WORKSHOP ON EU ADMINISTRATIVE LAW: STATE OF PLAY AND FUTURE PROSPECTS (LEÓN - SPAIN)

BRIEFING NOTES

2011
Notes

Abstract

During a delegation of the Legal Affairs Committee, the Policy Department has organised a Workshop on EU administrative law at the University of León (27 - 28 April 2011). Several academic experts as well as law practitioners were invited to make contributions. The present collective edition contains all the briefing notes produced for the Workshop.
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AUTHORS

Professor Dr. Juergen Schwarze, Albert-Ludwigs-Universitaet Freiburg
Professor Jacques Ziller, Università degli Studi di Pavia
Oriol Mir-Puigpelat, University of Barcelona
Luis Ángel Ballesteros Moffa, University de León
Stéphane Braconnier, Université Panthéon-Assas (Paris II)
Professor Jesús Fuentetaja, Universidad Nacional de Educación a Distancia (Madrid)
Dr Manuel Rebollo-Puig, University of Córdoba
Mr Hendrik Viaene, Stibbe Brussels
Professor Michael Gotze, Copenhagen University
Dr Päivi Leino-Sandberg, Ministry of Justice Finland
Helena Jäderblom, Supreme Administrative Court Sweden

RESPONSIBLE ADMINISTRATOR

Danai Papadopoulou
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

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I. EUROPEAN ADMINISTRATIVE LAW IN THE LIGHT OF THE TREATY OF LISBON: INTRODUCTORY REMARKS

Professor Dr. Juergen Schwarze

Abstract

This contribution covers the development of European administrative law, in particular the changes which the Treaty of Lisbon has brought about. Next to a growing amount of secondary law EU administrative law has been mainly shaped by the Court of Justice of the European Union. However, it still lacks a coherent structure. The author, thus, pleads for the codification of the major rules on administrative procedures in particular in the field of indirect implementation of European law – on a yet to be established legal basis in the Treaties which – in his view – the Lisbon Treaty still does not provide for.
LIST OF ABBREVIATIONS

AG   Advocate General
CFI  Court of First Instance
ChFR Charter of Fundamental Rights
CMLR Common Market Law Review
DÖV  Die öffentliche Verwaltung
ECJ  European Court of Justice
ECR  European Court Reports
ECHR European Convention for the Protection of Human Rights and Fundamental Freedoms
EJIL European Journal of International Law
EuR  Europarecht
TEU  Treaty on European Union
TFEU Treaty on the Functioning of the European Union
EXECUTIVE SUMMARY

Given the fragmentary nature of written law, administrative law at European level was in a first step shaped and developed by the Court of Justice of the European Union on the basis of unwritten general principles of law common to the constitutional traditions of the Member States. In a second stage a reverberating effect of the newly developed European law on national administrative law and thus the development of a system of interaction between national and European administrative law could be observed.

Nowadays, European administrative law is developing in two different, but somehow overlapping forms: in a narrower sense as the administrative law which regulates the direct and indirect execution of European Union law and in a broader sense as the description of the process of harmonization of the legal standard for administrative action between national laws of the Member States and the European Union (“Europeanization of administrative law”).

Even though the Treaty of Lisbon leaves the system of European administrative law – on the whole – rather untouched and sticks to the traditional forms and instruments, it also brings about some vital changes. At first, Art. 197 TFEU introduces a new Title XXIV on Administrative Cooperation the autonomous legal value of which might however be questioned.

More importantly, Art. 290 TFEU allows the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act, as long as this legislative act or the Treaty itself delegates the power to do so. In contrast, Art. 291 paragraph 2 TFEU allows the conferment of implementing powers on the Commission as far as uniform conditions for implementing legally binding Union acts are needed. The also unprecedented Art. 298 paragraph 1 TFEU commits the Union's administration to the principles of openness, efficiency and independency.

Furthermore, the Charter of Fundamental Rights of The European Union, declared legally binding by Art. 6 paragraph 1 TEU, contains two guarantees which are of significant importance for European administrative law: The right to good administration in Art. 41 ChFR and the right of access to documents enshrined in Art. 42 ChFR.

Thinking forward and considering which intrusion into the administrative competences of the Member States appears to be more severe – either a Union-wide codification of administrative principles in particular for the indirect implementation of administrative law, or the extremely detailed provisions for the implementation of rules regarding specific matters which can currently be found as an annex to various substantial rules of secondary European law – it might be suitable to codify at least the basic principles of European administrative procedures on the basis of a yet to be established competence in the Treaties which – in my view – the Lisbon Treaty has especially not created in Art. 298 paragraph 2 TFEU.

1. INTRODUCTION

Within the context of this colloquium on “EU administrative law: state of play and future prospects” it is my task to present – next to Judge Luis Ortega – some introductory
remarks on the scope and evolution of EU administrative law. In the wording of the programme of our colloquium I am asked to comment on the development of European administrative law “from Paris” – the beginning of European integration with the first Treaty on the European Coal and Steel Community, concluded in Paris 1951 – “to Lisbon” – the site where the most recent step of the European Treaties’ reform was taken, entering into force at 1 December 2009. Naturally, I cannot go into details describing this long and complex process which characterizes the development of what we call today “European administrative law.”

The latter is a relatively new branch of law, comprising in a narrow sense the administrative law for the European Union and in a broader sense the approximation of administrative laws between the Member States and the European Union. Therefore, I will start with a comment on the main stages of the development of European administrative law and the actual status it has reached so far (2.).

The focus of my analysis then lies on the major changes which the Treaty of Lisbon has brought about in the area of European administration and European administrative law – the key issue of my introduction (3.).

I will conclude with several remarks on the perspectives for the future development of European administrative law and in particular formulate a proposal for a partial codification of the rules on the indirect administration of the law of the European Union (4.).

2. THE DEVELOPMENT OF EUROPEAN ADMINISTRATIVE LAW

2.1. Main Stages of the Development

Only some parts of European administrative law, in the sense of an administrative law for the European Union, are laid down in the written sources of European Union law. Even today, more than half a century after the first Community treaty entered into force, the European Union still lacks a coherent and comprehensive set of codified rules of administrative law. Given this fragmentary nature of written law, case law has a particular significance in the Union especially in the area of administrative law. By far the greatest number of legal principles governing administrative activity in European Union law originate in the creative law-making process of the Court of Justice of the European Union. Thus, administrative law at European level was shaped and developed on the basis of unwritten general principles of law common to the constitutional traditions of the Member States. The landmark decision in the case of Algera, concerning the question of revocation of administrative acts constitutes the well-known starting point for this judicial practice of the Court of Justice of the European Union. Therein the Court of Justice derived its obligation to


2 ECJ, joined Cases 7/56 and 3-7/57, Dineke Algera et al./Common Assembly, ECR 1957, p. 83 et seq.
creative law-making from the absence of express Treaty provisions on the question concerned. In its reasoning the Court of Justice borrowed from the famous wording of Art. 4 of the French Code Civil dealing with the subject matter of “dénie de justice” (denial of justice) and held that:

“Unless the Court is to deny justice, it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.”

The general principles of law – determined and shaped by the Court of Justice by way of an “evaluative comparison of laws” (wertende Rechtsvergleichung) – have been used in the case-law of the Court from this point on in order to fill gaps in the existing law and as aids to interpretation. Moreover there is now widespread agreement that the principles of law are to be applied by the institutions of the Union and that the Court of Justice may condemn a breach of these principles just like the breach of any written norm.

The elaboration of certain rules for a specific European administrative law by the Court of Justice led to the recognition of the principle of legality as well as the principles of proportionality, of legal certainty, of the protection of legitimate expectations, of non-discrimination, of a fair administrative process and of effective judicial review. It is the combination of these principles that represent the core and the point of crystallisation for European administrative law today.

To sum up, the influence of rules of national constitutional and administrative law on the development of unwritten general legal principles in European Community law is characteristic for this initial phase in the formation of a European administrative law.

While in the beginning French law had exercised the most decisive influence on the formulation of central concepts in Community administrative law, other administrative legal orders subsequently started to have more and more impact on Community law. British law, for example, had a decisive effect on the development of procedural guarantees, whilst German law contributed strongly to the consequent recognition of the principle of proportionality in Community law. A respective development can be identified for the principles of transparency and the access to files since Scandinavian countries have joined the European Union.

In a second stage this development took a different direction. A reverberating effect of the newly developed European law on national administrative law and thus the development of a system of interaction between national and European administrative law could be observed. In other words, after having been formed by a comparison of administrative law

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5 See ECJ, Case 17/74, Transocean Marine Paint Association/Commission, ECR 1974, p. 1063 et seq.


principles of the Member States, this new European law itself started to reflect back on the national law, influencing and modifying it. This development took place on three different levels. Changes in national administrative law have been caused, firstly, by means of European legislation, secondly, by means of leading decisions of the Court of Justice influencing the indirect administration of EU law and, thirdly, even by the voluntary adoption of European standards into national administrative law in its autonomous scope of application. Thereby the jurisdiction of the Court of Justice again played a vitally important role. This development gives rise to the assumption that the national administrative systems of the Member States find themselves in a process of partial convergence.

The general principles of administrative law as elaborated by the Court of Justice have thus become instrument and promoter of an evolution of a common European administrative law. This is highly remarkable, because it was the field of national administrative law which had been characterised in the beginnings as particularly resistant to the methods of comparative law and European influences. In the context of a study of the influence of French administrative law on the development of German law Ulrich Scheuner\(^8\), law-professor at the University of Bonn, wrote in 1963 that administrative law belongs to those areas of law “in which the national characteristics of the people and the State are revealed most starkly”. In other words: In contrast to constitutional law which since Aristotle has been open to methods of comparative law, administrative law was by its very nature thought to be specifically restricted and thus at least to some extent locked for the approach of comparative law. According to Prof. Scheuner, the legal position of administrative personnel, the relationship between the administration and the citizen, the level of centralisation and the entire style of administration are “to a large extent the expression of national particularities”. This impermeability is to some extent understandable, especially if the innovations are difficult to incorporate into an existing system without significantly changing traditional structures. On the other hand administrative law is only able to meet future challenges if the preservation of established administrative traditions and principles does not obscure the view on new problems that can only be solved by innovation and change. In this respect, we can at least identify a trend towards common standards of modern administrative law among the Member States of the EU. This development has led to a situation for which the term of Europeanization of administrative law has been applied\(^9\) – a new trend of administrative law in Europe, that the famous French law professor Jean Rivero\(^10\) was one of the first to comment on.

2.2. The Actual Status of European Administrative Law

Drawing some conclusions from this manifold and complex process at national and European level, the actual status of European administrative law – apart from the impact of the Treaty of Lisbon on which I will specifically comment in the following part of my presentation – seems to be characterized by the following main elements.

- First of all, it has to be noted that in contrast to the beginning of European integration under the Treaty of Rome a new discipline of legal rules and reasoning, called “European administrative law” has emerged over the last decades and is

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\(^8\) U. Scheuner, Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsordnung, DÖV 1963, p. 714 et seq.

\(^9\) For a detailed analysis of this process compare J. Schwarze (ed.), Administrative Law under European Influence, On the convergence of the administrative laws of the EU Member States, Baden-Baden 1996.

nowadays more or less commonly accepted in the political and administrative practice as well as by the legal literature.\textsuperscript{11}

- Actually, European administrative law is developing in two different, but somehow overlapping forms: in a narrower sense as the administrative law which regulates the direct and indirect execution of European Union law and in a broader sense as the description of the process of harmonization of the legal standard for administrative action between national laws of the Member States and the European Union ("Europeanization of administrative law").

- The jurisprudence of the Court of Justice of the European Union still plays a decisive role in shaping European administrative law, although the amount of written rules of secondary law has expanded over the years also in the field of European administrative law.

- The increase in written law can be interpreted as an expression of the search for more transparency and legal security. The new written rules are often codifications of general legal principles already shaped by the case law of the European Courts. The evolution of European administrative law therefore resembles the history of the national systems of administrative law. They, too, were initially characterised predominantly by judge-made law. Codifications usually occurred much later.

- In the area of direct execution of European Union law by the institutions of the Union – still the exceptional form of implementation – European competition law presents prominent examples for codified standards of European administrative law, above all the Regulation (EC) No. 1/2003 which determines the procedure in antitrust matters. It involves the national competition authorities and courts in the process of implementing European competition law and creates a network of the competition authorities of the Member States and of the European Commission.

- Furthermore, there are partially new rules of secondary law regarding the direct implementation of administration in the area of merger control, anti-dumping rules, the control of state aid, trademark law and the law on the civil service of the EU.

- In the domain of indirect implementation of European Union law – still the main form of implementation – there has also been a noticeable trend for some time to create at least certain uniform legal standards for the implementation of EU law by means of secondary legislation in specific areas, for instance the European Customs Code from 1992\textsuperscript{12} or the Regulation on genetically modified food and feed from 2003\textsuperscript{13}.

- The fundamental distinction between direct implementation by the authorities of the Union itself and indirect implementation by the Member States as it has just been mentioned is still applicable today. It also remains true that the implementation of European Union law is left to the administrative authorities of the Member States as a rule – a fundamental principle which has even been explicitly stipulated by the


\textsuperscript{12} Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.

\textsuperscript{13} Regulation (EC) No 1829/2003 on genetically modified food and feed.
The Treaty of Lisbon (the latter is discussed in more detail in the following section). However, if one looks at the administrative reality of the Union, a straight forward separation of tasks and functions of the Union on the one hand and the Member States on the other hand has been replaced nowadays by various forms of administrative cooperation between the authorities of the Union and the Member States. The competition network which has just been mentioned is an outstanding example for these new types of cooperation which are nowadays at least to some extent typical for the administration within the system of the European Union.

The assessment of the current status of European administrative law therefore leads to a multilayered conclusion. The unwritten general principles of law – developed by the Court of Justice and further refined and concretized by the General Court (former Court of First Instance) – still dominate the perception of European administrative law from outside.

Next to judge-made law also written secondary law which has been enormously growing over the last decades in a multitude of fields has shaped European administrative law up to the present days.

Although there can be identified manifold virtual interactions between unwritten and written sources of European administrative law and also between its two major elements – the proper administrative law for the European Union and the Europeanization of administrative law in Europe in general –, it is to assert that EU administrative law still lacks a coherent body of law and a clear and convincing structure.

3. THE IMPACT OF THE TREATY OF LISBON

The following main part of my statement will focus on the impact of the Lisbon Treaty on the development of European administrative law. Before I go into details, there is one general introductory remark I would like to make: As far as the administrative functions are concerned, the Treaty of Lisbon leaves the system – on the whole – rather untouched and sticks to the traditional forms and instruments. The so-called principle of the administrative autonomy of the Member States (now explicitly stipulated in Art. 291 paragraph 1 TFEU) according to which it is generally for the national bodies to execute EU law is retained. The European institutions are only competent in specific fields such as the area of competition policy where the Commission has the power to execute the relevant rules in the form of direct administration.

Therefore, in the majority of cases there continues to be a divergence between the competence of the organs of the EU to actually make European Union law on the one hand, and the responsibility of national authorities to enforce the Union’s law on the other. It is this divergence that poses the main problems to ensure the uniformity of European Union

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14 Art. 291 paragraph 1 TFEU.
European administrative law in the light of the Treaty of Lisbon: introductory remarks

law in practice. This situation has hardly been changed by the Treaty of Lisbon. Nevertheless, the Lisbon Treaty also brings about some vital changes in the area of European administrative law.

3.1. General Alterations

The Treaty of Lisbon reconfirms the importance of the rule of law. It also underlines the significance of the general principles of law in Art. 6 paragraph 3 TEU, which states that “fundamental rights (…) shall constitute general principles of the Union’s law.” Even though this statement expressly refers only to the fundamental rights as constitutional principles, it does not preclude the continued applicability of other general principles, in particular principles of administrative law which often refine general principles of constitutional character. This means that the Treaty of Lisbon does not change the existing legal status quo in this regard. In the same context, it is generally accepted that the term “law”, formerly used in Art. 220 EC, now in Art. 19 TEU which describes the parameters for the level of control exercised by the European courts does comprise not only codified rules but also unwritten legal principles.

Irrespective of any separation into written and unwritten law the entire acquis communautaire is meant to remain in force. The Court of Justice of the European Union expressly remains in charge of the interpretation of European Union law. Besides, the Treaty of Lisbon affirms the commitment of administrative practice to the rule of law by attributing to the Charter of Fundamental Rights of the European Union (ChFR) the same legal value as the Treaties.

3.2. Changes Concerning the Rules on European Administration

Apart from that, the Treaty of Lisbon introduces some changes concerning the rules on European administration.

3.2.1. Administrative Cooperation According to Art. 197 TFEU

First of all, a new Title XXIV on Administrative Cooperation which was already designated within Art. III-285 of the Constitutional Treaty has been introduced to the Treaty on the Functioning of the European Union. From this Art. 197 TFEU some general conclusions on vertical administrative cooperation (between national and European authorities) can be drawn. Its first paragraph affirms that “effective implementation of Union law by the Member States […] shall be regarded as a matter of common interest”. The Union can ultimately achieve its character as a community based on the rule of law only if its law is applied as consistently as possible in all Member States. Although Art. 197 paragraph 1 TFEU surely is of high symbolic significance, it does not create any obligations. This can be concluded from its third paragraph which explicitly underlines that Art. 197 TFEU is without prejudice to the obligations of the Member States to implement Union law. Taking into consideration the already existing duty of the Member States to cooperate sincerely with the institutions of the European Union stemming from Art. 4 paragraph 3 TEU, the autonomous legal value of Art. 197 TFEU might be questioned. Hence, the administrative cooperation laid down in Title XXIV is to be characterized as voluntary cooperation. The Union only possesses supportive competences in this field, notably excluding any

17 See the Preamble of the TEU and its Art. 2 and 21.
18 See in detail J. Schwarze, European Administrative Law, revised 1st edition 2006, Chapter 1 C.
19 Art. 19 paragraph 1 clause 2 TFEU.
20 Art. 6 paragraph 1 clause 2 TEU.
harmonisation of Member States' laws or regulations.\textsuperscript{21} Art. 197 paragraph 2 TFEU contains the Union’s offer to support the Member States in their efforts to improve their administrative capacity to implement European Union law. This support may include facilitating the exchange of information and of civil servants as well as supporting training schemes.\textsuperscript{22} Art. 197 paragraph 2 clause 3 TFEU stresses, however, that no Member State is obliged to avail itself of such support.

### 3.2.2. The Distinction between Delegated Acts and Implementing Acts

Furthermore, the Treaty on the Functioning of the European Union introduces a hierarchy among the different types of legal rules,\textsuperscript{23} which was already intended by the Treaty establishing a Constitution for Europe.\textsuperscript{24}

In this context, the distinction between delegated acts in terms of Art. 290 TFEU and implementing acts within the meaning of Art. 291 TFEU is of specific significance.

Art. 290 TFEU allows the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act, as long as this legislative act or the Treaty itself delegates the power to do so.\textsuperscript{25} However, such power to delegate is not unlimited. Art. 290 TFEU itself establishes certain prerequisites which resemble for instance those of German constitutional law.\textsuperscript{26} Thus, the delegating legislative acts have to define the objectives, the content and the scope of the rules which may be enacted by the Commission. Furthermore, the essential elements of an area shall be reserved for the legislative act and might not be subject to a delegation of power.

In the same way, the legislative act shall explicitly lay down the formal and substantial conditions to which the delegation is subject. This barrier shall prevent the Commission from establishing legal rules in all areas and thus from avoiding the legislative procedure. Supplementary to this limitation, the European Parliament or the Council may decide to revoke the delegation and the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

In contrast to Art. 291 TFEU, Art. 290 TFEU is self-sufficient and thus, does not require the adoption of any binding instrument of secondary legislation to ensure its implementation. In December 2009 the Commission released a Communication\textsuperscript{27} stating its point of view.

\begin{footnotes}
\item[21] Compare Art. 6 clause 2 lit. g) and Art. 2 paragraph 5 TFEU. Regarding the division of competences after the Treaty of Lisbon see M. Ruffert, Institutionen, Organe und Kompetenzen – der Abschluss eines Reformprozesses als Gegenstand der Europawissenschaft, EuR supplement 1/2009, p. 31 (36 et seq.).
\item[22] Art. 197 paragraph 2 clause 2 TFEU.
\item[23] Regarding the legal acts of the Union and their hierarchy after the Treaty of Lisbon see T. von Danwitz, Europäisches Verwaltungsrecht, Heidelberg 2008, p. 270 et seq.
\item[26] Art. 80 paragraph 1 clause 1 of the German Grundgesetz.
\item[27] COM(2009) 673 final.
\end{footnotes}
about the general framework within which such delegations of power should operate. The Parliament published a Resolution on the power of legislative delegation in May 2010.28

These (quasi-legislative) delegated acts in terms of Art. 290 TFEU have to be distinguished from the (executive) implementing acts within the meaning of Art. 291 TFEU.

Art. 291 paragraph 2 TFEU allows the conferral of implementing powers on the Commission as far as uniform conditions for implementing legally binding Union acts are needed.29 A certain compensation for this “interference” with the autonomous competence of the Member States to implement Union acts is provided by Art. 291 paragraph 3 TFEU, according to which the Member States have to be endowed with mechanisms to control the Commission’s exercise of implementing powers. Thus, in February 2011 the European Parliament and the Council adopted Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.30 The Regulation particularly rationalises the committee structure as created by the Comitology Decision31 by providing merely two procedures.32 As a result, the Commission is subject to a control comparable to the previous procedure of comitology.33 Art. 291 paragraph 3 TFEU exemplifies the intention of the Lisbon Treaty to strengthen the position of the Parliament, since it was according to the former legal situation exclusively for the Council to determine certain restrictions for the exercise of implementing powers by the Commission.34

3.2.3. Consequences in the Area of Judicial Review

At this point, please allow me to point out how European administrative law is interwoven with questions of legal protection by reference to two current examples.

At first, the hierarchy of norms which has been introduced by the Lisbon Treaty inter alia in Art. 290 TFEU raises questions in the context of Art. 263 TFEU which in its paragraph 4 deals with the legal protection of individuals before the European Courts. According to the newly added last alternative of Art. 263 paragraph 4 TFEU any natural or legal person may institute proceedings “against a regulatory act which is of direct concern to them and does not entail implementing measures”. Whether only “non-legislative acts of general application” as formulated in Art. 290 TFEU are such “regulatory acts” in the sense of Art. 263 TFEU or whether “regulations” within the meaning of Art. 288 paragraph 2 TFEU are “regulatory acts” too, is a question that has led to doctrinal discussion and, finally, will have to be decided by the European Courts. The uncertainty regarding the interpretation of “regulatory act” in Art. 263 paragraph 4 TFEU arises due to the fact that the Treaty of Lisbon only partially incorporates provisions from the Constitutional Treaty while it discards others, without properly adjusting the adopted formulations to each other.35 In the context of the question concerned, the Treaty of Lisbon has dropped the new denominations of the

29 Under strict conditions it is also possible to confer implementing powers on the Council, compare Art. 291 paragraph 2 alternative 2 TFEU.
32 See Recital No 8. According to the Regulation, Parliament and Council are not involved any more in the new procedures. This is due to the allegation of Art. 291 paragraph 3 TFEU that it is for the Member States and not for the Union’s institutions to control the implementing powers of the Commission. See however the “Right of scrutiny for the European Parliament and the Council” in Art. 11 of the Regulation.
34 Compare Art. 202 bullet point 3 EC. In practice, Commission and Parliament had established manifold ways of cooperation by means of interinstitutional agreements, see Official Journal 2008 No C 143, p. 1 et seq.
35 J. Ziller, Il nuovo Trattato europeo, Bologna 2007, p. 163 et seq.
legal acts of the Union provided in the Constitutional Treaty which were the “European law”, the “European framework law” and the “European regulation”, and has stuck to the traditional legal forms of “regulation” and “directive”. On the other hand, it has maintained the formulation “regulatory act” from Art. III-365 paragraph 4 of the Constitutional Treaty in Art. 263 paragraph 4 TFEU.

Apart from that, the Treaty of Lisbon takes also notice of the structural changes of the European administration in the area of judicial control. As a counterbalance to the new forms of administration new forms of judicial protection have been integrated by the Lisbon Treaty. Articles 263 and 265 TFEU now expressly mention “bodies, offices and agencies”. Thus, an action for annulment or an action against inactivity can directly be brought against those agencies, which have multiplied during the last years.

3.2.4. Formal Requirements for Administrative Actions

The (also) unprecedented Art. 298 TFEU commits the Union’s administration to the principles of openness, efficiency and independency. As these principles are to be seen as standards of conduct for the entire European administration, they do not bind only the Commission. Since they mainly follow already from the settled case law of the European Courts concerning the principle of “good administration” and further requirements of EU primary law, Art. 298 paragraph 1 codifies and summarizes the already existing conditions for the Union’s administration. Paragraph 2 of the provision mandates the Parliament and the Council to lay down a legal framework establishing the further requirements for the European administration. In doing so, notably the right to good administration, embedded in Art. 41 of the Charter of Fundamental Rights and reciprocally linked with Art. 298 TFEU, has to be taken into account.

3.3. Guarantees of the Charter of Fundamental Rights of the European Union

The efforts to base European administrative law upon the rule of law and to confirm the Union’s administration as administration of a community governed by the rule of law has significantly shaped the development of the protection of fundamental rights. The Charter of Fundamental Rights of The European Union, declared legally binding by Art. 6 paragraph 1 TEU, contains two guarantees which are of significant importance for European administrative law. On the one hand there is the abovementioned Art. 41 ChFR stipulating the right to good administration. On the other hand, Art. 42 ChFR guarantees a right of access to the documents of the institutions, bodies, offices and agencies of the Union.

37 See e.g. Protocol 36 to the Treaty of the European Community on the Privileges and Immunities of the European Communities.
3.3.1. The Right to Good Administration, Art. 41 ChFR

The right to good administration in Art. 41 ChFR is a "modern fundamental right" and certain aspects of this right can be traced back to the case law of the Court of Justice. The provision is framed as a subjective right, not as an objective principle of administration. Its inclusion in the Charter of Fundamental Rights goes back to a suggestion of the European ombudsman. Paragraph 1 of the provision creates an individual right that all proceedings must be subject to the rule of law as everybody's affairs have to be handled impartially, fairly and within a reasonable time.

The specific elements of proceedings under the rule of law are then clarified as follows: Paragraph 2 guarantees the right to be heard as well as an access right to documents and places an obligation on the administration to give reasons for its decisions. The latter obligation has an equivalent in the Treaty provision Art. 296 paragraph 2 TFEU.

Paragraph 3 provides a right to claim damages which is in accord with the non-contractual liability of the Union for any damage caused by its institutions or by its servants enshrined in Art. 340 TFEU.

Finally, paragraph 4 stipulates every person's right to communicate with the institutions of the Union in an official EU language of choice.

Prior to its incorporation into the Charter, this right to good administration was already part of the "general principles that are observed in a State governed by the rule of law" according to the case law. The Charter now aims to guarantee these rights on the basis of a clear written constitutional basis.

This can be seen as an illustration of the general trend of European administrative law to evolve from unwritten law towards written law; furthermore, it reveals a specific relationship between guarantees that can be found in constitutional law and their more concrete forms in administrative law.

3.3.2. The Right of Access to Documents, Art. 42 ChFR

Art. 42 ChFR guarantees the right of access to documents, regardless of their form, for every citizen of the Union as well as for every natural or legal person having its residence or statutory domicile within a Member State. This fundamental right and Art. 15 paragraph 3 TFEU are coextensive.

