

Transnational Administration: International Data Transfers under the European Privacy Directive

Francesca Bignami*

In the European Union, a dizzying array of institutional arrangements exist for the implementation of the common policies set out in the Treaties and secondary instruments.¹ Policymakers and scholars have classically identified two modes of European administration: administration of select policy areas such as competition by the Commission (direct administration) and administration of the rest by national governments, with no or little interference from above (indirect administration).² The powers exercised by the Commission are unknown in other international regimes, given the reluctance in virtually every other part of the world to cede the sovereignty necessary to institute such a supranational body. The administrative powers exercised by member states, however, are typical of most international regimes, the World Trade Organization, the Council of Europe, and the Climate Change Convention, just to name a few.

Over the past couple of years, attention has shifted to a new and varied set of institutional processes designed to curb national discretion in the second form of European administration, that is, indirect administration.³ European legislation often imposes requirements on national authorities, such as independence from the executive branch and the duty to consult interest groups. Member states are subject to extensive

* Associate Professor, Duke University School of Law. I would like to thank George Christie, Donald Horowitz, Robert Keohane, Christopher Schroder, and Giulio Vesperini for their comments.

¹ In anticipation of the adoption of the draft Constitution for Europe, this article uses “European Union,” “European,” and “Union,” rather than “European Community” and “Community.” Also in line with the draft Constitution, secondary instruments known individually as directives, regulations, and decisions, where appropriate, are referred to collectively as “legislation” or “law.”

² See Jurgen Schwarze, *The Convergence of the Administrative Laws of the EU Member States in The Europeanisation of Law: The Legal Effects of European Integration* (Francis Synder ed., 2000).

reporting duties, so that the Commission can monitor their track records on rulemaking and enforcement and, in extreme cases of non-compliance, step in with proposals for new European legislation or with enforcement actions. A series of European agencies have been established, not to replace domestic administration, but rather to serve as an alternative for firms which are dissatisfied with the national mechanisms for granting, say, European new drug approvals and European trademarks. Lastly, in a number of areas, directives and other secondary instruments have instituted an elaborate sequence of administrative decisions, known as "mixed" or "composite" administration. Through this process, national authorities, engaging in indirect administration, promulgate rules and bring enforcement actions, but are checked and, in some instances their decisions reversed, by the Commission and other member states.

This article analyzes mixed administration through a detailed case study of the operation of the European Data Protection Directive in Italy.⁴ For purposes of this article, a mixed procedure is an administrative process, established by Treaty or European legislation, in which national and European administration share responsibility for a single determination of rights and duties under European law.⁵ The determination might, to draw on categories familiar in systems of domestic administrative law, be specific to an individual or firm, i.e. administrative adjudication, or be generally applicable to a class

³ See *The Europeanisation of Administrative Law: Transforming National Decision-Making Mechanisms* (Karl-Heinz Ladeur ed., 2002).

⁴ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. L 281/31 [hereinafter the "Data Protection Directive"].

⁵ It should be noted that my definition of mixed administration includes only those areas in which administrative authority is truly shared, not policy areas in which authority is exercised almost exclusively at the national level, by member state authorities. This definition, therefore, excludes instances where national authorities implement European norms with only minimal supervision from the Commission, either through the Commission's power to prosecute for breach of European law, or the power of prosecution in conjunction with national notification duties, duties which improve the Commission's ability to detect breaches. This narrow definition of mixed administration allows me to focus attention on one of

of firms or individuals, i.e. administrative rulemaking. The procedure is structured similar to a judicial hierarchy: national authorities make the initial decision which is then reviewed by European administration, generally consisting of the Commission and a committee of national representatives who decide by qualified majority vote (comitology committee). This administrative architecture is highly unusual, even in a federal system like Germany in which legislative and administrative authority, including administrative rulemaking and enforcement, is generally split between federal government on the one hand and Länder governments on the other. The operative verb in this characterization of the German system is split, not share, as in the case of the EU. While the German government has many tools for supervising Länder authorities, serving as an appeals body for administrative decisions is not one of them.⁶

The article proceeds in four parts. First, I analyze the mixed procedure for transfers of personal information to third countries as it appears on the face of the Data Protection Directive. Second, I describe the experience with the procedure in the brief period from implementation of the Data Protection Directive to the present day and conclude that it has not yet come to life. Third, I suggest that the sharing of administrative responsibility creates special problems for democratic accountability and, to a lesser extent, individual rights. This conclusion rests largely on the actual practice of third country data transfers rather than on the formal process laid down in the Directive. Decisionmaking on third country transfers has been characterized by informality and failure to act, forms of administrative action which are notoriously difficult for courts to

the most unusual and least explored elements of European governance, the sharing of responsibility for single public decisions among EU and national authorities.

⁶ See generally David P. Currie, *The Constitution of the Federal Republic of Germany* (1994) 69-76.

police. Yet political accountability, which in domestic systems generally compensates for the lack of judicial review, is weak in the European Union.

Lastly, I turn to the larger puzzle of why member states sometimes decide to retain administrative authority for themselves, i.e. classic indirect administration, and other times decide to share it with the Commission and other member states sitting in comitology committees. Data protection is a policy area in which member states have preferred, on balance, to administer European law with little interference from the Commission, rather than institute mixed procedures.⁷ I draw on political science literature on European integration and the theory of credible commitments to offer an explanation for this choice. My review of the history of the Directive suggests that the choice in favor of national sovereignty was driven by radical disagreement among the member states on the data protection issue. Because views on the importance of information privacy as a civil liberty differed significantly among member states, both those in favor and those opposed to information privacy resisted the transfer of policymaking authority to a supranational forum in which the other side might prevail. In the words of the political science literature, the common interest in privacy was too feeble, preferences too varied, for member states to credibly commit themselves to a future stream of decisions through a joint administrative apparatus.

1. Mixed procedure in European data protection law

1.1. The Data Protection Directive

⁷ In referring to the policy area, I use “data protection,” “information privacy,” and “privacy” interchangeably.

The Data Protection Directive contemplates mixed procedures in two instances, both of which relate to external trade. Under the Directive, member states are required to ensure that third countries to which personal data are transferred provide "an adequate level of protection" for the data.⁸ A mixed procedure is triggered in two distinct circumstances: a national privacy authority finds that a third country fails to ensure an adequate level of protection and decides to block a transfer or, conversely, a national privacy authority decides to permit a transfer to an inadequate country because special protections are in place.

