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The implementation of EU law by national administrations: Executive federalism and the principle of sincere cooperation

by

Rui Tavares Lanceiro*

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Abstract

This paper explores the similarities between the EU's system of administrative implementation of its legislative acts, and the German and American systems of administrative implementation of their respective federal laws. The article will also study the connection between the principle of sincere cooperation, established in the EU Treaties, and equivalent principles which exist in federal legal orders, namely the "Bundestreue" principle. The EU system appears to be closer to the German model of federalism than the US. Despite the federal inspiration, one cannot say that the principle of sincere cooperation is a federalising influence on the EU.

Key-words

executive federalism, European Union, principle of sincere cooperation, administrative implementation, European Union Law

1. The principle of sincere cooperation and the European Union

The principle of sincere cooperation is, in a general sense, linked to the creation of complex, decentralised, decision-making structures with different levels of action (and different actors) and, in particular, to the need to ensure coherence and harmony in the absence of a hierarchical relationship between these different levels. This principle has, as its common feature, a general duty of cooperation, which binds the various actors in relation to each other. In this sense, this principle is typically found in multilevel power structures, such as federations and, in some cases, supranational international organisations.

The European Union (EU) is a good example of one of these multilevel structures and the principle of sincere cooperation, expressly established in Article 4 (3) of the Treaty of the EU (TEU), is broadly recognised as a general principle of EU law, occupying a central role in its legal order. One can also find this principle and its normative content, which is inherent to the EU constitutional structure laid down in the Treaties, through the interpretation and the global (systematic) weighting of various EU primary law rules. It is a deductive effort of interpretation as opposed to a general principle of EU law extractable through a comparative effort of law (Kahl 2002: 446).

In this context, the principle of sincere cooperation guarantees the existence, through actions or restraint, of general mutual duties of respect, assistance, articulation, and non-contradiction – of coherence of action – between all the public entities covered by the EU legal order, both at the national level of Member States and at the supra-national EU level. The principle of sincere cooperation applies both horizontally, between Member States and between institutions, and vertically, between Member States and the EU, and covers all areas in which the EU has jurisdiction (although, in the area of the common foreign and security policy, taking into account the limitations of the jurisdiction of the CJEU, its development is non-existent).

Some of the most important premises of European economic and political integration are the harmonisation of the different legal systems (of the Member States and of the EU),

and cooperation between the legal entities involved, in order to achieve the objectives and goals established in the Treaties, without any of them losing their distinctive characteristics.

The realisation of the European integration project is ultimately based on the creation and maintenance of mutually loyal relations between the Member States and the EU. In EU law, because of the principle of sincere cooperation, the Member States and the institutions must adopt behaviour which is not only compatible with the Treaties' obligations but which ensures optimised compliance with them, with the EU legal order, and with the objectives of the Union.

In the absence of a general rule, expressly provided for in the Treaty, governing relations between Member States and the (then) European Communities, the CJEU recognised the principle of sincere cooperation, as a unifying legal principle, initially on Article 5 of the Treaty of the European Economic Community (TEEC), later Article 10 of the Treaty of the European Community (TEC) – and today, Article 4 (3) of the TEU. To the extent that this provision of the Treaty was understood as enshrining a general obligation, given its broad wording, it was left to the CJEU's case-law to build the substance of the principle and the general and specific co-operation duties which flowed from it to the various actors, in particular, the Member States.

The case-law of the CJEU on the principle of sincere cooperation has evolved through time (Kahl 2002: 441.). The stages of its case-law accompany the very evolution of the construction of the European project, and the very nature of litigation brought to the CJEU. At the outset, as the Member States controlled the Community legislative process, avoiding measures contrary to their interests through the central role of the Council; hence, non-compliance was not so much due to fundamental differences, but for reasons of convenience. However, with the evolution of the Treaties, and the legislative procedure rules (with the Council's loss of influence vis-à-vis the European Parliament, and amendments of rules on majority voting), non-compliance seems now to have become a strategy for some Member States. With the change to the initial balance, there seems to have been a need to affirm a cooperative relationship and a spirit of loyalty of Member States towards the EU and its institutions (Hirschman 1972: 19; Weiler 1991: 2464 ss.).

At the outset, the importance of Article 5 TEEC was not obvious. It appeared to be too generic a provision, and similar to many others in International Law. Thus, in the first

judgments in which the CJEU expressly referred to the provision, it did so as confirmation of arguments or conclusions which it had already reached, or in the context of the application of other principles or parts of the Treaty (Lang 2007: 1484; Klamert 2013: 65 ss.).

The *Deutsche Grammophon* judgment established a new line of case-law on the principle of sincere cooperation. In the decision, the Court stated that Article 5 TEEC establishes a "general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme" (ECJ, Case 78/70, *Deutsche Grammophon v Metro-SB-Großmärkte*, 1971 ECR 489, nº 5). Thus, while accepting the existence of a general duty of sincere cooperation, it would only bind the Member States, or institutions, to the extent that it is complemented by specific duties under EU law (see also ECJ, Case 9/73, *Schlüter v Hauptzollamt Lörrach*, 1973 ECR 1135, nº 39; Case 229/83, *Leclerc v "Au blé vert"*, 1985 ECR 1, nº 46 ss., nº 48; Case 231/83, *Cullet v Leclerc*, AG Opinion, 1984 ECR 306, nº 3, § 4; and Lang 1986: 505). Accordingly, Article 5 TEEC was not recognised as having an immediate or direct effect, given its general and imprecise nature, its indeterminate wording and the necessary discretion of the Member States, being dependent on the establishment of specific duties (ECJ, Case 9/73, *Schlüter v Hauptzollamt Lörrach*, 1973 ECR 1135, nº 39; Case 229/83, *Leclerc v "Au blé vert"*, 1985 ECR 1, nº 20; Case 44/84, *Hurd v Jones*, 1986 ECR 29, nº 46 ss.; and Kahl 2002: 449).

Gradually, the CJEU adopted a different approach. In a number of fisheries-related cases, motivated by measures adopted by the United Kingdom, the CJEU used Article 5 TEEC as a source from which to draw a set of duties applicable to Member States, such as the duty to provide information to the Commission and to act in accordance with the Community interest when it acts within the framework of this legal order (ECJ, Case 141/78, *French Republic v United Kingdom*, 1979 ECR 2923; Case 32/79, *Commission v United Kingdom*, 1980 ECR 2403 ; Case 804/79, *Commission v United Kingdom*, 1981 ECR 1045). The view that Article 5 of the EC Treaty, by its indeterminate and general nature, could not establish any direct duty to the Member States, eventually become obsolete (ECJ, Case C-213/89, *Factortame*, 1990 ECR I-2433; Case C-285/96, *Commission v Italian Republic*, 1998 ECR I-5935, nº 19; and Koopmans 1991: 502; Lück 1992: 107; Jarass 1994: 9; Kahl 2002: nº 15 ss; Danwitz 2008: 474-475, Bogdandy 2014: nº 10 ss.; Hatje 2012: nº 1).

