

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[24] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

institutions[25]. Among these, one can find for example the European Investment Bank or the European University Institute located in Fiesole, near by Florence[26]. This chapter only deals with the first category of entities, which are effectively part of the EU. Indeed, such a group is more homogeneous and, unlike the other bodies, it affects only legal persons established primarily to implement EU policies[27]. By contrast, the other bodies simply «devoted to furthering the EU's interests» are not formally part of the EU and therefore do not behave as «bodies» of the latter, but rather just as external partners occasionally complementing EU action.

4. *The European civil service at national level*

For the purposes of this research, national officials are framed as the «local» bureaucracy of the European civil service. Member States have their own civil service systems, which of course are older than the European Communities. In the original setting, the interplay between national and EU bureaucracies should have been straightforward: the latter should have been assigned to the policy making, whereas national officials should have been in charge of the policy implementation. As time passed by, these roles have been progressively shifting, so nowadays the landscape is much more complicated. Now and then, EU officials take part to policy implementation by operating with (or even in substitution of) national officials, performing a wide range of tasks. At the same time, national officials are not only accountable to their own public employers – that is to say, the Member States and their bodies – but also to EU bodies which have gained the power to coordinate them.

This is the outcome of a process led by many factors, partly emerged some decades ago and partly developed more recently. On the one hand, indeed, scholars have already studied the many facets of the process of Europeanisation of national administrations, which of course affected the public employment as well. On the other hand, recent

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[25] Art. 37 SRs.

[26] Réglementation modifiant la réglementation portant fixation de la liste des organismes à vocation communautaire visés à l'article 37, premier alinéa, point b) deuxième tiret, du statut des fonctionnaires des Communautés européennes, 2002, accessible via <https://circabc.europa.eu/ui/index.html>(last visited 1 May 2024).

[27] For further references on the topic, Rogalla, *Dienstrecht der Europäischen Gemeinschaften*, (Carl Heymanns Verlag, 1981), p. 15-19.

developments in the EU administration might be framed in a new model: the Europeanisation has been coupled with the integration of EU and national bureaucracies.

The first process, which is to say the Europeanisation, has actually been there since the beginning, but only thanks to the seminal work by Schwarze and the subsequent studies it has been possible to conceptualize it[28]. By and large, Europeanisation is a regulatory phenomenon which primarily affects national legal sources, either by influencing their interpretation or by requiring their disapplication[29]. This can happen through EU principles, primary law or even secondary law[30]. Focusing on the civil service matters, Europeanisation has affected some important features of the national systems, such as the access criteria to get into them[31].

However, Europeanisation does not exhaust the range of phenomena observable in practice. Indeed, part of the literature has started to describe the rise of a new model, which somehow absorbs and goes beyond the mere Europeanisation. In fact, whereas the latter still implies the existence of two separate administrative organizations – the EU and the national one – part of the literature has theorized the birth of an «integrated administration», in which national bodies work as decentralised offices of the EU[32].

Despite suggestive and confirmed by some examples, this theoretical solution is neither accepted by all the scholars nor consistently applied by the case-law of the Court

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[28] Schwarze, *European Administrative Law*, (Sweet and Maxwell, 1992), whereby he traces the distinction between direct and indirect administration.

[29] Jans, de Lange, Prechal and Widdershoven (Eds.), *Europeanisation of Public Law*, (Europa Law Publishing, 2007), p. 7-9.

[30] Tridimas, "The general principles of EU law and the Europeanisation of national laws", (2020) Review of European Administrative Law, p. 5-31.

[31] The literature on the topic is large; see, for instance, Sassi, *Il lavoro nelle amministrazioni pubbliche tra ordinamento europeo e ordinamenti nazionali*, (Giuffrè, 2007), p. 367-385; Taillefait, *Droit de la fonction publique*, 9th ed. (Dalloz, 2022), p. 87; Kämmerer, "Europäisierung des öffentlichen Dienstrechts", (2001) Europarecht, p. 47.

[32] Chiti, "Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies", (2004) European Law Journal, p. 402-438; for a broader overview about the organizational arrangements in place across the EU administration, see Hofmann, Rowe and Turk, *Administrative Law and Policy of the European Union*, (OUP, 2011), p. 259-331.

of Justice. As regards the former, for example, it has been underlined that «[t]he formal addressee of a State-addressed decision always remains the Member State as such»; hence, the two levels of government would have to be kept separate and the EU would allegedly lack the power to command national officials[33]. As regards the case-law, the possibility to conceive an integrated organisation seems to be barred by the fact that the Court of Justice has always argued that in the EU there is a clear-cut distinction between the competence of national judiciaries and the one of EU courts: the former decide on national administrative decisions, the latter on the EU ones, even in cases of «mixed» administration or «composite» procedures[34].

In other words, the relationship between national and EU bureaucracies is far from being settled. Therefore, the research seeks to appraise whether it is possible to outline the concept of «European civil service» as the result of the integration between supranational and national bureaucracies. In order to do so, such a question is addressed by focusing on two sub-questions: the first is whether the EU has the power not only to set the objectives to be pursued by Member States, but also to tell them how to rule on their officials as to achieve such objectives; the second one is whether the EU officials can directly command national ones, regardless the formal separation between the two organisations.

5. *Scope and objective of the comparison*

As a common understanding, the EU is a hybrid system, neither a simple international organisation nor a State strictly speaking[35]. Hence, it shares some similarities and shows some differences with both the models, since it lies in-between them. In light of this, a comparison aiming at shedding light on these discrepancies is in principle possible and, moreover, arguably profitable.

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[33] Schütze, *European Constitutional Law*, (Cambridge University Press, 2012), p. 253.

[34] Case C-97/91, *Borelli v. Commission*, ECLI:EU:C:1992:491, par. 9-10.

[35] About the concept of international organisation, see Golia and Peters, "The Concept of International Organization" in Klabbers (Ed.) *The Cambridge Companion to International Organizations Law* (Cambridge, 2022), p. 25-49. See Biaggini, "Legal Conceptions of Statehood" in Cassese, von Bogdandy, Huber (Eds.) *The Max Planck Handbooks in European Public Law: The Administrative State* (OUP, 2017), p. 557-579, for a theoretical account of the concept of statehood.

As seen above, whereas some works providing such a comparison with regards to international organisations already exist in literature, this is not replicated for the opposite model. Indeed, it is only possible to find some works – even quite recent – that study legal nature of the EU civil service against the broader category of international civil service systems[36].

Conversely, comparisons between the EU and state entities are few and, above all, mostly unsatisfactory or of narrow scope[37]. Moreover, the analysis usually focuses only on the EU civil service, so it takes into account only the supranational civil service as outlined above. By contrast, a systematic and far-reaching comparison of what differentiates the broader notion of European civil service from fully-fledged States in this specific field is still missing[38].

It goes without saying that States can vary in their constitutive elements: according with their division of tasks among the levels of government and therefore with the more or less decentralised outlook of their legal systems, States can mirror different models. Therefore, it is crucial to decide what is the purpose of the comparison that is going to be carried out, in order to decide which State to compare. As regards the European civil service, this research aims at providing a better understanding of its legal nature, by identifying the origins of the current framework and by outlining the possible outcomes of its evolution.

To this end, it would be almost pointless to simply compare the European civil service with, for example, a centralised system such as the French *fonction publique*, since the former is not supposed to align itself to the latter, at least in the near future. Conversely, at least since its origins and still to some extent nowadays, federalism has been one of the underlying ideals underpinning the process of EU integration. Of

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[36] Ullrich, *The Law of the International Civil Service Institutional Law and Practice in International Organisations*, (Duncker & Humboldt, 2018), *passim*; Scheinman, "Some Preliminary Notes on Bureaucratic Relationships in the European Economic Community", (1966) International Organization, p. 750-773; see also Smith, "The European Economic Community and National Civil Servants of the Member States. A Comment", (1973) International Organization, p. 563-568.

[37] Focusing on the issue of proportional quotas within the civil service in a comparative perspective, see Didczuhn, *Der Grundsatz der proportionalen föderalen Parität*, (Nomos, 1990), *passim*.

[38] Ziller, "Das öffentliche Dienstrecht aus der Perspektive der vergleichenden Verwaltungswissenschaft", (2006) Die Öffentliche Verwaltung, p. 233-241 on the difficulties to compare civil service systems.

course, such a path is far from being concluded, despite many elements are already there. As Schütze has remarkably pointed out, legal comparison between the EU and other fully-fledged federal systems can provide meaningful insights to better understand the constitutional and administrative underpinnings of the EU[39].

Consequently, in order to provide a fruitful comparison, this research explores the civil service systems in the Federal Republic of Germany (hereinafter simply Germany) and the United States of America (US), seeking to point out their main features. In particular, these two systems are taken into account because they provide almost antithetic forms of government and, therefore, they can expectedly offer the widest range of possibilities when it comes to civil service matters. Indeed, as better explained in the next chapters, these two systems reflect a different scheme in the relationships between the federal level and the local entities: whereas in Germany there is a «cooperative» model with many ties between the *Bund* and the *Länder*, for the US there have been coined several labels, but at the end of the day they still embrace a dualistic model, in which the Federation and the States are to be kept separate. Unsurprisingly, these differences bring about many consequences for the civil service systems.

6. *Overview of the contents*

Having clarified the issues and the objects this research is intended to address, it is possible to concretely outline the contents of the next chapters. To this end, the current research is roughly divided into two parts.

In the first one the analysis focuses on the civil service systems in Germany and in the US, as to provide the basic elements featured by these countries (chapter II). The objective is to gather the necessary information of the German and US systems as to be able to subsequently carry out a comparison with the European civil service. Hence, the analysis first depicts the two conceptions of federalism that are in place in both the countries, as to lay down the general framework in which the further analysis can be fruitfully conducted. As a second step, the legal sources and the allocation of legislative competences within the two legal systems are taken into account, focusing on the

[39] For a fruitful comparison between the EU, the US and Germany, see Schütze, "From Rome to Lisbon: "executive federalism" in the (new) European Union", (2010) in Common Market Law Review, p. 1385-1427.

regime of the civil service. Thirdly, the main features of the two models are better clarified, delving into the rules concerning selection procedures, remunerations and liability of public officials. These elements are taken into account because they are more likely to be dependent on the multi-level nature of federal systems. In particular, it is worthy to clarify whether «local» entities (*Länder* and States) play any role in shaping these features. After that, the analysis passes through a very distinctive category of entities that are crucial for the sound functioning of federal systems, which is to say the interbureaucratic bodies. Finally, public officials enjoy fundamental rights that stem from their citizenship, regardless the level of government they belong to; the chapter tries then to unveil the interplay between the two statuses of «public official» and «citizen», aiming at ascertaining whether this plays a role in the relationships between the Federation/*Bund* and the States/*Länder*.

Having outlined the fundamental features of these two federal systems, the second part of the research is aimed at analysing the characteristics of the European civil service, by distinctively taking into account the supranational and the national layers of the system. Chapter III deals with the EU civil service, whereas chapter IV delves into the study of the European civil service at national level.

After a brief historical introduction on the origins and the evolution of EU civil service, chapter III provides a description of the legal sources of the latter and an analysis of the legal framework and its principles, by focusing on the same elements already treated in the previous chapter. After that, the research delves into some peculiar administrative settings in place at supranational level: on the one hand, it takes into account the large set of committees of the EU and, on the other hand, it deals with some *sui generis* offices and bodies that differ to a certain extent from the general model previously delineated.

To complement the analysis, chapter IV focuses on the European civil service at national level. In order to conduct the investigation, the research applies a functionalist approach: to determine the regime applicable to national officials it is wondered whether or not they implement EU policies. Thus, first it is taken into account the situation in which national officials are expected to implement and enforce EU law, playing as «EU agents» (first section). This happens in case of purely indirect administration or in case of mixed administration. Second, it is analysed the situation in which national officials, albeit having nothing to do with the implementation of EU law,

are still deeply affected by EU rules, either directly or indirectly, through the interposition of Member States (second section).

The last chapter is finally dedicated to the comparative analysis of the results. The objective is to address the questions posed above: is it possible to outline an integrated European civil service? If so, which is its legal nature? Does it resemble the regime in place within federal systems or it still lacks some important features?

Chapter II
The Civil Service in Federal Systems: Germany and the US

FIRST SECTION

1. The German kooperativer Föderalismus

The German administrative system is made of several entities. In the public sphere, there are bodies of general scope identified by territorial competence, namely the *Bund*, the *Länder*, the *Staadtstaaten*, the *Kreise* and the *Gemeinden*. Their organization varies according to their size and the amount of duties assigned to them. So, for example, the *Bund* is made of several offices that manage their own personnel: at central level there are the Government, the Chancellor, the Ministers and the Court of Auditors; there are further offices dislocated on the territory and surveilled by the Ministers (e.g., the *Bundeskriminalamt*, the *Bundeskartellamt* and so on). This set of bodies (a part from the *Gemeindem*, which fall in the category below) makes part of the so called direct administration of the State (*unmittelbare Staatsverwaltung*)[40].

Along with these, there are other bodies of public law that are established either by the *Bund* or by the *Länder* to perform public tasks (*Körperschaften*, *Anstalten* and *Stiftungen* of public law). Looking at the private sphere, finally, also private companies can operate as public agents while implementing public policies. These two groups of bodies – the public and the private ones – compose the so called indirect administration of the State (*mittelbare Staatsverwaltung*).

The question of «who is in charge of what» between the *Bund* and the *Länder* defines the type of federalism that is in place in Germany. There are theoretically two possibilities: on one side, there is the model in which each entity implements its own

[40] Schmidt, *Allgemeines Verwaltungsrecht*, (Gasberg bei Bremen, 2022), p. 24.

policies; on the opposite side, there is the situation in which the lower entity implements the policies of the higher one. The first model provides a clear-cut attribution of competences and therefore it is more suitable for promoting accountability; the second model, instead, is conceived to diversify policy implementation at local level and thus it gives more importance to local needs; in doing so, however, accountability is likely to be less effective.

In principle, in Germany the *Länder* are in charge of exercising public powers and performing public tasks, unless otherwise provided by the federal Constitution (*Grundgesetz*, GG)[41]. Of course, this brings about some consequences in terms of division of legislative and administrative competences[42]. As regards the legislative power, the *Länder* pass the laws unless the Constitution attributes such a power to the *Bund*[43]; similarly, when it comes to administrative activity, the *Länder* are in charge of implementing not only their own policies, but also those designed by the *Bund*, unless the Constitution differently provides or allows[44]. In other words, the competences of the *Bund* are in principle only a close number (even though there are some general clauses that allow for some flexibility in the system).

Focusing on the types and allocation of administrative competences, the *Länder* can implement federal laws either as their own matter (*Landeseigenverwaltung*)[45] or on behalf of the Federation (*Bundesauftragsverwaltung*)[46]. In both the cases, since it is up to the *Länder* to implement federal laws, they also enjoy the power to establish and organize their own administrative offices in order to do so[47]. As a result, they are granted with a far-reaching power of organization (*Organisationsgewalt*), which implies also the faculty to rule on their personnel to the extent that this does not encroach on the legislative competences reserved to the Bund.

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[41] Article 30 GG.

[42] Rengeling, Gesetzgebungszuständigkeit, in Isensee and Kirchhof (Eds.) *Handbuch des Staatsrechts. Band VI: Bundestaat* (C.F. Müller Verlag, 2008), p. 567.

[43] Article 70 GG.

[44] Article 83 GG.

[45] Ar. 84 GG.

[46] Article 85 GG.

[47] Heitsch, *Die Ausführung der Bundesgesetze durch due Länder*, (Mohr Siebeck, 2001), *passim*.

Of course, despite being a task reserved in general to the *Länder*, the implementation of federal laws is not completely disregarded by the *Bund*, which retains some powers of intervention. In particular, there is an important difference between the two types of administration just described: whereas in the *Landeseigenverwaltung* the *Bund* can intervene on the organization of public bodies at local level and on procedural requirements[48], in *Bundesauftragsverwaltung* the Federation exercises a stricter surveillance and can even address the organs of *Länder* with specific administrative guidelines and indications (*Weisungen*)[49].

As stated above, the Constitution also provides some cases in which the *Bund* is in charge of implementing its own policies. Sometimes these tasks are mandatory according to the Constitution, as it happens, for instance, for the external defense or the air traffic (*obligatorische Bundesverwaltung*)[50]. In other cases, instead, the *Bund* can freely decide whether to exercise a competence or rather to leave the room for implementation open for the intervention of the *Länder* (*fakultative Bundesverwaltung*).

These are the options explicitly provided by the Constitution; according to the case-law of the *Bundesverfassungsgericht* (BVfG) and the literature, however, there are also some unwritten competences that are attributed to the *Bund* despite not being explicitly laid down in the Constitution (*ungeschriebene Zuständigkeiten*), for example when this is necessary to ensure a uniform implementation or when it is implied by the «nature of the subject matter» at stake[51].

As a rule, regardless the type of implementation chosen by the Constitution, it is always important to ensure the accountability of each level of government towards the citizens. For this reason, the implementation of a specific policy can be a matter alternatively either of the *Länder* or of the *Bund*, accordingly with the aforementioned models, as to ensure the clear-cut definition of «who is in charge of what» (*Verantwortungsklarheit*).

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[48] Article 84, abs. 1, GG.

[49] Trute, "Artikel 83", in Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024), p. 17.

[50] Respectively provided by article 87b and article 87d GG.

[51] Hermes, “Art. 83” in Dreier (Ed.) *Grundgesetz-Kommentar*, (Mohr Siebeck, 2018), *ad vocem*; Trute, "Artikel 83", in Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024), p. 40.

Strictly speaking, this principle would prevent the German legal system from adopting models of «mixed administration», because they would undermine the clarity of the accountability system[52]. However, in practice things go differently and there are many occasions in which the *Bund* and the *Länder* cooperate to pursue the same policy at administrative level. Sometimes this remains on a procedural level, by providing the involvement of both the entities in the same procedure; other times, this cooperation is even institutionalized and ends up in the establishment of interbureaucratic collegial bodies, that operate both at political and administrative level (see par. 6).

All these settings have a feature in common, that is to say that they can only be used to better coordinate the activity of public bodies, but not to exercise decision-making powers; in other words, they cannot be adopted to circumvent the administrative models provided by the Constitution or to alter the allocation of accountability among the *Bund* and the *Länder*. To put it differently, the involvement of different levels of government cannot have binding effects[53].

To conclude, the German administrative legal system revolves around two tenets: one the one hand, the allocation of administrative competences follow the criterion of subsidiarity, according to which public duties have to be in principle carried out at local level[54]; on the other hand, there are many grounds of cooperation between the *Bund* and the *Länder*, despite their concrete functioning has to comply with the general prohibition of mixed administration.

2. *Law-making powers in the field of the Beamtentum*

The cooperative federalism in place in Germany can easily explain also the division of law-making powers between *Bund* and *Länder* when it comes to the civil service matter (*Beamtentum*). In principle, as stated above, the *Länder* have the power to pass

[52] The *Bundesverfassungsgericht* has set out a general prohibition of mixed administration, only so far it implies the creation of a common organisation or the performance of public tasks by the *Bund* and the *Länder* altogether; see BVfG 11, 105 (124).

[53] Trute, "Artikel 83", in Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024), p. 24; Mauer, *Allgemeines Verwaltungsrecht*, (Beck, 2024), p. 650.

[54] Oeter, *Integration und Subsidiarität im deutschen Bundestaatsrecht*, (Mohr Siebeck, 1998) *passim*.

statutory law in Germany, unless the Constitution provides differently[55]. There are therefore three regimes for law-making powers: first, there is the general competence of *Länder*, which is residual in nature and thus can be called into play whenever the Constitution does not provide differently; secondly, there is the list of exclusive competences that are reserved to the *Bund*[56]; finally, there are the competences that are shared by the *Bund* and the *Länder*, in which the latter can pass laws on such topics unless the *Bund* has already intervened[57].

When it comes to the German civil service, it is interesting to notice that the Constitution specifies in a quite precise manner the division of law-making powers in this field. As a general scheme, this division mirrors the power of organization in the administrative field: who controls the public office is also the one in charge of setting out the rules concerning its personnel.

Therefore, first of all, the *Bund* has the power to lay down the rules concerning the legal relationship in its offices and in the other bodies of public law under its control[58]. The scope of application of the provision can be identified both *ratione personae* and *ratione materiae*.

As regards the first criterion, the legislative power of the *Bund* entails the power to set out rules concerning the personnel in its offices (Government, Ministries and other offices) as well as in the other bodies of public law that are used in indirect administration (*Körperschaften*, *Anstalten* and *Stiftungen*). However, this competence has to be coordinated the power to set out rules in the field of labour law, that applies both to private and public sector[59] and is shared by the *Bund* and the *Länder*[60].

To better clarify this point, it is necessary to underline that the exclusive competence of *Bund* applies only to *stricto sensu* public officials (*Beamten*), which are approximately those subject to a public law relationship with their administration (see

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[55] Article 70 GG.

[56] Article 73 GG.

[57] Article 74 GG.

[58] Article 73, abs. 1, no. 8, GG.

[59] See BVfG 7, 342 (351).

[60] Article 74, abs. 1, no. 12, GG. See Oeter and Münkler, "Artikel 74", in Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024), p. 2267.

below, par. 4)[61]. On the other side, the other workers (*Arbeiter*) or employees (*Angestellten*) working at *Bund*'s offices or in other public bodies are subject to labour law rules, which are partially determined by the *Länder* as well[62].

As regards the scope of application *ratione materiae*, the *Bund* retains the power to rule on all the aspects concerning the legal relationship with its public officials, such as the establishment, the changes, the termination and post-effects of a public employment relationship; the rights and duties of *Beamten*; the remuneration and the benefits; the career; the collective representation; the disciplinary rules; the legal protection of the officials[63].

A part from its own personnel, the *Bund* can also interfere with the regime of the civil service systems of the *Länder*, even though to a limited extent. First, it can do so by adopting rules in the field of labour law, as already mentioned above[64]. Along with this, it enjoys a more intrusive power of intervention, which relies on the possibility of setting out rules concerning rights and the obligations linked to the status of the officials working for the *Länder*, the *Gemeinden* and the other bodies of public law, with the exception of the rules concerning their career, their remuneration and their welfare system[65].

This provision deserves attention for two reasons. First, it is one of the most important outcomes of the constitutional reform occurred in 2006[66]. In particular, focusing on the officials at local level, this amendment took away the competences on the career, the remuneration and the welfare system and gave them back to the *Länder*, which therefore nowadays are the only ones in charge of ruling on them. As shown

[61] For the difference between *Beamten* and other *Arbeiter*, see Schmidt, "Recht des öffentlichen Dienstes in Deutschland, in Kahl and Ludwigs (Eds.) *Handbuch des Verwaltungsrecht* (Müller, 2022), p. 1363.

[62] Heintzen, "Artikel 73", in Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024), p. 2246.

[63] *Ibid*., p. 2247, and case-law cited.

[64] As it happened with the *Betriebsverfassungsgesetz.*

[65] Article 74, abs. 1, no. 27.

[66] Pechstein, "Wie können di Länder ihre neue beamtenrechtliche Kompetenzen nutzen?", (2006) Zeitschrift für Beamtenrecht, p. 285.

below, the result is a quite radical differentiation among the civil service systems at *Land*'s level[67].

Moreover, the shared competence on the status of the *Beamten* both at central and local level brings about a twofold consequence: on one side, since it concerns a competence which is not reserved to anyone but rather shared, the intervention of the *Länder* is not barred as such, but only so far there are rules already adopted by the *Bund* on the same topic. In other words, *Länder* are prevented from going *contra legem*, but they have still room for going *praeter legem*. This entails that they can theoretically – and in practice they do – intervene, also with administrative regulations, as to better clarify and to "flesh out" the general provisions adopted at federal level. Moreover, whenever there are fundamental rights protected by the Constitution coming into play, the *Länder* can even increase the level of protection for their officials, going beyond what is ensured by the *Bund*[68].

Finally, the latter can set out rules in another subject matter, quite relevant for the civil service, that concerns the rules on the public tort liability of the State and its officials. As better clarified below, technically the *Bund* has not exercised such a competence, because there were rules already in place dating back to the Civil Code of 1896 (*Bürgerliches Gesetzbuch*, BGB). Nonetheless, such rules are quite exhaustive and, moreover, the Constitution does not leave much more space for the intervention of the *Länder*, since it outlines all the relevant features in article 34 GG.

Having passed through all the competences of the *Bund* in the field of civil service, it stands out that, symmetrically, the *Länder* enjoy a wide margin of intervention in such a subject matter, given the federal model adopted in Germany. This brings about a radical differentiation in the civil service systems at local level, as it is better described in the following paragraphs. Moreover, such a differentiation was further exacerbated by the constitutional reform of 2006, which ruled out the possibility of the *Bund* to adopt framework laws (*Rahmengesetze*) in the field of the civil service, unlike before.

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[67] An overview of the legal framework for remuneration and welfare at State level is provided by Tews, *Auswirkungen der Föderalismusreform auf das öffentliche Dienstrecht*, (Kovac Verlag, 2022), *passim*.

[68] Article 142 GG.

3. *Legal sources of the Beamtentum*

In light of the division of competences just drawn, it is easy to understand that in the German *Beamtentum* many legal sources coexist, adopted both by the *Bund* and the *Länder*, either of legislative or administrative nature.

A first set of rules is laid down in the Constitution, which envisages many substantive provisions beyond those on legislative competences. In particular, the most important ones are set out in articles 33, 34 and 36 GG[69].

The first notable provision is article 33 GG, which is a cornerstone of the legal framework governing *Beamtentum*. It establishes four key principles that shape Germany's civil service system: the merit-based system; equal access to civil service with prohibition of discrimination based on religious or political beliefs; the principle that public duties are reserved for Beamten (*Funktionsvorbehalt*); and the rule that Beamtentum must evolve in accordance with the traditional principles of the system (*hergebracthen Grundsätze*). The first three points are better developed below. Here, some attention must be paid to the notion of «traditional principles» and its relevance for the subject matter.

Since such principles are not better defined in the Constitution, it is necessary to look at the case-law of the *Bundesverfassungsgericht* to identify them[70]. Generally speaking, in order to decide whether a rule fits into such a notion it is necessary to check two elements, which are the «traditionality» (*Traditionalität*) and the «fundamentality» (*Fundamentalität*)[71]. According to the first feature, such principles have to be enrooted in the legal tradition of *Beamtentum*, dating back to the rules existing before the Constitution of 1949, referring at least to the provisions already in place at the time of the Weimar Republic[72]. The fundamentality, instead, refers to the importance of the provisions, that could not be repealed without altering the inner

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[69] The whole set of rules is outlined by Wolff, "Öffentlicher Dienst", in Stern, Sodan and Möstl (Eds.), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund* (Beck, 2022), p. 627.

[70] Lecheler, "Die „hergebrachten Grundsätze des Berufsbeamtentums" in der Rechtsprechung des Bundesverfassungsgerichts und des Bundesverwaltungsgerichts", (1978) Archiv des öffentlichen Rechts, p. 349-382.

[71] Kawik, Dechmann, Krauser and Pflüger, *Beamtenrecht*, (Beck, 2023), p. 53.

[72] BVfG 8, 332 (343).

essence of *Beamtentum*[73]. Following these two criteria, the BVfG has recognized a long list of traditional principles: for example, some elements of the relationship between the *Beamten* and their employers have to be regulated by statutory law (*Vorbehalt des Gesetzes*), such as the voices that compose the remuneration[74]. This of course imposes a limit to the possibility of pursuing a complete privatization of the German civil service, since the remuneration cannot be defined simply by private contracts, as it happens in labour law.

These principles are crucial within the legal framework of *Beamtentum* for two reasons: firstly because, especially after the constitutional reform of 2006, they contribute to the development of the German civil service, bringing it up to date[75]; secondly, because they are binding both for the *Bund* and for the *Länder*, ending up in being a tool to provide the unity of the system.

The other two important constitutional provisions are embedded in articles 34 and 36 GG. The first one gives some indications concerning the tort liability of public administrations. In particular, it specifies that, generally speaking, damages are compensated by the public administration itself, not by its officials; moreover, the jurisdiction to settle the disputes in this field is reserved to the ordinary courts.

Finally, article 36 states that, within the highest federal authorities, civil servants from all the *Länder* should be employed in an appropriate proportion. This clause is aimed at ensuring the regional proportionality within the German civil service, reserving – at least in theory – a proportional number of spots to the employees coming from each *Land*. In practice, this provision has turned out being problematic, as better explained below.

A part from the Constitution, the *Bund* and the *Länder* pass their own statutes in their respective fields of competence. At federal level, the landmark piece of legislation is the *Bundesbeamtengesetz* (BBG), which provides most of the rules concerning the regime of the *Bund*'s officials. Moreover, there is the *Bundesbesoldungsgesetz* (BBesG) that contains the rules dealing with the remuneration of the civil service of the *Bund*. On their side, each *Land* has passed its own statutes, both regulating matters of general

[73] BVfG 114, 258 (286).

[74] BVfG 8, 1.

[75] BVfG 117, 330.

scope (*Landesbeamtengesetze*) and topics of specific interest, such as the career (*Laufbahn*), the remuneration (*Besoldung*) and the welfare (*Versorgung*)[76].

As anticipated above, the *Bund* shares also with the *Länder* the power to pass laws concerning the status of public officials in the whole legal system. This has been the case with the *Beamtenstatusgesetz* (BeamtStG) of 2008, which applies also to the civil service systems of the *Länder*. As explained above, however, the latter can dispose *praeter legem*, by adopting their own statutes in the spots left free by *Bund*'s legislation or even by passing administrative regulations in the same field, if they comply with the standards provided by the BeamStG.

Finally, an important role is also played by the administrative regulations[77]. First, there are many regulations with external effects (*Verordnungen*) that outline important aspects of the civil service regime. For example, as regards the *Bund*, there is the regulation concerning the career of the officials (*Bundeslaufbahnverordnung,* BLV) which by the way sets out some rules concerning the public selection procedures to get into the civil service at federal level. Moreover, there are also internal regulations (*Verwaltungsvorschriften*) that clarify crucial aspects of the functioning of public administration and, specifically, of their personnel[78]. An example is offered by the general regulations aiming at ensuring the uniformity in the training process of the employees under article 85, abs. 2, GG[79].

4. *Legal framework and its principles*

In principle, it is possible to provide an all-encompassing notion of civil service in Germany, which addresses all the people working in the public service and its

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[76] Tews, *Auswirkungen der Föderalismusreform auf das öffentliche Dienstrecht*, (Kovac Verlag, 2022), *passim*; Heintzen, "Die Charakteristika der Ländergesetzgebung und der ausschließlichen Gesetzgebung des Bundes nach der Föderalismusreform", in Heintzen and Uhle (Eds.) *Neuere Entwicklungen im Kompetenzrecht* (Duncker & Humboldt, 2014), p. 54.

[77] Wolff, "Öffentlicher Dienst", in Stern, Sodan and Möstl (Eds.), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund* (Beck, 2022), p. 627.

[78] Mauer, *Allgemeines Verwaltungsrecht*, (Beck, 2024), p. 694.

[79] See the *Allgemeine Verwaltungsvorschrift zur Bundeslaufbahnverordnung*; Trute, "Artikel 85", in Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024), p. 87; Mauer, *Allgemeines Verwaltungsrecht*, (Beck, 2024), p. 650.

ramifications: the *Bund*, the *Länder*, the local authorities and the other public bodies. These people take part to the so-called *öffentlicher Dienst* and counted up to roughly five million units in 2021[80].

Despite the German civil service can be conceived unitarily under many regards, there is still a quite clear distinction between the public officials (*Beamten*) and the other workers and employees (*Arbeiter* and *Angestellten*)[81]. This duality has been already touched upon while dealing with the law-making powers provided in the Constitution.

A part from its effects on the allocation of legislative competences, actually this duality has a key role in the legal framework of the German civil service, being enrooted in the Constitution[82]. In particular, it must be read in conjunction with two rules: on one side, there is the principle according to which public tasks have to be conferred to those that are in a public-law service and loyalty relationship with the administration (*Funktionsvorbehalt*)[83]; on the other side, the duality is part of the traditional principles of the German civil service (*hergebracthen Grundsätze*)[84].

Focusing on the first rule, it must be said that a satisfactory delimitation of the administrative activities reserved to the public-law relationship is quite problematic. It is widely accepted in the literature that the activity impinging on fundamental rights must be necessarily reserved to public officials (*Eingriffsverwaltung*). This notion encompasses for instance the activities carried out by the police or within the justice

[80] Kawik, Dechmann, Krauser and Pflüger, *Beamtenrecht*, (Beck, 2023), p. 4.

[81] Schmidt, "Recht des öffentlichen Dienstes in Deutschland", in Kahl and Ludwigs (Eds.) *Handbuch des Verwaltungsrecht* (Müller, 2022), p. 1363.

[82] See Jung, *Die Zweispurigkeit des öffentlichen Dienstes*, (Duncker & Humboldt, 1971) *passim*.

[83] Article 33, abs. 4, GG. Strauß, *Funktionsvorbehalt und Berufsbeamtentum*, (Duncker & Humboldt, 2000) *passim*.

[84] Article 33, abs. 5, GG. In literature, Lecheler, "Die „hergebrachten Grundsätze des Berufsbeamtentums“ in der Rechtsprechung des Bundesverfassungsgerichts und des Bundesverwaltungsgerichts", (1978) Archiv des öffentlichen Rechts, p. 349-382. The special regime of the public-law relationship of the *Beamten*, as a traditional principle of the German civil service, has been repeatedly stated by the BVfG in several decisions, since BVfG 8, 1.

system. Conversely, it is more debated whether the activities providing services to the public can be reconciled with such a notion (*Leistungsverwaltung*)[85].

In order to find out a criterion suitable for circumscribing the scope of application of the *Funktionsvorbehalt*, one has to look at the function of bureaucracy in democratic systems, which is to ensure the full respect of the fundamental rights of citizens. In this regard, it is undisputed that this concept covers the field of public security, criminal prosecution, enforcement of judicial decisions and tax collection. At the same time, however, it also encompasses the activities falling within the realm of social assistance, given the centrality of the latter in modern democratic systems[86].

It goes without saying that the reservation of some activities to the specific legal regime of public law is supposed to prevent them from being privatised. Actually, it has been progressively accepted that this principle suffers some exceptions, that must be however duly motivated. In particular, it is possible to entrust private subjects with public tasks in some occasions, whether for example the privates are clearly better equipped for carrying out the activities at stake, or whether the outcome of privatization is likely to better ensure the protection of fundamental freedoms[87].

Under this perspective, it has been wondered whether the activities normally falling within the *Funktionsvorbehalt* in Germany can fit into the scope of the notion of «public service» contemplated in article 45 TFEU. When this is the case, the *Funktionsvorbehalt* does not pose particular problems, since these activities fall outside the scope of application of the freedom provided by article 45 TFEU and the implementing secondary legislation. However, when the two provisions do not perfectly overlap, the EU legislation prevails, mostly by requiring a consistent interpretation of article 33, abs. 4, GG at national level[88].

Another aspect which is crucial for the legal framework of the German civil service deals with the selection procedures to get into it. In this case as well, the Constitution provides some indications which steer the *Bund* and the *Länder* in shaping their

[85] Kaiser, "Artikel 33", in Huber and Voßkuhle (Eds.), *Grundgesetz-Kommentar* (Beck, 2024), p. 893.

[86] *Ibid*.

[87] Strauß, *Funktionsvorbehalt und Berufsbeamtentum*, (Duncker & Humboldt, 2000) *passim*, p. 197.

[88] Klaß, *Die Fortentwicklung des deutschen Beamtenrechts durch das europäische Recht*, (Nomos, 2014), p. 46-47.

respective hiring procedures. In particular, there are two intertwined principles that have to be taken into account, that are the principle of selection of the best (*Bestenauslese*) and the merit system (*Leistungsprinzip*). These principles stem from the rule according to which every citizen has equal access to any public office based on their suitability (*Eignung*), qualifications (*Befähigung*), and professional performance (*fachlichen Leistung*)[89].

In light of these principles, the BVfG has progressively outlined a set of rules concerning the open selection procedures (*Ausschreibungen*). First, these principles apply not only to the *Bund* or *Länder* while operating through direct administration, but also to the other bodies of public law involved in indirect administration[90]. Secondly, it has been also clarified that every selection procedure has to be preceded by a job description that must point out the qualifications required to the applicants. These qualifications have to be consistent with the needs of the positions that are going to be covered: therefore, in principle, they bind the appointing authority and they must set out criteria that are comparable among the candidates. This comparison has to be carried out mostly through official documents and only in case of *ex aequo* the appointing authority can call upon to other criteria, which are still related to the posts to be covered[91].

These are some of the principles applicable to open selections[92]. However, it remains questionable whether the merit system implies a clear obligation to issue open procedures, or rather it allows other means to pursue the selection of the «best», according to each specific situation. Part of the literature argues that such an obligation exists, but the BVfG has never recognised it explicitly[93]. Hence, statutory law is heterogeneous both at federal and local level.

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[89] Article 33, abs. 2, GG. Kaiser, "Artikel 33", in Huber and Voßkuhle (Eds.), *Grundgesetz-Kommentar* (Beck, 2024), p. 893.

[90] *Ibid.* p. 905.

[91] BVerwG, Beschl. v. 27.9.2011 – 2 VR 3/11.

[92] There can be exceptions to these rules, always in light of the case-law of the BVfG. See Kaiser, "Artikel 33", in Huber and Voßkuhle (Eds.), *Grundgesetz-Kommentar* (Beck, 2024), p. 893.

[93] Wichmann and Langer, *Öffentliches Dienstrecht*, (Kohlhammer, 2014), p. 164.

As regards the *Bund*, there is actually a general obligation in statutory law to carry out open selection procedures for the federal bodies[94]. However, the law only specifies that the procedures must abide from using discriminatory criteria[95]; it does not go much further, since it does not provide all the rules applicable to selection procedures, so each body at federal level can decide how to shape them accordingly to its needs and in compliance with the Constitution[96].

This general obligation of course allows some exceptions, that are nonetheless explicitly provided by the administrative regulation on the career of officials (*Bundeslaufbahnverordnung*)[97]. In particular, it is specified that the open selection procedure does not apply, for example, when the posts to be filled are deemed to be "sensitive", as it happens for the political staff or for the advisors to the heads of the highest federal authorities; other times, instead, the regulation strikes a balance with other social objectives, as it happens for the positions filled to avoid retirement due to incapacity for service or to reappoint civil servants after the restoration of their service capability.

The situation is slightly different when it comes to the statutes adopted by the *Länder*. As stated above, they enjoy a broad power to determine the regime of their civil service systems, unless the *Bund* intervenes by setting out rules concerning the status of *Beamten*. As regards the selection procedures, this has not been the case so far.

Hence, when it comes to the obligation to carry out public selection procedures, there are three models among the *Länder*. First, there are those that provide a general and clear obligation to carry out public selection procedures. This is what can be observed in Baden-Württemberg, Berlin, Bremen, Rheinland-Pfalz, Saarland, Sachsen-Anhalt und Thüringen. There is then a second model, in which public selection procedures are considered to be the usual business, unless there are atypical situations in which the administration can depart from them. This is what happens in Bayern,

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[94] § 8, BBG.

[95] § 9, BBG, which prevents any discrimination based on gender, descent, race or ethnic origin, disability, religion or worldview, political beliefs, origin, relationships or sexual identity.

[96] Lenders, Peters, Weber, Grunewald and Lösch, *Das Dienstrecht des Bundes*, (Luchterhand Verlag, 2013), p. 39.

[97] §4, abs. 2, BLV.

Brandenburg, Hamburg, Hessen, Mecklenburg-Vorpommern, Niedersachsen, Sachsen, Schleswig-Holstein. Finally, there is Nordrhein-Westfalen that does not require such a procedural step to hire people and in which, therefore, public selections are carried out only if imposed by particular norms[98].

It goes without saying that, as a consequence, within the whole German legal system there is a fragmentation in regimes concerning the hiring procedures for the civil service. While for the *Bund* there is a general obligation to use public selection procedures, indeed, in many *Länder* the legal framework is different.

A part from that, the Constitution imposes another rule which is still related to the hiring procedures just mentioned. In particular, within the «highest federal bodies», officials are expected to proportionally reflect the *Länder*[99]. In other terms, there is the theoretical possibility to impose a system of regional quotas. The provision is deeply enrooted in the history of the unification of Germany, and it is considered as a consequence of the federal spirit of the latter[100].

The notion of «highest federal bodies» encompasses the Government, the Chancellor, the single Ministers and the Court of Auditors[101]. Although the provision has a long history, however, nowadays it has not a great impact on the organisation of federal administration, since the proportion among regional officials is blatantly disregarded[102].

A fourth element to be taken into account is the regime of remuneration of public officials. Before 2006, the competence of determining the remuneration was shared between the *Bund* and the *Länder*; after the constitutional reform, this has been given back to the *Länder*. Hence, its regime is determined at federal level by the *Bundesbesoldungsgesetz* (BBesG) and at local level by statutes adopted by each *Land*.

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[98] Lutze, *Die Stellenausschreibung im Beamtenrecht*, (Duncker & Humboldt, 2023), p. 196.

[99] Article 36, abs. 1, GG. See also Pleyer, *Föderative Gleichheit*, (Duncker & Humboldt) 2005, p. 199.

[100] See Didczuhn, *Der Grundsatz der proportionalen föderalen Parität*, (Nomos, 1990), *passim*, who traces back this provision to article 16 of the Constitution of Weimar Republic.

[101] Mauer, *Allgemeines Verwaltungsrecht*, (Beck, 2024), p. 647.

[102] Damwitz, "Artikel 36", in Huber and Voßkuhle (Eds.), *Grundgesetz-Kommentar* (Beck, 2024), p. 1121.

As stated above, the remuneration of *Beamten* has to be determined by statutory law[103] and it follows, in principle, the career of officials, which of course depends on the choices made by the administration. Generally speaking, remuneration is made of basic salary and other voices, which can be either linked to the position of the official or to their personal background[104]. The basic salary usually depends on two elements: first, the type of tasks to be carried out[105]; secondly, the level (*Stufe*) of each official, which also depends on many factors[106].

As regards the *Bund*, officials are divided into several clusters: some of them enjoy a basic salary that progressively increases (e.g., *Bundesbesoldungsordnung A*); others, instead, have a fixed basic salary (*Bundesbesoldungsordnung B*)[107]. In general, within each cluster there are sub-groups, determined on the tasks to be performed. For example, in cluster "A" there are fourteen groups. Moreover, in this specific cluster officials can increase their salary by reaching one out of the eight existing steps (*Stufe*).

Looking at the *Länder*, the situation is unsurprisingly heterogeneous[108]. Every Land can of course determine the number and composition of its clusters, the groups and the steps within each of them[109]. This brings about a fragmentation in the German civil service, since it can happen that two *Beamten*, carrying out the same tasks in the same place (e.g., Berlin), but belonging to different administrations, are paid differently[110]. This is because the federal law on remuneration does not provide adjustment criteria among *Länder*, so federal officials are paid equally regardless of their workplace.

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[103] § 2, BBesG.

[104] §1, BBesG.

[105] §20, BBesG.

[106] § 27, BBesG.

[107] Anlage I, BBesG.

[108] Pechstein, "Wie können di Länder ihre neue beamtenrechtliche Kompetenzen nutzen?", (2006) Zeitschrift für Beamtenrecht, p. 285.

[109] Tews, *Auswirkungen der Föderalismusreform auf das öffentliche Dienstrecht*, (Kovac Verlag, 2022), *passim*.

[110] Heintzen, "Die Charakteristika der Ländergesetzgebung und der ausschließlichen Gesetzgebung des Bundes nach der Föderalismusreform", in Heintzen and Uhle (Eds.) *Neuere Entwicklungen im Kompetenzrecht* (Duncker & Humboldt, 2014), p. 54.

Finally, to appraise the functioning of the German federal system it is useful to look at the rules concerning the tort liability of public officials (*Amtshaftung*). As anticipated, the Constitution provides some indications that bind both the *Bund* and the *Länder*[111] and apply both to public officials (*Beamten*) and other workers and employees (*Arbeiter* and *Angestellten*)[112].

In particular, the Constitution clarifies that, as a rule, the administration is held liable for the damages caused by its officials[113]. Only subsidiarily, the administration can sue the officials to obtain a redress for what it has paid to third parties, so far the officials acted intentionally or with gross negligence[114].

From the procedural point of view, the Constitution states that the disputes concerning the liability of public administrations are settled by ordinary courts. This choice reflects the distrust of the constituents back in 1949 towards administrative courts, considered to have too many ties with the Executive[115]. To this end, persons who claim damages can sue the public administration alone – not directly the official[116] – before the ordinary court of the *Land* which is competent at local level. In this regard, of course, both the bodies of the *Bund* and the *Länder* can be sued before local courts. Only in a second moment, parties dissatisfied with the decision of the court of first instance can challenge it before federal courts. Indeed, in Germany there is a vertical relationship between the courts of *Länder* and the higher courts of the *Bund*[117].

5. *Interbureaucratic bodies*

The federal system of Germany has been labelled as «cooperative» in nature, because it provides a large set of tools to coordinate the activities of the *Bund* and the

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[111] Article 34 GG.

[112] Wittreck, "Der Amtshaftungsanspruch nach Art. 34 S. 1 GG/§ 839 I 1 BGB", (2013) Juristische Ausbildung, p. 1215.

[113] Article 34 GG. The same rule is contained in § 839 BGB.

[114] § 75 BBG. For the *Länder*, see § 48 BeamStG.

[115] Wittreck, "Der Amtshaftungsanspruch nach Art. 34 S. 1 GG/§ 839 I 1 BGB", (2013) in Juristische Ausbildung, p 1225.

[116] Tremml, Karger and Luber, *Der Amtshaftungsprozess*, (Franz Vahlen München, 2009), p. 109.

[117] Albrecht and Kuchenhoff, *Staatsrecht*, (Erich Schmidt Verlag, 2024), p. 154.

Länder[118]. This practice has to cope with the general prohibition of mixed or shared administration (*Verbot der Mischverwalung*), justified by the need to ensure that every level of government is fully and clearly accountable for the tasks it performs.

From this perspective, thus, the cooperative tools at disposal have to comply with such a prohibition. As stated above, this implies, for example, that coordination can only work on an advisory level, so to say that there cannot be a (hidden) transferral of administrative powers from one level to another. Concretely speaking, coordination thus takes place wither through the standardization of rules pursued by sharing information or advisory opinions; or through the creation of mixed committees whose tasks are merely advisory in nature; or even through planning, as it happens in some cases explicitly embedded in the Constitution[119].