As Advocate-General Léger has pointed out – in opposition to the right to good administration – ECJ case law has not yet educated a common principle of law concerning a

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42 S. Magiera, ibid., Art. 41 ChFR, note 2.
43 Regarding the control of administrative procedures under existing law cf. J. Schwarze, Judicial review of European administrative procedure, Public Law 2004, p. 146 et seq.
right of access to documents as part of the common constitutional traditions of the Member States.\(^{46}\)

A possibility to restrict this generally extensive right of access is contained in Art. 15 paragraph 3 subparagraph 2 TFEU:\(^{47}\) according to this provision the Parliament and the Council can determine general principles and limits on grounds of public or private interest governing this right of access to documents. They do so by means of regulations, acting in accordance with the ordinary legislative procedure. On this base the relative and absolute rights to refuse document access have evolved in Regulation (EC) No. 1049/2001.\(^{48}\)

3.3.3. **General Remarks on the Charter of Fundamental Rights of the European Union**

Even though the Charter had not yet been legally binding in a formal sense, notably, the European Courts have already accepted the Charter and in particular its Art. 41 as a point of reference in their case law before the Treaty of Lisbon entered into force.\(^{49}\) However, it is an important step forwards integrating especially the right to good administration and the right of access to documents as well as all the other guarantees of the Charter into the existing law of the Treaties.\(^{50}\)

Although I would like to leave aside the problems which will arise because the UK and Poland have reserved an opting out-clause in Protocol No. 30 amending the Treaty of Lisbon\(^{51}\) which will also apply to the Czech Republic,\(^{52}\) I would like to make the following general remark: even if the Charter itself might, due to their decision to opt out, not be binding for these states, there can be no doubt that the UK, Poland and the Czech Republic remain bound to the (unwritten) general principles of EU law which are partly identical to the guarantees now enshrined in the Charter.

Conclusively, I want to point out one final aspect regarding the Charter of Fundamental Rights. The Charter further strengthens the influence which the European Convention on Human Rights (ECHR) – besides the constitutional traditions of the Member States – already has\(^{53}\) on the development of general principles of EU law. In the context of the protection of fundamental rights in Europe, the ECHR serves according to the explicit wording of Art. 52 paragraph 3 ChFR from now on as a minimum standard in EU law wherever the Charter contains rights which correspond to rights guaranteed by the ECHR.\(^{54}\) Due to the fact that the ECHR contains particularly distinct procedural guarantees which further substantiate the rule of law, this correlation will significantly influence the future of European administrative law.

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\(^{46}\) Opinion GA Léger, Case C-41/00 P, Intercorp, ECR 2003, I-2125, note 80.

\(^{47}\) Compare Art. 52 paragraph 2 ChFR.

\(^{48}\) The Court of Justice has recently dealt with and further elaborated on the problematic relation between the protection of personal data and the right of access to documents without explicitly mentioning Art. 42 ChFR. See ECJ, Case C-28/08 P, Bavarian Lager, EuZW 2010, p. 617 et seq.


\(^{50}\) The right to good administration is closely connected to the principle of transparency, see S. Prechal, M. de Leeuw, Dimensions of Transparency: The Building Blocks for a New Legal Principle?, Review of European Administrative Law 2007, p. 51 et seq.

\(^{51}\) See Official Journal 2010 No C 83, p. 313; on this subject J. Ziller, Il nuovo trattato europeo, Bologna 2007, p. 175 et seq.

\(^{52}\) See European Council Presidency Conclusions from 29/30 October 2009.


Considering everything that has been said so far, it is fair to say, that overall the Treaty reform has brought about some progress also in the area of European administrative law.

4. **PERSPECTIVES FOR THE FUTURE DEVELOPMENT OF EU ADMINISTRATIVE LAW: A PARTIAL CODIFICATION**

Recent experience with the reform of the European Treaties shows that the Member States are in principle not willing to give up their autonomy in the area of the execution of European Union law. However, there are some arguments for further integration and convergence in this field.\(^{55}\)

There is first, the age of globalization which impacts on administrative law.\(^{56}\) A system of administrative law based on the principle of territoriality within a single national state is, on the whole, hardly capable of solving all problems at stake when confronted with worldwide trade movements or cross-border communication processes. The threat of international terrorism can also hardly be dealt with effectively by any given individual state just by recourse to its own administration and administrative law. It would be reasonable to expect that the global character of these issues of public order and risk will also strengthen the trend towards developing common transnational standards of administrative law.\(^{57}\) In this context, the EU would be well served to accept that a need for uniform rules does not only exist in the internal market and in the domain of trade and economic law: such a need for a certain degree of consistency also exists in the area of public law, at least in principle.

Moreover, the need to strengthen the administrative internal structure of the Union is compelling in view of the extension to (at present) 27 Member States. It is by no means certain that the European Courts on their own will be able to guarantee the required highest possible level of uniformity in the application of the relevant rules and regulations simply by applying general principles of law. A new element in order to guarantee the uniformity of European Union law is the already mentioned Art. 291 TFEU, according to which the Commission and in some cases even the Council may assume implementing powers under certain conditions as laid down in paragraph 2 and 3 of this article. Nevertheless, this article should not be misunderstood as to provide for a general all-inclusive administrative legal competence. In contrast, the competence is limited to those specific areas of law where differing administrative practices would lead to unacceptable negative repercussions for the European Union.

Finally, it should also be considered which intrusion into the administrative competences of the Member States appears to be more severe: either a Union-wide codification of administrative principles in particular for the indirect implementation of administrative law, or the extremely detailed provisions for the implementation of rules regarding specific

\(^{55}\) For further details, see J. Schwarze, European Administrative Law, revised 1st edition, Baden-Baden 2006, Chapter 1 G II.


\(^{57}\) On the crystallization of common standards and the development of a global administrative law, see the articles in B. Kingsbury/N. Kirsch/R. B. Stewart/J. B. Wiener (eds.), The Emergence of Global Administrative Law, Law & Contemporary Problems 68 (2005); see furthermore the contributions to the Symposium: Global Governance and Global Administrative Law in the International Legal Order, EJIL 17 (2006), p. 1 et seq.
matters which can currently be found as an annex to various substantial rules of secondary European law.

Under these conditions, I would think that the following proposal – which will be discussed in greater detail in the last part of our colloquium tomorrow – would be worth considering: it might be suitable to codify at least the basic principles of European administrative procedures on the basis of a yet to be established competence in the Treaties. This proposal mirrors a suggestion made by the former President of the European Court of Justice, Ole Due, more than 20 years ago in view of the parallelism of European case law and the traditionally grown national administrative law. Such a partial codification of administrative procedures restricted to the implementation of EU law would clearly contribute towards the consistency between indirect and direct administration in the European Union. At the same time, it could counteract the increasing tendency towards regulating administrative procedural issues as an annex to the manifold substantive rules of EU law. It might also, by way of a general option of reference, help to reduce the workload of the Union’s legislature and simplify legislation.

As already mentioned, in order to accomplish such a codification an explicit authorization in the Treaties is needed, which first of all would have to be established by a further reform of the Treaties. For – in my view – the Treaty of Lisbon does also not provide for such a legal basis. Admittedly, Art. 298 paragraph 2 TFEU allows the European Parliament and the Council to establish provisions to the end of paragraph 1 that is the guarantee of an open, efficient and independent European administration. Due to the above mentioned fact that Art. 298 paragraph 1 TFEU is mostly of declaratory nature, it is hardly conceivable, that paragraph 2 should be a sufficient legal basis for a whole codification of EU administrative procedural law. Moreover, Art. 298 paragraph 1 TFEU explicitly adresses only the institutions, bodies, offices and agencies of the Union and, thus, cannot be invoked in any case in the context of indirect implementation of European law by the Member States. Bearing in mind that the overall concept of the administrative autonomy of the Member States is now for the first time explicitly stipulated in Art. 291 paragraph 1 TFEU, it would also be more than surprising if the European legislator would at the same time be empowered to codify the major rules on European administrative procedures in the field of indirect implementation of EU law. It is furthermore hardly possible to interpret Art. 298 paragraph 2 TFEU in such a way as to provide for a competence in question without any qualifications taking into account that the conferment of implementing powers on the Commission and under exceptional circumstances even on the Council in Art. 291 paragraph 2 TFEU is restricted to those specific areas of law where differing administrative practices would lead to unacceptable negative repercussions for the European Union. Most importantly, any authorisation in the Treaties for such a substantial step that would be the (partial) codification of the major rules on administrative procedures must be stated in my view expressis verbis and thus, be beyond any doubt. Conclusively, before such a codification is possible, from my point of view a further reform of the Treaties providing for a respective legal basis is necessary.

All difficulties which a reform of the Treaties would undoubtedly encounter should, however, not prevent us from reflecting about solutions which are not actually at hand, at least not in

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59 O. Due, Le respect des droits de la défense dans le droit administratif communautaire, Cahiers de Droit Européen 1987, p. 383 (396).
an international colloquium devoted to an analysis of the state of the European Union’s administrative law and to a debate on its perspectives in the future.

I am aware of the fact that my arguments for a (partial) codification of the basic parameters for the implementation of European Union law - de lege ferenda - will face significant counter-arguments and be greeted with considerable doubt. However, in the first place, I do not argue for a comprehensive codification of administrative law in general, but rather for a (partial) codification of the substantive principles regarding the implementation of EU law. This area of law is in need of a systematic order because of its rich subject-matter, its complexity and its growing importance. Secondly, it will always be debatable whether the time has come for a codification project. Nonetheless, such a suggestion at the least deserves to be discussed in the context of an analysis of the further development of European administrative law. Thereby, one basic element needs further appreciation: it creates inherent imbalances in the evolution of the European Union if its legislation is constantly extended (which is currently a noticeable trend), whilst there are no corresponding guarantees that an adequate level of uniformity in the implementation of these jointly agreed legal rules may be achieved.

Given therefore the legal situation as it stands today, the problem of how to ensure the uniformity of European law in the process of its application will be a crucial issue – perhaps the key-issue – of administrative functions in particular in a Union, which has enormously grown over the last years and which definitely needs a coherent acquis communautaire in the area of administrative law.
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II. IS A LAW OF ADMINISTRATIVE PROCEDURE FOR THE UNION INSTITUTIONS NECESSARY? INTRODUCTORY REMARKS AND PROSPECTS

Professor Jacques Ziller

NOTE

Abstract

Four main purposes exist for a codification of EU administrative procedure: clarification of, and easier access to law; increasing the coherence of principles and procedures; setting up default procedures to fill gaps in existing law and establishing the functions of administrative procedure. In order to meet the needs for codification at EU level, a broad scope of application and an appropriate method would have to be chosen for innovative codification.
LIST OF ABBREVIATIONS

APA  Administrative Procedure Act
CJEU  Court of Justice of the European Union
EC  European Community
EU  European Union
OHIM  Office for Harmonisation in the Internal Market
ReNEUAL  Research Network on European Administrative Law
TEU  Treaty on the European Union
TFEU  Treaty on the Functioning of the European Union
USA  United States of America
EXECUTIVE SUMMARY

Background
In the framework of the activities of the European Parliament’s Committee on Legal Affairs, the author of this note has been asked by the European Parliament to present introductory remarks and comment prospects on the question whether a Law of Administrative Procedure for the Union institutions, bodies, offices and agencies is necessary.

Aim
- The aim of this note is to explain the parameters which have to be taken into account in order to answer such a question.
- Experiences in the codification of administrative procedure exists in the Member States since the 1920s, with a renewed intensity in the 1970s and 1990s and can be complemented by the United States of America’s experience in the codification of federal administrative procedure law.
- On the basis of those experiences, four main purposes of codification may be indicated: clarification of, and easier access to, the law; increasing the coherence of principles and procedures; setting up default procedures to fill gaps in existing law and establishing the functions of administrative procedure. All these purposes need to be met at the level of EU institutions.
- In order to meet the needs for codification at EU level, a broad scope of application would have to be chosen for such a codification, including a wide institutional scope (most, if not all, institutions, bodies, offices and agencies of the Union) and material scope (most if not all policy sectors). Such a codification should cover adjudication, rule-making, contracts and information management.
- In order to meet the needs for codification at EU level, the appropriate methodological option is that of innovative codification, i.e. taking over principles and rules from existing legislation and case law, making choices in cases of conflict and adopting new principles and rules in order to substitute inappropriate ones or to complement existing ones.
- The possible adoption of a Law of Administrative Procedure for the Union institutions, bodies, offices and agencies would imply solid preparatory work and could hardly be achieved within the ongoing legislature.
1. INTRODUCTION

There is hardly any doubt that EU administrative law at present is fragmented, too much fragmented indeed, and that it contains too many gaps to comply with the best standards of “an open, efficient and independent European administration” (Art. 298 TFEU) and the right to good administration as expressed in Article 41 (1) EU Charter of Fundamental Rights, which states that “Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union”.

As already stated in another note by the same author to date, only few areas of EU administrative law are subject to a systematic approach with rules and principles applicable beyond a single policy area. In some areas the Commission is actively proposing a more systematic approach, for example, with respect to the organisation and functioning of regulatory agencies. EU legislation has been a true laboratory of experimental institutional and procedural design for administrative structures. They are marked by an overburdening complexity of often overlapping rules and principles. There is in many respects a growing gap between, on one hand, the proliferation of new forms of administrative action in the EU and their regulatory framework and, on the other hand, their integration in various control and legitimacy mechanisms. This often leads to a lack of transparency, predictability, intelligibility and trust in EU administrative and regulatory procedures and their outcome.

The consequences of sector specific fragmentation due to different approaches in sector specific EU legislation are intensified by the lack of a general common approach to transversal issues such as the adoption and implementation of binding decisions, which have limited and identified addressees (adjudication), of generally binding regulatory acts (rule-making) and of binding agreements (contracts).

There are at present only few generally applicable pieces of EU legislation that organise accountability procedures and remedies for individuals, associations and businesses: this is mainly the case with the Financial Regulation, which applies to EU spending operations, the Regulation on Access to Documents and the Regulation on Data Protection. The discrepancies between the fields of application and the contents of such general instruments have already generated problems which have led to cases which had to be decided upon by the CJEU.

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63 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8 of 12.01.2001).
64 For instance Case C-28/08 P, Bavarian Lager, where one of the issues was how to coordinate the application of Regulations No 1049/2001 regarding public access to European Parliament, Council and Commission documents and No 45/2001 on the protection of individuals with regard to the processing of personal data.
For the future of EU administrative law, two key issues to be addressed in this context are, on one hand, the potential, and arguably substantial, need for simplification, and on the other hand the need to fill some important gaps with regard to the principles and rules applicable to the application of EU legislation by EU institutions. There is a real need to understand the prevailing diversity and have it reflected in a general approach to the development of EU administrative law. This can be achieved by a coordinated attempt to rationalise and improve structures and methodology used throughout EU policy fields for which there is no standard template for EU administrative procedures. Such rationalisation promises to increase transparency and predictability of outcome as well as to improve conditions of accountability of administrative activities.

Such rationalisation would allow for more streamlined sector specific legislation, in line with the efforts launched some years ago under the motto of ‘Better Regulation’, for better implementation of EU policies and better cooperation between Member State institutions and bodies when working together in composite procedures. It would further increase legal certainty and enhance judicial protection of individuals in the Area of Freedom, Security and Justice and in the Internal Market.

A general diagnosis seems rather easy to agree upon; it is not the purpose of this note, which only tries to address the question whether a Law of Administrative procedure for EU institutions, bodies, offices and agencies is the appropriate remedy. This is a more complicated issue than setting the diagnosis, be it only because of the limited amount of relevant experience of codification at EU level. Codification of EU legislation mainly consists in assembling the content of different pre-existing instruments of sector specific legislation and in complementing it with an updated synthesis of the relevant case law of the CJEU, sometimes together with developing new principles. EU experience in codification is almost always limited to a specific sector: this is in line with the principle of conferral, which has been reaffirmed in art. 4 and 5 TEU. One of the rare experiences of transversal codification at EU level is the Charter of Fundamental Rights. It is this author’s view that experiences in the codification of administrative procedure at national level, especially in EU Member States, is an appropriate tool to help understanding if, why and how a codification of EU administrative procedure could be a remedy to the shortcomings of present day EU administrative law.

Therefore this Note will start with a short survey of codification experiences that might be relevant to EU Institutions (section 2) in order to present ideas on the purpose of codification of administrative procedure (section 3) and address the issues of the scope (section 4) and the methods (section 5) of such a codification. These considerations will be summarised in the conclusion (section 6).

2. A SHORT SURVEY OF CODIFICATION EXPERIENCES THAT MIGHT BE RELEVANT TO EU INSTITUTIONS

KEY ELEMENTS

There is a wide variety of experiences of codification of administrative procedure at national or infra-national level, as well amongst EU Member States as abroad. In order to avoid re-inventing the wheel, taking into account these experiences is essential to any reflection on the possibility, need and methods of codification of administrative law at the level of EU Institutions.

2.1. Chronological Survey

Setting aside the very specific case of the XIXth century codification in Spain, it is possible to identify over time three main waves of codification of administrative procedure in Europe, to which it might be useful to add the codification of federal administrative procedure in the USA. The following is not an exhaustive list, but just a mention of some of the most interesting cases of codification in the perspective of a possible EU codification of administrative procedure.

- The first wave of codification of administrative procedure is usually identified with the Austrian Administrative Procedure Law of 1925. The Austrian law has served as a model for the Polish Administrative Procedure Law of 1928. Albeit not directly inspired by the Austrian precedent, one should also quote the Spanish Administrative Procedure Law of 1958. These codifications have rather easily applied in the context of an authoritarian State such as in Austria, in 1933-38, or Poland in 1930-39 or have even been generated in such a context in Spain, in 1958 (see 2.2.1). Most of these laws have undergone thorough revisions during the two or three last decades.

- In the United States, the Administrative Procedure Act (APA) of 1946 has had a very important impact on the entire development of Federal administrative law and has also had quite some impact at State level. It has not been known in Europe for quite a long time, but it has attracted attention in the last decade or two, especially due to its provisions on rule-making.

- The second wave of codification of administrative procedure in Europe is usually identified with the German laws on administrative procedure adopted at federal level and by the Länder in 1976, followed by a similar Law in Luxembourg in 1979. A federal law on administrative procedure had also been adopted in Switzerland in 1968.

- A third wave of codification started in the mid-eighties of the last century with the Danish Administrative Procedure Law which entered into force at state level in 1985 and at local level in 1986. A law of administrative procedure also entered into force in 1986 in Sweden. A whole series of important laws of administrative procedure were then adopted in the nineties: in 1990 in Italy; in 1991 in Portugal and in 1992 in the Netherlands. In 1984 and 1992 general revisions of the Spanish Administrative Procedure Law were also adopted. Greece adopted such a law in
1999. A specific mention might be useful also with regard to France, where the production of an administrative code was set on the agenda of the Codification commission in 1996 but abandoned in 2003-2004. France and the United Kingdom are therefore, together with Belgium and Ireland, amongst the rare EU countries not to have adopted a general law on administrative procedure.

These chronological developments should be read in the light of two types of related laws which have taken place in EU Member States during the four last decades.

- First, laws on access to administrative documents have been adopted nowadays in almost all Member States. The most ancient of these laws is without any doubt the Swedish *Law on the Freedom of Information*, 1766, which remained rather unique during two centuries (most of the Swedish legislation on administration continued to be applied in Finland after its incorporation in the Russian Empire in 1809). After the US *Freedom of Information Act* of 1966, a wave of laws on the access to administrative documents has been adopted: for instance in France in 1978, in the UK in 2000; the EU Institutions had adopted a similar legislation with *Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents*.

- Second, legislation on data protection was adopted first in Germany at the level of some Länder (starting with Hessen in 1970) and later at federal level in 1977, then by Sweden in 1973, by Austria and by France in 1978, whereas the new Spanish Constitution of the same year included a clause according to which a law on data protection should be adopted; this was done in 1996. In the meantime, *Directive 95/46/EC on data protection* had been adopted by the Community legislator; the transposition of the directive to all Member States has ensured a certain level of harmonisation, which could be enhanced in the future on the basis of art. 16 TFEU, which has a broader scope than its predecessor, art. 286 EC.

### 2.2. Common Features and Specificities of Codification Experiences

In order to assess the usefulness of experiences in the codification of administrative procedure, a number of common features and specificities have to be taken into account, so as to determine the relevance of such experiences for a possible codification with regard to EU institutions, bodies, offices and agencies. However, the very specific character of the EU, which is not a State, and also differs widely from international organisations, would make it impossible to find similarities with a national experience on all points. It is not, therefore, necessary to find similarities with the situation in the EU, in order to qualify an experience as relevant for further reflection and work on a possible codification of EU administrative procedure.

#### 2.2.1. The Principle of Legality of Administrative Action

An essential common feature of all the administrative systems of EU Member States and of the EU institutions is that they are all founded upon the principle that the legality of
administrative action is the first and essential condition of its legitimacy. In other words: administrative procedure derives from the concept of administration based on law.

It might be worthwhile to underline that, contrary to some widespread clichés, this concept applies to continental European countries as well as to the United Kingdom and Ireland. As far as administrative law and administrative procedure are concerned, there are no relevant differences between countries with a so-called ‘common law’ system – UK, Ireland – and countries with a so-called ‘civil law’ system – European continental countries.

There are only three important differences between those two types of legal systems:

i) the organisation of the legal profession – largely unitary in common law countries, as opposed to the separation between the careers of judges and of advocates in continental Europe;

ii) the style in which laws (statutes) are written, i.e. more weight being given to general principles in the tradition of continental Europe, as opposed to an attempt to solve practical issues in an exhaustive manner in the common law tradition;

iii) the scope of the areas where law is mainly based on judge-made law, which remains broader in common law countries – where statute law is however steadily growing in importance – than in continental European countries – where administrative law has however been developed mainly as judge-made law in countries like France.

The lack of relevance of the so-called civil law / common law divide to the issue of codification of administrative procedure is demonstrated by the fact that the USA – without any doubt a common law country – have been amongst the first countries to codify administrative procedure with the APA of 1946, whereas France – a typical civil law country – has never adopted a code of administrative procedure.

The UK administrative law has a unique feature which is not due to the common law but to a very special constitutional principle, according to which the organisation and running of the Civil Service needs not be based upon Acts of Parliament, but constitutes a competence of the executive, under the Royal prerogative. This principle does not impede however the adoption of Acts of Parliament in the sphere of administrative action, as demonstrated by numerous laws: for instance the Parliamentary Commissioner Act, 1967 (Ombudsman), the Freedom of Information Act 2000, or most recently the Constitutional Reform and Governance Act 2010, which partly codified the rules applying to the use of the Royal prerogative.

2.2.2. The Growing Importance of Sector Specific Fragmentation of Administrative Law

A second very important common feature of all the administrative systems of EU Member States and of the EU institutions is the growing importance of sector specific fragmentation of administrative law. This is due to a parallel growth of specialised sector specific legislation and of specialised ministerial departments and agencies that implement those laws.

The growth of specialised sector specific legislation is also partly due to the growing importance of EU directives, which necessitates a transposition in binding legal instruments – laws or regulations – in all Member States. To a certain extent, the growth of specialised administrative departments and agencies in Member States is in fact due to EU legislation: typically, EU regulations, while they do not have to be transposed into Member State’s
binding legal instruments, necessitate the adoption of all the organisational and budgetary provisions which are needed for their implementation.

A further factor of sector specific fragmentation is also linked with the growth of EU legislation. The traditions in administrative organisation, administrative law and administrative procedure differ from one Member State to another, and therefore EU legislation often cannot fully accommodate the resulting diversity; trying to accommodate all Member State’s specificities would result in compromises that would not allow for the effectiveness of EU law and to its uniform application. Uniform application is indispensable for most EU legislative instruments in order to guarantee that the Internal Market and, to a certain extent, the Area of Freedom, Security and Justice be indeed common to all Member States. If follows from this premise that EU legislation can have a disturbing impact upon the homogeneity of Member States’ administrative procedure and legal system.

2.2.3. The Differentiated Impact of Multi-Level Policy Making and Execution

National experiences in codification of administrative procedure vary greatly when it comes to take into account that public administration is usually organised in at least two levels – local and central – or more – local, regional and central – sometimes even up to five levels – for instance in France communal, intercommunal, departmental, regional and central. The question of the scope of a law of administrative procedure is therefore fundamental, especially as much of the ‘street level administration’ is in the realm of local government. Typically in many countries either there are different laws of administrative procedure for different levels of government, or there have been different dates of entry into force of the law, as in Denmark – 1986 for central government, 1987 for local government.

Furthermore only a limited number of member States has a regional level with legislative powers – as in Austria, Belgium, Germany, Italy and Spain, as well as Finland, Portugal and the United Kingdom for certain parts of their territory. This is important to the issue of codification of administrative procedure. In Germany a similar situation leads to the parallel existence of a Federal law applicable to federal institutions, departments, bodies and agencies, and laws of each Land which are in turn applicable to the latter’s institutions, departments, bodies and agencies. In Spain or in Italy, a general law is applicable to all levels of administration, but there is room for complementary legislation at regional level.

Another aspect linked to multi-level systems is even more relevant to the EU, i.e., the issue of ‘executive federalism’ (Vollzugsföderalismus) which is well known in Germany. In a nutshell, one may oppose two different models of executive federalism: the US version and the German version. In the USA, the execution of federal law and federal policies is in principle a task of federal institutions and authorities, whereas in Germany the principle is that the execution of federal law and policies is a task of the institutions and authorities of the Länder. As the German system of ‘executive federalism’ is the closest to the system of the EU, the German experience has a particular relevance when it comes to codification.

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68 Denmark, France and the Netherlands are not mentioned here, as the Faeroe Islands, Greenland, the French Overseas Collectivities and the Dutch Islands of the Caribbean are not integral part of the scope of application of the Treaties (art. 355 TFEU).
2.2.4. The Differentiated Impact of Systems of Appeals, Remedies and other Accountability Mechanisms

Codification of administrative procedure has usually been accomplished in a country specific framework of judicial review of administration. Such frameworks vary from country to country, and so do the systems of administrative appeals, and of non-judicial independent review of administration. The framework in which EU institutions, bodies, offices and agencies are operating bears some resemblances with several elements that appear in different Member States; this has to be taken into account when reflecting upon the relevance of national codification experiences.

- An important difference among the abovementioned waves of codification in Europe (under 2.1) is that the first laws on administrative procedure (in Austrian, Poland and Spain) were mainly based upon the concept that a codification of administrative procedure would allow to increase legal security both for administration offices and private persons dealing with the administration and therefore contributing to an effective protection of the latter in their dealings with public administration. This was conceived in a situation of weak judicial review of administrative actions. In the countries of the second and third wave of laws, on the other hand, the dominant concept remained for long that legal security and effective protection of the citizens was the result of a solid system of review of administrative action by independent courts, as a component of democracy and the rule of law. The situation at the EU level is clearly closer to that of the second and third waves of codification, due to the CJEU’s jurisprudence since the 1950s. The case-law of the ECJ which is now reflected in art. 19 TEU on the ECJ and arts. 8 (data protection), 41 (good administration), 42 (access to documents) and 47 (access to justice) of the Charter of Fundamental Rights.

- There are also differences in the systems of judicial review of public administration. Most Member States tend to have specialised courts in charge of the review of public administration (but see Denmark, where specialisation occurs within the structure of general courts). However, the overall framework is variable: in some Member States, specialisation occurs within a unified system of courts (for instance, in Spain or in the UK), whereas in others administrative courts are a special branch of justice. The EU system may be considered as a unified system with some specialisation for the General Court and the EU Civil Service tribunal. However, the general EU courts system is very specific, due to the possibility of a dialogue with Member States’ courts provided for by the system of references for preliminary ruling.

- More importantly than the organisational aspect of courts’ specialisation, there are important differences between Member States with regard to the easiness or difficulty of access to justice, and to the powers of courts. In some Member States (such as, for instance, France or the UK), rules on standing – i.e. the criteria that allow individuals or groupings to file a case with a court – are rather widely understood, whereas in others, individuals or groupings have to demonstrate a very special interest and / or the breach of a subjective right (like for instance in Germany) in order to ask for judicial review of public authorities’ actions. In the EU system, the rules of art. 263, fourth indent, are closer to the second group of

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69 "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".
countries. As far as the powers of the courts are concerned, there is a general tendency in EU Member States to enhance them by giving the courts not only the power to grant quashing orders, but also mandatory orders against administration. Even in countries like France, where for a long time courts could only annul acts of public administration or grant damages in a procedure for liability, courts have been given the possibility to grant such mandatory orders. EU courts on the contrary do not have such a power of mandatory orders, for which a Treaty change would probably be necessary. There are also important differences between Member States, and with the CJEU, as regards the possibility, scope and content of interim injunctions.