The case-law of the CJEU has thus taken this Treaty provision as a way of reinforcing the effectiveness of other obligations under Community law, and as a basis for limiting the

exercise of powers by the Member States in the event of non-existence of a specific Treaty obligation (Constantinesco 1987: 110-11; Klamert 2013: 62 ss.). The Court started to allow an expansive force (or broad interpretation) of the general duty of cooperation envisaged in this provision, especially the obligation of each Member State to "*facilitate the achievement of the Union's tasks*" and to refrain to "*from any measure which could jeopardise the attainment of the Union's objectives*". For example, the Court held that "*if the implementation of a provision of the Treaties or of secondary community law or the functioning of the community institutions were impeded by a measure taken to implement* (…) *an agreement concluded between the Member States outside the scope of the Treaties* (…) *the measure in question could be regarded as contrary to the obligations arising under the second paragraph of Article 5 of the EEC Treaty*" (ECJ, Case 44/84, *Hurd v Jones*, 1986 ECR 29, nº 39; and Blanquet 1994: 306 ss.). Currently the prevailing view is that this provision, when certain requirements are met, may establish autonomous duties for Member States or for institutions not expressly provided for in EU law. Thus, even where there is no specific provision establishing a Member State's duty to cooperate, its conduct may still infringe the duty of sincere cooperation laid down in Article 4 (3) TEU.

Some examples will illustrate the evolution. First of all, in the context of Competition Law, in the words of the CJEU, "while it is true that Article [101 TFEU] is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness" – these are obligations for Member States, arising from the principle of sincere cooperation, which are not expressly provided for in the Treaty text (ECJ, Case 13/77, *INNO v ATAB*, 1977 ECR 2115, nº 31). In another example, the Court distinguished between the obligation to transpose directives, which derives directly from Article 288 TFEU, and the obligation to adopt a series of additional or consequential acts, whether normative or not, to ensure their application and effectiveness in the internal legal order, arising from Article 4 (3) TEU and the principle of sincere cooperation (Lang 2003: 1937-1938; Craig 1997: 519-538).

The wording of Article 4 (3) TEU is still extremely relevant in this matter. This rule consists of three paragraphs. The first paragraph establishes the duty of respect and mutual assistance between the Member States and the EU in "carrying out tasks which flow from the Treaties". In the second paragraph and in the first part of the third paragraph, we find

positive obligations (or general obligations) of the Member States regarding the EU. The former can be considered as an obligation of result - in the sense that the Member States must take measures capable of ensuring compliance with the obligations arising from Union law - and the latter an obligation of means - Member States are obliged to make available all the necessary means to "facilitate the achievement of the Union's tasks". In the second paragraph, we find a reference not only to the obligations arising from the Treaty, but also to acts of the EU institutions - legislative and non-legislative acts of all institutions. In the final part of the third paragraph a negative obligation (or general prohibition) can be identified, preventing Member States from adopting "any measure which could jeopardise the attainment of the Union's objectives".

This means that, in accordance with the principle of sincere cooperation, the Member States have the duty not only to implement EU law, but to ensure its effectiveness. Also, in this context, the duty to implement EU law covers the entire corpus of EU law (the French "bloc de légalité"), including all EU law (e.g. the EU Treaty and the TFEU) and all secondary legislation (e.g. international agreements EU, regulations, directives and decisions).

In so far as the principle of sincere cooperation involves a duty of the Member States to respect EU law and to assist the EU in the pursuit of its objectives, this results in a limitation of the Member State's autonomy. In fact, since the autonomy of the Member States has to be reconciled and balanced with its duty to cooperate with the EU, the principle of sincere cooperation can be seen as an integration tool (Pernice 1999: 742) and the counterpoint, to some extent, to the principle of autonomy of Member States (Moreno Molina 1998: 44; 2000: 152).

However, the principle of cooperation is two-way: not only are the Member States bound by it, but also the EU. It applies to the mutual relationship between them, also guaranteeing that the EU institutions are obliged to respect the autonomy of the Member States and to ensure the coherence of their joint action. This can also be seen in Article 4 (2) TEU, which establishes the duty of the Union to respect the national identity and diversity of the Member States.

EU institutions and bodies, in the decision-making processes, have a duty to take into account the Member State´s responsibilities and powers by virtue of the principle of sincere cooperation (Lenaerts *et al.* 2005: 415). The institutions must not neglect their duty to

cooperate with the Member States on the basis of their privileges and immunities, since they are of a purely functional nature (ECJ, Case C-2/88, *Zwartveld*, 1990 ECR I-4405, nº 21). This includes the powers of the Member States as members of EU institutions, such as the European Council or the Council. For example, the CJEU has on several occasions considered that the European Parliament should respect the power of the Member States in determining the seats of the institutions - directly or indirectly invoking the principle of sincere cooperation (ECJ, Case 230/81, *Luxemburg v European Parliament*, 1983 ECR I-255, nº 38; Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, 1986 ECR 1339, n.º 25; Case C-345/95, *French Republic v European Parliament*, 1997 ECR I-5215, nº 31). Likewise, in a situation where, in the absence of action by the Council, it is the Commission which acts, it must do so through effective cooperation with the Member States (ECJ, Case 325/85, *Ireland v Commission of the European Communities*, 1987 ECR 5041, nº 15-17). However, the CJEU has also ruled that the adoption of a legislative act by the Council could not result in breach of the duty to cooperate even if it were to run counter to the interests invoked by a Member State (ECJ, Case C-63/90 and C-67/90, *Portuguese Republic and Kingdom of Spain v Council of the European Communities*, 1992 ECR I-5073, nº 53). Thus, the regular exercise of the powers of the institutions cannot be regarded as an infringement of the principle of sincere cooperation.

Despite this mutual nature, it is undeniable that the case-law of the CJEU has more significantly developed Member States' duties of cooperation, support and respect of EU law, in particular the duty to implement EU law.

The scope of the principle of cooperation also encompasses the relationship between national and EU legal systems. In the absence of a specific Treaty rule governing the relationship, it is Article 4 (3) TEU which ultimately serves that purpose (Lang 2003: 1905-1906), guaranteeing the unity of the EU legal order.