Delving into the phenomenon of committees, it is interesting to notice that their functions can vary a lot: they span from the internal coordination of political summits to the implementation of federal policies at regional level. In particular, as regards the latter task, it is observed in practice that mixed committees are used like a shortcut to "circumvent" some procedures that otherwise would require a more demanding effort: this is the case of the general administrative regulations under article 85, abs. 2, GG, that should be issued with the approval of the *Bundesrat*, which is made of the representatives of the *Länder*. To ease this procedure, the government usually seeks an agreement within the mixed committees competent on the subject matter, which then lead the implementation at each single *Land*'s level[120]. In other words, in these cases the coordination is still institutionalised but it works on a more informal level.

As regards their legal framework, committees are either provided by the Constitution or informally established at administrative level. Some of the committees deal with the workflow of the *Bundesrat*, providing administrative assistance to the latter[121]. Focusing on the Executive, committees can be categorised by two criteria, which is to say focusing either on their tasks or on their composition.

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[118] Schnapp, "Mischverwaltung im Bundesstaat nach der Föderalismusreform", (2008) Juristische Ausbildung, p. 241.

[119] Trute, "Artikel 83", in Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024), p. 24.

[120] Trute, "Artikel 85", in Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024), p. 97.

[121] Article 52 GG. See Savino, *I comitati dell'Unione europea*, (Giuffrè, 2005), p. 52.

Starting from the composition, committees are made either of honorary personnel (Presidents or Ministers) or of professional staff (with different qualifications). The first typology is essentially embodied by the Conference of the Presidents (*Ministerpräsidentenkonferenz)* and, at a lower level, by the several conferences of the ministers competent on the specific matter at stake (*Fachministerkonferenzen*)[122]. Below these, one can find a wide set of committees whatsoever named (*Gremien*, *Arbeitsgruppe*, *Amtschefkonferenzen*) that are linked to the conferences of ministers and perform operational tasks to the benefits of the latter[123].

In some cases, these committees can be standing, as it happens, for instance, in the Conference of Ministers of Sport (*Konferenz der Sportministerinnen und Sportminister*)[124], in the Conference of Ministers of Culture (*Konferenz der Kultusminister*)[125], in the Conference of Ministers for European Affairs (*Konferenz der Europaministerinnen und Europaminister*)[126] or in the Conference of Ministers for Digitalisation (*Digitalministerkonferenz*)[127]. In other cases, the same conferences can also establish *ad hoc* sub-committees, that are brought into play for specific issues (standardisation, opinion, implementation and so on).

Usually, such interbureaucratic bodies are made of officials freely appointed by the *Länder*, without any requirement in terms of qualification and seniority. Sometimes, however, given the tasks to be carried out by the committees (e.g., more sensitive topics), they are composed of Directors of the Ministries at each *Land*'s level. These are

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[122] At the moment there are eighteen permanent conferences of ministers in place, see Hoffmann, "Die Standardsetzung der Bund/Länder-Arbeitsgemeinschaften – zulässige informelle Gesetzeskonkretisierung?", (2023) Neue Zeitschrift für Verwaltungsrecht, p. 984.

[123] Rudolf, "Kooperation in Bundesstaat", in Isensee and Kirchhof (Eds.) *Handbuch des Staatsrechts. Band VI: Bundestaat* (C.F. Müller Verlag, 2008), p. 1005.

[124] See § 2.7, *Geschäftsordnung der Konferenz der Sportministerinnen und Sportminister der Länder in der Bundesrepublik Deutschland*.

[125] See § B and § C, *Geschäftsordnung der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland*; see also Hepp, *Bildungspolitik in Deutschland*, (Verlag für Sozialwissenschaften, 2011) p. 265.

[126] See § F, *Geschäftsordnung für die Konferenz der Europaministerinnen und Europaminister der Länder in der Bundesrepublik Deutschland*.

[127] See § 4 and § 7, *Geschäftsordnung der Digitalministerkonferenz*.

the so-called *Amtschefkonferenzen*, which are in place, for example, within the Conference of Ministers of Environment (*Umweltministerkonferenz*)[128], the Conference of Ministers of Consumers (*Verbraucherschutzministerkonferenz*)[129] and the Conference of Ministers of Agriculture (*Agrarministerkonferenz*)[130]. It is important to stress, here, that the officials appointed by the *Länder* are considered «representatives» of the latter (*Vertreter*).

As regards their tasks, the latter span from a mere day-to-day internal coordination, carried out to the benefits of the *Fachministerkonferenzen*, to a more substantive activity, consisting in providing opinions, preparing regulatory proposals, doing the follow-up of the acts of the *Fachministerkonferenzen* and moving the first steps towards the implementation at regional level.

To conclude, the interbureaucratic bodies are pivotal in the relationships between the *Bund* and the *Länder*. When they have a political standing, their existence and their functioning is more formalised; when they mostly grant administrative support, instead, these elements are less formalised. As regards their composition, the rule is that, in principle, *Länder* are free to appoint whoever they want, so far the appointees belong to the competent authorities to be represented in the committee. However, for some sensitive issues, the administrative regulations of the *Fachministerkonferenzen* require the delegated officials to have managing powers within the regional administration they belong to.

6. *The Beamte as a German citizen*

So far, the elements ensuring the unity of the German civil service system has been collected mostly by taking into account the constitutional provisions addressing the allocation of legislative competences between the *Bund* and the *Länder*. Along with these, it is also worthy to consider the perspective of the employees.

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[128] See § 11, *Geschäftsordnung der Umweltministerkonferenz*. See also Hoffmann, "Die Standardsetzung der Bund/Länder-Arbeitsgemeinschaften – zulässige informelle Gesetzeskonkretisierung?", (2023) Neue Zeitschrift für Verwaltungsrecht, p. 984.

[129] See § 8, *Geschäftsordnung der Verbraucherschutzministerkonferenz*.

[130] See § 9 and § 12, *Geschäftsordnung der Agrarministerkonferenz*.

Since officials are natural persons, they enjoy a twofold status: on the one hand, they are *Beamten*, with the set of rights and obligations descending from it; on the other side, they are citizens like every other natural person and can thus claim the fundamental rights granted by the Constitution[131]. This juxtaposition of statuses can give rise to some tensions, since the two situations can come at odds in concrete cases, whereby the implications of being a public official require a limitation of the fundamental rights otherwise granted by the Constitution.

To tackle this issue, many theories have been developed: historically, the prevailing idea was that the public officials were subject to the power of the public administration and therefore did not enjoy the rights normally granted to other citizens; nowadays, such a solution is not viable anymore, since the full respect of fundamental rights has become a tenet of democratic systems, even within the internal activity of public bodies. Therefore, in order to strike the balance between the two elements, the public officials are considered to enjoy a «special status» (*Sonderstatus*), which basically implies that they have rights as citizens but they are also subject to special rules required by the fact that they are public officials[132].

For the purposes of this research, the twofold nature of *Beamten* is relevant for two reasons: first, because it plays a specific role in the interplay between the *Bund* and the *Länder*; second, because it sets some limits to the law-making powers, both of the *Bund* and of the *Länder*, drawing a common baseline for the system.

As regards the first point, set of rules linked with the status of *Beamte* reflect the shared law-making competence between the *Bund* and the *Länder*[133]. Therefore, whenever the former exercises its prerogatives, it provides common rules for *all* the public officials in Germany, notwithstanding their workplace. This has been the case with the *Beamtenstatusgesetz*, which provides common rules dealing with many

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[131] Merten, "Das Recht des öffentlichen Dienstes in Deutschland", in Magiera and Siedentopf (Eds.) *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft* (Duncker & Humboldt, 1994), p. 207.

[132] For an overview of the theoretical framework, see Werres, "Der Beamte als Grundrechtsträger – unter besonderer Berücksichtigung der Religionsausübungsfreiheit", (2006) Zeitschrift für Beamtenrecht, p. 288.

[133] Article 74, no. 27, GG.

fundamental features of the civil service system, such as the principles of the working relationship between the administration and the officials (except for remuneration and welfare), the beginning and the end of the working relationship, the cross-border transfer of officials and their transfer to the federal administration.

The second element to consider is that the fundamental rights stemming from the citizenship of *Beamten* and entrenched in the Constitution bind both the *Bund* and the *Länder*. In other words, they create a sort of common set of rules that provide the system with uniformity. Thus, public employers cannot narrow down the scope of fundamental rights *vis-à-vis* public officials, unless they do it complying with some principles.

The first one is that, as it happens for other citizens, the limitations of fundamental rights for *Beamten* have to be set out, as a rule, by statutory law (*Vorbehalt des Gesetzes*)[134]. This principle is valid for most of the rights and obligations linked to the status of *Beamte*, except for those for which the Constitution does not impose to adopt statutory law[135]. Secondly, limitations are acceptable to the extent that they are strictly required by the nature of the public tasks to be performed, so there has to be a finalistic link in this regard.

SECOND SECTION

7. *The dual federalism in the United States*

As a starting point, looking at the features of the US federalism, it stands out that the differences with the German legal system are striking. In the conception of the Framers, indeed, the Confederation (later Federation) of the US should have only been vested with a limited set of powers, leaving the remaining ones to the States[136]. Apparently, there was no room for fostering the cooperation between the Union and the States, neither by allowing the Congress to influence State policies nor to prescribe rules concerning the State implementation of federal policies.

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[134] Merten, "Das Recht des öffentlichen Dienstes in Deutschland", in Magiera and Siedentopf (Eds.) *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft* (Duncker & Humboldt, 1994), p. 208.

[135] Wichmann and Langer, *Öffentliches Dienstrecht*, (Kohlhammer, 2014), p. 33.

[136] See Hamilton, *Federalist Papers* no. XXXII, 1788.

These elements testify the existence of the principle of dual sovereignty in the US, so to say the fact that the Union and the States are both sovereign in their respective fields of competence. This foundational rule has been repeatedly stated by the Supreme Court in its settled case-law, since the first decades after the foundation of the US[137].

Nowadays, this conception has not been abandoned, although it has passed through several steps that have provided a better understanding of the potentialities of the US Constitution. Within the latter there are many provisions that underpin both the views, allowing to choose between the model of dual federalism and the one of cooperative federalism[138].

Seeking a definition, according to Zimmerman, the concept of dual federalism rests on some postulates that ensure the separation between the levels of government, which are that Congress possesses only enumerated powers and may employ them to promote only a few purposes; that within their respective spheres, Congress and states are "sovereign" and "equal"; that neither Congress nor a state legislature may nullify an act of the other or employ coercive powers against the other plane; that changes in the power distribution between the two planes of government can be accomplished only by constitutional amendments; that inter-plane relations are minimal as each Congress and each state legislature operates autonomously by employing its respective enumerated or reserved powers; finally, that Congress and a state legislature each possesses the power to tax and borrow funds. At the same time, some provisions, such as those regarding the elections of Senators or the appointment of presidential electors, would confer to the system a more cooperative fashion[139].

Within this constitutional framework, the US have experienced several stages in their history, which of course have also influenced their civil service system. A turning

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[137] See *Chisholm v. Georgia*, 2 US 419 (1793).

[138] As regards the dual federalism, there are for example the Tenth Amendment ("*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*") and the Fourteenth Amendment ("*All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside*").

[139] Zimmerman, "National-State Relations: Cooperative Federalism in the Twentieth Century", (2001) Publius: The Journal of Federalism, p. 15.

point has been traditionally identified in the rise of welfare state during the 20th century. After more than a century, in which the dual federalism had prevailed, the social needs of the '20s and '30s pushed the US to find cooperative solutions with the States[140].

In particular, especially after the financial crisis of 1929 and the subsequent adoption of the New Deal, the Federation started to use grants-in-aid to «steer» policies at State level. The scheme was pretty easy: the Federation offered financial aid (particularly welcomed back in those days), conditioned on the fact that the States had to enact some policies of national interest. This trend has been labelled as a proof of the «passing of dual federalism»[141].

This practice was further enhanced after the World War II and especially since the '70s, when the Federation ran into financial troubles and thus the simple use of fiscal capacity was not a viable option anymore. On this premises, the Federation started to use more coercive tools – namely, passing statutes – to pre-empt law-making powers at State level[142]. Long story short, the new administrative setting in the early '90s was hard to reconcile with the orthodoxy of US Constitution: the progressive expansion of enumerated powers of the US government coupled with the ever more frequent delegation of powers to independent agencies led some scholars to argue that a blatant violation of the original meaning of the Constitution was going on[143].

This path towards the enhanced cooperation was then stopped by the Supreme Court, which adopted two landmark rulings reaffirming the dual nature of the US federalism. In *New York v. United States*, the Court faced a case in which the Congress had enacted a statute (the Low-Level Radioactive Waste Policy Amendments Act of 1985) which, among other things, imposed upon States the obligation to provide for the disposal of waste generated within their borders. In this regard, such Act contained three provisions setting forth "incentives" to States to comply with that obligation. In its decision, the Court relied on the principle of dual sovereignty to conclude that the

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[140] Elazar, *The American Partnership: Intergovernmental Co-Operation in the Nineteenth-Century United States*, (The University of Chicago Press, 1962), *passim*.

[141] Corwin, "The Passing of Dual Federalism", (1950) Virginia Law Review, p. 1-24.

[142] Kincaid, "From Cooperative to Coercive Federalism", (1990) The Annals of the American Academy of Political and Social Science, p. 139-152.

[143] Lawson, "The Rise and Rise of the Administrative State", (1994) Harvard Law Review, p. 1231.

concrete design of the financial incentives at stakes would have resulted in a «command» to the State government, ending up in encroaching upon the Constitution[144]. In a subsequent case, the Supreme Court repeated such a conclusion with regards to the prohibition to the US government to «command» some activities to State officials[145].

In other words, the cooperative trend registered to that point was struck down by the Supreme Court. Nowadays, the dual paradigm still prevails and this has led some scholars even to claim that the relationship between the Federation and the States should be framed in terms of contraposition, so to say as a «non-cooperation»[146].

This historical overview depicts two features relevant to the US federalism: first, that the US Constitution leaves an appreciable room for institutional developments in the system; second, that the relationship between the levels of government depends on the contextual elements in place.

The observation of the powers of pre-emption and development of the anti-commandeering doctrine is particularly meaningful. The expansion and the reduction of these two elements give a clue of the stage of federalism in place in a specific moment. In particular, pre-emption is deemed to be a consequence of the supremacy clause embedded in the Constitution, according to which federal law is «the supreme Law of the Land» notwithstanding any state law to the contrary[147]. On the contrary, the anti-commandeering doctrine prevents the Federation from «commandeer», a concept that «refers to a federal requirement that state officials enact, administer, or enforce a federal regulatory program»[148].

In a quite recent case, the Supreme Court clarified that the distinction between pre-emption and commandeering rests on the difference «between federal laws that regulate the people directly (and accordingly can permissibly preempt state law) and federal laws that regulate the state's regulation of the people (and are therefore unconstitutional

[144] See *New York v. United States*, 505 US 144 (1992).

[145] *Printz v. United States*, 521 US 898 (1997).

[146] Bulman-Pozen and Gerken, "Uncooperative Federalism", (2009) The Yale Law Journal, p. 1256.

[147] Article 6, US Constitution.

[148] Siegel, "Commandeering and Its Alternatives: A Federalism Perspective", (2006) Vanderbilt Law Review, p. 1629.

attempts at commandeering)»[149]. When it comes to civil service matters, this distinction is particularly fruitful. According to the US Constitution, indeed, the Federation has only a limited set of powers; only in such fields it can occasionally intervene in order to pre-empt State laws. It is undisputed that the US Government lacks the power to pre-empt States in regulating their own officials. At the same time, the Supreme Court has explicitly ruled out the possibility for the Federation to tell the States (or their officials) what they have to do[150]. By excluding both the ways, it is clear that the US Government lacks any direct power of organization when it comes to the civil service systems at State level. As better described in the following paragraphs, it can only «steer» what happens at State level by means of financial conditionality, unless this violates the principles just outlined.

It goes without saying that these constitutional premises bring about some consequences in terms of administrative organization. Each sovereign entity indeed retains the power to create its administrative offices and agencies. As regards the Federation, this power is implied by the so-called «Necessary and Proper Clause» of the Constitution, according to which the Congress is entitled «[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof»[151]. At subnational level, such a power stems from the sovereignty of States.

As regards the organization at federal level, the executive branch of the US Government revolves around the broad notion of «agency», which encompasses each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include the Congress, the courts of the United States, the governments of the territories or possessions of the United States and the government of the District of Columbia[152]. Agencies can thus be categorized either as

[149] See Hartnett, "Distinguishing Permissible Preemption from Unconstitutional Commandeering", (2000) Notre Dame Law Review, p. 352; see also *Murphy v. National Collegiate Athletic Association*, 584 US 453 (2018).

[150] See *New York v. United States*, 505 US 144 (1992); *Printz v. United States*, 521 US 898 (1997).

[151] Article 1, § 8, US Constitution. See *Freytag v. C.I.R.*, 501 US 868 (1991).

[152] § 551 of Administrative Procedure Act.

regulatory agencies – when they are entitled to restrict individual rights via regulation or adjudication – or other agencies, when they are just vested with the power to dispense social benefits to the public[153].

All these bodies are the only ones in charge of implementing federal policies: according to the principles aforementioned, indeed, the US Government cannot compel the States to enact and implement federal policies. Therefore, as a starting point, there is a clear-cut distinction between the national and sub-national level of government, which both are separately in charge of implementing their own laws.

At the same time, States are not only free from interference of the US Government, but they even lack inherent powers to implement federal policies. Consequently, they cannot decide to enact federal policies unless they are explicitly empowered to do so by federal laws, as it happens, for example, for some statutes that entitle the State attorneys to enforce federal law before federal courts[154]. In other words, it can happen that State officials are authorized to enforce federal law, but they can never be obliged to do so.

In light of what has been outlined so far, there are some features that must be stressed for the purposes of next paragraphs: US federalism still relies on a model of dual sovereignty; consequently, each government retains the power and the duty to implement its policies and to carry out the tasks envisaged by the Constitution; although some forms of cooperation are admissible, they can never end up in being a circumvention of the clear-cut allocation of tasks provided by the Constitution; finally, as a consequence, each civil service is in charge of implementing the policies of the government it belongs to; therefore, it is under the sole control of the latter. In light of these elements, it is possible to delve into the legal framework of the US civil service system.

8. Legal sources of the US civil service

Unlike Germany, the US Constitution contains only few references to the civil service. This difference reflects the historical period in which the Constitution was drafted and, therefore, the different objectives it was pursuing. In particular, the US Constitution represented the outcome of the American Revolutionary War and therefore

[153] Schwartz, Corrada, Brown and West, *Administrative Law*, (Wolters Kluwer, 2018), p. 17.

[154] Lemos, "State Enforcement of Federal Law", (2011) New York University Law Review, p. 708.

it drew a line of separation from the previous regime in place under the British Empire. This context was reflected in two provisions regarding the civil service.

In first place, as seen above, thanks to the «Necessary and Proper Clause» of the Constitution, the Congress is vested with the power «[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof»[155]. This provision has been consistently interpreted as to allow the US Government to establish all the administrative offices (*i.e.*, agencies) that turn out being necessary to execute the powers explicitly conferred by the Constitution[156]. This of course extends the sphere of influence of federal administration, that brings about an expansion of the federal civil service.

The second provision which is crucial for the federal civil service is the so-called «Appointments Clause», according to which the President of the United States «shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments»[157].

Such a rule is relevant for two concurring reasons: first, because it deals with the separation of powers, tracing the boundaries of the powers of the Congress and the President when it comes to the appointment of federal officers; second, because it outlines the vertical allocation of the power of appointment among the several layers of the executive branch (i.e., among the President itself and the Heads of Department).

In the original view of the Framers, depicted by Hamilton, the concentration of powers upon the President descending from the Appointments clause should have played a twofold role, both by providing the «best» method of selection and by ensuring the full accountability of the President towards citizens[158]. The first assumption was

[155] Article 1, § 8, US Constitution.

[156] *Freytag v. C.I.R.*, 501 US 868 (1991).

[157] Article 2, § 2, US Constitution.

[158] See Hamilton, *Federalist Papers* no. LXXVI, 1788.

determined by the previous experience under the British domination, given the fact that the concerns surrounding the «King's friends» had been one of the main reasons that led to the outbreak of the Revolution[159]. Therefore, vesting the President with the power of appointment – and not the politics represented by the Congress – seemed a better way to select public officers. The second assumption – that is to say, the accountability issue – reflected the intention of the Framers to make the President fully accountable for the large set of powers it was provided with.

Given the striking implications descending from the provision, it is crucial to determine its scope of application. In this regard, it is necessary to understand, on the one side, whether all the federal officers (*i.e.*, those working at federal agencies) fall within the realm of the Appointments clause; on the other side, one must ascertain whether and to what extent such a clause applies also to State officers.

Starting from the first question, according to the wording of the Constitution, there are at least two categories of officials at federal level, that is to say the «principal officers» and the «inferior» ones[160]. Since its earliest case-law, the Supreme Court has specified that the term «principal» has to be intended as equivalent to «head of department»[161]; inferior officers are thus identified by exclusion.

Along with this, the Supreme Court has also identified a further category of persons working within the federal government, who are not considered officers but rather mere «employees». To this end, the line of demarcation is quite blurred, since the Court has always labelled the employees as «lesser functionaries» undergoing the direction of federal officers; the latter are those «exercising significant authority pursuant to the laws of the United States» and, consequently, are required to be appointed pursuant to the Appointments clause[162].

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[159] Civil Service Commission, *History of the Federal Civil Service – 1789 to the Present*, (US Government Printing Office, 1941), p. VIII.

[160] Article 2, § 2, US Constitution.

[161] See *United States v. Germaine*, 99 US 508 (1878).

[162] See *Buckley v. Valeo*, 424 US 1 (1976).

It is undisputed that such a definition does not provide sufficient indications on how to determine whether a worker is an officer or rather just an employee[163]. The only further help provided by Court rests on the fact that «employees» lack the power to adopt the final decisions in relation to their tasks[164]. Looking at the case-law, there are some examples of lower tasks that have been assigned to «inferior officers», such as the district court clerk, the US commissioners in district courts proceedings, an independent council, and so on[165].

The unclear definition of what is a federal officer affects the relationship between the US and the States as well. In this regard, two conceptions are theoretically on the table: one, with a structuralist fashion, accepts that only persons working at federal offices can be framed as «federal officers»; the other one, instead, claims that even State officials vested with federal tasks can be deemed as officers under the Appointments clause. This is what would supposedly happen with regards to State attorneys allowed to bring cases before federal courts to enforce federal rules[166]. Despite suggestive, such a thesis has not been upheld, either by the case-law or by the administrative practice.

To sum up, the Appointments clause only applies to federal officers (*i.e.*, those working at federal agencies) that are vested with powers incompatible with the role of mere employees. This of course leaves many doors open: from the perspective of the Federation, the Appointments clause only sets some rules protecting the presidential prerogatives, but it does not provide specific indications on *how* to conduct the selection procedures. From the perspective of single States, they are essentially free to rule on their officials, with the sole limit of the respect of their constitutional rights, as better explained below.

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[163] Critical remarks are provided by Lindstedt, "Developing the Duffy Defect: Identifying Which Government Workers are Constitutionally Required to Be Appointed", (2011) Missouri Law Review, p. 1143; Plecnik, "Officers under the Appointments Clause", (2014) Pittsburgh Tax Review, p. 201-240; West, "Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence", (2017) The Yale Law Journal Forum, p. 42-61.

[164] *Freytag v. C.I.R.*, 501 US 868 (1991).

[165] For further examples, see Schwartz, Corrada, Brown and West, *Administrative Law*, (Wolters Kluwer, 2018), p. 75.

[166] This is claimed by Lemos, "State Enforcement of Federal Law", (2011) New York University Law Review, p. 708.

This entails that, both at federal and state level, statutory law plays a pivotal role. Focusing on the US Government, one must look at the provisions of Title V, Parts II and III, of the US Code, respectively dealing with the institutional and procedural rules concerning the US civil service[167]. In particular, such provisions set out the rules concerning, among the others, the Office of Personnel Management (which took over the tasks previously carried out by the United States Civil Service Commission) and the Merit System Protection Board[168]. Moreover, as regards the substantial aspects of the civil service, the Federation has adopted rules concerning the selection procedures and the remuneration of officers and employees. Such rules are better clarified by the regulations passed by the executive branch, which are then merged within the Code of Federal Regulations (CFR).

9. Legal framework and its principles

Given the rigid separation determined by the dualistic model adopted in the US, the civil service is not conceived as a unity, but rather as a sum of the Federal service and the civil services of States. This brings about a radical heterogeneity in the system. This paragraph thus focuses on the legal framework of the Federal service, although it outlines some of the tools used by the Federation to steer the substantive legal framework at State level, introducing some elements of homogeneity at sub-national level.

As stated above, through its case-law, the Supreme Court has divided the federal personnel into three categories: the «principal» officers, the «inferior» officers and the mere «employees»[169]. Whereas, constitutionally speaking, such a distinction has its relevance, when it comes to the substantive rules outlining the day-to-day management, it bears a lesser importance. If one looks at the provisions on selection, hiring,

[167] For an overview of the reforms of civil service systems at State level, see the contributions in Kellough and Nigro (Eds.), *Civil Service Reform in the States*, (State University of New York Press, 2006), *passim*.

[168] Respectively regulated in 5 US Code Chapters 11 and 12.

[169] Lindstedt, "Developing the Duffy Defect: Identifying Which Government Workers are Constitutionally Required to Be Appointed", (2011) Missouri Law Review, p. 1143; Plecnik, "Officers under the Appointments Clause", (2014) Pittsburgh Tax Review, p. 201-240; West, "Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence", (2017) The Yale Law Journal Forum, p. 42-61.

remuneration and tort liability, it stands out that the latter generally apply to the all-encompassing category of «employees», which involves the «officers» as well.

The first set of rules to be taken into account deals with the establishment and the functioning of the merit system within the Federal service. It is undisputed that, unlike Germany for example, the US Constitution does not envisage substantive rules prescribing *who* to hire and *how* to do it. Therefore, during most of the 19th century, the Presidents of the US frequently recurred to political patronage, selecting officers not because of their skills, but rather because of their political affiliation. In practice, such a trend remained in place for long, even though in the second part of the 19th century the spoils system was progressively mitigated; the turning point can be dated back to the Pendleton Civil Service Reform Act of 1883, which can be considered as the starting point of the merit system in the Federal service[170].

In the subsequent decades, the standards ensuring meritocracy within the Federal service have been better refined. For the civil service systems at State level the story went differently, since the rules concerning the merit system were introduced later, mostly because of the financial pressure of the Federation, as described below (see par. 10). In any case, nowadays the merit system at federal level revolves around both institutional and substantive rules.

From the institutional point of view, the merit system within the Federal service relies on two offices, which are the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). The OPM plays a crucial role in regulating and conducting the selection procedures concerning federal employees. In particular, in compliance with the Appointments clause, the President can delegate – and in practice it has – to the OPM the authority for personnel management and the power to carry out competitive examination to access the Federal service[171]. A part from this, the OPM is in charge of setting standards to uniformize the main aspects of the examination procedures[172] and, more broadly, it can enact regulations to implement the US Code[173].

[170] See Civil Service Commission, *History of the Federal Civil Service – 1789 to the Present*, (US Government Printing Office, 1941), p. X.

[171] 5 US Code § 1104 (a).

[172] 5 US Code § 1104 (b).

[173] § 5.1. CFR.

Moreover, it can further delegate other agencies to conduct the selections by themselves, by simply closing an agreement with the latter.

On the other hand, the MSPB is an office made of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom may be adherents of the same political party[174]. Its main task is to protect employees from improper conducts and, to this end, its powers span from the faculty to conduct hearings, collect evidence and adjudicate on the claims brought before it. For example, the MSPB is competent on the appeals lodged by employees when their positions are terminated; in this regard, however, the MSPB can only review such decisions on the ground of non-discrimination and procedural flaws[175]. A part from that, the MSPB is also supposed to review the regulations enacted by the OPM, in order to ensure that they do not result in a «prohibited practice» of the civil service system, such as discrimination, solicitation, improper influence on competitive selections and so on[176].

As regards the substantive rules, it must be stressed that, as seen above, the merit system is not actually imposed by the Constitution itself. Therefore, statutory law provides positions for which the selection is carried out not by merits, but rather relying on other criteria. According to this premise, the Federal service can be divided into three categories, which are the Senior Executive Service[177], the Competitive Service[178] and the Excepted Service[179]. The first category encompasses those employed in top positions that are not appointed by the President itself[180]; the Excepted Service constitutes a derogation to the merit system based on competitive examinations, which instead is the rule for the Competitive Service.

Looking at the interplay between the second and the third category, it is interesting to notice that exceptions to the competitive selection are not to be set out by statute, but

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[174] 5 US Code § 1201.

[175] § 315.806 CFR.

[176] 5 US Code § 1204. The prohibited practices are enlisted in 5 US Code § 2302 (b).

[177] 5 US Code § 2101a.

[178] 5 US Code § 2102.

[179] 5 US Code § 2103.

[180] 5 US Code § 3132(a)(2).

rather simply by a decision of the OPM[181]. In particular, the latter can identify these «exceptions» when there are positions belonging to some specific groups («Schedules») of employees, so to say: people for which an examination would be impossible, for example, in case of disabilities (Schedule A); positions for which there is an examination but a strictly speaking competition would not be practicable (Schedule B); positions of political or confidential nature (Schedule C); positions for which a competitive examination would hinder the selection of individuals attending qualifying educational programs (Schedule D)[182]; positions as administrative judge (Schedule E). By exclusion, positions which do not fall within these schedules and are not part of the Senior Executive Service have to filled via competitive examinations carried out by the OPM or by the delegated agency itself.

In general, examinations can be competitive or non-competitive in nature; the OPM is in charge of holding them «at least twice a year in each State and territory or possession of the United States where there are individuals to be examined»[183]. Such examinations have to be «practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought»[184].

In conducting the examinations, the US Code outlines two models. In principle, there is the «rule of three», according to which the appointing authority (either the OPM or the delegated agency itself) can pick up one of the top three candidates from the list of eligibles applicants[185]. Exceptionally, the Code allows to adopt the so called category ranking approach, which grants more discretion to the appointing authority. In practice, this second method has been qualified as mandatory by a Memorandum of the President and therefore it applies to all the competitive procedures, unless the agency concerned

[181] § 6.2. CFR.

[182] These programs encompass, for instance, high schools/GED whose curriculum has been approved by a state or local governing body, or a home-school curriculum; any accredited technical or vocational school; a two or four year college or university; a graduate or professional school; a post-secondary home-school curriculum.

[183] 5 US Code § 3305.

[184] 5 US Code § 3304(a)(1).

[185] 5 US Code § 3317(a); 5 US Code § 3318.

requests and receives an exception under the terms of the Memorandum[186]. According to this method, once assessed, applicants are ranked by being placed in one of two or more predefined quality categories instead of being ranked in numeric score order[187]. Then, the appointing authority may pick up a candidate from the highest category, without caring about the ranking *within* the category. It is clear, therefore, that the appointing authority enjoys a wider discretion in selecting the candidate that better fits the position.

These are the principles of merit system within the Federal service. Looking at the situation at State level, instead, the landscape is quite heterogeneous. There are some common patterns though, that are mostly the outcome of two factors: on the one hand, they reflect the financial pressure exercised by the Federation, especially through the grants-in-aid put in place since the early 20th century; on the other hand, they constitute a consequence of the broad conception of «merit system» in the US. In particular, the latter notion encompasses not only the procedures to select employees, but also their procedural rights granted to prevent any misconduct or maladministration in the service. As seen above, the MSPB adjudicates on complaints about procedural flaws, among the others. Since many of these rights are protected as constitutional rights, they bind not only the Federation, but the States as well[188].

A second point to be taken into account, after selection procedures, is the remuneration. The latter is determined by looking at two criteria, one functional and the other geographical in nature.

From the first point of view, the pay of federal officers is determined according to some principles, which basically revolve around the necessity to grant an equal pay for substantially equal work; moreover, to increase the performance of the employees,

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[186] Memorandum of President of the United States, May 11, 2010, 75 F.R. 27157, *Improving the federal recruitment and hiring process*.

[187] Office of Personnel Management, *Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices*, (2019), at <https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/>, (last visited 8 August 2024).

[188] The interplay between merit system at State level and constitutional rights stands out from the case study of Georgia; for further information, see Kuykendall and Facer, "Public Employment in Georgia State Agencies", (2002) Review of Public Personnel Administration, p. 133-145.

variations in rates of basic pay paid to different employees have to be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service[189].

Hence, pay positions are grouped in classes and grades. Classes encompass positions that reflect similar kind or subject-matter of work; or similar level of difficulty and responsibility; or similar qualification requirements of the work. Grades involve all the classes that, although different in subject-matter, still have the same level of difficulty and responsibility or the same level of qualification requirements of the work.

In practical terms, all the officers and employees (except for those, for example, working at FBI or DEA) have their salary framed within a General Schedule («GS»). There are fifteen GSs and within each of them there are ten steps in the salary. From the combination of these elements, that reflect the functional framework just outlined, one could theoretically calculate the basic salary of a federal offer.

However, as anticipated, the remuneration for Federal service is also set out by looking at the workplace of the employees. As a principle, indeed, there should be equal pay for substantially equal work within each local pay area; within each local pay area, pay distinctions should be maintained in keeping with work and performance distinctions; Federal pay rates should be comparable with non-Federal pay rates for the same levels of work within the same local pay area. In the intention of the US Government, any existing pay disparities between Federal and non-Federal employees should be completely eliminated[190].

Practically speaking, the local pay areas have been identified and they reflect, most of the times, the territory of the States, even though there are some discrepancies[191]. For each local pay area there is a rate to calculate the adjustment of remuneration. In conclusion, the salary of federal officers is partially determined by their tasks, their performances, their seniority, and partially also by their geographical location.

[189] 5 US Code § 5101.

[190] 5 US Code § 5301.

[191] § 531.603 CFR.

Finally, it is necessary shed light on how individuals that suffered losses caused by the activity of federal officers can seek redress. Also in this case, indeed, one must distinguish the position of the officers from the one of the agency they work for.

As a matter of principle, since the Federal Tort Claims Act of 1946, third parties who have allegedly suffered losses because of the activity of an officer carrying out its duties can sue the US Government either before the district court competent on the territory or before the United States Court of Federal Claims[192]. Hence, the US Government can be held liable for damages caused by its employees «in the same manner and to the same extent as a private individual under like circumstances»[193]; thus, it can be sued before federal courts to repair such losses but, interestingly, the sought court applies the law of the place where the harmful act or omission occurred. In other words, federal liability can also descend from violation of State laws.

A part from that, at least theoretically, third parties might have another option, which is to file a suit against the official personally. In this regard, there has been an evolution in the legal framework of the personal tort liability of federal officers[194].

At the beginning, under common-law principles, federal officers could be held personally liable for harmful misconducts. Only later on, during the 20th century, the Supreme Court started to shield them from claims for damages based on state-laws violations, by developing a doctrine of immunity in their regards[195].

This doctrine was better refined (and limited) in *Westfall v. Erwin*, whereby the Court specified that the immunity granted to federal officials from state-law tort liability had to be limited to cases in which «the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature»[196]. Hence, not all the tasks were covered by immunity, but only those that concretized «decision-making discretion».

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[192] 28 U.S: Code § 1346.

[193] 28 U.S: Code § 2674.

[194] Sisk, "Recovering the Tort Remedy for Federal Offifficial Wrongdoing", (2021) Notre Dame Law Review, p. 1789-1834.

[195] See the landmark case *Barr v. Matteo*, 360 US 564 (1959).

[196] See *Westfall v. Erwin*, 484 US 292 (1988).

At the same time, the Supreme Court developed a slightly different jurisprudence regarding the constitutional tort liability, so to say the personal liability of federal officers *vis-à-vis* third parties for having breached constitutional rights. In this regard, the landmark case was *Bivens*, in which the Supreme Court theoretically admitted the possibility to hold the official personally liable towards the plaintiff in cases of a violation of a constitutional right (in that case, the Fourth Amendment was concerned)[197]. By this way, the Supreme Court has also seek to introduce a deterrent in the system, as to prevent blatant violations of fundamental rights by public officers[198].

These principles have been partially transferred in the *Federal Employees Liability Reform and Tort Compensation Act* of 1988 (also known as the *Westfall Act*), which was remarkable for two reasons: first, it basically widened the immunities for federal officers, by symmetrically reducing the scope of the case-law of Supreme Court with regards to the possibility to sue federal officials. In particular, nowadays it is not possible, as a rule, to directly sue a federal official: the claim against the US Government is deemed to be «exclusive». However, federal officials might still be held liable in two situations: according to *Bivens*, they can be sued for a violation of the US Constitution; moreover, they can also be individually sued whenever there is a federal law explicitly providing so (as *lex specialis*)[199]. Therefore, to sum up, third parties can bring the US Government before a court, but cannot individually sue the federal officials that caused the damages, unless they complain about a violation of constitutional rights or they are explicitly empowered to do so by federal law.

There is another hurdle in order to sue a federal officer though: according to the case-law of the Supreme Court, indeed, even in cases in which constitutional rights are at stake, federal officials might enjoy the so-called «qualified immunity», which implies that «government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known»[200]. Concretely speaking, this means that whenever there are doubts on the

[197] See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971).

[198] See *Carlson v. Green*, 446 US 14 (1980).

[199] 28 US Code § 2679.

[200] See *Harlow v. Fitzgerald*, 457 US 800 (1982).

concrete scope of a constitutional right or on its meaning, the federal officer could be shielded by qualified immunity. This set of rules has radically narrowed down the concrete possibilities for individuals to obtain redress for their losses, as empirical studies has shown so far[201].

10. Financial conditionality and State officials

As seen above, the Federation lacks law-making powers to shape the legal framework of civil service systems at State level. This is the consequence of both the dual federalism in place in the US and the anti-commandeering doctrine established by the Supreme Court.

To put it differently, the Federation cannot pre-empt States with statutory law. Hence, during its history, the US Government has frequently used the financial leverage – via «conditionality» - to influence the developments of State civil services. In order to do so, two issues have been tackled: first, there is an issue concerning the spending power of the US Government, since granting financial assistance and requiring some policies related to public personnel means spending federal funds for purposes which are not explicitly enlisted in the Constitution; second, it is necessary to understand how far the Federation can go in providing such financial assistance without resulting in a fully-fledged constriction.

As regards the spending power of the Federation, the main issue is to ascertain whether the latter can collect and spend funds only in the enumerated fields in which the Congress has legislative powers, or it can rather go beyond such competences and provide financial assistance for other policies. In this regard, according to settled case-law of the Supreme Court, it is undisputed that the Congress has a spending power which is broader than its legislative competence. The only limitation that it encounters rests in the necessity to operate for the «national welfare»[202].

[201] Reinert, "Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model", (2010) Stanford Law Review, p. 809-862.

[202] See *United States v. Butler*, 297 US 1 (1936). See also Briffault, "Public Finance in the American Federal System: Basic Patterns and Current Issues", (1996) Columbia Journal of European Law, p. 533-556.

According to this rule, since the early years of 20th century, the US Government has started to provide grants-in-aid to State governments in order to enact public policies which were supposed to increase the national welfare[203]. However, the US Government did not only provide financial aid, but attached also some «conditionalities» to the latter, in order to give incentives to the States to pursue some collateral policies[204]. Interestingly, since the beginning of this practice, the Federation started to ask to the States to introduce internal rules to enact the merit system for their civil services[205].

This practice has been further strengthened, especially after the financial crisis of 1929 and the adoption of New Deal as a response to the economic depression[206]. Since then, the Federation has engaged in hundreds of financial programs to be implemented at State level on voluntary basis. When one focuses on the civil service matters, it is possible to see that many of these programs have been used to establish a merit system at State level while implementing them[207]. A meaningful example is offered by the set of policies enacted in the field of «Public Health and Welfare», which provided, for instance, Grants to States for Old-Age Assistance, Grants to States for Aid to Blind, Grants to States for Aid to Permanently and Totally Disabled and so on[208].

There was a clear pattern in those programs: first, the latter generally required «the establishment and maintenance of personnel standards on a merit basis»; second, the measures adopted at State level were designed by the State itself, which submitted a specific plan to the Federal Administration for the approval and to receive the funds.

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[203] Elazar, *The American Partnership: Intergovernmental Co-Operation in the Nineteenth-Century United States*, (The University of Chicago Press, 1962), *passim*.

[204] The notion of financial conditionality has developed primarily at international law level and, only later on, has been spread over the EU. See Pinelli, “Conditionality”, in Wolfrum (Ed.) *Max Planck Encyclopedias of International Law* (OUP, 2013).

[205] See e.g. Friedrich, “Responsible Government Service under the American Constitution”, in Friedrich, Beyer, Spero, Miller and Graham (Eds.) *Problems of the American Public Service* (McGraw-Hill Book Company, 1935), p. 63.

[206] See Sunstein, “Constitutionalism after the New Deal”, (1987) Harvard Law Review, p. 421-510.

[207] See *Norton v. Blaylock*, 285 F. Supp. 659 (1968). In literature, Friedrich, “Responsible Government Service under the American Constitution”, in Friedrich, Beyer, Spero, Miller and Graham (Eds.) *Problems of the American Public Service* (McGraw-Hill Book Company, 1935), p. 63.

[208] See 42 US Code § 302; 42 US Code § 1202; 42 US Code § 1352.

Unsurprisingly, these grants have never raised particular issues, since the conditions attached to the financial aids were strictly related to the purposes of the policy to be pursued. Indeed, making a financial aid conditional on the fact that the money is going to be managed by appropriate personnel is a reasonable way to operate for the «national welfare».

Therefore, this kind of conditionalities could have been labelled as «related», since the conditions attached to the grants were linked to the policies to be implemented. There is however another category of conditionalities that have been used to pursue objectives that were not related to the target of the spending powers. These «crossover» conditionalities have raised more concerns and thus required the intervention of the Supreme Court, as seen below[209].

The most important program with crossover implications for the civil service systems at State level has been enacted through the *Intergovernmental Personnel Act* of 1970[210]. This federal program aimed at improving the administrative capacity and the performance of personnel at State level. To this end, the United States Civil Service Commission was enabled to make grants to States up to the 75% of the costs to develop and implement plans to achieve such objectives. In order to be eligible, these plans had to fulfill some requirements and in particular had to set forth practicable actions to improve the civil service at State level, such as asking the States to make grants to local government to strengthen the civil service of the latter, or requiring the States to conduct assessments on their personnel, strengthening the recruitment and the selection and so on. These programs have been crucial for laying down a common set of rules and principles, shared by almost all the States, regarding the regime of public officials[211].

It goes without saying that the aforementioned typologies of intervention of the Federation into the legal framework of personnel at State level brought about some constitutional concerns. In particular, the Supreme Court has been sought over the years

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[209] Baraggia, *La condizionalità come strumento di governo negli Stati compositi*, (Giappichelli, 2023), p. 76.

[210] Public Law no. 91-648.

[211] For an early appraisal of the measure, see US Congress, *An Evaluation Of The Intergovernmental Personnel Act Of 1970*, 1979.

to set out some limits to the power of spending and of imposing conditionalities of the Federation.

The landmark case in this regard is *South Dakota v. Dole*, in which a federal policy was challenged because it conditioned access to a certain portion of federal highway funding given to state governments on the recipient states' willingness to ban the sale of alcohol to persons under the age of 21[212]. In this decision, the Supreme Court outlined the doctrine of «unconstitutional conditions» with regards to the spending powers of the Federations *vis-à-vis* the States[213]. In particular, the Court articulated a four-steps test to be followed in order to assess the legality of the conditions attached to federal grants: first, it repeated that the spending power must be used to pursue the «general welfare»; second, it specified that the conditions attached to the grants must be unambiguously stated; third, it clarified that the conditions have to be related «to the federal interest in particular national projects or programs»; finally, it highlighted that such conditions have of course not to be specifically barred by autonomous provisions of the Constitution.

Taken as such, the *Dole*'s test has never brought to declare the illegality of a federal program. This is probably due to the fact that the test articulated by the Court in *Dole* did not deal with the different question of whether the financial pressure carried out by the Federation turned into compulsion towards the recipient States, a question that the Court had already addressed in previous cases instead[214].

Such an issue has turned to be crucial in a more recent case, *NFIB v. Sebelius*, in which the Court had to ascertain whether the aids granted within the framework of the

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[212] See *South Dakota v. Dole*, 483 US 203 (1987); see also Oliver, "South Dakota v. Dole: the Federalist Revolution Undermined and States Coerced", (2006) Georgetown Journal of Law and Public Policy, p. 595.

[213] The doctrine of unconstitutional conditions has a broader scope of application, spanning from the conditions imposed on the enjoyment of constitutional rights to the spending powers of the US Government. See Williams, "Unconstitutional Conditions and the Constitutional Text", (2024) University of Pennsylvania Law Review, p. 747-827; see Sunstein, "Is There an Unconstitutional Conditions Doctrine?", (1989) San Diego Law Review, p. 337-345 for a general theory perspective; see Sullivan, "Unconstitutional Conditions", (1989) Harvard Law Review, p. 1413-1506, focusing on the case-law of the Supreme Court.

[214] See, e.g., *Steward Machine Co. v. Davis*, 301 US 548 (1937).

Affordable Care Act (also known as *Obamacare*) complied with the constitutional limits imposed upon the Congress' spending powers. In this case, for the first time the Court declared void a federal program because it imposed unconstitutional conditions upon the recipient States[215]. The main argument spent by the Court was financial in nature: first, unlike other federal programs, the *Obamacare* conditioned *all* the funds to the allegiance to its conditions, not only part of them; second, the Court underlined that «Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs». Following this line of argumentation, the Court famously concluded that «the financial ''inducement'' Congress has chosen is much more than ''relatively mild encouragement''—it is a gun to the head».

To conclude, the power to impose financial conditions in order to steer State policies is not unlimited. However, when it comes to civil service matters, it is hard to think that the *Dole*'s test or the *Sebelius*'s one could play a great role. Indeed, unlike *Sebelius*, which concerned the health care system, it must be highlighted that federal funds for civil service programs do not account that much in States' budget. Thus it is difficult to imagine that the conditions imposed by the Federation regarding the State officials could turn into a compulsion or – to say it with the Supreme Court – into a «gun to the head».

11. The public officer as a US citizen

As already observed in Germany, also in the US the public officers enjoy a double role: on one side, they have a special status, being in charge of carrying out tasks of public interest; on the other side, they are still citizens and therefore they can claim the rights conferred by the Constitution. It is thus interesting to see how the US legal system have coped with this tension through their history[216].