Take the example of a country with a problem with identity theft because its regulators fail to require rigid security measures of data processors. In the first type of mixed procedure, a national privacy authority which discovered the problem would be obliged to make a finding of inadequacy and block transfers of personal information to that country. That same privacy authority would be required to report its finding to the Commission, which in turn could initiate a procedure to block data transfers to that third country throughout the Union or could enter into negotiations with the third country with an eye to improving privacy protection.⁹ The Directive contemplates a Commission decision of adequacy upon completion of the negotiations, which would be valid for all member states, although in theory and in practice the Commission decision can come at any time and not necessarily as the final stage of bilateral negotiations. Whenever the Commission takes action in this domain it must act through a comitology committee of member state representatives and must seek the opinion of the working party of national

⁸ Data Protection Directive, art. 25.1.

⁹ Id. at art. 25.3-25.5.

data protection authorities.¹⁰ Both courses of action are entirely discretionary, meaning that even though a member state may find that its citizens' privacy rights are abused by a third country, the Commission may or may not require that other member states also block data transfers to that third country and may or may not enter into negotiations with that third country.¹¹ Furthermore, both decisions may be initiated by the Commission alone, not exclusively by the member states, and therefore they do not necessarily represent the culmination of a mixed procedure.

The second mixed procedure involves the decision to allow data transfers to inadequate third countries. Even if a third country does not guarantee an adequate level of privacy protection, member states may authorize transfers on six separate grounds listed in the Data Protection Directive.¹² Member states are permitted to authorize transfers on additional grounds, not specifically enumerated in the Directive, but, in such cases, they must notify the Commission and the other member states. To return to the example of a country with identity theft problems, a member state might decide to permit a transfer if there is a contract rendering the receiving party liable in tort for any loss or

¹⁰ Id. at arts. 31 & 30.1(b). The committee of member state representatives is a management committee, meaning that a qualified majority of the national regulators on the committee is required to oppose a Commission decision and send the decision to the Council for a vote. In regulatory committees, by contrast, only a blocking minority of national regulators is necessary to force the Commission to send the decision to the Council. In other words, in the data protection area, national regulators on the committee influence the Commission, but not to the same extent as they do in fields with regulatory committees.

¹¹ The Commission's citizen rights guide explains the procedure in the following manner:

Where a non-EU country does not ensure an adequate level of protection, the Directive requires the blocking of specific transfers. Member States must inform the Commission of any such blocking measures, and this triggers a Community procedure to ensure that any Member State's decision to block a particular transfer is either extended to the EU as a whole, or reversed.

European Commission, Data Protection in the European Union, p. 12, available at: http://europa.eu.int/comm/internal_market/en/dataprot/guide.htm.

¹² Art. 26.1. Those grounds are: the data subject has consented to the proposed transfer; the transfer is necessary for performance of a contract between the data subject and the controller; the transfer is necessary for performance of a contract between the controller and a third party for the benefit of the data subject; the transfer is justified on public interest grounds or for purposes of a lawsuit; the transfer is

theft of the personal information. That decision would have to be notified to the Commission and the other member states.¹³ If either the Commission or another member state objected to the transfer, the matter would be taken up by the Commission and the comitology committee, which then would make the final decision on whether to permit the transfer.

1.2. Italian implementing legislation

Italy enacted legislation implementing the Data Protection Directive in 1996 and subsequently promulgated a number of amending regulations.¹⁴ In 2003, the entire corpus of legislation was systematized and modified slightly in the Personal Data Protection Code.¹⁵ The legal duties in the Directive and the Italian implementing law operate as standards which data users are expected to follow or else face administrative action and judicial sanctions. Personal data users are not required, for the most part, to submit their data processing operations to the national privacy authority for review and approval before the operations may commence.

The reliance upon legal duties and sanctions rather than licensing and screening applies to transfers to inadequate third countries. The data controller is bound by the duty to stop transfers of data to inadequate third countries:

[I]t shall be prohibited to transfer personal data that are the subject of processing from the State's territory to countries outside the European Union, temporarily or not, and in any form and by any means whatsoever, if the laws of the country of destination or transit of the data do not ensure

necessary to protect the "vital interests" of the data subject; and the transfer is from a data base to which the public routinely has access because of national laws on access to documents.

¹³ Data Protection Directive, art. 26.

¹⁴ Law n. 675 of 31 December 1996; Legislative decree n. 51 of 26 February 1999; Legislative decree n. 467 of 28 December 2001.

¹⁵ Legislative decree n. 196 of 30 June 2003.

an adequate level of protection of individuals. Account shall also be taken of the methods used for the transfer and the envisaged processing operations, the relevant purposes, nature of the data and security measures.

Art. 45. If the Italian Personal Data Protection Authority (“Garante”) suspects that a data controller has breached this duty, it may undertake an investigation and impose certain restrictions on, or block altogether, future data transfers of the same type.¹⁶ Failure to comply with an administrative injunction of this sort can lead to criminal prosecution and imprisonment of three months to two years.¹⁷ Moreover, individuals harmed by the transfer of their personal information in violation of the law, may sue for material damages as well as emotional distress (*danni non-patrimoniali*).¹⁸ Lastly, in extreme cases the Garante can refer breaches to the public prosecutor, who may bring a criminal prosecution for imprisonment between one and three years.¹⁹ Any administrative or judicial decision to impose a sanction for transfer to an inadequate third country would have to be notified to the European Commission under the Data Protection Directive.

Tracking the Directive, the Italian law enumerates exceptions to the ban on transfers to third countries with inadequate privacy safeguards.²⁰ The Italian legislation also provides that the Garante may allow such transfers on grounds other than those specifically enumerated in the legislation, such as privacy-protecting contractual terms.²¹ These exceptions can come either in the form of an individual authorization, giving a data user assurances, in advance of a particular transfer, that the Garante will not take enforcement action or in the form of a block authorization, permitting certain classes of

¹⁶ Personal Data Protection Code, art. 154.

¹⁷ Id. at art. 170.

¹⁸ Id. at art. 15.

¹⁹ Id. at art. 167.2 (“Any person who, with a view to gain for himself or another or with intent to cause harm to another, processes personal data in breach of . . . [Article 45] . . . shall be punished by imprisonment for between one and three years if harm is caused, unless the offence is more serious.”)

²⁰ Id. at art. 43.

transfers. As described above, under the Data Protection Directive, such exceptions must be notified to the European Commission and the other member states and may give rise to objections from other member states or the Commission, objections which would then trigger a comitology procedure.