Indeed, the autonomy of the various agents (Member States or EU institutions), and of the various legal systems, can pose a threat to the effective and coherent application of EU law throughout the single market. Legal and political conflicts between the agents, arising from the tension generated between the need for unity and their institutional autonomy, require the existence of adequate response mechanisms – and one of these mechanisms is the principle of cooperation. In providing a legal basis for the solution of possible normative conflicts and tensions between the several states' legal systems and the Union's legal system,

the principle of sincere cooperation has a function which is similar to, and indeed comparable with, the principles that, in a federation, regulate the relation between federal law and state law (ensuring the prevalence of former over the latter).

In the more specific dimension of the regulation of the action of the administrations of the Member States and of the EU it is the principle of sincere cooperation which lends the EU its constitutional and administrative cooperative nature (Kahl 2002: 445; also Häberle 1978: 141-177; Schmidt-Aßmann 1996: 270–301).

2. Administrative implementation of EU law and the principle of sincere cooperation

The duty of the Member States to implement EU law falls on all their public bodies and powers. There are legislative, judicial and administrative spheres of implementation of EU law. The rules applicable to the first two cases are not, however, easily applicable in the third case.

Regarding the legislative power, when, according to the principles of attribution, subsidiarity and proportionality, a given subject falls within the EU's legislative sphere of competence, conflict situations between EU legislative provisions (regulations, directives or decisions) and rules of the Member States (laws or regulations) should be resolved by the principles of primacy, direct applicability and direct effect. In relation to the judiciary, there is a separation of spheres of action and control of validity between EU and national courts, but it is mandatory for national courts to apply EU law as interpreted by the CJEU (Cassese 2004a: 35; Ruffert 2011: 277-306).

None of these scenarios is necessarily repeated in the administrative field. In a multilevel structure with the power to adopt legislative acts, such as the EU, one of the questions that need to be addressed is the distribution of (administrative) implementing powers through the various entities involved.

Generally, the EU relies on Member States' public administrations for the administrative implementation and safeguarding of EU law. This solution was expressly enshrined in Article 291 (1) of the Treaty on the Functioning of the EU (TFEU) by the Lisbon Treaty. The same Treaty introduced the express recognition that the Member State must assure the "effective

implementation of Union law", which is considered "essential for the proper functioning of the Union" (Article 197 (1) TFEU). The public administrations of the Member States are thus tasked with ensuring the administrative implementation of EU law in cooperation with the EU institutions, specially the Commission, and this administrative execution depends on them, primarily (*v.g.*, Danwitz 2008: 302-303, 309, 469; Estella De Noriega 2000: 97; González-Varas Ibáñez 2012: 33 ss.; Schwarze 2009: 29 ss.; Cassese 1991: 769-774; Widdershoven 2002: 265-269). One should bear in mind that the normative implementation of EU legislation (namely through delegated acts or implementing acts, established in Articles 290 and 291 TFUE) is different from the administrative enforcement of rules – this paper focuses in the latter.

Even before the Lisbon Treaty, which introduced the provision, this task of the Member States' administrations was recognised by the CJEU, as a consequence of the principle of sincere cooperation, within the duty of Member States to ensure the full effectiveness of EU law, provided for in Article 5 TEEC – today, Article 4 (3) TEU (*v.g.*, ECJ, Case 94/71, *Schlüter & Maack v Hauptzollamt Hamburg-Jonas*, 1972 ECR 00307, p. 10; Cases 205 to 215/82, *Deutsche Milchkontor GmbH and others v Federal Republic of Germany*, 1983 ERC 2633, p. 17 e 19; Case C-290/91, *Johannes Peter v Hauptzollamt Regensburg*, 1993 ECR I-02981, p. 8; Case C-285/93, *Dominikanerinnen-Kloster Altenhohenau v Hauptzollamt Rosenheim*, 1995 ECR I-4069, p. 26; Case C-292/97, *Kjell Karlsson and Others*, 2000 ECR I-2737, p. 27; Cases C-231/00, *Cooperativa Lattepiù arl v Azienda di Stato per gli interventi nel mercato agricolo (AIMA)*, C-303/00, *Azienda Agricola Marcello Balestreri e Maura Lena v Regione Lombardia and Azienda di Stato per gli interventi nel mercato agricolo (AIMA)*, and C-451/00, *Azienda Agricola Giuseppe Cantarello v Azienda di Stato per gli interventi nel mercato agricolo (AIMA) and Ministero delle Politiche Agricole e Forestali*, 2004 ECR I-2869, p. 56). This provision commands Member States to "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" (Danwitz 2008: 302-303, 307, 309, 469; González-Varas Ibáñez 2012: 33 ss.; Schwarze 2009: 29 ss.).

The CJEU has already stated that, "in the fields covered by European Union law, (…) the public authorities of the Member States are bound by a duty of sincere cooperation. Under that principle, they must take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union and refrain from any measure which could jeopardise

the attainment of the European Union's objectives" (Case C-518/11, *UPC Nederland BV v Gemeente Hilversum*, ECLI:EU:C:2013:709, p. 59). Consequently, all duties arising from Article 4 (3) TEU - obligations to implement European Union law, whether through actions or omissions, of ends and means – are included, and are applicable in the administrative implementation of EU law by the Member States. In general, the principle of loyal cooperation may be considered a general obligation of the Member States to pursue and safeguard the interests of the Union - and of European citizens – at least in the same way or in a similar way in which they pursue and protect their own interests (Bogdandy 2011: 50 ss.).

Despite the historical recognition of the central nature of Member States national administrations in EU law enforcement, the real extent of their role and importance has deepened over time, culminating in the current wording of Article 291 TFEU (Danwitz 2008: 307; Widdershoven 2002: 267 ss.). The duty laid down in Article 291 (1) TFEU is therefore a consequence of the principle of sincere cooperation, which implements and complements it.

The importance of the principle of sincere cooperation is, in this context, clear. On the one hand, the legal obligation or general duty of the Member States to implement EU law is based on this principle (Keessen 2009: 85; Schütze 2012: 251). On the other hand, in the absence of a general duty of cooperation, Member States could block EU action in a significant number of areas, even unintentionally, for example by the inactivity of their administration – by not implementing EU law.

National public administrations are hence obliged to implement - enforce and apply - EU law. This duty applies even when their national law states the contrary of what is established by European legislation or when the Member State concerned would prefer not to apply the rule. The legal force of the cooperation principle surpasses the political will of the Member State. Strictly speaking, it is possible for a national administrative authority to act, solely based on powers provided on a rule of EU law, even if national law does not provide for it.