The starting point of this journey can be traced back to the 1892, when the Justice Holmes iconically wrote that a policeman «may have a constitutional right to talk

[215] See *N.F.I.B. v. Sebelius*, 567 US 519 (2012); in literature, Baker, "The Spending Power After NFIB v. Sebelius", (2014) Harvard Journal of Law & Public Policy, p. 71.

[216] For further readings, see the annual issue "Developments in the Law: Public Employment", (1984) Harvard Law Review, p. 1611-1800.

politics, but he has no constitutional right to be a policeman»[217]. To put it differently, being a public officer was not conceived as a «right», but rather as a simple concession. This quote summarizes in few words the famous «doctrine of privilege», according to which the set of prerogatives descending from the status of officer was not to be considered as a right, but only like a privilege that was «conditioned» on some circumstances. Such a conception could have been sketched as follows: *if* citizens wanted to be vested with public tasks, *then* they had to renounce to some of their constitutional rights.

This idea might be viewed as the US version of the German doctrine of supremacy that has been in place for a long time. Such a theory, however, has started to be criticized by scholars since the second part of the 20th century, when its compatibility with the Constitution has been put into question[218].

To overcome such a lock in, also in this case the doctrine of «unconstitutional conditions» has played a crucial role. Whereas at the beginning the public employment relationship was arbitrarily conditioned, thanks to this doctrine the Court has started to incrementally rule out the blatant unreasonable limitations to fundamental rights[219]. By observing its case-law, indeed, some scholars have started to point out that the latter had shifted its approach, by progressively extending constitutional protections to public employees on a case-by-case basis[220].

On the substantive side, the Court outlined the scope of fundamental rights with regards to public employees. Taking for instance the freedom of speech, since *Pickering v. Board of Education* of 1968 the Court had already had the opportunity to clarify that the power of the public employer is not unlimited, since «[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the

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[217] See *The McAuliffe v. Mayor of New Bedford*, 155 Mass. 216 (1892).

[218] See Dotson, "A General Theory of Public Employment", (1956) in Public Administration Review, p. 197-211.

[219] See Sunstein, "Is There an Unconstitutional Conditions Doctrine?", (1989) San Diego Law Review, p. 337-345; Sullivan, "Unconstitutional Conditions", (1989) Harvard Law Review, p. 1413-1506.

[220] Rosenbloom, "The public employment relationship and the Supreme Court in the 1980s", (1988) Review of Public Personnel Administration, p. 49-65.

efficiency of the public services it performs through its employees»[221]. In subsequent decisions the Court has better clarified the terms of such a balance, but what really matters here is that the doctrine of privilege was progressively watered down trough the case-law.

Looking at the procedural rights of employees, in *Cleveland Board of Education v. Loudermill* the Court had to ascertain whether an official of Ohio was granted with the right to due process prior to being fired. Interestingly, the Court stated that, regardless of the statutory framework at State level, the plaintiff was provided with such a right by the Due Process Clause of the US Constitution[222].

According to Rosenbloom, by observing the case-law of the Supreme Court it is possible to identify a path of convergence between the «public employment relationship» - historically special – and the employment in private sector. In particular, «today, the impact of the reinventing government movement and the development of the blended workforce appears to be blurring the distinction between public and private employment—a distinction on which the public employment relationship has been based since the demise of the doctrine of privilege in the 1950s–1970s»[223].

Leaving aside this issue, it seems out of question that the modern conception of the US «public employment relationship» is more in line with what can be found in Germany – and in other comparable countries – and plays a pivotal role in the interplay between the Federation and the States. Regardless the more or less «orthodox» conception of dual federalism in place in the US, the States are not completely free to shape their own civil service systems, because they have to comply with the constitutional rights granted to State officers as US citizens. This tends to unify the US civil system as a whole under the same umbrella.

[221] See *Pickering v. Board of Education*, 391 US 563 (1968).

[222] See *Cleveland Board of Education v. Loudermill*, 470 US 532 (1985).

[223] Rosenbloom, *Federal Service and the Constitution*, (Georgetown University Press, 2014), p. 183.

Chapter III
The EU Civil Service

1. Historical background

The historical origins that turned to the current setting of the EU civil service are an important but yet neglected topic in the academic discourse. With some exceptions[1], nowadays scholars mostly focus on the current state of affairs of the EU civil service, disregarding the historical background that brought about the ongoing situation[2].

In this research, it is though crucial to understand where the composite nature and the variety of legal frameworks within the EU civil service come from. Moreover, in order to conduct a meaningful comparison, it is necessary to clarify whether the legal framework of the EU civil service has been influenced by the institutional evolution of the EU as a whole.

To this end, the period that spans from the establishment of the European Coal and Steel Community (ECSC) in 1951 through the current situation is divided into four parts. First, it is taken into account the very starting point, in which there was a contractual regime for EU employees. Secondly, the analysis touches upon the main features of the EU civil service during the first decades of statutory regime, as interpreted, applied and shaped by the case law of the Court of Justice (CJEU). As a third step, an investigation is conducted as to ascertain how the massive changes occurred since the '90s have influenced the current functioning of the EU civil service.

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[1] See, for instance, Dubouis, "L'évolution de la fonction publique communautaire concorde-t-elle avec celle des Communautés Européennes?", in Mélanges offerts à Pierre-Henri Teitgen (A. Pedone, 1984), p. 127-143 ; Franchini, "La funzione pubblica comunitaria", in Chiti and Greco (Eds.) *Trattato di diritto amministrativo europeo*, (Giuffrè, 2007), p. 467-496; Id., "L'organizzazione amministrativa dell'Unione europea", in Chiti (Ed.) *Diritto amministrativo europeo*, (Giuffrè, 2018), p. 273.

[2] See Pilorge-Vrancken, *Le droit de la fonction publique de l'Union européenne*, (Bruylant, 2017).

Finally, there is an assessment of the most recent changes, partially related to the several crises (different in nature) that broke out in the last years.

1.1.Contractual regime until the staff regulations

The first experiments in the European integration have been promoted by a functionalist and institutionalist approach, rather than a pure federalist one. Operatively, this has resulted in the conferral only of few – although still strategic – policy fields, underpinned by the establishment of an institutional setting entrusted with public tasks at supranational level[3].

Unsurprisingly, the initial choices regarding the EU civil service have been thus pivotal in the first steps of the integration process. The main concerns at that time were, on the one hand, to immediately recruit the staff to be employed at the High Authority of the ECSC and, on the other hand, to shape such a personnel in a supranational way.

To satisfy the first necessity, ECSC Treaty provided that, until the adoption of the statute of the personnel, staff had to be recruited by means of contracts[4]. Therefore, as a matter of principle, the founding Member States decided to provide the staff of the ECSC with a statutory regime. In the very next aftermath of the establishment of the ECSC, however, the workers had to be hired through contracts.

Similar provisions were embedded into the two Treaties of Rome of 1957, establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The statutory regime was thus preferred, but a provisional contractual regime was also envisaged, as to cover the time between the establishment of each institution and its permanent statutory setting[5].

On this premises, the three Communities could have followed two possible paths theoretically observable in the international landscape at that time: on one side, there was the model of the classical secretariats of international organisations; on the other, there was the United Nations' model (former League of Nations)[6]. Whereas the first

[3] Olivi and Santaniello, *Storia dell'integrazione europea. Dalla guerra fredda ai giorni nostri*, 3rd ed. (il Mulino, 2015), p. 22.

[4] Art. 7 ECSC.

[5] Art. 212 and art. 246 EEC; Art. 186 and art 214 Euratom.

[6] Rogalla, *Dienstrecht der Europäischen Gemeinschaften*, (Carl Heymanns Verlag, 1981), p. 1.

model would have implied a typical intergovernmental outcome, in which every Member State would have retained for itself a quota of officials on circular basis, the second one would have conferred a more supranational "soul" to the civil service. Despite the High Authority was deemed to be a supranational body[7], strictly speaking the two options regarding the civil service were equally on the table in the first years.

It was mostly because of the background of the first people chairing the High Authority that this one acquired a more supranational "spirit". A crucial role have been played indeed by Jean Monnet, who first led such institution, after having already served within the League of Nations. His mandate revolved around two principles: first, on the idea that the staff should have been entrusted with steering competences (*administration de mission*), whereas the operational tasks should have been performed by staff of Member States[8]; on the other hand, he was concerned with the proliferation of staff caused by attempts of Member States to get an equal representation based on nationality[9].

Another important role in shaping the civil service in a supranational way has been played by the CJEU. As regards the very first cases concerning the staff, the latter clarified that the contracts concluded by the communities had to bee considered as *sui generis* contracts or, to better saying, as contracts «governed by public law»[10]. By following this line of argumentation, the Court also managed to protect the contracts of employment from the influence of Member States. When the Court was requested to decide whether such contracts fell within the realm of private or public law, it started by saying that they were concluded «by a person of public law» and eventually stated that «the contract at issue comes under public law and is subject to the general rules of administrative law»[11]. By doing so, the Court began to elaborate a set of rules of European administrative law in the specific field of civil service. This is not surprising,

[7] Art. 9 ECSC.

[8] Monnet, *Memoirs*, (Doubleday & Company, 1978), p. 373. See also Lassalle, "Contribution à une théorie de la fonction publique supranationale", (1957) Revue de droit publique et de la science politique en France et a l'étranger, p. 474-512.

[9] Monnet, *Memoirs*, (Doubleday & Company, 1978), p. 384.

[10] Case 1/55, *Antoine Kergall v. Common Assembly of the European Coal and Steel Community*, para 4.

[11] Case 44/59, *Rudolf Fiddelaar v. Commission of the European Economic Community*.

because it was perhaps the first subject matter in which the Communities were operating *vis-à-vis* individuals (i.e., their servants).

In the meantime, each institution started to individually adopt its own regulations, while waiting for the statute that was supposed to be passed pursuant the Treaties. The Court of Justice and the Assembly put their regulations into effect in July 1953, the Council of Ministers in November of that year, and the High Authority in November 1954[12].

Each Community then started to progressively adopt its own general regulations: the ECSC passed it in 1956, while the EEC and the Euratom came next in 1962. Remarkably, the ECSC statute originally stated that officials were expected to «conform their conduct to their status as *supranational* civil servants». This provision raised some concerns and was thus elided in the amendments of 1962, aligning it with the other two newly adopted statutes[13].

To understand the foundational tenets of these regulations, one must keep in mind the two main features of the Communities at that time. First, they were conceived as regional IOs and therefore were somehow influenced by the models that were spreading at that time within the European continent. Secondly, the Communities were designed to be *sui generis* IOs, at least if compared to other international bodies established in the aftermath of the World War II. This is because they had been settled to pursue an ambitious outcome, which was the harmonisation and integration of European markets.

As regards the first point, scholars have meticulously outlined the origins of the staff regulations adopted by the Communities, which flowed into the broader debate about the staffs within other contemporary IOs in Europe, such as the OECD, the Council of Europe, or the ELDO[14]. This common understanding surrounding the

[12] Feld, "The Civil Service of the European Communities: Legal and Political Aspects", (1963) Journal of Public Law, p. 68-85.

[13] Ibid, p. 73.

[14] Vandersanden, "Vers une harmonisation des differents systemes de fonction publique européenne", (1975) Uniform Law Review, p. 60-66.

European civil service systems was testified by several initiatives launched in those years, which aimed at laying down a sort of *corpus iuris* for such staffs[15].

However, the staff of the Communities has been primarily shaped by the very peculiar nature of such organisations. Unlike other IOs established back in those days, the Communities have been created as to pursue the integration of the legals systems of their Member States. Hence, unlike the OECD or even the UN, which strongly relied in their first steps, whether not entirely, at least partially, on national officials seconded to their offices, the Communities began to hire and manage their own staffs reducing at the very minimum the interferences by Member States. For this reason, as Schwob pointed out, the staff of the Communities embodied a sort of "closed" model, by contrast with the others, which were still deemed as being "open to" or "mixed with" the Member States[16].

This conception evidently inspired the first regulations and was then incorporated without massive changes into the merger regulation of 1968, which came right after the unification of the Executives of the three Communities[17]. Since then, the Communities have been applying the SRs and CEOS that are still in place nowadays, despite several amendments that had occurred in the meanwhile.

1.2.First decades of statutory regime

The adoption of a statutory regime rather than a contractual one brings about several consequences in legal terms. First and foremost, the rights and obligations connected to the status of "official" derive only from the law[18], that is to say that contracts are not able to produce such effects and are thus irrelevant before EU judges[19].

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[15] Benoit, "Réflexions sur une fonction publique européenne. Le statut-type élaboré par la Conférence gouvernementale pour la fonction publique européenne", (1967) Annuaire français de droit international, p. 587-606.

[16] Schwob, *Les organes intégrés de caractère bureaucratique dans les organisations internationales*, (Bruylant, 1987), p. 358.

[17] Houben, "The Merger of the Executives of the European Communities", (1965-1966), Common Market Law Review, p. 37–89.

[18] Case 28/74, *Fabrizio Gillet v. Commission*, ECLI:EU:C:1975:46, para 4.

[19] Case 18/69, *Bernard Fournier v. Commission*, ECLI:EU:C:1970:37, para 8.

This does not imply that EU bodies cannot hire by means of contracts: they can do it either according to the CEOS or – at least theoretically and in very residual chances – by means of contracts of private law, as it is discussed below. Rather, the statutory regime implies that staff governed by SRs and CEOS is entirely and solely subject to law, regardless of what is written in contracts of employment.

Given the centrality of the statute, scholars generally claim that the EU civil service has been drawn upon two models: the one of IOs and the one of some of the founder Member States, in particular Germany and France[20]. As regards the influence of the latter, there is an even greater belief that «[l]'expérience de codification du statut des fonctionnaires de la République française de l'après deuxième guerre mondiale nous semble à cet égard déterminante». Accordingly, the EU civil service has allegedly borrowed by French *fonction publique* the list of rights and obligations, the framework of careers, the system of recruitment based on open competitions (*concours*), the concept of *positions administratives* and so on[21]. As it will be demonstrated below, however, such a belief comes at odds with the concrete application of the SRs and CEOS, which strongly departs in concrete from the French model.

On the other side, like every other international organisation, the EEC had to cope with the problem of mixed nationalities within the civil service too. In this regard, as

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[20] Oberdorff, "Fonction publique de l'Union européenne" in Auby and Dutheil de La Rochère (Eds.) *Traité de droit administratif européen* (Bruylant, 2022), p. 229-246; the French tradition was important also according to Sant'Anna, "Sources et champ d'application du droit de la fonction publique de l'Unione européenne", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 18; Blumann and Dubouis, *Droit institutionnel de l'Union européenne*, 6th ed. (LexisNexis, 2016), p. 345-346; Lindemann, *Allgemeine Rechtsgrundsätze und europäischer öffentlicher Dienst. Zur Rechtsprechung des Europäischen Gerichtshofs in Personalsache*, (Duncker & Humboldt, 1986), p. 75-79; for a brief comparison with the US system, Page, *People Who Run Europe*, (OUP, 1996), p. 9; Franchini, "L'organizzazione amministrativa dell'Unione europea", in Chiti (Ed.) *Diritto amministrativo europeo*, (Giuffrè, 2018), p. 274.

[21] This is argued specifically by Sant'Anna, "Sources et champ d'application du droit de la fonction publique de l'Unione européenne", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 18; Blumann and Dubouis, *Droit institutionnel de l'Union européenne*, 6th ed. (LexisNexis, 2016), p. 345-346; Lindemann, *Allgemeine Rechtsgrundsätze und europäischer öffentlicher Dienst. Zur Rechtsprechung des Europäischen Gerichtshofs in Personalsache*, (Duncker & Humboldt, 1986), p. 75-79.

stated above, the statute opted for a "supranational" model of civil service, seeking to shield the latter from the interferences of the Member States. However, such an objective has been only partially achieved and, even nowadays, nationalities still play a pivotal role in steering staff policies within the EU bodies. However, as Coombes correctly pointed out, such exceptions to the pure "supranational" model somehow helped the integration process, since a completely segregated staff would have probably undermined the sound functioning of integration in the first years of European project[22].

This conclusion is coherent with results collected by political scientists and sociologists. In this regard, some have stressed the importance of the "interpenetration" between EEC and national officials in order to cope with the very peculiar issues faced in the first years following the foundation of the EEC[23]. In this regard, despite some nuances, such authors agree that national officials seconded to the EEC helped the latter to find out suitable ways to overcome the scepticisms raised by Member States[24]. Far from creating a group of "socialised" officials with strong federalist feelings, these practices rather made such officials more realistic and practical about the concrete steps to be followed to pursue a more effective European integration[25].

The second and perhaps even more important actor on the stage has been the CJEU, especially in the first years after the establishment of the EU civil service. Such a deep intervention can be easily appraised by taking a sight of the statistics: from 1955 to 1963 there were 15 decisions about civil service matters; in just two years, from 1964 to

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[22] Coombes, *Towards a European Civil Service*, (Chatham House, 1968), p. 56-57.

[23] Scheinman, "Some Preliminary Notes on Bureaucratic Relationships in the European Economic Community", (1966) International Organization, p. 750-773; see also Smith, "The European Economic Community and National Civil Servants of the Member States. A Comment", (1973) International Organization, p. 563-568.

[24] The importance of national officials seconded to the EEC is stressed by Bowett, "Tenure, Fixed Term, Secondment from Governments: The United Nations Civil Service and the European Civil Service Compared", (1982) New York University Journal of International Law and Politics, p. 799-806; for some data on the quotas for senior officials and national bargaining within the EEC, see Michelmann, "Multinational Staffing and Organizational Functioning in the Commission of the European Communities", (1978) International Organization, p. 477-196.

[25] Pendergast, "Roles and Attitudes of French and Italian Delegates to the European Community", (1976) International Organization, p. 669-677.

1965, they reached the number of 54 cases (mainly due to the new statutes and the new career system); from 1967 to 1971, the number was lowered to 36 cases before the CJEU[26]. With this pace, in 1986 the Court had already issued more than 400 decisions in civil service matters[27].

Such a phenomenon has a twofold explanation: as anticipated, staff matters involve individuals and, therefore, are likely to give rise to many complaints, ending up in being a privileged laboratory to test the application of general principles of administrative law before Courts. Moreover, the CJEU «shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union»[28]. In this regard, the Court has interpreted such a provision in a broad manner, in order to apply it «not only to persons who have the status of officials or of servants other than local staff but also to persons who lay claim to this status»[29]. This very foundational case-law has obviously widened the scope of intervention of the Court, resulting in a larger amount of claims filed to it.

Interestingly, case-law in this specific sector has involved some of the most important leading cases in the development of European administrative law. Not by chance, *Algera* originated right within the civil service of the ECSC, since it dealt with the claims of an official at the Common Assembly that complained about having been retroactively and thus unlawfully deprived of her rights conferred under the SRs[30]. Moreover, this ruling is also important because it sharpened a method of reasoning that would have been used many times by the Court later on. This consists in the elaboration

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[26] Schröder. "Die dienstrechtliche Rechtsprechung des Gerichtshof der Europäischen Gemeinschaften in den Jahren 1955-1971", (1972) Zeitschrift für Beamtenrecht, p. 15-20.

[27] Lindemann, *Allgemeine Rechtsgrundsätze und europäischer öffentlicher Dienst. Zur Rechtsprechung des Europäischen Gerichtshofs in Personalsache*, (Duncker & Humboldt, 1986), p. 17.

[28] Art. 270 TFEU.

[29] Case 65/74, *Porrini v. Euratom*, ECLI:EU:C:1975:38, para 13.

[30] Case 7/56, *Algera v. Common Assembly of the European Coal and Steel Community*, ECLI:EU:C:1957:7.

of general principles of law by borrowing them from Member States[31]. In particular, in *Algera* the Court conducted a comparative study among Member States ending up in saying that there was a common consensus on the existence of the general principle of legal certainty, that thus could have become a fully-fledged European principle.

A similar line of argumentation has been used to develop principles specifically applicable to civil service matters. This was the case of the duty of care, which has been borrowed from the German legal system (where it is known as *Fürsorgepflicht*)[32]. In particular, such a principle, that implies that EU bodies shall primarily take into account the interest of their officials when issuing decision addressing them, has been a milestone of the case-law concerning staff-related matters[33].

Through this, the Court has progressively and consistently influenced every single element of the EU civil service. As it will be better explained below, the Court has played an important role in systematising rules on very crucial features of the civil service.

This was the case for the criteria to be followed while filling a vacancy within an EU body, namely in order to decide whether to rearrange internal resources or to recruit external ones[34]. Similarly, the Court has set out important rules concerning recruitment and internal promotions, as to make prevailing a merit system above an intergovernmental one, in which posts are distributed merely on national basis. So, for instance, it has enlisted the criteria to use to strike the balance between the interest of the service and the necessity to ensure the geographical balance among officials[35]. As

[31] Van den Brink, Den Ouden, Prechal, Widdershoven, and Jans, "General Principles of Law", in Jans, Prechal and Widdershoven (Eds.) *Europeanisation of public law* 2nd ed. (Europa Law Publishing, 2007), p. 136-138.

[32] Joined Cases 33 and 75/79, *Richard Kuhner v. Commission of the European Communities*, ECLI:EU:C:1980:139, para 18.

[33] Reithmann, *Die dienstrechtliche Fürsorgepflicht in der Rechtsprechung des Gerichts für den öffentlichen Dienst der Europäischen Union*, (Nomos, 2019) p. 109-127.

[34] Joined Cases 45 and 49/70, *Fritz August Bode v. Commission of the European Communities*, ECLI:EU:C:1971:56; Case_34/77, *Jozef Oslizlok v. Commission of the European Communities*, ECLI:EU:C:1978:101.

[35] Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz, "Art. 212", in Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz (Eds.), *Le Droit de la Communauté économique européenne : commentaire*

regards promotions, the Court has been even stricter in tracing the line of reasoning to be followed in assessing the candidates[36]. Finally, also claims involving fundamental rights issues have taken a considerable portion of case-law concerning civil service matters[37]. By this way, in the '70s the Court has repeatedly struck down all forms of disparate treatment[38] and discrimination within the EU bodies, such as those based on sex[39] or religion[40].

To conclude, the first years of the EEC have been characterised by two features: on the one hand, the civil service has been drawn upon the idea of a supranational *administration de mission*, with a mixed composition and a strong participation of national officials seconded by Member States[41]; on the other hand, the CJEU has progressively clarified the most important elements of SRs and CEOS as to counteract the influence of Member States.

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du traité et des textes pris pour son application. Dispositions générales et finales, (Edition de l'Université de Bruxelles, 1987) p. 33; for case-law, see Case 282/81, *Salvatore Ragusa v. Commission of the European Communities*, ECLI:EU:C:1983:105, para 14; Case 81/74, *Giuliano Marenco v. Commission of the European Communities*, ECLI:EU:C:1975:139; Case T-58/91, *Dierk Booss and Robert Caspar Fischer v Commission of the European Communities*, ECLI:EU:T:1993:15; Case 97/63, *Luigi de Pascale v Commission of the European Economic Community*, ECLI:EU:C:1964:61; Case_62/65, *Serio v Commission de la CEEA*, ECLI:EU:C:1966:61, especially where it sets out the difference between competitions run by merits and mere selection procedures.

[36] For career promotions and related case-law, see Saggio, "Le système de la promotion des fonctionnaires des Communautés européennes: réflexions sur certaines orientations de la jurisprudence", (1992) Rivista di diritto europeo, p. 543-557; see also Case 188/73*, Daniele Grassi v Council of the European Communities*, ECLI:EU:C:1974:112, about the duty of giving reason for promotions.

[37] Weber, "Die Grundrechte in europäischen Beamtenrecht", (1978) Zeitschrift für Beamtenrecht, p. 326-333.

[38] Case 48/70, *Giorgio Bernardi v. European Parliament*, ECLI:EU:C:1971:28.

[39] Case 20/71, *Luisa Sabbatini v. European Parliament*, ECLI:EU:C:1972:48.

[40] Case 130/75, *Vivien Prais v. Council of the European Communities*, ECLI:EU:C:1976:142.

[41] Bodiguel, "La fonction publique européenne", (1995) Revue Internationale des Science Administratives, p. 501-522.

1.3.New trends in EU organisation

As seen so far, the EU civil service has been initially based on a pretty simple idea: EU officials only design policies, whereas implementation is delegated to national officials. This institutional premise has turned into two outcomes: first, the EU Executive has kept a small size and a uniform framework in the first decades since its birth, with officials almost entirely located in Brussels and Luxembourg; on the other hand, the so called "street-corner-bureaucracy" has been basically absent for a long time[42].

This situation underwent radical changes, partially since the latest '80s and in particular since the '90s. The main innovations can be summarised as follows: the birth and consolidation of comitology; the decentralisation of administrative tasks via «agencification»; the departure from a mostly indirect system of implementation with a shift towards a shared (or mixed) model; the Europeanisation of national civil services; finally, the new competences conferred to the EU by the Treaty of Maastricht. Each of these deserves an in depth analysis.

As regards comitology, the constellation of committees and other collective bodies whatsoever labelled (*e.g.* working groups, expert groups etc.) represents one of the specificities of the EU policy-making process. For this reason, such a topic has triggered the interest of both political scientists and legal scholars[43]. After the first experiments launched during the '60s in the Common Agricultural Policy field, the establishment of committees has been fostered as to allow the EU to erode the room for implementation previously retained by Member States.

This new trend in policy implementation has produced – among others – two important consequences for our purposes: first, it has established a permanent model of decision making, that can be theoretically expanded to all EU policies[44]; second, such a process is carried out by collegial bodies of mixed composition, mainly national but

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[42] Cassese, "Theoretical Sketch of the Cooperative and Multidimensional Nature of Community Bureaucracy", in Jamar and Wessels (Eds.) *Community Bureaucracy at the Crossroads* (De Tempel, 1985), p. 39-46.

[43] See references in par. 4 below.

[44] Della Cananea, "Cooperazione e integrazione nel sistema amministrativo delle comunità europee", (1990) Rivista trimestrale di diritto pubblico, p. 655-702.

partially supranational as well. In other words, comitology has embodied an institutional solution to cope with the composite nature of the EU decision making and its implementation[45].

The composite nature of comitology will be better investigated below. What must be stressed now, however, is that such a solution is neither purely supranational nor intergovernmental in nature. In a nutshell, from a functional point of view, national officials working there are undoubtedly performing EU tasks. At the same time, taking into account the structural relationship between national officials and EU committees, it is impossible to ignore that the former are chosen with composite criteria, laid down part by the EU and part by the sending Member State. This feature sets a radical difference between members of committees and *stricto sensu* officials or other servants, that are subject to the SRs and the CEOS and, to get hired, must simply fulfil those requirements set out by EU law.

A second important trend, partially linked to the previous one, is the agencification, that is the well-known practice of establishing separate entities and providing them with administrative tasks of different scope as to delegate either the decision making or the implementation of EU policies, or both. There have been many "waves" in such a trend: after the first round that led to the establishment of European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)[46] and the European Centre for the Development of Vocational Training (CEDEFOP)[47], the '90s witnessed the establishment of technical fora such as the European Medicine Agency (EMA)[48] and

[45] Cassese, "Il sistema amministrativo europeo e la sua evoluzione", (1991) Rivista trimestrale di diritto pubblico, p. 769-774.

[46] Currently see Regulation (EU) 2019/127 of the European Parliament and of the Council of 16 January 2019 establishing the European Foundation for the improvement of living and working conditions (Eurofound).

[47] Currently see Regulation (EU) 2019/128 of the European Parliament and of the Council of 16 January 2019 establishing a European Centre for the Development of Vocational Training (Cedefop).

[48] Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

the European Environmental Agency (EEA)[49], and other agencies such as the European Food and Safety Agency (EFSA)[50] conceived after the outbreak of some scandals in order to restore the credibility of the EU. Thirdly, during the 2000s, agencification has been purposedly pursued by the Commission as a manner to relaunch the implementation and the enforcement of EU policies[51]. These factors have turned the number of agencies up to the current amount, which roughly counts 40 agencies, according to the EU budget 2024.

This number clearly encompasses entities which are actually really different in nature. Approximately, a major distinction can be traced between executive and decentralised agencies; moreover, even among the latter, several taxonomies have been suggested, taking into account the tasks and functioning of each agency[52]. Regardless their differences, however, such bodies have all in common the fact that are provided with legal personality and, therefore, operate as distinct entities under EU law, both as regards their external activities and their relationship *vis-à-vis* their staffs[53].

This of course has brought about radical changes in the institutional setting of the EU and has at the same time undermined the monolithic nature of the EU civil service in place until that moment. Before agencification, indeed, staff was basically concentrated in the EU institutions: primarily in the Commission and in the Secretariat of Council and European Council, with little contribution given by the Parliament and the Court of Justice. With agencification the landscape has been massively diversified, allowing theoretically each agency to adapt staff rules to its own necessities.

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[49] Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network.

[50] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

[51] Vos, "EU Agencies and Independence", in Ritleng (Ed.) *Independence and Legitimacy in the Institutional System of the European Union* (OUP, 2016), p. 209.

[52] Vos, "EU Agencies and the Composite EU Executive", in Everson, Monda and Vos (Eds.), *European agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 11-47.

[53] Chiti, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, (CEDAM, 2002), p. 346.

Accordingly, for the purposes of this research, three features have to be underlined. First, the different types of governance within agencies, despite being nowadays often harmonised thanks to common rules[54], still differ a lot from one to another. Hence, systems of appointment of members of governing or managing boards are usually intergovernmental in nature, reserving one or more positions to each Member State[55]. Secondly, such an eruption of different bodies within the landscape of EU legal system has required an adaptation in the regulatory framework of the EU civil service, as to strike the balance between staffing autonomy (granted to each agency) and systematic coherence (pursued by the Commission in staff policies)[56]. Thirdly, decentralised agencies are geographically established all around Europe. Unsurprisingly, thus, this has raised some problems concerning the legal regime applicable to their employees: besides the *stricto sensu* officials, indeed, agencies employ *intérimaires* as well, to whom national labour law applies, as it will be better described below.

A further phenomenon that irrupted in the '90s and is still ongoing is the progressive shift from an indirect towards a shared or mixed model of implementation of EU law[57]. This has implied the creation of new institutional settings to cope with the multilevel and composite nature of administrative procedures, designed to involve the contribution of both the EU and national administrations in some or each of their stages[58]. The wide range of European networks and joint implementing bodies, made both of national and EU officials, are prominent examples in this regard.

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[54] See "Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies", 19 July 2012.

[55] For further references, see para. 4 below.

[56] Fuentetaja Pastor, "La función pública comunitaria como contrapunto a la tendencia laboralizadora en Europa", (1995) Documentación Administrativa, p.325-345.

[57] Hofmann, "European administration: nature and developments of a legal and political space", in Harlow, Leino and Della Cananea (Eds.) *Research Handbook on EU Administrative Law* (Edward Elgar Publishing, 2017), p. 21-43; Chiti and Franchini, *L'integrazione amministrativa europea*, (il Mulino, 2003).

[58] For an exhaustive reconstruction of the concept, despite aiming at tackling the gaps in judicial protection, see Eliantonio, "Composite procedures for the Implementation of EU law and Access to Justice: the Story so Far", in van Creynenbreugel and Wildemeersch (Eds.) *Selected Issues in European Business Law* (Bruylant, 2023).

By this way, since the ‘90s the EU started to resort to shared administration in many policy fields. Undoubtedly, one of the most important is the funds management and budget implementation, that, according to financial regulations, can be carried out either through a direct, shared or purely indirect model[59].

A new phenomenon became thus observable, which is to say the Europeanisation of the civil services of Member States[60]. This brought about some consequences at national level: for instance, the reduction of posts reserved to nationals within Member States' public services, under a set of decisions adopted by the CJEU aiming at narrowing down the “public service exception”[61]; the incentives for mobility of national public servants among Member States via the recognition of diplomas, seniority and pension rights[62]; the evolution of rights and duties of national officials under the influence of EU law[63].

Remarkably, this happened without a formal attribution of competences to the EU in this subject matter. If one had to scroll all the TFEU provisions, it would not find any reference to national civil services. However, such an influence has been exercised by the EU by other means, such as by stretching the competences in the field of internal market and social policies[64]. Moreover, since the ‘90s (and maybe even more nowadays), the Europeanisation of national civil services has been pursued via

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[59] Hofmann, Rowe and Türk, *Administrative Law and Policy of the European Union*, (OUP, 2011), p. 333-359.

[60] Kämmerer, “Europäisierung des öffentlichen Dienstrechts”, (2001) Europarecht, p. 47.

[61] Art. 45(4) TFEU; in literature, Barnard, *The Substantive Law of the EU The Four Freedoms*, 7th ed. (OUP, 2022), p. 497-502.

[62] Sassi, *Il lavoro nelle amministrazioni pubbliche tra ordinamento europeo e ordinamenti nazionali*, (Giuffrè, 2007), p. 381-385. The CJEU has moreover stated that the SNEs are to be considered “workers” under the TFEU and thus must enjoy the related status when attached to EU institutions, see Case C-466/15, *Jean-Michel Adrien v. Premier Ministre*, ECLI:EU:C:2016:749.

[63] An extensive analysis on German legal system is conducted by Klaß, *Die Fortentwicklung des deutschen Beamtenrechts durch das europäische Recht*, (Nomos, 2014) p. 161.

[64] Demmke, “Die Europäisierung der öffentlichen Dienste – zwischen nationaler Souveränität und Rechtsangleichung”, (2005) Zeitschrift für Tarif-, Arbeits- und Sozialrecht des öffentlichen Dienstes, p. 2-14.

conditionality tools, usually attached by the EU to the spending programmes funded by the EU budget[65].

This evolution was coupled with the massive constitutional revision brought about by the Treaty of Maastricht in 1992. Such a fundamental enlargement of policies and competences attributed to the EU has inevitably affected the EU civil service framework. Notably, the achievement of the political union pursued by the Treaty of Maastricht has been only possible by conferring to the Union further competences in the field of external action, common foreign and security policy (CFSP) and justice and home affairs (JHA). Through the (provisional) arrangement relying on "three pillars", the EU has been able to settle down the concerns of Member States and to find out a way to pursue a closer integration.

This important innovation has paved the way to many institutional solutions, which, compared to the traditional model of EU civil service, strike a different balance between the supranational ambitions and the national reluctances[66]. For instance, this is clear when one looks at the Europol, which provides the means for the cooperation in criminal investigations by employing both supranational and national officials in a very original fashion. More recently, after the Lisbon Treaty and despite the abolition of the three-pillars approach, such a trend has resulted in the creation of the European External Affairs Service, of the European Defence Agency and in the establishment of the European Public Prosecutor Office, which all show *sui generis* features that will be better analysed later on.

All these elements, besides the political scandals that hit on the Santer Commission at the end of the '90s[67], suggested to the EU to pass in 2004, after some attempts[68], the

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[65] Rivellini, "Pubblico impiego nazionale e condizionalità europea", (2023) Diritto pubblico europeo rassegna online, p. 850-866.

[66] Chiti, "An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies", (2009) Common Market Law Review, p. 1398; Aden, "Administrative Governance in the Fields of EU Police and Judicial Co-Operation", in Hofmann and Türk (Eds.) *EU Administrative Governance* (Edward Elgar Publishing, 2006), p. 341-360.

[67] Vandersanden, "La réforme administrative de la Commission", (2005) Cahiers de droit européen, p. 285-350.

[68] Fitch, "The General Framework of the Administrative Reform", in Govaere and Vandersanden (Eds.) *La fonction publique Communautaire* (Bruylant, 2008), p. 5-13.

first substantial reform of the SRs and the CEOS[69]. To some extent, the reform ratified what was already ongoing in the civil service of the EU. This is the case for the inclusion of agencies and other bodies within the list of entities to which SRs and CEOS apply[70].

Quite innovatively, however, since 2004 the SRs has recognised that «[o]fficials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties»[71]. Such a provision has progressively turned to be pivotal for the realignment of the level of rights accorded to EU officials with that usually granted to other workers within the EU[72].

Moreover, the reform of 2004 brought about many other innovations[73]: it provided a new career path, which provisionally (*i.e.*, until 2013) reduced the function groups from four to two, administrators (AD) and assistants (AST); it provided OLAF with more intrusive powers for preventing frauds and other mismanagements within the EU civil service; it introduced an automatic system of adjustment of remuneration of officials and other agents; more importantly, it put in place the European Public Selection Office (EPSO), that became the tenet of selection procedures in the newly composite and variegated civil service of the European Union. Another important point was the revision of *parachuting* (i.e., direct appointment of senior officials without selection), reducing the posts at disposal for this practice[74].

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[69] Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.

[70] Art. 1a(2), SRs.

[71] Art. 1e(2), SRs.

[72] See para. 2.1. below.

[73] Jansen, "Les modifications apportées au Statut", in Govaere and Vandersanden (Eds.) *La fonction publique Communautaire* (Bruylant, 2008), p. 15-26; Reithmann, "Europäisches Dienstrecht und Gericht für den öffentlichen Dienst der Europäischen Union: Überblick über die letzten zehn Jahre", (2015) Zeitschrift für Beamtenrecht, p. 217-238.

[74] Gauer, *Die Reform des Europäischen öffentlichen Dienstrechts*, (Carl Heymanns Verlag, 2007), p. 172-173.

Long story short, since the '90s through the first decade of 2000s, EU civil service was characterised by two main trends. First, it started the long path – still to be completed – from an *administration de mission* towards an *administration de gestion*[75]. Secondly, it abandoned the monolithic model originally adopted and turned into a patchwork of different legal regimes, which require principles, rules and institutions for an effective coordination[76].

1.4. When the enforcement moves to Brussels

The last decade has mostly given continuity to the trends already observable in the past but, to some extent, has been also characterised by important modifications dictated by the crises occurred in the meantime. In sum, this period has been marked by the struggle between two elements: on the one side, the persistence of a "minimal" apparatus serving at EU bodies, deriving from the original conception of the EU; on the other side, the progressive and never-ending enlargement of the scope of intervention of the EU, coupled with the necessity of ensuring an ever more effective implementation of EU law.

As Scholten has pointed out, since 2008 a new trend in EU policy implementation has been observable, which is to say the fact that «enforcement of EU law has been moving to 'Brussels'»[77]. Such a trend has implied the creation of new agencies or the conferral of new powers to the existing ones[78]. It worths to notice that, however, this shift from indirect to direct enforcement has not been always clear-cut. Hence, there are mixed forms of enforcement in which EU and national officials cooperate in carrying out several activities, which time to time include factual conducts[79]. This new

[75] This is the conclusion cautiously reached, for example, by Della Cananea, "L'amministrazione europea", in Cassese (Ed.) *Trattato di diritto amministrativo* (Giuffrè, 2003), p. 1813.

[76] Fuentetaja Pastor, "La reforma de la funciòn pùblica europea", (2005) in Revista de Derecho Comunitario Europeo, p. 751-780.

[77] Scholten, "Mind the trend! Enforcement of EU law has been moving to 'Brussels'", (2017) Journal of European Public Policy, p. 1348-1366.

[78] Scholten, "EU Enforcement Agencies", in Scholten (Ed.) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023), p. 152-166.

[79] Hofmann, Rowe and Türk, *Administrative Law and Policy of the European Union*, (OUP, 2011), p. 667-673.

administrative arrangement can raise several issues, for the twofold reason that administrative acts are always attributable alternatively either to the EU or the Member States (whit immediate consequences in terms of judicial review) and that EU officials enjoy the immunities and privileges granted by the Treaties.

Moreover, the enlargement of tasks at EU level went hand by hand with the establishment of new bodies after the Lisbon Treaty, as already pointed out above. Among these, the EEAS, the EDA and the EPPO are definitely paradigmatic for our purposes, since their staffs are subject to the SRs and the CEOS (or other staff regulations set out at EU level), but they are partially appointed by Member States, ending up being *sui generis* offices in the EU landscape.

The need of flexibility, due to the heterogeneity of the EU civil service, alongside the financial difficulties linked to the crisis of the early '10s, brought about the reform of 2013[80], that amended the SRs and the CEOS in several parts, despite being less intrusive than the previous one of 2004. The main objectives of the reform were the realignment of staff management with best practices usually in place in private sector, the strengthening of the merit system and the reduction of costs due to the financial ties caused by the crisis[81].

As a result, the main amendments affected the career and the framework of staff, turning the function groups again from two to three thanks to the introduction of the secretaries and clerks (AST/SC)[82]; they then pursued more flexibility when it comes to

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[80] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union.

[81] Reithmann, "Europäisches Dienstrecht und Gericht für den öffentlichen Dienst der Europäischen Union: Überblick über die letzten zehn Jahre", (2015) Zeitschrift für Beamtenrecht, p. 217-238; Cassagnabère, "La fonction publique de l'Union européenne. Un statut de crise, mais pas de crise du statut", (2014) Actualité Juridique Droit Administratif, p. 776.

[82] Pilorge-Vrancken, *Le droit de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 9.

contract agents[83]; they revisited the system of adjustment of remunerations, which after the financial crisis had brought about a case between the Council and the Commission[84].

To sum up, nowadays officials, agents and other employees working within the EU bodies count as a heterogeneous galaxy of people of different nationalities, with different legal regimes, different ties with their own States of provenience, performing a wide range of tasks, from more conceptual to more practical ones. In other terms, focusing on staff-related matters, the evolution of the EU legal system as a whole has brought about a composite system in which the supranational and the national elements are strictly intertwined, although with different intensities according to the different offices and bodies taken into account. Next paragraphs delve into this scenario, by analysing the legal sources of the subject matter and legal framework that results from it.

2. *Legal sources of the EU civil service*

A widespread assumption among scholars is that the sources of the law of EU civil service basically make part of a closed system, in which there is no room for any source but those provided at EU level. This is to say that EU civil service is regulated entirely by primary and secondary law, but not by national rules[85]. This idea probably derives from the premises already examined above. Indeed, if one only accepts a narrow conception of civil service – as the majority of scholars do – then of course the set of legal sources reveals to be limited to EU ones.

But if one adopts the opposite approach – as it is done in the current work – by encompassing even national officials working within EU bodies and performing EU tasks, then it becomes logically possible and methodologically necessary to study

[83] Jacob, "Les Nouvelles dispositions générales d'exécution de la Commission européenne: des modifications ai régime actuel ou l'amorce d'une politique nouvelle?", (2018) Revue du droit de l'Union européenne, p. 51-90.

[84] Case C-63/12, *European Commission v. Council of the European Union*, ECLI:EU:C:2013:752.

[85] Bradley, "European Union Civil Service Law", in Hofmann, Rowe and Türk (Eds.) *Specialized Administrative Law of the European Union: A Sectoral Review* (OUP, 2018), p. 559-579; Andreone, "Hiérarchie des normes et sources du droit de la fonction publique de l'Union européenne", (2015) Cahiers du GRASP, p. 61; Andreone, "Typologie des actes et cadre juridique de la fonction publique de l'Union européenne", (2016) Revue de l'Union européenne, p. 588.

whether and to what extent national legal sources have a role in such a framework. Therefore, after having analysed the EU sources, the analysis moves to the national ones.

2.1.EU sources

Like any other field of EU law, sources in this policy area are divided into primary, secondary and *sui generis* law. The first one is contained in the TEU and TFEU, in the protocols attached, in the Charter of Fundamental Rights of the European Union (CFR). Among these, general principles of EU law are deemed to be part of primary law. Secondary law is made by legislative acts and other regulatory or whatsoever labelled acts provided by treaties or legislation to implement EU law. In between of these two categories stay international agreements concluded by the EU, which are *sui generis* because they prevail on secondary law but cannot set aside primary law.

a) Primary law

Despite the appearances, there are many provisions of primary law embedded in the Treaties that tackle EU staff-related issues. Some of them directly address specific aspects. Others, instead, just refer to the topic indirectly. Moreover, there are some provisions providing special rules for single offices or bodies.

Article 270 TFEU sets the rule that any dispute arising between the Union and its servants shall be settled down by the CJEU within the limits and according to the rules laid down in the SRs and the CEOS. The jurisdiction on this subject matter has been conferred to the Court since the very beginning of the EU foundation. What has been changing in the meanwhile, however, is the internal division of competences among the branches of such an institution. While during the first decades these disputes have been handled by Court of Justice, since the creation of the Court of first instance back in 1989, the same disputes were devolved to the latter. A very important turning point was registered in 2005, when the Civil Service Tribunal was established[86]. Such a body has been in place until 2016, when it was dissolved and its tasks were given back to the General Court.

[86] Cameron, "Establishment of the European Union Civil Service Tribunal", (2006) Law and Practice of International Courts and Tribunal, p. 273-284.

The scope of "jurisdiction" is determined by two criteria, *ratione personae* and *ratione materiae*[87]. Interestingly, it is worth noting that the CJEU has showed an inconsistent attitude towards these two criteria: it has indeed interpreted narrowly the first one, by excluding some categories of workers from the notion of "servants" under article 270 TFEU[88]; at the same time, it has provided a broad interpretation regarding the material scope of its jurisdiction, covering for instance not only acts regulated by SRs and CEOS, but also acts addressed to workers that merely *claim* the status of "servants"[89].

Another pivotal provision is article 298(1) TFEU, which provides that «[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration». Scholars have sketched a possible interpretation of the meaning of such adjectives. It has been said that «[t]he adjective "open" reflects the need of transparency, which has now found a general acknowledgement particularly in Article 11 paras 2 and 3 TEU and has been elevated to the status of a fundamental right in Article 41 CFREU. The efficiency of the administration, explicitly called for in the context of the individual institutions, correlates with the functional logic of the administration and an administration that serves the interests of the (European) citizen (but as any principle of efficiency it also relates to a sound financial management and budgetary rigour). Finally, the relative independence of the administration is a consequence of the rule of law-based separation of powers, which calls for a separation not only of the three classical branches but also of the executive and the administrative branch»[90].

More in general, it has been correctly underlined that such a provision is important not because it grounds the existence of the EU administration with its staff, but rather

[87] Kraemer, "The European Union Civil Service Tribunal: a New Community Court Examined After Four Years of Operation", (2009) Common Market Law Review, p. 1873–1913.

[88] For instance, the Court explicitly held that «les intérimaires ne sont pas soumis aux mêmes conditions de subordination, d'évaluation et de discipline que les fonctionnaires ou agents», see Case F-123/05, *Jean-Marc Bracke v. Commission*, ECLI:EU:F:2007:76, para 52.

[89] Case 65/74, *Porrini v. Euratom*, ECLI:EU:C:1975:38, para 13.