- There are also important differences from one Member State to another with regard to the obligation to make an administrative appeal before filing a case with the relevant court. In Germany, for instance, an administrative appeal is a general precondition to filing a case with an administrative court – without exception until recently, while in France, for instance, there is no such general obligation. In the TFEU, a preliminary administrative appeal is only required in case of an action for failure to act against EU institutions, bodies, offices and agencies (art. 265 TFEU). In many Member States where there is no general obligation of preliminary administrative appeal, such an appeal is nevertheless necessary in specific cases according to sector specific legislation. There is a general tendency all over Europe to develop the number of areas with an obligation of preliminary administrative appeal. Some similar cases are to be found in EU secondary legislation: the clearest example is provided by art. 65 of the Regulation on the Community trade mark, according to which an action may be brought before the Court of Justice against decisions of the Boards of Appeal of the Office for Harmonisation in the Internal Market (OHIM).70

- Last but not least, there are important differences between Member States as regards the existence and powers of Ombudsmen and specialised independent authorities (for access to documents, for data protection, for regulated sectors). Whereas there is an Ombudsman, or a corresponding independent authority, in 25 out of 27 Member States and at the level of EU institutions, there is no such authority at national level in Germany and in Italy. The European Ombudsman is dealing not only with maladministration, but also with access to documents, whereas in a number of Member States, there is a specialised authority in charge of the latter, such as the Commission d’Accès aux Documents Administratifs in France. In some Member States, access to documents is dealt with by the independent authority that is also in charge of data protection, such as the Garante per la protezione dei dati personali in Italy or the Information Commissioner’s Office in the UK. In other Member States on the contrary, there are distinct bodies in charge of data protection and of access to documents; similarly, at EU level the European Data Protection Supervisor is separated from the European Ombudsman.

There is no single best practice as far as systems of appeals, remedies and other accountability mechanisms are concerned. Each of the Member States’ systems, as well as the existing EU system, has advantages and drawbacks; what is important is to be aware of the interaction between these systems and administrative procedure.

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Codification of administrative procedure is often an opportunity to revise the existing system of appeals, remedies and other accountability mechanisms, but this existing system is also sometimes one of the important factors that eventually impede such a codification.

3. THE PURPOSES OF A CODIFICATION OF ADMINISTRATIVE PROCEDURE

3.1. Clarification of, and Easier Access to, Law

A first and prominent purpose of codification is usually the clarification of the content of law and facilitation of access to law for individuals, associations and businesses.

Such a purpose has been the main endeavour of the French experience since 1989, where the Commission supérieure de codification has produced more than seventy special and general codes in the last three decades, using the method of ‘codification à droit constant’ (see section 5.1). Facilitation of access to law is indicated as one of the main purposes of the French Law of 2000 on the rights of citizens in their relationship with public administration. The Conseil Constitutionnel has declared that the relevant right had the level of a constitutional right in French law. Interestingly enough, however, this law of 2000 is by no means a general codification of administrative procedure. One of the reasons why the Commission supérieure de codification eventually dropped the idea of an administrative code from its agenda is probably that it considered that a mere codification of the existing laws was not enough, because an important part of the existing rules and principles of administrative procedure has been established in France by the case-law of the supreme administrative court, the Conseil d’État.

The EU experience with codification (see introduction, footnotes 3, 4 and 5) might therefore be more relevant than the French method of ‘codification à droit constant’. Indeed, many of the codifications in Europe have drawn on established case-law. Such a codification is however more difficult to achieve, as it also involves innovation with respect to existing rules and principles, be it only because the jurisprudence is conditioned by the cases which have been submitted to the courts, usually in a haphazard way.

3.2. Coherence of Principles and Procedures

A second purpose of codification, by no means contrary to clarification and easier access to law, is to ensure the coherence of established principles and procedures, as opposed to the piecemeal character of sector specific legislation and of case-law. This has been clearly an aim of most codifications, with different approaches in different countries.
The main challenge for codification with such a purpose is that sector specific needs will usually lead to maintaining or to developing again sector specific laws. Such a challenge is at the centre of a big part of the recent literature on the codification of administrative procedure in Germany. If there is too much sector specific legislation providing for procedures that are clearly distinguished from general administrative procedure law, the latter may well become a kind of symbolic document with little practical impact.

Maintaining coherence of principles and procedure is not merely an aim for legal theory: numerous practical problems arise, due to contradictions in the principles and procedures of different sector specific regulations. It is therefore essential that the legislator carefully chooses which principles and procedures should have a general application across the board, and which variations as to the generally applicable principles and procedures are sustainable. The choices made by the legislator in this respect are reflected not only by the scope of codification (see section 4), but also in the general structure of the law on administrative procedure. Transitional clauses have to be carefully drafted in order to allow for an incremental adaptation of sector specific legislation when necessary.

In the perspective of a codification of administrative procedure at EU level, the existence of a big number of so-called composite proceedings needs to receive particular attention. Composite proceedings are procedures in which some segments of the procedure are accomplished by EU institutions, bodies, offices and agencies, and some others by Member States’ authorities. A general codification of EU administrative procedure needs to take into account the need of coherence of principles and procedures in all those segments: this is a difficult task, in view of the absence of a legal basis for harmonisation of administrative procedures in the Member States.

### 3.3. Default Procedures to Fill Gaps in Existing Law

A third purpose of a general law on administrative procedure is to fill gaps in the existing law. Gaps can exist for a number of reasons.

- First, when the law applicable to administrative procedure is developed on the basis of judicial review of administrative action, it is made of principles and rules which have usually developed overtime in a quite haphazard way. Indeed, courts have to deal with specific cases which are submitted to them, and they do not therefore get an opportunity to address all the legal issues which arise from administrative action. Especially, an important number of issues might affect individuals who have neither the knowledge, nor the resources to bring their cases to court.

- Second, sector specific legislation often contains a series of rules applying to administrative procedures that are drafted in a rather limited sector specific perspective, without taking into account the existing experience in other policy sectors. Such a sector specific perspective often leaves out some issues which should be dealt with in the law on administrative procedure.

- Third, administrative procedures are influenced by changes in the political, social, and technical environment. The developments of information technology in the last three decades have had a big impact on the design of routine procedures, on the availability of information and even on the sequences of decision-making processes. Developments of IT have usually led to specific legislation on data protection, but not always to a comprehensive review of the issues to be dealt with.
In order to fill the gaps of sector specific legislation and case law, a general law of administrative procedure is an appropriate tool to set up principles and rules that will apply by default in the absence of specific legal rules.

The work already undertaken by the Research Network on EU Administrative Law (ReNEUAL), to which the author of this note belongs, has already shown that there are important gaps to be filled in the EU law of administrative procedure. This is confirmed by the fact that a number of problems are submitted to the European Ombudsman or to the European Data Protection Supervisor, in the absence of a clear solution in EU legislation or in the case law of the ECJ. For instance, there is no comprehensive set of principles that apply to policy decisions of the European Commission; there are not either general principles applying to the participation of interested parties and the public in the decision making process for rule-making is not sufficiently dealt with by existing case law; there is a lack of general principles applicable to the management of contracts and agreements between EU institutions and private persons; etc. Furthermore, there is a lack of legal principles applying to the transmission and use of information in a growing number of policy fields, as well as in the functioning of the Internal Market and of the Area of Freedom, Security and Justice.

3.4. Establishing the Functions of Administrative Procedure

In order to guarantee the coherence of principles and procedures and fill the gaps of sector specific legislation and case law, the drafters of some of the general laws of administrative procedure have thought it necessary to first establish what the functions of administrative procedure are. Administrative procedures are different from the procedures applied in private industry and services; they are not only the result of technical processes and quest for efficiency, but respond to specific public sector values.

The Italian experience which led to the adoption of the Law on Administrative Procedure n° 241/1990 is an interesting illustration of such a way of proceeding. The commission of experts presided by Professor Nigro which worked on the codification of administrative procedure until 1984 was thus able to agree upon the fact that, in Italy, administrative procedure has four main functions. First, administrative procedure serves to make sure that what is going to be decided is in line with existing law; this necessitates finding out and qualifying the factual situation. Second, administrative procedures serve as a complement to existing law, through the exercise of administrative discretion – i.e. a choice permitted by law – taking into account that discretion allows neither for arbitrariness nor for haphazard decisions. Third, administrative procedure serves ascertaining the interests which might be affected by what is going to be decided: general interest, interests of the addressees of a possible decision or act, interests of the public, and of specific stakeholders. Fourth, administrative procedure enables to organise the relevant interests to be safeguarded in order to adapt the application of law to the protection and balancing of interests.

Thinking about the functions of administrative procedure in the context of EU policies and legislation is especially necessary, as EU administration has a very special and complex nature, different from that of States, sub-state or local administration.

According to the author of this note, EU administrative law has to be considered in the light of its specific foundations. The foundations of EU administrative law are:
1) Functional foundations such as the fundamental freedoms – freedom of movement of persons, goods, services and capitals – and more generally the objectives now set up in art. 3 TEU;

2) The principle of institutional balance which affects the relationship between EU institutions bodies, offices and agencies; and the principle of procedural autonomy which affects the relationship between EU institutions and Member States’ authorities;

3) The rights, principles and rules guaranteed by the EU Charter of Fundamental Rights.

Thinking about the functions of administrative procedure should not be seen as a mere academic exercise. On the contrary, it is a unique opportunity for EU institutions bodies, offices and agencies to develop a common concept of their tasks. There is, however, a drawback in the idea that one of the purposes of codification of administrative procedure is to establish its functions: contrary to the three other purposes identified in this section, this fourth purpose cannot be achieved solely by technical work, and therefore may imply a longer time in order to come to an agreement between all those involved in such an exercise.

4. SCOPE OF CODIFICATION OF ADMINISTRATIVE PROCEDURE

KEY ELEMENTS

In order to meet the needs for codification at EU level, a broad scope of application would have to be chosen for such a codification, including a wide institutional scope (covering most, if not all, institutions, bodies, offices and agencies of the Union) and material scope (covering most, if not all, policy sectors). Such a codification should cover adjudication, rule-making, contracts and information management.

4.1. Institutional Scope of Application

The question whether an EU codification of administrative procedure should apply only to EU institutions bodies, offices and agencies, or also to Member States’ authorities when implementing EU policies has to be answered in the light of the existing Treaty provisions.

The Treaties provide only for a possible legal basis for a general codification of administrative procedure of the EU institutions, bodies, offices and agencies: art. 298 TFEU, according to which (par. 2) “the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to [the] end” of making sure that “in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration” (par. 1).

It is the author of this note’s view that neither art. 114 TFEU (on the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market), nor art. 352
TFEU (the ‘flexibility clause’) could be considered as a basis for a general codification of administrative procedure applying to Member States’ institutions and administration in the implementation of EU legislation. Therefore, a system similar to the Italian or Spanish Administrative Procedure Laws (see above 2.2.3), which contains principles and rules applicable to State administration as well as to the administration of Autonomous Communities and Local Government, is not applicable to the EU. The German solution of a Federal Law and parallel Laws of the Länder is more akin to the issues to be solved by the EU, but the diversity as regards the law of administrative procedure in Member States is broader than the diversity between German Länder.

This being said, even if a codification were to apply only to EU institutions, bodies, offices and agencies, the principles and rules that it would establish need to be thought of in the light of the co-operation between them and Member State’s authorities which most EU policies implies. This is especially important when it comes to composite proceedings (see above section 2.3), or when dealing with flows of information (see above section 2.4).

4.2. **Material Scope of Application**

Many of the Member States’ laws on administrative procedure such as the German and Italian law (see above section 2.1) apply only to so-called administrative decisions (or adjudication), i.e. to unilateral decisions affecting single interests of individuals, groups or businesses, even if they sometimes contain a few rules applicable to contracts, as in the German Laws. The 1946 US federal *Administrative Procedure Act*, on the other hand includes very important rules and principles which apply to ‘rule making’, i.e. the exercise of regulatory power by administration. Only few Administrative Procedure Laws, such as for instance the Portuguese law of 1992 also include agreements and contracts between administrative authorities and other private or public bodies or individuals.

The work already been undertaken by the ReNEUAL network – to which the author of this Note belongs – is based upon the assumption that there is a need for clarifying, restating and stating principles applicable to adjudication, rule making and contracts, and that, furthermore, in a transversal manner, to information management. Therefore ReNEUAL has set up four working groups, dealing with each of these four issues⁷¹. The work already undertaken has confirmed that there is a good amount of overlap of issues and principles in the sectors of adjudication, rule-making and contracts, and that there is room for general overarching principles.

4.2.1. **Adjudication**

Most of the EU law principles and rules of administrative procedure that have been developed by the ECJ and are reiterated in art. 41 EU Charter of Fundamental Rights apply mainly to adjudication, i.e. to unilateral decisions affecting single interests of individuals, groups or businesses: ‘administrative acts’ as they are called in most of the Continental European legal systems. The same is true of the European Ombudsman’s European Code of Good Administrative Behaviour and of the relevant Institutions’ internal regulations.

It would be wrong, however, to deduct from this statement that an EU law of administrative procedure for adjudication could be a mere codification of existing case-law and sector specific legislation. Choices have to be made between sometimes conflicting solutions of different sector specific legislations, and a number of gaps also have to be filled.

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⁷¹ See *Towards Restatements and Best Practice Guidelines*, cit. n. 1, p. 12.
Furthermore, many of the procedures that concern the issues of adjudication are composite proceedings (see section 2.3) and therefore a codification of adjudication procedure at the level of EU institutions, bodies, offices and agencies has to be carefully designed in order to be compatible with the different laws of administrative procedure in Member States.

4.2.2. Rule Making

In some Member States, like France, ‘administrative acts’ also include regulatory acts (decrees, ministerial regulations etc.); as mentioned before the USA’s APA contains very important rules and procedures which apply to ‘rule making’, i.e. the exercise of regulatory power by federal administrations, such as for instance the ‘notice and comment’ procedure which aims to the participation of stake-holders in rule making.

There would be good reasons to include rule making in an attempt to codify EU administrative procedure. Rule making is a particularly important activity of EU Institutions and bodies in quantitative terms, especially as regards the Commission. Arts. 290 TFEU on delegated acts and 291 TFEU on implementing acts set a very specific Treaty framework to EU rule-making. Rule-making involves in very many cases not only the Commission or Council as holder of the Executive function, but also other EU bodies, offices and agencies, and the Parliament as delegating institution, if one is to take the view that delegated acts belong to rule-making. Furthermore, there is a very important component of composite proceedings in EU rule making.

Rule making is a sector where the lack of coherence between different sector specific legislation and the scarcity of general principles in the case law of the ECJ calls for an effort in clarifying, restating and stating principles which could be applicable across the board. It is the view of the author of this Note that nothing impedes applying art. 41 of the Charter on the right to good administration also to rule making, including to consultation procedures by the Commission.

4.2.3. Contracts and agreements

As already mentioned, few Member States laws on administrative procedure also include contracts and agreements. It has to be noted however that in France, for instance, contracts and agreements entered into by public administration are also considered as ‘administrative acts’ and would therefore normally be subject to a general administrative procedure law. Portugal is one of the rare countries where the general law of administrative procedure of 1991 has also been designed to apply to contracts of public administrations. The fact that it has later been decided to take deal with contracts in a separate law should not be interpreted as a reason to also split the law of administrative procedure at EU level: in Portugal, the main reason of this change was to facilitate compliance with the often changing EU directives on public procurement.

Contracts and agreements of EU institutions, bodies, offices and agencies are not limited to providing them with infrastructures, supplies and services: they have become a major tool of policy implementation in many important sectors such as research and technological development, development aid, judicial cooperation in civil matters as well as in criminal matters and police cooperation, and more generally in the fields of supporting, coordinating and supplementing actions of the Union.
As far as the EU institutions, bodies, offices and agencies are concerned, one may consider the Financial Regulation\textsuperscript{72} as a basic codification as regards the awarding phase. However, the Financial Regulation has been drafted mainly in the perspective of sound financial management, whereas administrative procedure needs to take other interests into account: especially those of sub-contractors and of third parties who are not involved in a contract or agreement that may affect their interests. Furthermore, each of the institutions has its own standard contractual clauses and model contracts, whereas there is room for some harmonisation. There are also numerous agreements and contracts which do not necessarily imply spending EU funds, and therefore are not submitted to the rules of the Financial Regulation.

Beyond the aspects of administrative procedure which apply to the award phase, there are numerous problems in the phase of contract management where there is a need for general principles of EU laws. One of the problems is that, to a great deal, the law applicable to contracts of EU institutions, bodies, offices and agencies is not EU law, but national law – often the law of the Member State where an institution, body, office or agency has its seat. As a consequence, there are often discrepancies between the rules applicable to the contract depending on where and by whom it has been concluded, and furthermore national law usually does not take into account the very specific interests which have to be protected on both sides of the contracting parties.

4.2.4. Information Management

As already mentioned under section 2, most Member States have a specific legislation on data protection and access to documents. The EU has its own Regulations on these issues, which are under scrutiny for a revision after the coming into force of the Lisbon Treaty. Some Member States have a more extensive set of principles on information management.

Information management is central to a growing number of networks which involve EU institutions, bodies, offices and agencies on the one side, Member States’ authorities, interests groups and NGO’s on the other. Even if in many cases such networks do not formally participate in a procedure that may lead to the adoption of a decision, regulatory act or agreement, the information they provide to institutions, bodies, offices and agencies is a central factor in decision making.

There is no reason to exclude data protection and access to documents from a general endeavour to codify administrative procedure. Furthermore, there is lack of legal principles applicable to the transmission and use of information generated outside of the institutions, bodies, offices and agencies in a growing sectors of policy fields, as well as in the functioning of the Internal Market and of the Area of Freedom, Security and Justice; this statement applies to all of the three areas already mentioned: adjudication, rule-making and contracts.

5. METHODS OF CODIFICATION

**KEY ELEMENTS**

In order to meet the needs for codification at EU level, the appropriate methodological option is that of innovative codification, i.e. taking over principles and rules from existing legislation and case law, making choices in cases of conflict and adopting new principles and rules in order to substitute inappropriate ones or to complement existing ones.

5.1. ‘Codification à Droit Constant’, ‘Innovative Codification’ and ‘Statements and Restatements’

Member States’ and EU Institutions’ experiences in codification may be classified under two types of codification endeavours: ‘codification à droit constant’ and ‘innovative codification’; a non-binding type of codification is also worthwhile considering, under the label of ‘statements and restatements’.

- **‘Codification à droit constant’** – a technique which has been especially developed in France over the last three decades (see section 2.1) – amounts to establishing a legally binding consolidated version of existing legislation. It is therefore mainly a technical endeavour which can be undertaken without involving the legislator. The latter only formally adopts the text which has been prepared by technicians. The main advantage of this technique is that codification is not dependent upon the work-load of the legislator which only formally adopts a text which is not being amended. Therefore ‘codification à droit constant’ is a method suited to rapid codification of existing law, when its main purpose is clarification of, and easier access to law (see section 3.1). The main drawback of the method is that it does not allow for changes in legal rules: this is a paradox with important consequences as usually the codification exercise itself reveals contradictions and gaps in existing law. Furthermore, ‘codification à droit constant’ is usually not legally adapted for a codification of courts’ case-law.

- **‘Innovative codification’** is the exercise whereby a new law takes over existing principles which are usually dispersed in different laws and regulations and in the case law of courts, and modifies existing principles and rules if needed, adding new principles or rules if necessary. ‘Innovative codification’ has the advantage that it allows resolving contradictions and filling gaps. Its main drawback is that, in order for the codification to have legally binding value, it needs to be adopted by the legislator, which implies allowing time for the necessary debates and votes. Furthermore, innovative codification may be diverted from its purpose if the different institutions involved in drafting the law of administrative procedure try and use the opportunity to adopt principles and rules that are outside of the primary scope of the act.

- A non-legally binding type of codification, called ‘restatements’ is in use in the USA. “In the United States, the notion of a Restatement of the Law has traditionally signified a consolidation of the principles of [judge made] law governing a given field with a view to bringing a measurably greater degree of clarity, consistency and simplicity to the law than would otherwise exist – without, however, any pretense that such a consolidation
...amounts in itself to positive law"\textsuperscript{73}. Both the fact that a big part of the relevant EU law is not judge made law, and, more importantly, that a number of important gaps in the existing law have to be filled, the endeavour of the ReNEUAL Network would be better caught by the formula ‘statements and restatements’; a previous note by the same author has given more indications about this method\textsuperscript{74}.

5.2. **Preparatory Phase of Codification**

During the preparatory phase of a possible codification of administrative procedure for EU institutions, Member States’ previous experience show that there should be room for a series of actors to help stating principles and rules:

- Practitioners coming from institutions, bodies, offices and agencies of the Union, but also from Member States’ authorities and public administrations;
- Judges, who are not participating in their formal capacity – differently from their work in court – but whose experience is essential in order to get supplementary insights on problems which are perceived by courts but on which they cannot decide either because of lack of formal competence or because of conflicting rules in written law;
- Representatives of addressees of administrative decisions and other stake-holders in EU policies;
- The European Ombudsman, who would have an important role, both as the author of the Code of Good Administrative Behaviour and as the body which receives numerous complaints that are not dealt with by courts but reveal the need for clearer principles and rules;
- Similarly, the European Data Protection Supervisor in the field of information management;
- Academia. European Administrative Law has been developed as a field of research and teaching over the last decades. Furthermore, the need to ensure compatibility between EU law on administrative procedure and the relevant law of the Member States needs expertise in comparative administrative law, and expertise which is mainly present in the ECJ, and in academia;
- Last but not least, the European Parliament – and to a certain extent of National Parliaments – at the preparatory stage of codification, especially in order to ensure that a law on administrative procedure that would eventually come out of the preparatory work is in line with mechanisms for political accountability.

5.3. **Drafting**

The institutional setting embedded in the treaties implies that drafting a law on administrative procedure for institutions, bodies, offices and agencies of the Union is a function of the Commission services, with Parliament and Council amending the proposed draft according to the usual procedures.


\textsuperscript{74} See *Towards Restatements and Best Practice Guidelines*, cit. n. 1, p. 10.
Importantly, one has to take into consideration not only art. 298 TFEU, by virtue of which the ordinary legislative procedure is applicable to a general codification of administrative procedure, serving “an open, efficient and independent European administration”, but also art. 52 (1) of the EU Charter of Fundamental Rights. The principle therein stated, known for instance in Germany as ‘Gesetzesvorbehalt’ and in Italy as ‘riserva di legge’ (reservation for law) means that limitations to rights and freedoms can only be established by a legislative procedure. According to the author of this note, this could to a large extent impede institutions, bodies, offices and agencies of the Union of adopting their own regulations of administrative procedure that would be binding for the holders of rights and freedoms, i.e. individuals and legal persons.

Differently, if preference remains with a non-binding instrument, there is nothing which prevents each institution, body, office or agency to adopt its own code of conduct, as has already happened with the Institutions. There is also nothing which prevents the European Parliament of adopting a resolution containing a code of conduct with a general scope, drafted in a way that allows for application by all institutions, bodies, offices and agencies of the Union. Experience shows however that there is little hope for voluntary compliance with such a non-binding instrument by all institutions, bodies, offices and agencies, or that compliance happens with variations which defeat the goal of a general codification.

Non-binding codification of administrative procedure had therefore better remain a ‘private’ endeavour, such as the one pursued by the ReNEUAL Network. Statements and restatements, and best practice guidelines on EU administrative law can therefore have a double purpose:

- Proposing materials for the EU legislator in order to foster coherence of sector specific and issue specific directives and regulations, and for the voluntary development of institutions’, bodies’, offices’ and agencies’ own codes of administrative procedure;

- Provide for a comprehensive basis of a law of administrative procedure for EU institutions if and when the Institutions deem the moment for such a general binding codification has come.

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75 “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”
6. CONCLUSIONS

KEY ELEMENTS

The possible adoption of a Law of Administrative Procedure for the Union institutions, bodies, offices and agencies would imply solid preparatory work, to be carried out throughout the current parliamentary term, and possibly over the next one.

In order to answer the questions ‘Is a Law of Administrative Procedure for the Union Institutions Necessary?’ the following points have to be taken into account, on the basis of previous experience in general codification of administrative procedure in the Member States and elsewhere.

Taking into account the possible purposes of a codification of administrative procedure (section 3) there is clearly a need for codification of EU law on administrative procedure:

- The sector specific and issue specific fragmentation of existing EU legislation and case law calls for clarification and easier access to law;

- Differences between sector specific legislation and the need to guarantee compatibility between EU law and Member States’ law of administrative procedure in composite proceedings calls for more coherence of principles and procedures;

- The sector specific and issue specific fragmentation of existing EU legislation and case law and the fact that it will continue developing over time with a changing technological and legal environment calls for default procedures to fill gaps in existing law;

- The very specific nature of the EU – as opposed to a State – and of its policies which have to comply with the objectives as set down in the treaties and with the principle of institutional balance and that of procedural autonomy of the Member States calls for a thorough reflection on the functions of EU administrative procedure.

Taking into account the different types of instruments used by the institutions, bodies, offices and agencies and their different roles in the implementation of EU policies, the need for a general codification of administrative procedure of the EU institutions should have a broad scope including:

- Procedures of all the institutions, bodies, offices and agencies, with the usual provisos for very specific aspects in some fields of the ESPC; the lack of a legal basis for the approximation of Member States’ general laws of administrative procedure obviously excludes Member States’ authorities from the scope of such a codification;

- Policies that are directly implemented by EU institutions, bodies, offices and agencies and policies the implementation of which is shared by the former and Member States’ authorities; codification of EU law needs to aim at compatibility with the relevant Member States’ law;
Codification should include not only adjudication (administrative decisions) but also rule-making (regulatory powers) as well as the adoption and management of contracts and agreements, and all the issues linked with information management.

Taking into account the sector specific and issue specific fragmentation of existing EU legislation and case law and the gaps to be filled in existing law, a codification of EU law of administrative procedure can only be undertaken as ‘innovative codification’, not as ‘codification à droit constant’.

In order to be relevant, coherent, as exhaustive as possible, and compatible with Member States’ law on administrative procedure, a codification of EU administrative procedure law needs an important preparatory work with the participation of:

- Practitioners;
- Judges;
- Representatives of addressees and other stake-holders;
- The European Ombudsman;
- The European Data Protection Supervisor;
- Academia: experts in European Administrative Law and in comparative administrative law;
- Last but not least, the European Parliament.

Preparatory work could be achieved in the form of statements and restatements and best practice guidelines.