From a functional point of view, national administrative authorities operate as if they are part of the European administration, almost as a type of decentralised European administration (Bogdandy 2014: nº 43; Moreno Molina 1998: 38 ss.; 2000: 176; Schmidt-

Aßmann 2002: 1375 ss.; Schütze 2012: 55). This is a functional split ("*dédoublement fonctionnel*") - the public administrations of the Member States must assume the dual role of national administration and EU administration (Moreno Molina 1998: 38 ss.; 2000: 176) because they are bound by the duty to apply national and EU law *ex vi* principle of sincere cooperation (Verhoeven 2010: 26-27; 2011: 45 ss.). The national public administrations of the Member States are "Europeanised" in this way. Thus, the administration of EU legislation is characterised as a multi-level administration, combining the EU administration and the various administrations of the Member States in a variety of ways and through multiple types of procedures.

The "*dédoublement fonctionnel*" of national administrations poses extremely complex problems. First of all, because national administrations themselves are bound by a much larger set of legal rules ("*bloc légal*"), and must not only continue to pursue the national public interest but also - in the same way - the public interest of the European Union. This may give rise to conflicts as to the relevance of the public interests in question - since the public interest which must be pursued at the EU level may be different from that which the national law determines (Kadelbach 1999: 32-35).

Why does the EU entrust the task of administrative implementation of EU law, as a rule, to the Member States?

Several reasons seem to contribute to this legal solution.

According to Sabino Cassese, for instance, there are three reasons for this: (i) constitutional: to avoid an expansion of the European administrative machinery that offends the prerogatives of national executives; (ii) functional: with the practical impossibility of direct execution due to lack of Community staff; (iii) cultural: Administrative Law, culturally, was understood as a strictly state function (Cassese 2006: 117; 2002: 291 ss., p. 293).

One must explore further possible reasons.

A pragmatic motive can be also be developed as an explanation. The national public administrations of the Member States, when compared with the public administration directly dependent on the EU institutions, bodies, offices, or agencies, are somewhat larger and have more means at their disposal for the fulfilment of their tasks. It would not be possible for the EU administration to achieve the same level of administrative

implementation of EU laws and policies (in terms of efficiency and results) which national administrations are able to achieve (Schütze 2012: 25-27). It was therefore considered more efficient to entrust this task to national administrations, given the difficulties that the EU administration would have if it alone took on the burden of administrative implementation of all EU legislation, especially taking into account the complexity of the tasks and the financial cost inherent in such an undertaking (*v.g.*, Moreno Molina 1998: 43). The ability to administrate the implementation of EU law is sometimes considered the Achilles heel of EU law – because the EU is dependent upon Member States to ensure its effectiveness (Keessen 2009: 85).

This means that the Union depends on the action of national public administrations, within the context of EU law, for the implementation of its own policies, and to reach its objectives as provided in the EU Treaties (Hofmann *et al.* 2011: 260 ss.). National administrations must therefore assume the role of implementing EU law, because without them, EU laws and policies would not, simply put, be effectively implemented.

But practicality is not the only reason: a further argument derives from the principle of subsidiarity. This is a fundamental pillar of the functioning of the EU, whose normative content indicates that decisions should be taken as closely as possible to the citizens. This principle is enshrined in Article 5 TEU, together with two others considered essential for decision-making at European level: the principles of conferral and proportionality. This set of rules is applicable to the EU's actions. Firstly, according to the principle of conferral, the EU can only act if the action in question is part of the powers conferred on it by the Treaties (Article 5 (2) TEU). Secondly, it follows from the principle of subsidiarity that, within shared competences between the EU and Member States, European action is only possible if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, because of the scale or effects of the proposed action, be better achieved at Union level (Article 5 (3) TEU). Finally, it follows from the principle of proportionality that the content and form of EU action cannot go beyond what is necessary to achieve the objectives set out in the Treaties (Article 5 (4) TEU). Subsidiarity and proportionality are corollary to the principle of conferral. They determine the extent to which the EU can exercise the powers conferred on it by the Treaties.

The principle of subsidiarity regulates the distribution of competences between the EU and the Member States, primarily in terms of legislative power. However, the same normative content - the same criterion - can also be applied to executive powers: in principle, the implementation of EU legislative acts should belong to the level of power which is closest to the citizens - the level of the Member States - except in exceptional situations where that implementation should be at EU level (Lucia 2012: 17-45, 23).

What was said above does not mean that the EU has no powers of administrative implementation of EU law.

In fact, the implementation of EU law can fall - in a secondary, subsidiary or exceptional way, - to the EU institutions (Schütze 2012: 55 ss.; Moreno Molina 1998: 45). This was established in Article 291 (2) TFEU, which provides that "where uniform conditions for implementing legally binding Union acts are needed", the legislative acts in question should "confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council". In this way, it is recognised that the Union can implement its legislative acts when the adoption of "uniform conditions of implementation" is necessary, which can be interpreted as a reference to the principles of subsidiarity and proportionality.

It is in these circumstances that the EU's own public administration becomes evident: the administrative apparatus that is accountable to the institutions, and the EU bodies and entities that have the attribution and competence of administrative enforcement of EU law in particular.

Where there is EU competence to implement EU law, the body responsible for such implementation will, as a general rule, be the Commission. In matters of common foreign and security policy it is the Council which has the implementing powers – as well as in "duly justified specific cases". It was the Treaty of Lisbon which expressly recognised, for the first time, the executive powers of the Commission, regardless of the Council's delegation (unlike what was provided by Article 202 TEC before the Lisbon Treaty). Despite this innovation, it can still be said that the EU's own implementation of EU law is based on a "dual executive" logic (Schütze 2012: 225), with the Council and the Commission being responsible for administrative implementation, albeit with the intervention of the Council mainly concerned with matters of common foreign and security policy.

The Commission's exercise of the powers of administrative implementation of EU legislation may, in accordance with the legislation in question, follow comitology procedures. Comitology procedures, in the proper sense, are procedures of implementation of EU law in which the Commission is required to act together with intergovernmental committees, composed of representatives of the national administrations of the Member States. The adoption of comitology procedures does not follow a pattern, and depends on how EU law regulates its own implementation.

In the context of the administrative implementation of EU law, comitology procedures are therefore an embodiment of the principles of sincere and vertical cooperation, allowing the cooperation of national administrations in the procedures (Craig 2006: 104 ss.). The comitology procedures, by involving the establishment of dialogue and contacts between national public administrations between themselves and with the Commission, contribute to the establishment of (formal and informal) relations of cooperation (Chiti 2011: 187; Keessen 2009; Parejo Alfonso 2000: 55 e 56.; Vos 2000: 1116-1117; Haibach 2000: 186; Schäfer 2000: 16.).