[90] Kotzur, "Article 298 [*European administration*]" in Geiger, Khan and Kotzur (Eds.) *European Union Treaties. A Commentary* (Beck, 2015), p. 965-966.

because traces a link between the latter and the principle of sound administration[91]. This interpretation is confirmed by the second paragraph of this article, which states that «[i]n compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end».

All in all, the potential of such a provision has remained almost unexpressed insofar. The Court has only stressed its link with the principle of sound administration and, in particular, with the duty to give reason concerning administrative decisions adopted in staff-related matters. Quoting the Court, «[a]n open and effective European administration must scrupulously comply with the provisions of the Staff Regulations. In particular, the reasoning of any act adversely affecting staff of the European Union is a necessary condition for ensuring a peaceful working environment in the European Union administration, avoiding giving rise to the suspicion that the management of its personnel is based on arbitrary considerations or favouritism»[92].

Scrolling further, one encounters article 336 TFEU, which constitutes the legal basis for the adoption of SRs and CEOS (and thus their amendments as well). Nowadays such regulations are adopted through the ordinary legislative procedure, after the consultation of institutions concerned. In the past, there was a predominance of the Council in this subject matter[93]. At the same time, as better explained below, the SRs and CEOS envisage also delegated acts to implement or modify some parts of the regulations. In this regard, procedural rules and competences set out in the SRs are expression of the institutional balance in the subject matter[94].

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[91] Loewenthal, "Art. 298 TFEU", in Kellerbauer, Klamert and Tomkin (Eds.) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP, 2019), p. 1951.

[92] Case T-601/16, *Georges Paraskevaidis v European Centre for the Development of Vocational Training*, ECLI:EU:T:2017:757, para 36.

[93] Andreone, "Hiérarchie des normes et sources du droit de la fonction publique de l'Union européenne", (2015) in Cahiers du GRASP, p. 61.

[94] Case 817/79, *Roger Buyl and others v Commission of the European Communities*, ECLI:EU:C:1982:36.

As anticipated in the first paragraph, article 339 TFEU provides the duty of professional secrecy for «[t]he members of the institutions of the Union, the members of committees, and the officials and other servants of the Union». This provision opts for a broad conception of civil service, because for example it touches members of committees as well, although they are not subject to the SRs nor the CEOS and thus they cannot get such statuses. At the same time, for some commentators, article 339 TFEU has only a limited scope of application, since, according to its formulation, it seems not referring to staff of other bodies than the institutions. In other terms, agencies would be cut out. Therefore, usually for the latter such a duty is established in the founding regulations of each entity[95].

Right after one faces article 340 TFEU, which deals with non-contractual liability of the EU[96]. Such a provision has a twofold relevance: first, unlike contractual liability, article 340 TFEU reserves exclusive jurisdiction on these claims to the CJEU; second, it provides the liability of the EU as a whole, but not the direct liability of the civil servants *vis-à-vis* third parties[97]. Such a regime follows normal rules of EU law and must comply with the immunities and privileges granted to servants thanks to Protocol 7 attached to the TFEU.

An important set of rules concerning the EU civil service is in fact provided right by Protocol 7, specifically envisaging the regime of immunities and privileges granted to EU officials. Actually, Protocol 7 only provides substantial and procedural rules concerning immunities and privileges. If one wants to trace the boundaries *ratione personae*, it has look at the regulation of 1969 determining the categories of personnel to whom immunities and privileges are applicable[98]. It goes without saying that such a

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[95] Geiger, "Article 339 [*Professional Secrecy*]" in Geiger, Khan and Kotzur (Eds.) *European Union Treaties. A Commentary* (Beck, 2015), p. 1022-1024.

[96] Kotzur, "Article 340 [*Public liability of the Union*]" in Geiger, Khan and Kotzur (Eds.) *European Union Treaties. A Commentary* (Beck, 2015), p. 1024-1029.

[97] Andreone, "Hiérarchie des normes et sources du droit de la fonction publique de l'Union européenne", (2015) in Cahiers du GRASP, p. 61.

[98] Regulation (Euratom, ECSC, EEC) No 549/69 of the Council of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply.

set of rules only applies to EU officials *vis-à-vis* Member States. Therefore, it must be kept separate from other two issues, which are immunities of national officials within the EU and immunities of EU officials *vis-à-vis* third countries. These problems are though coped with via international agreements and thus they are not relevant in this part.

Another question would be whether primary law provides any legal basis to intervene on national civil service systems as to ensure uniform application of EU law, or even simply to ensure equal treatment to the public servants wherever established. A part from provisions on administrative cooperation between national administrations there are no provisions specifically addressing the competence of the EU to intervene in such a field.

First of all, article 197(2) TFEU deals with administrative cooperation among civil servants of Member States, carried out under coordination of EU bodies. From the EU's standpoint, this provision confers the competence, among the others, to facilitate the exchange of information and of civil servants as well as supporting training schemes[99], but it cannot oblige Member States to adhere to such schemes.

Article 197 TFEU is a sort of umbrella provision because, pursuant to the third paragraph, it applies «without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union». For instance, this is a reference to article 88 TFEU, which addresses the Europol's tasks that involve administrative cooperation in criminal investigations as well.

A very peculiar but still important provision is article 27 TEU, which sets the composition of the EEAS. Remarkably, it states that «[t]his service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States».

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[99] Garben, "Art. 197 TFEU", in Kellerbauer, Klamert and Tomkin (Eds.) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP, 2019), p. 1559-1561; Kotzur, "Article 197 [*Effective implementation of Union law by the Member States regarding administrative cooperation*]" in Geiger, Khan and Kotzur (Eds.) *European Union Treaties. A Commentary* (Beck, 2015), p. 736-738.

Pursuant to article 6 TEU, the CFR is part of primary law as well. Accordingly, rights thereby recognised play an important role even in the relationship between the EU and its servants. In particular, after the first decades of its existence, in which the EU has progressively granted fundamental rights to its officials thanks to the case-law of the CJEU, nowadays such rights are crystalised in the Charter, which is more and more frequently invoked before the Court[100].

However, the role of the CJEU remains crucial when it comes to the development of general principles of law and, especially, for the internal application of principles stemming from the ECHR. As seen above, the Court has always relied on legal traditions of Member States to strengthen the protection of fundamental rights of EU officials. Also the ECHR has contributed to shape the set of rights granted to EU staff[101]. For instance, looking at art. 8 ECHR, the Court has clarified that «the rules of the Staff Regulations extending entitlement to the household allowance to officials registered as stable, non-marital partners, including those of the same sex, must be interpreted in such a way as to make those rules as effective as possible, so that the right in question is not theoretical or illusory, but practical and effective»[102].

b) Secondary law

When it comes to secondary law of the civil service of the EU, one must divide it into legislative and non legislative acts. Regulations adopted pursuant to article 336 TFEU are certainly the most prominent source of rules concerning the EU civil service. But they are not the only ones. Besides them, there have been many other regulations passed to address specific and temporary issues. Moreover, despite the appearances, not only regulations play a role in this field. Even directives, which are by definition addressed to Member States, can produce some effects even internally, between the EU and its staff. Looking at non-legislative acts, instead, one can count a plethora of acts

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[100] Bradley, "The application of the Charter of Fundamental Rights in EU staff law", (2014) in ERA Forum, p. 561-574.

[101] Klaß, *Die Fortentwicklung des deutschen Beamtenrechts durch das europäische Recht*, (Nomos, 2014) p. 128.

[102] Case F-86/09, *W v European Commission*, ECLI:EU:F:2010:125, para 43.

that flesh out the legal framework of the EU civil service and that stand for the real specificity of this subject matter.

Starting from the SRs and the CEOS, they are in place since 1968 and they have been amended several times in the last 65 years. They are both regulations nowadays to the ordinary legislative procedure to amend or repeal them. What differs between them is however the scope of application, which is determined *ratione personae*. In particular, SRs apply to officials, while CEOS apply to other servants, a category which encompasses temporary staff, contract staff, local staff, special advisers and accredited parliamentary assistants[103].

Given the strict ties between SRs and CEOS, since the latter frequently remands to the former to flesh out its own regime, the question of whether the provisions of SRs can be extended by analogy by default to the CEOS has been raised. Once sought, the Court has replied that «the provisions of the Staff Regulations which apply by analogy to other servants are expressly listed in the Conditions of Employment of Other Servants»[104].

Moreover, the Court has also excluded by any chance that SRs and CEOS could apply simultaneously. To put it differently, it is impossible for the same person to fall at the same time within the notion of «official» and the one of «other agent». In particular, when asked whether the status of «probationary official» was compatible with that of «local staff», the Court has denied such a possibility by stating that «It is apparent from Article 24 (1) of the Treaty [….] of 8 April 1965 as well as from the preamble to Regulation No 259/68 […] that the Staff Regulations and the Conditions of Employment constitute two complementary acts inasmuch as each governs specific categories of servants: the Staff Regulations apply to officials stricto sensu and to probationary officials whilst the Conditions of Employment apply to a number of other categories of servants including local staff. It is thus apparent that the Staff Regulations and the Conditions of Employment each cover a clearly defined range of persons and that accordingly it is not possible, except where there is an express derogation, for a

[103] Art. 1 CEOS.

[104] Case 25/80, *Alain de Briey v Commission of the European Communities*, ECLI:EU:C:1981:56,para 9.

servant to come simultaneously within the scope of both of those acts laid down by regulation»[105].

The way of amending such regulations deserves some comments as well. Actually, they are amended through the ordinary legislative procedure pursuant to article 336 TFEU. However, given the very large number of bodies provided with legal personality and thus managing staff within the EU, the SRs states that any proposal to revise the Statute must receive the opinion of the Staff Regulations Committee[106]. The latter is a collegial body made of representatives of each institution or each cluster of bodies making part of the EU[107]. Such an organ is crucial within the regulatory framework of the EU civil service, since it is involved in the most important procedures of revision and implementation of SRs[108]. A different position is held by the trade unions, which conversely are less involved in such procedures, mainly because of the diffidence of the EU legislator towards them[109]. In this regard, there are only two moments in which they take a role: one the one hand, they can be deliberately consulted – without any obligation – by the Commission in the revision process[110]; on the other, they can conclude agreements with EU bodies, but without implying any amendments to the Statute[111].

When it comes to the identification of the legal nature of the two regulations, one can observe two schools of thought: on the one side, those who simply consider them as

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[105] Case 105/80, *Hugues Desmedt v Commission of the European Communities*, ECLI:EU:C:1981:149, para 13.

[106] Article 10 SRs.

[107] For the current composition, see "Réglementation prise d'un commun accord par les autorités investies du pouvoir de nomination des institutions de l'Union européenne relative aux modalités de composition du comité du statut", accessible at <https://circabc.europa.eu/ui/index.html>.

[108] Andreone, "Le comité interinstitutionnel du statut : simple organe consultatif ou garant des principes fondamentaux de la fonction publique communautaire?", (2010) Revue française d'administration publique, p. 105-118.

[109] Livolsi and Schiano, "Droits et obligations du fonctionnaire", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 175.

[110] Article 10b SRs.

[111] Article 10c SRs.

ordinary regulations under article 288(2) TFEU[112]; on the other side, those who treat them as *sui generis* sources instead, since they allegedly have two features, which is to say addressing only internal matters (the staff) and being fleshed out by a wide set of implementing acts whatsoever labelled[113]. At a closer look, it seems that the first hypothesis fits better within the system of EU sources of law.

In particular, despite being formally addressed to staff-related matters and thus aimed at tackling organisational issues, the SRs and CEOS nonetheless impose obligations upon Member States as well. These obligations depend of course on the scope of the regulations *ratione materiae* and derive from the general principle of loyal cooperation embedded in article 4 TEU as well. This conclusion has been originally drawn by the Court once sought to decide on an infringement procedure concerning pension schemes in Belgium, which was allegedly in breach of the rights granted to EU officials by the SRs. In that situation the Court held that «Staff Regulations, in addition to having effects in the internal order of the Community administration, are binding on Member States in so far as their cooperation is necessary in order to give effect to those regulations. Consequently, where a provision of the Staff Regulations requires national measures for its application, the Member States are bound under Article 5 of the EEC Treaty to adopt all appropriate measures, whether they be general or particular»[114].

A part from that, the argument that SRs would be *sui generis* because it lays in between primary sources and implementing rules is at odds with the fact that even in other sectors implementing rules depart from the normal scheme of delegated and implementing acts envisaged by articles 290 and 291 TFEU, so far they comply with the

[112] See, for instance, Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz, "Art. 212", in Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz (Eds.), *Le Droit de la Communauté économique européenne : commentaire du traité et des textes pris pour son application. Dispositions générales et finales*, (Edition de l'Université de Bruxelles, 1987) p. 23.

[113] Franchini, "La funzione pubblica comunitaria", in Chiti and Greco (Eds.) *Trattato di diritto amministrativo europeo*, (Giuffrè, 2007), p. 467-496; Id., "L'organizzazione amministrativa dell'Unione europea", in Chiti (Ed.) *Diritto amministrativo europeo*, (Giuffrè, 2018), p. 273.

[114] Case 137/80, *Commission of the European Communities v Kingdom of Belgium*, ECLI:EU:C:1981:237, para 9. Dubouis, "Fonctionnaires et agents des Communautés européennes", (1983) Revue trimestrielle de droit européen, p. 86-146.

Meroni doctrine. To this extent, SRs and CEOS are thus regulations which fit into the ordinary place within the hierarchy of norms[115].

SRs CEOS are not the only legislative acts relevant to this subject matter either, since many other regulations have been passed[116]. A typical example in this regard is given by regulations setting out a provisional framework to counterbalance geographical imbalances deriving from the enlargements of the EU after the accession of new Member States[117]. A massive scheme was passed in 2004 after the Eastern enlargement[118].

At the same time, directives influence the legal framework of the EU civil service too[119]. This could seem surprising, since directives address only Member States by

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[115] For general remarks, Curtin and Manucharyan, "Legal Acts and Hierarchy of Norms in EU Law", in Chalmers and Arnull (Eds.) *The Oxford Handbook of European Union Law* (OUP, 2015), p. 103–125.

[116] Andreone, "Hiérarchie des normes et sources du droit de la fonction publique de l'Union européenne", (2015) in Cahiers du GRASP, p. 61.

[117] See, for instance, Regulation (Euratom, ECSC, EEC) No 2530/72 of the Council of 4 December 1972 introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of new Member States, and for the termination of service of officials of those Communities; Council Regulation (ECSC/EEC/Euratom) No 662/82 of 22 March 1982 introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of the Hellenic Republic to the Communities; Council Regulation (EC) No 626/95 of 20 March 1995 introducing special and temporary measures applicable to the recruitment of officials of the European Communities as a result of the accession of Austria, Finland and Sweden; Council Regulation (EC, Euratom) No 401/2004 of 23 February 2004 introducing, on the occasion of the accession of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, special temporary measures for recruitment of officials of the European Communities; Council Regulation (EC, Euratom) No 1760/2006 of 28 November 2006 introducing, on the occasion of the accession of Bulgaria and Romania to the European Union, special temporary measures for recruitment of officials of the European Communities; Regulation (EU) No 1216/2012 of the European Parliament and of the Council of 12 December 2012 introducing, on the occasion of the accession of Croatia to the European Union, special temporary measures for the recruitment of Union officials and temporary staff.

[118] Gravier, "The 2004 enlargement staff policy of the European Commission: the case for representative bureaucracy" (2008) Journal of Common Market Studies, p. 1025-1048.

[119] Reithmann, "Europäisches Dienstrecht und Gericht für den öffentlichen Dienst der Europäischen Union: Überblick über die letzten zehn Jahre", (2015) Zeitschrift für Beamtenrecht, p. 217-238.

definition, pursuant to article 288(3) TFEU. Nonetheless, the CJEU has managed to extend their effects as to make them covering some aspects of the EU civil service as well[120]. In particular, there are four ways through which EU directives can be waived before the Court in cases related to EU staff.

First, when a directive incorporates a rule that is actually also a general principle of EU law. This process has been fostered to some extent by the growing importance of the CFR in the case-law of the Court, which results in bridging the application of general labour law with EU internal staff cases[121]. Secondly, there is the case in which an institution decides to bind itself within the scope of its organisational autonomy and within the limits of the Staff Regulations, seeking to carry out a specific obligation laid down by a directive[122]; the same reasoning applies when an internal measure of general application itself expressly refers to measures laid down by the EU legislature pursuant to the Treaties. Thirdly, a directive can be indirectly invoked as to actualise the principle of loyal cooperation, which is incumbent not only on Member States but also on the EU itself. In this regard, EU bodies must take into account, in their conduct as employers, legislative provisions laying down in particular minimum requirements designed to improve the living and working conditions of workers in the Member States through the approximation of national laws and practices and, in particular, the EU legislature's intention to make stable employment a prime objective as regards labour relations within the European Union. Finally, legal definitions provided by EU directives can play as yardstick for interpreting provisions of SRs and CEOS, by going beyond their wording and considering also the context in which they occur, the objects of the rules of which they are part, and the provisions of EU law as a whole[123].

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[120] O'Leary, "Applying principles of EU social and employment law in EU staff cases", (2011) European Law Review, p. 769-797.

[121] Bradley, "The application of the Charter of Fundamental Rights in EU staff law", (2014) ERA Forum, p. 561-574.

[122] Here also article 1e SRs must be recalled, since it provides that «Officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties».

[123] Case F-65/07, *Laleh Aayhan and Others v European Parliament*, ECLI:EU:F:2009:43.

Besides legislative acts, EU civil service is regulated by other non-legislative acts, either regulatory or non-regulatory in nature, whose legal basis is entrenched in several provisions of SRs and CEOS. Andreone has counted three types of acts called upon to implement the Statute: the delegated acts of the Commission, the acts adopted by agreement of two or more institutions and the general provisions implementing the Statute (GPI).

Concretely, delegated acts are used to supplement or to amend provisions of articles 56a (allowances for shiftwork), 56b (allowances for standby duty) and 56c (allowances for arduous working conditions) of SRs, Article 13(3) of Annex VII (daily subsistence allowances) and Article 9 of Annex XI (withdrawal of a correction coefficient for remuneration), and Articles 28a(11) (unemployment insurance scheme for temporary staff) and 96(11) (unemployment insurance scheme for contract staff) of CEOS. Such delegated acts can be revoked in any time by the European Parliament or by the Council[124]. It is clear by scrolling the list that such acts are used to amend or flesh out provisions envisaging expenditures. In other words, they are means to give flexibility to the statutory system, which otherwise would require every time a procedure through article 336 TFEU.

The second category of acts, which is to say those adopted by agreement of two or more institutions are used to set out permanent rules regarding one or more institutions. In practice, these acts have been used, for instance, to specify the composition of the Staff Committees established in each institution, or to define the composition of the Staff Regulation Committee provided by article 10 SRs[125]. To this end, agencies are not deemed as institutions, but they are consulted by the Commission when interested by the measure[126].

Finally, there are the GPI, which are instead adopted by each institution or body after having consulted their internal Staff Committee and the Staff Regulation

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[124] Art. 112 SRs.

[125] "Réglementation prise d'un commun accord par les autorités investies du pouvoir de nomination des institutions de l'Union européenne relative aux modalités de composition du comité du statut", accessible at <https://circabc.europa.eu/ui/index.html>.

[126] Art. 110(3) SRs.

Committee[127]. A special regime is however provided for agencies: indeed, GPI adopted by the Commission are extended by analogy to the agencies after nine months, unless in the meanwhile the latter object and submit their own implementing rules as a proposal to the Commission. Of course, agencies submit proposals for implementing rules to the Commission even though the latter has not adopted GIP yet. When the Commission agrees, such implementing rules are passed[128]. The GIP come into play in two scenarios: on the one side, they are adopted when the SRs or CEOS expressly state so; on the other side, the Court has clarified that they can be passed even when there are statutory provisions that, because of their wording, leave room for an arbitrary application[129].

The differences among these sources are mainly justified by the different institutional balance sought[130]. Accordingly, CJEU has stated that such a delegation of powers must comply with *Meroni* doctrine and, insofar, it has always been deemed as doing so[131]. Moreover, these non-legislative acts are by definition subordinated to the legislative ones and, in particular, to the SRs and CEOS. For this reason, «they cannot, by way of explaining more fully a clear term of the Staff Regulations, reduce the scope of those regulations»[132]. It goes moreover without saying that they cannot derogate from SRs or CEOS as well[133]. This principle applies to the GIP and acts of common agreement, but not to delegated acts in itself, of course, which by definition can even amend legislative acts pursuant to article 290 TFEU.

Finally, there are internal rules adopted by each body, usually provided by guidelines, directives and so on. These acts bind the body which adopted them, and

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[127] Art. 110(1) SRs.

[128] Art. 110(2) SRs.

[129] Case T-156/95, *Diego Echauz Brigaldi v Commission of the European Communities*, ECLI:EU:T:1997:102.

[130] Andreone, "Hiérarchie des normes et sources du droit de la fonction publique de l'Union européenne", (2015) in Cahiers du GRASP, p. 61; Case 817/79, *Roger Buyl and others v Commission of the European Communities*, ECLI:EU:C:1982:36.

[131] Case T-333/99, *X v European Central Bank*, ECLI:EU:T:2001:251.

[132] Case T-75/89, *Anita Brems v Council of the European Communities*, ECLI:EU:T:1990:88, par 29.

[133] Case C-310/19, *Boudewijn Schokker v European Aviation Safety Agency*, ECLI:EU:C:2020:435.

therefore their breach results in the invalidity of the acts adopted relying on them[134]. These rules could be thus relevant in selection procedures. Interestingly, the Code of good administrative behaviour for staff of the European Commission in their relations with the public makes part of this category, since it sets out rules for staff but specifies that «[r]elations between the Commission and its staff are governed exclusively by the Staff Regulations». Another important set of rules is provided within the Comitology, since each committee can pass its own rules of procedures which bind its own composition and functioning.

c) Sui generis sources

Finally there are other *sui generis* sources that govern some facets of the EU civil service. First, one encounters the principles provided by the ECHR and the International Labour Organisation (ILO)[135]. Second, there are many international agreements that affect the status of EU officials whenever they are called to operate abroad.

As regards the first category, undoubtedly ECHR has been a driver in the evolution of the EU civil service since its foundation[136]. Like the CFR, provisions of ECHR can moreover be invoked as general principles to cover the provisions of EU directives in the field of general labour law. By this mechanism, directives are implicitly introduced in the legal framework of the EU civil service as well, "dressed up" like general principle of EU law.

A different line of reasoning has been developed by the CJEU when it comes to ILO. In this regard the Court has stated that case-law of the Administrative Tribunal of ILO does not constitute a source of EU law[137]. Unlike ECHR, however, it does not encapsulate principles of EU law either, since such a case-law and the rules it provides

[134] Andreone, "Hiérarchie des normes et sources du droit de la fonction publique de l'Union européenne", (2015) in Cahiers du GRASP, p. 61.

[135] Reithmann, "Europäisches Dienstrecht und Gericht für den öffentlichen Dienst der Europäischen Union: Überblick über die letzten zehn Jahre", (2015) in Zeitschrift für Beamtenrecht, p. 217-238.

[136] Klaß, *Die Fortentwicklung des deutschen Beamtenrechts durch das europäische Recht*, (Nomos, 2014) p. 128.

[137] Case F-98/09, *Sarah Whitehead v European Central Bank*, ECLI:EU:F:2011:156.

can be invoked only to back and corroborate general principles of EU law that have been already recognised[138].

As seen above, EU officials enjoy far-reaching immunities and privileges *vis-à-vis* Member States, pursuant to article 343 TFEU and Protocol 7 attached to it. However, the same enjoy also immunities on the international stage, when they operate abroad within third countries. The regime of such immunities is governed by *ad hoc* bilateral or treaties, since the safety net of Vienna Convention of Diplomatic Relations does not apply to EU, since it lacks the nature of State[139]. The observation of the practice in international relations of the EU reveals that the set of immunities granted to EU officials is usually very favourable.

However, international agreements are not relevant only externally to the EU territory, but even internally. Actually, drawing upon the NATO's example, the EU has passed its own agreement on the Status of EU forces (EU SOFA). This applies to military staff of Member States and to civilian staff of EU institutions as well, and it is conceived to cover the operations pursued by the EU within the CSFP field[140].

2.2.National sources

An important and yet neglected part of rules governing the EU civil service is actually laid down by Member States. This is due to two reasons: the first one descends from the premises of this work, since we have decided to adopt a broader scope of analysis and accordingly the notion of EU civil service encompasses also "hybrid" figures, such as SNEs, members of committees, temporary workers and so on; the second consideration is that there are members of the EU staff that are appointed through national procedures and according to national rules, despite falling entirely within the scope of the statutory regime traced by the SRs and the CEOS. This second

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[138] Case F-15/10, *Carlos Andres and Others v European Central Bank*, ECLI:EU:F:2013:194.

[139] Wessel, "Immunities of the European Union", (2014) International Organizations Law Review p. 395-418.

[140] Voetelink, "The Eu Sofa: The European Union Status of Forces Agreement", (2005) Military Law and Law of War Review, p. 17-38; Sari, "The European Union Status of Forces Agreement (EU SOFA)", (2009) Journal of Conflict & Security Law, p. 353–391.

scenario is determined by the legal nature of some EU bodies which, as sketched above, are still inspired by a more intergovernmental model.

As a matter of principle, the importance of national rules is not a novelty within the EU system of civil service. Although it is true that the Court has held since the beginning that contracts of employment of EU staff are governed by public law and therefore are not subject to national civil and contractual rules, it is also true that the Court has expressly allowed the EU bodies to conclude contracts of employment by other means than those provided by the Treaties and the SRs/CEOS, insofar they are not conceived as to avoid the application of the latter. To put it differently, the EU bodies can use contract of private law and thus governed by national law if these satisfy to the need of the service and do not erode the scope of application of the SRs and the CEOS[141]. Despite completely marginal in practice, such a possibility makes theoretically compatible the simultaneous existence of national and EU sources within the civil service of the EU.

There are then other clusters of personnel which are partially governed by EU law and partially by national rules. Some scholars have elaborated the notion of "external staff", referring to workers that have no relationship of service with EU bodies but nonetheless work within the latter[142]. To this end, the most important categories are the SNEs, the members of committees and the temporary workers. It must be stressed that all these workers are selected according to national rules: SNEs are officials, selected with national procedures and appointed by acts of national law, even though they must comply with requirements set out by the GIPs adopted by each hosting EU body[143]; members of committees follow the same rationale, since most of the times (but not always) are part of national administrations, they are selected and appointed by the latter, which must though comply with the requirements specified in the establishing

[141] Case 249/87, *Françoise Mulfinger and others v Commission of the European Communities*, ECLI:EU:C:1989:614.

[142] Fuentetaja Pastor, "La reforma de la funciòn pùblica europea", (2005) Revista de Derecho Comunitario Europeo, p. 751-780.

[143] Vartolomei, "Aspects of legal regime applicable to the secondment national experts to the EU institutions and bodies regulated by the law no. 105/2012", (2012) Perspectives of Business Law Journal, p. 315-319.

regulations or in the rules of procedures of each committee; more interestingly, temporary workers (*intérimaires*) are technically hired by national private agencies and, therefore, are subject to national labour law, which is by the way mostly harmonised by EU law; nonetheless, such national agencies are selected via tender procedures governed by EU law and specifically by financial regulations, since it is a matter of procurement of EU bodies.

Even more interestingly, there are national officials that get the status of EU officials and are thus subject to EU statutory provisions, without loosing the previous qualifications. In other words, there are workers that merge the two statuses because of the peculiar nature of the EU bodies they work for. Of course, this situation must be coordinated with national legal systems, which must provide legal arrangements and must allow such a sum of qualifications.

For instance, this issue has been brought before the French *Conseil d'Etat*, asked to determine whether the status of *magistrat* was compatible with the one of *fonctionnaire européen*. The *Conseil d'Etat* has confirmed its settled case-law dating back to 1994[144], according to which, as a matter of principle, such a coexistence of statuses is not incompatible with French rules governing the *function publique*, insofar there are other effective means to prevent conflicts of interest[145].

Practically speaking, this situations mostly arise in those EU bodies that come from the former intergovernmental pillars of JHA and CFSP. This happens to some extent within Europol, which makes use of a net of *liaison* officers that are functionally at disposal of the agency but remain subject to national rules; in EPPO, which relies on national prosecutors, that nonetheless get the status of EU officials; analogously, the same applies to EEAS, which instead hosts national diplomats, or to EDA, which hosts national officials with an expertise in defence or military matters, despite providing some exceptional rules which are further explored below.

3. *Legal framework and its principles*

So far it is clear that the EU civil service is a patchwork of several legal regimes. This is due to the current organisation of the EU as a whole, in which the administration

[144] Conseil d'Etat, 9 June 1994, affaire n° 355948.

[145] Conseil d'Etat, 11 July 2023, affaire n° 407156.

has been progressively growing up and thus shows a constellation of different bodies and institutions structured in a variety of settings.

If one simply focuses on institutions, it easy to grasp this situation. Looking at the Commission, there are the Commissioners, the professional staff working within DGs and several working groups involved in decision and rule making process. Looking at the Council, the landscape is similar, since there are the Members of the Council, the staff working at the General Secretariat, the permanent representatives within COREPER and those participating to working parties. The European Council basically relies on the structures provided by the General Secretariat of the Council instead[146]. In the European Parliament, besides the Members of the Parliament and their assistants, there are officials working within the twelve DGs of the Parliament's General Secretariat, whose organisation is set out by the Bureau according to the Rules of Procedure of the Parliament itself[147]. The Court of Justice shows analogous features: alongside the judiciary, there are the administrative Departments that are managed by the Registrar. In other words, even within the very basic structure of the EU, which is to say within institutions provided by the Treaties, administrative arrangements vary a lot.

The outcome does not change looking at the agencies. While professional staff is pretty homogeneous, thanks to the application of SRs and the coordination performed by the GIPs, governing boards are shaped in different manners, according to each establishing piece of legislation. Moreover, both within institutions and other bodies "external" workers are employed as well, according to the aforementioned meaning.

In the following pages attention is paid to those features in the legal framework that are more likely to be dependent on the multi-level nature of the European civil service, so to say those features at supranational level that are more likely to be co-determined by Member States as well[148]. In particular, the analysis delves into the rules concerning recruitment, remuneration, and personal liability of people working within the EU bodies, included the regime of immunities. Given their specificities, a specific account

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[146] Article 235(4) TFEU.

[147] Rule 234 of the Rules of procedures of the European Parliament.

[148] Further and more comprehensive analysis are conducted by Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017); Pilorge-Vrancken, *Le droit de la fonction publique de l'Union européenne*, (Bruylant, 2017).

is reserved to personnel within committees and agencies and for workers serving at *sui generis* offices, such as EEAS, EDA, EPPO and Europol.

3.1.Recruitment and access to posts

At national level, some countries recognise a conceptual distinction between, on one side, voluntary or honorary service and, on the other, obligatory or professional service. In France such a distinction is in place between the *service professionnel* and the *fonction d'honneur*; in Germany there are the *Berufsbeamter* and the *Ehrenbeamter* that cover respectively analogous positions; in Italy the same tasks are respectively carried out by the *personale professionale* and the *personale onorario*. Such a legal terminology actually unveils an underlying premise which is primarily logical in nature: being a public official does not necessarily entail being assigned to an office. Whereas honorary officials are such only so far they perform their duties in an office, this is not necessarily true for professional ones[149].

Concretely speaking, this is the same difference observable between a European Commissioner and an Administrator assigned to a Directorate General of the Commission. They both "work for" the Commission; they are both "paid" by the latter, there are rules on their selection and appointment. The difference lays in the fact that when the Commissioner ceases its functions, it stops "working for" the Commission; conversely, when the Administrator is assigned to another office, its legal relationship with the Commission does not cease at all. Therefore, when it comes to analyse recruitment and access to EU bodies, this pivotal distinction should be borne in mind.

Having clarified this, when it comes to the recruitment of professional staff (which is the object of the current analysis), there is another major distinction between, on one side, officials and other servants and, on the other side, external staff. The former are subject to SRs and CEOS; the latter does not fall within their scope of application, even though they concretely work within EU bodies and thus are managed by them.

As a matter of principle, officials and other servants have to be selected, at least at the entry stage, through «competitions»[150]. This rule concretises the so called merit system, which is intrinsic to the Weber's conceptualisation of «bureaucracy». Likewise

[149] Battini, "Il personale", in Cassese (Ed.) *Trattato di diritto amministrativo* (Giuffrè, 2003), p. 381.

[150] Art. 28(1), lett. d) SRs.

other professional civil service, the EU system of recruitment is directed first and foremost «to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity»[151].

Historically, as claimed by Cassese and Pellew, the widespread of merit system on global scale can be seen as a mechanism developed by bureaucracies to take control on the access to the civil service systems. By setting out rules, procedures and objective requirements to enter into public offices, bureaucracies have progressively managed to retain some power and to reserve for themselves a room of manoeuvre *vis-à-vis* political influence[152].

On top of that, it is worth noting that the concept of merit system does not entail a specific model of recruitment, but rather a wide range of possibilities. Selections based on merits can be carried out internally, within the administration, or externally, opening them to the public; criteria for assessment can vary a lot, both as regards the subject matters evaluated and the type of exams, whether written, oral, theoretical or practical etc.; the comparison among candidates can be strict or more flexible and lenient, according the legal framework to be considered. To summarise, merit system is a broad concept with several nuances, that theoretically finds many types of application[153].

This premise is useful to understand the basic functioning of recruitment within the EU civil service. In particular, given the aforementioned hybrid nature of the EU, merit system must be weighed with other two elements: on one side, the intergovernmental residues of the EU, which are still important in many regards[154]; on the other, the influence exercised by politics on top officials. This complex balancing must be borne in mind while analysing the means of recruitment and of covering vacant posts.

Whenever there is a vacancy within an EU body, there are two ways to fill it: first, by searching a substitute within the EU staff, which means using the internal transfer, the appointment of an AST to an AD’s position, the promotion within the institution,

[151] Art. 27(1) SRs.

[152] Cassese and Pellew, “Il sistema del merito nel reclutamento della burocrazia come problema storico”, (1987) Rivista trimestrale di diritto pubblico, p. 756-770.

[153] Ibid., 763-764.

[154] Andreone, "La sélection, le recrutement et l'engagement des fonctionnaires de l’Union européenne", (2019) Revue de l'Union européenne, p. 626.

the inter-institutional transfer, or considering the lists of suitable candidates already drawn, or holding an internal competition reserved to officials and temporary staff; secondly, a part from these, the other option is to recruit an official from outside[155].

As a matter of principle[156], the first option is preferred, both because, by doing so, there is a financial saving and because career prospects of internal staff are better enhanced[157]. Accordingly, even among the first set of options there is an order of priority, aimed at preferring staff of the same institution over that belonging to the others[158].

Whenever an EU body decides to look at the public to recruit, procedures change according to the type of worker to be recruited. For *stricto sensu* officials (i.e., subject to the SRs) there are general competitions regularly issued by the institutions and managed by EPSO. Given the similarities with officials, also temporary staff (i.e., subject to the CEOS) is selected in the same way and, moreover, EPSO can be required to apply even the same standards of those used for *stricto sensu* officials[159]. As regards contract agents, instead, although EPSO is involved, it has a different role, namely because it does not provide a one-shot but rather a permanent assistance to the EU bodies. To this end, it has set out the Contract Agents Selection Tool (CAST Permanent), which allows everyone who is interested in becoming a contract agent to apply whenever they prefer, because the selection is regularly updated.

For officials, competitions can be issued by one or more bodies jointly and are mostly regulated by Annex III to the SRs. All procedures start with a notice, which lays down the job description (vacant post, duties to be performed, requirements to participate) and further rules concerning the evaluation (type of exams, possibly

[155] Bejenar, "Recruitement et concours", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 79-96.

[156] Art. 29 (1), SRs; see also Case 21/70, *Eva Rittweger v Commission of the European Communities*, ECLI:EU:C:1971:7.

[157] Case 20/83, *Aristides Vlachos v Court of Justice of the European Communities*, ECLI:EU:C:1984:392.

[158] Art. 4, SRs.

[159] Article 12(4), CEOS.

specifying the system of assessment)[160]. Of course, such notices are binding for all the parties involved, at every stage of the procedure.

For each competition a selection board is established, entrusted with the task to assess candidates. It is composed of representatives both from the appointing authority(-ies) and from the Staff Committee. Therefore, it represents at the same time the public interest, embodied by the appointing authority, and the collective interest of workers, that are represented in Staff Committees of each institution.

Its main task, which is to say drawing the list of suitable candidates and forwarding it to the appointing authority[161], has to be coordinated, on one side, with the prerogatives of the latter and, on the other side, with the tasks conferred to EPSO. This twofold limit raises different issues.

As regards the role of EPSO, right after its establishment it was not clear whether it was also in charge of assessing the candidates and, if so, whether it could reach even the stage of drawing by its own the list of suitable candidates. Such a doubt has been dispelled the Court, that clarified that «it follows from Article 7 of Annex III to the Staff Regulations that, as regards the conduct of competitions for the recruitment of officials, the tasks of EPSO are essentially organisational. That conclusion is not contradicted by the specific provisions contained in the decision setting up EPSO and the decision on the organisation and operation of EPSO, even if those decisions sometimes contain misleading formulations, such as, for example, that EPSO is to 'draw up reserve lists' (which would suggest that EPSO is responsible for determining which candidates are included) because those decisions are in any event of lower rank than the provisions of the Staff Regulations»[162]. Therefore, EPSO remains in charge of organisational tasks, basically carrying out a centralised assessment on behalf of the appointing authorities. Only selection boards are entitled to draw the list of suitable candidates.

This opens to the second question, which deals with the relationship between selection boards and appointing authorities. The former are in charge of drawing the lists; the latter appoint the candidates by picking them up from the lists. The question is

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[160] Art. 1, Annex III to SRs.

[161] Where possible, these candidates shall be twice the number of vacant posts, pursuant to art. 5, Annex III to SRs.

[162] Case F-35/08, *Dimitrios Pachtitis v European Commission*, ECLI:EU:F:2010:51, para 56.

thus whether the authority is bound by the order set by the Selection Board, which comes out of the comparison conducted among candidates.

According to the case-law dating back to the ‘60s and consistently confirmed later on, as a matter of principle the appointing authority is not obliged to choose the first candidate in the list, but can pick up another one if the latter fits better in the post to be covered[163]. However, «[a]lthough it is entitled in making its selections to ignore the precise order of merit in the competition for reasons which it is incumbent upon the administration to evaluate and justify before the Court, nevertheless it may not destroy the very concept of competition by departing substantially from the result of the competition without serious reasons»[164].

This requires a short digression on the merit system within the EU and, more in general, on its meaning in light of the traditions of Member States. In particular, such a rule seems to be at odds with the common understanding according to which the EU civil service system would resemble in many regards the continental model.

As stated above, the «merit system» is an umbrella definition that encompasses many phenomena: it spans from the very basic idea of selecting by merits (*i.e.*, knowledge and skills) through the precise and more narrow concept of competition, which entails a comparison of one candidate to another. The merit system finds its apex in the French legal concept of *concours*, which is the cornerstone of recruitment within the *fonction publique*.

In this regard, the *Conseil d’Etat* has clarified that every *concours* shall ensure the comparison among candidates based on merits and has to result in a ranking list[165]. From this perspective, unlike what many scholars argue[166], the EU regime differs

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[163] Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz, "Art. 212", in Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz (Eds.), *Le Droit de la Communauté économique européenne : commentaire du traité et des textes pris pour son application. Dispositions générales et finales*, (Edition de l'Université de Bruxelles, 1987) p. 23.

[164] Case_62/65, *Serio v Commission de la CEEA*, ECLI:EU:C:1966:61.

[165] Taillefait, *Droit de la fonction publique*, 9th ed. (Dalloz, 2022), p. 176-177.

[166] Oberdorff, “Fonction publique de l’Union européenne” in Auby and Dutheil de La Rochère (Eds.) *Traité de droit administratif européen* (Bruylant, 2022), p. 229-246; the French tradition was important also according to Sant’Anna, “Sources et champ d’application du droit de la fonction publique de l’Unione européenne”, in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de*

considerably from the French one, because the former requires a comparison among candidates that can be overcome by the appointing authority though, whereas the latter is stricter and does not allow such a possibility, at least in principle.

Similar conclusions are reached in the Italian legal system, where the obligation to win a *concorso* to get into public offices is enshrined in the Constitution[167]. In this regard, the *Corte di cassazione* has specified that whenever an appointing authority retains the power to disregard the ranking of a list of suitable candidates (providing a sufficient reason), such a procedure cannot be deemed as a *concorso*, but rather as a mere *procedura selettiva*, with consequences in terms of jurisdiction that are not negligible at all[168].

Therefore, despite being definitely inspired by the merit system, the EU civil service does not provide competitions which perfectly fit into the notion of *concours* delineated at national level. This more lenient approach to the merit system makes recruitment procedures more porous to other interests that depart from the purely meritocratic model. These are the necessity to provide national representativeness to EU bureaucracy and the influence of political patronage.

Looking at the first element, it must be noted that national representativeness is an issue common to most of the international organisations and, in this regard, the EU does not provide an exception[169]. To grasp the core of the problem it is worth to stress the difference that occurs between the notion of «representation» and that of

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l'Union européenne, (Bruylant, 2017), p. 18; Blumann and Dubouis, *Droit institutionnel de l'Union européenne*, 6th ed. (LexisNexis, 2016), p. 345-346; Lindemann, *Allgemeine Rechtsgrundsätze und europäischer öffentlicher Dienst. Zur Rechtsprechung des Europäischen Gerichtshofs in Personalsache*, (Duncker & Humboldt, 1986), p. 75-79; for a brief comparison with the US system, Page, *People Who Run Europe*, (OUP, 1996), p. 9; Franchini, "L'organizzazione amministrativa dell'Unione europea", in Chiti (Ed.) *Diritto amministrativo europeo*, (Giuffrè, 2018), p. 274.

[167] Art. 97 of the Italian Constitution.

[168] For instance, on the procedures to appoint directors in public hospitals, see Cass. Civ., Sez. Lav., 3 Sept. 2021, n.23889.

[169] Statistics about geographical balance within the Commission are usually published in its Statistical Bullettin, accessible at <https://commission.europa.eu/about-european-commission/organisational-structure/commission-staff/commission-staff-statistical-bulletin-history_en> (last visited 3 May 2024).

«representativeness»[170]. While the first is a legal term that implies the presence of a mandate given from the represented to the representative, the representativeness is a concept drawn by political scientists, used to describe «representative bureaucracy», to sketch the idea that «if a bureaucracy is broadly representative of the public it serves, then it is more likely to make decisions that benefit that public»[171]. Given this broad scope, representativeness does not only deal with nationality, but also with other criteria, such as, for instance, sex.

As already demonstrated, geographical and national balance within EU institutions and, above all, within the Commission, has played a significant role in the first decades after the establishment of the EEC. The practice to reserve informal quotas to each Member State and to second national officials to EU positions has contributed to the creation of an *esprit de corps* among EU officials and to the mutual contamination between the EU and Member States' administrations[172].

From a regulatory point of view, the SRs says that recruitment shall be conducted «on the broadest possible geographical basis from among nationals of Member States of the Union». On top of that, it is also unequivocally specified that «[n]o posts shall be reserved for nationals of any specific Member State»[173].

Therefore, legally speaking, neither the budgetary authority nor the EU bodies can reserve posts to certain nationalities. Geographical balance must therefore be ensured by other means. This is achieved through the ordinary competitions (with some *caveat*),

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[170] As regards the UN, this point is correctly and repeatedly stressed by Battini, *Amministrazione senza Stato. Profili di diritto amministrativo internazionale*, (Giuffrè, 2003), p. 129.

[171] Meier, Wrinkle and Polinard, "Representative Bureaucracy and Distributional Equity: Addressing the Hard Question" (1999) The Journal of Politics, p. 1026.

[172] Scheinman, "Some Preliminary Notes on Bureaucratic Relationships in the European Economic Community", (1966) International Organization, p. 750-773; Smith, "The European Economic Community and National Civil Servants of the Member States. A Comment", (1973) International Organization, p. 563-568; Bowett, "Tenure, Fixed Term, Secondment from Governments: The United Nations Civil Service and the European Civil Service Compared", (1982) New York University Journal of International Law and Politics, p. 799-806; Michelmann, "Multinational Staffing and Organizational Functioning in the Commission of the European Communities", (1978) International Organization, p. 477-196.

[173] Art. 27 SRs.

through *ad hoc* policies implemented after the accession of new Member States and through soft law instruments aimed at stimulating the cooperation with Member States in pushing their respective nationals to engage in EU careers.

As a matter of principle, competitions shall be designed first and foremost «to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity»[174]. However, this does not prevent the appointing authority from taking into account national indicators to pursue a geographical (re-)balancing of the staff. To this end, there are two issues at stake, that are whether such national indicators can prevail over merit and which kind of indicators can be used. Both the questions has been answered by the CJEU.

The cornerstone of the selection process of EU officials is in fact the «interest of the service»[175]. From this premise derives that national indicators can be considered only when candidates are on an equal footing as regards merits, as to rebalance a geographical disequilibrium in the office[176].

However, the formula of the «interest of the service» is open to interpretation. This means that sometimes even national indicators can play as requirements to get a post within the EU civil service, so far they match such a test. A very slippery topic is the one of linguistic regime of the EU civil service. On one side, selection procedures shall be designed in a way not to discriminate or exclude certain nationalities. Therefore, rules on languages to be used or tested in the exams are crucial[177]. On the other side, it is not categorically forbidden to prefer some candidates due to their linguistic knowledge[178], as far as this is objectively justified by the necessity to ensure the proper functioning of the service[179].

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[174] Art. 27(1) SRs.

[175] Case 282/81, *Salvatore Ragusa v. Commission of the European Communities*, ECLI:EU:C:1983:105, para 14.

[176] Case 17/68, *Andreas Reinarz v Commission of the European Communities*, ECLI:EU:C:1969:14.

[177] Zannoni, "Il regime linguistico dei concorsi dell'Unione europea", (2015) Rivista del commercio internazionale, p. 703-735.

[178] Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz, "Art. 212", in Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz (Eds.), *Le Droit de la Communauté économique européenne : commentaire du traité et des textes pris pour son application. Dispositions générales et finales*, (Edition de l'Université de Bruxelles, 1987) p. 32.

The Court followed a similar line of argumentation when asked to determine whether the preferential treatment reserved to some nationalities was justifiable under articles 7 and 27 SRs, in a case in which officials had to deal with agricultural matters. In that case, the Court looked at the notices of vacancy and, given that they required a thorough knowledge about very specific issues of agricultural policy affecting a specific Member State, such a preferential treatment could be deemed as legitimate[180].