2. Experience with the mixed procedure for international data transfers

To date, the Commission has issued adequacy decisions for five countries: Hungary, Switzerland, the United States, Canada, and Argentina.²² In the case of the United States, the decision applies not to the overall regulatory framework for privacy protection but to certain "Safe Harbor Principles" which, if respected by exporting firms, guarantee compliance with Directive's adequacy requirement. The Commission has also issued two decisions specifying standard contract clauses which guarantee privacy rights notwithstanding an inadequate public regulatory regime.²³ The Garante has implemented all of these decisions, with the exception of the Argentina adequacy determination, through block authorizations (*autorizzazioni generali*).²⁴ Italian firms and public entities which export to Hungary, Switzerland, Canada, or the United States, respecting the Safe Harbor Principles, or include the standard clauses in their contracts, can rest assured that they are in compliance with Italian data protection law. (Under European law, the same applies to Argentina since individuals may rely on the Commission's Argentina decision

²¹ Id. at art. 44.

²² Commission Decision 2000/519/EC, 2000 O.J. L 215/4 (Hungary), Commission Decision 2000/518/EC, 2000 O.J. L 215/1 (Switzerland), Commission Decision 520/2000/EC, 2000 O.J. L 215/7 (United States), Commission Decision 2002/2/EC, 2002 O.J. L 2/13 (Canada), Commission Decision 2003/490/EC, 2003 O.J. L 168/19 (Argentina).

²³ Commission Decision 2001/497/EC, 2001 O.J. L 181/19; Commission Decision 2002/16/EC, 2002 O.J. L 6/52.

even in the absence of an Italian implementing act.) In addition, the working party of European privacy authorities, established under Article 29 of the Directive, has issued an opinion on Australia, finding that its data protection regime is inadequate in certain respects.²⁵ The Commission has entered into discussions with Australia to secure additional privacy safeguards.²⁶

When the Data Protection Directive was first drafted it was expected that an assessment of privacy in third countries would be made initially by member state authorities and then, over time, any dissatisfaction would percolate up to the Commission. As the national regulators on the Council's working party said in the negotiations on the Directive:

[This article] gives a certain degree of flexibility to the member states. Initially, it is for them to decide, following procedures that they will choose themselves, on the adequate level of protection in third countries, taking into account certain criteria enumerated in [Article 25.2]. In a later phase, a Community procedure will be launched in order to ensure a common approach which is well-structured in this area.²⁷

Yet no member state has ever notified the Commission, pursuant to Article 25 of the Directive, of a decision to block a data transfer because of adequacy problems.²⁸ Each of the Commission adequacy decisions surveyed above was initiated by another actor: the

²⁴ In June 2003, the regime for data processing in Argentina was recognized as adequate and presumably the Garante will implement the Commission decision in the same fashion as the other four. See Commission Decision 2003/490/EC, 2003 O.J. L 168/19 (Argentina).

²⁵ See Opinion 3/2001 on the level of protection of the Australian Privacy Amendment (Private Sector) Act 2000, January 26, 2001, DG MARKT 5095/00 WP 40.

²⁶ E-mail communication from European Commission, DG Markt, Unit Data Protection (Dec. 18, 2002).

²⁷ Rapport du Groupe des questions économiques (Protection des données) en date des 6/7 octobre 1994 au Comité des Représentants Permanents, Bruxelles le 18 octobre 1994, Council Doc. 9957/94, p. 12.

²⁸ E-mail communication from European Commission, DG Markt, Unit Data Protection (Dec. 18, 2002).

Commission or the third country itself.²⁹ Therefore the first of the mixed procedures established under the Data Protection Directive is, in practice, a dead letter.

The second mixed procedure, the authorization of transfers to inadequate third countries, has seen more use but still is insignificant in light of the volume of international transactions with countries without information privacy legislation or with only minimal public protections. According to figures reported in December 2002, on seventeen occasions, national authorities have notified the Commission of authorizations to export personal information to third countries without an adequacy finding.³⁰ Most of these have involved transfers under contracts which the national data protection authority found to guarantee individual privacy rights. Spain has shown itself to be the most active in the area, with eight notifications, followed by Finland with four, Portugal with three, and Germany and the Netherlands each with one. None of these notifications, however, have resulted in further, European-wide action, since neither the member states nor the Commission raised objections which would trigger a comitology procedure.

The Commission has recognized that the joint administration of privacy in the international trade context is disappointing. In a report on the implementation of the Data Protection Directive issued in May 2003, it was critical of national enforcement.

According to the Commission:

²⁹ In the case of Argentina, the Argentinian government sought an adequacy decision from the Commission. See Opinion 4/2002 on the level of protection of personal data in Argentina, October 3, 2002, DG MARKT 11081/02/EN WP 63, at 2. The Commission initiated adequacy proceedings for Switzerland and Hungary because both had ratified the Council of Europe Convention, thus providing prima facie evidence of adequacy, and both showed some interest in obtaining adequacy decisions. In the case of Canada and the United States, both governments initiated discussions with the Commission with an eye to avoiding trade disruptions. See e-mail communication from European Commission, DG Markt, Unit Data Protection (Dec. 18, 2002).

³⁰ E-mail communication from European Commission, DG Markt, Unit Data Protection (Dec. 18, 2002).

many unauthorised and possibly illegal transfers are being made to destinations or recipients not guaranteeing adequate protection.³¹

It called the number of notifications under the second of the mixed procedures, i.e. Article 26, “derisory by comparison with what might reasonably be expected.”³² The Commission believes that transfers to countries without adequate privacy safeguards are being made and that national authorities have failed to clamp down, either by prohibiting the transfers or by requiring special guarantees. In a subsequent letter, the Commission urged national privacy authorities to ensure that authorizations, allowing export of personal information to inadequate third countries, are notified to the Commission and other member states.³³ In other words, the Commission called upon national administrations to put into practice the second of the mixed procedures foreseen in the Directive. The Commission identified three related goals: improving the level of protection for Europeans’ personal information outside of the Union, increasing awareness among national regulators and the Commission of the circumstances surrounding third country transfers, and facilitating the exchange of best practices when personal information is sent to inadequate third countries.

3. Individual rights and democratic accountability

3.1. The theory of mixed administration

In the following section, I analyze mixed procedure from the perspective of traditional administrative law values of individual rights and accountability to elected

³¹ Report from the Commission: First report on the implementation of the Data Protection Directive (95/46/EC), COM(2003) 265 final at p. 19 (May 15, 2003).

³² Id.

officials. The analysis is divided into two parts. In the first, the fate of rights and accountability in mixed administration, as it is designed to operate under the letter of the Data Protection Directive, is scrutinized. In the second part, I undertake the same exercise, but this time for the actual practice of mixed procedure, which departs significantly from the letter of the Data Protection Directive.