The organisation of the "*European Administrative Union*" is thus based on a multi-level structure deriving from Article 291 (1) and (2) TFEU: the national administrations of the Member States (dealing with the ordinary implementation of EU law) and the EU's own administration (when justified by the interests of the EU and the application of the principles of subsidiarity and proportionality). In the latter case, it is dual, as it includes both the Commission and the Council. In this context, one can classically distinguish between: (i) direct implementation of EU law, carried out by the EU's own administrative bodies; and (ii) indirect implementation, when it is carried out by the administrative authorities of the Member States (Danwitz 2008: 607 ss.; Kadelbach 2002: 167-207; Moreno Molina 1998: 33 ss.; Schwarze 2009: 29 ss.; Ziller 2007: 235 ss.; Cassese 1997: 7 further distinguishes between "instrumental implementation", which is the province of the EU administration, and "final implementation" which would be up to the national administrations).

Beyond this strict dichotomy, there is a progressive emergence of EU law enforcement procedures in which both administrations (national and EU) participate jointly. There are

areas where the level of cooperation between administrations is so high that it challenges the typical categories of direct and indirect implementation (Danwitz 2008: 122 ss., 609, 612).

Indeed, in the implementation of EU law, some procedures were established with links between administrations of Member States and the Commission (vertical cooperation) and between administrations of Member States (horizontal cooperation), in particular through the provision of composite or multi-level administrative procedures.

In the case of vertical cooperation, the link between the various levels of administration is aimed at enhancing the advantages, and reducing the disadvantages, of direct and indirect implementation. In fact, the objective is to strike a balance between the guarantee of a consistent and uniform application of EU law, best achieved by the EU's own administration (through direct implementation), with the implementation by the Member States, which are the ones closer to the citizens (respecting the principle of subsidiarity) and that ensures greater effectiveness, since this level has more and better means of execution (Danwitz 2008: 609-610; Schmidt-Aβmann 1996: 270 ss.). Combining these advantages reduces or compensates for the implementation deficit which may arise from the fact that the executive level is alternately distinct or shared by the EU administration itself and the administrations of the Member States.

One can find complex or joint procedures of implementation of EU law, where national administrations and the Commission participate (in vertical cooperation and/or horizontal cooperation between Member States) at different procedural stages. The establishment of these complex administrative procedures, combining elements of direct and indirect implementation, is especially noteworthy in areas such as Environmental law, Agricultural law, or the approval of new products entering the single market (Danwitz 2008: 607-609, 612; Chiti 2011: 240; Martín Delgado 2010: 151). One possible example is the procedure established in Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs for PDO (Protected Designation of Origin) and PGI (Protected Geographical Indication). This is a vertical joint procedure, since there are two distinct phases, one national and one supranational. Complex horizontal and vertical cooperation mechanisms, with the possible involvement of administrations from other Member States, and a dialogue with the Commission. The Commission begins by acting as a mediator between the Member States, but in the absence of an agreement between them, it takes the final decision on registration

(Article 52) – with the application of a comitology procedure (Article 57 (2) (Cassese 2004a: 27 Cassese 2004b: 39; Franchini 2004: 191.)

With regard to horizontal cooperation, Sydow suggests that, in parallel with classic indirect implementation, dispersed across Member States, and with vertical centralisation in the case of direct implementation, there is also the potential for horizontal centralisation through the transfer and concentration of decision-making powers in a single Member State (Sydow 2006: 66 ss., 71). These are cases where EU Law establishes its implementation through national administrative procedures, leading to administrative decisions of the Member States with transnational effects throughout the EU (either directly or after a recognition procedure), usually associated with horizontal cooperation mechanisms (Cananea 2007: 6 ss; Keessen 2009: 27 ss.; Maduro 2006: 131 ss., 167; Sydow 2006: 122-123; Ruffert 2001: 453-485; Schmidt-Aβmann 1996: 270 ss.). One example of the establishment of a transnational European administrative decision can be found in Article 26 of the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council), which states that "*Except where the effect of a decision is limited to one or several Member States, decisions relating to the application of the customs legislation shall be valid throughout the customs territory of the Union*".

Finally, it is necessary to mention procedures in which EU institutions delegate their own implementing powers to national administrations, thus depending on their cooperation for the enforcement of EU law. Examples can be found both in the management of EU funds by national administrations, and in the area of Competition Law (Regulation (EC) No 1/2003 of 16 December 2002).

This therefore means recognising an autonomous type of enforcement of EU law, with a focus on cooperative (vertical or horizontal) mechanisms - joint implementation or co-administration - involving procedures in which the EU administration and national administrations cooperate to meet the common interest in the application of EU law. The notion of administrative cooperation in joint implementation may cover distinct doctrinal concepts such as: multi-level administration, association of administrations or administrative federation (*Verwaltungsverbund*) or mixed administration.

In short, the regime of administrative implementation of EU law is complex and composite.

In certain areas, the implementation power of national authorities prevails, but in others it is up to the supranational level authorities to execute EU laws, which complicates the coordination between administrations. The emerging situation of mutual dependence can only be resolved through the principle of sincere cooperation (Cassese 2004a: 23; 2004b: 33-34). Thus, in the administrative function, problems arise from the need for joint action (or, at least, not incoherent action) between Member States' administrations and the EU's own administration.

To solve these problems, cooperation models between the EU and Member States in EU law implementation procedures were adopted. Links have been developed between national administration bodies of Member States and between them and the EU administration, in particular through the setting up of committees or working groups with representatives of the administrations of the Member States and the Commission.

Similarly, administrative procedures were created which intertwined the EU level and national level (Cassese 2004a: 23-24; 2004b: 34-35), namely through mechanisms of cooperation to ensure the effectiveness and uniformity of EU law administrative implementation. Even when implementation is the responsibility of the national administrations of the Member States, the Commission still has a role to play, at least in terms of monitoring national compliance with EU law.

3. The inspiration for the principle of sincere cooperation

The CJEU's gradual construction of the principle of sincere cooperation, and its ramifications, does not appear to have been significantly challenged by the Member States or institutions. The principle has been peacefully applied not only by the Court but also by the other institutions of the EU and by the Member States.

This process raises the following question: what was the inspiration for the CJEU in the initial formulation of the principle and its subsequent evolution? The correct answer seems impossible to find, not only because it was a gradual construction, but also because of the specific characteristics of the CJEU. This is not just because it is a collegiate body (like so many other judicial bodies), but especially because of its system of functioning. In particular, it is impossible to know in which way Justices decide (the secrecy of their deliberations is particularly rigid), and why, with the same applying to the rules of procedure. The Opinions

of the Advocates-General, addressing the principle and its wording, also provide no clue as to their origin.

It is therefore believed that the most likely answer will come from multiple origins; here inspirations from both principles of International Law and from the principles of "federal loyalty", recognised in federal states, can be listed.