Therefore, geographical balance in open selection is never pursued as such. It can be considered as a second best option after merits or, on top of that, it can match the interest of the service whenever some nationalities better fit, in an objective way, the posts to be covered.

There is however the possibility for the EU legislator to implement provisional policies in order to rebalance the geographical disequilibrium in place in a certain period. This happened during the several rounds of accession of new Member States, that of course could not be faced simply by incrementing the amount of officials, both for institutional and financial reasons. Therefore, relying on the general clause of article 336 TFEU, the EU provisionally laid down rules to address such an issue, by reserving the posts progressively freed up in the EU with nationals from the newly entered Member States[181].

A part from these two possibilities, hard law does not provide further means to cope with geographical imbalances. Consequently, in practice such an issue is tackled by setting out a cooperation with underrepresented Member States and by adopting *ad hoc* GIPs.

In particular, in 2022 the DG Human Resources of the Commission has concluded roughly 15 joint action plans in order to incentivise the presence of less represented

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[179] Arguing *a contrario*, Case 15/63, *Claude Lassalle v European Parliament*, ECLI:EU:C:1964:9.

[180] Case 81/74, *Giuliano Marenco v. Commission of the European Communities*, ECLI:EU:C:1975:139.

[181] Gravier, "The 2004 enlargement staff policy of the European Commission: the case for representative bureaucracy" (2008) Journal of Common Market Studies, p. 1025-1048.

nationalities within the EU civil service[182], and many others have been drafted in 2023[183]. Such plans usually require the Member States to spread among their citizens information about the EU prospects of career, the vacancies, the procedures issued by EPSO, and so on. Besides that, Member States can be also required to provide assistance, services of coaching and advice to nationals applying for EU positions. In general, these solutions try to circumvent the explicit prohibition to reserve posts in the EU to specific nationalities.

As previously said, other interferences with the merit system derive from the political pressure exercised above professional staff. This phenomenon is common to all bureaucracies but its magnitude and intensity vary according to each legal system. As regards the EU, political patronage intensifies the more one moves from the bottom to the top positions.

First, a procedure other than the competition procedure may be adopted by the appointing authority for the recruitment of senior officials[184] and, in exceptional cases, also for recruitment to posts which require special qualifications. Remarkably, such a possibility applies to officials that, despite their high ranking, are still to be considered "professional staff" and not honorary. In other words, this is a clear exception to the merit system in relation to posts that by their nature could be perfectly covered through a selection procedure.

Empirical studies have demonstrated that such positions are usually deemed as political enclaves by public office holders[185]. As a practice, for instance, every member of the Commission is coupled with a Director General. Since the Commission is still composed of a member from each Member State, it is evident that political and geographical considerations are tightly intertwined in this case.

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[182] Commission, Annual Activity Report 2022, p. 16, accessible at <https://commission.europa.eu/publications/annual-activity-report-2022-communication_en> (last visited 3 May 2024).

[183] See <https://commission.europa.eu/about-european-commission/organisational-structure/people-first-modernising-european-commission/people-first-working-european-commission/action-plans-geographical-balance_en> (last visited 3 May 2024).

[184] It applies to Directors-General or their equivalent in grade AD 16 or AD 15 and Directors or their equivalent in grade AD 15 or AD 14. Art. 29(2), SRs.

[185] See above, par. 2.2.

It goes without saying that the Court has tried to narrow down the possibility to use such a tool, which clearly impinges on the merit system. In particular, the Court seems to be stricter when the procedure other than the open competition is used not to cover top positions, but rather lower ones. In this cases the Court has stressed the "exceptionality" of such a choice, which requires an explicit reasoning both on the requirements of the service and the legitimate interest of officials and which is subject to the scrutiny of the Court[186].

A part from that, the CEOS envisage a category of temporary staff which is, by definition, assigned to public office holders and therefore is political in nature[187]. This regime applies only to those who are not part of the civil service yet, because otherwise their respective ordinary regime keeps applying. Concretely speaking, such a temporary staff works within the Cabinets of the Commission and, as well as the previous example, it is chosen both according to political and geographical considerations[188].

As said, professional staff encompasses not only officials and other servants, but also 'external' workers that are formally subtracted from the application of SRs and CEOS, but still work within the EU bodies under the command and directives of their employers. The most relevant figures in this regard are the SNEs and the *intérimaires*. Theoretically, the possibility to make use of these workers must comply with the general principle for which «if it is not possible to engage someone as an official or servant, the Community institutions may not fill, even temporarily, a vacant post involving a power to take decisions, except with a deputy or by appointing an official to fill the post ad interim. That principle may only be derogated from for compelling reasons related, in particular, to the urgency of filling a vacant post»[189]. This means that, in principle, it is not allowed to appoint SNEs or *intérimaires* to cover posts implying decision making powers (*i.e.*, the power to adopt legal acts *vis-à-vis* third parties)[190]. It

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[186] Case 45/70, *Fritz-August Bode v Commission of the European Communities*, ECLI:EU:C:1971:56.

[187] Art. 2, lett. c), CEOS.

[188] Art. 19, C(2000) 3614, "Rules of Procedure of the Commission".

[189] Case 341/85, *Erik van der Stijl and Geoffrey Cullington v Commission of the European Communities*, ECLI:EU:C:1989:93, para 13.

[190] Fuentetaja Pastor, "La reforma de la funciòn pùblica europea", (2005) in Revista de Derecho Comunitario Europeo, p. 764.

follows from that that external staff can only be entrusted with internal and operational tasks.

For SNEs, attention must be paid to the fact that this category actually encompasses a set of different figures. Since SNEs are not regulated either by the SRs nor by the CEOS, provisions applicable to them are laid down in GIPs adopted by each EU body and residually by the Member States of origin[191]. Moreover, not all SNEs fall within the notion of «external staff»: there are some figures working at *sui generis* bodies that, once seconded to EU institutions, acquire the status of officials and therefore must be handled as such. This happens, for instance, at EEAS.

Looking at the secondment at the Commission, it is worth noting that the selection of SNEs revolves around a double conformity check: simultaneously, national officials have to comply with the eligibility criteria set out in national legislation and, on top of that, winning a selection procedure held by the Commission and delineated by the Directorate-General for Personnel[192]. For instance, Italian officials willing to become eligible as SNEs at the EU must be shortlisted by the Ministry of Public Administration and the Ministry of Foreign Affairs[193].

Once selected, SNEs are assigned to assist either officials or temporary staff, but in no way they can perform tasks which legally or financially bind the Commission *vis-à-vis* third parties[194]. Remarkably, they are subject to the rules of procedure of the Commission, even though they are neither officials or other agents.

SNEs are thus in a hybrid position. The CJEU has specified that SNEs working abroad – which is to say not in their home country – enjoy the status, rights and obligations granted to workers under article 45 TFEU[195]. From this point of view, they are exactly like any other (private or public) worker posted in a different Member State.

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[191] For instance, Vartolomei, "Aspects of legal regime applicable to the secondment national experts to the EU institutions and bodies regulated by the law no. 105/2012", (2012) Perspectives of Business Law Journal, p. 315-319.

[192] Art. 3, Commission decision of 12.11.2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training, C(2008) 6866 final.

[193] Art. 32, legislative decree 30 March 2001, no. 165.

[194] Art. 6, Commission decision of 12.11.2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training, C(2008) 6866 final.

[195] Case C-466/15, *Jean-Michel Adrien v. Premier Ministre*, ECLI:EU:C:2016:749.

Moreover, SNEs do not usually fall within the jurisdiction of the CJEU, since the latter steps in only for disputes between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union[196]. As already clarified, these two pieces of legislation do not apply to SNEs[197].

However, from time to time the Court has stretched its jurisdiction as to encompass also those disputes in which SNEs are in a very similar position to the fully-fledged EU officials. This was the case within the framework set out for the European Union Police Mission (EUPM), carried out in Bosnia and Herzegovina[198]. In that situation, when SNEs and EU officials were operating shoulder to shoulder «at theatre level», they were both subject to disciplinary measures adopted by EU superiors. The Court drew upon this premise to conclude that disputes arising between NSEs and the managing authorities of EUPM were covered by article 270 TFEU, so falling within the scope of its jurisdiction[199]. Despite being pretty isolated, such a ruling confirms the tendency to keep together internal and external staff as to provide an all-encompassing notion of EU civil service.

Finally, the other figure of external staff is the *intérimaire*, that is hired via external agencies by means of private law contracts. The basic functioning of this category is very similar to the one provided for local staff in international organisations, that notoriously need a certain amount of staff «on the ground» to carry out operational and practical tasks.

The EU does not provide an exception in this regard. Looking at the activities carried out in third countries, the EU employs local staff, whose manner of engagement, leave and remuneration are determined according to the laws in place where the body is established[200]. Similarly, as regards the activities within Member States, the EU

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[196] Article 270 TFEU.

[197] Except for those cases in which SNEs temporarily acquire the status of official because of the *sui generis* nature of the bodies they belong to.

[198] Council Decision 2009/906/CFSP of 8 December 2009 on the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH).

[199] Case C-455/14 P, *H v Council of the European Union and Others*, ECLI:EU:C:2016:569.

[200] Art. 120 CEOS.

employs *intérimaires*, that are also subject to national rules of where they work. However, since they do not acquire the status of local staff, they do not fall within the scope of the CEOS and, therefore, their claims are not handled by the CJEU[201].

Legally speaking, *intérimaires* are not properly «hired» by EU bodies, but rather «outsourced». In particular, there is a trilateral relationship between the EU body, the *intérimaire* and the private agency supplying personnel. The latter closes public contracts with the EU via tender procedures subject to the financial regulations of the EU[202]. Then the agencies provide the workers, that are hired by means of private contracts.

Attention must be paid to the legal framework of these contracts. They are purely private contracts, concluded between private parties, since the EU is only the final "buyer" of the supplier. Nonetheless, financial regulation imposes to the EU and, indirectly, to the suppliers, to comply with «social and labour law obligations established by Union law, national law, collective agreements or the applicable international social and environmental conventions listed in Annex X to Directive 2014/24/EU»[203].

Therefore, *intérimaires* are in the same position as every other worker supplied to a Member State's public administration: they are subject to private law, they have a contract with a private agency, they are covered by EU labour law directives and enjoy the treatment reserved by collective agreements. There is, however, a difference: while two outsourced workers within a single Member State arguably receive the same legal and economic treatment, *intérimaires* are treated differently according to where the EU body they work for is established. Thus, for instance, an *intérimaire* working for the Commission in Brussels is treated differently compared to a colleague working in Parma at EFSA, or in The Hague at Europol, despite being entrusted with the same tasks.

Such a problem seems to get worse the more the EU decentralises its tasks, as it is occurring especially after the last crises. The two trends described above (i.e.,

[201] Case T-723/17, *Alessandro Quadri di Cardano v European Commission*, ECLI:EU:T:2018:480.

[202] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

[203] Art. 166, Regulation (EU, Euratom) 2018/1046.

decentralisation and shift to direct implementation) require an adaptation of the EU civil service. An outcome of such an adaptation is the growing employment of *intérimaires*, that should however imply, at the same time, a rearrangement of the legal framework, as to prevent discriminatory situations[204].

3.2.Remuneration

The influence of Member States emerges also when it comes to determine the remuneration of EU officials. In this regard, the regime of salaries and monetary emoluments is conceived as to mainly satisfy two needs: on the one hand, they have to be as much high as to ensure the independence of the officials and the attractiveness of the EU civil service[205]; on the other, they have to be tailored on the different places in which officials work, as to prevent disparate treatments. In both cases, the legal nature of the EU and the differences among Member States play a pivotal role.

As a premise, one must bear in mind that the remuneration of EU officials is made of three parts: basic salary, family allowances and other allowances[206]. Whereas family allowances follow rules that are not relevant for our purposes, the first and the third voices are determined also by considering the situation within the Member States.

Unlike many other IOs, the EU does not apply the so called «Noblemaire principle», according to which the international officials must enjoy a level of remuneration which is not less favourable than the highest in place in one member state of the organisation[207]. The adoption of such a criterion dates back to the establishment of the League of Nations, where it was implemented to make employment within such an organisation attractive, with the aim of hiring the best available resources[208].

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[204] Data about tender procedures regarding staff supplies are available at <https://opentender.eu/eu/sector/79620000> (last visited 3 May 2024)

[205] Barone and Lanni, “Rémunération”, in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l’Union européenne*, (Bruylant, 2017), p. 227.

[206] Art. 62 SRs; see also Pilorge-Vrancken, *Le droit de la fonction publique de l’Union européenne*, (Bruylant, 2017), p. 112.

[207] Battini, *Amministrazione senza Stato. Profili di diritto amministrativo internazionale*, (Giuffrè, 2003), p. 69.

[208] For some historical remarks, Ullrich, *The Law of the International Civil Service Institutional Law and Practice in International Organisations*, (Duncker & Humboldt, 2018), p. 223.

The EU has not adopted such a model, but achieves similar results by other means. In principle, the officials' basic salary is determined by statute and it varies according to the function group[209], the grade and the step of each official. The mix of these elements reflects into a grid that describes the basic salary for each position[210].

Every official usually improves its income every two years, by getting to the next step of the same grade[211]. To pass from one grade to the next, they have to be promoted through a comparative procedure. It must be stressed that, through this way, it is only possible to shift within the same «type of position» (e.g., Director-General Director, Adviser, Head of Unit, etc.), whereas to pass from one to another of the latter it is necessary to win either an internal or an external competition[212].

So far, the regime of remuneration does not seem to depart a lot from that one provided in many states. Differences arise when one realises that EU officials are spread among different Member States. Therefore there are some mechanisms to address the disparities that inevitably exist. Such mechanisms are the use of correction coefficients to adapt the remuneration to the place of work and the periodical adjustment of the remuneration as to stabilise the purchasing power of the officials.

Correction coefficients are designed to sterilise the differences among Member States when it comes to the real value of salary. In this regard, they put into practice the principle of equal treatment *vis-à-vis* EU officials[213]. Remuneration shall thus be weighted at a rate above, below or equal to 100 %, depending on living conditions in the various places of employment. The baseline for such a correction is given by Brussels and Luxembourg[214].

The coefficients are adopted by Commission by means of delegated acts, but the request can be filed by the appropriate authorities of the Member States concerned, the

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[209] There are three function groups (AD, AST and AST/SC), see art. 5 SRs.

[210] Article 66 SRs.

[211] Art. 44 SRs.

[212] Meyer, "Avancement de la carrière: notation, avancement d'échelon, promotion, certification", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 141.

[213] Barone and Lanni, "Rémunération", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 229.

[214] Art. 64 SRs.

administration of the institution of the Union or the representatives of officials of the Union in a specific place. The final decision is adopted after the opinion of Eurostat, that must confirm that the difference among living conditions is appreciable (at least 5%)[215].

To this end, Eurostat takes into account the situation in Member States' central governments. The technique is to compare the price of the average 'basket' of goods and services purchased by staff in Brussels with the price of the average basket purchased by staff in each of the other places of employment. In other words, national officials' salaries play as terms of comparison to determine the correction coefficients for EU staff[216].

Similarly, also the annual update of remuneration is partially influenced by the situation in place within Member States. Actually, annual adjustments constitute a practice common to most of the Member States: sometimes it is automatic, others it is subject to approval; for statutory civil service systems, it amends the law, while for contract ones it can fall into the objects bargained by trade unions.

Given the statutory nature of the EU civil service, the adjustment is not bargained with trade unions and it impinges on the legal sources of the matter. Moreover, since 2013 the previous procedure has been abandoned, opting for an automatic system of update, in order to prevent discussions among EU institutions and between the latter and the Member States[217].

The leading criterion to determine the annual adjustment is the «rule of parallelism» (*régle du parallélism*), according to which the variation in the purchasing power for EU officials cannot be worse than the one affecting national officials. To this end, Eurostat calculates specific indicators reflecting changes in the real remuneration of national

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[215] Art. 9, Annex XI to SRs.

[216] Eurostat, Calculation of Intra-EU correction coefficients in accordance with the EU Staff Regulations, July 2020, Doc. A6465/14/59 rev4.

[217] Barone and Lanni, "Rémunération", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 228; Pilorge-Vrancken, *Le droit de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 8-12; Cassagnabère, "La fonction publique de l'Union européenne Un statut de crise, mais pas de crise du statut", (2014) in Actualité juridique de droit administratif, p. 776.

civil servants in central government[218]. The rule of parallelism definitely plays in favour of EU officials, since it grants a sort of right of «being no worse off» than their national colleagues. However, the Court has also specified that such a right does not prevent the EU legislator from intervening and differently calibrating the annual adjustment, even in a worse way for the EU officials. This is because such a right is not a «vested» right[219]. In other terms, the rule of parallelism could be theoretically set aside with an ordinary legislative procedure[220].

Besides the basic salary, a thick part of the remuneration is made of allowances, granted for family reasons or with other purposes. While for the former there is no connection with Member States, for the latter it is the opposite. In particular, expatriation allowances (*indemnité de dépaysement*) and foreign residence allowances (*indemnité d'expatriation*) are both granted to officials that work «abroad», which is to say not in their Member State of origin or, at least, not in the place they reside or have their occupation in[221].

Such allowances pursue similar objectives, to the extent that they seek to satisfy the needs of officials working abroad, but they are in fact also alternative, meaning that their scope of application never overlaps. Indeed, the foreign expatriation allowance only applies to an official «who does not fulfil the conditions laid down» for expatriation allowances[222].

The legal regime of these allowances revolves around the criterion of nationality. The mere fact that an official is not a citizen of the State where they perform their duties gives rise in itself to the right to get a foreign residence allowance. However, if they are also able to give evidence of not having resided in that State – nor having carried on there their main occupation – during the five years before they entered into service, they get the right of the more favourable regime of expatriation allowances. Conversely, if an official is a national of the State where they take service, they get no allowance, unless

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[218] Art. 1, Annex XI, SRs.

[219] Case T-530/16, *Ludwig Schubert and Others v European Commission*, ECLI:EU:T:2018:956.

[220] Case 3/83, *Roland Abrias and others v Commission of the European Communities*, ECLI:EU:C:1985:283.

[221] Art. 4, Annex IV, SRs.

[222] Art. 4(2), Annex IV, SRs

they demonstrate that they have resided or carried on their main occupation in a different country during the ten years before they took service.

The role of nationality brought about a claim before the Court, sought to ascertain whether such a criterion could result in a discrimination prohibited by the Treaties. In response, the Court held that the two types of allowances tackle different issues: «[i]t cannot be denied that an official who has not and has never had the nationality of the State in whose territory his place of employment is situated may be subject, by reason of his status as an alien, to a number of inconveniences both in law and in fact, of a civic, family, educational, cultural and political nature, which the nationals of the country do not experience. As the foreign residence allowance is intended to compensate for the disadvantages which officials undergo as a result of their status as aliens, the Community legislature was entitled, in applying its discretionary judgment to that situation, to rely on the single criterion of nationality, whereas in the case of the expatriation allowance, the object of which is "to compensate officials for the extra expense and inconvenience of taking up employment with the Communities and being thereby obliged to change their residence" […], the Community legislature adopted as the principle criterion that of the official's usual place of residence, considering nationality as of only secondary importance»[223].

Therefore, the requirement of having resided or having carried on the main occupation in another place for a certain period is a cumulative criterion. In particular, a *quaestio facti* that must be ascertained case by case. Given the importance of the issue, its economic relevance and its legal nature, the Court has been largely seised to settle disputes on this topic[224].

3.3.Immunities and personal liability

The last topic to explore in order to describe the legal framework of the EU civil service deals with the regime of personal liability for EU staff and, in particular, with the rules of its immunities and privileges. This is a field which the EU has in common

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[223] Case 147/79, *René Hochstrass v Court of Justice of the European Communities*, ECLI:EU:C:1980:238, para 12.

[224] Barone and Lanni, "Rémunération", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 244.

with many other international organisations[225]. It is open to question, however, whether such a regime perfectly fits into the internationalistic model or, rather, it bears some differences because of the very peculiar nature of the EU.

The topic of liability is logically preliminary to the one of immunities. To this end, the regime of EU officials and other servants diversifies the contractual from the non-contractual liability. Indeed, as regards the former, EU officials are subject to the national rules applicable to the contract which has been allegedly breached[226]. In these cases, the jurisdiction on the disputes is held by national courts, since, even «disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States»[227]. By contrast, the non-contractual liability for EU officials is governed by a much more favourable regime. Indeed, as it happens in Germany (see above, Chapter II), EU officials are not held personally liable *vis-à-vis* third parties. May a wrongful damage occur, compensation is provided by the EU body concerned under article 340 TFEU, whereas «[t]he personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them»[228]. To this end, EU officials are expected to recover the damages suffered by the Union as «a result of serious misconduct on his part in the course of or in connection with the performance of his duties»[229].

Looking at the immunities, in the international law the latter are usually fiscal or jurisdictional in nature and have a functional aim, which is to say that they are conceived as to shield the organisations from external perturbances while they perform their duties. Moreover, within the global landscape, immunities can be categorised in three forms: general ones, whose prototype is provided by the UN, which prevent the

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[225] Blumann and Dubouis, *Droit institutionnel de l'Union européenne*, 6th ed. (LexisNexis, 2016), p. 345-346; Oberdorff, "Fonction publique de l'Union européenne" in Auby and Dutheil de La Rochère (Eds.) *Traité de droit administratif européen* (Bruylant, 2022), p. 229-246.

[226] Article 340(1) TFEU.

[227] Article 274(1) TFEU.

[228] Article 340 (4) TFEU.

[229] Article 22 SRs. See also Baroni, "L'azione di rivalsa sui dipendenti per responsabilità extracontrattuale delle Istituzioni europee", (2008) Rivista italiana di diritto pubblico comunitario, p. 1105-1122.

staff from undergoing any legal process, whatsoever caused and save for express waiver; the second category is made of restrictive immunities, which are made equivalent to those of states; third, there are functional immunities, which are only activated whenever it is necessary to fulfil the purposes of the organisation concerned[230].

At first sight, immunities granted to EU staff fit in none of the above mentioned models. Looking at «external» immunities, like those *vis-à-vis* third countries or other international persons, their scope and effects vary a lot, according to the different international agreements concluded each time with third parties[231]. Similarly, focusing on «internal» immunities, that are those in place within the Member States' territory, the main paradigm is the functionalistic one (third model seen above), but there are some prominent exceptions to keep in mind.

Logically and legally speaking, rules on immunity come after those on jurisdiction: before saying that a national court cannot prosecute a person because of immunity, nor decide on a tort claim, one must demonstrate that the national court has in fact jurisdiction[232]. When it comes to the EU legal system, then, it is necessary to look at articles providing the CJEU with the jurisdiction on certain claims. Only once its competence is out of the radar, rules on immunity can be invoked before national courts.

This led some authors, such as Blumann and Dubouis, to claim that «l'immunité de juridiction n'existe pas vraiment puisque soit la Cour de justice est compétente (légalité et responsabilité non contractuelle de l'Union) soit, en vertu des dispositions combinées des articles 272 et 340 TFUE, les juridictions nationales peuvent connaître des engagements contractuels souscrits par l'Union»[233]. In other words, EU jurisdictional immunities would be pointless, since for every claim there would allegedly be a competent court to settle the case. Such an argument seems unsatisfactory though,

[230] Rossi, *International Law Immunities and Employment Claims. A Critical Appraisal*, (Hart, 2021), p. 26.

[231] Wessel, "Immunities of the European Union", (2014) International Organizations Law Review p. 395-418.

[232] Rossi, *International Law Immunities and Employment Claims. A Critical Appraisal*, (Hart, 2021), p. 7.

[233] Blumann and Dubouis, *Droit institutionnel de l'Union européenne*, 6th ed. (LexisNexis, 2016), p. 349.

because it only deals with one side of the problem. Actually, immunity from jurisdiction does not only engage with tort law, but also with criminal offences.

It is thus pivotal to ascertain, once the jurisdiction of the CJEU is dismissed, whether a situation falls within the scope of application of the rules on immunities of EU staff. To this end, one must conduct a three-steps assessment: *ratione loci*, *ratione personae* and *ratione materiae*.

According to the first criterion, the easiest to match, the Union enjoys internal immunities and privileges «in the territories of the Members States»[234]. This entails that outside such boundaries immunities provided under the TFEU do not apply and, at best, only the regime provided by international law applies.

Once established a territorial link, it is necessary to look at the person involved in the dispute. The basic rule is that internal immunities are granted to «officials and other servants of the Union», regardless their nationality[235]. Therefore, at first sight, exemption from tax imposition and judicial prosecution is reserved to those that enjoy such a status, deriving from the applicability of the SRs and the CEOS.

However, in reality, not all of them are shielded: it is up to a EU regulation to determine which categories are in fact covered by immunities[236]. For instance, to local staff only the immunity from legal proceedings applies, while the other ones provided by article 12 of the Protocol (*e.g.*, no restrictions on immigration, import of furniture and effects free of duty, etc.) are not granted[237].

An important exception to the general application of jurisdictional immunity is envisaged for «Europol staff placed at the disposal of a joint investigation team in respect of official acts» issued in fulfilment of its duty[238]. In other terms, whenever an Europol official conducts an operation on national soil in cooperation with national

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[234] Art. 343 TFEU.

[235] Art. 11, Protocol no. 7, TFEU.

[236] Art. 15, Protocol no. 7, TFEU.

[237] Art. 1, lett. b), no. 1, Regulation (Euratom, ECSC, EEC) No 549/69 of the Council of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply.

[238] Art. 1a, Regulation (Euratom, ECSC, EEC) No 549/69.

officials, they do not enjoy the immunity from legal proceedings. Such an exception was introduced in 2009[239], and aimed at counterbalancing the alleged lack of accountability of Europol when this conducts operational and material activities «on the ground»[240]. This special regime is even more exceptional if compared to other settings in which, like Europol, national and EU administrations conduct joint operations, but in which EU staff keeps enjoying full internal immunities.

Therefore, the scope *ratione personae* does not necessarily follow the status of official. Not all of the EU officials, in themselves, enjoy internal immunities; moreover, at the same time, the latter not only apply to EU officials, but also to other categories. This is the case of the members of the ECB's organs, who do not necessarily fall within the scope of application of the SRs or the CEOS and nonetheless enjoy such a regime[241].

As regards this topic, in a case concerning criminal offences, the CJEU has been asked to ascertain whether the governors of national central banks were provided with the same immunities of EU staff while acting within the Governing Council of the ECB[242]. So to say, whether national officials enjoyed the same status of EU officials for the purposes of immunities.

To reach a conclusion, the Court could have relied on a textual argument, according to the quite broad formulation of the Protocol, which extends such a regime also to the simple «members of the organs» of the ECB, no matter what legal relationship exists with the latter. Instead, the Court followed a different line of argumentation, functional and teleological in nature: it first recalled, as a premise, that the figure of «national governor» is characterised by a dual professional role resulting in a hybrid status[243]; it then held that the immunities given to ECB contribute to the independence of the

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[239] Council Regulation (EC) No 371/2009 of 27 November 2008 amending Regulation (Euratom, ECSC, EEC) No 549/69 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply.

[240] Gless, "Europol", in Mitsilegas, Bergstrm and Konstadinides (Eds.) *Research Handbook on EU Criminal Law* (Edward Elgar Publishing, 2016), p. 475.

[241] Art. 22, Protocol no. 7, TFEU.

[242] Case C-3/20, *Criminal proceedings against AB and Others*, ECLI:EU:C:2021:969.

[243] See also Cases C-202/18 and C-238/18, *Rimšēvičs and ECB v Latvia*, EU:C:2019:139, paragraph 70.

institution; moreover, it added that denying the immunity to national governors «would have the paradoxical consequence of depriving of any immunity persons to whom the Treaties entrust responsibility for the monetary policy of the European Union and whom those treaties expressly intended to be exempt from any influence in the performance of that task»; likewise, it finally stressed that members of the governing organ cannot enjoy a lower level of protection than the ordinary staff of the ECB.

As a conclusion, governors of national central banks enjoy immunities so far they are acting, *ratione materiae*, in their duties as members of the Governing Council of the ECB. Such an outcome is not striking in itself since, as said above, the wording of the provision would have easily allowed that. Rather, the arguments spent by the Court seem remarkable, because they could be theoretically extended, *mutatis mutandis*, to other EU bodies which share the same features: mixed composition, with national officials sitting in collective organs; independence; decision-making tasks; importance of the policy field concerned. It is evident that such requirements are common to many other EU bodies (*e.g.*, the management boards of agencies) and it is therefore not unforeseeable that one day the same immunities will apply to national officials working in such settings.

Finally, jurisdictional immunities can only be invoked if, *ratione materiae*, they relate to acts committed by the staff «in their official capacity». This is because such advantages are conferred in the interest of the EU, so far it is necessary to guarantee the functioning and the independence of the latter[244]. Notwithstanding the potentially wide range of situations falling within this definition, the Court has adopted a narrow interpretation when it comes to define it in light of criminal offences. In particular, it has specified that such a notion only covers acts which, by their nature, represent a participation of the person claiming immunity in the performance of the tasks of the

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[244] Livolsi and Schiano, "Droits et obligations du fonctionnaire", in Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 184; Pilorge-Vrancken, *Le droit de la fonction publique de l'Union européenne*, (Bruylant, 2017), p. 217.

institution to which they belong[245]. Therefore, for instance, offences like fraud, money laundering or corruption fall outside of this definition[246].

On the procedural level, EU immunities operate automatically, meaning that they do not need to be expressly raised by the person or the institution concerned[247]. However, the decision-making process to waive them is more complicated: usually it is on the institution concerned to waive the immunity, when, *ratione materiae*, a dispute seems to fall outside its scope of application; however, if the facts clearly show that, *ictu oculi*, a certain matter is not related to the duties of the official, the national proceeding authority can disregard the immunity by itself. It is up to the person concerned, then, to raise an objection and, in this case, national authorities are under the obligation of loyal cooperation, being therefore obliged to cooperate and to forward the request to the EU body. Failing to do so can justify the activation of an infringement procedure under article 258 TFEU[248].

4. *Committees and collegial bodies of EU agencies*

Once outlined the legal framework of internal and external staff, there is still another crucial part – to some extent, the original core – of the EU civil service, made of those who take part in collegial organs of the EU and contribute, in a broad sense, to the policy making and its first implementation. The reference goes to the vast array of "committees", "groups", "boards" in place within the EU organisation, either connected with the proper institutions or making part of other bodies, such as the agencies.

This topic can be tackled in two ways. From a functional point of view, what stands out is that these organs perform a set of heterogeneous tasks, which spans from practical support, through to consultative roles and ending up with direct implementation of EU policies. Notoriously, as quasi decision making powers stepped into play, fears arose that these bodies would have encroached on the institutional balance struck by the

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[245] Case 5/68, *Claude Moïse Sayag and S.A. Zurich v Jean-Pierre Leduc, Denise Thonnon*, spouse of Leduc, and S.A. La Concorde, ECLI:EU:C:1968:42.

[246] Case C-3/20, *Criminal proceedings against AB and Others*, ECLI:EU:C:2021:969.

[247] Case C-182/91, *Forafrique Burkinabe SA v Commission of the European Communities*, ECLI:EU:C:1993:165.

[248] Case C-3/20, *Criminal proceedings against AB and Others*, ECLI:EU:C:2021:969.

Treaties and the non-delegation doctrine[249]. Unsurprisingly, thus, most of the scholarly literature focuses on this first side of the problem, seeking to shed light on the concrete functioning of such forums and on the underlying legal issues[250].

There is a second approach though, which stresses the structural implications of this model. These institutional settings have indeed in common two features: the collegiality and the interbureaucratic composition, since they are usually made of officials belonging either to national or EU administrations. A part from these two features, such forums vary for many other reasons, such as the manners of establishment, the formality (or informality) of their compositions; the rank of the officials involved, and so on.

For our purposes it is more important to focus on this second approach. The analysis provides two parts: first, there is the set of bodies serving the institutions, namely the Commission and the Council; on the other side stand the governing boards of agencies, mostly composed of representatives of Member States and, sometimes, of top officials of national authorities.

Starting from the first cluster, the most prominent example is given by comitology, which supports the Commission in the adoption of implementing acts pursuant to article 291 TFEU[251]. Since their birth, scholars have been mostly focusing on the institutional reflections of committees and the risk they bear to impinge on the institutional balance between the Commission, the Council and the Parliament[252]. To a lesser extent,

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[249] These problems spring from the well-known case-law of the CJEU about the validity of agencies and implementing powers conferred to the Commission; as regards the first issue, the case-law was inaugurated by Case 9/56, Meroni & Co., *Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7; as regards compatibility of implementing powers given to the Commission, see Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co*, ECLI:EU:C:1970:115, with the subsequent developments and arrangements.

[250] The literature on the topic is broad; see, for a recent reconstruction, Volpato, *Delegation of Powers in the EU Legal System*, (Routlege, 2022).

[251] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

[252] Lenaerts and Verhoeven, "Towards a Legal Framework for Executive Rulemaking in the EU? The Contribution of the New Comitology Decision", (2000) Common Market Law Review, 645–686; Della Cananea, "Cooperazione e integrazione nel sistema amministrativo delle comunità europee", (1990) Rivista trimestrale di diritto pubblico, p. 655-702.

attention has been paid to the structure, the organisation and the composition of such forums.

At the moment, according to the register held by the Commission, 357 committees are in place[253]. In practice they are either established by the legislative act concerned *ratione materiae* or by a decision of the Council. Looking at their legal nature, they have been defined as «collegi interburocratici onorari, prevalentemente virtuali o di composizione, strutturati secondo il principio della rappresentatività»[254]. Hence, they are collegial bodies (*collegi*), made of bureaucrats from many administrations (*interburocratici*); more specifically, they are honorary bodies, in the sense outlined above, and not professional ones, so to say that those sitting therein are employed as far as they perform such duties[255].

Apparently, they follow the principle of representativeness, since they reflect a geographical balance and not a specific mandate issued by their home administrations. Perhaps, this could be also disputed, since the rules of procedures normally adopted by each committee, copying out the standard format passed by the Commission, use the term «representation»[256]. Moreover, according to the wording of the provisions, States are the actual members of the committees, so it could be argued that their officials are vested with a fully fledged mandate of representation. The truth is probably somewhere in between: the EU considers them as representatives, while the Member States are free to frame the relationship with their delegations in stricter or more lenient way.

Interestingly, their functioning and organization are the outcome of a composite set of legal sources. As regards the functioning, rules are embedded partly in the EU regulation concerning mechanisms for control by Member States of the Commission's

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[253] Art. 10, Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011.

[254] Savino, *I comitati dell'Unione europea. La collegialità amministrativa negli ordinamenti compositi*, (Giuffrè, 2005), p. 163.

[255] Battini, *Amministrazione senza Stato. Profili di diritto amministrativo internazionale*, (Giuffrè, 2003), p. 129.

[256] Art. 5, Standard rules of procedure for committees (2011/C 206/06).

exercise of implementing powers[257], and partly in the rules of procedures adopted by each committee. Usually, the latter also set out some organizational rules, such as those regarding the delegation of each Member State within the committee, the reimbursement of travel expenses and the rule to prevent the conflicts of interest. In this case, when there is a possible ground of conflict, the person concerned has to inform the chair of the committee and the latter can ask the former to withdraw from the meeting at stake.

On the other side there are rules set out by Member States addressing the appointment of delegations. Accordingly, it is on the single State to decide whether to confer the mandate to senior or junior officials, or to appoint external counselors to go to Brussels[258]. This of course brings about a diversity in the backgrounds, skills and political affiliations of national delegations Empirical studies show that, for example, some countries (such as Denmark) send officials belonging to the ministry concerned *ratione materiae*, usually drawing them from the bottom of the hierarchy. They are basically highly educated officials, sometimes with a technical background (engineering, national sciences, etc.) but more often with a generalist one (law, political science, etc.) [259].

Still within the Commission, another cluster is the one of expert groups. These collegial bodies work in tandem with comitology, since the latter deals with implementing rules, while the former with the consultations and drafting of delegated acts under article 290 TFEU. According to the register held by the Commission, 1121 groups are currently in place.

This category is slightly different from the previous one because of some elements. The Commission in this case has indeed sought to formalize what is required to take part in expert groups. In particular, there are five «types» of members: individuals

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[257] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.

[258] Savino, *I comitati dell’Unione europea. La collegialità amministrativa negli ordinamenti compositi*, (Giuffrè, 2005), p. 170.

[259] Blom-Hansen, *The EU Comitology System in Theory and Practice Keeping an Eye on the Commission?*, (Palgrave Macmillan, 2011), p. 156.

appointed in their personal capacity who are to act independently and in the public interest («Type A»); individuals appointed to represent a common interest shared by stakeholders in a particular policy area, who do not represent an individual stakeholder, but a policy orientation common to different stakeholder organisations («Type B»); organisations in the broad sense of the word, including companies, associations, NGOs, trade unions, universities, research institutes, law firms and consultancies («Type C»); Member States' authorities, at national, regional or local level («Type D»); other public entities, such as third countries' authorities, including candidate countries' authorities, Union bodies, offices or agencies and international organisations («Type E»)[260].

In other words, not all the expert groups are interbureaucratic in nature, but only types D and E, while other groups can be also fed by individuals taken from the public[261]. Accordingly, the Commission has laid down rules for the selection of members, to ensure a proper expertise and, on top of that, a geographical balance as far as possible. Such calls can be either opened continuously or just for a fixed period.

However, these rules do not apply to interbureaucratic expert groups, since their members are appointed by national administrations and the latter are completely free to choose the officials or employees they want. So, from this perspective, expert groups and comitology work in a quite similar way: members are nominated by home administrations, according to national procedures defined by national law; they are subject to article 339 TFEU; the rules on conflict of interests are set out by the EU. In this regard, however, it is also specified that Type D members do not need to issue a declaration concerning the conflict of interests, since they do not provide personal opinion but rather «express the views of the public authorities which they represent»[262]. Therefore, at least in this case, the relationship between experts and national authorities is labelled as «representation».

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[260] Art. 7, Commission decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups, C(2016) 3301 final.

[261] In particular, «Type D and E members shall only be represented by civil servants or public employees», pursuant to art. 9, Commission decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups, C(2016) 3301 final.

[262] Art. 11, Commission decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups, C(2016) 3301 final.

The second institution to focus about is the Council, which actually has been the first to test this kind of institutional solutions since the '50s, given its intrinsic intergovernmental attitude. In particular, some attention must be paid to the COREPER and the other preparatory bodies of the Council, all involving to different extents national officials in their daily functioning.

As regards the former, it was first established as a provisional setting to prepare the meetings of the Council in an informal way, turning later into a stable organ of the Union whose existence is nowadays guaranteed by the Treaties[263]. This strikes a difference between COREPER and other aforementioned collegial bodies, which have been established at best via ordinary procedure. Moreover, its structure has been progressively growing and diversifying, so its members change according to the different configurations each time adopted. In particular, the main distinction lays between COREPER I and COREPER II[264].

COREPER I is in charge of dealing with more technical issues, usually related with the internal action of the Union. On the other side, COREPER II is mostly engaged with broader and sensitive issues, usually bringing about financial and institutional implications, or with issues related to external action of the EU. As a result, the composition of the two settings reflects the importance of the subject matters dealt with. As a rule, indeed, in COREPER II sit ambassadors of the Member States, while in COREPER II one can find the deputy permanent representatives. Both the configurations are moreover assisted by groups of officials, known as the *Antici* and the *Mertens* groups: the first provides assistance to COREPER II, while the second does the same for COREPER I[265].

Given the position of the officials involved (ambassadors, lower diplomats, other officials, etc.) also in this case rules on nomination of such figures are set out by the sending Member States. The only EU's concern is to ensure the proper functioning of COREPER, which is crucial for the decision-making process of the Council.

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[263] Article 16(7) TEU; article 240 TFEU.

[264] Such a difference stands indirectly out by art. 19, Council decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU).

[265] De Zwaan, *The Permanent Representatives Committee. Its Role in the European Union Decision-Making*, (Elsevier, 1995), p. 93.

Actually, permanent representatives are basically expected to be the tenet between many institutions and organs: during the ordinary legislative procedure, they take part in the conciliation process with the European Parliament[266]; moreover, other preparatory bodies (such as Council's committees and working parties, as seen below) give account to permanent representatives of their activities[267]. Given their high profile and their outstanding expertise, permanent representatives are also involved in the composition of the EEAS. In other words, they perform crucial duties during the decision making process of the EU, but as a status, they resemble more State representatives in IOs than public officials in a supranational organisation.

Finally, as briefly sketched above, the Council relies on many other preparatory bodies, which get the form either of Committees or working parties[268]. Some of the former are even provided by the Treaties, such as the Political and Security Committee (PSC)[269], Economic and Financial Committee (EFC)[270], Employment Committee (EMCO)[271], Trade Policy Committee (TPC)[272], Standing Committee on Operational Cooperation on Internal Security (COSI)[273] and the Social Protection Committee (SPC)[274].

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[266] Art. 289 TFEU.

[267] Bostock, "Coreper Revisited", (2002) Journal of Common Market Studies, p. 215-234.

[268] Art. 19, Council decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU). A list annually updated lies down the Committees, working parties and other bodies performing preparatory tasks for the Council. See, for instance, Council document of the 20th December 2023, no. 16975/23.

[269] Art. 38 TEU; see also Council decision of 22 January 2001 setting up the Political and Security Committee.

[270] Art. 134 TFEU; see also Council decision of 29 September 2000 on the composition and the statutes of the Economic Policy Committee.

[271] Article 150 TFEU; see also Council decision (EU) 2015/772 of 11 May 2015 establishing the Employment Committee.

[272] Article 207(3) TFEU; see also Council document of the 3rd of June 2021, no. 8728/21.

[273] Article 71 TFEU; see also Council decision of 25 February 2010 on setting up the Standing Committee on operational cooperation on internal security.

[274] Article 160 TFEU; see also Council decision (EU) 2015/773 of 11 May 2015 establishing the Social Protection Committee.

Their composition varies both in respect of the bodies involved and the expertise of members sitting therein. As a rule, representatives of Members States and Commission have their posts; sometimes, a representative of the ECB is involved too (e.g., within EFC and EPC), as well as representatives of the EEAS (e.g., within PSC)[275]. Moreover, it is also possible to provide a merely provisional participation for some bodies, as it is the case for representatives from Eurojust, Europol, the European Border and Coast Guard Agency (Frontex) and other relevant bodies occasionally called to attend COSI's meetings.

Such collegial bodies are interinstitutional, since they gather together representatives from different public bodies; however, they are not always interbureaucratic, because each time it is on the EU acts to specify whether representatives must be public officials (e.g., within EPC) or rather simply «experts» in the specific field of interest (e.g., within EFC or EMCO), leaving open the door for the participation of other individuals belonging to the private sector. In general, these are the main paradigms followed within the whole constellation of committees in charge of preparatory tasks for the Council, also for those not specifically envisaged by the treaties but set out by the Council itself[276].

Alongside committees – and, to some extent, in tandem with them – one can observe the working parties of the Council[277]. Here, normally speaking, informality rules: usually receiving a mandate from the General Secretariat of the Council[278], working parties can be either established *ad hoc* for temporary assistance or can be standing to deal with ordinary topics. In practice, they are usually made of senior officials of Members States and their presidency mirrors the turning order in place at the Council[279].

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[275] For further accounts on PSC's composition, Juncos and Reynolds, "The Political and Security Committee: Governing in the Shadow", (2007) in European Foreign Affairs Review, p. 127–147.

[276] In general, Neuhold and Radulova, "The involvement of administrative players in the EU decision making process", in Hofmann Türk (Eds.) *EU Administrative Governance* (Edward Elgar, 2006), p. 44-73.

[277] For a list, see Council document of the 20th December 2023, no. 16975/23.

[278] See, for instance, Council document of the 3rd of June 2021, no. 8728/21.

[279] De Zwaan, *The Permanent Representatives Committee. Its Role in the European Union Decision-Making*, (Elsevier, 1995) p. 96.

Once analysed the landscape within institutions, some attention must be paid to the characteristics of management boards of EU agencies. These can be defined as «the steering bodies of agencies and have the tasks to adopt the agencies' work programme and rules of procedure, and play a central role in the adoption of their budgets and the appointment and dismissal of their directors»[280].

Such boards reflect the composite nature of the EU executive, since they gather together, as a rule, representatives from Member States and from the Commission. Moreover, as Chiti pointed out, sometimes management boards of EU agencies are part of broader networks that involve national authorities as well, creating some sorts of sectoral sub-governments[281]. Therefore, also in this case, it is useful to outline the composition of such organs and the requirements imposed to take part in them.

As exhaustively described by Vos, the basic model, provided also by the so called Common Approach[282], reflects a mixed composition, made of representatives appointed by Member States and by the Commission (e.g., CEPOL, EASA, EFCA and ELA). Sometimes, representatives of the European Parliament are also allowed to take part in the management boards (e.g., ECDC, ECHA, EEA, EMA, EUIPO and GSA), even though they do not always express political affiliation, since in some cases they are chosen because of their expertise (e.g., EMA and ETF). Interestingly, in many situations there are representatives of scientific communities relevant to the subject matter at stake (EMA, EMCDDA)[283]. In this way, organisational complexity of agencies is further enriched as to strengthen their representativeness *vis-à-vis* the entire society[284]. A striking exception to these models is offered by EFSA, whose members are entirely

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[280] Vos, "EU Agencies and the Composite EU Executive", in Everson, Monda and Vos (Eds.), *European agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 25.

[281] Chiti, "An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies", (2009) Common Market Law Review, p. 1441.

[282] See "Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies", 19 July 2012.

[283] Data are taken from Vos, "EU Agencies, Common Approach and Parliamentary Scrutiny", (2018) European Parliamentary Research Service (doi: 10.2861/656418).

[284] Chiti, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, (CEDAM, 2002), p. 350.

nominated by the Council in consultation with the Parliament, except for one who represents the Commission[285].

A second issue regards the requirements set out by EU legislation to narrow down the discretion of Member States to appoint their representatives. Most of the times, relevant regulations specify some sort of technical requirement that must be fulfilled by members of managerial boards, expressed in terms of «knowledge, recognised experience and commitment»[286], «degree of relevant experience and expertise»[287] or «knowledge in the field»[288]. It is rare, conversely, that the EU specifies the type of experience required, as it does with EASA instead, whereby it imposes that «[t]he members shall have overall responsibility at least for civil aviation safety policy in their respective Member States»[289]. Anyways, to what extent these rules are enforced and enforceable remains disputable.