Drafting a law on administrative procedure for the Union institutions would need to be done on the basis of art. 298 TFEU by ordinary legislative procedure. The necessary preparatory work and time for drafting and coordination between the institutions implies that a law of administrative procedure for the Union institutions, bodies, offices and agencies could probably at best be adopted towards the end of the ongoing parliamentary term, and possibly only during the next one. In the meantime, non-binding instruments could be further developed on the basis of the preparatory work that has been indicated above.
III. ARGUMENTS IN FAVOUR OF A GENERAL CODIFICATION OF THE PROCEDURE APPLICABLE TO EU ADMINISTRATION

Oriol MIR-PUIGPELAT

NOTE

Abstract

After examining the current regulation and pointing out its main shortcomings, this briefing argues that a general codification of the procedure of the institutions, bodies, offices and agencies that make up the EU administration is the best way of fulfilling the mandate, imposed by Article 298 TFEU, of adopting the necessary provisions to achieve ‘an open, efficient and independent European administration’ and to duly develop the fundamental right to good administration laid down in Article 41 CFREU.
ABBREVIATIONS AND ACRONYMS

CFREU  Charter of Fundamental Rights of the European Union of 7 December 2000 (with the adaptations agreed by the European Parliament, the Council and the Commission on 12 December 2007)

DÖV  Die Öffentliche Verwaltung

DV  Die Verwaltung

DVBl.  Deutsches Verwaltungsblatt


ECR  European Court Reports

ELJ  European Law Journal

EPL  European Public Law

EU  European Union

EUI  European University Institute (Florence)

EuR  Europarecht

IJGLS  Indiana Journal of Global Legal Studies

LPBR  The Law and Politics Book Review

NVwZ  Neue Zeitschrift für Verwaltungsrecht

OJ  Official Journal of the European Union

REDA  Revista Española de Derecho Administrativo

REDC  Revista Española de Derecho Constitucional

RFC  Revista Española de la Función Consultiva

RTDP  Rivista trimestrale di diritto pubblico

RVAP  Revista Vasca de Administración Pública
Arguments in favour of a general codification of the procedure applicable to EU administration

**TECE**  Treaty establishing a Constitution for Europe

**TFEU**  Treaty on the Functioning of the European Union

**TUE**  Treaty on European Union

**VVDStRL**  Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer

**VwVfG**  Verwaltungsverfahrensgesetz (German Federal Law on administrative procedure of 25 May 1976)
1. IMPACT OF THE TREATY OF LISBON ON THE DEBATE ON CODIFICATION OF THE PROCEDURE APPLICABLE TO EU ADMINISTRATION

1.1. Constitutionalisation of the EU administration and increased density of its regulation as a result of the Treaty of Lisbon

European public law doctrine has for some time been debating whether the basic rules and principles of administrative procedure that must be observed by both the EU administration and the administrations of the Member States when implementing EU law should be codified at EU level.\(^{76}\)

This debate, which began at the end of the 1980s as a result of the substantial increase in the Community’s powers brought about by the Single European Act, intensified following the adoption of the Treaty of Maastricht. It has entered a new phase since the Treaty of Lisbon came into force, particularly with regard to codification of the procedural rules applicable to the EU administration.

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The Treaty of Lisbon has in fact boosted an increased density of the EU administration’s regulation; this has occurred in several ways.

The starting point lies in that the said Treaty gives the EU administration due visibility and constitutional anchorage\(^{77}\). Unlike most national constitutions, which make a clear distinction between the various powers of the State, the EU’s primary legislation has for a long time not clearly and expressly recognised the existence of the EU administration, i.e. a specific organisational apparatus entrusted with implementing EU law, together with the national administrations, with this apparatus being integrated within the executive and clearly separate from the other Union powers (legislative and judiciary). This lack of constitutional recognition entailed a lack of specific constitutional limits on the Union’s administrative action, limits which are in fact common in the constitutions of the Member States.

This lack of interest of the primary legislation in the Union’s administrative dimension, traditionally justified by the principle of institutional autonomy of the Member States and the consequent preponderance of indirect implementation of EU law, lost all justification some time ago. The constant increase in the Union’s powers with successive reforms of the Treaties has resulted in the formation of a European administrative apparatus of considerable size, with significant powers to materially condition the implementation of EU law by national administrations, and even to directly affect Union citizens.

The Treaty of Lisbon has corrected this situation and explicitly constitutionalised the EU administration, making it visible and separating it more clearly from the other powers of the Union.

As a result, despite keeping the traditional names of the sources of EU law and not introducing the formal categories of ‘European law’, ‘European framework law’ and ‘European regulation’ contained in the unsuccessful Constitutional Treaty\(^{78}\) (expressions with significant symbolic and identifying value\(^{79}\) and therefore likely to hinder ratification of the Treaty), the Treaty of Lisbon distinguishes much more clearly between the legislative function and the (normative) regulatory function, by expressly giving the European Parliament and the Council the ‘legislative function’\(^{80}\), recognising the Commission’s power to propose ‘Union legislative acts’\(^{81}\), contemplating and regulating the ‘ordinary legislative procedure’ and the ‘special legislative procedures’ and providing that ‘legal acts adopted by legislative procedure shall constitute legislative acts’\(^{82}\), giving the Commission the power to develop (normative) delegated\(^{83}\) and implementing\(^{84}\) acts, and providing – as a particular innovation in terms of judicial protection – that any natural or legal person may ... institute


\(^{78}\) Article I-33(1) TECE.

\(^{79}\) Ruffert, ‘Rechtsquellen’ (footnote 77), p. 1105.

\(^{80}\) Articles 14(1) and 16(1) of the new TEU.

\(^{81}\) Article 17(2) of the new TEU.

\(^{82}\) Article 289 TFEU.

\(^{83}\) Article 289 TFEU and other corresponding articles.

\(^{84}\) Article 290 TFEU.
proceedings against ... a regulatory act which is of direct concern to them and does not entail implementing measures\(^{65}\).

In the same respect, the Treaty highlights the administrative dimension of the Commission when it sets out its functions\(^{86}\) and alludes, for the first time, expressly and systematically to the ‘bodies, offices and agencies’ of the Union. These bodies, offices and agencies (offices, European agencies and executive agencies), as distinct from the ‘institutions’ of the EU, have proliferated in recent years and taken over a large part of the administrative functions previously carried out by the Commission, thereby constituting a fundamental part of the current EU administration.

However, the Treaty of Lisbon does not just recognise the existence of the EU administration, but, most importantly, subjects it to new constitutional limits.

In this respect, it expressly subjects, not only the institutions, but also the other bodies, offices and agencies making up the EU administration, to the constitutional rules enshrining the democratic and rule of law principles in the relations between citizens and the EU: principle of equality\(^{88}\), principles of transparency and participation\(^{89}\), principle of protection of personal data\(^{90}\) and the principle of judicial protection against EU acts\(^{91}\). The Treaty also imposes financial control over the EU administration\(^{92}\) and highlights the importance of the effective implementation of Union law by the Member States and the role played to this end by the cooperation between national administrations and the EU administration\(^{93}\).

The Treaty of Lisbon, by recognising the full legal effectiveness of the Charter of Fundamental Rights of the European Union of 7 December 2000 (with the adaptations agreed by the European Parliament, the Council and the Commission on 12 December 2007)\(^{94}\), also recognises an extensive list of fundamental rights, which must be respected by the EU administration. Particularly important, in relation to administrative procedure, is the fundamental right to good administration\(^{95}\). As is well-known, this right, which only applies to the institutions, bodies, offices and agencies of the EU – and not to the Member States when implementing EU law\(^{96}\) – entails a series of fundamental procedural guarantees established by the Court of Justice and – in part – by the Treaties and secondary legislation\(^{97}\). Included in the CFREU at the request of the then European Ombudsman, the

\(^{65}\) Fourth paragraph of Article 263 TFEU.

\(^{86}\) Article 17 of the new TEU.

\(^{87}\) These are now listed in Article 13 of the new TEU. They naturally include the Commission, which is the true Executive of the Union, and the Council, which also has certain administrative functions.

\(^{88}\) Article 9 of the new TEU.

\(^{89}\) Article 15 TFEU.

\(^{90}\) Article 16 TFEU.

\(^{91}\) Articles 263 and 265 TFEU (action for annulment and proceedings for failure to act).

\(^{92}\) Article 325 TFEU (fight against fraud and protection of the financial interests of the EU).

\(^{93}\) Article 197 TFEU.

\(^{94}\) Article 6(1) of the new TEU, conferring on the CFREU the same legal value as the Treaties.

\(^{95}\) Article 41 CFREU.


\(^{97}\) See Section 2 below.
Finn Jacob Söderman, this right now occupies a central position in the constitutional design of the EU administration98.

1.2. In particular, the mandate to regulate the EU administration contained in the new Article 298(2) TFEU

Closely linked with the right to good administration, the Treaty of Lisbon also now establishes, for the first time, that ‘in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration’99, and requires the European Parliament and the Council to adopt, in accordance with the ordinary legislative procedure, the regulations needed to that end100. With this new provision, the Swedish delegation, which pressed for its inclusion in the Constitutional Treaty, aimed to ensure that the Union legislature would develop, through a legally binding rule, the fundamental right to good administration contained in the CFREU, based on the codes of good administrative behaviour developed by the European Ombudsman and the Commission101.

In light of the above, there can be no doubt that the Treaty of Lisbon has made an important step forward in the gradual process of juridification of the EU administration that has taken place in recent years. The new Article 298(2) TFEU is particularly important in this respect, as it contains a genuine mandate given to the Union legislature to adopt, by means of legally binding regulations, all those provisions needed to guarantee the openness, efficiency and independence of the EU administration.

The European Parliament has realised the significance of this provision and has recently launched a Working Group on EU administrative law ‘with the aim of examining whether a codification of EU administrative law is possible and what such a project would involve in practice’102.

There is no doubt that Article 298(2) TFEU offers a sufficient legal basis for the Union legislature to adopt a binding general codification of the administrative procedure of the EU administration103, although it certainly does not oblige it to do so. The literal wording of this provision, which refers to ‘regulations in accordance with the ordinary legislative procedure’, in the plural104, also allows the Union legislature to opt for partial codifications, and even for merely sectoral regulations governing the actions of the EU administration.

Nevertheless, there are many good arguments for the technique of general codification, as will be seen in this briefing. Firstly, however, we need to briefly indicate the current sources of the procedure applicable to EU administration and point out their main shortcomings.

99 Article 298(1) TFEU.
100 Article 298(2) TFEU.
103 In this respect, Craig, EU Administrative Law (footnote 76), p. 280; Nieto Garrido/Martín Delgado, European (footnote 76), pp. 37, 108 and 118 et seqq.; Ladenburger, ‘Kodifikation’ (footnote 76), p. 119 (according to whom this provision also contains a mandate to develop a general codification); Kahl, ‘Europäisierung’ (footnote 76), p. 58.
104 Unlike Article III-398 TECE, which, in the Spanish version, referred to ‘European law’ in the singular.
2. REGULATORY SOURCES OF THE PROCEDURE APPLICABLE TO EU ADMINISTRATION

2.1. General principles of administrative procedure developed by the Court of Justice and sectoral and partial codifications of secondary legislation

The regulatory sources of the administrative procedure governing the EU administration have developed in a very similar way to those of the Member States. As in the latter, their development has been entrusted for a long time to case-law, which over the years has established a stable body of general principles based on the limited procedural provisions initially contained in the Treaties and secondary legislation, and in particular on the deep-rooted – although not always common – principles established in the various Member States105.

As has also happened in many Member States, this praetorian phase has been followed by the increasing positivisation of procedural law through sectoral secondary legislation106. Some of this legislation establishes, in considerable depth, the procedural rules that the EU administration must observe, thereby forming genuine sectoral codifications – when compared to the dispersion existing in other sectors – or partial general codifications107.

The following are notable examples of sectoral codifications:

- Regulation (EC) No 1/2003 on defence of competition108
- Regulation on concentrations109
- Regulation on control of State aid110
- Regulation on the Structural Funds and the Cohesion Fund111
- Single Regulation on the common organisation of agricultural markets112

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106 On the reasons for this increasing proceduralisation of the EU’s secondary legislation, see Mir Puigpelat, 'Codificación' (footnote 76), p. 57 et seqq.

107 This briefing uses the concept and types of codification indicated by Kahl, 'Verwaltungsverfahrensgesetz' (footnote 76), p. 83 et seqq.


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- and the regulations on certain European agencies (due to containing general rules on their form of action), particularly on those agencies with decision-making powers, such as the Office for Harmonization in the Internal Market\(^{113}\), the Community Plant Variety Office\(^{114}\), the European Medicines Agency\(^{115}\), the European Aviation Safety Agency\(^{116}\) or the European Chemicals Agency\(^{117}\)

In turn, the following are notable examples of (very) partial general codifications:

- Regulation on periods\(^{118}\)
- Regulation on the languages to be used by the EU\(^{119}\)
- Regulation on the right of access to documents of the EU institutions\(^{120}\)
- Regulation on the protection of personal data with regard to its processing by the EU institutions and bodies\(^{121}\)
- Financial Regulation\(^{122}\) (which also incorporates rules governing the contracts awarded by the EU administration)
- Staff Regulations of EU officials\(^{123}\)
- new Regulation on comitology\(^{124}\), which repeals and replaces the Decision on comitology\(^{125}\) (with a large number of EU regulations referring to its procedural rules)
- General Regulation on Community inspections\(^{126}\)
- or Regulation (EC) No 58/2003 on the EU executive agencies (which contains particular procedural rules applicable to all agencies)\(^{127}\)

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\(^{118}\) Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits.

\(^{119}\) Regulation (EEC) No 1 [of 1958] determining the languages to be used by the European Economic Community.


\(^{121}\) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.


\(^{123}\) Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission.


\(^{126}\) Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities.

Some of these regulations also cover related issues, albeit in piecemeal fashion, which are often included in national codifications of administrative procedure, such as certain aspects relating to administrative acts\textsuperscript{128}, administrative appeals, review on the initiative of the authorities themselves or non-contractual liability of administration\textsuperscript{129}.

However, unlike in many Member States (such as Austria, Spain, Germany, Denmark, Sweden, Poland, Italy, Portugal, the Netherlands, Greece, Czech Republic, Lithuania, Slovakia, Estonia, Slovenia, Finland and Latvia)\textsuperscript{130} and other countries outside the EU, such as, in particular, the United States\textsuperscript{131}, this process of the gradual development of administrative procedure has not – yet – culminated, in the case of the EU, in a complete\textsuperscript{132} general codification applicable to the EU administration.

\subsection*{2.2. Codes of good administrative behaviour}

The closest we have to this type of general codification at EU level is the various \textit{codes of good administrative behaviour} adopted by various institutions and bodies, especially the European Code of Good Administrative Behaviour (ECGAB) adopted by the European Parliament on 6 September 2001\textsuperscript{133,134}.

Under the impetus of the European Ombudsman, and in parallel with the gestation of Article 41 of the Charter of Fundamental Rights of the European Union of 2000\textsuperscript{135}, the said Code is intended to develop that article\textsuperscript{136}. It therefore includes both substantive and procedural principles aimed at all the institutions, bodies, officials and servants of the

\begin{itemize}
\item \textsuperscript{128} On the administrative act concept under EU law, see Arzoz Santisteban, ‘Concepto’ (footnote 105), p. 66 et seqq.
\item \textsuperscript{129} See, for example, Article 21 et seqq. of Regulation (EC) No 58/2003 on executive agencies or the regulations on the aforementioned European agencies.
\item \textsuperscript{131} See its federal Administrative Procedure Act of 11 June 1946, now included within Title Five, Part One, Chapters Five (Sub-Chapter Two) and Seven of the \textit{United States Code} (Sections 551 et seqq. and 701 et seqq.).
\item \textsuperscript{132} No general codification of procedure, not even those regarded as the most extensive, such as the German \textit{Verwaltungsverfahrens- und Verwaltungsprozeßrecht europäischer Staaten}, DOV 2002, p. 133 (p. 137 et seqq.); Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 94 et seqq.; \textit{Swedish Agency for Public Management, Principles} (footnote 99), p. 73.
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EU in their external relations with the public. However, its central points add little to what has already been established by EU case-law.

Nevertheless, like other similar codes at EU level (such as, in particular, the Commission’s Code of Good of Administrative Behaviour), it is not binding and is merely a typical European instrument of soft law.

As such, it has no immediate external legal effectiveness, although it may have certain mediate legal effects, by serving to indicate the existence of an administrative precedent. Failure to observe this precedent in a specific case may be considered harmful to the principles of equality (in relation to the treatment of other citizens) or protection of legitimate expectations (in relation to the treatment received by the same citizen previously).

Precisely to make the ECGAB legally binding, both the European Parliament and the European Ombudsman have urged the Commission to incorporate it in a proposal for a regulation of the Union. However, to date the Commission has not only not presented this proposal, but has not even adopted the ECGAB. The Commission is still governed by its own Code of Conduct, which is much less detailed and guarantees much less than the ECGAB.

2.3. Commission communications on Better Regulation

The various Commission communications on Better Regulation are also an instrument of soft law. They were prepared in accordance with the recommendations contained in the famous Mandelkern Report 2001.

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137 Article 2 ECGAB. It does not therefore apply to the administrations of the Member States.
138 Article 3 ECGAB.
139 Ladenburger, ‘Kodifikation’ (footnote 76), pp. 114 et seq. and 128.
140 Code of good administrative behaviour for staff of the European Commission in their relations with the public, adopted on 13 September 2000 and included as an Annex to the Commission’s Rules of Procedure through a Decision of 17 October 2000 (published in OJ L 267, 20.10.2000, p. 63). The text of this Code can be found on the Commission’s website at http://ec.europa.eu/civil_society/code/index_en.htm. This Code has been used as an alternative model to the ECGAB by certain EU institutions and bodies. On this, see Martínez Soria, ‘Kodizes’ (footnote 133), passim; Tomás Mallén, Buena administración (footnote 133), pp. 91 et seq. and 271 et seq.; Ladenburger, ‘Kodifikation’ (footnote 76), p. 114 et seq.
141 As observed by Ruffert, ‘Art. 41 GRCh’ (footnote 94), p. 2684; Schöndorf-Haubold, Bettina, Die Strukturformen der Europäischen Gemeinschaft. Rechtsformen und Verfahren europäischer Verbundverwaltung, C.H. Beck, Munich, 2005, p. 400, footnote 186; Tomás Mallén, Buena administración (footnote 133), pp. 89 et seq. and 275 et seq.; Rengeling/Szczechalla, Grundrechte (footnote 94), p. 892. On the other hand, the external legal effectiveness of the ECGAB, unlike the Commission’s Code, which would be purely internal, is supported by Martínez Soria, ‘Kodizes’ (footnote 133), p. 697 et seq. Grzeszick considers that the various codes are binding as they define the new right to equal treatment under Article 41(1) CFREU: Grzeszick, ‘Gute Verwaltung’ (footnote 94), p. 177 et seq.
143 Regardless of its legal effectiveness, the ECGAB is used by the European Ombudsman as a parameter for judging the EU administration in the exercise of his or her duty of non-judicial scrutiny of maladministration under Article 228 TFEU and Article 43 CFREU.
144 Paragraph 1 of said European Parliament resolution of 6 September 2001 adopting the ECGAB (see footnote 133 above) and paragraph 9 of the Introduction included in the second edition of the ECGAB, written by the European Ombudsman (see footnote 133 above).
These communications define and develop in a very innovative manner important aspects for the governmental-administrative phase\textsuperscript{146} of the EU rulemaking procedure, such as the consultation of interested parties and the public in general\textsuperscript{147}, and the economic, social and environmental impact assessment (RIA) of the proposed measures\textsuperscript{148, 149}.

In some Member States, as in the United States, the administrative rulemaking procedure is governed by legally binding general codifications\textsuperscript{150}.

3. **FRAGMENTATION, GAPS AND OTHER SHORTCOMINGS IN THE CURRENT REGULATION OF THE PROCEDURE APPLICABLE TO EU ADMINISTRATION**

3.1. **Shortcomings in written law sources**

This peculiar combination of written and case-law sources and soft law instruments has certain shortcomings and problems that should not be ignored.

The written law sources are characterised by their high degree of fragmentation. In contrast to the situation in many Member States, at EU level, as we have seen, there is no binding general codification (beyond the micro-codification contained in Article 41 CFREU), and the procedural rules are spread among a large number of sectoral measures. In this respect, we only need to point out that each of the around 30 European agencies has its own general rules of procedure.

This gives rise to unjustified differences between the existing rules and to gaps. Despite the major efforts made in recent years to bring the EU’s administrative law into line with the usual democratic and rule of law requirements in national legal systems\textsuperscript{151}, there are still

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\textsuperscript{146} This takes place before the Commission presents its proposal for a regulation or directive and commences the legislative procedure properly speaking. The rulemaking procedure is exclusively a governmental-administrative procedure where the Commission itself ends the procedure by adopting the measure, as happens when developing delegated and implementing acts.


\textsuperscript{149} The Mandelkern Report and the other key communications and initiatives adopted in recent years by the EU to ensure better regulation are available on the following Commission website: \url{http://ec.europa.eu/governance/better_regulation/index_en.htm}. On this important process of improvement, in which attempts are being made to also involve the Member States, see Ponce Solé, Juli/Sánchez, Ana, ‘La evaluación de la calidad normativa’, Garde Roca, Juan Antonio (Coord.), *La Agencia Estatal de Evaluación de la Calidad de los Servicios y de las Políticas Públicas. Reflexiones y propuesta de creación. Informe Comisión Expertos, INAP*, Madrid, 2005, p. 139 (passim); Comisión Jurídica Asesora de la Generalidad de Cataluña, ‘Comunicación presentada a las IX Jornadas de la Función Consultiva’, *REFC*, 2007, p. 59 (p. 70 et seqq.) (available on the website of that institution: \url{http://cja.gencat.cat}); Smeddinck, Ulrich, ‘Optimale Gesetzgebung im Zeitalter des Mandelkern-Berichts’, *DVBl*. 2003, p. 641 (p. 643 et seqq.), with subsequent references.

\textsuperscript{150} For example, in Spain the general administrative rulemaking procedure (for regulations adopted by the central Government) is set out in Article 24 of Law No 50/1997 of 27 November 1997 on the Government and in Royal Decree No 1083/2009 of 3 July 2009 regulating the report on the regulatory impact assessment (in turn clearly influenced by the EU model).

\textsuperscript{151} Trute, Hans-Heinrich, ‘Die demokratische Legitimation der Verwaltung’, Hoffmann-Riem/Schmidt-Aßmann/Vößkuhle (Coords.), *Grundlagen* (footnote 77), p. 307 (p. 375 et seqq.); Ruffert, ‘Rechtsquellen’ (footnote 77), p. 1171. These efforts, which resulted in much of the secondary legislation listed in the previous section, stemmed, in part, from the serious institutional crisis provoked by the fall of the Santer Commission in
significant gaps in the various areas in which the Union is involved (in relation, for example, to time-limits for deciding on proceedings, rules on impartiality of officers, position of interested third parties, rules on electronic communications, indication of appeals that may be lodged, termination of proceedings by agreement, etc.).

These gaps include those associated with the increased interaction between the various national and EU administrations, and the resulting emergence of the European administrative union\textsuperscript{152}. As is well-known, the secondary legislation has greatly favoured this interaction in recent years, but has not solved many of the new problems arising with it, with these problems being typical of and inherent in any administrative union (Verbundprobleme\textsuperscript{153}).

The joint participation (for example, in integrated proceedings) of various national and EU administrations, subject to legal rules that are partly different, raises problems such as the procedural guarantees that shall be observed in each of the phases in which the administrations are involved (and the consequent effect that any procedural defect in the action of an administration has on the decision that may ultimately be adopted by another administration), judicial review with regard to administrative actions that do not formally decide the merits of the case, but do substantively (in cases of administrative interaction, there is a high risk of negative conflicts of jurisdiction, as happened in the famous Borelli case\textsuperscript{154}), or the determination of the non-contractual liability of each of the participating administrations if damage is caused.

Added to these problems, which are linked to the rule of law principle, are shortcomings in terms of the democratic principle and legitimacy, which derive from the overlapping of administrations and the subsequent lack of transparency and clear accountability\textsuperscript{155}. The Commission itself has warned about the lack of clear accountability resulting from the action of European agencies, and called for a rethink of their institutional design\textsuperscript{156}. 

\textsuperscript{152} See Mir Puigpelat, 'Codificación' (footnote 76), p. 60 et seqq.
\textsuperscript{153} Schmidt-Aßmann, 'Verfassungsprinzipien' (footnote 77), pp. 258 and 274.

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1999, due to certain cases of corruption (on this crisis and the administrative reform undertaken by the Prodi Commission to resolve this, see Fuentetaja Pastor, Jesús Ángel, La Administración Europea, Thomson-Civitas, Madrid, 2007, p. 102 et seqq.).


These interaction problems often cannot be satisfactorily solved by national or EU case-law nor by the law of the various Member States, but require an express solution by the EU legislature157.

3.2. Shortcomings in case-law sources

Despite the crucial role played by EU case-law in transforming the EU into a genuine Community (Union) of law and, in particular, into a Community (Union) of administrative law, the problems caused, in the current phase of the integration process, by entrusting to case-law the function of determining the procedural rules of the EU administration cannot be overlooked.

The judicial and therefore case-based determination of these rules creates more legal uncertainty and has less democratic legitimacy than that carried out by the legislature.

Furthermore, due to its specific nature and institutional function, case-law lacks the necessary instruments and perspective to create a complete and coherent body of procedural rules matching up to the multiple functions – which are not just limited to defending individual rights and interests – nowadays played by such an important instrument for steering the administration’s action as the administrative procedure is currently158.

In an EU with consolidated democratic institutions, the role of case-law must be to solve the interpretative problems that may be thrown up by procedural rules, and not to produce such rules. Despite gradual harmonisation, there are still significant differences in the regulation of administrative procedure in the various Member States, and the choice of which of the various national options (or other more innovative options) is most appropriate for the EU administration must be made by the democratic legislature.

3.3. Shortcomings in soft law

Finally, soft law seems inadequate to ‘regulate’ a central steering instrument such as procedure, which not only has an internal dimension, but directly affects citizens and the quality of administrative decisions.

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157 As has already occurred in certain specific areas through the introduction, for example, of rules – albeit not without their own problems – on non-contractual liability by substitution (Stellvertreterhaftung), under which the victim can direct his claim to the administration that has acted against him, despite the damage being attributable to another administration. Such rules have been introduced, among other areas, in relation to damage deriving from use of the Customs Information System (CIS): the administration causing injury to a citizen through the use of the CIS will be liable to that citizen, even though this injury has its origin in inaccurate data supplied by another of the administrations participating in the CIS (Article 40 of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters). On this liability by substitution, see Hofmann, ‘Rechtsschutz’ (footnote 155), p. 379 et seq.; Schmidt-Aßmann, ‘Verfassungsprinzipien’ (footnote 77), p. 258 et seq.

Arguments in favour of a general codification of the procedure applicable to EU administration

It is certainly difficult to admit that national administrations shall be subject to genuine binding rules on procedure, while the EU administration is subject to mere codes of conduct\textsuperscript{159}.

In addition, the regulatory appearance of the provisions of the codes examined\textsuperscript{160} and the fact that they can have mediate legal effects are contrary to legal certainty.

The EU legislature appears to have understood this as, in recent times, as has been seen, it has widely regulated the procedures governing the action of the EU administration (both the Commission, by increasing procedural regulation of the sectoral measures in which it is involved, and the European and executive agencies, through their specific regulations). The conversion of these codes of conduct and other instruments of soft law into formal sources – while extending and improving them – would be coherent with said development. The switch from the earlier codes on citizens’ access to documents of the Council, European Parliament and Commission to Regulation (EC) No 1049/2001 is a good example of the beneficial effects of that conversion\textsuperscript{161}.

After the entry into force of the Treaty of Lisbon, it seems clear that the development of a fundamental right such as that contained in Article 41 CFREU cannot be entrusted to mere soft law. As has been seen, Article 298(2) TFEU, introduced specifically to guarantee that the regulatory development of this right would be binding on the EU administration, requires this regulation to be achieved though ‘regulations in accordance with the ordinary legislative procedure’. This legal reservation, reiterated in Article 52(1) CFREU, forces the legislature to at least regulate its essential elements, without being able to delegate them to a Commission non-legislative act (Article 290(1) TFEU).

4. FUNCTIONS AND DYSFUNCTIONS OF A GENERAL CODIFICATION OF THE EU ADMINISTRATIVE PROCEDURE

4.1. Increased legal clarity and certainty

The experience available from existing national codifications supports the idea that adopting a regulation containing a legally binding general codification of the administrative procedure of the various institutions, bodies, offices and agencies making up the EU administration could help to correct many of the problems highlighted\textsuperscript{162}.