For purposes of clarity, the sequence of decisionmaking is summarized below, organized under the Directive's provisions on third country transfers.

Domestic Phase

Article 25 (Transfer to adequate third countries)

(1) An administrative decision to block a particular data transfer or enjoin future data transfers based on a finding that the third country is inadequate. Technically, this would be issued as an order (*provvedimento*) of the Garante.³⁴

Article 26 (Exceptions to the adequacy principle)

(2) An administrative decision to authorize a data transfer based on a finding that the particulars of the transaction will guarantee privacy, regardless of the adequacy of the third country's privacy laws. This would be issued by the Garante as an authorization (*autorizzazione*).³⁵

(3) An administrative rule authorizing certain types of transfers, regardless of the adequacy of the third country's privacy laws. This would be issued by the Garante as a general authorization (*autorizzazione generale*).³⁶

European Phase

Article 25 (Transfer to adequate third countries)

Commission negotiations with the third country found "inadequate" by the Garante leads to a change in the country's privacy regime and the Commission

³³ Note from the Commission to Member States and Data Protection Authorities, Markt/E4/LCN/ck D (2003) 270 (Aug. 21, 2003), available at http://europa.eu.int/comm/internal_market/privacy/docs/lawreport/notification-art-26_en.pdf.

³⁴ Data Protection Code, art. 154.

³⁵ Id. at art. 44

³⁶ Id.

acting in conjunction with the working party and comitology committee issues a decision finding that the country is "adequate."

The Garante gives effect to the Commission decision with a rule (*autorizzazione generale*) allowing transfers to the third country to which transfers previously prohibited.

Article 26 (Exceptions to adequacy principle)

Commission, acting in conjunction with the comitology committee, issues a decision finding that the safeguards deemed by the Garante to guarantee privacy are not protective enough.

The Garante gives effect to the Commission decision by revoking the specific authorization (*autorizzazione*) permitting a third country transfer or the general authorization (*autorizzazione generale*) permitting a class of transfers.

If individual rights are taken to mean the opportunity to participate in administrative determinations and the ability to challenge such determinations in an independent judicial forum, mixed procedure in the privacy area is not problematic. Generally speaking, a strong right to participate in administrative decisionmaking does not exist in continental legal systems.³⁷ Rather, individual rights are protected through the availability of review in an independent forum, which in countries like Germany is part of the judiciary and in countries like France and Italy is a separate branch of government administration. In Italy, however, over the past decade there has been a trend towards greater proceduralization of the administrative process. A law passed in 1990 guarantees the right of participation in administrative adjudications: affected individuals have a right to examine the administrative record, submit written arguments

³⁷ On the traditional approach, see Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, 9 Eur. Pub. L. 563, 566 (2003).

and evidence, and receive a decision in writing which gives reasons and shows that their position has been considered.³⁸

The Garante adheres to the requirements of the 1990 law.³⁹ Therefore, a firm which considered that, contrary to the Garante's belief, a third country did offer adequate protections (first type of administrative action) or that a contract was protective of privacy rights (second type of administrative action) would have the opportunity to persuade the Garante in an administrative proceeding. Even in rulemaking, which in Italian and continental law more generally is considered a matter of discretionary policymaking and does not give rise to legal rights of individual participation, the Garante has a reputation for consulting the community of interested individuals and firms. Therefore a firm or individual with opinions on a rule prohibiting or permitting a certain class of transfers (third type of administrative action) would probably be heard, albeit in a very loose sense of the word.

If the Garante's determination triggers review by the Commission and a comitology committee, or, in other words, triggers the European phase of the administrative proceeding, individual participation would be guaranteed only if the European determination turned on the particular facts of an individual data transfer.⁴⁰ This would most likely arise where the Garante had approved a foreign transfer based on a contract submitted by an individual firm (second type of administrative action). Otherwise, neither the Data Protection Directive nor the general background provisions disciplining comitology require that individuals be allowed to make submissions or argue

³⁸ Law n. 241/1990. See Aldo Sandulli, *Il Procedimento*, 2 *Diritto Amministrativo Generale* 1031 (Sabino Cassese et al. eds., 2000).

³⁹ See Regolamento n. 1 of 28 June 2000, G.U. serie generale n. 162 of 13 July 2000.

⁴⁰ See Technische Universitat Munchen, C-269/90, 1991 E.C.R. I-5469.

their case before the Commission or the committee. Thus, if an Italian determination involving a general assessment of a third country's adequacy (first type of administrative action) or a model contract (third type of administrative action) were then submitted to European-wide review, individuals would not have a right to participate. In the absolute, this might be objectionable, but if the benchmark is the state of affairs at the national level in the absence of mixed procedure, the lack of participation is not particularly disturbing. As discussed above, there has never been a strong right of participation in administrative proceedings in Italy, especially in what is considered discretionary policymaking, which covers the vast majority of what Union institutions decide in the privacy area. The lack of procedural guarantees in the European phase of mixed procedure is not a cause for concern.

Judicial review, which in the continental tradition bears most of the burden of guaranteeing that individuals are fairly treated by government administration, is also fairly robust in the formal operation of mixed administrative proceedings. Although there is, as of yet, no practical experience in Italy with the procedure for international information transfers, it is clear that judicial review would be available under standard principles of Italian administrative law.⁴¹ Assume for the moment that the Garante's decision does not trigger a comitology proceeding. If the decision were of the first or second type, judicial review would be easy to obtain. The Italian concept of "legitimate

⁴¹ The Italian data protection legislation modifies the background administrative law system by specifying that all challenges to the Garante's decisions, regardless of whether they involve "subjective rights" or "legitimate interests" are to be brought in the civil courts. Data Protection Code, art. 152. Both "legitimate interests" and "subjective rights" serve as the functional equivalent of standing in American law but a distinction is drawn for purposes of allocating jurisdiction between the administrative courts and the ordinary, civil courts. The Italian data protection law therefore improves the availability of judicial review by avoiding the time-consuming process of deciding in which court--civil or administrative--to bring a suit. Furthermore, the civil courts are generally believed to be more rights friendly and less deferential to the

interest,” which serves as a functional equivalent of standing in American law, would cover a data-exporting firm’s financial interest in challenging a prohibition on a data transfer. Likewise, an individual would very likely be found to have the “subjective right” necessary to challenge the authorization of a particular data transfer because of the fundamental nature of privacy rights and the material injury and emotional distress which could result from the misuse of her private information.