One can point out the principle of good faith (*bona fides*) as well as the principle of *pacta sunt servanda* in International Law as inspirations for the principle of sincere cooperation. Both these principles and the principle of sincere cooperation imply a limitation of the sovereignty of States and of their discretion. Article 2 (2) and (5) of the Charter of the United Nations, or Article 26 of the Vienna Convention on the Law of Treaties, signed on 23 May 1969, are normally mentioned as examples of this International Law inspiration for the wording of Article 4 (3) TEU (Witte 1995: 140 ss.; 2000: 83-101, p. 87).

It is not unusual for treaties of international organisations to incorporate reinforced dimensions of the principles of good faith, and *pacta sunt servanda* as an institutionalised form, to ensure the pursuit of the organisation's ends. The scope of these legal principles (and their implications) depends, to a large extent, on the capacity of the legal system in which they are inserted to ensure compliance with them - notably through effective judicial instruments. This is the distinctive character of the principle of cooperation within the EU. Furthermore, the principle of sincere cooperation's scope extends not only to the Member States, but also to the EU itself and its institutions, thus becoming a principle concerning the internal organisation and functioning of the Union. It is particularly relevant that the principle of sincere cooperation, as embodied in the case-law of the CJEU, is driven by the objective of ensuring the effectiveness of the Treaties. The guarantees of the effectiveness of EU law and the principle of sincere cooperation are not comparable with the mechanisms of other international conventions. Indeed, the creation and development of the principle of sincere cooperation in the EU depended largely on the existence of a judicial system to ensure compliance with the obligations arising from the Treaties, inter alia, by the Member States.

So, despite the importance of International law, and the good faith and *pacta sunt servanda* principles, the main inspiration seems to have come from the federal *Bundestreue* principle.

The principle of sincere cooperation is, thus, a kind of duty of "Community solidarity" (*Gemeinschaftstreue*).

The German Constitutional Court (BverfG) considered the principle of federal loyalty (*Bundestreue*) to be one of the implicit constitutional norms (*immanenten Verfassungsnormen*) that regulate the relationship between federation (*Bund*) and states (*Länder*), imposing reciprocal duties of mutual respect, cooperation and joint action, irrespective of the concrete co-operation duties of the *Grundgesetz* (GG) (BVerfGE 6, 309, *Reichskonkordat*, 361). In fact, for the BVerfG, as the Federal Republic is a federation (Article 20 (1) GG), it follows from the federal principle that there is a constitutional duty of reciprocal loyalty and mutual understanding between its members (horizontal, between states, and vertical, between these and the federation). According to the BVerfG, "*the essence of the constitutionally-mandated*" federalism "*which binds them means that they must cooperate and contribute to the strengthening and guaranteeing of the vested interests of the federation and its members*". This means that inherent in a federal state is the existence of a constitutional duty of behavior of its constituent elements "*in a friendly way towards the federation*" ("*bundesfreundlichem Verhalten*") (BVerfGE 1, 299, *Wohnungsbauförderung*, 315; the BVerfG in this case finds historical roots for its reasoning, quoting R. Smend 1968: 247 ss., 261; see also BVerfGE 1, 117, *Finanzausgleichsgesetz*, 131; and 3, 52, *Weihnachtsgeld*, 57).

The principle of *Bundestreue* is not seen as the establishment of a new legal relationship between subjects, but can support, modify or limit the respective powers and duties within the existing legal relationship. It has a negative dimension (duties of omission) and a positive (duties to aid and assistance) - which shows its proximity to the general principle of cooperation (Stern 1984: 755).

4. Does the EU follow a "cooperative federalism" paradigm of administrative implementation of EU law?

How to qualify, then, the administrative implementation system of EU law?

There are several models of administrative enforcement of legislation. As for the EU, given its multilevel structure, it is interesting to take into account the models adopted by federal systems for the administrative implementation of federal legislation. In fact, as in a federal state, the enforcement of federal legislation may be the responsibility of the federation

or the states, in the EU the enforcement of EU law may be the responsibility of the Union or the Member States – in both cases one can find two levels: a state level and a supranational level. These models, however, are not directly and incontestably transposable to the context of the EU, since its classification - between a supranational international organisation, a federal state, a confederation or a *tertium genus* – is still an open question (d'Atena 2005: 195-212; the BVerfG classified the EU as a "*Staatenverbund*" in its Maastricht Decision: BVerfGE 89, 155). Irrespective of this question, the truth is that the normative regime established by the Treaties sometimes seems to be inspired by institutions typical of federal constitutionalism.

The instruments and mechanisms for implementing the legislation produced by the supranational level are therefore at least comparable to the EU ones.

Classically, two models of federal systems can be presented with respect to the separation and balance of powers between the entities involved - dual federalism and cooperative federalism (Schütze 2009: 5).

Dual federalism is based on the idea of "dual sovereignty." The Constitution divides sovereignty into two exclusive sets of powers and assigns one to the federation and the other to the federal states. The federal level and the state level hold sovereign spheres of action, acting independently and sometimes concurrently – ideally, no interference between the two spheres exists. The tasks and competences of the federal level are those expressly established in the Constitution, conferring all others to the states. As a result, the relationship between these two levels is one of tension rather than co-operation. Federal and state powers should be absolutely distinct and clear - the federation dealing with national affairs and states of local affairs - as a layer cake, hence the alternative name of "layer cake federalism" (Grodzins 1966: 190; Volden 2005: 327-348, 328).

Cooperative federalism is based on the idea that, given the complexities of today's world and the vast public powers, the clear divisions between the various levels of government do not exist or are diffuse, with areas of overlapping or shared competence (*i.e.* an interpenetration of competencies) being foreseen. Thus, as federal and state powers must be seen as interdependent and deeply interconnected, and the objectives pursued by both of them, to a large extent, the same, it would be best to adopt cooperation as a preferential mode of action: the federal and state levels must interact, cooperating and acting collectively,

avoiding conflict or competition. Instead of the existence of two or three levels, or layers, perfectly distinct, - the aforementioned layer-cake – one must recognise that the powers of the federal, state and local authorities intersect and blend, depending on the matters in question, being closer to the image of the mixed layers of a marble cake. The notion of layer cake federalism is therefore opposed by that of marble cake federalism (Grodzins 1966: 8-9, 174; Volden 2005: 327-328).

German federalism can be considered to be cooperative ("*Kooperativer Föderalismus*"); it is an expression of federalism in which the various entities present in a federation must co-operate and carry out their tasks together. Since the federation has a significant share of the legislative function and the *Länder* have a predominant administrative role, there is a natural need for cooperation. This conception of cooperative federalism is the opposite of the idea of competitive federalism ("*Wettbewerbsföderalismus*"). According to this conception, states should have a wide discretion of action and decision, which creates a competition between them that will reward the most efficient (Hildebrandt *et al.* 2008: 11-21; Schatz *et al.* 2000; Zenthöfer 2006: 33 ss.).