\textsuperscript{159} In general, on the need for appropriate parallelism between the legal regulation of the EU administration and that of the administrations of the Member States (Parallelisierungsthese), see Schmidt-Aßmann, Eberhard, \textit{Das allgemeine Verwaltungsrecht als Ordnungsидеe}, 2nd ed., 2004, pp. 387, 392 and 399; Schmidt-Aßmann, Eberhard, ‘Verfassungsprinzipien’ (footnote 77), p. 264.

\textsuperscript{160} In particular the ECGAB, the provisions of which are worded in such a way that they seem to confer genuine rights on citizens. As has been seen, some authors consider that this code possesses immediate legal effectiveness.

\textsuperscript{161} Ladenburger, ‘Kodifikation’ (footnote 76), p. 112.

\textsuperscript{162} In general, on the functions and dysfunctions of any codification, see the interesting observations made by Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 89 et seqq.
Such codification would firstly increase *legal clarity and certainty*\textsuperscript{163}. A written code, which would summarise, coordinate and systematise the procedural provisions that are currently spread across multiple sectoral acts of secondary legislation, judgments of the various European courts and codes of conduct adopted by the various institutions, bodies, offices and agencies of the EU, and which would dispel doubts about their legal effectiveness, would be a significant improvement in terms of legal clarity and certainty and would help to achieve the principles of simplification and accessibility associated with quality regulation by the aforementioned Mandelkern Report\textsuperscript{164}.

The concentration of procedural provisions in a single text would offset, in terms of clarity, the greater degree of abstraction that any general codification involves in comparison to sectoral regulations and codifications\textsuperscript{165}.

In turn, that greater abstraction, combined with the broader scope of a general codification, would allow its provisions to be applied to all areas in which the EU administration acts, which would reduce the number of existing *lacunae* and would make it easier to fill those that may remain.

Simply including case-law principles in a written body would in itself constitute a step forward – in terms of legal clarity and certainty – from their indication on a case-by-case basis in the various judgments. However, in order for the increase in legal clarity and certainty to be even greater, it would seem advisable for the codification to be used to specify these principles to a certain extent\textsuperscript{166}, without prejudice to the important role that case-law should keep playing in the interpretation and application of the new written provisions. This need for legal clarity and certainty would make it advisable not to limit the codification to those issues that are undisputed, and on which there is consensus, as it is precisely those aspects in dispute which mostly need clarification by the legislature. Clearly, this does not mean that disputed provisions should be adopted; in such a case they risk compromising their intended targets: the solution adopted should only be incorporated in the final text if there has been consensus throughout the codifying process, to whose key importance we will return further on.

The positive consequences of this greater legal clarity and certainty are manifold and are expressed by a series of strictly inter-related sub-functions: in this way, *knowledge of current law* among authorities and citizens is facilitated, which in turn favours – although of course does not guarantee – its *acceptance and observance* by both.

In particular, the *reduction of costs to business* for obtaining information on current law would discourage the flight of capital from the EU and would encourage foreign investment. In this respect, there is no doubt that, in the current globalised economy, legal clarity and certainty in the legal system (and, in particular, in the regulations governing the functioning of administrations) constitute an important factor in the competitiveness of the respective territory.

\textsuperscript{163} This is the main argument put forward by legal doctrine in favour of codification. It is supported (with reference in some cases only to the codification of procedural rules for the indirect implementation of EU law) by Harlow, ‘Codification’ (footnote 76), p. 30; Vedder, ‘(Teil)Kodifikation’ (footnote 76), pp. 89 et seq. and 97; Schwarze, ‘Konvergenz’ (footnote 76), pp. 886 and 889; Schily, ‘Innenpolitik’ (footnote 76), p. 888; Schnapauff, ‘Integration’ (footnote 76), p. 25; Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 124; Nieto Garrido/Martín Delgado, *European* (footnote 76), p. 116 et seq.

\textsuperscript{164} That report uses the broad and non-technical concept of ‘codification’, common in EU documents, as a synonym for ‘the process of repealing a set of acts in one area and replacing them with a single act containing no substantive change to those acts’ (p. 81 of the English version).

\textsuperscript{165} In addition, as will be noted further on, those more specific sectoral regulations should not disappear.

\textsuperscript{166} In this respect, see Ladenburger, ‘Kodifikation’ (footnote 76), p. 128.
Greater clarity in legislation also results in less litigation and lower costs for administering the judicial system.

4.2. Standardisation of procedural rules and guarantees

A second major function of a general codification would be to systematically standardise the basic procedural rules and principles of the whole EU administration. The Commission, the Council (when performing administrative functions), the around 30 European agencies, the various executive agencies and other bodies of the EU administration would therefore have a common reference procedural framework, from which the unjustified procedural differences would have been removed.

This standardisation would be to the benefit of citizens, who would enjoy certain uniform procedural guarantees in their relations with the whole EU administration, which would go beyond the minimum common denominator offered by Article 41 CFREU and the general principles laid down by EU case-law. Such guarantees would in fact be even greater if, as seems advisable, the codification – or a separate regulation – also included rules on the administrative rulemaking procedure and made binding those provisions on public consultation, as contained in the soft law instruments referred to above.

This standardisation would also boost the efficiency of the EU administration’s action, as specifically demanded by Article 298(1) TFEU. As is commonly known, a well-designed administrative procedure not only serves to guarantee the rights and interests of citizens, but also, and very importantly, helps to increase the quality of administrative decisions and their acceptance by their intended targets. The standardisation of such procedural rules would therefore increase efficiency in all areas in which the EU administration is involved, thus facilitating its uniform and effective application of EU law (as well as the correct exercise of its function of monitoring the correct implementation of EU law by the national administrations), encouraging the development of the necessary mutual trust between the various administrations making up the European administrative union and simplifying its relations. The risk of non-uniform application and lack of necessary trust increases, as new European agencies are set up and as the organisational decentralisation of the EU administration extends further. As organisational decentralisation increases, there is a greater need for uniform rules governing administrative action.

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167 As proposed by Craig, EU Administrative Law (footnote 76), p. 279 et seqq., and Ladenburger, ‘Kodifikation’ (footnote 76), p. 129.

168 This is the other main argument put forward by legal doctrine in favour, in particular, of European codification of the procedural rules applicable to the national administrations when implementing EU law. It is supported by Vedder, ‘(Teil)Kodifikation’ (footnote 76), p. 97; Schwarze, ‘Konvergenz’ (footnote 76), p. 887 et seq.; Schnapauff, ‘Integration’ (footnote 76), p. 25; Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 124.

169 The regulation of minimum uniform procedural standards (intended to guarantee impartiality, diligence and correction of administrative action) is not of course sufficient on its own to ensure trust, which in particular stems from effective compliance with those standards. However, it seems clear that it does help in building that trust. On this need for mutual trust, see Schmidt-Aßmann, Ordnungsidee (footnote 159), p. 392.

170 Cosculluela Montaner, Luis, ‘La posición ordinamental de la Ley 30/1992 y los principios y efectos de la misma’, Santamaria Pastor, Juan Alfonso (et al.), Comentario sistemático a la Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común. Ley 30/1992, de 26 de noviembre, Carperi, Madrid, 1993, p. 20 (p. 31), with regard to national competence for the common administrative procedure and relations between the various Spanish administrations.
4.3. Regulation’s innovation

As with any codification\textsuperscript{171}, this particular codification could also play an important role in terms of innovation in regulating the EU administrative procedure. In this respect, the codification should not be limited to summarising, coordinating, systematising and resolving the contradictions in the existing rules and principles, but should use this opportunity to improve regulation, by providing innovative solutions to current challenges and problems, and in particular to the typical problems inherent in any administrative union, as referred to above\textsuperscript{172}.

As a legislative codification, it would be an innovation invested with democratic legitimacy\textsuperscript{173}, carried out by whoever has the necessary instruments and perspective to design appropriate procedural rules fulfilling the defensive and positive functions of administrative procedure.

4.4. Other functions of codification

This codification would also fulfil other important functions. Given its intended permanence, it would give stability to the regulation of the Union and would guide future sectoral developments\textsuperscript{174}.

Being applicable in all sectors, it would reduce the risk of favouritism towards certain sectoral interests (which are so influential and well-organised at the EU level), thus requiring the reasons for a specific rule to be justified\textsuperscript{175}, and would facilitate the adoption of new rules by unburdening the EU institutions of the task of negotiating procedural aspects, which would already be set out\textsuperscript{176}. The latter aspect is particularly important in the case of EU acts, which are subject to such lengthy and complex drafting procedures, with so many opposing political interests involved.

As has occurred with many national codifications\textsuperscript{177}, it would serve as a model that could be exported to other regions of the world\textsuperscript{178}, with the obvious benefits that this would bring in particular for business and lawyers in the EU. In particular, it would form an outstanding model for the global procedural law that is emerging as the administrative functions of universal international organisations increase. The influence that this codification would surely have within the various Member States would be especially significant. The gradual irradiation of its rules into the national sphere (both in areas subject to EU law and in purely internal areas) would multiply the positive effects of the standardisation examined above.

\textsuperscript{171} Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 91.
\textsuperscript{172} See Section 3.1 above.
\textsuperscript{173} The usual criticism of the democratic deficit of the EU’s legislative bodies does not prevent the assertion that the democratic legitimacy of these bodies is, in all cases, greater than that of the European courts.
\textsuperscript{174} Schmidt-Aßmann, ‘Europäisches’ (footnote 76), p. 92 et seq. (in general, on any codification).
\textsuperscript{175} Schmidt-Aßmann, ‘Europäisches’ (footnote 76), p. 92 et seq. (in general, on any codification).
\textsuperscript{176} Schmidt-Aßmann, ‘Europäisches’ (footnote 76), p. 92 et seq. (in general).
\textsuperscript{178} Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 94 et seqq. (in general).
Due to its structure, it would facilitate the survival of existing national codifications of procedure, which are currently threatened by the extensive fragmentation brought about by the growing sectoral regulation of administrative procedure, as contained in the EU’s secondary legislation\(^\text{179}\).

Given the central role that any general codification of procedure occupies in the respective legal system\(^\text{180}\) and the symbolic value associated with developing a general list of procedural rights of citizens with regard to the administration, it can be ventured that this codification could also assist, albeit to a limited extent, with the construction of a European identity and the resulting increase in Union integration\(^\text{181}\).

In particular, from an academic perspective, it would significantly help to develop a systematic science of European administrative law based on shared foundations\(^\text{182}\).

### 4.5. Dysfunctions to be avoided

Naturally, the dysfunctions potentially inherent in any codification should be avoided. Firstly, this codification should respect and coexist with sectoral regulations containing specific procedural rules that are justified, in order to thus avoid the risk of excessive substantive uniformity\(^\text{183}\). This is despite the fact that it seems reasonable for such regulations to continue being subject, where possible, to sectoral codifications, as we have seen that the EU has been doing in recent years.

The codification should also incorporate the technical elements ensuring that it is resistant to the passage of time and that it can be duly adapted in line with the rapid changes that are currently occurring, in order to thus reduce the risk of petrification and obsolescence\(^\text{184}\). With regard to this last aspect, we have already seen the advantages of legislative innovation – consisting in this case in the reform of a pre-existing codification – compared to innovation based on case-law\(^\text{185}\).

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\(^{179}\) On the ‘codification-breaking’ (Kodifikationsbrecher) nature of the current international and European law on administrative procedure, see Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 112 et seqq.

\(^{180}\) García de Enterría, ‘Un punto de vista’ (footnote 177), p. 11 et seq.


\(^{183}\) In this respect also, see Ladenburger, ‘Kodifikation’ (footnote 76), p. 128.

\(^{184}\) Such as, for example, authorisation for regulatory development, balanced introduction of indeterminate legal concepts and areas of discretion, or review and assessment clauses [Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 104 et seq.].

\(^{185}\) Furthermore, as has also been said above, and contrary to what has sometimes been claimed, codification would not prevent the development of case-law, as judicial interpretation of the new written provisions would still be necessary.
4.6. Importance and beneficial effects of the codifying process

The virtues of a possible general codification of the procedure of the EU administration would not, however, be limited to the legislative text that would result in the end: almost as important as the codification itself would be the codifying process.\(^{186}\)

This should not be surprising, considering the impact that any procedure – the codifying process is also a kind of procedure – has on the quality of the resulting decision.

Therefore, as is the case with administrative procedure, it would be vital to design a good codifying process, which would enable the best possible codification to be achieved: a codification that would correctly fulfill the beneficial functions highlighted above, without generating the aforementioned dysfunctions.

The experience with national codifications shows that this process must not be rushed, but must involve a pre-legislative phase\(^ {187}\) that is long enough and is driven forward by the competent political body, and in which both legal doctrine and the legal actors – judges, officials, lawyers – who must apply the resulting regulation are intensively involved\(^ {188}\).

In the case of codifying the procedure of the EU administration, this process should be driven forward by the Commission, with the assistance of the European Parliament and the European Ombudsman. It should involve – through, for example, committees of experts – in addition to EU judges and officials and experts in EU law, relevant professors and legal actors from the various Member States, who would set out the solutions already developed and confirmed in their national legal systems\(^ {189}\).

A good codifying process would bear positive fruit – particularly scientific – even if it does not culminate in codification\(^ {190}\).


\(^{187}\) The start of any codifying process may be set at the point when the political body responsible for presenting the corresponding regulatory proposal decides to instigate its gestation. In the case of the EU, the legislative phase of this process would begin at the point when the Commission presents its regulatory proposal for adoption by the European Parliament and the Council, according to the procedure set out in the TFEU. Prior lengthy debate would therefore form the precodifying period, which is what we are in at the moment.


\(^{189}\) The European Commission’s request that the Swedish government produce a study on the principles of good administration existing in the various Member States, with a view to preparing a codifying initiative based on Article III.398(2) TECE (now Article 298(2) TFEU), was a first step in this direction and resulted in an interesting work on comparative law [Swedish Agency for Public Management, Principles (footnote 99)]. However, the subsequent failure of the TECE led the Commission to interrupt this process. The formation of the Working Group on European administrative law within the European Parliament (see Section 1.2 above) will perhaps help to re-invigorate this process. Recently a broad European network of professors has been formed with the aim of developing an academic codification likely to be taken into account by the EU legislature (‘ReNUAL – Research Network on EU Administrative Law’: \(\text{http://www.reneual.eu/}\)).

\(^{190}\) Voßkuhle, ‘Kodifikation als Prozeß’ (footnote 186), p. 86 et seqq.; Kahl, ‘Verwaltungsverfahrensgesetz’ (footnote 76), p. 98, with both giving the example of the planned German codification of environmental law (\textit{Umweltgesetzbuch}).
5. CONCLUSION: CODIFICATION OF THE EU ADMINISTRATION´S PROCEDURE AS A PRIOR STEP TO CODIFICATION APPLICABLE TO ALL EUROPEAN ADMINISTRATIONS

As has been confirmed, there are many reasons why the administrative procedure of the various institutions, bodies, offices and agencies making up the EU administration should be laid down in a binding general codification. It is not by chance that most of the EU Member States have general codifications of national administrative procedure, which have assumed a central role in their respective legal systems and which define the core of their citizens’ basic guarantees in their relations with the public administration.

A codification aimed solely at the EU administration would also not lead to the competence objections and political resistance among Member States that would be caused by a codification also applying to the national administrations when implementing EU law.

Despite the fact that many of the reasons given also justify this European codification being extended to the national administrations,191 there are many who doubt that the Treaties – before and particularly since the Treaty of Lisbon – offer a sufficient legal basis for the EU to attempt this192.

Furthermore, it should be assumed that, in the current phase of deceleration of the integration process, following the vast expansion to the east, the failure of the TECE and the difficulties in ratifying the Treaty of Lisbon, a codification project binding on the national administrations would lead to opposition in many Member States. It seems more in line with the current European political context to subject the EU administration to stricter rules (which would be precisely the effect of the codification defended here) than to subsequently limit the legislative competences of the Member States – to the detriment of their respective legal and administrative traditions – through a European codification which would be binding on their national administrations.


In addition to being less problematic, codification of the procedure of the EU administration is also more urgent than that of the national administrations, which – in general – already have a body of procedural rules and principles of internal law that is more complete and finished than that of the EU.

All this makes it advisable to start by codifying the procedure of the EU administration and leave that of the national administrations to a later stage, when the former has been consolidated and started to filter down into the national legal systems.
Arguments in favour of a general codification of the procedure applicable to EU administration

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IV. THE APPLICATION OF EU LAW: RELEVANT ASPECTS OF EUROPEAN ADMINISTRATIVE PROCEDURE

Luis Ángel BALLESTEROS MOFFA

NOTE

Abstract

Administrative procedure continues to gain prominence within European administrative law, going even further than its own application measures, whether they are adopted by the European institutions, the Member States or at both levels by means of composite administration. With regard to indirect or integrated application, the Member States’ procedural autonomy has been unable to halt the increasing Europeanisation of procedures, to the point where there are highly ambitious plans to codify them. Meanwhile, European interventionism in procedural matters continues to take on indirect and direct, praetorian and regulatory characteristics, ranging from soft law to formal sources, and from the sectoral to the general.
LIST OF ABBREVIATIONS

**BOE**  Boletín Oficial del Estado [Spanish Official State Gazette]

**Comp.**  Compiler

**Ed.**  Editor

**No**  Number

**Op. cit.**  opere citato - in the work quoted

**p./pp.**  page(s)

**et seq.**  et sequens - and the following

**TFEU**  Treaty on the Functioning of the European Union

**TEU**  Treaty on the European Union

**Vol.**  Volume(s)
1. THE ROLE OF PROCEDURE WITHIN EUROPEAN ADMINISTRATIVE LAW

In spite of the autonomous nature of European law, which warns of the danger of bringing national categories of law under its control, where there are a number of universal or timeless categories attributable to any legal system, it seems reasonable that a legal order based on the transfer of sovereignty from Member States should enjoy the same functions as the national systems, such as the independent administrative function of the comparative administrative system. A fact that, although clear in relation to indirect application by the Member States themselves, with national administrative procedures for the application of European law having gained increasing importance, is less evident when administrative competence lies with the Union institutions.

From this second perspective of direct application, the legal-administrative aspect becomes hazy and restricted, hampered by the blurring of regulatory and administrative functions, which has been one of the most striking drawbacks of the unusual Community system. The cautious and fragmentary nature of the concept of a European administrative act and European administrative procedure, with the absence, accordingly, of any general

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procedural law capable of providing a full framework for them is merely the tip of the iceberg in a system based, from its inception, on other parameters: the systematisation of Community acts, whether these take a standard form (corresponding to the definitions of regulations, directives, decisions, recommendations and opinions laid down in Article 288 TFEU) or are sui generis, depending on criteria other than their legislative or administrative nature; generic references to a 'non-legislative' and, more frequently, 'executive' function, with no distinction drawn between the legislative implementation of basic sources of law and administrative implementation (at present, the main legal instruments are classified as either 'legislative' or 'non-legislative', the latter consisting of the 'delegated' and 'implementing' acts referred to in Articles 290 and 291 respectively of the TFEU), the non-definition of administrative functions with regard to their distribution among the institutions or authorities owing to the absence of any natural influence from the classic three-way structure of legislature, executive and judiciary and, of greater interest to us here, a problematic reconciliation of functions and procedures, beyond Article 289(3) TFEU's statement that 'legal acts adopted by legislative procedure shall constitute legislative acts'.

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197 See also Articles 263 and 297 TFEU and 16(8) and 17(1) TEU. Article 2(1)(a) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (amended by Council Decision 2006/512/EC) refers, alongside other implementing measures subject to comitology procedures, to ‘management measures, such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications’. As highlighted by E. NIETO GARRIDO (El sistema de fuentes del Derecho de la UE, in NIETO GARRIDO, E. and MARTÍN DELGADO, I., Derecho administrativo europeo en el Tratado de Lisboa, Marcial Pons, Madrid, 2010, p. 33, No 55), ‘the unclear role of implementing acts is down to the fact that the EU has a legal system in which, in accordance with the principle of subsidiarity, implementing powers generally lie with the Member States’.


198 See also Articles 263 and 297 TFEU and 16(8) and 17(1) TEU. Article 2(1)(a) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (amended by Council Decision 2006/512/EC) refers, alongside other implementing measures subject to comitology procedures, to ‘management measures, such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications’. As highlighted by E. NIETO GARRIDO (El sistema de fuentes del Derecho de la UE, in NIETO GARRIDO, E. and MARTÍN DELGADO, I., Derecho administrativo europeo en el Tratado de Lisboa, Marcial Pons, Madrid, 2010, p. 33, No 55), ‘the unclear role of implementing acts is down to the fact that the EU has a legal system in which, in accordance with the principle of subsidiarity, implementing powers generally lie with the Member States’.

199 The uncertainty surrounding the distinction between legislative and administrative acts can be resolved less easily on the sole basis of the body that adopts them or the procedure that is followed than through examination of the substance and purpose of the acts themselves; AIROLDI M., Lineamenti di diritto amministrativo comunitario, op. cit., p. 18.
An ambiguity that has, nevertheless, had to coexist on a daily basis with a conflicting reality, primarily because of the increasing complexity of the Community apparatus, as evidenced by the omnipresence of measures and procedures that are essentially administrative in the day-to-day work of the Union institutions, against the backdrop of the general principles of administrative action established by the Court of Justice. The former include those acts adopted by institutions, bodies and agencies other than the Council, European Parliament and Commission, or which are issued by these institutions but with characteristics different from those of legislative acts - in particular from those of legislative acts arising from the ordinary legislative procedure of joint adoption by Parliament and the Council, on the basis of a Commission proposal, or from special legislative procedures - such as those found in acts relating to internal organisation or staff, or which are of a preparatory or preliminary or political nature, aimed either at Community bodies or third parties subject to international law. Translated into procedures, either generic or sectoral and often in the context of material rules, these characteristics can be found, without prejudice to their consolidated versions, in Regulation No 1 of 1959 determining the languages to be used by the European Economic Community; Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (including selection and disciplinary procedures and the concept of administrative silence); Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits; Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data; Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (laying down the procurement and grant award procedures to be followed by the European institutions and bodies); Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes (under Article 22 of this Regulation, administrative proceedings may be referred to the Commission concerning any act of an executive agency which injures a third party, so that its legality may be reviewed, the explicit or implicit rejection of which appeal may be the subject of an action for annulment before the Court of Justice); and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings etc.

It is, perhaps, this discrepancy between theory and practice, or the basing of the Community system on the model of states run along administrative lines, that has...
contributed to the gradual recognition of the European administration, on the one hand, and European administrative acts, on the other, as the logical prerequisite for the formal reception and future codification of European administrative procedure (the subjective and formal elements respectively of the administrative act). These are irretraceable steps towards the consolidation of a Union administrative law, which, while they sometimes fill only a terminological gap, can, on occasion, have implications for the legal system. It is a task, completed by the insertion in the Lisbon Treaty of the failed Constitutional Treaty’s provisions regarding the administrative workings of the Union, in which European case law and legal theory have played a crucial role over the last few decades 203.

Thus, in terms of the organisational phase, beyond the decentralised apparatus of the Member States, it is worth noting the progress achieved in primary law as regards the concept of European administration, such as in the former wording of Article 6(4) TEU: ‘The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.’ A further example being the definitive constitutionalisation of this administration by the Lisbon Treaty under Article 298 TFEU, according to which ‘in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration’, to which end the European Parliament and the Council, acting by means of regulations adopted in

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203 In terms of the theoretical reception of European administrative procedure over time, it is possible to discern an initial moment in which ‘the atmosphere of administrative law’, as felicitously expressed by C. F. OPHÜLS (Les Règlements et les Directives dan les Traités de Rome, in Cahiers de Droit Européen, 1966, p. 10), of the Treaty establishing the European Coal and Steel Community prevailed, in contrast to the ‘atmosphere of Constitutional Law’ of the Treaties of Rome, regarding which interesting studies have been published, such as: DE VERGOTTINI, G., Note sugli atti normativi e amministrativi dell’ordinamento comunitario europeo, in Rivista Trimestrale di Diritto Pubblico, 1963, pp. 887 to 972; DE LAUBADÈRE, A., Traits généraux du contentieux administratif des Communautés Européennes, in Revue Trimestrielle de Droit Européen, 1978, pp. 2 to 17; WADE, W. and FORSYTH, C., Administrative Law, Clarendon Press, Oxford, 1994, p. 15 et seq.; PENNERA, Ch., The Beginnings of the Court of Justice and its Role as a driving Force in European Integration, in Journal of European Integration History, 1995, pp. 111 to 127; and ARZOZ SANTIسابن, X., Concepto y régimen jurídico del acto administrativo comunitario, op. cit., p. 33 et seq.

accordance with the ordinary legislative procedure, will establish provisions in compliance with the Staff Regulations and the Conditions of Employment (Article 336 TFEU)\textsuperscript{204}.

As regards the clear presence at European level of legal-administrative acts - beyond the purely material\textsuperscript{205} and not only of an internal nature but also with an outward and even decisive impact on individual legal situations\textsuperscript{206}, it is useful to recall briefly some of the principal milestones Community case law has helped to reach in what has been the ‘slow separation of legislation and administration’\textsuperscript{207} or ‘the gradual separation of powers in accordance with the legislative-executive system’\textsuperscript{208}:

First of all, in terms of the formerly fundamental Articles 145 and 202 of the Treaty establishing the European Community (governing the implementing powers of the Commission and, in exceptional circumstances, the Council), paragraph 11 of the Judgment of the Court of Justice of 24 October 1989 (Case 16/88 - Commission v Council), which states that, ‘the concept of implementation for the purposes of that article comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application. Since the Treaty uses the word “implementation” without restricting it by the addition of any further qualification, that term cannot be interpreted so as to exclude acts of individual application.’

The separate level required for satisfaction of the first precondition for European extra-contractual liability depending on the legislative or administrative nature of the illegal act. The Union’s current liability under Article 340 TFEU, formerly Article 288 of the Treaty establishing the European Community, arises from any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. In that regard, the Court of Justice has laid down a threefold requirement: the illegality of the conduct of a Community institution, actual damage and the existence of a relationship of cause and effect between the illegal conduct and that damage; the first element is viewed differently depending on whether the illegal conduct translates into a legislative act or mere administrative act or measure, so that whereas, in this case, any infringement of the law would constitute an illegal act that could incur liability, in the case of legislative acts, particularly those resulting from a broad discretionary power, there would need to be a sufficiently clear infringement, i.e. the serious and manifest infringement of a superior rule of law protecting individuals, such as

\textsuperscript{204} Indeed, Article 24(1) of the Merger Treaty of 8 April 1965, which established a single Council and single Commission for the three European Communities in existence at the time, stated that ‘the officials and other servants of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community shall, at the date of entry into force of this Treaty, become officials and other servants of the European Communities and form part of the single administration of those Communities’. See, in particular, FUENTETAJA PASTOR, J. A., La Administración europea: la ejecución europea del Derecho y las políticas de la Unión, Foreword by Ramón Parada, Thomson-Civitas, Madrid, 2007.

\textsuperscript{205} Although, as S. GONZÁLEZ-VARAS IBAÑEZ (El Derecho Administrativo Europeo, op. cit., p. 183) has stated, ‘administrative acts vary greatly in nature and their classification as an act or simple action would be problematic and of little interest in this context (proposals, communications, declarations, reports, press releases, recommendations, consultations, written and oral questions, calls for tender, letters of formal notice, motions for a resolution, working documents, dossiers etc.).’

\textsuperscript{206} X. ARZOZ SANTISTEBAN proposes the following definition of a Community administrative act: ‘any measure adopted by a Community authority in the aim of settling a specific matter, with or without binding force, in respect of an individual addressee, be it a Member State or private entity’ (Concepto y régimen jurídico del acto administrativo comunitario, op. cit., p. 195).

\textsuperscript{207} CASSESE, S., Il diritto amministrativo comunitario e la sua influenza sulle amministrazioni pubbliche nazionali, in VANDELLI, L., BOTTARI, C. and DONATI, D., Diritto Amministrativo Comunitario, Maggioli, 1994, p. 18.

the principle of non-discrimination, protection of legitimate expectations or respect for acquired rights\textsuperscript{209}.