If the decision were a rule giving the green light to a class of information transfers, however, it would be difficult to obtain judicial review (third type of administrative action). In Italian law, individuals are generally not believed to have interests which can be adversely affected by broadly constructed administrative action and vindicated through judicial review.⁴² They would have to wait until the rule was applied in a specific case, say the Garante denied an individual petition to stop a data transfer based on a general authorization. And even then, judicial review would be limited to the question of whether the general authorization was “illegal,” which is a very limited inquiry.

Now assume that the Garante's decision triggers a comitology proceeding, which results in an opposite determination. That is, the Italian authorities prohibit data transfers to a third country but, after negotiations and review by the Commission, that third country is found to be adequate. The Garante, therefore, is required to issue a general authorization permitting such transfers. Or the Garante authorizes certain transfers to "inadequate" third countries, which, on review by the Commission and comitology

government than administrative courts and hence individual rights should be better protected under this scheme.

⁴² Jacques Ziller, *Le contrôle du pouvoir réglementaire en Europe*, 9 *L'Actualité Juridique Droit Administratif* 635, 642 (1999).

committee, are found to lack adequate privacy safeguards. The Garante, therefore, is required to revoke the authorization. If an individual application for a transfer is at stake (second type of administrative act) then the Commission's reversal would be amenable to review, either in the Court of Justice or by way of a preliminary reference through the national courts in a challenge to the Garante's final decision. Otherwise, where the effect is a general, rule-like determination, the Commission's reversal would become amenable to review when applied, by the Garante, to permit or prohibit a specific third country transfer. The data subject, in the case of a transfer to a supposedly “adequate” third country, or the data user, in the case of the prohibition of a transfer under supposedly defective contractual guarantees, could go to court to object to the Garante’s enforcement decision and the Commission's determination on which it was based.

On balance, it does not appear that access to judicial review has been compromised by mixed administration. Although to a French or American eye the Italian law on access to judicial review might appear quite restrictive, the fact remains that administrative decisions may—or may not—be challenged whether the Garante acts alone or European administration also intervenes.⁴³ Likewise, intensity of judicial review, that is how carefully administrative decisions are scrutinized on substantive grounds of lawfulness, reasonableness, and so on, does not appear to suffer. Both Italian courts and the European Court of Justice give significant deference to administrative determinations and therefore the transfer of judicial review powers to the Court of

⁴³ For a comparison of the more liberal standing rules for challenging regulations in France as compared to Italy, see Jacques Ziller, *Le contrôle du pouvoir réglementaire en Europe*, 9 *L'Actualité Juridique Droit Administratif* 635, 640 (1999).

Justice, implicit in the preliminary reference procedure, does not appreciably lower standards of judicial review.

On accountability to elected officials, by contrast, mixed administration is weak. Say a trade union is unhappy with the experience of transfers of employee data abroad because it believes that, through the transfers, employers have been able to circumvent Italian labor laws and use the information to discriminate against employees. To which elected official does it complain? Can the union just complain to national parliamentarians and members of government or is a broader assault, perhaps through the European Trade Union Congress, on other governments and the European Parliament necessary? To choose, the trade union must determine whether the Garante alone, or also the European institutions, are responsible for the transfers abroad. And to do that, it would have to identify which administrative acts declaring certain countries adequate or certain types of transactions protective of privacy interests, were the true culprits and, within that set of acts, whether the Garante or the European process, was responsible for the determination. In a world of multiple variables and uncertain causation, this type of identification is generally impossible. Consequently, the performance of administrative agencies in domestic systems of accountability is generally evaluated through track records. Yet, in this hypothetical, it is entirely unclear whether the track record to blame is the Italian one or the European one.

3.2. The practice of mixed administration

The reality of European privacy administration alters significantly the normative assessment, both on the rights and accountability scores. The law of mixed procedure, as

set down in the Data Protection Directive, presumes an orderly succession of administrative decisions: the Garante issues a decision, which is reviewed by the Commission and comitology committee and results in another decision, which, depending on the outcome, is followed by a final Italian implementing act. This has proven to be pure fiction. The record does not contain one single episode of this kind. Rather, on international data transfer issues, the Italian approach, like that of most other national data protection authorities, has been to wait and see. The Garante has not used its power to block or authorize data transfers. This is to the detriment of both data subjects, whose privacy rights are not protected when their information is sent abroad, and data users, which operate under conditions of legal uncertainty. In the language of American administrative law, the Garante has failed to act.

Action, instead, has come from EU institutions, and it has come in two forms. First, the Article 29 working party of data protection authorities has developed common criteria for evaluating third country adequacy and contract clauses. These common criteria are informal, taking the form of opinions,⁴⁴ working documents,⁴⁵ and unwritten consensus among the members of the working party. Second, as reviewed above, the Commission and comitology committee have issued formal decisions on third countries and model contracts.⁴⁶

Inaction and informal action are both problematic in administrative law. Neither is susceptible to judicial review. Courts are generally aware of their institutional limits and are reluctant to dictate a particular course of action for an agency. By definition,

⁴⁴ See, e.g., Opinion 3/2001 on the level of protection of the Australian Privacy Amendment (Privacy Sector) Act 2000, 26 January 2001, DG MARKT 5095/00 WP 40.

⁴⁵ See Transfers of personal data to third countries: applying Articles 25 and 26 of the EU data protection Directive, 24 July 1998, WP 12.

informal action is difficult to discern, and even when it is identifiable, courts are reluctant to deprive agencies of this flexible mode of action by imposing ordinary standards of judicial review, which require a high level of proof and justification. When administrative action takes the form of inaction or informal action, the political process rather than courts must police for arbitrariness and illegality. A government authority which fails to take the action necessary to implement certain statutory mandates or which informally implements the statute contrary to public opinion can expect to face pressure from elected officials.

The problem with the mixed procedure for international data transfers is twofold. First, the sharing of powers between national and European authorities appears to have generated even more of the judicially immune form of administrative action than is normally the case in purely national policymaking. National authorities, rather than experiment based on their domestic experiences with information privacy, and block or authorize certain transfers, have preferred inaction.⁴⁷ Because it is so difficult to anticipate the threats to individual privacy and devise measures that will adequately safeguard privacy rights once the information leaves the EU, national data protection commissioners have chosen to transfer responsibility to the European process. The European process, however, is inherently slow, meaning that inaction can persist for long periods, and the type of administrative action it tends to generate is informal. The

⁴⁶ See Section Two of this paper.