What matters is that most of the times EU legislation does not confer an interbureaucratic nature to management boards, since they can be also made of individuals belonging to the private sector, although appointed by Member States. An exception to this rule is provided by the agencies established after the financial crisis outbroken in the late '10s, that brought about a enhanced integration among supervisory authorities in the EU financial sector. Hence, EIOPA, ESMA and EBA involves in their

[285] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

[286] For EASA, see art. 99, Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency.

[287] For EFCA, see art. 33, Regulation (EU) 2019/473 of the European Parliament and of the Council of 19 March 2019 on the European Fisheries Control Agency.

[288] For CEPOL, see art. 8, Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL). For ELA, see art. 17, Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority.

[289] For EASA, see art. 99, Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018.

respective management boards the heads of national supervisory authorities, who are thus national public officials.

5. *Sui generis offices: Europol, EPPO, EEAS and EDA*

The abolition of the three-pillars structure after the Lisbon Treaty has brought about some significant changes in terms of procedures and institutional framework of the EU. Nonetheless, it is still evident that when it comes to the fields of former JHA and CFSP, the models adopted depart somehow from what examined so far. This is true looking at some exemplificatory bodies that show *sui generis* features as regards the regime of their personnel, namely Europol, EPPO, EEAS and EDA[290]. The main peculiarities pertain to the legal sources of their regimes, the status of their staff and their manners of appointment. In a nutshell, these bodies provide a different relationship with Member States, also when it comes to their personnel.

Established in the late '90s, Europol is an agency with a composite structure. A central core of functions carried out in The Hague by EU officials is coupled with decentralised tasks performed at national level by linked offices[291]. In particular, its staff in the Netherlands is either temporary or under contract and it is thus subject to the CEOS. Remarkably, it is also added that some posts «provided for in the establishment plan can be filled only by staff from the competent authorities of the Member States. Staff recruited to occupy such posts shall be temporary agents and may be awarded only fixed-term contracts, renewable once for a fixed period»[292]. In other words, personnel enjoying the proper status of «temporary agent» can be either recruited with normal procedures provided by CEOS or, in alternative, be hired from the competent authorities of the Member States.

[290] See for further remarks on the legal nature of some of these bodies, Chiti, "An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies", (2009) Common Market Law Review, p. 1398.

[291] For further remarks on the history and structure of Europol, see Den Boer and Bruggeman, "Shifting gear: Europol in the contemporary policing era", (2007) Politique européenne, p. 77-91.

[292] Art. 53, Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol).

This is due to the very peculiar structure of Europol which, alongside the central office, works in team with the national units designated by each Member State[293]. Hence, every unit is expected to appoint a liaison officer, who is attached to Europol and is in charge of fostering the coordination and the exchange of information between their national units, Europol, and other Member States' national units[294]. These officers – as well as their national units – keep being subject to national laws, when the Europol Regulation does not provide otherwise.

Keeping the focus on the former JHA's field, EPPO has to be taken into account[295]. Although envisaged by the Treaties, the implementation of organisational measures to empower European prosecutors has seemed to be "shy" so far, since *ratione materiae* EPPO has been allowed to initiate prosecutions only for offences related to financial interests of the Union[296]. Hence, competences on other important matters such as environmental crimes and terroristic threats are still retained by Member States, despite an extension of EPPO's prerogatives would be probably desirable[297].

EPPO, like Europol, is provided with a network structure; however, unlike Europol, it is framed as «an indivisible Union body operating as one single Office with a decentralised structure»[298]. This means that the national units of EPPO (in jargon, the European Delegated Prosecutors), are organs of EPPO, which is the one that eventually adopts the legal acts under EU law.

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[293] Article 7, Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016.

[294] Article 8, Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016. For further remarks, Gless, "Europol", in Mitsilegas, Bergström and Konstadinides (Eds.) *Research Handbook on EU Criminal Law* (Edward Elgar Publishing, 2016), p. 457-479.

[295] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office; for its background, see Ligeti, "The European Public Prosecutor's Office", in Mitsilegas, Bergström and Konstadinides (Eds.) *Research Handbook on EU Criminal Law* (Edward Elgar Publishing, 2016), p. 480-504. On the status of staff working at EPPO, see Barrocu, *La procura europea: dalla legislazione sovranazionale al coordinamento interno*, (Wolters Kluwer, 2021), p. 63-65.

[296] Bellacosa and De Bellis, "The Protection of the EU Financial Interests Between Administrative and Criminal Tools: Olaf and Eppo", (2023) Common Market Law Review, p. 15–50.

[297] Minucci, "Verso un ampliamento delle competenze dell'EPPO?", (2024) Il diritto dell'Unione europea, p. 7.

[298] Art. 8, Council Regulation (EU) 2017/1939 of 12 October 2017.

This feature brings about some reflections when it comes to the EPPO's staff. The latter is defined, formalistically, as «the personnel at the central level who supports the College, the Permanent Chambers, the European Chief Prosecutor, the European Prosecutors, the European Delegated Prosecutors and the Administrative Director in the day-to-day activities in the performance of the tasks of this Office under this Regulation»[299]. However, such a status is not reserved for the administrative employees at central level: indeed, the European Delegated Prosecutors are subject to the SRs and the CEOS as well[300], despite being substantially nominated by Member States according to mixed criteria[301], partly set out by the State concerned and partly laid down by the EU regulation[302]. In particular, on the national side, European Delegated Prosecutors has to be «active members of the public prosecution service or judiciary of the respective Member States which nominated them»; at the same time, EU law also specifies that «[t]heir independence shall be beyond doubt and they shall possess the necessary qualifications and relevant practical experience of their national legal system»[303].

Procedurally speaking, this entails that the College of EPPO has to dismiss European Delegated Prosecutors if it finds that they no longer fulfil the requirements set out either by national or EU law[304]. Such an arrangement clearly stands out within the normal landscape of EU law, since it allows an EU organ to apply national law, which occurs pretty rarely within the EU legal system.

Hence, at central level, European Delegated Prosecutors take advantage of EPPO's staff, while at national level they rely on national resources. In particular, it is on

[299] Art. 2, no. 4, Council Regulation (EU) 2017/1939 of 12 October 2017.

[300] Art. 96, Council Regulation (EU) 2017/1939 of 12 October 2017.

[301] Formally the appointment is made by the College upon the proposal of the European Chief Prosecutor, see art 17, Council Regulation (EU) 2017/1939 of 12 October 2017.

[302] For further indications, see also Decision of the College of the European Public Prosecutor's Office of 16 November 2020 laying down rules on the procedure for the appointment of the European delegated prosecutors, which sets out the procedures that must be followed by the College do assess the eligibility criteria of the European Delegated Prosecutors.

[303] Art. 17(2), Council Regulation (EU) 2017/1939 of 12 October 2017.

[304] Art. 17(3), Council Regulation (EU) 2017/1939 of 12 October 2017.

Member States to provide their respective European Delegated Prosecutors with enough personnel to perform their tasks[305].

Moving to the CFSP's field, there are two striking examples to take into account, which are EEAS and EDA. They are both envisaged by the Treaties and, according to their tasks and nature, they both provide a particular organizational setting towards Member States, given their intergovernmental attitude[306].

EDA is an EU agency that, to some extent, shows unique features when it comes to its organisation and the composition of its organs. As correctly underlined by Calcara, EDA is the only EU agency whose steering board (i.e., management board) has to meet «at the level of Defence Ministers of the participating Member States or their representatives»[307]. At the same time, however, its staff is not selected through a national quotas system but rather on the merits of the candidates[308].

Its staff can be either temporary or under contract, so there are not permanent officials therein. Remarkably, there are three legal regime for EDA's staff, since three are the category of personnel working at it[309].

First, there is the staff recruited by EDA, who is not subject to the SRs and CEOS but rather to another Staff Regulation specifically adopted for EDA[310]. Since this staff formally falls outside the scope of application of the SRs and CEOS and, thus, article

Secondly, there are the SNEs sent by Member States, who remain under the influence of national law. However, unlike other agencies, EDA has specified some substantial and procedural rules addressing their appointment. In particular, the agency has to issue an open call; national officials can apply through their permanent

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[305] For example, in Italy, such enabling rules are provided by the legislative decree of the 2nd of February 2021, no. 9.

[306] For EEAS, see art. 27(3) TEU; for EDA, see art. 42(3) TEU.

[307] Art. 8(2), Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency.

[308] Calcara "The Role of Experts in the European Defense Agency: An Emerging Transgovernmental Network", (2017) European Foreign Affairs Review, 377–392.

[309] Art. 11(3), Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defense Agency.

[310] Council Decision (EU) 2016/1351 of 4 August 2016 concerning the Staff Regulations of the European Defence Agency.

representatives in Brussels, but must be sponsored by the national administrations they belong to; finally, the appointment of NSEs is formalized through an exchange of letters between the permanent representatives and the agency[311].

The third category is basically made of EU officials "horizontally" seconded to the Agency. It goes without saying that, unlike the previous situation, this one is entirely regulated by the EU law, namely the SRs, which provides specific rules for secondment of officials among EU bodies[312].

Finally, some account must be given in respect of EEAS, which definitely provides a further model for our purposes. Unlike the aforementioned bodies, the legal nature of EEAS is disputable, since it neither fits in the model of an agency nor the one of other collegial bodies such as COREPER. Hence, there is who correctly argues that EEAS is akin a Directorate General of the Commission, because of it tasks, functioning and given its relationship with the High Representative of the Union for Foreign Affairs and Security Policy[313]. When it comes to the regime of its personnel, however, similarities with the DGs of the Commission do not go much further.

In particular, its staff enjoys the status of the officials and other agents of the EU; hence, in this case SRs and CEOS are fully applicable. However, the personnel is partially appointed in a different manner than what happens in the ordinary bodies. Namely, along with the permanent officials selected by the EEAS through selection procedures, there are units drawn from the diplomatic services of the Member States and labelled as temporary agents[314]. In this way EEAS takes advantage of the expertise collected by diplomats within COREPER and, not by chance, when it was established, it was provisionally fleshed out by officials and other servants coming from the Council and the Commission[315].

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[311] Council Decision (EU) 2016/1352 of 4 August 2016 concerning the rules applicable to national experts seconded to the European Defence Agency.

[312] See the Title III, Chapter II, Section II, SRs.

[313] Van Vooren, "A Legal-Institutional Perspective on the European External Action Service", (2011) Common Market Law Review, p. 491.

[314] Art.6, Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service.

[315] Cross, "Building a European Diplomacy: Recruitment and Training to the EEAS", (2011) European Foreign Affairs Review, p. 447–464.

Therefore, it really stands out in this model that the two categories of staff – the one recruited by EEAS and the one appointed by Member States – are both subject to the same rules (SRs and CEOS) and must be handled with no distinctions. This is the theory, because in practice it is common – at least as registered at the beginning – to face the predominance (in terms of career chances) of officials coming from Member States over those following the "normal" track[316]. This is due to the fact that, especially in this setting, having a State "in your corner" is a fundamental element to climb the internal hierarchy.

To sketch out the main features of the just mentioned bodies, two models can be identified. On one side stand bodies such as EPPO and EEAS, which testify a stricter administrative integration, since they are able to put under the same umbrella officials recruited both at EU and national level. The two examples of European Delegated Prosecutors and the temporary agents of national origins at EEAS are striking in this regard, because they both enjoy the status of EU officials under EU law without having been selected via the ordinary procedures. On the other side, one can find Europol and EDA, which keep a separate status for their officials: the former, despite its network structure, applies EU law to staff settled in The Hague, while national law keeps applying to *liaison* officers; the latter, instead, has its own staff regulation and applies three different regimes to its staff, with a neglectable intrusion in the selection procedures of NSEs.

Hence, the two further «models» analysed in this chapter clearly depart from the normal legal framework described above. However, whether they are just a step in a longer process or rather a destination of the administrative integration in their respective fields remains an unanswered question.

[316] Wouters, *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities*, (2013) p. 24, published by the Directorate-General for External Policies of The Union (doi: 10.2861/1175).

Chapter IV
The European Civil Service at National Level

FIRST SECTION

1. National officials as EU agents

As outlined in the introduction, national officials can be considered as the «local» bureaucracy of the European civil service. In order to better develop such hypothesis, this chapter follows a functionalist approach by focusing on the tasks performed by national officials rather than on the organic relationship they have with the national bodies. In other words, the yardstick of the investigation is given by the implementation of EU policies. Thus, in this section is taken into account the situation in which national officials are expected to implement and enforce EU law, playing as «EU agents».

Generally speaking, «Member States shall adopt all measures of national law necessary to implement legally binding Union acts»[540]. This obligation binds the Member States as a whole, no matter their organisational choices. Thus, the «measures» outlined by the Treaty might be legislative, administrative or judicial in nature; what really matters is that they achieve the objectives set out by the Union acts concerned.

Taken as such, this obligation would leave the Member States almost completely free to decide how to implement EU law. This reflects the so-called institutional autonomy of the Member States, which entails that the latter enjoy a room for discretion in deciding where to allocate the competences within their own legal systems and which powers to confer to the recipient authorities as to effectively implement EU law[541].

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[540] Article 291(1) TFEU. See Baratta, "Art. 291 TFUE", in Tizzano (Ed.) *Trattati dell'Unione Europea*, (Giuffrè, 2014) p. 2283.

[541] Becker, "Application of Community Law by Member States' Public Authorities: Between Autonomy and Effectiveness" (2007) Common Market Law Review, p. 1035-156; Verhoeven, "The 'Costanzo Obligation' and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the

Along with this national autonomy, however, Member States and the EU are subject to a reciprocal obligation of sincere cooperation enshrined in primary law[542]. Initially drawing upon this, the Court of Justice has progressively outlined the two principles of effectiveness and equivalence, according to which, on the one hand, Member States have to implement EU law in a way not to make it impossible or excessively difficult to enforce EU law at national level[543] and, on the other hand, they must treat in an equivalent manner the purely domestic situations and those stemming from EU law[544].

This set of principles has brought about the Europeanisation of many aspects of national law, acting at the substantial, procedural and judicial level[545]. All in all, even when the EU does not harmonize national administrative rules, nonetheless, according to these principles, Member States must shape their internal legal systems as to comply with the principle of sincere cooperation.

For our purposes, the same phenomenon can be observed, *mutatis mutandis*, in the field of national public employment systems. In other words, there are situations in which national legal systems have to reshape their civil service, albeit the EU does not

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Gap?" (2010) Review of European Administrative Law, p. 23-64; Lottini, *Principio di autonomia istituzionale e pubbliche amministrazioni nel diritto dell'Unione Europea* (Giappichelli, 2017); for a critical account on this principle, see Arzos Santisteban, "La autonomía institucional y procedimental de los Estados Miembros en la Unión Europea: mito y realidad" (2013) Revista de Administración Pública, p. 159-197.

[542] Article 4(2) TEU.

[543] There is a settled-case law on this matter; inter alia, see Case C-201/02, *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*, ECLI:EU:C:2004:12, par. 67; see also Accetto and Zleptnig, "The Principle of Effectiveness: Rethinking its Role in Community Law", (2005) European Public Law, p. 374-403.

[544] Case C-312/93, *Peterbroeck v. Belgian State*, ECLI:EU:C:1995:437, par. 12.

[545] Jans, de Lange, Prechal and Widdershoven (Eds.) *Europeanisation of Public Law*, (Europa Law Publishing, 2007), *passim*. Nowadays, the principle of effectiveness has been partially absorbed by the principle of effective judicial protection, enshrined in article 19 TEU and article 47 CFR; for a focus on this interplay, see Bonelli, "Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature" (2019) Review of European Administrative Law, p. 35-62; Gentile, "Effective judicial protection: enforcement, judicial federalism and the politics of EU law" (2022) European Law Open, p. 1-16.

explicitly require so, only because the latter imposes some institutional requirements which could indirectly affect the national officials as well.

A meaningful example in this regard can be found in the field of internal market, in which the EU has progressively delegated Member States to set up national regulatory authorities (NRAs) as to regulate and adjudicate on some specific issues related to the market fields concerned. Generally speaking, the EU requires that such NRAs are provided with a certain degree of independence, both from the government and from the economic operators they rule on[546].

It goes without saying that the notion of independence is multifaceted, because it entails many forms of autonomy (financial, staff, statutory, procedural autonomy and so on)[547]. The issues surrounding the independence of NRAs have been recently brought to the attention of the Court of Justice, in a case concerning the sources of financing of the Italian NRA in the postal sector[548]. In particular, the Italian Council of State referred to the Court, *inter alia*, the question of whether a system of financing entirely based on the contributions of regulated operators would be able to hinder the independence of the NRA[549]. In its opinion on the case, the Advocate General argued that «[t]here is nothing […] to prevent a Member State from establishing a public system or a hybrid system: both are consistent with the purpose of Directive 97/67, which makes provision for the existence of NRAs that are independent of postal sector operators […] in order to ensure the proper performance of their regulatory and supervisory duties. I consider the two systems to be compatible with the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67, as they safeguard the independence of NRAs *vis-à-vis* postal sector operators and ensure their proper functioning. […] The same holds for the

[546] Sześciło, "Challenging Administrative Sovereignty: Dimensions of Independence of National Regulatory Authorities Under the EU Law" (2021) European Public Law, p. 191-216; Kaufhold, "Complete, yet limited: The guarantee of independence for National Regulatory Authorities in the energy sector: Commission v. Germany" (2022) Common Market Law Review, p. 1853–1892.

[547] See, among the others, Merusi, "Autorità indipendenti", in *Enciclopedia del diritto – Aggiornamento*, VI, (Giuffrè, 2002), p. 143-192.

[548] See Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service.

[549] See Cons. St., sez. VI, ord., 23 marzo 2022, n. 2066.

compatibility of strictly private systems of financing (such as the Italian system), provided that they ensure, first, the independence of the NRA and, second, that the NRA has, in practice, the necessary resources to perform its tasks. […] The truth of the matter is that the source of an NRA's funding does not necessarily determine its independence. What must be ensured is that the NRA has the necessary financial resources to be able to shield itself from any undue influence from the main market players and other public authorities»[550]. The Court upheld such an opinion by confirming that the directive «must be interpreted as not precluding a Member State from opting for a mechanism of financing the NRA responsible for the postal sector funded exclusively by means of contributions imposed on operators in that sector under the fourth indent of the second subparagraph of Article 9(2) of that directive, to the exclusion of any funding from the State budget, provided that that system ensures that the NRA concerned will actually have the necessary resources to ensure its proper functioning and the performance, in complete independence, of its tasks relating to the regulation of the postal sector or the legal means to acquire those resources»[551].

What is remarkable in this decision is not its outcome, but rather the line of argumentation followed to get there. The Court in fact recognized that the choice on the system of financing of the NRA was reserved, as a matter of principle, to the Member State concerned, since the directive did not opt for a specific model. However, since the purpose is to ensure the independence of the NRA, national organizational rules – in that case, financial rules – had to ensure at least that the NRA had «the necessary resources to ensure its proper functioning and the performance»[552]. Hence, the

[550] See the Opinion of the AG in Case C-226/22, *Nexive Commerce and Others*, ECLI:EU:C:2023:251, par. 58.

[551] See Case C-226/22, *Nexive Commerce and Others*, ECLI:EU:C:2023:637, par. 44.

[552] By recalling the opinion of the Advocate General, the Court implicitly adhered to the studies conducted by the OECD on the subject matter, such as OECD, *The Governance of Regulators – Being an independent Regulator*, (OECD Publishing, 2016), available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/07/being-an-independent-regulator_g1g66e65/9789264255401-en.pdf, p. 79-80 (last visited 30 August 2024); see also OECD, *Creating a Culture of Independence: Practical Guidance against Undue Influence*, (OECD Publishing, 2017), available at https://www.oecd-ilibrary.org/creating-a-culture-of-independence_5jfxjd55fzd2.pdf?itemId=%2Fcontent%2Fpublication%2F9789264274198-

organizational choices of Member States are not free from the scrutiny of the Court of Justice, which can control whether the concrete choices made at national level fully, effectively and promptly implement the institutional provisions set out at EU level.

When it comes to the civil service system, such a case-law could become relevant, since the same arguments could be extended to the staffing autonomy of NRAs. At EU level, staffing autonomy entails the capability of an administrative body to hire and manage its personnel free from external interferences, regardless whether they come from the privates or from the political power[553]. By applying this idea to Member States' bodies, it is reasonable to argue that NRAs are expected to enjoy some sort of staffing autonomy from the central government. Again, since the EU does not usually impose a specific model, it is up to the Member States to set up the appropriate means to achieve such a goal[554].

Focusing on Italy, for example, there is some consensus on the fact that the current legal regime of personnel within NRAs is mainly justified by the *sui generis* nature of the latter[555]. In particular, most of the officials working at the *Autorità indipendenti* are subject to public law rules (*regime di diritto pubblico*) and, according to some scholars, this prevents them from being influenced by the Government, since otherwise their regime would be partially determined by the collective negotiations for private law staff, which in Italy are carried out by an agency (*Aran*) dependent on the *Presidenza del Consiglio*.

In other words, given the contextual elements of each Member State, EU institutional provisions could be deemed to require some adjustments at national level also as concerns the civil service system, with outcomes that of course can vary from

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en&mimeType=pdf, p. 27-28 (last visited 30 August 2024); moreover, OECD, *The Governance of Regulators – Equipping Agile and Autonomous Regulators*, (OECD Publishing, 2022), available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/09/equipping-agile-and-autonomous-regulators_7d343ff7/7dcb34c8-en.pdf, p. 50 (last visited 30 August 2024).

[553] This is clearly depicted by the studies on EU agencies, such as in Vos, "EU Agencies and Independence", in Ritleng (Ed.) *Independence and Legitimacy in the Institutional System of the European Union* (OUP, 2016), p. 209.

[554] Saltari, *Amministrazioni nazionali in funzione comunitaria*, (Giuffrè, 2007), p. 75.

[555] See, for instance, Carinci and Tenore (Eds.), *Il pubblico impiego non privatizzato*, IV, (Giuffrè, 2007).

one country to another. More importantly, these choices are reviewable by the Court of Justice.

Such a trend has been by the way confirmed with regards to the three EU agencies of «last generation», so to say the European Banking Authority (EBA)[556], the European Securities and Markets Authority (ESMA)[557] and the European Insurance and Occupational Pensions Authority (EIOPA)[558]. In two empirical surveys of ESMA and EIOPA published in 2021, the two authorities gathered data on the degree of independence of national competent authorities (NCAs), pointing out also the main concerns for their staffing autonomy[559].

As regards the authorities surveilling the market of securities, some problems were underlined concerning the capacity of the NCAs to hire and attract best skilled personnel. For example, back in 2021 the Spanish authority reported that it was allowed to hire new staff only once authorized by the central government[560]. In other cases, it was stressed the fact that the law imposed «staff ceilings» on recruitment[561]. Looking at the field of pensions controlled by EIOPA, the situation was similar. The necessity to ensure financial stability prevented some NCAs from freely managing their expenditures for hiring their own staff[562]. Other NCAs denounced the fact that to recruit

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[556] Article 19, Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

[557] Article 8(1) (b), Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority).

[558] Article 8 and 30, Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority).

[559] ESMA, *Report on the Independence of National Competent Authorities* (ESMA42-110-3265), 18 October 2021; EIOPA, *Report on the Independence of National Competent Authorities* (EIOPA-BoS-21/278), 18 October 2021.

[560] ESMA, *Report on the Independence of National Competent Authorities* (ESMA42-110-3265), 18 October 2021, p. 17.

[561] Ibid., p. 18, for France and Italy.

[562] EIOPA, *Report on the Independence of National Competent Authorities* (EIOPA-BoS-21/278), 18 October 2021, p. 18, reporting the case of the Bulgarian NCA.

additional staff they needed the approval of the Department of Social Protection and the Department of Public Expenditure[563].

In general, it seems that all these shortcomings in the independence of NCAs could be theoretically divided into two groups: part of them are just organizational deficiencies that do not result in a *contra legem* situation; in other words, they are just a matter of good administrative governance, thus falling within the institutional autonomy of the Member States; however, depending on the interpretation given to concept of «independence», part of them could also be deemed as breaching the EU law, since they could prevent the NCAs from enjoying a full independence in their administrative activities. This could happen in those cases in which the power to hire and to manage the workforce purely depend on a unilateral decision of the State Government. In this cases, one could reasonably argue that the independence required by EU law is not effectively fulfilled, paving even the way to an infringement procedure or to a disapplication of national law.

It would be also possible to argue that the importance of such examples is limited, since they only refer to a quite specific field, which is the one of regulatory authorities. However, this critique could be reasonably overcome by looking at the legal basis used to set out these regimes, which is not «specific» at all. Indeed, in order to harmonize administrative rules concerning NRAs, the EU has mostly relied on article 114 TFEU[564]. Such a provision is rightly considered by Schütze as one of the sources of the administrative power of the EU[565]. By providing measures of harmonization, the EU can set out not only procedural rules to be implemented by Member States, but can also impose institutional requirements to the latter. This can be inferred, *a fortiori*, by the fact that the Court of Justice has already confirmed that such a provision can be invoked even to establish a new body at EU level[566], so this implicitly entails the possibility to

[563] Ibid., p. 19, reporting the case of the Irish NCA.

[564] De Pasquale e Pallotta, "Art. 114 TFUE", in Tizzano (Ed.) *Trattati dell'Unione Europea*, (Giuffrè, 2014) p. 1261.

[565] Schütze, *European Constitutional Law*, (Cambridge University Press, 2012), p. 244.

[566] Case C-217/04, *UK and Northern Ireland v European Parliament and Council of the European Union*, ECLI:EU:C:2006:279, par. 44.

harmonize institutional settings at national level, which by definition is a less intrusive option.

A part from that, theoretically and practically speaking, also article 352 TFEU has been invoked to justify the intervention of the EU within the institutional realm of Member States. In the past, it has happened that such a provision has been used to establish new administrative bodies in policy fields that did not confer to the EU such a power[567]. Of course, this option is unlikely to be frequently triggered, both because it requires the unanimity and because of the substantive limitations it suffers, since it cannot be used to harmonize administrative rules in cases where the Treaties explicitly exclude so.

Following this line of argumentation, it is reasonable to conclude that the power to provide institutional rules to be implemented by Member States is implicit in each policy field attributed to the EU, so far the latter is provided with the correspondent power of harmonization. To this end, the competence in internal market is again a particularly explicatory example: it is a shared competence under article 4 TFEU, which hast to be therefore exercised in light of the principles of subsidiarity and proportionality. Hence, these two criteria set the real limitation to the intervention of the EU in the national civil service systems.

In particular, in order to enact rules influencing the national public employment, the EU must, on one side, demonstrate that its objectives cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level, by outlining institutional rules or even rules concerning national officials; on the other side, the EU must demonstrate that the rules it intends to adopt do not exceed what is necessary to achieve its objectives.

Whereas the principle of subsidiarity has been so far unfruitfully invoked to limit the intervention of the EU, the principle of proportionality is more likely to play a relevant role in the interplay between the EU and the Member States[568]. All in all,

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[567] Some examples are provided by Bariatti, “Art. 352 TFUE”, in Tizzano (Ed.) *Trattati dell’Unione Europea*, (Giuffrè, 2014), p. 2554.

[568] On the scarce relevance of the principle of subsidiarity, see Davies, “Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time”, (2006) Common Market Law Review, p. 63-84; Craig,

however, it seems that so far the necessity to ensure uniformity has been achieved mainly by setting out general institutional rules, without laying down specific rules directly affecting, for example, the selection procedures of national officials. However, such an outcome could not be excluded *a priori*, at least in those cases whereby the EU wants to ensure that national personnel is appropriately skilled to perform EU tasks. A similar conclusion can be drawn with regards to the EU exclusive competences, which are only subject to the principle of proportionality though[569].

To summarize, whenever the EU opts for a decentralized and indirect model of implementation of its policies, national officials partially change their legal nature, somewhat embodying the role of EU agents. This is undisputed when one looks at the functional relationship between them and the EU legal system: no matter whether they directly apply EU law (*e.g.*, a regulation) or rather they formally rely on national law (*e.g.*, a statute implementing directive), they still have to comply with general principles of EU law and the fundamental rights provided by the CFR[570].

However, the consequences of such an «agency» relationship are not only functional in nature; indeed, this paragraph has shown that there are some organic implications. In particular, when they work as (indirect) EU agents, national officials take part to a trilateral relationship: their regime is by and large determined by their national employer, that has however to comply with the organizational rules laid down by the EU; moreover, it can also occur that the latter sets out specific rules directly applicable to national officials. In other words, the relationship between national officials and the Member States is not exclusive in this regard; however, unlike what happens in mixed administration (as described in a while), in purely indirect

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"Subsidiarity: A Political and Legal Analysis", (2012) Journal of Common Market Studies, p. 72-87; Panara, "Subsidiarity v. Autonomy in the EU", (2022) European Public Law, p. 269-296.

[569] For a recent analysis on the principle of proportionality as a limit to the EU competences, see on the principle of proportionality, Petersen and Chatziathanasiou, "Balancing Competences? Proportionality as an Instrument to Regulate the Exercise of Competences after the PSPP Judgment of the Bundesverfassungsgericht", (2021) European Constitutional Law Review, p. 314-334.

[570] See article 51 CFR, according to which «The provisions of this Charter are addressed […] to the Member States only when they are implementing Union law».

administration the influence exercised by the EU operates solely within the field of legal sources.

2. *Mixed administration and civil service issues*

Different phenomena are observable when the implementation of EU law is carried out via mixed or shared administration. In this case, the tasks to be performed to concretely «put into practice» the EU law are neither wholly delegated to the Member States nor retained by the EU bodies, but they rather stay in between of them, resulting in a patchwork of several models of cooperation. In a nutshell, mixed administration is neither purely indirect nor direct administration[571].

The landscape becomes even more complicated when one looks at the enforcement of EU law, which entails not only decision-making powers, but also factual actions to be taken in order to concretize EU legal provisions. The observation of the several models of enforcement is particularly suitable to appraise the ongoing process of bureaucratic integration[572].

Indeed, in the last two decades a new set of enforcement tools has been conferred to the EU bodies, which can exercise more and more intrusive powers within the territory of the Member States. In recent research, De Bellis has shown some concerns regarding the respect of fundamental rights affected by the wide range of powers of inspection conferred either to the Commission or to the EU agencies[573].

Actually, the trend to allocating enforcement competences at EU level and to creating mixed bodies or composite procedures is particularly interesting when it comes to the functioning of the civil service. To this end, it is possible to outline two models: first, there is the case in which the shared enforcement is institutionalized in bodies composed of EU and national officials, empowered to enforce EU law; second, there are situations in which such an institutionalization lacks, but the EU bodies can still directly

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[571] Chiti and Franchini, *L'integrazione amministrativa europea* (il Mulino, 2003), *passim*;; Hofmann, Rowe and Turk, *Administrative Law and Policy of the European Union*, (OUP, 2011), *passim*.

[572] In general terms, see Scholten, "Mind the trend! Enforcement of EU law has been moving to 'Brussels'", (2017) Journal of European Public Policy, p. 1348-1366.

[573] De Bellis, "Multi-level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?", (2021) German Law Journal, p. 416-440.

intervene at national level, requiring also the assistance of national administrations. More specifically, as regards this second category, a further distinction can be made, between the cases in which the assistance is generically provided by the Member State concerned and the cases in which such an assistance is directly given by national officials, who are thus put at disposal of EU ones.

Historically, the non-institutionalized model has been the first to appear. Spanning from the powers conferred to the Commission in the field of competition law[574], to the prerogatives conceived to protect the financial interests of the Union[575], enforcement is not a novelty in the EU legal system. In the last years, however, such powers have been intensified as to make the intervention of the EU more effective.

A first example is offered by OLAF, which can conduct not only internal investigations – so to say within EU offices – but also external ones, going on-spot and acceding the premises of public and private bodies at national level. In this regard, «[a]t the request of the Office, the competent authority of the Member State concerned shall provide the staff of the Office with the assistance needed in order to carry out their tasks effectively»[576]. The provision generically refers to the «Member State», so it is up to the latter to decide how to provide such an assistance.

As said above, however, there is an even more integrated model, appeared in the last years, in which national officials are directly put at disposal of EU ones. For instance, this happens when the Commission carries out inspections at national level in the field of competition law. To do so, «[o]fficials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by

[574] Article 20, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[575] Articles 4 and 6, Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities.

[576] Article 3, Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

the Commission»[577]. Similar provisions are established for ESMA, which can inspect the premises of rating agencies at national level, requesting the help of national officials[578].

Within this group one can also ascribe the powers exercised by EPPO at national level. As described in the previous chapter, EPPO is an «indivisible Union body», which nonetheless can dispose of two or more European Delegated Prosecutors (EDPs) for each Member State that takes part to this body[579]. EDPs are thus EU staff, but operate at national level and, remarkably, they have «the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment»[580]. Hence, unlike the previous examples, the set of powers attributed to the EU officials (*i.e.*, the EDPs) is not predetermined and homogeneous across the EU, but it rather depends on the legal system concerned. For example, in Italy the police is subordinated to the prosecutors who hold the police offices[581]. This means that the EDPs in charge in Italy have the power to manage national policemen; so to say, EU officials directly command national ones.

The difference in the examples just mentioned rests in the fact that, whereas in the past the only accountable person was the Member State required to ensure assistance, lately national officials have been directly subjected to the hierarchical power of EU officials. This marks an important evolution in the EU administrative system, which of course raises also new issues, as better analysed below.

Along with this model, there is a more institutionalized one that has emerged more recently. In particular, there are cases in which the EU law makes the national and the EU officials working «shoulder to shoulder», providing them with powers that span from the simple sharing of information, to the technical assistance and the joint exercise of enforcement powers.

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[577] Article 20(5), Council Regulation (EC) No 1/2003.

[578] Article 23d(5), Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

[579] Article 13(2), Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[580] Article 13(1), Council Regulation (EU) 2017/1939.

[581] Article 59, Italian Code of Criminal Procedure.

The oldest example is offered by the Joint Investigation Teams (JITs), in which Europol's staff and national one work together. In this framework, «Europol staff may, within the limits of the laws of the Member States in which a joint investigation team is operating, assist in all activities and exchanges of information with all members of the joint investigation team»[582]. The JITs are a crucial tool in the cooperation in criminal matters within the EU, involving various actors, both at EU and national level[583]. Their core activity is in any case to streamlining the exchange of information among the competent authorities of Member States and the EU bodies in charge of public tasks in criminal field.

Another important example is given by the joint operations conducted by Frontex[584]. In this case, the Agency is engaged both in the action at the external borders of the Union and in the return operations towards third countries[585]. Interestingly, the EU and the Member States can set up mixed teams to cooperate in both the sectors, but the final decisions concerning the merits of the asylum-seekers always remain a sole responsibility of the Member State concerned: in other words, these mixed settings are only entitled to provide factual and technical assistance.

A similar solution has been pursued for the European Union Agency for Asylum (EUAA), which can establish Asylum Support Teams (ASTs) to assist Member States from a technical point of view: for instance, by helping the latter in the identification of asylum-seekers, or by providing interpreting services[586]. Again, the ASTs «consist of experts from the Agency's own staff, experts from Member States, experts seconded by

[582] Article 5(2), Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol).

[583] Riehle, "'20 years of Joint Investigations Teams (JITs) in the EU': An overview of their development, actors and tools", (2023) ERA Forum, p. 163–167.

[584] For a general overview of the activities performed by Frontex, see Raimondo, *The European Integrated Border Management* (Hart, 2024), *passim*.

[585] Section 7 and 8, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard.

[586] Article 16, 19 and 20, Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum.

Member States to the Agency or other experts not employed by the Agency with demonstrated relevant knowledge and experience in line with operational needs»[587].

A more intrusive and somewhat unique arrangement is envisaged for the banking supervision. Here, the EBA can conduct inspections at national level similarly to what happens, for instance, with ESMA. However, there are two interesting features to stress here: first, inspections are conducted by «on-site inspection teams» which must involve the personnel of NCAs as well[588]; second, such investigations are carried out under the surveillance of the Joint Supervisory Teams (JSTs), which are established to watch upon the most significant supervised entities[589]. Interestingly, these mixed teams work as a *liaison* between the officials operatively engaged at national level and the central surveillance conducted at the headquarter of EBA. The magnitude of the powers of the Authority is tangible, since it has been reported that in 2023 the 44,9% of the measures adopted have been carried out on-site; in absolute terms, in 2023 roughly 178 on-site inspections (OSIs) and 83 internal model investigations (IMIs) have been reported[590].

All in all, both the institutionalized and non-institutionalized solutions just described raise some issues. The main concerns deal with, on the one hand, the accountability of EU and national public administrations when they perform in this way and, on the other hand, the consistency of the liability regime of the officials involved in such activities.

As regards the first point, there is a clear mismatch between the general premises of the EU administrative system outlined at the beginning of this chapter and the legal consequences brought about by these mixed solutions. Looking at the general setting of the Treaties, indeed, one can observe that the choice to allocate the administrative implementation of EU policy either at supranational or national level brings some consequences in terms of accountability.

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[587] Whereas no. 25, Regulation (EU) 2021/2303.

[588] Article 144, Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation).

[589] Article 3, Regulation (EU) No 468/2014.

[590] For further statistics, see ECB, *ECB Annual Report on supervisory activities 2023*, March 2024, p. 30.

In the indirect model of implementation, a national Government which fails to correctly implement EU law is politically accountable to its national constituency; moreover, the administrative shortcomings occurring at national level can find redress before national courts, which must grant appropriate means in compliance with the principles of equivalence and effective judicial protection. Similarly, the same can be said for the direct administration carried out at supranational level. Even in composite procedures, thanks to the case-law of the Court of Justice, it is somehow possible to fill the gaps in the accountability, since the decisions are alternatively attributed – albeit sometimes fictitiously – either to the national or supranational level[591].

However, when it comes to the enforcement activities and especially to the examples just outlined, this system does not seem to work properly. In particular, looking at the national officials subordinated to EU ones, it is hard to argue that their occasionally wrongful acts – or their failures to act – are wholly imputable to the Member State that employs them. It is perhaps even more difficult to say so, when there are joint teams that perform EU tasks in a indivisible way. In this regard, the dualistic system of accountability shows all its shortcomings. In these cases, it would appear more suitable to hold accountable both the EU and the Member States, or at least to define a clear manner to determine to whom a specific activity is imputable.

Such a line of argumentation seems to become even stronger when one looks at the rules concerning the public liability for wrongful conducts. These are particularly relevant, since the activities performed by mixed administration might affect – and in practice they frequently do – the fundamental rights of the citizens, the violation of which must always be effectively redressed according to the rule of law.

Recent scandals have confirmed that the exchange of information carried out by Europol can impinge on the privacy of citizens[592], so as the technical assistance provided by Frontex can result into a blatant violation of the fundamental rights of

[591] Case C-97/91, *Borelli v. Commission*, ECLI:EU:C:1992:491, par. 9-10.

[592] For some allegations in the newspapers, see the piece come out on The Guardian, “EU police body accused of unlawfully holding information and aspiring to become an NSA-style mass surveillance agency”, 10 January 2022, https://www.theguardian.com/world/2022/jan/10/a-data-black-hole-europol-ordered-to-delete-vast-store-of-personal-data (last access on 31 August 2024).

migrants[593]. Similar concerns have been raised with regards to the several powers of inspections conferred to EU bodies in the last years[594].

An ongoing debate in the judiciary and among scholars deals with the possibility to conceive a joint liability of the EU and the Member States in cases of mixed administration. Such an issue has been brought before the Court of Justice in two occasions, one regarding Frontex and the other one dealing with Europol.

As regards the former, the General Court has dismissed two claims for damages filed against the EU – *sub specie*, against Frontex – by asylum seekers who reported the violation of their fundament rights[595]. The main argument spent by the Court revolves around the lack of a causal link between the conduct of Frontex's officials and the damages allegedly suffered by the claimants. According to the Court, indeed, «since Frontex has no competence either as regards the assessment of the merits of the return decisions or as regards applications for international protection, the direct causal link alleged by the applicants between the damage allegedly suffered and the conduct of which Frontex is accused cannot be established»[596].

Such a conclusion has been strongly criticized by the first commentators, who correctly underlined that the «Court substantially misses the mark, as the applicants did not challenge the adoption of the (negative) asylum and return decisions (which in this case were never issued), but the execution of the (non-existent) return decision by

[593] For some allegations, see K. Fallon, "EU border force 'complicit' in illegal campaign to stop refugees landing" appeared on the 24 October 2020 on The Guardian, accessible at https://www.theguardian.com/global-development/2020/oct/24/eu-border-force-complicit-in-campaign-to-stop-refugees-landing#:~:text=The%20EU's%20border%20agency%20has,%2C%20or%20involvement%20in%2C%20pushbacks (last access on 31 August 2024); in the literature, recently, see Tas, "Datafication of the hotspots in the blind spot of supervisory authorities", (2024) European Law Journal, p. 87-102.

[594] De Bellis, "Multi-level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?", (2021) German Law Journal, p. 416-440.

[595] See Case T-600/21, *WS and Others v Frontex*, ECLI:EU:T:2023:492; Case C-136/22, *Hamoudi v Frontex*, ECLI:EU:T:2023:821.

[596] Case T-600/21, *WS and Others v Frontex*, ECLI:EU:T:2023:492, par. 66.

Frontex»[597]. In other terms, whereas the settled case-law can work well with regards to decision-making powers, the same jurisprudence shows some shortcomings when it comes to mixed enforcement.

Hence, it seems better to embrace the other solution outlined by the Court in another decision adopted later on, dealing with a claim for damages filed against Europol for the illegal exchange of information carried out by the latter in *liaison* with Member States[598]. In this case, the Court of Justice has stressed two points that would be suitable to overcome most of the issues described so far: first, in cases of joint liability, the claimants cannot be asked to demonstrate to which authority – whether the EU or the national administration – the conduct and the related damages are attributable; second, the claimants must be entitled to invoke the public liability both before the national and the EU courts, obviously accordingly to the respective fields of competence. So, practically speaking, the claimant must have the possibility to decide whether to sue the State before the national courts or the EU before the Court of Justice. It is up to the public entities to find an agreement afterwards, as to decide who in charge of what[599].

Despite its potentialities, such a decision is unlikely to be extended to other fields. The Court of Justice, indeed, has held that a joint liability is conceivable only because the Europol's regulation specifically provides so. In other terms, joint liability here is probably only the result of a *lex specialis.* In the meantime, however, the Court of Justice has been sought to decide on the appeals against the decisions of the General Court dealing with the liability of Frontex. This could be the opportunity for the Court to clarify whether there is room in the EU legal system for introducing the joint liability from a general point of view[600].

The problems with liability are not limited to these though. Another remarkable gap in the system derives from fact that the EU officials are completely shielded for the claims for damages filed by third parties. This is hardly justifiable when looking at two

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[597] Gkliati, "Shaping the Joint Liability Landscape? The Broader Consequences of WS v Frontex for EU Law", (2024) European Papers Insights, p. 78.

[598] Case C-755/21 P, *Kočner v EUROPOL*, ECLI:EU:C:2024:202.

[599] For a comment, see Caranta, "La responsabilità "solidale" di Europol per la divulgazione di dati sensibili", (2024) Giornale di diritto amministrativo, p. 479-484.

[600] See Case C-679/23 P, pending before the Court of Justice.

factors: first, the set of competences of EU officials has evolved and nowadays they can frequently perform tasks of direct enforcement «on the ground», as outlined above; moreover, the impossibility to hold the EU officials personally liable for their wrongful actions *vis-à-vis* third parties partially comes at odds with one of the main functions of public liability, which is to play as a deterrent and thus to prevent illegal misconducts[601]. Interestingly, this has brought some scholars to draw the hypothesis of criminalizing these kinds of conducts put in place by EU officials, even though there is no agreement on which legal basis in the Treaties must be used to achieve such a result[602].

A part from that, however, the impossibility of directly suing EU officials when they take part to joint teams with national officials raises further issues. In particular, this situation leads to many inconsistencies in the system and to a fragmentation of legal remedies at disposal for claimants. This happens because the rules concerning personal tort liability for national officials are usually not harmonised, thus it is up to each Member State to determine whether to allow such a possibility.

This framework brings about some discrepancies, as it clearly emerges from simply considering an example made of two individuals: one entering into the Italian territory and the other into the German one. They are both intercepted by two joint teams, composed by Frontex and national officials. In performing such operations, these two teams commit several offences that cause damages to the two individuals; the latter decide to seek redress before the competent national courts (so to say, the Italian and the German one).

Now, according to Italian law, the first claimant could sue both the Italian public administration (presumably, the Coast Guard) and the single national officials concerned, who can be held liable under Italian law[603]. By contrast the individual cannot

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[601] Aalto, *Public Liability in EU Law* (Hart Publishing, 2011), p. 62.

[602] According to Di Martino, "Does the European Union's rule of law require the criminalisation of EU public officials? A first appraisal", (2024), European Law Journal, p. 1-16, there is room to invoke article 83(1) TFEU; by contrast, Guild and Mitsilegas, "Taking the normative foundations of EU criminal law seriously: The legal duty of the EU to criminalise failure to rescue at sea", (2023) European Law Journal, p. 502-504, consider more suitable using article 83(2) TFEU.

[603] Article 22 and 23, decreto del Presidente della Repubblica 10 gennaio 1957, n. 3.

sue the EU officials that worked shoulder to shoulder with the Italian ones. In other terms, although on claimant's side the circumstances are exactly the same, in one situation the fundamental rights are better protected than in the other, depending solely on the circumstance of who is the person enforcing EU law.

Along with this inconsistency – which might be labelled as «internal» - one can observe even an «external» inconsistency. Indeed, turning the attention to the individual entering the German territory, it stands out that the remedies at disposal are even fewer. Under German law, in fact, public officials cannot be held personally liable *vis-à-vis* third parties (see above, chapter II), even when they breach fundamental rights. Therefore, the individual has practically and legally speaking less chances to obtain redress, if compared to the same situation occurred in our example in Italy. In other terms, there is a disparate treatment that depends only on which part of the external borders (whether the Italian or the German one) is crossed. These discrepancies are even more relevant when one considers that, according to the statistics of the case-law of the Court of Justice, actions brought under article 340 TFEU against the Union rarely end with a positive outcome[604].

Finally, there is a field which remains overlooked, both in literature and in the case-law. Thanks to the new trend just described, national officials are being progressively put under the hierarchical control of the EU officials. To better saying, even though there is no hierarchical control, they must at least comply with the commands of the EU counterparts. There are some legal consequences that derive from this framework: in particular, it should be investigated the disciplinary regime of national officials who do not comply with the commands of EU ones; this issue theoretically falls outside the realm of EU law and rather concerns the national legal systems. However, it could be useful to wonder – from the EU perspective – whether it could be fruitful to provide some sort of harmonization of such rules at national level, whereby national officials are put under the command of EU ones.