The debate surrounding the legislative or administrative nature of decisions, whether in regard to the application of compensatory measures or \textit{obiter dicta} in other areas, in conjunction with the settled case-law stating that 'the nature of a measure is not to be sought in its external form, but rather in whether or not the measure at issue is of general application'\textsuperscript{210}. A debate that, in addition to its other contributions\textsuperscript{211}, has given rise to such revelatory conclusions as those of Mr Advocate General Ruiz-Jarabo Colomer in the appeal against the judgment of the Court of First Instance of 15 April 1997, \textit{Aloys Schröder and others v Commission} (T-390/94), a case in which, owing to their general application, certain decisions restricting the export or transport of products in the event of an epizootic disease were classified as legislative: 'Where it is mandatory to classify the contested decisions in one category or the other, I would be tempted to call them administrative measures rather than legislative measures, since in my view the fact that they were adopted merely in order to implement pre-existing general rules prevails in this instance,
[i.e., objectively speaking] they are measures designed to provide a remedy for a unique situation, their effectiveness is limited in time and their application ‘exhausts’ the potentialities of the measure itself [...].”

With regard to the repeal of legislative acts, meanwhile, without its being an instrument for removing the illegality thereof properly speaking, the conferral on the European administration of a power of repeal as a specific measure against wrongful administrative acts, complements the judicial appeal procedure, in spite of the fact that, as stated in the Judgment of the Court of 17 April 1997 in Case C-90/95 P, Henri de Compte v European Parliament, overturning the revocation by Parliament of a decision recognising that an official of the institution was suffering from an occupational disease, ‘retroactive withdrawal of a favourable administrative act is generally subject to very strict conditions [...].’ According to settled case law, while it must be acknowledged that any Community institution which finds that a measure which it has just adopted is tainted by illegality has the right to withdraw it within a reasonable period, with retroactive effect, that right may be restricted by the need to fulfil the legitimate expectations of a beneficiary of the measure, who has been led to rely on the lawfulness thereof [...]' (paragraph 35)212.

The provisions that make literal reference to the category of European administrative act, which are contained primarily in instruments regulating working methods and the rules governing the internal functioning of each institution, in accordance with the principle of administrative self-organisation, include the following:

Article 10 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, according to which, ‘any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act [...].’ The Commission’s Rules of Procedure were adapted accordingly by Commission Decision 2008/401/EC, Euratom, of 30 April 2008, with the introduction of rules on the submission by non-governmental organisations of requests for internal review of ‘administrative acts’ adopted by the Commission.

Article 8 of the Council’s Rules of Procedure, which, in the consolidated version of 2009, states that, ‘where a non-legislative proposal is submitted to the Council relating to the adoption of rules which are legally binding in or for the Member States, by means of regulations, directives or decisions, on the basis of the relevant provisions of the Treaties, with the exception of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions), the Council’s first deliberation on important new proposals shall be open to the public [...].’

And Rule 19(4) of Parliament’s Rules of Procedure, in its 2004 version, according to which, ‘Parliament shall be represented in international relations, on ceremonial occasions and in administrative, legal or financial matters by the President, who may delegate these powers.’

The European administrative procedure is explicitly recognised as a legal concept strictly relating to the administrative function of the European institutions and bodies in the following sources of primarily soft-law:

- The Code of Good Administrative Behaviour for staff of the European Commission in their relations with the public included in the Commission’s Rules of Procedure by Decision 2000/633/EC, ECSC, Euratom, of 17 October 2000, which states that, ‘where a member of the public requires information relating to a Commission administrative procedure, staff shall ensure that this information is provided within the deadline fixed for the relevant procedure’.

- Article 22(1) of the European Code of Good Administrative Behaviour, championed by the European Ombudsman and adopted by the European Parliament resolution of 6 September 2001, according to which, ‘when appropriate, the official shall give advice on how to initiate an administrative procedure within his field of competence’. This will be accompanied by the statement of public service principles for EU civil servants, another project launched by the European Ombudsman in the aim of establishing a European culture in which maladministration has no place and which is currently under public consultation, following the consultation of national ombudsmen within the European Network of Ombudsmen.

- And Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, which also makes use of the terms ‘administrative procedure’ (recital 13) and ‘good administrative practice’ (Articles 1(c) and 15), envisaging, additionally, the application of the notion of administrative silence where the European administration fails to settle matters.

The appeal of the European administrative procedure, aside from its role in connection with the European administrative act, was demonstrated in the Lisbon Treaty’s recognition of the binding nature of the Charter of Fundamental Rights of the European Union of 7 December 2000 (Article 6(1) TEU and Declaration 1 annexed to the Final Act of the Lisbon Treaty), Article 41 of which governs the right to good administration by the European administration law contained in the case law of the Court of Justice and is also inspired by national law, according to the foreword by the European Ombudsman, a practical tool for European officials and a vital one for the Ombudsman’s work in carrying out the tasks of independent scrutiny conferred on him by Articles 228 TFEU and 43 of the Charter of Fundamental Rights of the European Union. According to these provisions, any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice acting in its judicial role. Its importance for the internal workings of the European institutions with regard to administrative activities is highlighted in COBEROS MENDAZONA, E., Nota al Código Europeo de Buena Conducta Administrativa, in Revista Vasca de Administración Pública, No 64, September - December 2002, pp. 237 to 247; TOMÁS MALLEN, B., El derecho fundamental a una buena administración, INAP, Madrid, 2004, p. 89 et seq.; MIR RUGGIELAT, O., La codificación del procedimiento administrativo en la unión administrativa europea, op. cit., p. 67 et seq.; and MARTÍN DELGADO, I., Hacia una norma europea de procedimiento administrativo, op. cit., p. 177 et seq.

213 cf. WEBER, A., El Procedimiento administrativo en el Derecho comunitario, op. cit., p. 58. Although this notion is gradually being extended to mixed and national procedures for the application of European law, in line with a broader concept of European administration that makes use of procedure to implement legislation through the adoption of an act with regard to a Member State or natural or legal person (MARTÍN DELGADO, I., Hacia una norma europea de procedimiento administrativo, op. cit., pp. 155 and 159).

214 This code, which incorporates the principles of European administrative law contained in the case law of the Court of Justice and is also inspired by national law is, according to the foreword by the European Ombudsman, a practical tool for European officials and a vital one for the Ombudsman’s work in carrying out the tasks of independent scrutiny conferred on him by Articles 228 TFEU and 43 of the Charter of Fundamental Rights of the European Union. According to these provisions, any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice acting in its judicial role. Its importance for the internal workings of the European institutions with regard to administrative activities is highlighted in COBEROS MENDAZONA, E., Nota al Código Europeo de Buena Conducta Administrativa, in Revista Vasca de Administración Pública, No 64, September - December 2002, pp. 237 to 247; TOMÁS MALLEN, B., El derecho fundamental a una buena administración, INAP, Madrid, 2004, p. 89 et seq.; MIR RUGGIELAT, O., La codificación del procedimiento administrativo en la unión administrativa europea, op. cit., p. 67 et seq.; and MARTÍN DELGADO, I., Hacia una norma europea de procedimiento administrativo, op. cit., p. 177 et seq.

215 The section concerning the objectivity of the project states that, ‘in procedures involving comparative evaluations, civil servants should base recommendations and decisions only on merit and any other factors
European institutions, without prejudice to its impact on internal affairs\textsuperscript{216}. This right was introduced at the initiative of the European Ombudsman and was inevitably underlined in writings on the first binding (micro-)codification of administrative procedure within the Union and the material basis for a subsequent, more ambitious effort in this regard\textsuperscript{217}.

As DOMÉNECH PASCUAL and MIR PUIGPELAT point out, it is difficult to find a tendency at present that attracts such support from public law scholars as the revision of procedures by the public authorities in order to guarantee their effectiveness and legitimacy\textsuperscript{218}, which is, of course, clearly visible in European law, as shown by the present gaps in direct implementation, with the fruitful search for a European administrative identity having become a drive to overcome its present state of fragmentation.

\section*{2. THE DECENTRALISED SYSTEM OF APPLICATION: COMPOSITE OR INTEGRATED ADMINISTRATION}

The complexity of the European model of application cannot be remedied solely through the identification of an administrative function within the system of Union institutions; it is also necessary to take account of the unusual framework resulting from the three-way relationship between the EU, its Member States and its citizens. In spite of the growth of direct administration and the increasingly used methods of European and national interaction, indirect implementation by the Member States continues to be the rule when it comes to administrative application (principle of cooperation set out under Article 4(3) TEU as the basis of the ‘federalism of implementation’)\textsuperscript{219}, representing, alongside the now expressly prescribed by law’. Information about the project can be found on the European Ombudsman's website: http://www.ombudsman.europa.eu/.

\textsuperscript{216} Of relevance in the Spanish legal system, where the Supreme Court and several higher courts are citing this article, in spite of the fact that this right explicitly relates to the European institutions - in contrast to the general scope of the Charter - with paragraph 1 stipulating that, ‘every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union’.


\textsuperscript{218} DOMÉNECH PASCUAL, G., El seguimiento de normas y actos jurídicos, in Revista de Administración Pública, No 167, May - August 2005, p. 97; and MIR PUIGPELAT, O., La codificación del procedimiento administrativo en la unión administrativa europea, op. cit., p. 57. See the section below dealing with the recognition of administrative procedure in its own right.

\textsuperscript{219} As highlighted by legal theory based on the traditional dichotomy between direct and indirect implementation: ‘In accordance with this traditional distinction,’ writes A. WEBER, ‘administrative law is applied by the European Community bodies themselves (direct application) or by the Member States (indirect application), with the latter the general rule and the former the exception’ (El procedimiento administrativo en el Derecho comunitario, op. cit., p. 58). In the words of E. GARCÍA DE ENTERRÍA (Perspectivas de las justicias administrativas nacionales en el ámbito de la Unión Europea, in Revista Española de Derecho Administrativo, No 103, July - September 1999, p. 403), ‘Community law is usually drafted and implemented, under decentralised arrangements, by the national administrative authorities (except in the few areas in which the Commission operates according to a system of direct administration, as in the case of competition law’). L.
clarity both legislative, administrative and judicial functions, the basis of the present system of implementation of European law.\textsuperscript{220}

A situation that, as far as this study is concerned, does not hinder the growing dominance within Europe of the administrative procedure, even though, from the point of view of the identification of a distinct administrative function and its codification, with which we are concerned here, it is beginning to resemble most closely the - once exceptional - subordination of national procedures to Community guidelines, including with regard to the very approaches taken to unification.\textsuperscript{221}

The causes of this indirect administrative implementation, which are largely responsible, along with the overlapping of competences, for the Union’s lack of administrative transparency, are well known: aside from the limitations arising from a Union of 27 countries, 23 official languages and almost 500 million people, the gaps in its infrastructure and autonomous enforcement mechanisms, the principles of subsidiarity and...
proportionality laid down in Article 5 TEU, which, while they work in Member States’ favour with regard to Union legislative acts (Protocol 2 on the application of the principles of subsidiarity and proportionality, annexed to the TEU and TFEU, which establishes a system of scrutiny whereby national parliaments are consulted), and in terms of the regulatory enforcement of basic European acts (Article 291(1) TFEU, recognising the general competence of Member States when it comes to implementation, involving them, at any rate, in the comitology procedures for the exercise of the Commission’s implementing powers), necessarily favour the indirect administrative application of European law, as stated by Declaration 43 annexed to the Final Act of the Treaty of Amsterdam of 2 October 1997: ‘The High Contracting Parties confirm [...] the conclusions of the Essen European Council stating that the administrative application of Community law shall in principle be the responsibility of the Member States in accordance with their constitutional arrangements. This shall not affect the supervisory, monitoring and implementing powers of the Community Institutions [...]’.

Principles that have also traditionally required genuine decentralisation, meaning that, when Member States applied Community law, they would act autonomously from an institutional and procedural point of view, without interference from Europe, which would ultimately come to represent the main obstacle to the aforementioned European influence on national procedures. Although it is true that this organisational and procedural autonomy has been eroded as European integration progresses, thanks to restrictive case law and legislation serving supranational interests. The principles of equivalence and effectiveness cited by the Court of Justice as conditions with which national procedure must comply, for the effective and uniform application of European law, the large-scale procedural harmonisation begun at sectoral level, and the debate as regards extending the codification of European administrative procedure to national systems will guide us in this regard.

However, the workings of the Union cannot be understood without this basic idea of Member State co-responsibility, which, as we know, not only has an impact on administrative but also on legislative and judicial application. It is therefore the criteria relating to the distinct institutional level from which these measures can be applied and the three-way separation of legislative, judicial and administrative functions that determine the overall implementation of European law. Consequently, by combining various categories of application, ratione personae and ratione materiae, it is possible, alongside direct administrative implementation by the European authorities and indirect administrative implementation by the national authorities, to distinguish, on the one hand, between legislative implementation, in keeping with the system of delegated and implementing acts adopted by the Commission, of existing basic acts, arising from the legislative or regulatory competence of Member States, at their various territorial and institutional levels, to adopt national rules implementing regulations - without prejudice to their complete or self-contained nature - or transposing directives; and, on the other, judicial

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223 Regardless of whether these general implementing powers result in essentially administrative acts measures.


225 SANTAOLALLA LÓPEZ, F., Reflexiones sobre el desarrollo normativo del Derecho comunitario en España, in Revista de Instituciones Europeas, No 2, 1987, pp. 339 to 363; CAPOTORTI, F., La problematique juridique des
implementation, both as a result of the powers conferred on the Union’s judicial bodies and on the national judicial authorities in their safeguarding of citizens’ rights and interests on the basis of the direct applicability of primary and secondary sources of law\textsuperscript{226}.

However, to return to the administrative aspect of concern to us here, it is important to note that the dichotomy between direct and indirect application is being replaced by a third form of administrative implementation characterised by measures shared between the European administration and individual national administrations. From the regular reports the Member States are required to submit to the Union concerning the application of European law (Article 10 of Law 30/1992 of 26 November 1992 on the Legal Provisions applicable to the Public Administrations and the Common Administrative Procedure) to more complex horizontal and vertical interactions. An integrated or composite administration arrangement that, aside from lending added complexity to the European system of application and making the distinction between direct and indirect implementation increasingly problematic, poses not inconsiderable problems in terms of the heterogeneity of procedural guarantees and due process, which derive their uniformity from European law\textsuperscript{227}.

\textsuperscript{226} Including the pathological and vertical direct effect of directives (pathological or unnatural, as these acts are essentially indirect or imperfect, and vertical because they do not concern relations inter privatos), without prejudice to the other measures used to guarantee the primacy of European law where it conflicts with national law (Declaration 17 concerning primacy, annexed to the Final Act of the Lisbon Treaty), such as the valuable procedural instrument of referral for a preliminary ruling, the ‘transfusion effect’ or interpretation according to European law, and, in the last resort, Member State liability for failure to comply with Community law, such as the non-transposition or unsatisfactory transposition of Directives. See GARCÍA DE ENTERRÍA, E., Las competencias y el funcionamiento del Tribunal de Justicia de las Comunidades Europeas. Estudio analítico de los recursos, in GARCÍA DE ENTERRÍA, E. et al., Tratado de Derecho Comunitario Europeo (Estudio sistemático desde el Derecho español), Civitas, Madrid, 1986, pp. 655 to 729; and Perspectivas de las justicias administrativas nacionales en el ámbito de la Unión Europea, op. cit., pp. 401 to 411;ORTUZAR ANDÉCHAGA, L., Aplicación judicial del Derecho comunitario, Trivium, Madrid, 1992; RUIZ-JARABO COLOMER, D., El Juez nacional como Juez Comunitario, Civitas, Madrid, 1993; RODRIGUEZ IGLESIAS, G. C. and LIÑÁN NOGUERAS, D. J. (ed.), El Derecho comunitario europeo y su aplicación judicial, Civitas, Madrid, 1993; COBREROS MENDAZONA, E., Incumplimiento del Derecho comunitario y responsabilidad del Estado, Civitas, Madrid, 1995; PALACIOS GONZÁLEZ, J., El Sistema Judicial Comunitario. Perspectiva institucional, reglas de procedimiento, vertical de recursos, University of Deusto, Bilbao, 1996; QUINTANA LÓPEZ, T., La responsabilidad del Estado legislador por daños a particulares generados por violación del Derecho comunitario (Sentencia del TJCE de 5 de marzo de 1996), in La Ley, 1996-4, D-238, pp. 1244 to 1247; ALONSO GARCÍA, R., La responsabilidad de los Estados miembros por infracción del Derecho Comunitario, Civitas, Madrid, 1997; and Actividad judicial v. inactividad normativa (El Tribunal de Justicia de las Comunidades Europeas frente al déficit normativo de las Instituciones y de los Estados miembros), in Revista de Administración Pública, No 151, January - April 2000, p. 121 et seq.; GARCÍA LUENGO, J., El recurso comunitario de anulación: objeto y admisibilidad, Thomson-Civitas, Madrid, 2004; and WAEGENBAUR, B., EU Court of Justice. Statute and rules of procedure, 2011, awaiting publication.

In view of the complexity this creates for administrative procedure, it is not surprising that legal theory is attempting to bring some order to the various procedural levels within the Union (CASSESE, S., Diritto amministrativo europeo e diritto amministrativo nazionale: signoria o integrazione?, in Rivista Italiana di Diritto Pubblico Comunitario, No 5, 2004, pp. 1138 to 1139; SCHMIDT-ASSMANN, E., Pluralidad de estructuras y funciones de los procedimientos administrativos en el Derecho alemán, europeo e internacional, in BARNÉS VÁZQUEZ, J. [ed.], La transformación del procedimiento administrativo, Derecho Global, Seville, 2008, pp. 95 to 97), as summarised by I. MARTÍN DELGADO: ‘procedural rules adopted specifically for the Union administration; rules establishing procedures applicable to all national administrations; rules harmonising procedures in specific sectors of Union law; basic rules for the procedures carried out by the national authorities in the application of Union law; common procedural standards (derived from the general principles of law) that are binding on European institutions and national administrations and, finally, procedural rules governing cooperation between the two’ (Hacia una norma europea de procedimiento administrativo, op. cit., p. 157). These mechanisms for procedural co-administration, which have upset the traditional dichotomy characterising implementation, are explained systematically in GALERA RODRIGO, S., La aplicación administrativa del Derecho comunitario., op. cit., p. 63 et seq.; DELLA CANANEA, G., I procedimenti amministrativi composti dell’Unione europea, in BIGNAMI, F. and CASSESE, S., Il procedimento amministrativo
Furthermore, it is inevitable that the maze of application arrangements arising from decentralisation should become ever denser, from both a European and national point of view, owing to the growing number of agencies within the Union and, at national level, owing to the decentralisation of composite states themselves (Articles 4(2) and 5(3) TEU).

3. THE INTRINSIC IMPORTANCE OF PROCEDURE

The prominence administrative procedure has gained within European law, beyond even its direct and integrated forms, though not without these having been strengthened as a natural tool for action by a consolidated European administration, disguises, in reality, a growing awareness of this phenomenon, not solely as a means of adopting eventual applicable measures, but as an end in itself for the attainment of national and European objectives. Thus, in spite of the restrictions arising from the principle of subsidiarity and procedural autonomy, the European administrative procedure has also had an impact on indirect implementation through the determination at Community level of national procedures and guarantees, against a backdrop of growing European interventionism in respect of the exercise of national competences.

In connection with the functions of procedure in administrative law, and its traditional place as a formal element of the act, Article 263 TFEU makes clear the inextricable relationship between both categories, listing ‘infringement of an essential procedural requirement’ as one of the grounds for bringing proceedings for annulment against eligible Community acts before the General Court in the first instance and the Court of Justice on appeal, which do not include irregularities that are non-substantial and, ultimately, not invalidating.

However, the multifunctional nature of procedure transcends the act’s end-purpose, acquiring an autonomy or legal status of its own that takes it beyond its traditional secondary role. It is acknowledged to ensure the possibility of defence for interested parties, a guarantee of judicious and effective administrative decision-making and a...
channel for interaction between individual administrations and citizens, as well as serving as an instrument for the due application of substantive law and the achievement of its objectives\textsuperscript{231}, which goes a long way to explaining the renewed interest in this concept\textsuperscript{232}.

This situation, which can be seen in the various legal arrangements in force [Article 105(c) of the Spanish Constitution\textsuperscript{233}], is particularly in evidence in European law at present\textsuperscript{234}, which, in addition to solving the conundrum of direct administration, the aim being harmonised procedural rules, has continued to influence national implementing procedures; European codification could also have a bearing on the latter and, thanks to this common administrative procedure, on all proceedings of national administrative law. It can therefore be claimed that the significance assumed by European administrative procedure, in its direct, indirect and integrated forms, is tipping the balance of implementation towards Europe, to the detriment of the Member States, in spite of the counterbalance provided by the principle of subsidiarity and procedural autonomy.

\textsuperscript{231} As E. SCHMIDT-ASSMANN states, (in Pluralidad de estructuras y funciones de los procedimientos administrativos en el Derecho alemán, europeo e internacional, op. cit., p. 96.), ‘underlying this approach [Directives with a clear procedural content] is a vision of the particular suitability of procedure as a tool for achieving various aims in these specific sectors, be it the greater transparency of markets, more rational use of natural resources or consensus-building and the creation of political trust’.

\textsuperscript{232} ‘Law is, of course, language. A language that evokes concepts, that is based on a prior understanding, on what the words evoke or suggest […]. However, above all, law is procedure. Procedure as a guarantee. Not just a guarantee of legality, judiciousness and appropriateness, as stated by the former Law on administrative procedure of 1958 governing administrative activity, but an all-purpose guarantee, a means of securing any transformation or change. Because the basis of legal certainty, an essential criterion, as stressed, incidentally, by Article 9(3) of the Spanish Constitution, is procedure’: MARTÍN REBOLLO, L., El procedimiento como garantía (Una reflexión sobre los principios y las formas en el Derecho Administrativo), which can be consulted on the website of the Asociación Española de Profesores de Derecho Administrativo [Spanish Association of Administrative Law Scholars]: http://www.aepda.es/.

\textsuperscript{233} On the need to attach greater significance to the procedural aspect of Spanish administrative law, see MALARET I GARCÍA, E., Los principios del procedimiento administrativo y el responsable del procedimiento, in TORNOS MAS, J. (comp.), Administración pública y procedimiento administrativo. Comentarios a la Ley 30/1992, de 26 de noviembre, Bosch, Barcelona, 1994, p. 312 et seq.; PONCE SOLÉ, J., Deber de buena administración y derecho al procedimiento administrativo debido. Las bases constitucionales del procedimiento administrativo y del ejercicio de la discrecionalidad, Lex Nova, Madrid, 2001; CIERCO SEIRA, C., La participación de los interesados en el procedimiento administrativo, Bologna, 2002; BARNES VÁZQUEZ, J., Sobre el procedimiento administrativo: evolución y perspectivas, in the collective work Innovación y reforma en el Derecho Administrativo, Derecho Global, Seville, 2006, p. 263 et seq.;and AGÚNDEZ FERNANDEZ, A., Las Administraciones públicas y el procedimiento administrativo común, Comares, Granada, 2010.

\textsuperscript{234} ‘There is no doubt that procedure is a key instrument serving European integration’: SCHMIDT-ASSMANN, E., Pluralidad de estructuras y funciones de los procedimientos administrativos en el Derecho alemán, europeo e internacional, op. cit., p. 99.
4. THE SUBORDINATION OF MEMBER STATES’ PROCEDURAL AUTONOMY TO THE GOALS OF EUROPEAN INTEGRATION

4.1. Indirect and casuistic subordination in the event of divergence from or the obstruction of European law: the principles of equivalence and effectiveness

The principle of institutional and procedural autonomy satisfies Member States’ political desire to maintain control of the organisational and procedural spheres, so that their legislators and executives can adopt the formal arrangements that best suit them, on the basis of the guiding principles of subsidiarity and proportionality and their bearing on administrative implementation and, more specifically, the institutional and procedural tools employed for the purposes of implementation. These principles ultimately constitute a brake on the European legislator and general intervention by the Union in these specific fields.235

Nevertheless, the numerous constraints that have gradually undermined this freedom, as European interest in administrative procedure has grown, have raised questions about the principle in the context of procedural integration.236 As a result, its virtual nature should perhaps be considered in conjunction with that of the principles of subsidiarity and proportionality themselves, the real scope or outcome of which depends on the particular interplay of powers within the Union at any given point, as these are guideline principles that do not translate into absolute terms in a complex legal order in which indeterminate legal concepts are the exception: ‘[...] in areas which do not fall within its exclusive competence237, the Union shall act only 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, by reason of the scale or effects of the proposed action, be better achieved at Union level’ and ‘[...] the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’ (Article 5(3) and(4)). Meanwhile, prior to its amendment by the Lisbon Treaty, the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Amsterdam (1997) stated that, ‘subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified’.238

235 As highlighted by A.M. MORENO MOLINA (La Administración pública de los Estados miembros como Administración comunitaria. Referencia a la situación española, in PAREJO ALFONSO, L. et al., Manual de Derecho Administrativo Comunitario, CERA, Madrid, 2000, p. 149 et seq.) and VELASCO CABALLERO, F. (Procedimiento administrativo español..., op. cit., p. 439 et seq.), Community case law has long recognised that ‘where national authorities are responsible for implementing a community regulation [...] this implementation takes place with due respect for the forms and procedures of national law’ (Case 39/70 Fleischkontor [1971]), while going on to clarify that ‘this principle of law must be reconciled with the need to apply community law uniformly’ (Case 94/71 Schlüter [1972]).

236 O. MIR PUIGPELAT, in particular, describes it as ‘empty wrapping that adds nothing to the principles of subsidiarity and proportionality as checks on the EU’s legislative powers’ (La codificación del procedimiento administrativo en la unión administrativa europea, op. cit., p. 59).

237 Bear in mind the new classification of Union competences (Articles 2, 3, 4 and 6 TFEU).

In fact, the independent drafting of national procedural rules is more commonly referred to in European case law as a means of guaranteeing the full and unconditional application of European law, on equal terms with national provisions, than as a means of asserting their separate nature. The result is that national procedural rules drafted for the application of Union law ensure the same level of compliance as for national legislation and guarantee the exercise in practice of rights deriving from it.\(^{239}\)

These are the legal principles of equivalence and effectiveness, which, while they are applied in literal terms to the procedural channels for administrative and judicial complaints, in particular, with regard to the latter, help to shape the procedural framework across a wide range of areas of administrative activity. They therefore constitute a restriction on Member States’ autonomy in terms of proceedings but also in terms of procedure, in the interests of the uniform and effective application of European law in accordance with the general principle of sincere cooperation, to which end, ‘the Member States shall 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 [...] and refrain from any measure which could jeopardise the attainment of the Union’s objectives’ (Article 4(3) TEU).\(^{240}\)

According to the Judgment of the Court of 9 December 2010 in Case C-568/08 Combinatie v Provincie, as regards possible Member State liability for damage caused to individuals by infringements of EU public procurement law, ‘in the absence of EU provisions in that area [...]’, the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult

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\(^{239}\) For a detailed guide to such case law, see MUÑOZ MACHADO, S., Los principios generales del procedimiento administrativo comunitario..., op. cit., p. 341 et seq. And, in particular, Case 33/76 Rewe-Zentralfinanz and Rewe-Zentral [1976], paragraph 5; Case 309/85 Bruno Barra v Belgian State and City of Liège [1988], paragraph 18; Case 68/88 Commission v Greece [1989], paragraphs 24 and 25; Cases C-430/93 and C-431/93 van Schijndel and van Veen v Stichting Pensioenfonds [1995], paragraph 17; Case C-53/04 Marrou and Sardino [2006], paragraph 52; Case C-432/05 Unibet v Justitiëksaner [2007], paragraph 43; Case C-1/06 Bonn Fleisch v Hauptzolamt [2007], paragraph 41; Case C-268/06 Impact [2008], paragraph 46; Case C-542/08 Friedrich G. Barth [2010], paragraph 17; and Case 246/09 Bulicke v Deutsche Büro Service GmbH [2010], paragraph 25.