⁴⁷ The lack of local experimentation is surprisingly, as it runs contrary to the expectations of some of the literature on European governance. See, e.g., Joanne Scott & David Trubeck, *Mind the Gap: Law and New Approaches to Governance in the EU*, 8 *Eur. L. J.* 1 (2002). Under certain circumstances it is predicted that different approaches to the same policy problem will emerge and will eventually lead to the adoption of best practices as well as the continuation of beneficial plurality, suited to local differences. The negotiations that led to the adoption of the Data Protection Directive show that the drafters intended for the mixed procedure to foster precisely this form of experimentalism. National regulators, however, have preferred to shift responsibility for this thorny policy area to the EU rather than experiment locally.

agreement generated in a few e-mail exchanges among data protection regulators or the consensus in a working document or opinion is not subject to judicial review.

The second problem with the European administrative process is that political accountability, which generally compensates for the inability of courts to police administrative inaction and informal administrative action, is weak. As argued above, the sharing of authority means that it is unclear which administrations and which elected politicians should bear the brunt of public dissatisfaction. Moreover, if the EU process is to blame, a European-wide campaign is extremely costly and difficult to mount, even for an organized group like labor, which, unlike many other interest groups, has a European-wide federation, the European Trade Union Congress. In sum, the administrative practice of third country transfers is low on both judicial and political oversight, thus compromising administrative law ideals of rights and political accountability.

4. Explaining the administrative architecture of the Data Protection Directive

Curiously, with the exception of international data transfers, mixed administration is missing from the architecture of European privacy law. There were many areas in which mixed administration could have usefully harmonized national application of the Data Protection Directive.⁴⁸ The following section reviews a branch of political science

⁴⁸ In fall 2002, the Commission called for comments on the implementation of the Data Protection Directive. The companies and trade associations that responded were unanimous in calling for greater uniformity among the member states in their application of the Directive. See Bundesverband der Deutschen Industrie, Joint position on the online consultation by the European Commission (DG Internal Market) on application of the Data protection directive 95/46/EC, September 4, 2002 (calling for greater uniformity on the question of whether personal data covers both natural persons and firms, on conditions for obtaining consent, on a firm's place of establishment for purposes of determining applicable law, and on notification procedures); Confederation of British Industry, Comments on Directive 95/46 re data protection (calling for greater uniformity on obtaining consent); UNICE, Implementation of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data of 24 October 1995, August 30, 2002 (calling attention to disparities in levels of

research on the institutional dynamics of European integration and argues that the privacy case provides support for the theory that transfers of sovereignty only occur when governments wish to credibly commit to mutually beneficial policies.

Very briefly, the Directive follows the earlier Council of Europe Convention in imposing a number of requirements on those who collect, use, and transfer personal information. Personal data must be processed fairly and lawfully; personal information can be collected only for specific and legitimate purposes; the amount of information collected may not be excessive in relation to those purposes; personal data must be accurate; and information can be kept no longer than necessary to fulfill the original purpose of collection.⁴⁹ The Directive extensively elaborates on the original Council of Europe principles. It specifies the information which must be provided to individuals when their data is collected, the types of personal information which may and may not be collected, the circumstances under which that information may be used, and the rights of individuals in checking on their information. The Directive, however, allows member states considerable leeway in interpreting the substantive standards to which data processors are held.

The enforcement scheme contemplated in the Directive relies on a combination of notification, generally to the data protection authority, before commencing processing operations, authorization for operations defined by member states as posing special risks

data protection generally and definitions of consent and sensitive data in particular); Presentation of Prof. Dr. Büllesbach, Daimler Chrysler, September 30, 2002 (calling for uniformity on question of whether Directive protects both natural persons and firms, consent, sensitive data, establishment, notification requirements, and third country transfers); Covington & Burling, Comments on Implementation and Application of the 1995 Data Protection Directive (recommending uniformity in the definitions of personal data and establishment and calling for a greater role of Art. 29 Working Party in eliminating inconsistent interpretations at the national level). These comments may be found at: http://europa.eu.int/comm/internal_market/en/dataprot/lawreport/papers_en.htm.

⁴⁹ Directive, art. 6.

to privacy, and administrative and judicial enforcement of standards. As with the Directive's substantive provisions, member states enjoy considerable discretion in implementing the regulatory scheme. For instance, Italy has chosen to eliminate, with only a few exceptions, notification, and to make extensive use of authorization and administrative enforcement.

In all of these areas, the drafters of the Directive could have provided for mixed administration. The member states could very well have been required to notify the Commission of their rules and allow other member states and the Commission to object to the standards that went beyond the baseline set in the Directive.⁵⁰ Countries which require authorization for sensitive data could have been required to notify the Commission when they granted or denied authorizations. The same type of European procedure could have been put in place for national investigations and sanctions, as occurs in the food safety area⁵¹ and in the competition area.⁵² After all, a corporation which is alleged to have violated privacy rights in one member state might very well have violated them elsewhere, in which case the duty to inform is vital. Or the same investigation might be undertaken in multiple jurisdictions, creating the danger of contradictory decisions under the same provisions of the Data Protection Directive.

Why, then, this paucity of shared administrative responsibility? A number of political scientists have examined the institutional choices made in the Treaties and in

⁵⁰ This is not as speculative as it might seem on its face. In the free movement of goods area, the member states are required to notify the Commission of new technical standards and the Commission or other member states may object on the grounds that they create barriers to trade which are not justified for legitimate public policy reasons. See Council Directive 83/189/EEC, 1983 O.J. 109/8, arts. 8-9.

⁵¹ In the event of an outbreak of disease in livestock, national authorities must take protective measures and notify the Commission and other member states. If the Commission or other member states find the measures inadequate, the matter goes to a comitology procedure, and a more protective measure may be adopted. See Council Directive 90/425/EEC, 1990 O.J. L 224/29, art. 10.

secondary instruments such as directive and regulations.⁵³ Their research has addressed the following types of questions. Why did the original member states delegate powers of proposal and enforcement to the Commission and decide that, when voting in the Council, the decision rule would sometimes be unanimity, other times qualified majority? Why do some secondary instruments delegate rulemaking powers to the Commission alone, others to the Commission acting together with a committee of national regulators? And when the secondary legislation requires the Commission to act together with a committee of national regulators, why is the committee sometimes given significant power, i.e. regulatory or management committees, and sometimes given very little power, i.e. advisory committees? Although the political science literature has largely ignored the phenomenon of mixed administration, the same type of question can be asked: why do the member states sometimes retain powers of rulemaking and enforcement and other times choose to allow the Commission and other national regulators, sitting on comitology committees, to supervise and influence domestic administration through mixed procedure?

This is not the place to survey the burgeoning political science literature on EU institutional design. Suffice it to say that, within the rational choice school alone, a number of competing explanations have been advanced for delegations to supranational institutions.⁵⁴ According to some, supranational institutions offer superior information on technical policy matters, above and beyond what can be generated by national

⁵² Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, 1997 O.J. C 313/3, point 49.