[604] European Parliament Research Service, *Action for damages against the EU*, December 2018.

SECOND SECTION

3. Open Method of Coordination, conditionality and national civil service

As seen in the first section, whenever the national officials work as EU agents, the Union has many tools to influence the development of their regime. In this second section, the analysis delves into the opposite situation, whereby the national officials are not taken as EU agents, but are nonetheless influenced by the EU. The question here is whether the EU does have any instrument to steer the Member States is this regard and, if so, how this process actually works.

Preliminarily, it is worth noting that the national officials are first and foremost workers, so they play as economic factors within the internal market of the Union; hence, the latter sets out rules aiming at ensuring the sound functioning of the internal market. Moreover, for traditional and legal reasons, national officials are mostly nationals of the Member States in which they are in service, so they enjoy the correspondent status of EU citizens with all the related corollaries. Finally, public-sector employment is not only a matter of Member States, since it produces indirect effects on the EU legal system as a whole under many regards: in terms of financial stability, since public workforce counts for many billions in the State budget; in terms of administrative capacity to contribute to the broadly speaking EU objectives; in terms of employment policy, since it provides job for millions of citizens across the EU.

Unsurprisingly, then, the EU has refined some tools as to influence the development of national civil service systems and to cope with the issues just outlined. To this end, the EU has adopted some rules, providing the harmonization of the regime of the public officials even when they do not play as EU agents; at the same time, however, the EU has also set out a framework to orientate the public policies adopted by Member States, relying more on soft than on hard law. This second category of tools is commonly referred as the Open Method of Coordination (OMC). In this paragraph attention is paid to the latter, while the other instruments are further analysed in the next paragraph.

The OMC has historically emerged as an instrument to reach a wide consensus among the Member States and so to allow the EU to pursue its social objectives while respecting the peculiarities in place at national level. First launched in the early 2000s,

the OMC has been primarily used in two policy fields, which are the economic and the employment and social policies. The rationale behind each of them of course changes according to their historical background[605].

As regards the economic field, the OMC has been developing in the aftermath of the Maastricht Treaty and then enhanced in the following years as to prevent the possible collateral effects of the monetary Union. One the one side, indeed, the States that had adopted the common currency had remitted their monetary policy and, therefore, had lost an important tool of economic policy; on the other side, the monetary and economic policy are intertwined, so the macroeconomic choices of the Member States can somehow affect also the strength of the common currency. It was thus straightforward for the Union to developing its own fiscal and economic rules as to coordinate national policies[606].

Similarly, in the employment and social policies, the EU had to cope with a fragmented legal framework at national level, in which the rules on social assistance and to increase the level of employment differed among the Member States. In this case too, thus, the EU overcame the reluctances of the Member States by setting out a «mild» instrument, starting from the European Employment Strategy (EES), revolving more around the soft than the hard law[607].

The basic functioning of the two policy fields is quite straightforward: every year, the Council – usually assisted by a first technical assessment carried out by the Commission and more political conclusions adopted by the European Council – issues some guidelines targeted at each Member State for the two policy fields[608]. According to these guidelines, each Member State has to put in place its own national policies as to achieve the objectives set out by the former. At the end of the yearly cycle, the Member States have to report their results to the Commission and the Council. The latter can

[605] For a general overview about the OMC, see Craig, EU *Administrative Law*, 3rd ed. (OUP, 2019) p. 199.

[606] Dermine, *The New Economic Governance of the Eurozone* (Cambridge University Press, 2022), p. 28.

[607] Ashiagbor, “The New Economic Governance of the Eurozone”, (2004) European Public Law, p. 305-332.

[608] Article 121(2) TFEU; article 148(2) TFEU, which states that the guidelines of the two strands, the economic and employment one, must be consistent with each other.

thus issue Country Specific Recommendations (CSRs) in light of the above as to tackle specific issues emerged at national level. These recommendations usually outline a wide range of measures to be adopted by Member States, usually involving also legislative reforms that affect the national public administrations.

These processes have been progressively enhanced by setting up some corrective mechanisms as to «sanction» the Member Stats that do not comply with the CSRs. This has been particularly evident with regards to the economic field especially after the financial crisis of 2008, when it became clear that the EU had to strengthen its capacity to coordinate fiscal and economic policies of Member States as to prevent future crisis[609].

Despite all these elements, however, social scientists have demonstrated that the CSRs have remained mostly ineffective for a long time[610]. To tackle this issue, the EU has progressively started to improve its capacity to coordinate Member States by relying on conditionality tools.

Within the process of EU integration, conditionality as been in place since some decades[611]. Borrowed from the international practice spread by the International Monetary Fund (IMF)[612], conditionality has been first imposed to set out eligibility criteria towards third countries to join to the European Community[613]. Only later on the Union has started to introject the conditionality in its relationship with the Member States. Despite gradual, such a process has aimed at progressively strengthening the effectiveness of the CSRs, by requiring their fulfilment to get access to the financial aids put in place by the EU. First, it has happened with regards to the structural funds,

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609 See Dermine, *The New Economic Governance of the Eurozone* (Cambridge University Press, 2022), p. 96.

610 See, from the Italian perspective, Di Mascio, "Semestre europeo e riforme amministrative in Italia", (2020) Rivista italiana di politiche pubbliche, p. 227-246.

611 Viță, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", (2017) Cambridge Yearbook of European Legal Studies, p. 116-143; Pinelli, "Conditionality and Economic Constitutionalism in the Eurozone", (2019) Italian Journal of Public Law, 22-42.

612 Rbichek, "The IMF's Conditionality Re-Examined", in Muns (Ed.) *Adjustment, Conditionality and International Financing* (IMF, 1984), p. 67-75.

613 Grabbe, *The EU's Transformative Power*, (Palgrave Macmillan, 2006), p. 7-38.

by requiring that the national plans to implement them must comply with *ex ante* conditionalities, which basically mirror the CSRs issued for the Member State concerned[614]. Second, with the crisis of sovereign debts, conditionality has also become a requirement to justify the validity of the fiscal intervention of the EU under article 125 TFEU[615] and, as better seen below, it has also been invoked as a justification to using the fiscal capacity of the Union in the aftermath of the pandemic, by relying on article 122(2) TFEU[616]. At the same time, the respect of the CSRs has been imposed as a condition to benefit from the purchasing programs of the ECB during the last decade[617].

Long story short, conditionality has become an important tool in the EU's hands in order to steer the public policies at national level. In particular, since such conditions have been attached to the financial (or sometimes only monetary) programs of the EU, they have played a more prominent role in the countries that were financially weaker. In this context, empirical data show that this instrument has been used also to influence the development of national civil service systems, with more important outcomes in those countries particularly «sensitive» to the fiscal and economic coordination of the EU. Hence, this research takes Italy as a case study and examines the CSRs addressing it between 2011 and 2022[618].

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[614] Article 19 and 55, Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund.

[615] See Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756, par. 135.

[616] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis. In literature, see De Witte, "The European Union's Covid-19 Recovery Plan: the Legal Engineering of an Economic Policy Shift", (2021) Common Market Law Review, p. 635-682.

[617] See Viterbo, "Legal and Accountability Issues Arising from the ECB's Conditionality", (2016) European Papers, p. 501-531.

[618] The CSRs are available at https://ec.europa.eu/economy_finance/country-specific-recommendations-database/ (last access 24 August 2024). In literature, see Mariotto and Franchino, "L'attuazione delle

The CSRs that directly or indirectly concerned the organization of the Italian civil service were issued almost every year in the range of time taken into consideration, with the exception of 2015 and 2018, during which the European Union did not provide guidance on public administration. In the early years, the CSRs did not directly address the civil service but rather the public administration as a whole. Specifically, between 2011 and 2014, the recommendations focused on increasing administrative capacity for the management of structural funds, particularly in Southern Italian regions. It was only from 2016 onwards that the Commission and the Council began to emphasize the importance of civil service reforms, initially urging Italy to complete the implementation of Law No. 124 of August 7 and subsequently suggesting more detailed measures, such as enhancing the skills of public employees (2019). In 2020, the year the pandemic broke out, the recommendations focused on issues related to health administration, although a general reference to the improved «functioning of the public administration» was made. Finally, in 2022, the CSRs referred to the measures contained in the National Recovery and Resilience Plans (NRRPs), implementing the Recovery and Resilience Facility (RRF) at national level[619]. In this regard, the Italian NRRP includes numerous objectives specifically related to the civil service.

As regards the latter, it stands out that the RRF and the related NRRPs provide a different form of conditionality and have demonstrated to be more effective when it comes to their capacity to steer the national policies affecting the public employment. This is due to many reasons: first, because the RRF puts on the table a massive amount of financial aids, playing as a convincing incentive for the Member States to comply with milestones and targets laid down in their NRRPs; second, because such milestones and targets (which is to say, the conditions attached to the financial aid) are not unilaterally decided by the EU, in a top-down scheme, but rather negotiated by the latter

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raccomandazioni specifiche all'Italia dal 2002 al 2018", (2020) Rivista italiana di politiche pubbliche, p. 159-186.

[619] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility. On the constitutional and administrative repercussions of this instrument, see Dermine, "The Planning Method: an Inquiry into the Constitutional Ramifications of a New EU Governance Technique", (2024) Common Market Law Review, p. 959-992.

and each single Member State within the framework outlined by the establishing regulation; finally, NRRPs set out medium-term objectives, covering even a period up to six years, so they better fit with the needs required to reform the civil service system, which is by definition a sector that requires more time to be reformed. These features make the RRF an effective tool to enhance the coordination of national public policies, even within the sector of public employment and even in those fields in which the EU lacks any legislative competence.

Finally, it must be mentioned that the EU has recently reformed its fiscal rules as to bring the European Semester up to date in relation to the new needs emerged after the pandemic[620]. Within the new framework, the EU will not conduct an economic coordination of the economic policies of the Member States on an annual basis anymore, but it will rather require the Member States to set out medium-term objectives. This will be achieved trough «national medium-term fiscal-structural plan», so to say documents containing the fiscal, reform and investment commitments of a Member State, covering a period of four or five years depending on the regular length of the legislative term of that Member State. It is clear that the new governance draws upon the outcomes registered with the RRF; however, it is open to questions whether this new economic governance will be as effective as the one provided by the RRF, given the fact that it is unlikely, at the moment, that the Union will still make use of its fiscal capacity on a permanent basis.

4. *National civil servants as EU citizens*

As seen above, national officials rest on the intersection of many social clusters: traditionally, they were nationals of their respective States[621]; despite some peculiarities, they were also affected by national labour law, even though they usually enjoyed a special regime. These features have brought about some consequences along with the process of EU integration. National citizens have automatically got the EU citizenship; national individuals working under the subordination of an employer in exchange for remuneration became EU workers under the Treaties. In a nutshell, nowadays national

[620] Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance.

[621] See Cassese, "Stato-nazione e funzione pubblica", (1997) Giornale di diritto amministrativo, p. 88-92.

officials enjoy many overlapping statuses: they are at the same time national and EU citizens and they are likely to be also EU workers[622].

Since every EU status comes along with EU rights, this multifaceted position allows the EU to interfere with the institutional autonomy of the Member States, even in those sectors where public officials only perform *national* tasks. The following analysis seeks to shed a light on this process.

First, one must identify the legal basis in the primary law that allows the EU to take advantage of this composite status of national officials. As said, since the latter are also likely to be EU citizens[623], they are covered by the provisions on non-discrimination and they can be affected by rules adopted pursuant to article 19 TFEU. This set of rules constitutes the subject matter of antidiscrimination law. Moreover, national officials are workers also under the EU law and, therefore, they are affected by two Treaty provisions: on the one hand, article 45 TFEU applies to them, enabling the EU to pass rules for the implementation of the internal market; on the other hand, in order to pursue its social objectives, the EU can enact further rules affecting national workers pursuant to article 153 TFEU. In other words, national officials can be affected by the Labour law of the Union. Hence, according to these legal bases, it is possible to delve into three different branches of EU law which are obviously intertwined[624].

a) Antidiscrimination law.

Starting from antidiscrimination law, it must be stressed that article 19 TFEU only applies to a closed number of protected factors, which are sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Therefore, it cannot be invoked to protect further conditions, such as the political orientation[625]. So, theoretically speaking, national officials could be subject to rules only concerning these elements.

[622] Weiss, "European Labour Law in Transition from 1985 to 2010", (2010) The International Journal of Comparative Labour Law and Industrial Relations, p. 3-16.

[623] It is not theoretically excluded that a Member State allows also third-country nationals to become officials. In this occasion (practically never happening), the latter would not enjoy the EU citizenship.

[624] Prechal, "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes", (2004) Common Market Law Review, p. 533-551.

[625] Bell, "Art. 19 TFEU", in Ales, Bell, Deinert and Robin-Oliver (Eds.) *International and European Labour Law* (Bloomsbury Publishing, 2018), p. 26.

This would apparently narrow down the scope of intervention of the EU, since the material scope of the protection is limited. Along with that, however, one must remember that the CFR can play a complementary and important role, by strengthening, enriching and fleshing out the meaning of the provisions adopted by the EU. To better clarify this point, one must remember that the fundamental rights granted by the CFR apply to Member States «only when they are implementing Union law»; hence, it must be ascertained whether such rights can be claimed by national officials.

To this end, Delfino has correctly identified three scenarios: first, there are the «complete rights and principles», which fully apply to national officials because the EU has enacted secondary legislation which is implemented by the Member States; second, there are the «pending rights», resting in those fields in which the EU could theoretically intervene but has not done it yet; finally, there are the «limited rights», which fall outside the scope of intervention of the EU (e.g., right to striking) and thus are not affected by the CFR at all[626]. Such a conceptualization is particularly fruitful, because outlines an important difference between the EU (supranational) civil service and the national ones: whereas the former is completely subject to the Charter as seen in the previous chapter, the latter enjoys such rights only to the limited extent just described.

All in all, however, the EU has passed many pieces of secondary legislation to protect the factors enlisted in article 19 TFEU. In particular, it has adopted rules concerning the equal treatment of men and women in matters of employment and occupation («Recast Directive»)[627], rules preventing discrimination based on the grounds of religion or belief, disability, age or sexual orientation as regards employment

[626] Delfino, "Art. 51 CFREU", in Ales, Bell, Deinert and Robin-Oliver (Eds.) *International and European Labour Law* (Bloomsbury Publishing, 2018), p. 236.

[627] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

and occupation (so called «Framework Directive»)[628], and provisions aimed at ensuring equal treatment irrespective of racial and ethnic origins («Race Directive»)[629].

For our purposes, it is worthy to clarify whether such provisions apply also to the civil service systems of Member States. To do so, one must determine the material and the subjective scope of application.

As regards the first criterion, it is possible to draw a difference between the directive addressing the discrimination based on racial or ethnic origins and the other ones[630]. Indeed, the first one applies not only to discriminations perpetrated in the workplace, but also those arising from the provision of good and services; by contrast, the other two directives only apply to the discriminations in place during employment. Hence, some provisions to prevent discrimination between men and women have been adopted in a separate directive (so-called, «Good and Services Directive»)[631]. Under this first criterion, thus, national civil service systems are covered by EU antidiscrimination law.

The conclusion is partially different when it comes to determining the subjective scope of application. As a matter of principle, indeed, the public sector is usually covered by the EU antidiscrimination law. This is explicitly enshrined in the Framework Directive and in the Race Directive[632]; when it comes to the Recast Directive, apparently the latter only recalls the situations related to the access to employment[633], but actually the Court of Justice has repeatedly stated that it applies to the public sector

[628] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[629] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[630] Ellis and Watson, *EU Anti-Discrimination Law*, 2nd ed. (OUP, 2012), p. 361.

[631] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[632] Article 3, Council Directive 2000/78/EC; article 3, Council Directive 2000/43/EC.

[633] Article 14, Directive 2006/54/EC.

in general[634], since the non-discrimination between men and women is one of the foundational principles of the EU[635].

Thus, antidiscrimination law applies in principle to the national civil service systems, shaping the rules on selection procedures, on equal treatment in the civil service relationship, on remuneration and so on. However, the EU also allows the Member States to provide some exceptions to this rule, exceptions that are in any case subject to strict requirements: they can be scrutinized by the Court of Justice, they must be duly motivated and they have to be justified by objective reasons[636]. Moreover, from a substantive point of view, these exceptions have to be proportionate and, therefore, are not legal whenever they are not necessary, so to say when there is an equally suitable but less discriminatory measure to use[637].

As regards the Race Directive and the Recast Directive, EU law allows the Member States to set out exceptions «by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate»[638]. Commentators argue these provisions do not allow for negative discrimination but rather only for positive one, thus operating basically in favour of the protected group[639]. *Mutatis mutandis*, this can apply to all the cases in the public sector in which it is reasonable to reserve a position to a member to a protected group because of the kind of tasks to be performed. It would be reasonable to reserve to women some positions in a public service addressed at maternity-related issues.

To sum up, the genuine occupational requirement that allows the Member States to depart from the EU legal framework relies upon three elements: first, the disparate

[634] See Case C-149/10, *Zoi Chatzi v Ipourgos Ikonomik*, ECLI:EU:C:2010:534, par. 29; C-595/12, *Loredana Napoli v Ministero della Giustizia*, ECLI:EU:C:2014:128, par. 39.

[635] Case C-1/95, *Hellen Gerster v Freistaat Bayern*, ECLI:EU:C:1997:452, par 17.

[636] In literature, see Ellis and Watson, *EU Anti-Discrimination Law*, 2nd ed. (OUP, 2012), *passim*.

[637] See Case C-285/98, *Tanja Kreil v Bundesrepublik Deutschland*, ECLI:EU:C:2000:2, par. 23.

[638] Article 14, Directive 2006/54/EC; article 4, Council Directive 2000/43/EC.

[639] See Ellis and Watson, *EU Anti-Discrimination Law*, 2nd ed. (OUP, 2012), p. 382, who provide the example of an actor required to play Otello or a woman hired to dress with women's clothes.

treatment has to be required by the very nature of the tasks to be performed; second the aim of the discrimination must be legitimate; third, as seen above, such disparate treatment must be proportionate[640]. It must be stressed, however, that the provisions of the Race Directive and of the Recast Directive do not specifically address the issues arising in the public administration, but are rather aimed at both the private and the public sector.

This situation partly differs from the Framework Directive, whereby the EU has allowed some exceptions specifically targeted at the civil service of the Member States instead. Indeed, along with the possibility to provide a disparate treatment on the ground of a genuine occupational requirement[641], «Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces»[642]. Here there are two aspects to be considered: first, the provision only refers to discrimination on the grounds of disability and age, so it does not apply to other grounds covered by the Framework Directive, such as religion, belief or sexual orientation; secondly, it must be clarified how to interpret the «may» clause, which entails to clarifying whether the States are free to set out their own exceptions or are rather subject to the scrutiny of the Court and its standards of review.

The answer to this question can be found in the case-law of the Court of Justice, which has repeatedly outlined some principles in this context. In particular, it is frequent among the Member States to set age limits in order to participate to public selections to get into the armed forces. In this regard, the Court of Justice has pointed out that such limits pursue a legitimate aim if they are aimed at ensuring the operational capacity and proper functioning of the police services[643].

However, to be proportionate, such limits must also be justified by the nature of the tasks to be performed by the national officials. In a recent ruling concerning an Italian law setting out age limits for police commissioners, the Court recalled its settled case-law and explained that to assess the legality of such a treatment it was necessary to

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[640] Muir and Waddington, "Directive 2000/78/EC", in Ales, Bell, Deinert and Robin-Oliver (Eds.) *International and European Labour Law* (Bloomsbury Publishing, 2018), p. 520.

[641] Article 4, Council Directive 2000/78/EC.

[642] Article 3(4), Council Directive 2000/78/EC.

[643] See Case C-416/13, *Mario Vital Pérez v Ayuntamiento de Oviedo*, ECLI:EU:C:2014:2371, par. 44.

ascertain «whether the duties actually performed by those police commissioners are essentially operational or executive duties which require exceptionally high physical capacities. It is only in the latter case that that maximum age limit could be regarded as proportionate. It seems to follow from the request for a preliminary ruling that the State Police commissioners do not perform such duties»[644].

All in all, it seems that, by focusing on an assessment based on the merits, so to say by examining the «executive and operational» nature of the duties performed by national officials, the Court follows a functionalist approach and carries out a strict scrutiny on the choices made by Member States at national level. In other terms, the latter are far from being free to frame their armed forces as they want.

This assumption has been confirmed in other occasions, when the Court of Justice has intervened in policy fields which were traditionally linked to the sovereignty of Member States, as it used to be for the policies of recruiting armed forces. In this regard, the Court has confirmed that the States can legitimately aim at «rejuvenating» the armed forces, but in doing so, «with a view to re-establishing a satisfactory age pyramid, the possession of particular physical capacities should be envisaged not statically, at the time of recruitment competition tests, but dynamically, taking into consideration the years of service that can be accomplished by a police officer after he or she has been recruited»[645]. In other words, the scrutiny of the Court is so deep as to review even the choices made in the field of army by the Member States. In a nutshell, national armed forces enjoy a status – as a baseline on European scale – which is not solely determined by their respective national constitutions and statutory law, but rather by the EU itself.

This theoretical conclusion is partially supported by the empirical observation of the legal regime in place at national level. By looking at the statistics collected by the Commission in 2023, it stands out that «[a] few states have included an explicit exemption for the armed forces in relation to both age and disability: Cyprus, Denmark,

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[644] See Case C-304/21, *VT v Ministero dell'Interno and Ministero dell'interno*, ECLI:EU:C:2022:897, par. 61.

[645] See Case C-258/15, *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*, ECLI:EU:C:2016:873, part 47.

France, Greece, Ireland, Italy, Malta and Slovakia»[646]. By contrast, «[o]ther countries have simply maintained age and capability requirements in their regulations on the armed forces without expressly declaring an exemption from the equal treatment principle, e.g. Estonia, Hungary, Latvia, Lithuania, Poland, Portugal, Romania and Spain». It is possible then to draw a twofold conclusion: on the one hand, many States still envisage a disparate treatment based on age or disability when it comes to the armed forces; however, on the other hand, this condition is scrutinized by the Union (*i.e.*, by the Commission under article 258 TFEU and by the Court), which can step in whenever there is a breach of the rule of the legitimate aim or of the principle of proportionality.

b) Free movement of workers

The second strand of analysis involves the provisions aimed at fostering the development of internal market. In particular, these rules apply to national officials because of the hybrid role of the latter, who can be deemed as «workers» not only under national law, but also under the meaning of EU law.

As seen above, the foundational provision in this regard is article 45 TFEU, that provides the freedom of movement for workers among Member States. Along with that, pursuant to article 114 TFEU, the EU has adopted positive rules to harmonize the national systems as to concretely implement the purposes of article 45 TFEU. To this end, one has to look at the Regulation (EU) no. 492/2011, specifically addressing the right to free movement for workers.

In order to clarify the way in which the EU has relied on these provisions as to influence national civil service systems, it is necessary to precisely delimitate their scope of application, both under the material and the subjective point of view.

As regards the first criterion, looking at the primary and secondary law, it stands out that the free movement of workers covers a wide range of possibilities: it spans from the right to equal access to employment and goes through all the elements that characterize the exercise of the employment, such as the conditions, the tax advantages and the

[646] Commission, *A comparative analysis of non-discrimination law in Europe 2023*, (Publications Office of the European Union, 2024), p. 67.

social advantages[647]. In particular, the EU aims at preventing all the obstacles to the free movement of workers between one State (the home State) and another (the host State). To this end, EU law not only prohibits direct discrimination, that is to say based on nationality, but according to the settled case-law of the Court of Justice, it also prevents indirect (or covert) discrimination, which arises when a Member State sets out rules which, «by the application of other criteria of differentiation, lead in fact to the same result»[648]. In other words, requirements such as language and residence could result in an indirect discrimination hardly justifiable in light of the Treaties.

When it comes to the second criterion to determine the scope of application, which is the subjective one, it is equally clear that the Court of Justice has stretched as much as it could the meaning of the provisions at stake, aiming at ensuring a consistent interpretation of EU law among Member States and at extending the group of beneficiaries of the provisions. Hence, a «worker» is an individual who is in a relationship of employment with another natural or legal person. Since its early case-law, the Court has clarified that there is such a relationship whenever «for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration»[649]. Furthermore, it must be underlined that under the provisions concerning the free movement of persons, the protection of article 45 TFEU is not only granted to *stricto sensu* workers, but also to job-seekers under certain conditions and for a fixed period of time[650].

This broad interpretation of the provisions on free movement would thus lead to conclude that the civil service systems of the Member States are entirely covered by the former. However, since they wanted to prevent such an outcome, Member States

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[647] See Ellis, "Social Advantages: a New Lease of Life?", (2003) Common Market Law Review, p. 639-659.

[648] See Case 152/73, *Giovanni Maria Sotgiu v Deutsche Bundespost*, ECLI:EU:C:1974:13, par. 11.

[649] See Case 66/85, *Deborah Lawrie-Blum v Land Baden-Württemberg*, ECLI:EU:C:1986:284, par. 17.

[650] Article 7(3), Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

clarified in the Treaties that free movement «shall not apply to employment in the public service»[651].

Back in the days this exception could have been interpreted in two ways by the Court of Justice: on one side, by adopting the institutional approach, according to which Member States could have exempted all the jobs within a public organization; on the other side, there was the functional approach, which by contrast would have narrowed down the scope of the exception by looking at the concrete tasks to be performed by the officials concerned. Also taking into account the fact that national administrations counted for several millions of workers across the EU[652], the Court preferred the more narrow approach and adopted a functionalist interpretation of article 45(4) TFEU[653]. As a consequence, several jobs have been subtracted from the «public service derogation»[654].

This functionalist approach has been further developed by the Commission in its communications on the implementation on free movement of workers. In particular, since the '80s the Commission excluded from the scope of application of such a derogation, inter alia, the «bodies responsible for administering commercial services (e.g. public transport, electricity and gas supply, airline and shipping companies, posts and telecommunications, radio and television companies), — public health care services, — teaching in State educational establishments, — research for non-military purposes in public establishments». These choices were made because «[e]ach of these

[651] Article 45(4) TFEU.

[652] Cassese, "La nozione comunitaria di pubblica amministrazione", (1996) Giornale di diritto amministrativo, p. 915-923.

[653] See, inter alia, see C-473/93, Co*mmission of the European Communities v Grand Duchy of Luxemburg*, ECLI:EU:C:1996:263, par. 27.

[654] See Barnard, *The Substantive Law of the EU*, 7th ed. (OUP, 2022), p. 496, who examines the main the case-law and recalls the cases of teacher in a state school, of a state nurse, of a foreign-language assistant in a university, of various posts on the state railways, of a local government employee, of a trainee lawyer, of a seaman, of a job in research not involving sensitive research work and of a post in the lower echelons of the civil service.

activities also exists in the private sector, to which Article 48 (4) does not apply, or may be exercised in the public sector without the imposition of nationality requirements»[655].

Given their wide scope of application, provisions on free movement have played a significant role in shaping national civil service systems, mostly because of their structural features: since its early case-law, indeed, the Court has clarified that article 45 TFEU confers to its addressees individual rights that are thus provided with direct effect and are thus enforceable before national courts, which are consequently required to set aside the conflicting national rules[656]. Given their nature, such rights can be invoked not only *vis-à-vis* the host State, but also against the home State[657] and have of course an horizontal effect as well[658]. These features configure the prerogatives under article 45 TFEU as fully fledged EU rights, which strengthen the legal regime of national officials.

The concrete consequences of such a regime can be observed in many regards, from the requirements to get into the civil service systems to the access to the related social benefits. To this end, a meaningful example has been given by the Court, when it stated that «where a public body of a Member State, in recruiting staff for posts which do not fall within the scope of Article 39(4) EC, provides for account to be taken of candidates' previous employment in the public service, that body may not, in relation to Community nationals, make a distinction according to whether such employment was in the public service of that particular State or in the public service of another Member State». So to say, a national official in one Member State has not only the right to apply everywhere else in the Union, but has also the right to spend its seniority when this is assessed in the host State.

c) The social policy of the Union

[655] See Commission *Freedom of movement of workers and access to employment in the public service of the Member States — Commission action in respect of the application of Article 48 (4) of the EEC Treaty*, 1988.

[656] See Case C-716/17, *A*, ECLI:EU:C:2019:598, par. 40.

[657] See Case 167/73, *Commission of the European Communities v French Republic*, ECLI:EU:C:1974:35, par. 45.

[658] See Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale*, ECLI:EU:C:1974:140, par. 19.

The last competence which affects the national civil service systems is related to the social policy of the EU. In this field the Union shares its competence with the Member States and, pursuant to article 153(2) TFEU, it can adopts directives aiming at setting out «minimum requirements for gradual implementation» of the social objectives of the Union. This draws a difference between this competence and the one provided by article 114 TFEU, which allows the approximation of national legislations even via regulations[659].

By and large, the power conferred through article 153(2) TFEU allows the EU to enact rules concerning the health and safety, the working conditions, the social security and the social protection of workers, the protection of workers where their employment contract is terminated, the information and consultation of workers, the representation and collective defence of the interests of workers and employers, the conditions of employment for third-country nationals legally residing in Union territory, the integration of persons excluded from the labour market and the equality between men and women with regard to labour market opportunities and treatment at work.

As it is clear from the long list just mentioned, the material scope of application of the provision is wide and it can theoretically affect most of the aspects of the employment relationship at national level. The only main elements excluded by the provision are the right to pay, the right of association, the right to strike or the right to impose lock-outs[660]. Moreover, article 153 TFEU does not set out any restriction as regards the subjective scope of application of the provision, so the EU can theoretically regulate both the private and the public sector pursuant to this power. Indeed, this is what has happened.

Just focusing on the main pieces of legislation, the EU has provided rules concerning the health and safety of workers («Health and Safety Directive»)[661], the

[659] Ales, "Art. 153 TFEU", in Ales, Bell, Deinert and Robin-Oliver (Eds.) *International and European Labour Law* (Bloomsbury Publishing, 2018), p. 161.

[660] Article 153(5) TFEU.

[661] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

conditions for fixed-term workers[662], some aspects of the organisation of working time («Working Time Directive»)[663], the temporary agency work[664], some standards aimed at ensuring transparent and predictable working conditions[665], the rules pursuing a work-life balance for parents and carers[666] and, lately, it has also passed a directive setting out standards conceived to ensure the adequate minimum wages in the Union[667].

These directives explicitly or implicitly apply to workers belonging to both the private and public sector. In fact, article 153 TFEU does not apparently provide any distinction between the two groups. In this view, some commentators have criticized some of the measures adopted by the Union, as better refined by the interpretation of the Court of Justice, because they would have allegedly decreased the level of protection for national civil servants by equating them to the private workers. For instance, Mazuyer argues that this trend would be observable within the field of fixed term contracts[668].

However, perhaps also in order to duly take into account the specificities of national public services, secondary legislation does provide some exceptions to the general application of EU social policy provisions. Examples can be found in the Health and Safety Directive and in the Working Time Directive. The former states that it is not applicable «where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it»[669]. On the other hand, the Working Time

[662] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

[663] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[664] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

[665] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

[666] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers.

[667] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.

[668] Mazuyer, “Critical Analysis of ECJ Case Law on Fixed-Term Contracts in the Public Sector”, (2014) European Labour Law Journal, p. 334-348.

[669] Article 2(2), Council Directive 89/391/EEC.

Directive determines its scope of application by referring to the Health and Safety Directive[670], thus the interpretation of the both is intertwined.

Interestingly, by focusing on the wording of the provisions, it emerges that such derogations are mandatory for the Union: the directives «shall not apply» in those cases, without any margin of appreciation. Hence, it seems crucial to determine their exact meaning.

In this regard, the Court of Justice has recently provided some further elements to interpret these provisions. In particular, the Court has been sought to ascertain whether the Working Time Directive applied even to workers employed in the defence sector and to military personnel who perform guard duty in peacetime. The question referred was particularly important to understand the current level of integration of bureaucracies within the EU, because it permits to appraise to what extent the social policies of the EU can interfere with a sector – such as the army – traditionally reserved to the sovereignty of Member States.

As a response, the Court provided a quite articulated answer: namely, the Working Time Directive (and thus, by reference, also the Health and Safety Directive) does not apply in those cases in which, by reason of the tasks to be performed, the activity is incompatible with the requirements set out by EU law. This occurs in a wide range of situations, not necessarily related to the direct exercise of public powers. In particular, the Court has admitted that an activity is excluded by the scope of EU law «where that activity takes place in the course of initial or operational training or an actual military operation; or where it is an activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive; or where it appears, in the light of all the relevant circumstances, that that activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed; or where the application of that directive to such an activity, by requiring the authorities concerned to set up a

[670] Article 1(3), Directive 2003/88/EC.

rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations»[671].

Therefore, in this case as well, the Court has clarified that the derogations from the EU social policy must be justified by relying on a functionalist approach, so to say by looking at the nature of the tasks to be performed rather than at the institutions concerned. Perhaps more interestingly, however, the Court has also stressed an important passage in its reasoning, which better clarifies the interplay between the primacy of the EU and the institutional autonomy of the Member States. In particular, the Court has stated that «[u]nder Article 4(2) TEU, the Union is to respect, first, the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, and, second, their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. That provision also states that national security is to remain the sole responsibility of each Member State. […] In that regard, it should be noted that the principal tasks of the armed forces of the Member States, which are the preservation of territorial integrity and safeguarding national security, are expressly included among the essential functions of the State which the European Union must respect in accordance with Article 4(2) TEU»[672].

By developing this line of argumentation, the Court has essentially underlined two aspects: first, the derogations enshrined in secondary sources have a foundation in article 4(2) TEU and, consequently, the latter could be theoretically invoked by the Member States to set a limit to the expansion of the EU in the field of armed forces; second, the clause provided by article 4(2) TEU must be interpreted in a functionalist way, so by looking at the tasks performed by the Member States in a certain moment. Since the defence is a task still in the hands of the latter, the armed forces are a field reserved to national autonomy.

The far-reaching intervention of the EU even in the field of armed forces is confirmed to some extent by the observation of the practices spread among the Member States. According to a research conducted by the Commission, it emerges that «[a]bout

[671] Case C-742/19, *B.K. v Republika Slovenija*, ECLI:EU:C:2021:597, par. 88.

[672] *Ibid.*, par. 36-37.

half of the Member States have adopted transposing measures in order to apply the Directive to their armed forces. Several Member States have not explicitly transposed the Directive but, nevertheless, apply its provisions to the armed forces to a certain extent. A few Member States do not apply the Directive to military personnel, without prejudice to the existence of national rules concerning the working conditions and protection of health and safety of armed forces personnel»[673].

5. *What is left out*

Drawing some preliminary conclusions, the previous paragraphs have tried to point out that the EU relies on many legal bases in order to influence the legal regime of national officials; moreover, it can even use its fiscal capacity to impose specific conditions as to steer the national public policies implemented by Member States.

The outcome of these multiple factors is not only a Europeanisation of the national rules concerning the public employment. As already pointed out by other scholars, this result was already there since the very beginning of the Community law. The late developments in EU administrative law have rather outlined a new model in the relationship between EU and national bureaucracies, a model that aims at integrating the two branches. Such an integration clearly arises whenever the two groups of officials (the EU and the national ones) start to work together and to have direct legal relationships without the intromission of the Member States. These situations pose of course new legal issues that have not been duly explored so far by the scholars and that would benefit from the comparative analysis. To this end, the next Chapter seeks to fill this gap by providing some comparison with the results already collected from the German and the US legal systems.

To conclude the analysis, however, one open question remains on the table, so to say what is actually left out from this process of integration looking at the current setting provided by the Treaties. Indeed, it has been underlined that the UE can use many provisions to pursue such an integration: theoretically, each legislative competence can allow the EU to lay down rules concerning national officials, so far this is justified by the necessity to provide uniform implementation and it complies with the

[673] Commission, *Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time*, COM(2023) 72 final, p. 5-6.

principles of proportionality and subsidiarity (the latter in case of shared competence); moreover, the EU has historically used its competences in the field of internal market and, lately, it has even intensified its efforts in the field of social policy. All in all, it is hard to foresee how far the EU can go, given the current legal framework of the EU primary law as interpreted by the Court of Justice.

Actually, to draw an answer, it seems that some elements are already there and have been highlighted by the analysis. In particular, the two main yardsticks to limit the intervention of the EU – so to say, to protect the autonomy of the Member States and their national bureaucracies – are the exceptions provided by article 45(4) TFEU (the public service derogation) and the general clause enshrined in article 4(2) TEU. Both the provisions, indeed, unambiguously set out limits to the intervention of the Union.

In particular, article 45(4) TFEU specifies that the development of internal market of workers does not affect the «public service»; at the same time, article 4(2) TEU protects national identities and, moreover, clearly states that «national security remains the sole responsibility of each Member State». However, it seems also that such limits have been framed as to be not static, but rather dynamic.

As seen above, indeed, both the limits provided by the Treaties have been interpreted by the Court of Justice in a functionalist way, so by stressing the attention on the concrete tasks to be performed by the national officials concerned. This approach makes it impossible to predetermine in advance which situations are subtracted from the intervention of the Union; moreover, it provides some flexibility to the system, because national public tasks depend on the specific needs emerging in a certain historical period. In a nutshell, public tasks are socially and politically determined and can change over the time. By and large, looking at the late developments in the field of common defence, it seems possible the conclusion that, in the short or long term, even some fields traditionally reserved to the sovereignty of Member States, such as the armed forces, could be progressively integrated within the EU legal system without structurally amending the Treaties, by simply «shifting» with the progressive conferral of correspondent tasks at EU level.

Chapter V
The Legal Nature of the European Civil Service

1. Current and future prospects of the European civil service

The analysis conducted so far allows to draw some conclusions on the legal nature of the European civil service. In particular, it is possible to get an answer to the question raised at the beginning, which is whether it is possible to frame the EU and national bureaucracies in an newly form of integrated system, so to say the European civil service. The research has delineated the evolution of the civil service within the multilevel legal system of the EU, since its international origins through the current setting, which features some characteristics similar to federal systems. The first element to assess is thus the legal nature of the European civil service between the international and the federal model.

The analysis has also highlighted some problems in the current framework. Hence, a further question deals with the prospects de *iure condendo* of the European civil service, so to say the possibility to amend the rules governing it as to cope with the federalizing process and to prevent the negative spillovers of the latter. Spanning from the relationship between the EU and the Member States in this subject matter till the substantive rules of the supranational and national bureaucracies, the research has pointed out some inconsistencies in the current system. It is thus necessary to explore the possibility to suggest some regulatory amendments that could tackle these issues.

Hence, the first part of this chapter draws the conclusions that emerge from the comparison between, on one side, the German and US legal systems and, on the other side, the EU one. In this regard, the analysis focuses on the current legal framework as to depict the legal nature of the European civil service.

The second part is instead dedicated to the legal prospects of the European civil service, seeking an appraisal of the room left to improve it and to make it better fitting the evolution in the EU legal system as a whole. In other words, the second section is aimed at outline the main solutions to be possibly taken as to tackle some of the issues

arising from the process of bureaucratic integration between the EU and the Member States. These solutions are identified also by taking into account the comparative analysis just conducted.

2. *Drivers of flexibility within the EU legal framework*

First, the European civil service is characterized by the flexibility of its legal sources. In particular, primary law of the Union pays scarce attention to the functioning of the civil service, both at supranational and national level. Legal provisions are few and, most importantly, they leave open many options to secondary law. This feature stands out in the comparison between the European civil service and the other legal systems taken into account so far. In particular, the analysis has shown that the German and the US legal systems differ a lot when it comes to their civil services. It is thus important to understand where to collocate the European civil service in this context.

Starting from the US, it has been underlined that there are only few provisions in their Constitution that govern the civil service at federal level. Similarly, the US Constitution does not say anything about the functioning of the State employment either. All in all, the main provisions affecting the regime of the US civil service are two: on the one hand, one finds the «Necessary and Proper Clause», according to which the Congress is vested with the power «[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof»[674]; on the other hand, there is the «Appointments Clause» which entails that the President of the United States «shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments»[675].

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[674] Article 1, § 8, US Constitution.

[675] Article 2, § 2, US Constitution.

It has been highlighted that such provisions apply only the Federal civil service and actually leave statutory law (*i.e.* the Congress) basically free of deciding how to regulate the civil service. This can be understood by reading the US Constitution against the historical context in which it was conceived and against the main ideals underpinning it. It could be reasonably argued that, back in those days, the Framers were mostly concerned with ensuring the division of powers between the Executive, the Legislative and the Judiciary, while keeping intact the sovereignty of federated States. In other words, the civil service was conceived as a matter internal to the public administration without any particular relevance by a constitutional point of view.

This has allowed the US bureaucracy to evolve over the times, radically changing according to the different moments of American history. Moreover, since the Federation lacked the legislative power to influence the civil service at State level, it had to rely on the fiscal policy and on the spending powers granted by the Constitution, by attaching to the financial programs some conditions aimed at shaping *ab externo* the State policies concerning public officials. In a nutshell, the US legal framework of the civil service is poorly constitutionalized and thus quite flexible.

On the contrary, the German *Grundgesetz* sets out many rules concerning the public officials, both at *Bund* and *Länder* levels. Very significantly, it must be pointed out that the German Basic Law provides a quite clear-cut division of legislative powers between the two levels of government when it comes to the civil service matters. As seen above, the *Bund* is entitled to pass laws concerning its own personnel and the one working at other public bodies at federal level (*Körperschaften*, *Anstalten* and *Stiftungen*)[676]. This is an exclusive competence reserved to the *Bund*. Moreover, the latter shares with the *Länder* the power to pass laws affecting the status of the officials working for the *Länder*, the *Gemeinden* and the other bodies of public law, with the exception of the rules concerning their career, their remuneration and their welfare system[677].

A part from these rules which mainly deal with the allocation of competences, the *Grundgesetz* envisages also other provisions that govern the substance of the public employment in Germany. *Inter alia*, one might refer to the general principles set out by

[676] Article 74, abs. 1, no. 12, GG.

[677] Article 74, abs. 1, no. 27.

article 33 GG, which provides a constitutional anchoring for the merit system in Germany; it is also possible to recall the provisions outlining the public liability, which radically narrow down the possibility to opt for alternative solutions at statutory level.

All in all, it seems that the German legal system is far more rigid than the US one when it comes to the issues surrounding the civil service matter. This could be explained by looking at the different historical moment in which the *Grundgesetz* was laid down. In the aftermath of the World War II and the fall of the Nazi regime, German constitutional lawyers were deeply aware of the relevance played by bureaucracy in modern States, especially with the growing importance of the Welfare State and the social rights in the constitutional landscape. This could justify the many provisions entrenched in the *Grundgesetz*, which objectively limit the room left to the statutory law.

Therefore, it seems reasonable to conclude that the European civil service better matches with the US than the German one when it comes to the degree of «constitutionalisation» of the regime of public employment. Indeed, although the analysis has shown that that there are some provisions in the Treaties that directly or indirectly govern the European civil service, it is also evident that such provisions are very generic in their content and, most importantly, do not preclude any possible outcome in the evolution of the system. There are several examples that support such a conclusion.

The EU does not provide any rule concerning the division of competences between the supranational and the national level as regards the regime of bureaucracy. Nonetheless, by looking at the wording of the provisions and their concrete application in the practice, it is also clear that they do not prevent the EU from setting out rules concerning the national civil services. Another example is offered by the national quotas within the EU bodies. The Treaties do not explicitly impose their presence; nonetheless, the SRs and the CEOS give them a specific relevance. Furthermore, the TFEU does not govern the problem of the joint liability for the Member States and the EU when they operate in mixed settings; however, it does not prevent this solution either, so there are some situations in which this outcome is imposed by secondary law, as it has been seen for Europol. Long story short, these examples demonstrate that the European civil service is only little «constitutionalized».

The first conclusion to be drawn is that the EU enjoys quite a flexibility when it comes to the regime of the civil service, both at EU and at national level. This feature

objectively echoes what is observable in the US, despite the fact that the two systems are different in many regards: from the historical point of view, of course, but also from the legal point of view, the premises are completely divergent. Whereas the US are a State entity, the EU is still considered an international organization (despite *sui generis*); moreover, whereas the US have embraced a system of dual sovereignty, the EU has progressively shifted towards a cooperative model which better matches with the German one. The flexibility of the EU model can thus be important in order to bring the civil service system up to date under two regards: first, by looking at the evolution of the legal nature of the EU as a whole, which is evolving from an international towards a state model; second, by looking at the administrative model adopted in the EU, which lately seems to rely more and more on cooperative instruments. Both these trends require specific arrangements when it comes to the civil service and the system seems to be enough flexible to do so.

3. Typical features of the federal civil service systems

Looking at the regime of the European civil service, it must be quantified the degree of its integration, by exploring whether it matches the model of federal systems or rather it still resembles the international civil service systems. To provide an answer, first it is necessary to outline the main features of the federal systems and, only after that, it is possible to assess whether the European civil service fits in such a model.

Actually, by summarizing the results of the comparison conducted so far, it is questionable that a strictly speaking «federal model» does exist. The analysis of the German and the US legal systems reveals instead that the two models differ under many regards and that it is hard to find a common baseline as to draw a general model suitable to describe every federal system.

As just seen, the legal sources governing the federal officials in both the systems are differently framed, with a quite diverse role played by the «local» entities when it comes to matters related to the public employment. Similarly, when observing the selection procedures, it stands out that the conception of «merit system» is not the same in the two countries and it has been developed in Germany and in the US with different trajectories. The same can be said for the rules concerning the remuneration of public officials and their personal liability for wrongful acts. As regards the latter, it is interesting to notice that the two systems cope with this issue in an opposite way: whereas Germany does not hold personally and individually liable its officials *vis-à-vis*

third parties, the US explicitly provide the contrary, by entitling the individuals to claim damages for violation of constitutional rights to directly sue the officials under certain conditions.

Actually, both the systems share a feature, so to say that all their public officials enjoy a set of common fundamental rights, regardless the nature of the public body they work for (either the federation, the state or the local entity). This is observable both in Germany and in the US, so it could be deemed as a typical characteristic of federal systems. However, this argument is contradicted by the fact that also non-federal systems (whatsoever labelled, such as «centralized», «regional» and so on) provide similar features. This is particularly evident, for instance, in Italy, where the rights conferred by the Constitution apply also to public officials and, moreover, the State has the exclusive power to lay down the basic rules governing the public employment relationship, by relying on its competence in the field of «ordinamento civile»[678].