\(^{240}\) In response to the question as to why Community case law focuses on the interaction between procedural rules in the judicial sphere and Community law while neglecting to refer in the same way to the role of public administrations, A. GARCÍA URETA argues that ‘this is down, to a certain extent, to the fact that the Court of Justice considers questions referred by the national judicial authorities for a preliminary ruling in the light of the problems with which the latter are faced. However, that cannot rule out an analysis of the role of public administrations and, consequently, of the procedural rules governing their activities. Thus, the fundamental principles and obligations arising from Community case law are not applicable only to provisions relating to proceedings before judicial authorities but also to procedures before public administrations’ (Procedimiento administrativo y Derecho comunitario. Silencio administrativo, nulidad y anulabilidad de los actos en la Ley 30/1992, IVAP, Oñati, 2002, pp. 18 and 19).
the exercise of rights conferred by EU law (principle of effectiveness)’ (paragraphs 90 and 91).²⁴¹

4.2. Direct and sectoral subordination. The harmonisation of substantive and appeal proceedings

As highlighted by the most established legal theory,²⁴² the other means by which national procedural autonomy is subordinated stems from the power of European regulations to alter national legal orders in the interests of a common judicial system, which does not stop at substantive concerns, but frequently applies to organisational and procedural rules, with a view to achieving the objectives of judicial integration.²⁴³

It is in the various sectoral areas of European policies but also in the more general area of public procurement that transposition has brought about a genuine Europeanisation of national administrative law, using European procedural provisions to drive this change.²⁴⁴ A great many Directives over the last few decades have been characterised by dense procedural content, in spite of the fact that framework regulations are considered preferable to detailed measures and that they are, in any case, indirect instruments that allow the national authorities to choose the manner and means of achieving the intended results.²⁴⁵ This is in addition to other direct instruments in which the Union lays down procedural requirements, such as regulations, which supplant national procedural rules entirely [such as Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code], or common procedural standards in the form of rights to and principles of good administration of general application.

Under these circumstances, which are exacerbated by the codification debate, as we shall see, it is not surprising that the established reliance on the adoption of national procedural

²⁴¹ A form of judicial monitoring of national procedural rules that, according to established legal theory, has been narrowing in on Member State autonomy through legal rulings. Or, as E. SCHMIDT-ASSMANN concludes (in Pluralidad de estructuras y funciones de los procedimientos administrativos en el Derecho alemán, europeo e internacional, op. cit., pp. 96 and 97), ‘this organisational and procedural autonomy is, in practice, restricted and offset by the requirements of functional equivalence between all States and of effectiveness of application. This tendency is, of course, related to the theory of ‘effet utile’ (effectiveness), which has enabled the Court of Justice to encroach, and unsystematically at that, on theories of long standing in national legal systems, such as the binding nature of administrative acts. The phenomenon has been described as the “instrumentalisation of national procedural law”.


²⁴⁴ See the previous version of the Protocol on the application of the principles of subsidiarity and proportionality, adopted in Amsterdam in 1997 and annexed to the Treaty establishing the European Community.
rules for the administrative implementation of European law has become nothing more than a back-up arrangement, with these national provisions descending to secondary and provisional rules in the absence of Union rules or principles\textsuperscript{246}, or, at the very least, instructions guided or determined by increasingly dominant European provisions\textsuperscript{247}.

As well as in such distinctive fields of the judicial-administrative system as environmental law, with its emphasis on the principle of public participation\textsuperscript{248}, or economic law, the procedural harmonisation model can be seen in the sphere of public procurement, both in the procedures for awarding public contracts and review procedures in this regard\textsuperscript{249}. In the sense that it is based on a broad understanding of the concept of contracting authority\textsuperscript{250} in order to ensure free competition - with its requirements relating to publicity, transparency and non-discrimination -, streamlined and efficient public contract management and procedures for challenging decisions, and from the point of view of increasing alignment with environmental and social policy.

Since Spain’s accession to the European Communities, and notwithstanding other international sources of law\textsuperscript{251} the abundance of provisions governing public procurement has meant an ongoing effort to transpose Directives, under the interpretive guidance of the Court of Justice, that aim to achieve the coordination, above certain thresholds, of procedures for the award of public works, supply and service contracts, as well guaranteeing protection and the right to challenge\textsuperscript{252}. This process has not been without its

\begin{footnotesize}
\begin{enumerate}
\item[GALERA RODRIGO, S.,] La aplicación administrativa del Derecho comunitario...\textsuperscript{, op. cit., p. 27 et seq.; GARCÍA URETA, A., Procedimiento administrativo y Derecho comunitario...\textsuperscript{, op. cit., p. 20 et seq.}
\item[VELASCO CABALLERO, F.,] Procedimiento administrativo español...\textsuperscript{, op. cit., p. 433 et seq.}
\item[251] In terms of multilateral documents that are binding on signatory organisations and states, or which are merely instrumental in the development and harmonisation of international economic relations: the Agreement on the European Economic Area, done at Oporto on 2 May 1992 and adjusted by a Protocol of 17 March 1993, with the instrument of ratification deposited on 26 November 1993, which entered into force on 1 January 1994; the WTO Agreement on Government Procurement, done at Marrakech on 15 April 1994, with the instrument of ratification deposited on 30 December 1994, which entered into force on 1 January 1996; and the Model Law on Procurement of Goods, Construction and Services with Guide to Enactment, adopted by the United Nations Commission on International Trade on 15 June 1994. More information in this regard can be found in the following studies: URREA SALAZAR, M. J., La contratación internacional de las Administraciones públicas, Dykinson, Madrid, 1999; and OLIVERA MASSÓ, P., La problemática sobre la delimitación del ámbito subjetivo de las normas internacionales sobre contratación pública: la administración instrumental en las Directivas de la Comunidad Europea y en el Acuerdo de Contratación Pública de la Organización Mundial del Comercio, in Revista de Administración Pública, No 145, January - April 1998, pp. 445 to 474.
\item[252] Although the transversal nature of the principles governing the internal market means that they still apply to the award of public contracts that fall outside the scope of the Directives provided that they have a sufficient connection with the functioning of the internal market (Case C-458/2003 Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG [2005] and Case C-6/05 Medipac-Kazantzidis AE v Venizeleio-Pananeio [2007]; and the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C 179 of 23 June 2006, p. 2.).
\end{enumerate}
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difficulties and discord, resulting in the radical transformation of procurement, from the protectionist framework of Spanish industry, with its flimsy principles of publicity and competition\textsuperscript{253}, to alignment with the requirements of the internal market.

Thus far, this reception of European procurement law, which is no longer restricted specifically to the award of contracts (special conditions governing their execution, \textit{ius variandi}\textsuperscript{254}) requirements relating to the payment of contractors and subcontractors etc.), has resulted in Law 30/2007 of 30 October 2007 on public sector contracts, following the adoption of Directives 2004/18/EC of the European Parliament and of the Council of 31 March 2004 and Council Directive 89/665/EEC of 21 December 1989, the latter having been amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007; all of which, alongside the previous system's deficiencies concerning the right to challenge, has given rise to Law 34/2010 of 5 August 2010 amending public procurement legislation with regard to review procedures and Law 29/1998 of 13 July 1998 governing administrative courts and introducing a specific administrative procedure before specialised bodies (Tribunal Administrativo Central de Recursos Contractuales [Central Administrative Court of Procurement Appeals] and its regional counterparts) and including the issue of invalidity\textsuperscript{255}.


In which regard, Article 13 of the articulated text of the Law on State Contracts, adopted by Decree 923/1965 of 8 April 1965 merely stipulates that ‘the contracts referred to in this chapter shall be concluded, except where otherwise provided by this law, in accordance with the principles of publicity and competition […]’. For information on the emergence of legal arrangements granting access to the Spanish public procurement market, see LLAVADOR CISTERNES, H. (comp.), Gestión local Aranzadi. Contratación administrativa, Foreword by José M. Baño, Thomson-Aranzadi, Navarre, 2009, p. 38 et seq.

The aim, in fact, of most of the procurement reforms introduced by Law 2/2011 of 4 March 2011 on sustainable economy is to aid the extension across the entire public sector of the administrative arrangements associated with this prerogative, and not just to administrative contracts.

As a corollary to the important procedural and organisational aspects of this legislation, paragraph 1 of the eighth final provision of the Law on public sector contracts stipulates that the procedures based thereon ‘shall be governed, in the first place, by the provisions laid down therein and in the implementing arrangements and, additionally, by those of Law 30/1992 of 26 November 1992 and supplementary rules’. Which, in regard to this general procedural law, represents further generalised and transversal regulation of administrative procedures, including those conducted by electronic means (in Law 11/2007 of 22 June 2007 on electronic access to public services by members of the public, and Royal Decree 1671/2009 of 6 November 2009\(^\text{256}\)), as these provisions concern award procedures, the execution and expiry of public contracts and the review of the separable acts of preparing, awarding and finalising public contracts. And, consequently, in spite of the general and specific instructions set out in Law 30/1992 (for instance, in regard to the invalidity of the separable acts and the general administrative review of these acts), there is some duplication in the joint procedural provisions, which is questioned by PAREJO ALFONSO\(^\text{257}\), especially when procurement rules apply to the specific areas of excluded sectors (Law 31/2007 of 30 October 2007 on procurement procedures in the water, energy, transport and postal services sectors, transposing Directives 2004/17/EC of the European Parliament and of the Council of 31 March 2004 and Council Directive 92/13/EEC of 25 February 1992, also amended by Directive 2007/66/EC) and of defence and security (preliminary draft law on public sector contracts in the area of defence and security, transposing Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009).

Nevertheless, it is important to clarify that, in those sensitive areas in which the Spanish legislator has proved less flexible, such as in the subjective scope of the Directives and the effectiveness of the protection and legal remedies in place in respect of infringements of the selection procedures, Spanish provisions have confined themselves to complying with European requirements, without exceeding them, even though this is at the expense of the uniformity of substantive and procedural arrangements, including where, from this latter perspective, it runs counter to the theory of separable legal acts\(^\text{258}\). With a prior round of infringements and penalties having been necessary,\(^\text{259}\) these seem to have found their particular solution in the category ‘contracts subject to harmonised rules’, which makes it

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\(^{256}\) Electronic procurement is governed by the 18th and 19th additional provisions of Law 30/2007 of 30 October 2007 on public sector contracts; the only additional provision of Royal Decree 817/2009 of 8 May 2009 partially implementing the above law; and the third additional provision of Law 34/2010 of 5 August 2010 governing review procedures in this field. In addition, pending the adoption of implementing provisions, in the public sector and those sectors not specifically excluded from the aforementioned legislation, Order EHA/1307/2005 of 29 April on the use of electronic media in public procurement is applicable. In Catalonia, Law 29/2010 of 3 August 2010 on the use of electronic media in the public sector in Catalonia and Decree 56/2009 of 7 April 2009 promoting and developing electronic media within the Generalitat govern this area. In Galicia, Decree 3/2010 of 8 January 2010 governing electronic invoicing and the use of electronic media and information technology in public procurement is applicable. Meanwhile, Castile-Leon is covered by the provisions of Agreement 33/2009 of 20 March 2009 adopting binding guidelines for all regional government bodies in relation to public procurement.

\(^{257}\) Who considers it ‘difficult to justify, both from the point of view of the national constitutional requirement for one “common procedure” and in terms of the stipulation of Community law that all public contracting authorities should adhere to the same basic rules designed specifically to ensure equal access to the public contract in question’: PAREJO ALFONSO, L., *El procedimiento administrativo en España: situación actual y perspectivas de cambio*, in BARNÉS VÁZQUEZ, J., (ed.), *La transformación del procedimiento administrativo*, Derecho Global, Seville, 2008, p. 437 et seq.

\(^{258}\) For a more detailed analysis, see my monograph *La adjudicación de contratos en el sector público*, op. cit., p. 43 et seq., and 257 et seq.

\(^{259}\) Which S. DEL SAZ describes as ‘the inevitable ordeal of the transposition of Community public procurement provisions’ (*La nueva Ley de Contratos del Sector Público...*, op. cit., p. 351).
possible to identify the area of law relating to the Directives and, conversely, the discretion available to the national legislator.

4.3. The extension of European codification to national procedural systems

4.3.1. The issue of competence

The advantageousness has been raised of extending the planned binding codification of the basic procedural rules and principles of the European Union to the Member States as the main actors in the implementation of European law. This anticipated European achievement in the administrative sphere should give rise both to the harmonisation for the Union as a whole of its basic administrative procedures and to a common core of guidelines relating to procedures and guarantees, recognised at present only unsystematically, which will have a bearing on both the European administration and national administrations, since it will cover the direct, indirect and joint implementation of European law.

However, the attractions of a Europe-wide code that is able to harmonise, through binding provisions, the basis of administrative activity (unity, legal certainty, transparency, legitimacy and equal administrative treatment of European citizens, etc.) are offset by the debate as to whether the Union is competent to bring about this change, at least in terms of this level of codification. Although, on the one hand, the principles of conferral of competences and of subsidiarity and proportionality, along with procedural autonomy, advise restricting European competence to partial codification, while accepting uniformity in the case of the procedural principles applicable to the European institutions (Article 298(2) TFEU), on the other, they justify codification to the full vertical and horizontal extent, with steps taken to strengthen procedure within the Union and benefit integration, to the detriment of Member State autonomy. The public international law doctrine of implied powers in reference to the competences integral to the effective exercise of substantive powers, the finalistic theory of the effectiveness of legislation and the possibility of recourse to the ‘flexibility clause’ (Article 352 TFEU) would make it possible, in spite of the competences excluded from harmonisation and the necessary check in the form of subsidiarity, to fill the gap in respect of a provision comparable to Article 149(1)(18) of the Spanish Constitution, without having to forego this definitive step towards the uniform application of European law, in its administrative and, above all, procedural incarnations.


261 According to Article 352(3) TFEU, ‘measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation’. These exclusions are essentially foreseen in Article 6 in conjunction with Article 2(5) TFEU and relate to actions to support, coordinate or supplement the actions of the Member States in the areas of protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation. See, in this regard, MIR PUIGPELAT, O., La codificación del procedimiento administrativo en la unión administrativa europea, op. cit., p. 83; and MARTÍN DELGADO, I., Hacia una norma europea de procedimiento administrativo, op. cit., p. 170. See also, DELLA CANANEA, G., From Judges to Legislators? The Codification of EC Administrative Procedures in the Field of State Aids, in Rivista Italiana di Diritto Pubblico Comunitario, No 5, 1995, pp. 967 to 980; HARLOW, C., Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot, in European Law Journal, vol. 2, No 1, 1996, pp. 3 to 25; and SHAPIRO, M., Codification of Administrative Law: The US and the Union, in European Law Journal, vol. 2, No 1, 1996, pp. 26 to 47, the latter suggesting parallels between the United States’ Administrative Procedure Act and the current European debate regarding procedural codification.

262 In addition to other provisions that could be cited in this respect, such as Article 298(2) TFEU relating to a European administration, which was included in the Constitutional Treaty (Article III-398) at Sweden’s request.
In any case, it is well known that differing paces and sensibilities co-exist within the Union, which could postpone until a later stage the extension of standard procedures to national administrations, which would be a condition of a coherent European system of implementation. A codification process applicable to all administrations and stages of implementation, and which ensured that administrative activity was conducted in line with the requirements of simplification, flexibility and technological innovation, would continue, in the worst case scenario, to be a question of political will.

Furthermore, a codification of general guidelines and guarantees for the Member States is taking place in practice, not just through case law but whenever, at national level, the convergence measures exceed the Union’s requirements in that regard, through a ‘voluntary adoption of European law’ or, more subtly, ‘spontaneous adaptation to the specific nature and application requirements’ thereof. This phenomenon occurs in the national legislator’s interests, either because it allows European legislation to be adapted to national administrative bodies, making it easier to implement, or because it is unfeasible or disadvantageous for two different systems of administrative law to operate within one legal order. While this phenomenon takes place in regard to sectoral transposition, its impact has also been transferred to general legislation, in particular Law 30/1992; and from that basic starting point, it has begun to affect all national legislation, even though this is not concerned, strictly speaking, with the implementation of European law.

This is the case, as we shall see below, as regards Spain’s transposition of the Services Directive (2006/123/EC) of 12 December 2006, whereby the potential asymmetries and tensions arising from adaptation to European provisions were avoided by bowing to the superior legislation, even though that meant going beyond what was required by the latter. This is in contrast to the national reception of the Directives on public procurement, which, as has been stated, is restricted to the minimum necessary, on the basis of the ‘harmonised procurement’ category. This is demonstrated by the fact that, on the basis of the same guarantee of protection and the right to challenge, special appeals and the issue of invalidity are restricted in practice to contracts above a certain threshold, a restriction that, prior to the most recent reform concerning procurement appeals (Law 34/2010 of 5 August 2010), attracted criticism from the Spanish Economic and Social Council and Council of State.

4.3.2. Legitimate expectations and positive silence: the first signs of a common administrative procedure in a European mould

in the aim of providing a basis for future rules governing the right to good administration; or the European Charter of Fundamental Rights, in spite of the restrictive wording of Article 51(2) thereof, which rules out any extension, through its own provisions, of the scope of Union law or the creation of new powers or tasks for the EU or the modification of its existing powers and tasks.

See below.

JANS, J. H. et al., *Europeanisation of Public Law*, op. cit., p. 8 et seq.
VELASCO CABALLERO, F., *Procedimiento administrativo español…*, op. cit., p. 433 et seq.


According to Report 4/2006 of 20 February 2006 of the Spanish Economic and Social Council on the preliminary draft of the present Law on public contracts, special appeals should not be restricted in practice to contracts subject to harmonised regulation; instead, the provisional measures associated with them should apply to all types of contract, with preference given to measures of a similar nature provided for in the general administrative legislation. In its corresponding Report 514/2006 of 25 May 2006, the Council of State also advocated extending these guarantee mechanisms to all contracts governed by procurement legislation, even where the requirements of the Directive on review procedures were satisfied with the current scope, given that the benefits of the prompt and effective settlement of disputes relating to award procedures would apply to any public contract, whether or not it was subject to harmonised regulation.
The absence of any explicit reference to the principles of European law in the original text of Law 30/1992, along with the solitary mention in Article 10 of communication with the European Communities\textsuperscript{268} and a cautious assumption of good faith in the ex officio review\textsuperscript{269}, was described by MUÑOZ MACHADO as laziness on the part of the Spanish legislator in the face of what should have provided its key motivation or inevitable source of inspiration\textsuperscript{270}. Although this omission, aimed at balancing out common law, was justified in part by the plaid acceptance of Community principles under the previous Procedural Law of 17 July 1958\textsuperscript{271}.

It would not be until the amendments introduced by Law 4/1999 of 13 January 1999 that a minimal but significant reference to European administrative law would appear in the codified procedure, in the form of the general and explicit recognition of the concept of legitimate expectations, already employed in constitutional case law\textsuperscript{272} and administrative case law\textsuperscript{273}. According to the explanatory statement to this law amending the basic Procedural Law, 'the preliminary title [more specifically, Article 3(1) in fine] introduces two principles of action relating to public administration, derived from that of legal certainty. On the one hand, the principle of good faith [...] On the other hand, the principle, well established in European procedural law and also recognised by administrative case law, of the legitimate expectations of the public, which means that the activities of public administrations cannot be altered arbitrarily'.

It is an acknowledged fact that the concept of legitimate expectations, whose guarantee of the rights of those subject to the administration goes beyond the strictly procedural, was imported by Community case law from German administrative law (Vertrauensschutz) in the course of the ex officio review of positive illegal measures, and by way of an exception to the general principle of the inalterability of administrative measures. Only when sufficient account had been taken, in the course of the consideration in the light of case law of the public and private interests at stake, of the legitimate expectations of the public as regards the legality and upholding of the measure could the European administration exercise its power to set aside the decision. As a measure protecting established legal situations, it was ripe for further use within Community law and European legal systems (liability for damages, expropriation etc.), including in respect of the legislator's discretion as a check on the retroactivity in peius permitted under the law (pseudo- or improper retroactivity, whereby the legal rule or provision has a bearing solely on the current effects of a legal situation established in the past and still ongoing)\textsuperscript{274}.

\textsuperscript{268} The Spanish Supreme Court ruling of 13 July 2004 provides an interpretation of this article.
\textsuperscript{269} cf. CASTILLO BLANCO, F. A., La revisión de oficio de los actos administrativos: Un paso atrás en la construcción de un Derecho Común Europeo, in Revista Andaluza de Administración Pública, No 20, October - December 1994, p. 178 et seq.
\textsuperscript{270} MUÑOZ MACHADO, S., Los principios generales del procedimiento administrativo comunitario..., op. cit., p. 334 et seq.
\textsuperscript{271} For a full account, see ORTEGA ÁLVAREZ, L. and PLAZA MARTÍN, C., Administrative Procedure, op. cit., p. 24 et seq.
\textsuperscript{274} As far as the Spanish legal system is concerned, see Articles 9(3) of the Spanish Constitution and 57(3) and 62(2) of Law 30/1992 of 26 November 1992 on the Legal Provisions applicable to the Public Administrations and the Common Administrative Procedure, as well as the Spanish Constitutional Court ruling 182/1997 of 28 October 1997 and the Spanish Supreme Court ruling of 15 November 1999 on the German doctrine of differing classes and degrees of retroactivity. In terms of the guarantee of legitimate expectations as a general principle common to the legal systems of the Member States and European acquis, see MACKENZIE STUART, A. J., Legitime expectations and estoppel in Community Law and English Administrative Law, in Legal Issues of European Integration, 1983, pp. 53 a 73; HUBEAU, F., Le principe de la protection de la confiance legitime dans la jurisprudence de la Cour de Justice des Communautés Européennes, in Cahiers de Droit Européen,
This rule of due respect for legitimate expectations would be followed by technical improvements introduced by Law 4/1999 with regard to Articles 42, 43 and 44 of Law 30/1992, some of which were, according to the explanatory statement, ‘inspired by present-day Community public law’ (suspension on specific grounds of the deadline for adopting and notifying a decision, including as a result of the prior regulatory involvement of a European body under Article 42(5)(b)). This was in the context of the strengthening of the obligation to issue a decision\textsuperscript{275} and of positive silence, with the statutory exception replaced by the legal proviso, that of European law, which has been replicated in the reform of the services sector and the Law on sustainable economy, as we shall see below.

4.3.3. The connotations of generality in procedures governing access to and the provision of services

The process of aligning Spanish law with Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market\textsuperscript{276} in spite of officially being a question of sectoral transposition, albeit on a large scale and subject to detailed procedural conditions, is an example of the adaptation of Spanish general


\textsuperscript{276} More information about this Directive implementing the Lisbon Strategy and its national transposition can be found in the following studies: PAREJO ALFONSO, L., La desregulación de los servicios con motivo de la Directiva Bolkestein: la interiorización, con paraguas y en ómnibus, de su impacto en nuestro sistema, in El Cronista del procedente, No 14, 2009, pp. 34 to 41; DE LA QUADRA-SALCEDO FERNÁNDEZ DEL CASTILLO, T. (ed.), El mercado interior de servicios en la Unión Europea. Estudios sobre la Directiva 123/2006/CE relativa a los servicios en el mercado interior, Marcial Pons, Madrid, 2009; LA ECONOMÍA, A., La transposición de la Directiva de servicios en España, Thomson-Civitas, Navarre, 2007; and MUÑOZ MACHADO, S., La Ley 30/1992, some of which were, according to the explanatory statement, ‘inspired by present-day Community public law’ (suspension on specific grounds of the deadline for adopting and notifying a decision, including as a result of the prior regulatory involvement of a European body under Article 42(5)(b)). This was in the context of the strengthening of the obligation to issue a decision\textsuperscript{275} and of positive silence, with the statutory exception replaced by the legal proviso, that of European law, which has been replicated in the reform of the services sector and the Law on sustainable economy, as we shall see below.

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procedural rules to European arrangements by indirect means or collaterally. It is as if the restlessness building up in the European Union as regards administrative procedure, together with renewed European objectives for the liberalisation of services, could not help but leave its mark in the shape of codified rules on procedure and administrative activity.

It is an interesting example of the Europeanisation of Law 30/1992 and other general provisions of the Spanish legal system, assisted by various factors, including the expansion of services activities under Article 57 TFEU\textsuperscript{277}, albeit subject to the list of exceptions set out in the Bolkestein Directive and transposition arrangements; the controversial qualitative leap the Directive entails in its subjective application to national service providers\textsuperscript{278} (where Articles 49 and 56 TFEU, which reassert the great freedoms of establishment and movement of services on which the internal market is based, confine themselves to relations between Member States for the purposes of prohibiting any discrimination against non-nationals, which is a far cry from the ambitious scaling down of controls laid down by the Directive\textsuperscript{279}); the very importance of the authorisation procedure as a means of prior administrative control; and the phenomenon of the voluntary adoption of European law by the national legislator, which prompted Law 25/2009 of 22 December 2009 (known as the ‘Omnibus Law’) to ‘extend the principles of good regulation to sectors not covered by the Directive\textsuperscript{280}.

This far-reaching reform with transversal effects on Spain’s basic procedural provisions has resulted, along with other horizontal measures taken prior to the casuistic subordination of authorisation regimes to the principles of non-discrimination, justification for overriding reasons of public interest and proportionality\textsuperscript{281}, in the widespread recognition of such principles of administrative intervention, as well as general provision for the concepts of declaration of liability and prior notification, as means of subsequent verification and, ultimately, less restrictive alternatives to authorisation in the interests of the principle of proportionality\textsuperscript{282}. To that end, a new Article 39(a) was inserted in Law 30/1992 by

\textsuperscript{277} Not for nothing do they represent the largest sector of the European and Spanish economy, accounting for 70% of GDP and jobs in the majority of Member States.

\textsuperscript{278} Notwithstanding certain provisions and with the obvious exception of the movement of services in respect of providers established in another Member State (freedom to provide services).

\textsuperscript{279} Aspects that have continued to fuel an interesting debate about the European Union’s role with regard to each Member State’s freedom to conduct business and the precious social, environmental and other advances they have achieved. See, in particular, DE LA QUADRA-SALCEDO FERNÁNDEZ DEL CASTILLO, T., La Directiva de Servicios y la libertad de empresa, in El Cronista del Estado Social y Democrático de Derecho, No 7, October 2009, pp. 46 to 61; and Libertad de establecimiento y de servicios: ¿Reconocimiento mutuo o país de origen?, in Revista Española de Derecho Administrativo, No 146, April - June 2010, p. 257 et seq.; and FERNÁNDEZ RODRÍGUEZ, T.-R., Foreword by RIVERO ORTEGA, R., Mercado europeo y reformas administrativas. Mercado europeo y reformas administrativas. La transposición de la Directiva de servicios en España, Thomson-Civitas, Navarre, 2009, p. 17 et seq.

\textsuperscript{280} ‘[...] in line with an ambitious approach that will contribute significantly to improving the regulatory environment for the services sector and removing unjustified or disproportionate requirements or obstacles’ (Explanatory statement to Law 25/2009 of 22 December 2009 amending various laws to bring them in line with the Law on freedom of access to service activities and the provision thereof).


\textsuperscript{282} As noted by E. RIVERO YSERN, ‘in the case of a supervisory measure (authorisation regimes), the first point to bear in mind, as emphasised previously by the German doctrine, should be to note that the severest of the
Law 25/2009 of 22 December 2009 on the ‘principles of intervention by public administrations in respect of the pursuit of an activity’, along with a new Article 71(a) governing the declaration of liability and prior notification, with the corresponding amendment with regard to local authorities of Article 84 of Law 7/1985 of 2 April 1985 governing local authorities. The latter provision is supplemented by Articles 84(a) and 84(b)\(^{283}\), inserted, in this case, by Law 2/2011 of 4 March 2011 on sustainable economy in order to restrict licences to those activities associated with overriding reasons of general interest, in connection with the preservation of public health and safety, the environment and historical and cultural heritage, in which regard current legislation in all areas of competence is to be evaluated (eighth additional provision).