In this context, and related to this distinction, the doctrine traditionally distinguishes between two models of enforcement of federal legislation: the centralised model and the decentralised model.

According to the first, the enforcement of federal legislation rests with a federal public administration. In this case, the federation establishes its own administration, autonomous of the states' administrations, and with a jurisdiction coinciding with the scope of its legislative attributions. It is a model more easily derived from dual federalism, because it allows a separation of spheres of federal and state action by reason of matter. This is the model originally adopted by the USA (Schütze 2012: 244 ss.).

In the case of the decentralised model, the implementation of federal legislation is the responsibility of the public administrations of the federal states, the federal administration being of a residual nature and having a small size. There is no correspondence between the legislative powers and the administrative powers of the federation - in principle, the administrative sphere of competence is smaller than the legislative sphere. It is a model close to cooperative federalism, in that it implies interconnection between different levels. This

model, combined with a mechanism of representation of the states, through their executive branches, in the second chamber of the federal legislature, is called executive federalism (*Exekutivföderalismus*) and is adopted, for instance, by the Federal Republic of Germany (Laufer *et al.* 1998: 259-260). This system allows for substantial integration and complementarity between the federal legislative organs and the executive organs of the federal and state level, but gives a relatively minor importance to the *Landtage* (state parliaments) (Dann 2004: 135 ss.).

The links made between the models of dual federalism and centralised implementation, on the one hand, and cooperative federalism and decentralised implementation, on the other hand, only represent a trend. In fact, it is possible to adopt the model of cooperative federalism, despite the fact that the administrative implementation of federal legislation is exclusively reserved to the federal administration. In this case, the existence of a cooperative relationship can be observed in other aspects. This is what happened in the United States during a phase of its history, when cooperative federalism was adopted during the New Deal, for instance. It is also theoretically possible to set up a model of dual federalism in which there is a rigid separation between legislative and administrative activities - although in this case it is more difficult to classify such a system as pure dual federalism.

When comparing the EU with federal models, it should be noted that the European model departs from US federal doctrine.

It is the American Constitution that regulates the balance of power between the federation (the Union) and the states and between their respective legal systems - although much of this depends on interpretation. Its Article VI, paragraph 2, establishes the Supremacy Clause: the prevalence of federal law (the US Constitution, its laws and international conventions). The X Amendment to the US Constitution, which is part of the bill of rights, is the constitutional seat of the principle of American federalism, stating that all powers that are not attributed to the federation by the Constitution, and not prohibited by it, belong to the states or to the people. This Amendment, which clarifies the limits of the powers of the Union - its powers are only those provided for in the Constitution - is nevertheless regarded as redundant by the Supreme Court of the United States (Supreme Court or SCOTUS), which has already stated that this amendment "*added nothing to the*

[Constitution] *as originally ratified*" (SCOTUS, *United States v. Sprague*, 1931, 282 U.S. 716, 733). On the Amendment, the Supreme Court also stated that "*The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers*» (SCOTUS, *United States v. Darby*, 1941, 312 U.S. 100, 124).

Despite these norms, the American Constitution does not expressly define many of the reciprocal boundaries between the state and federal powers. It follows that one of the characteristics of American federalism is the existence of a fluid relationship between the powers of states and federal levels, depending on the interpretation of the Constitution; hence the importance of the Supreme Court's case-law.

In the field of the administrative implementation by the states of federal law, and based on the system of dual federalism, the jurisprudence of the Supreme Court established the *anticommandeering principle*, for example, in the *Printz v. United States* case (SCOTUS, *Printz v. United States*, 1997, 521 U.S. 898, 918-919, 935). According to this principle, Congress is prevented from imposing or requiring that the executive authorities of states enforce federal law. The federal authorities cannot issue directives that require the federal states to address specific problems or give orders to the administrative bodies or officials of states or their administrative divisions to enforce federal legislation. The states cannot be treated as mere instruments of implementation of federal policy. This rule is absolute and does not involve any balancing of interests (Tribe 2000: 880 ss. criticises this position).

The *anticommandeering principle* had already been established for the legislative implementation of federal policies in the *New York v. United States* case (SCOTUS, *New York v. United States*, 1992, 505 U.S. 144). According to the Supreme Court, the Union cannot establish an obligation for a state to perform a legislative act implementing a federal program. Similarly, the federation cannot force a state to execute a federal law by officials of the state, entities belonging to its administration or any of its territorial subdivisions, as this would be a way of circumventing the prohibition established by the *New York v. United States*. The states can only be encouraged to adopt a certain behaviour through financial mechanisms (the Union's "spending power" - for instance, establishing conditions for receiving federal funds; *e.g.*, SCOTUS, *South Dakota v. Dole*, 1987, 483 U.S. 203) or directly regulating the matter in

the place of the states through federal legislation, using the "commerce clause" (which establishes the power of the US Congress to regulate the "commerce (…) among the several states (…)").

The central reason for this jurisprudential construction is to ensure the effective autonomy of states and the accountability of their political bodies, preventing them from responding politically to actions that have been ordered by the federation.

From this perspective, there is a fundamental difference between the EU and US legal systems. In the USA, it is understood that when a specific subject is attributed to either the federation or the states, their competences in that matter are not only legislative or normative - they are "comprehensive" competences, which cover the administrative implementation of laws and their enforcement. This means that if the competence of the federation covers a particular subject, it includes not only the power to legislate on it, but also the power to execute those federal legislative acts by an autonomous federal administration and by an order of federal courts of its own.

Conversely, in the EU, Article 291 (1) TFEU imposes on the Member States a positive duty to implement EU law (Schütze 2012: 55). Although the administrative jurisdiction of the supranational level may coincide with its legislative powers (as in the USA) in some areas, that is an exception. The task of administratively implementing and executing the EU legislation rests primarily on the shoulders of the Member States. This is a fundamentally different reality from the US federalism. In the absence of a *prima facie* correspondence between the legislative powers and the administrative powers of the EU, the scope of its administrative sphere of competence will generally to be more restricted than the legislative sphere, and is also limited by the principles of proportionality and subsidiarity.

On this point, the principle of subsidiarity defines, in areas outside the exclusive competence of the EU, the circumstances in which the Union, rather than the Member States, should act. Its aim is to ascertain if EU action is justified, not necessarily to protect the freedom or discretion of the Member States. The principle of the autonomy of Member States, established in Article 4 (2) TEU, defines the areas that remain within the sovereignty of the States and thus fall outside the scope of the jurisdiction of the EU, not establishing a prohibition equivalent to the anticommandeering principle. Another clear difference is that the EU's principle of procedural autonomy of the Member States stipulates that, when

national administrations are implementing EU Law, national procedural law is applicable to the extent that EU law does not regulate the matter, with the double limitation of the principles of equivalence and effectiveness.