⁵³ See, e.g., Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* 73 (1998); Mark A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU 19-74* (2003).

⁵⁴ For a masterful overview of the different theories, see Mark A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU 19-74* (2003).

administrations. In a closely related argument, Mark Pollack has found evidence that powers are delegated to the Commission and other European institutions when there is a need for speedy and efficient European-wide decisionmaking.⁵⁵ Giandomenico Majone and Andrew Moravcsik have separately advanced the hypothesis that transfers of power to the Commission or collective decisionmaking processes in the Council and comitology committees, through qualified majority voting, are driven by the need for credible commitments.⁵⁶ That is, in pursuing mutually beneficial policies such as free trade, the member states operate in a classic prisoner's dilemma game in which, over time, they might be tempted to defect from the free trade line. Hence, to reassure the other parties to the strategic interaction that they will not do so, member states commit themselves to the policy by giving powers of monitoring, sanctioning, and future decisionmaking to institutions with some degree of independence from national governments.

The information privacy case lends credence to neither the expertise nor the speed theories. Both would have predicted transfers of authority in the data protection area. Protecting individuals' personal data in the highly complex and rapidly changing field of information technology is not self-evident, and supranational mechanisms which afforded the prospect of more expert and speedier solutions should have been very attractive to the member states. This, however, did not occur in the Data Protection Directive. Rather, the member states which negotiated the Directive were extremely reluctant to transfer policymaking authority to the Union.

⁵⁵ Id. at 107.

⁵⁶ Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 *European Union Governance* 103 (2001); Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* 73 (1998).

The dearth of mixed procedures is consistent, instead, with the credible commitments theory. The Directive was highly contentious, with the result that even after five years of continuous negotiations, the text ultimately adopted was so open-ended that it could accommodate most of the existing differences among the member states. To put it slightly differently, strong agreement on privacy rights was not forged in the Directive. Since member states had radically different views on the importance of privacy as a civil liberty, they were in no rush to credibly commit to a future stream of decisionmaking through a joint administrative scheme. In other words, they did not have common interests in information privacy, or to the extent that they were common, the preference was weak and the pay offs from the cooperative strategy were low. Moreover, the policy on which they were in agreement, an internal market in personal data, did not appear to be threatened by disparate information privacy regulations at the national level. In the entire history of the policy area, which stretches back to the first German and Swedish legislation in the early 1970's, there exist only a handful of examples where one jurisdiction threatened to block an information transfer to another jurisdiction because of privacy concerns.⁵⁷

The bargaining history of the Directive contains significant evidence for this hypothesis. First, the record shows that the member states actively opposed the Commission's attempt to shift policymaking authority to European institutions, namely the Commission and comitology committees. Although the Commission originally

⁵⁷ The principal anecdote is a failed data transfer from France to Italy. Fiat-France wished to transfer employee information to Fiat headquarters in Italy but the transfer was blocked by the French privacy authority (CNIL). According to CNIL, the personal information of Fiat's French employees would not be adequately protected once transferred to Italy because, at the time, Italy did not have a data protection law. Only after Fiat-France and Fiat-Italy had signed a contract in which Fiat-Italy undertook to respect the French law on privacy, did CNIL permit the transfer. See Paul M. Schwartz, *European Data Protection Law and Restrictions on International Data Flows*, 80 *Iowa L. Rev.* 471, 491 (1995) (describing episode).

proposed an extensive role for joint administration, the member states subsequently reduced that role to a minimum.

The original version of the Directive, proposed by the Commission in 1990, gave the Commission rulemaking authority in all areas covered by the Directive.⁵⁸ Furthermore, an advisory committee was created to monitor the Commission, meaning that the member states would have had relatively little influence over the Commission.⁵⁹ Therefore, had the initial proposal gone through, the Commission would have been able to harmonize everything from notification and authorization processes to the specific requirements for obtaining consumer consent and securing personal data, with only a marginal role for the member states.

Over the course of the Council deliberations, however, the Commission's powers were significantly reduced. In the Council, the member state representatives who worked on the Directive for almost five years disagreed on many matters, but the Commission's powers was not one of them. From the very beginning, they were unanimous on the need for a stronger comitology committee of member states representatives to discipline the

⁵⁸ Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data, 1990 O.J. C 277/3, art. 29:

Exercise of rule-making powers

The Commission shall . . . adopt such technical measures as are necessary to apply this Directive to the specific characteristics of certain sectors having regard to the state of the art in this field and to the codes of conduct.

⁵⁹ *Id.* at art. 30. There are three types of committees of national representatives created to supervise the Commission when it implements Community legislation: advisory, management, and regulatory committees. The main difference is the degree of control they have over Commission decisionmaking. With an advisory committee, the Commission must simply "take into account" the committee's opinion. A management committee has a veto power over Commission decisions, meaning that it may vote against a Commission decision, while a regulatory committee has the power of assent, meaning that it must vote in favor of a Commission decision.

Commission.⁶⁰ Ultimately, a compromise was reached with the Parliament, generally more supportive of the Commission position, in which a management committee, with the power to veto the Commission's implementing measures, was instituted.⁶¹ Furthermore, towards the very end of the negotiations in the Council, at the point when the Directive was escalated from the technical working party to the Committee of Permanent Representatives, the Commission's executive powers were eliminated at France's insistence.⁶² All that was, and is, left, are the Commission's prerogatives in the area of international data transfers, namely the ability to make adequacy determinations and stipulate the conditions for transfers abroad. This signified the reduction of not only the Commission's powers but also the powers of the national authorities acting collectively on the management committee.

The member states also watered down the role initially contemplated for European administration in the area of third country transfers. As explained previously, the mixed procedure allows national regulators to authorize transfers to third countries

⁶⁰ Results of deliberations (travaux) of working party on "Economic questions" (Data protection) of September 19, 1991, Council Doc. 8268/91. At this meeting, a large number of member states advocated a regulatory committee. By late 1994, all of the member states, with the exception of Belgium, were in favor of the strongest form of regulatory committee (type IIIB), with Belgium advocating the slightly weaker form (type IIIA). See Summary Minutes from the 1628th meeting of the Committee of Permanent Representatives in Brussels, Thursday, November 14, 1994, Council Doc. 10957/94. The only difference between the two types of regulatory committee is that, if the committee does not give its assent and the Commission's proposed measure is sent to the Council, the Council may simply veto the measure rather than having to agree on an alternative to the Commission's measure.