All in all, it thus seems that the federal systems do not have a common model. Rather, it seems more reasonable to conclude that they adopt some legal solutions as to cope with their basic organizational choices. In other words, in a system of dual sovereignty such as the US, some rules of the civil service find a justification in the clear-cut division of competences between the Federation and the States. This is evident, for example, by looking at the legislative competences of the Federation. By opposite, if one focuses on the German model, it can be noticed that its enhanced cooperation brings about a more integrated model, in which the bureaucracies of *Bund* and the *Länder* are called upon to work together in many institutional and procedural settings.

To summarise, the question is not whether the European civil service has already gained all the features which typically describe all the federal systems. Rather, the problem is to understand whether the its substantial regime is consistent with the theoretical and systematic premises of the EU administrative framework as a whole. In this regard, legal comparison can provide valuable insights.

[678] Article 117, co. 2, lett. l), Italian Constitution.

4. *The EU civil service: what remains of the Monnet's vision*

In the original vision, the EU civil service should have been composed mainly of national officials seconded to the EU bodies. Moreover, as regards its tasks, the EU bureaucracy should have been empowered only to design the EU policies and not to implement nor to enforce them. This was the original Monnet's vision: a minimal civil service posted only to policy-making.

This vision was justified by the theoretical premises underpinning the birth of the European Communities, which were designed as international organizations. Nonetheless, the original rules governing the EU civil service added some innovative elements in the system too, if compared to similar examples in place in the international landscape. The EU public officials enjoyed the status of international servants, while being selected and managed in a way that progressively resembled more and more what happened in the Member States. In other words, this imitative trend towards the Member States was already there since the beginning.

Since then, the Communities and later the Union have evolved much. Nowadays, the functional premises of the EU administrative system have radically changed. More and more powers of policy implementation and administrative enforcement have been progressively transferred to the Union. Although the EU has not its own firemen or doctors, day by day it is more and more engaged in ensuring public security and cooperation in the field of crime prevention and repression. In other words, the EU is building its own street-level bureaucracy.

This evolution is coupled with a hybrid regime for the EU civil service, in which some features that are typically observable in international civil service go along with other characteristics that are present in federal systems. An example for the former is given by the regime of immunities enjoyed by EU officials, which potentially shield them from prosecution at national level; another example is offered by the rules applying to remuneration, which reflect the economic fragmentation in place among Member States, despite the coordination of economic and social policy pursued by the Union; moreover, the national quotas in place within the EU bodies still remind the similar solutions adopted by other international organizations, such as the UN.

At the same time, however, the analysis has revealed that it is hard to keep the supranational EU civil service clearly distinct from the national one. Indeed, there are already many occasions in which the two branches of the European civil service are

integrated, both by a regulatory and by an administrative point view. This is a feature that cannot be linked to the international nature of the EU, but rather to the ongoing federalizing process. It seems that the progressive shift towards a cooperative federalism has brought about some important developments in the EU civil service.

From the regulatory perspective, the analysis of the European civil service has demonstrated that in the last years many euro-national mixed bodies have been established. This trend has required innovative solutions in order to ensure, at the same time, the uniformity of the regime of public employment and the autonomy of the Member States. Consequently, in these bodies the regime applicable to public officials is not determined only by the EU, but it is rather composed of a patchwork of legal acts adopted partly by the EU and partly by the Member States that take part in these mixed institutional settings. The main examples in this regard are the EPPO, the EEAS and the EDA, but also other agencies of last generation such as Frontex or the EUAA. In these cases the EU establishing acts just draw the baseline to get access to the posts at supranational level, sometimes specifying the relationship between the EU and the national offices. However, most of the times the concrete appointment of the officials and the requirements imposed to the latter are determined by the Member States. The result is an institutional arrangement which is governed by an integrated set of norms.

By exploring the substance of the process of integration, instead, it is evident that the last years have witnessed the birth of many offices in which the EU and national officials are expected to work together. This is not a novelty in the EU landscape, since national officials seconded to EU bodies have been there since the very beginning of the European project. The innovative scope of these solutions is rather given by the fact that the EU officials are empowered to coordinate and, to some extent, even to command the national ones. This has been observed, for instance, by focusing on the EPPO, the ESMA, the EBA and Europol. In these cases EU and national officials work together «on the ground», adopting legal acts or carrying out factual actions producing direct effects on third parties.

Hence, the comparison with the federal systems steps in. By confronting the European civil service with the US one, there is little to say at first sight. Nowadays, it seems that the EU and the US are headed towards different directions in this regard. The US are indeed based on a model of dual sovereignty, in which the federal and the state officials are clearly separated, both by a regulatory and an administrative point of view. This does not entail that the observation of the US legal system is useless, since, as

better explored below, some interesting solutions could be reasonably transplanted into the European civil service. To some extent, this has already happened as regards the use of fiscal capacity and spending powers by both the entities: indeed, both the EU and the US has used and still use the financial conditionality to steer the policies of «local» entities, even in the field of public employment.

A part from that, however, it seems more valuable to compare the EU and the German civil service systems, since the administrative and systematic premises are closer. Indeed, in Germany the cooperative federalism is one of the constitutive elements of the legal system and it is clear that, in the last years, also the EU has started to embrace such a model.

Surprisingly, the EU has somewhat gone beyond a mere cooperation though. One of the foundational features of the German legal system, indeed, is the general prohibition of mixed administration (*Verbot der Mischverwalung*), which entails that the forms of cooperation in place cannot subvert the allocation of administrative competences outlined by the *Grundgesetz*. Concretely speaking, this entails that, as seen above, the interbureaucratic offices established in Germany cannot be provided with binding powers, but rather only offer the occasion to coordinating decisions eventually taken somewhere else.

On the contrary, the most recent trends in the EU are characterized by an even stricter form of coordination, a coordination that turns out to be a form of integration. Shared inspections conducted under the coordination of ESMA o EBA can constitute an intrusion in the legal sphere of EU citizens; legal acts adopted by EU agencies are far from being simple occasions of administrative cooperation and are rather capable of impinging on the fundamental rights of the individuals concerned; joint operations conducted under Frontex can cause irreversible damages to the rights of asylum seekers. All in all, by simply looking at the civil service matters, it seems that the EU has gone far beyond a simple model of administrative cooperation, moving its first steps in the field of bureaucratic integration.

Unlike Germany, the EU has not put in place all the consistent solutions to cope with this integration. Whereas in Germany the allocation of legislative competence aims at providing the *Bund* with the power to interfere with the essential elements of civil service systems at *Länder*'s level, in the EU the regime is much more blurred. As described in the previous chapters, the competences in the field of national public employment are not explicitly envisaged by the Treaties. Nonetheless, the EU usually

relies on other legal bases as to interfere in this sector, justifying its intervention by reasoning on the principle of proportionality and subsidiarity. The result is that the balancing between the EU primacy and the Member States institutional autonomy is not struck by the Court of Justice but rather by the political bargaining within the institutions.

Similarly, by looking at the judicial remedies in place in the two systems, it clearly emerges that the EU is still seeking credible solutions to cope with the negative spillovers of the bureaucratic integration: the *querelle* concerning the joint liability is an example. By contrary, in Germany the administrative activity is always, by definition, imputable either to the *Bund* or to the *Land*; moreover, an individual claiming a compensation for damages can easily seek the local court and invoke the rules on public liability. In this case, although the German officials cannot be held directly liable, the coherence of the system is given by the fact that the individuals can easily access the courts at local level and, by lodging a simple appeal, they can even reach the top of the German judiciary. On the contrary, despite a more and more integrated bureaucracy, the EU still relies on a dualistic model of judiciary, so an individual has to guess which is the competent court to seek as to obtain redress. Moreover, within this framework, depending on the country concerned, only some of the national officials performing EU tasks can be held directly liable before national courts, because currently it is up to the Member States to govern the regime of the personal liability of their officials.

In conclusion, the path of bureaucratic integration still relies on a civil service which still features some of the elements of the international civil service systems just recalled above. For instance, it is hard to reconcile the regime of international immunities granted to the EU officials with the activity concretely performed nowadays by the latter on the ground. It is equally difficult to find out how to reduce the growing risk of blatant violations of fundamental rights committed by EU officials without postulating some forms of common criminalization of such conducts at EU level.

Hence, the European civil service definitely rests in between the international and the state models, although the tasks it performs are not merely «international» anymore. The question is thus to understand how intervene on the regulatory framework as to fix this problem.

5. *Choosing between the dualistic and the cooperative models*

As seen above, the current legal framework of the European civil service is quite flexible and basically allows the adoption of any model. A part for some basic rules, concerning for example the procedural steps for amending the Staff Regulations and the Conditions of Employment of Other Servants or those dealing with the immunities of EU officials, the Treaties enable secondary law to regulate the European civil service in different manners. Hence, a first choice to be taken deals with the model to be adopted in the next steps of the process of European integration, so to say, whether it is better to opt for a dualistic model or rather to pursue a stricter cooperation between the bodies of the EU and the Member States.

The first choice would probably come at odds with the late developments in the EU administrative infrastructure, which is progressively matching with a federal model. Solutions like those enacted in the field of financial markets, banking supervision or judicial cooperation in criminal matters are difficult to reconcile with a purely dualistic model. Moreover, the principle of administrative subsidiarity seems to suggest that, before ending up in duplicating the infrastructure at supranational level, so to say before opting for direct implementation, it is necessary to explore less intrusive means, which entail some sort of cooperation between the EU and the Member States.

Furthermore, the main hurdles to the adoption of a dualistic model rest not only in the primary law, but also in the concrete difficulties of duplicating the administrative bureaucracies at supranational level. The very basic idea behind the dual federalism is that federal policies are entirely and solely implemented by federal bureaucracy. In numerical terms, this would increase the number of EU officials of several times.

By and large, it seems more likely that the EU will thus keep pursuing a more integrated system by relying on a cooperative model. Generally speaking, enhancing the cooperation between the EU and the Member States would increase the number of cases in which the officials belonging to the two branches will work together, with an outcome that is hardly imputable only to one of the two entities. This choice would require some arrangements though. Among the others, the most prominent issues to be tackled at the moment deal with the regime of personal liability of the public officials in the EU and the legislative powers of the Union. The following paragraphs thus suggest some possible solutions *de iure condendo*.

6. Rethinking the personal liability of European public officials

In the last years the EU has acquired more and more powers. The set of tasks performed by EU officials has evolved and nowadays they frequently work on the ground. Chapter III has underlined that this evolution has brought about many shortcomings in the regime of the liability of the European public officials.

A general problem affects the possibility to outline a joint liability shared by the EU and the Member States involved in the implementation of EU law. As seen above, this possibility has not been recognized by the Court of Justice in general terms yet, but it has been only limited to specific provisions of secondary legislation which allow the individuals concerned to sue either the EU or the Member States for wrongful acts that are indistinguishably imputable to both. For instance, this solution has been adopted with regards to Europol in cases of violations of privacy. However, this arrangement does not directly affect the regime of public officials, since it only deals with the «external» relationship between the public bodies and third parties.

Hence, two questions arise: the first is whether the personal liability of public officials is a viable option adopted in other comparable legal systems and, if so, under which conditions; second, it is necessary to ascertain whether the personal liability of public officials could be transplanted into the EU legal system.

As regards the first question, it is worth noting that the German *Grundgesetz* rules out the personal liability for public officials. Thus, they can be only held liable subsidiarily, so to say when their public employer has already compensated the damages suffered by third parties. This situation would apparently suggest that the solution adopted by the EU is completely consistent with the set of remedies in place in other comparable federal systems. However, this answer could be easily contested.

Indeed, the first element to bear in mind is that, unlike Germany, in the EU there is a growing number of situations in which a specific harmful conduct is attributable both to the EU and the Member States. This is coupled with the duality of the judiciary in place in the EU, in which the national courts are competent to review national acts, whereas the Court of Justice is entitled to strike down only EU acts. The combination of these two factors entails a diminution of protection for the individuals in the EU, because they generally have to guess which is the body to sue and which is the court to be sought (either EU or national). On the contrary, in Germany the administrative activity must be always attributed either to the *Bund* or to the *Land*, so the room for

ambiguities is narrower. Moreover, individuals concerned have no problems in choosing which is the court to be sought, since the claims of first instance must be filed before local courts and, after that, the case might be brought before upper courts (even federal) by simply lodging an appeal. In other words, the situation *ex latere creditoris* is much easier in Germany than in the EU.

Actually, the analysis of the US civil service could provide further elements to better assess the regime in place within the EU. Indeed, despite embracing a dual federalism, the US provide the personal liability of public officials in specific cases, so to say when there is a violation of constitutional rights. This solution is the outcome of the case-law of the US Supreme Court, that has been transposed in statutory law later on. It is evident that, despite not being directly transplantable as such within the EU, this solution could nonetheless play an important role in filling the inconsistencies highlighted so far in the Union.

Another inconsistency in the system rests in the position of national officials that implement and enforce EU law, since the regime of personal liability is framed in a different way from one Member State to another. By comparing, for instance, the situation in Italy and in Germany, this research has shown that the individuals concerned might receive a disparate treatment in the two countries, although the conducts and the tasks performed are the exactly same. In the more favourable country (Italy), persons can directly sue national officials for a violation of EU law, whereas in the less favourable one (Germany) this is not possible.

This inconsistency might be legitimate in light of the principles of effective judicial protection and equivalence, as far as national systems grant appropriate redresses by holding liable the public bodies instead of the public officials. All in all, although it is desirable to strengthen the remedies at disposal, personal liability is not crucial to ensure effective judicial protection, unless there are no other viable ways to recover the violation of EU law.

The introduction of personal liability for public officials – both at EU and at national level – would rather be reasonably justifiable in light of the right to good administration enshrined in article 41 CFR. One of the corollaries of this fundamental right is that «[e]very person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States». Such a provision has two merits: first, its content is broad and it does not prevent the

establishment of personal liability for officials; second, the CFR applies not only to EU officials, but also to national ones when they apply EU law. Hence, this provision could play as a driver to streamlining the regime of personal liability of EU or national officials implementing EU law. Furthermore, personal liability would undoubtedly play also as a deterrent for public officials, preventing them – or at least strongly discouraging them – from committing facts that could breach the fundamental rights of persons concerned.

May these principles play as a justification within the EU legal framework, it remains to ascertain whether such a result could be achieved by merely modifying secondary law or rather by amending the Treaties. The answer seems to be that it is not necessary to resort to the second option.

Indeed, article 340 TFEU addresses two sides of the problem: the right to compensation for damages caused by the Union or its servants and the internal relationship between these two. It remains completely on the background the different issue concerning the personal liability of EU servants towards third parties. In other words, personal liability is not imposed by the Treaties, but it is not forbidden either. Therefore, primary law leaves open the possibility to introduce the personal non-contractual liability for EU public officials, even by simply amending the SRs and the CEOS pursuant to article 336 TFEU.

The position of national officials implementing EU law is slightly different. As outlined in the previous chapters, there is no legal basis in the Treaties for this subject matter. Nonetheless, the EU could rely on its ordinary competences and stretch the principles of proportionality and subsidiarity in order to lay down rules governing the personal liability of national officials when they are involved in the implementation of EU law. By and large, such a solution would not be isolated in the administrative landscape, since the EU has already set out many procedural rules in the last years as to harmonize the judicial protection before national courts.

Finally, article 343 TFEU states that the EU officials enjoy the immunities within the territory of the Member States. However, such immunities are subject to some conditions better clarified in Protocol no. 8, which empowers the Council to adopt a regulation specifying which categories of officials actually enjoy the immunities. In other words, the officials concretely enjoying this status are not determined by primary but rather by secondary law. In practice, this specification is made by the Regulation (Euratom, ECSC, EEC) No 549/69, that already rules out, for example, the staff of

Europol that works within the Joint Investigation Teams. Such a solution could be extended also to the other occasions in which EU officials perform joint operations with national staff, such as in the cases of Frontex, EBA and ESMA. For the European Delegated Prosecutors belonging to EPPO such a solution would not be as easily applicable as to the other bodies, since the EDPs perform quasi-judicial operations and thus must enjoy a *sui generis* status, unlike the other EU public officials.

7. *Streamlining the powers of the EU*

To improve the regime of the European civil service and to make it more consistent with the systematic premises of the EU administrative order as a whole it is not sufficient to amend secondary law, but it is probably also desirable to modify some provisions of the Treaties as to streamline the powers of the EU in this field. There are in particular two issues to be tackled. The first problem concerns the legal sources of the EU officials and other servants, so to say the SRs and the CEOS; second, it is probably necessary revising the competences of the EU in the field of national civil service systems.

Starting from the first point, the previous chapters have highlighted that the EU officials and the other servants are subject to a patchwork of legal acts. Spanning from the SRs and the CEOS to the general provisions implementing the Statute (GPI) and considering even national sources in specific circumstances, the rules concerning EU officials and other servants are spread across several sources. Moreover, the status of EU officials is kept aside from the one of national officials. For instance, the directives adopted in the field of social policy do not apply to EU officials, unless the SRs and CEOS do refer to them. This «segregation» of EU officials from the other civil servants within the EU is hardly justifiable in light of the tasks lately performed by the former. Therefore, an important step forward would be to uniformize the status of EU officials and national ones, by providing that the social provisions applicable to the latter must be automatically extended to the EU officials as well. This would not only foster the coherence of the system, but would also constitute an incentive to the free movement and thus the exchange between national and EU bodies.

As regards the second point, so to say the necessity to review the set of competences of the EU in the field of national civil service systems, it is worth noting that, unlike the other federal system examined above, the EU already has far-reaching powers to influence the development of national civil service systems within the Member States.

The boundaries of the intervention of the EU are basically traced by the principles of proportionality and subsidiarity and, to some extent, by the necessity to respect the national identity of the Member States pursuant to article 4 TEU. However, such a framework is hard to reconcile with the foundations of the EU, because the principles just outlined are unlikely to be enforced by the Court of Justice to strike down EU acts. The result is that the institutional autonomy of the Member States is somehow watered down and therefore the Union can easily govern the regime of national civil servants. This would not be a problem, if only the political accountability followed such a shift in legislative competences. It would be thus desirable to open a debate at academic level on the opportunity to revise the competences of the EU in this regard, alternatively by ratifying the current practice or by counteracting it. To this end, comparative analysis could be helpful and the EU could consider transplanting the German framework of competences that concern the public employment.

Bibliography

Accetto and Zleptnig, “The Principle of Effectiveness: Rethinking its Role in Community Law”, (2005) European Public Law, p. 374-403;

Ackerman and Lindseth (Eds.) *Comparative Administrative Law* (Edward Elgar Publishing, 2010);

Albrecht and Kuchenhoff, *Staatsrecht*, (Erich Schmidt Verlag, 2024);

Ales, Bell, Deinert and Robin-Oliver (Eds.) *International and European Labour Law* (Bloomsbury Publishing, 2018);

Andreone, "Hiérarchie des normes et sources du droit de la fonction publique de l'Union européenne", (2015) Cahiers du GRASP, p. 61 ;

Andreone, "La sélection, le recrutement et l'engagement des fonctionnaires de l’Union européenne", (2019) Revue de l'Union européenne, p. 626 ;

Andreone, "Le comité interinstitutionnel du statut : simple organe consultatif ou garant des principes fondamentaux de la fonction publique communautaire?", (2010) Revue française d'administration publique, p. 105-118 ;

Andreone, "Typologie des actes et cadre juridique de la fonction publique de l’Union européenne", (2016) Revue de l’Union européenne, p. 588 ;

Arzos Santisteban, “La autonomía institucional y procedimental de los Estados Miembros en la Unión Europea: mito y realidad” (2013) Revista de Administración Pública, p. 159-197;

Ashiagbor, “The New Economic Governance of the Eurozone”, (2004) European Public Law, p. 305-332;

Auby and Dutheil de La Rochère (Eds.) *Traité de droit administratif européen* (Bruylant, 2022);

Baker, “The Spending Power After NFIB v. Sebelius”, (2014) Harvard Journal of Law & Public Policy, p. 71;

Baraggia, *La condizionalità come strumento di governo negli Stati compositi*, (Giappichelli, 2023);

Barnard, *The Substantive Law of the EU The Four Freedoms*, 7th ed. (OUP, 2022);

Baroni, “L'azione di rivalsa sui dipendenti per responsabilità extracontrattuale delle Istituzioni europee”, (2008) Rivista italiana di diritto pubblico comunitario, p. 1105-1122;

Barrocu, *La procura europea: dalla legislazione sovranazionale al coordinamento interno*, (Wolters Kluwer, 2021);

Bartolini, Cippitani and Colcelli (Eds.) *Dictionary of Statuses within EU Law* (Springer, 2019);

Battini, *Amministrazione senza Stato. Profili di diritto amministrativo internazionale*, (Giuffrè, 2003);

Becker, “Application of Community Law by Member States’ Public Authorities: Between Autonomy and Effectiveness” (2007) Common Market Law Review, p. 1035-156;

Bekke, Perry and Toonen, *Civil service systems in comparative perspective*, (Indiana University Press, 1996);

Bellacosa and De Bellis, “The Protection of the EU Financial Interests Between Administrative and Criminal Tools: Olaf and Eppo”, (2023) Common Market Law Review, p. 15–50;

Benoit, "Réflexions sur une fonction publique européenne. Le statut-type élaboré par la Conférence gouvernementale pour la fonction publique européenne", (1967) Annuaire français de droit international, p. 587-606 ;

Blom-Hansen, *The EU Comitology System in Theory and Practice Keeping an Eye on the Commission?*, (Palgrave Macmillan, 2011);

Blumann and Dubouis, *Droit institutionnel de l'Union européenne*, 6th ed. (LexisNexis, 2016);

Bodiguel, “La fonction publique européenne”, (1995) Revue Internationale des Science Administratives, p. 501-522 ;

Bonelli, “Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature” (2019) Review of European Administrative Law, p. 35-62;

Bostock, “Coreper Revisited”, (2002) Journal of Common Market Studies, p. 215-234;

Bowett, “Tenure, Fixed Term, Secondment from Governments: The United Nations Civil Service and the European Civil Service Compared”, (1982) in New York University Journal of International Law and Politics, p. 799-806;

Bradley, “The application of the Charter of Fundamental Rights in EU staff law”, (2014) in ERA Forum, p. 561-574;

Briffault, “Public Finance in the American Federal System: Basic Patterns and Current Issues”, (1996) Columbia Journal of European Law, p. 533-556;

Bulman-Pozen and Gerken, “Uncooperative Federalism”, (2009) The Yale Law Journal, p. 1256;

Calcara “The Role of Experts in the European Defense Agency: An Emerging Transgovernmental Network”, (2017) European Foreign Affairs Review, 377–392;

Cameron, “Establishment of the European Union Civil Service Tribunal”, (2006) Law and Practice of International Courts and Tribunal, p. 273-284.

Can, Hofmann, Ip and Lindseth (Eds.) *The Oxford Handbook of Comparative Administrative Law* (OUP, 2021);

Caranta, “La responsabilità “solidale” di Europol per la divulgazione di dati sensibili”, (2024) Giornale di diritto amministrativo, p. 479-484;

Carinci and Tenore (Eds.), *Il pubblico impiego non privatizzato*, IV, (Giuffrè, 2007);

Cassagnabère, "La fonction publique de l'Union européenne. Un statut de crise, mais pas de crise du statut", (2014) Actualité Juridique Droit Administratif, p. 776

Cassese (Ed.) *Trattato di diritto amministrativo* I (Giuffrè, 2003);

Cassese and Pellew, “Il sistema del merito nel reclutamento della burocrazia come problema storico”, (1987) Rivista trimestrale di diritto pubblico, p. 756-770;

Cassese, “Il sistema amministrativo europeo e la sua evoluzione”, (1991) Rivista trimestrale di diritto pubblico, p. 769-774;

Cassese, “La nozione comunitaria di pubblica amministrazione”, (1996) Giornale di diritto amministrativo, p. 915-923;

Cassese, “Stato-nazione e funzione pubblica”, (1997) Giornale di diritto amministrativo, p. 88-92;

Cassese, von Bogdandy and Huber (Eds.) *The Max Planck Handbooks in European Public Law: The Administrative State* (OUP, 2017);

Chalmers and Arnull (Eds.) *The Oxford Handbook of European Union Law* (OUP, 2015);

Chiti (Ed.) *Diritto amministrativo europeo*, (Giuffrè, 2018);

Chiti and Franchini, *L’integrazione amministrativa europea*, (il Mulino, 2003);

Chiti and Greco (Eds.) *Trattato di diritto amministrativo europeo*, (Giuffrè, 2007);

Chiti, “An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies”, (2009) Common Market Law Review, p. 1398;

Chiti, “Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies”, (2004) European Law Journal, p. 402-438;

Chiti, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, (CEDAM, 2002);

Civil Service Commission, *History of the Federal Civil Service – 1789 to the Present*, (US Government Printing Office, 1941);

Coombes, *Towards a European Civil Service*, (Chatham House, 1968);

Corwin, “The Passing of Dual Federalism”, (1950) Virginia Law Review, p. 1-24;

Craig, “Subsidiarity: A Political and Legal Analysis”, (2012) Journal of Common Market Studies, p. 72-87;

Craig, *EU Administrative Law* 3rd ed. (OUP, 2019);

Cross, “Building a European Diplomacy: Recruitment and Training to the EEAS”, (2011) European Foreign Affairs Review, p. 447–464;

Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, (OUP, 2009);

Davies, “Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time”, (2006) Common Market Law Review, p. 63-84;

De Bellis, “Multi-level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?”, (2021) German Law Journal, p. 416-440;

De Witte, “The European Union’s Covid-19 Recovery Plan: the Legal Engineering of an Economic Policy Shift”, (2021) Common Market Law Review, p. 635-682;

De Zwaan, *The Permanent Representatives Committee. Its Role in the European Union Decision-Making*, (Elsevier, 1995);

Della Cananea, “Cooperazione e integrazione nel sistema amministrativo delle comunità europee”, (1990) Rivista trimestrale di diritto pubblico, p. 655-702;

Demmke, “Die Europäisierung der öffentlichen Dienste – zwischen nationaler Souveränität und Rechtsangleichung”, (2005) Zeitschrift für Tarif-, Arbeits- und Sozialrecht des öffentlichen Dienstes, p. 2-14;

Den Boer and Bruggeman, “Shifting gear: Europol in the contemporary policing era”, (2007) Politique européenne, p. 77-91;

Dermine, "The Planning Method: an Inquiry into the Constitutional Ramifications of a New EU Governance Technique", (2024) Common Market Law Review, p. 959-992;

Dermine, *The New Economic Governance of the Eurozone* (Cambridge University Press, 2022);

Di Martino, "Does the European Union's rule of law require the criminalisation of EU public officials? A first appraisal", (2024), European Law Journal, p. 1-16;

Di Mascio, "Semestre europeo e riforme amministrative in Italia", (2020) Rivista italiana di politiche pubbliche, p. 227-246;

Didczuhn, *Der Grundsatz der proportionalen föderalen Parität*, (Nomos, 1990);

Dotson, "A General Theory of Public Employment", (1956) in Public Administration Review, p. 197-211;

Dreier (Ed.) *Grundgesetz-Kommentar*, (Mohr Siebeck, 2018);

Dubouis, "Fonctionnaires et agents des Communautés européennes", (1983) Revue trimestrielle de droit européen, p. 86-146 ;

Dubouis, "L'évolution de la fonction publique communautaire concorde-t-elle avec celle des Communautés Européennes?", in Mélanges offerts à Pierre-Henri Teitgen (A. Pedone, 1984), p. 127-143 ;

Elazar, *The American Partnership: Intergovernmental Co-Operation in the Nineteenth-Century United States*, (The University of Chicago Press, 1962);

Eliantonio and Marique, "Comparative administrative law in Europe: State-of-the-art overview and research agenda" (2023) in Maastricht Journal of European and Comparative Law, p. 702-703;

Ellis and Watson, *EU Anti-Discrimination Law*, 2nd ed. (OUP, 2012);

Ellis, "Social Advantages: a New Lease of Life?", (2003) Common Market Law Review, p. 639-659;

European Commission, *A comparative analysis of non-discrimination law in Europe 2023*, (Publications Office of the European Union, 2024);

Everson, Monda and Vos (Eds.), *European agencies in between Institutions and Member States* (Wolters Kluwer, 2014);

Feld, "The Civil Service of the European Communities: Legal and Political Aspects", (1963) Journal of Public Law, p. 68-85;

Friedrich, Beyer, Spero, Miller and Graham (Eds.) *Problems of the American Public Service* (McGraw-Hill Book Company, 1935);

Fuentetaja Pastor, "La función pública comunitaria como contrapunto a la tendencia laboralizadora en Europa", (1995) Documentación Administrativa, p.325-345;

Fuentetaja Pastor, "La reforma de la funciòn pùblica europea", (2005) in Revista de Derecho Comunitario Europeo, p. 751-780;

Gauer, *Die Reform des Europäischen öffentlichen Dienstrechts*, (Carl Heymanns Verlag, 2007);

Geiger, Khan and Kotzur (Eds.) *European Union Treaties. A Commentary* (Beck, 2015);

Gentile, "Effective judicial protection: enforcement, judicial federalism and the politics of EU law" (2022) European Law Open, p. 1-16;

Gkliati, "Shaping the Joint Liability Landscape? The Broader Consequences of WS v Frontex for EU Law", (2024) European Papers Insights, p. 78;

Govaere and Vandersanden (Eds.) *La fonction publique Communautaire* (Bruylant, 2008);

Grabbe, *The EU's Transformative Power*, (Palgrave Macmillan, 2006);

Gravier, "The 2004 enlargement staff policy of the European Commission: the case for representative bureaucracy" (2008) Journal of Common Market Studies, p. 1025-1048;

Guild and Mitsilegas, "Taking the normative foundations of EU criminal law seriously: The legal duty of the EU to criminalise failure to rescue at sea", (2023) European Law Journal, p. 502-504;

Harlow, Leino and Della Cananea (Eds.) *Research Handbook on EU Administrative Law* (Edward Elgar Publishing, 2017);

Hartnett, "Distinguishing Permissible Preemption from Unconstitutional Commandeering", (2000) Notre Dame Law Review, p. 352;

Heintzen and Uhle (Eds.) *Neuere Entwicklungen im Kompetenzrecht* (Duncker & Humboldt, 2014);

Heitsch, *Die Ausführung der Bundesgesetze durch due Länder*, (Mohr Siebeck, 2001);

Hepp, *Bildungspolitik in Deutschland*, (Verlag für Sozialwissenschaften, 2011);

Hoffmann, "Die Standardsetzung der Bund/Länder-Arbeitsgemeinschaften – zulässige informelle Gesetzeskonkretisierung?", (2023) Neue Zeitschrift für Verwaltungsrecht, p. 984;

Hofmann and Türk (Eds.) *EU Administrative Governance* (Edward Elgar Publishing, 2006);

Hofmann, Rowe and Türk (Eds.) *Specialized Administrative Law of the European Union: A Sectoral Review* (OUP, 2018);

Hofmann, Rowe and Türk, *Administrative Law and Policy of the European Union*, (OUP, 2011);

Houben, "The Merger of the Executives of the European Communities", (1965-1966), Common Market Law Review, p. 37–89;

Huber and Voßkuhle (Eds.) *Grundgesetz-Kommentar* (Beck, 2024);

Isensee and Kirchhof (Eds.) *Handbuch des Staatsrechts. Band VI: Bundestaat* (C.F. Müller Verlag, 2008);

Jacob, "Les Nouvelles dispositions générales d'exécution de la Commission européenne: des modifications ai régime actuel ou l'amorce d'une politique nouvelle?", (2018) Revue du droit de l'Union européenne, p. 51-90 ;

Jamar and Wessels (Eds.) *Community Bureaucracy at the Crossroads* (De Tempel, 1985);

Jans, de Lange, Prechal and Widdershoven, *Europeanisation of Public Law*, (Europa Law Publishing, 2007);

Jung, *Die Zweispurigkeit des öffentlichen Dienstes*, (Duncker & Humboldt, 1971);

Kahl and Ludwigs (Eds.) *Handbuch des Verwaltungsrecht* (Müller, 2022);

Kämmerer, "Europäisierung des öffentlichen Dienstrechts", (2001) Europarecht, p. 47;

Kaufhold, "Complete, yet limited: The guarantee of independence for National Regulatory Authorities in the energy sector: Commission v. Germany" (2022) Common Market Law Review, p. 1853–1892

Kawik, Dechmann, Krauser and Pflüger, *Beamtenrecht*, (Beck, 2023);

Kellerbauer, Klamert and Tomkin (Eds.) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP, 2019);

Kellough and Nigro (Eds.), *Civil Service Reform in the States*, (State University of New York Press, 2006);

Kincaid, "From Cooperative to Coercive Federalism", (1990) The Annals of the American Academy of Political and Social Science, p. 139-152;

Klabbers (Ed.) *The Cambridge Companion to International Organizations Law* (Cambridge, 2022);

Klaß, *Die Fortentwicklung des deutschen Beamtenrechts durch das europäische Recht*, (Nomos, 2014);

Kraemer, “The European Union Civil Service Tribunal: a New Community Court Examined After Four Years of Operation”, (2009) Common Market Law Review, p. 1873–1913;

Kuykendall and Facer, “Public Employment in Georgia State Agencies”, (2002) Review of Public Personnel Administration, p. 133-145;

Lassalle, “Contribution à une théorie de la fonction publique supranationale”, (1957) Revue de droit publique et de la science politique en France et a l’étranger, p. 474-512;

Lawson, “The Rise and Rise of the Administrative State”, (1994) Harvard Law Review, p. 1231;

Lecheler, "Die „hergebrachten Grundsätze des Berufsbeamtentums“ in der Rechtsprechung des Bundesverfassungsgerichts und des Bundesverwaltungsgerichts", (1978) Archiv des öffentlichen Rechts, p. 349-382;

Lemos, "State Enforcement of Federal Law", (2011) New York University Law Review, p. 708;

Lenaerts and Verhoeven, “Towards a Legal Framework for Executive Rulemaking in the EU? The Contribution of the New Comitology Decision”, (2000) Common Market Law Review, 645–686;

Lenders, Peters, Weber, Grunewald and Lösch, *Das Dienstrecht des Bundes*, (Luchterhand Verlag, 2013);

Lindemann, *Allgemeine Rechtsgrundsätze und europäischer öffentlicher Dienst. Zur Rechtsprechung des Europäischen Gerichtshofs in Personalsache*, (Duncker & Humboldt, 1986) ;

Lindstedt, “Developing the Duffy Defect: Identifying Which Government Workers are Constitutionally Required to Be Appointed”, (2011) Missouri Law Review, p. 1143;

Lottini, *Principio di autonomia istituzionale e pubbliche amministrazioni nel diritto dell'Unione Europea* (Giappichelli, 2017);

Lutze, *Die Stellenausschreibung im Beamtenrecht*, (Duncker & Humboldt, 2023);

Magiera and Siedentopf (Eds.) *Das Recht des öffentlichen Dienstes in den Mitgliedstaaten der Europäischen Gemeinschaft* (Duncker & Humboldt, 1994);

Mariotto and Franchino, “L’attuazione delle raccomandazioni specifiche all’Italia dal 2002 al 2018”, (2020) Rivista italiana di politiche pubbliche, p. 159-186;

Mauer, *Allgemeines Verwaltungsrecht*, (Beck, 2024);

Mazuyer, “Critical Analysis of ECJ Case Law on Fixed-Term Contracts in the Public Sector”, (2014) European Labour Law Journal, p. 334-348;

Mégret, Waelbroeck, Louis, Vignes, Dewost and Schwartz (Eds.), *Le Droit de la Communauté économique européenne : commentaire du traité et des textes pris pour son application. Dispositions générales et finales*, (Edition de l'Université de Bruxelles, 1987) ;

Meier, Wrinkle and Polinard, “Representative Bureaucracy and Distributional Equity: Addressing the Hard Question” (1999) The Journal of Politics, p. 1026;

Merusi, “Autorità indipendenti”, in *Enciclopedia del diritto – Aggiornamento*, VI, (Giuffrè, 2002);

Michelmann, “Multinational Staffing and Organizational Functioning in the Commission of the European Communities”, (1978) International Organization, p. 477-196;

Minucci, “Verso un ampliamento delle competenze dell’EPPO?”, (2024) Il diritto dell’Unione europea, p. 7;

Mitsilegas, Bergström and Konstadinides (Eds.) *Research Handbook on EU Criminal Law* (Edward Elgar Publishing, 2016);

Monnet, *Memoirs*, (Doubleday & Company, 1978);

Muns (Ed.) *Adjustment, Conditionality and International Financing* (IMF, 1984);

O’Leary, “Applying principles of EU social and employment law in EU staff cases”, (2011) European Law Review, p. 769-797;

Oeter, *Integration und Subsidiarität im deutschen Bundestaatsrecht*, (Mohr Siebeck, 1998);

Oliver, “South Dakota v. Dole: the Federalist Revolution Undermined and States Coerced”, (2006) Georgetown Journal of Law and Public Policy, p. 595;

Olivi and Santaniello, *Storia dell’integrazione europea. Dalla guerra fredda ai giorni nostri*, 3rd ed. (il Mulino, 2015);

Page, *People Who Run Europe*, (OUP, 1996);

Panara, “Subsidiarity v. Autonomy in the EU”, (2022) European Public Law, p. 269-296;

Pechstein, “Wie können di Länder ihre neue beamtenrechtliche Kompetenzen nutzen?”, (2006) Zeitschrift für Beamtenrecht, p. 285;

Pendergast, “Roles and Attitudes of French and Italian Delegates to the European Community”, (1976) International Organization, p. 669-677;

Perillo and Giacobbo Peyronnel (Eds.), *Statut de la fonction publique de l'Union européenne*, (Bruylant, 2017) ;

Petersen and Chatziathanasiou, "Balancing Competences? Proportionality as an Instrument to Regulate the Exercise of Competences after the PSPP Judgment of the Bundesverfassungsgericht", (2021) European Constitutional Law Review, p. 314-334;

Pilorge-Vrancken, *Le droit de la fonction publique de l'Union européenne*, (Bruylant, 2017).

Pinelli, "Conditionality and Economic Constitutionalism in the Eurozone", (2019) Italian Journal of Public Law, 22-42;

Plecnik, "Officers under the Appointments Clause", (2014) Pittsburgh Tax Review, p. 201-240;

Prechal, "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes", (2004) Common Market Law Review, p. 533-551;

Raimondo, *The European Integrated Border Management* (Hart, 2024);

Reinert, "Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model", (2010) Stanford Law Review, p. 809-862;

Reithmann, "Europäisches Dienstrecht und Gericht für den öffentlichen Dienst der Europäischen Union: Überblick über die letzten zehn Jahre", (2015) Zeitschrift für Beamtenrecht, p. 217-238;

Reithmann, *Die dienstrechtliche Fürsorgepflicht in der Rechtsprechung des Gerichts für den öffentlichen Dienst der Europäischen Union*, (Nomos, 2019);

Riehle, "'20 years of Joint Investigations Teams (JITs) in the EU': An overview of their development, actors and tools", (2023) ERA Forum, p. 163–167;

Ritleng (Ed.) *Independence and Legitimacy in the Institutional System of the European Union* (OUP, 2016);

Rivellini, "Pubblico impiego nazionale e condizionalità europea", (2023) Diritto pubblico europeo rassegna online, p. 850-866;

Rogalla, *Dienstrecht der Europäischen Gemeinschaften*, (Carl Heymanns Verlag, 1981);

Rosenbloom, "The public employment relationship and the Supreme Court in the 1980s", (1988) Review of Public Personnel Administration, p. 49-65;

Rosenbloom, *Federal Service and the Constitution*, (Georgetown University Press, 2014);

Rossi, *International Law Immunities and Employment Claims. A Critical Appraisal*, (Hart, 2021);

Saggio, “Le système de la promotion des fonctionnaires des Communautés européennes: réflexions sur certaines orientations de la jurisprudence”, (1992) Rivista di diritto europeo, p. 543-557 ;

Saltari, *Amministrazioni nazionali in funzione comunitaria*, (Giuffrè, 2007);

Sari, “The European Union Status of Forces Agreement (EU SOFA)”, (2009) Journal of Conflict & Security Law, p. 353–391;

Sassi, *Il lavoro nelle amministrazioni pubbliche tra ordinamento europeo e ordinamenti nazionali*, (Giuffrè, 2007);

Savino, *I comitati dell’Unione europea*, (Giuffrè, 2005);

Scheinman, “Some Preliminary Notes on Bureaucratic Relationships in the European Economic Community”, (1966) in International Organization, p. 750-773;

Schmidt, *Allgemeines Verwaltungsrecht*, (Gasberg bei Bremen, 2022);

Schnapp, "Mischverwaltung im Bundesstaat nach der Föderalismusreform", (2008) Juristische Ausbildung, p. 241;

Scholten (Ed.) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023);

Scholten, “Mind the trend! Enforcement of EU law has been moving to ‘Brussels’”, (2017) Journal of European Public Policy, p. 1348-1366;

Schröder. "Die dienstrechtliche Rechtsprechung des Gerichtshof der Europäischen Gemeinschaften in den Jahren 1955-1971", (1972) Zeitschrift für Beamtenrecht, p. 15-20;

Schütze, “From Rome to Lisbon: “executive federalism” in the (new) European Union”, (2010) in Common Market Law Review, p. 1385-1427;

Schütze, *European Constitutional Law*, (Cambridge University Press, 2012);

Schwartz, Corrada, Brown and West, *Administrative Law*, (Wolters Kluwer, 2018);

Schwarze, *European Administrative Law*, (Sweet and Maxwell, 1992);

Schwob, *Les organes intégrés de caractère bureaucratique dans les organisations internationales*, (Bruylant, 1987) ;

Siegel, “Commandeering and Its Alternatives: A Federalism Perspective”, (2006) Vanderbilt Law Review, p. 1629;

Sisk, “Recovering the Tort Remedy for Federal Offifficial Wrongdoing”, (2021) Notre Dame Law Review, p. 1789-1834;

Smith, “The European Economic Community and National Civil Servants of the Member States. A Comment”, (1973) International Organization, p. 563-568;

Sommermann, Fraenkel-Haeberle and Krzywoń (Eds.), *The Civil Service in Europe: A Research Companion* (Routledge, 2024 forthcoming);

Stern, Sodan and Möstl (Eds.), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund* (Beck, 2022);

Stirn, *Vers un droit public européen*, 2nd ed. (LGDJ, 2015);

Strauß, *Funktionsvorbehalt und Berufsbeamtentum*, (Duncker & Humboldt, 2000);

Sullivan, “Unconstitutional Conditions”, (1989) Harvard Law Review, p. 1413-1506;

Sunstein, “Constitutionalism after the New Deal”, (1987) Harvard Law Review, p. 421-510;

Sunstein, “Is There an Unconstitutional Conditions Doctrine?”, (1989) San Diego Law Review, p. 337-345;

Sześciło, “Challenging Administrative Sovereignty: Dimensions of Independence of National Regulatory Authorities Under the EU Law” (2021) European Public Law, p. 191-216;

Taillefait, *Droit de la function publique*, 9th ed. (Dalloz, 2022);

Tews, *Auswirkungen der Föderalismusreform auf das öffentliche Dienstrecht*, (Kovac Verlag, 2022);

Tizzano (Ed.) *Trattati dell'Unione Europea*, (Giuffrè, 2014);

Tofan, “European civil service. The principles of the legal framework in force”, (2013) Juridical Tribune, p. 250-258;

Tremml, Karger and Luber, *Der Amtshaftungsprozess*, (Franz Vahlen München, 2009);

Tridimas, “The general principles of EU law and the Europeanisation of national laws”, (2020) Review of European Administrative Law, p. 5-31;

Ullrich, *The Law of the International Civil Service Institutional Law and Practice in International Organisations*, (Duncker & Humboldt, 2018);

van Creynenbreugel and Wildemeersch (Eds.) *Selected Issues in European Business Law* (Bruylant, 2023);

Van Vooren, “A Legal-Institutional Perspective on the European External Action Service”, (2011) Common Market Law Review, p. 491;

Vandersanden, "Vers une harmonisation des differents systemes de fonction publique européenne", (1975) Uniform Law Review, p. 60-66 ;

Vandersanden, “La réforme administrative de la Commission”, (2005) Cahiers de droit européen, p. 285-350 ;

Vartolomei, "Aspects of legal regime applicable to the secondment national experts to the EU institutions and bodies regulated by the law no. 105/2012”, (2012) Perspectives of Business Law Journal, p. 315-319;

Verhoeven, “The ‘Costanzo Obligation’ and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?” (2010) Review of European Administrative Law, p. 23-64;

Viță, “Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality”, (2017) Cambridge Yearbook of European Legal Studies, p. 116-143;

Viterbo, “Legal and Accountability Issues Arising from the ECB’s Conditionality”, (2016) European Papers, p. 501-531;

Voetelink, “The Eu Sofa: The European Union Status of Forces Agreement”, (2005) Military Law and Law of War Review, p. 17-38;

Volpato, *Delegation of Powers in the EU Legal System*, (Routlege, 2022);

Vos, “EU Agencies, Common Approach and Parliamentary Scrutiny”, (2018) European Parliamentary Research Service (doi: 10.2861/656418);

Weber, "Die Grundrechte in europäischen Beamtenrecht", (1978) Zeitschrift für Beamtenrecht, p. 326-333;

Weiss, “European Labour Law in Transition from 1985 to 2010”, (2010) The International Journal of Comparative Labour Law and Industrial Relations, p. 3-16;

Werres, "Der Beamte als Grundrechtsträger – unter besonderer Berücksichtigung der Religionsausübungsfreiheit", (2006) Zeitschrift für Beamtenrecht, p. 288;

Wessel, “Immunities of the European Union", (2014) International Organizations Law Review p. 395-418;

West, “Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence”, (2017) The Yale Law Journal Forum, p. 42-61;

Wichmann and Langer, *Öffentliches Dienstrecht*, (Kohlhammer, 2014);

Williams, “Unconstitutional Conditions and the Constitutional Text”, (2024) University of Pennsylvania Law Review, p. 747-827;

Wittreck, “Der Amtshaftungsanspruch nach Art. 34 S. 1 GG/§ 839 I 1 BGB”, (2013) Juristische Ausbildung, p. 1215;

Wolfrum, *Max Planck Encyclopedias of International Law* (OUP, 2013);

Zannoni, “Il regime linguistico dei concorsi dell’Unione europea”, (2015) Rivista del commercio internazionale, p. 703-735;

Ziller, "Das öffentliche Dienstrecht aus der Perspektive der vergleichenden Verwaltungswissenschaft", (2006) Die Öffentliche Verwaltung, p. 233-241;

Zimmerman, "National-State Relations: Cooperative Federalism in the Twentieth Century”, (2001) Publius: The Journal of Federalism, p. 15.