The existence of cases of joint implementation – of national administrations and the EU –also represents a disagreement between the US and EU models of implementation. In this case, not only are the national administrations of the Member States still bound to implement the legislation of the supra-national level, but are also integrated in common procedures. This would be unacceptable in the context of the American constitutional doctrine because of the mandatory nature of the powers imposed on the Member States.

From these differences between the two models, two conclusions can be drawn. On the one hand, the autonomy of the federal states in the US is - in this respect - broader than the autonomy of the EU Member States. On the other hand, recourse to the US legal system as a source of inspiration for legal solutions in the EU should always take this structural difference into account. At least in this area, the EU does not represent a European version of the US.

The EU model of administrative implementation of legislative acts is closer to the cooperative federalism model, inasmuch as it involves the establishment of cooperative relations between different levels of government. In fact, both with regard to the system of division of competences - where some of the characteristics of executive federalism are present, with the administrative implementation of EU law being seen, in general, as a duty of the Member States - and the organisational structure - with the Council of the EU to assume the role of legislative body representing the Member States, close to a Federal Senate (for instance, the German *Bundesrat*) - the solutions contained in the Treaties and the interpretation of them by the CJEU seem to be the result of a "federalising" inspiration.

To the extent that the powers transferred to the EU are mostly legislative powers - there being no general provision for the transfer of national administrative powers to the EU - it must be concluded that the EU has a strong legislative (and not administrative) element (Danwitz 2008: 307). The implementation powers are generally left to the states.

In this sense, the EU model of administrative enforcement of supranational legislative acts is closer - consciously or unconsciously - to the German model of executive federalism, although with some adaptations (Schütze 2012: 225).

The closeness derives from the fact that in the Federal Republic of Germany, it is a duty of the states (the *Länder*) to implement federal legislation, as its own attribution ("*als eigene Angelegenheit*") - as if it were state legislation - unless otherwise provided by the Constitution (Article 83 GG – the exceptions can be found in Articles 86 to 90 GG). This is in line with the general rule, established in Article 30 GG, which states that the exercise of public powers belongs to the *Länder*, unless otherwise specified. The administrative function in Germany therefore includes three situations: (i) the Länder (*Landesverwaltung*) enforces state legislation; (ii) the administrations of the Länder are also, in principle, responsible for enforcing federal legislation; (iii) the federal government (*Bundesverwaltung*) implements federal legislation in matters covered by the GG. In the cases referred to in (ii), the execution of federal legislation by the *Länder* may occur as provided for in Article 83, or by delegation of powers (*Bundesauftragsverwaltung*), when GG permits it, as provided for in Article 85 GG.

However, the possibility of joint implementation procedures, where the national and supra-national levels intervene, is EU specific, with no correspondence to the German federalist model.

The German and European regimes seem to resemble each other in that, in both cases, the legislative function is divided between two levels of power structures - national and supranational - with a functional complementarity between them (Pernice 1999: 724-725) and, in both cases, the administrative function, even of supranational normative acts, tends to belong to the national sphere. There is a vertical separation of powers between the EU and the Member States, similar to the one which exist in federal states with an "executive federalism" model (Parejo Alfonso 2000: 45; Pernice 1999: 724-725; Schütze 2012: 251). The system of "executive federalism" adopted is not, however, pure. Indeed, the popular view that European standards are adopted centrally in Brussels, and implemented at national level - as would be the case in a system of pure "executive federalism" - represents an over-simplification of the system. The power to implement EU legislative acts belongs to both the Union and the Member States (Bignami 1999: 454; Keessen 2009: 85; Schütze 2012: 251) - and sometimes to both levels, acting in the same procedure.

This means that, even though the EU structure of implementation bears some similarities to the German federal model, it has also distinct features.

5. Is the principle of sincere cooperation a "federalising" influence?

As discussed, the principle of sincere cooperation seems to be inspired, at least in part, by the normative solutions found by federations in ensuring the implementation of supra-national legislation. Here, as the EU chose to resort to the national administrations of Member States, it adopted a model analogous to the German– and eschew the US model. In this sense, the creation by the CJEU of the principle of sincere cooperation appears to have been inspired by the imposition of the duty of execution drawn from the German principle of *Bundestreue*. But does the closeness of the EU's administrative implementation system with a federal one necessarily imply acceptance of the federal nature of the EU?

The answer is no.

The EU cannot be considered a federal state, because it does not possess the elements necessary for recognition of a State - people, territory and political power (*e.g.*, Feige 1973: 89 ss.).

The principle of sincere cooperation is associated with the functioning of complex decision-making structures - in the sense that they are decentralised - with various levels of action and, especially, in the absence of a hierarchical relationship between the various levels. In this sense, the principle applies not only to federations but to several other non-federal realities, such as regional states, and must not be considered, by itself, as a federalising element.

To the extent that the Union is a complex power structure which involves decision-making processes involving the participation of various levels, the principle of sincere cooperation must be recognised as essential to guaranteeing the survival of the Union. This is especially necessary as there is no hierarchical relationship, either between the Union and the Member States, or between the EU and national legal orders (Bogdandy 2011: 11-55, 41-42; Zuleeg 2011: 763-786, 774-775). In fact, the principle of sincere cooperation has as one of its objective to provide flexible solutions to the various conflicts that may arise in a

political system with multiple levels, such as the Union (Witte 1995: 142; Bogdandy 2011: 51).

The principle of sincere cooperation therefore corresponds to general mutual obligations of the Member States and the EU, in which the specific content depends on each particular case, the provisions of the Treaty or the rules resulting from its general system (Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, 1971 ECR 487, p. 5; Case 2/73, *Riseria Luigi Geddo v Ente Nazionale Risi*, 1973 ECR 865, p. 4; see also Lang, 1986: 505).

The parallel established between the principle of sincere cooperation (as *Gemeinschaftstreue*) and the federal *Bundestreue* does not require resistance to a transformation of the EU into a federal state; this does not imply the permanent and unlimited growth of the competences of the EU which could only result from the exercise of the constituent power of the European peoples. It is restricted to aspects of "fidelity" to the supra-national organisation in which the States agreed to be part.

* Assistant Professor at the University of Lisbon School of Law; Senior Research Fellow at Centro de Investigação de Direito Público (CIDP - Lisbon Centre for Research in Public Law); Assessor (Law Clerk) at the Portuguese Constitutional Court.

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