⁶¹ Data Protection Directive, art. 31. The United Kingdom wanted to reject Parliament's amendment establishing a management committee as opposed to a regulatory committee, which would have required further negotiations with Parliament on a so-called "conciliation committee." However, the UK was out-voted by the other delegations. Summary Minutes of the 1662th meeting of the Committee of Permanent Representatives, First Part, Brussels, July 13, 1995, Council Doc. 9016/95 EXT 2(f)

⁶² Report of the Committee of Permanent Representatives of November 24, 1994 to the Internal Market Council of Ministers of December 8, 1994, Council Doc. 11369/94. In this report, COREPER pointed out that the Commission, under the currently existing version, had extensive powers of execution and that, in France's view, they should be eliminated. In the Council's version of the Directive, officially adopted on February 24, 1995, the Commission's general rulemaking authority had vanished. See Communication of the Commission to the European Parliament concerning the Council's common position, SEC (95) 303 final--COD 287, February 24, 1995.

and then gives the Commission and member states the opportunity to object. The initial versions of the Directive afforded greater protection for the right to object, giving European actors--the Commission and the member states--a greater role in the national decision on data transfers abroad. In the Commission's first proposal, a national decision to allow a transfer to an inadequate third country could only take effect ten days after notification to the Commission, to allow time for either the Commission or other member states to object before the transfer occurred.⁶³ In the Commission's second proposal, the ten-day guarantee was replaced by a vaguer duty to notify the Commission and other member states in "good time of its proposal to grant authorization."⁶⁴ By the time the Council had finished deliberating, the wait-and-see provision had disappeared altogether. Under the Directive, member states must simply notify the Commission *after* the authorization has been granted.⁶⁵ The record of the Council negotiations shows that this last modification was made after the UK, Denmark, Ireland, and Sweden objected that the third country procedure was too "heavy" and "bureaucratic."⁶⁶

Second, the negotiating history shows the extreme disagreement among national representatives on privacy policy, lending support to the hypothesis that the member states' opposition to shared administrative authority was driven by disagreement over substantive aims. On one extreme was the United Kingdom, supported to various degrees by Ireland, the Netherlands, Denmark, Finland, Norway, and Sweden. The

⁶³ Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data, 1990 O.J. C 277/3, art. 25.1.

⁶⁴ Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and the free movement of such data, 1992 O.J. C 311/30, art. 27.2.

⁶⁵ Data Protection Directive, art. 26.3.

⁶⁶ See COREER Report to the Internal Market Council, June 9, 1994, Council Doc. 7500/94; Working Document of Secretary General of the Council to the attention of the delegations, October 12, 1994, Council Doc. 9951/94; Report to the Working Party on Economic Questions, October 6/7, 1994, Council

Northern bloc did not see the need for a Data Protection Directive and would have preferred to simply rely on the Council of Europe Convention, which all member states, with the exception of Italy and Greece, had ratified and implemented. These member states opposed a number of vital aspects of the Directive: the inclusion of manual data in the definition of personal data, notification of data processing operations, authorization for sensitive data, the broad definition of sensitive data, the procedure for third country transfers, the right of individuals to access their information and object to its use, and the prohibition on decisions based exclusively on automatic data processing. Throughout, the Northern bloc criticized the Directive as bureaucratic, burdensome, and impractical. In the end, in fact, the UK opposed the Directive by abstaining from the final vote in the Council. On the other side was a bloc consisting of Italy, Belgium, Spain, and Luxembourg. The result was that principles such as authorization were retained in the final version of the Directive but they were written to allow for so many exceptions that member states could sidestep them entirely in their implementation of the Directive.

The last piece of evidence in the Council record for this explanation links opposition to common, European administration with a strong national view on privacy policy. The minutes from the Council indicate that France was the main proponent of eliminating the Commission's implementing powers.⁶⁷ France is a country with a long-standing tradition of data protection as a basic liberty, with an extensive government regulatory scheme. Although hardly dispositive, France's opposition is consistent with the credible commitment hypothesis. France opposed conferring powers on the Commission and committee of national regulators because its conception of privacy as a

Doc. 9957/94; Minutes from the 1628th meeting of COREPER, November 14, 1994, Council Doc. 10957/94.

basic liberty, guaranteed by a tough national regulatory scheme, was at odds with the approach elsewhere.

Because of the essential disagreement over the goals and means of data protection legislation, administrative responsibility in the privacy area rests with national administrations, not the Community institutions. Member states simply did not trust the Commission, acting with other member states, to protect privacy rights and strike the correct balance between civil liberties and the needs of information users, namely state administration and the market. Each member state still understands privacy rights differently and, given that the Directive made little headway toward a common definition, the member states were reluctant to establish a European administrative process which would, over time, develop such a definition.

Conclusion

The analysis of mixed administration in the data protection area has been driven by two distinct questions, one normative and the other empirical. First, does shared administrative responsibility between national and European institutions compromise traditional administrative law values of rights and democratic accountability? Second, why do countries decide in the first place to share policymaking authority with supranational actors rather than keep it for themselves, as is normally the case in international regimes? The answer to the first question is somewhat surprising. At least in Italy, the formal procedure for third country transfers does not compromise fairness but it does complicate accountability to the community of interested parties. More significantly, the actual practice of third country transfers, which is characterized by

⁶⁷ November 24, 1994, Council Doc. 11369/94.

failure to act and informal administrative action, poses a threat to values of fair and democratic administration. This type of administrative action is notoriously difficult for courts to police and the usual substitute, accountability of administrators to the political process, is extremely weak in the European Union. On the second question, the answer largely conforms with expectations of rational state behavior. Among the member states, there was very little agreement on information privacy and therefore they resisted relinquishing control and establishing a common, European administrative process. The interest that was shared—the free flow of electronic data in the internal market—did not require a strongly harmonized information privacy regime because the threat to trade caused by different national approaches was insignificant.

This case study holds possible lessons for other areas of European governance and other international regimes. Policymakers and national publics should take note of the prevalence of inaction and informal administrative action in international regimes. There certainly are advantages to supranational administration, for common solutions to international problems can be crafted on a regular basis, but there are also costs. When administrative authority is shared between national and supranational institutions, rights and political accountability suffer, rights because courts cannot discipline inaction and informal decisionmaking, political accountability because in the fragmented international system nationally elected politicians can avoid taking responsibility for collective, supranational decisionmaking.⁶⁸ The results of the causal inquiry can also be extended. When consensus on the substantive aims of policy emerges, countries can be expected to transfer executive authority to collective institutions, both in the EU and elsewhere.

⁶⁸ See Robert O Keohane & Joseph S. Nye, Jr., *Democracy, Accountability, and Global Governance* (2001).