This is not to forget the generalised application of positive administrative silence in all procedures initiated by the interested party, except in legal circumstances in which negative silence remains duly justified by an overriding reason of general interest, in accordance with Article 43(1) of Law 30/1992, as amended by the ‘Omnibus Law’, in addition to the widespread introduction of tacit consent for specific procedures relating to the authorisation of services, in accordance with Article 6 of Law 17/2009 of 23 November 2009 on freedom of access to service activities and the provision thereof (a sectoral framework known as the ‘Umbrella Law’).\(^{284}\) Article 40 of the Law on sustainable economy lays down the responsibility of the Spanish State and Autonomous Communities\(^{285}\) to steer legislative reform in this direction in order to improve the work of public administrations, which goes some way to addressing the unfortunate fourth additional provision of the Omnibus Law, according to which, ‘the existence of overriding reasons of general interest shall be understood to be present in those procedures which, having been subject prior to the entry into force of this law to statutory provisions or Community law, obey the principle possible remedies should be the ultima ratio of the intervention policy or measure (FLEINER). This is now known as the principle of proportionality, of such importance within the Directive. It is laid down officially in Article 6(2) of the Spanish Regulation on local authority services: if various intervention measures are possible, ‘the one that is least restrictive of individual freedom shall be chosen’ (La actividad de intervención en la Directiva de Servicios: autorizaciones administrativas, declaraciones responsables y comunicaciones previas, in RIVERO ORTEGA, R. (ed.), Mercado europeo y reformas administrativas. La transposición de la Directiva de servicios en España, Thomson-Civitas, Navarre, 2009, pp. 154 and 155). In the same vein: see LAGUNA DE PAZ, J. C., El estruendo del parto de los montes, in El Cronista del Estado Social y Democrático de Derecho, No 6, June 2009, p. 42 et seq.; and Controladores administrativos para el acceso al mercado: autorizaciones, declaraciones responsables y comunicaciones previas, in VICENTE BLANCO, D.-J. and RIVERO ORTEGA, R. (ed.), Impacto de la transposición de la Directiva de servicios en Castilla y León, CESCYL, Valladolid, 2010, pp. 311 to 328. As M. FUERTES LÓPEZ has written, ‘I disagree with the idea that “authorisation is guilty and must prove its innocence”, because authorisation is a legitimate measure that has to be reasonable and not arbitrary. It must be justified and proportional. We have been reading about most of these concepts for years, because administrative intervention has always been required to be minimal and proportional, to tie in with the aim pursued and to guarantee the principle of freedom’ (Luces y sombras en la incorporación de la Directiva de Servicios, op. cit., p. 4). See also RODRÍGUEZ FONT, M., Declaración responsable y comunicación previa: su operatividad en el ámbito local, in FONT I LLOVET, T. and GALÁN GALÁN, A. (ed.), Anuario del Gobierno Local 2009: La Directiva de Servicios. Contratación local y crisis económica. Nuevos desarrollos estatutarios, Institut d’Estudis de l’òmnium Públic, Barcelona, 2009, pp. 261 to 300; LOZANO CUTANDA, B., Ley ómnibus: silencio administrativo, declaración responsable y comunicación previa, in Diario La Ley, No 7339, February 2010; and RAZQUIN LIZARRAGA, J. A., De la intervención administrativa previa al control a posteriori: la reforma del procedimiento administrativo común a consecuencia de la Directiva de Servicios, in Revista Aranzadi Doctrinal, No 2, May 2010, pp. 115 to 134.

And by minimal changes to the revised text of the Law on Local Tax Authorities, approved by Royal Legislative Decree 2/2004 of 5 March 2004, authorising local tax authorities to levy fees for the verification of those activities not subject to prior authorisation or control.\(^{284}\) The source of this provision in favour of positive silence, except where ruled out by reasons of overriding general interest, can be found in Article 13(4) of the Services Directive.

\[^{283}\] The Autonomous Communities will also assess whether there exist overriding reasons of general interest that justify maintaining a system of negative administrative silence in administrative procedures governing by legislation adopted prior to the drafting of Article 43 of Law 30/1992 of 26 November 1992 on the Legal Provisions applicable to the Public Administrations and the Common Administrative Procedure, deriving from Law 25/2009 of 22 December 2009 amending various laws to bring them in line with the Law on freedom of access to service activities and the provision thereof \[^{285}\].
whereby the absence of any notification of a decision relating to the procedure within the prescribed period shall be interpreted as a refusal’.

Nevertheless, this strategy for the transposition of the Services Directive and the overall context of European harmonisation continue to suffer from the absence of a more far-reaching and systematic reform of the Law on common administrative procedure, as is the case in other European countries with established procedural legislation286.

4.3.4. Legal principles of a procedural nature

The role played by Community case law in the development of European administrative procedure can only be described as instrumental, since, in addition to building up a solid body of principles and rules over the years inspired by national legal systems, thereby paving the way for their consent in respect of direct application, these principles have returned to the original systems fine-tuned and streamlined for the procedural application of European law. Consequently, the praetorian contribution to the essential nature of procedure within the Union has been a two-way process, not just in its gestational stage, but throughout the development of the doctrine of the European administrative act, reminiscent in part of the changes undergone within procedural law in many Member States287, influencing the latter in their regulation and application measures, beyond merely the theory of equivalence and effectiveness, through the harmonising and protective vocation of European case law.

However, this is not the place to begin to outline even the most basic guidelines of the European system, many of which are now laid down in the Treaties, the European Charter of Fundamental Rights and soft law documents. Some relate more closely than others to the procedural aspects of the function of administration, but all are the subject of scientific study288, given their dominance in the most varied aspects of the European legal order with regard to scrutiny of administrative discretion and the protection of fundamental rights. The principles of the presumption of the legality of administrative acts, the general fairness of

286 ‘In those European countries with procedural legislation as solid as ours (such as Germany), one of the chief means of transposing the Directive has involved a fresh reform of their regulatory legislation, as a result of which it will no doubt take years to bring this piece of legislation in line with economic and social needs’, RIVERO ORTEGA, R., La transposición de la Directiva de servicios en España, in the collective work Mercado europeo y reformas administrativas, Thomson-Civitas, Navarre, 2009, p. 84.

287 There have even been parallels between the European Court of Justice and the French Council of State: MACKENZIE STUART, W., The European Community and the Rule of Law, op. cit., p. 13 et seq.; and WADE, W. and FORSYTH, C., Administrative Law, op. cit., p. 15 et seq. As A. WEBER states (El Procedimiento Administrativo en el Derecho Comunitario, op. cit., p. 62.), ‘European administrative law has come about, essentially, as praetorian law, through the investigation and comparative analysis of the general principles of law applicable in the Member States. The wealth of judicial creation has always been in evidence, in contrast to the situation within international law or the constitutional law of each State’.

European measures, self-organisation, defence, legal certainty and legitimate expectations, equality, proportionality and transparency, or the more procedural principles of competence, review, publicity, notification, reasoned decision-making and officiality, together with the vital principle of good administration289, form the organisational and functional backbone of the European legal system.

Consequently, even with the progress achieved and that which the Union anticipates making in the near future, case law must still be considered the binding element in the consolidation and renewal of European administrative law.

5. CONCLUSIONS

The prominence administrative procedure has gained, not solely as a means of adopting eventual applicable measures, but as an end in itself, is particularly visible within European law, where procedure has become one of the main forces of European integration, in terms of direct, indirect and integrated implementation.

With regard to direct implementation by the European institutions, we have witnessed a search for a European administrative identity become a drive to overcome its present state of fragmentation.

In terms of indirect implementation by the Member States, in spite of the underlying tension between the principles of subsidiarity, proportionality and organisational and procedural autonomy, on the one hand, and need to ensure the effective and uniform application of European law (principle of sincere cooperation pursuant to Article 4(3) TEU), on the other, it is true that national autonomy has been eroded by the growing Europeanisation of national administrative procedures, both through case law (principles of equivalence and effectiveness, along with other rules of a procedural nature) and as a result of the harmonisation of sectoral legislation, with the prospect of the planned binding codification of European administrative procedure even being extended to national procedural provisions. Something that has been occurring in practice as a result of the actions of national legislators (voluntary or spontaneous adoption of European law), with the contrasting examples within the Spanish legal system of its reception of the Services Directive (a further step towards the alignment with European provisions of Law 30/1992 of 26 November 1992 on the Legal Provisions applicable to the Public Administrations and the Common Administrative Procedure and other general provisions concerning intervention and administrative silence, greatly in evidence in Law 2/2011 of 4 March 2011 on sustainable economy) and its adaptation to the most recent Directives on public procurement (which was restricted to the bare minimum on the basis of the ‘harmonised

procurement’ category, at the price of the fragmentation of substantive and procedural arrangements, following previous infringements and penalties).

It is also important to note that the dichotomy between direct and indirect implementation is being replaced by a third form of administrative implementation characterised by measures shared between the European administration and individual national administrations. An integrated or composite administration arrangement that, aside from lending added complexity to the European system of application, highlights the need for the integral and uniform treatment of European procedure.

An administrative code at European scale is required that is able to harmonise, through binding provisions, the basis of administrative activity, to the full vertical and horizontal extent, with steps taken to strengthen procedure within the Union and benefit integration, to the detriment of Member State autonomy. The public international law doctrine of implied powers in reference to the competences integral to the effective exercise of substantive powers, the finalistic theory of the effectiveness of legislation and the possibility of recourse to the ‘flexibility clause’ (Article 352 TFEU) would make it possible, in spite of the competences excluded from harmonisation and the required monitoring of subsidiarity, to fill the gap in respect of a provision comparable to Article 149(1)(18) of the Spanish Constitution, without having to forego this definitive step towards the uniform application of European law, in its administrative and, above all, procedural incarnations.
Abstract

In awarding contracts the Community institutions are subject to the rules set out in Directive 2004/18/EC of 31 March 2004. The provisions of the directive are reproduced and adapted in Community Financial Regulations Nos 1605/2002 and 2342/2002 of 25 June 2002. These provisions ensure that all economic operators in the EU have non-discriminatory access to European contracts.
## LIST OF ABBREVIATIONS

- **BOAMP**: Official Gazette of public contract notices (Bulletin officiel des annonces des marchés publics, France)
- **CE**: Council of State (Conseil d’Etat, France)
- **CFIEU**: Court of First Instance of the European Union (now the General Court)
- **CJEC**: Court of Justice of the European Communities
- **CJEU**: Court of Justice of the European Union
- **DPS**: Dynamic purchasing system
- **EC**: European Communities
- **EP**: European Parliament
- **Fasc.**: Fascicle
- **JurisCl.**: JurisClasseur (LexisNexis)
- **LGDJ**: Librairie générale de droit et de jurisprudence (France)
- **OJEU**: Official Journal of the European Union
- **PW**: Public works
- **TFEU**: Treaty on the Functioning of the European Union
- **WTO**: World Trade Organization
EXECUTIVE SUMMARY

Background

The purpose of this note is to present the legal rules which apply when the EU institutions award public contracts and thus to contribute to the debate on the emergence of EU administrative law. The question is whether, beyond the special rules applicable to public procurement, a consistent body of rules and principles might emerge which, drawing on national legislation, would apply to all contracts awarded by the Community institutions.

Aim

- To present the legislation applicable to public procurement by the Community institutions.
- To describe how that legislation is applied.
- To describe the main features.
  - Types of procedures.
  - Access for economic operators to contracts awarded by the Community institutions.
  - Advertising of contracts awarded by the Community institutions.
  - Legal disputes concerning contracts awarded by the Community institutions.

General information

KEY FINDINGS

- Contracts awarded by the Community institutions are subject to general Directive 2004/18/EC of 31 March 2004.


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1. THE COMMUNITY INSTITUTIONS AS CONTRACTING AUTHORITIES

In its fundamental judgment in Case C-294/83 'Les Verts’ v European Parliament [1983] ECR 1339, the European Court of Justice formally stated that the Community institutions cannot avoid a review of whether the measures they adopt, including contracts they find it necessary to award in order to meet their own needs, are in conformity with the ‘basic constitutional charter’, the Treaty. The fact remains, however, that just like the 1957 Treaty of Rome and the subsequent Treaties of Maastricht (1992), Amsterdam (1999) and Nice (2000), the Lisbon Treaty on the Functioning of the European Union, which came into force on 1 December 2009, does not contain any specific provisions on public contracts.

The Treaty does, admittedly, include special rules on the free movement of goods, services, workers, capital and payments, and on freedom of establishment, free competition and State aid, but there are no rules or principles on public contracts or, a fortiori, public procurement by the Community institutions. There are obvious reasons for this.


Secondly, and above all, it was simply not feasible in practical terms to include detailed and consistent rules on public procurement at European level in the actual body of the original Treaty. The presence of such highly specialised rules in the Treaty would have been very much out of keeping with its constitutional dimension.

Lastly, the Community institutions have the power under the Treaties (in particular Article 5(3) EC) to take action in the field of public contracts, so there was no need to include detailed rules on the subject in the Treaties. Directives, which are based on the technical harmonisation of national legislation, appeared to be the optimum method for establishing Community principles in the field of public purchasing, where regulations tend to vary widely from one Member State to another.

It is therefore only in secondary Community legislation that there is a major series of directives on public contracts, particularly general Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, which together form a highly detailed body of legislation which has binding force for those to whom it applies.

The Community institutions obviously also come under this secondary legislation. They are in principle subject to acts of secondary legislation which translate and implement the rules contained in the Treaties (see in particular Case 7/56 Algéra [1957] ECR). Since the secondary legislation on public contracts was adopted on the basis of primary legislation, in this particular case Article 95 EC (now Article 114 TFEU), and since the general principles
contained in the Community Treaties affect public contracts beyond the limits defined by the 'public contracts' directives (Case C-324/98 Telaustria Verlags GmbH [2000] ECR), the procurement procedures that must be followed by the European institutions for awarding contracts to meet their needs are ordinary law procedures defined in particular by Directive 2004/18/EC of 31 March 2004. Indeed, paragraph 24 of the preamble to Regulation No 1605/2002 of 25 June 2002 (see below) provides that 'As regards contracts awarded by the institutions of the Communities on their own account, provision should be made for the rules contained in the Directives of the European Parliament and of the Council coordinating the procedures for the award of public works, service and supply contracts to apply'.

Directive 2004/18/EC applies in practice to 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive'.

Article 104 of Council Regulation No 1605/2002 of 25 June 2002 applicable to the general budget of the European Communities provides that the Community institutions are deemed to be contracting authorities in the case of contracts awarded on their own account (see also Regulation No 2342/2002, Article 116(7)).

However, the award of a public contract by an EU institution falls within a complex institutional framework which sometimes gives rise to special situations which the 2002 regulations were intended to take into account.

Two particular situations can be mentioned at this point.

The first is the joint procurement procedure with a Member State (Article 125(4) of Regulation No 2342/2002/EC). Where a procurement procedure is organised jointly by an EU institution and the contracting authority of one or more Member States, the procedural rules applicable to the Community institution apply in principle.

However, if the proportion of the estimated total value of the contract payable, or managed, by the Member State’s contracting authority is 50% or more, or in other duly justified cases, the institution may decide that the procedural rules applicable to the Member State’s contracting authority will apply, provided that they can be regarded as equivalent to the institution’s rules.

The institution and the Member State’s contracting authority involved in the joint procurement procedure must agree, in particular, on the practical arrangements for evaluating requests to participate or tenders, the award of the contract, the law applicable to the contract, and the court with jurisdiction in the event of any disputes.

The second special situation concerns contracts awarded between the Community institutions, for which an interinstitutional procedure (Article 91 of Council Regulation No 1605/2002 of 25 June 2002) has been devised.

The directive thus applies, as a matter of principle and across the board, to contracts awarded by the Community institutions on their own account. However, it only applies to the Community institutions themselves in so far as is provided for in the Financial Regulation of 25 June 2002, supplemented by Regulation No 2342/2002/EC, adopted to implement the Financial Regulation, which set out one or two special rules and exceptions designed to take account of the special nature of the procurement procedure used by the European institutions.
From this point of view the Community institutions are in exactly the same situation as the Member States, in that the 2002 Financial Regulations, in the same way as national legislation, appear to be the vehicle for transposing the requirements set out in the 2004 general directive.

It has to be said that these two Financial Regulations implement the directive very accurately on all aspects of public procurement.

2. TYPES OF PROCEDURE APPLICABLE

**KEY FINDINGS**

- The procedures applicable to public contracts awarded by the Community institutions largely depend on the value (threshold rules).
- The procedures applicable are those laid down in the general Community legislation on public procurement.

In accordance with the requirements of Directive 2004/18 of 31 March 2004, a public contract may be awarded by an EU institution, according to the provisions of Regulation No 2342/2002 (Article 122(1)), ‘by call for tender, using the open, restricted or negotiated procedure after publication of a contract notice or by negotiated procedure without prior publication of a contract notice, where appropriate following a contest’.

Article 119 of Regulation No 2342/2002 also includes the concept of ‘advertising by appropriate means’ developed by the Court of Justice in its *Telaustria* judgment referred to earlier and applicable to contracts not covered by the Community directives.

The thresholds which determine the arrangements for publication of contract notices, prior information notices and award notices, the choice of procedures and the corresponding time limits are those laid down in the Parliament and Council Directives (Regulation No 1605/2002, Article 105).

The Community legislature thus expressly intends contracts awarded by the Community institutions to be subject to the general rule, which in this case means the 2004 directives.

However, these directives are, by their very nature, merely harmonising legislation and are therefore not directly applicable. It is left to the Member States to decide how to achieve the stated objectives. Similarly, the directives have been adapted to the specific requirements and constraints of the Community institutions by the relevant Community regulations. Directive 2004/18/EC thus establishes a relationship between the legislation applicable to public procurement by the Member States and public procurement by the EU institutions. This shared relationship is playing a part in the emergence of reasonably homogeneous European law on public contracts.

At this point, however, questions arise about the relevance of this shared relationship in the particular case of the EU institutions. The aim of the 2004 directives as far as the Member States are concerned is not necessarily exactly the same as the aim which it seems the legislation applicable to public procurement by the EU institutions should have. In the former case, the ‘public contracts’ directives are geared towards integration and promoting the interpenetration of national economies. In the latter case, the application of advertising and competitive tendering procedures under the 2004 directives is mainly designed to
ensure that all economic operators in the EU have free, non-discriminatory access to public contracts awarded by the European institutions.

The aim of the 2002 Financial Regulations is therefore to address, on the basis of a single piece of legislation (the 2004 directive) the different aims pursued by the legislation on public contracts, according to whether it applies to the Member States or the EU institutions.

2.1. Thresholds

Article 105 of Council Regulation No 1605/2002 of 25 June 2002 states that, subject to the specific provisions on contracts awarded in the context of external actions, Directive 2004/18/EC lays down the thresholds applicable to contracts awarded by the European institutions on their own account, which determine:

- the publication arrangements;
- the choice of procedures;
- the corresponding time limits.

For information, Article 158 of Regulation No 2342/2002 (as amended by Commission Decision 2010/78/EU of 9 February 2010) fixed these thresholds at:

- EUR 4 845 000 for works contracts;
- EUR 125 000 for the supply and service contracts listed in Annex II A to Directive 2004/18/EC (with the exception of the research and development contracts listed in category 8 of that annex);
- EUR 193 000 for the service contracts listed in Annex II B to Directive 2004/18/EC, and for the research and development contracts listed in category 8 of Annex II A.

It is for each delegated or subdelegated authorising officer within each institution to assess whether the thresholds laid down in Directive 2004/18 have been reached (Article 149a of Regulation No 2342/2002).

2.2. Description of procedures

Article 91 of Regulation No 1605/2002 provides that procurement procedures can take one of the following forms: the open procedure, the restricted procedure, contests, the negotiated procedure or competitive dialogue.

Regulation No 2342/2002 details the procurement procedures that may be followed by the Community institutions.

2.3. Open or restricted procedures

Under Article 28 of Directive 2004/18 and Article 122 of Regulation No 2342/2002, the Community institutions must award public contracts using the open or restricted procedure, the contract being regarded as open where all interested economic operators may submit a tender, and restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 135 of Regulation
No 2342/2002 and invited simultaneously and in writing by the Community institutions may submit a tender.

The number of candidates invited to submit a tender may not be less than five, provided that a sufficient number of candidates satisfy the selection criteria (Article 123 of Regulation No 2342/2002), but (an interesting feature), the contracting authority may also provide for a maximum number of twenty candidates, depending on the subject of the contract and on the basis of objective and non-discriminatory selection criteria. In such cases, the range and criteria must be indicated in the contract notice or the call for expressions of interest (Article 123 of Regulation No 2342/2002).

Article 128 of Regulation No 2342/2002 provides for the special situation where there is a restricted procedure following a call for expressions of interest.

A call for expressions of interest is a means of preselecting candidates who will be invited to submit tenders in response to future restricted invitations to tender for contracts of a value of EUR 60 000 or more. The list drawn up following a call for expressions of interest is valid for no more than three years from the date on which the notice is sent to the Publications Office, and any interested person may submit an application at any time during the period of validity of the list, with the exception of the last three months of that period.

Where a specific contract is to be awarded, Article 128 of Regulation No 2342/2002 authorises the contracting authority to invite either all candidates entered on the list or only some of them, on the basis of objective and non-discriminatory selection criteria specific to that contract, to submit a tender.

2.3.1. Contests

Contests are procedures which enable the contracting authority to acquire, mainly in the fields of architecture and civil engineering or data processing, a plan or design proposed by a selection board after being put out to competitive tender with or without the award of prizes (Regulation No 2342/2002, Article 122(4)).

The selection board, appointed by the responsible authorising officer, is made up exclusively of natural persons who are independent of participants in the contest and must be autonomous in its opinions. Projects must be submitted anonymously by the candidates and must be based solely on the criteria set out in the contest notice.

The contracting authority then takes a decision giving the name and address of the candidate selected and the reasons for the choice by reference to the criteria announced in the contest notice, especially if it departs from the proposals made in the selection board’s opinion.

2.3.2. Negotiated procedures

Under Article 124 of Regulation No 2342/2002, the Community institutions may negotiate with tenderers the tenders they have submitted in order to adapt them to the requirements set out in the contract notice or in the specifications and in any additional documents, and in order to find the tender offering best value for money.

During the negotiation, the contracting authorities must ensure equal treatment for all tenderers.
Regulation No 2342/2002 provides, in line with Directive 2004/18/EC, for two categories of negotiated procedures: the negotiated procedure without prior publication of a contract notice, and the negotiated procedure after prior publication of a contract notice.

In both cases, the negotiated procedure may be used only in the situations listed in Regulation No 2342/2002.

It should be noted here that the Financial Regulation departs from the predominantly qualitative approach to competitive tendering in the 2004 directive and adopts a purely quantitative approach. Thus for contracts with a value of EUR 60 000 or below the negotiated procedure without prior advertising may be used, provided that at least five candidates are consulted. Similarly, for contracts with a value of EUR 25 000 or below the negotiated procedure with consultation of at least three candidates may be used. Finally, contracts with a value of EUR 5 000 or below may be awarded on the basis of a single tender, and costs of EUR 500 or below may simply be paid against invoice, without prior acceptance of a tender (Article 129 of Regulation No 2342/2002).

2.3.3. Competitive dialogue

Where a contract is particularly complex, if the Community institutions consider that the direct use of the open procedure or the existing arrangements governing the restricted procedure will not allow the contract to be awarded to the tender offering the best value for money, they may use the competitive dialogue referred to in Article 29 of Directive 2004/18/EC.

Clearly, it will be more exceptional for the Community institutions to use this option than the Member States, since the contracts awarded by the Community institutions are more 'standardised' than some of those awarded by the Member States.

Article 125b of Regulation No 2342/2002 on procurement by the institutions reproduces the general conditions set out in Article 29 of Directive 2004/18/EC.

Under the legislation referred to above, a contract is regarded as particularly complex where the contracting authorities find it objectively impossible to define the technical means of satisfying their needs or objectives or of establishing the financial or legal make-up of the project.

2.3.4. Dynamic purchasing systems

Under Article 33 of Directive 2004/18/EC and Article 125a of Directive 2342/2002, the Community institutions may use a dynamic purchasing system, which is a completely electronic process for making commonly used purchases that is open throughout its validity to any economic operator satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents. Indicative tenders may be improved at any time, provided that they continue to comply with the specification. A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases (Article 125a of Regulation No 2342/2002).
3. ACCESS TO PUBLIC CONTRACTS AWARDED BY THE COMMUNITY INSTITUTIONS

KEY FINDINGS

- Participation in tendering procedures must be open on equal terms to all natural and legal persons coming within the scope of the Treaties and to all natural and legal persons in a third country which has with the European Communities a special agreement in the field of public procurement.

- EU legislation has established special procedures designed to prevent conflicts of interest in public procurement by the European institutions.

3.1. Opening the Community institutions’ contracts to competitive tendering

Participation in tendering procedures must be open on equal terms to all natural and legal persons coming within the scope of the Treaties and to all natural and legal persons in a third country which has with the European Communities a special agreement in the field of public procurement under the conditions laid down in that agreement (Regulation No 1605/2002, Article 106).

Furthermore, where the Multilateral Agreement on Government Procurement concluded within the World Trade Organization applies, the contracts must also be open to nationals of the States which have ratified this agreement, under the conditions laid down in that agreement.

The European institutions’ specifications must require tenderers to indicate in which State they have their headquarters or domicile and to present the supporting evidence normally acceptable under their own law.

3.1.1. Exclusion from participation in procurement procedures

Articles 93 and 94 of Council Regulation No 1605/2002 of 25 June 2002 give a precise list of cases where a tenderer must automatically be excluded from an EU institution’s public procurement procedure.

Candidates or tenderers are excluded from participating in procurement procedures if they are bankrupt or being wound up, they have been convicted of an offence concerning their professional conduct, they have not fulfilled obligations relating to the payment of taxes or social security contributions, or they have been the subject of a judgment which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities’ financial interests.

Article 93 of Regulation No 1605/2002 states that candidates or tenderers must certify that they are not in one of the situations listed above. The institutions may, however, decide not to require such certification with contracts of a very low value (under EUR 10 000).

Article 94 of Regulation No 1605/2002 also states that contracts may not be awarded to candidates or tenderers who, during the procurement procedure, are subject to a conflict of
interests (see below) or are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information.

3.1.2. The central database

The Commission has set up a central database in compliance with Community rules on the processing of personal data. It contains details of candidates and tenderers who are in one of the exclusion situations described above, and is shared by all the Community institutions.

Under Article 95 of Regulation No 1605/2002, the authorities of the Member States and third countries involved in the implementation of the budget must forward to the responsible authorising officer information on candidates and tenderers who are in one of the exclusion situations, where the conduct of the operator in question has been detrimental to the Communities’ financial interests.

The responsible authorising officer receives this information and asks the accounting officer to enter it in the database.

Articles 133a and 134a of Regulation No 2342/2002 detail the conditions for the operation of the central database.

3.2. Managing conflicts of interest

3.2.1. Definition

According to Article 52 of Council Regulation No 1605/2002 of 25 June 2002, there is a conflict of interests where the impartial and objective exercise of the functions of a candidate or tenderer is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary.

There is considered to be a presumed conflict of interests if an applicant, candidate or tenderer is a member of staff covered by the Staff Regulations, unless he or she has been given prior authorisation by his or her superior to take part in the procedure.

3.2.2. Checking procedures

As a matter of principle, under Article 94 of Council Regulation No 1605/2002 of 25 June 2002 contracts awarded by the Community institutions on their own account may not go to candidates or tenderers who are subject to a conflict of interests during the procurement procedure.

To that end the regulation requires candidates and tenderers to provide sworn certification, duly dated and signed, stating that they are not subject to a conflict of interests.

However, depending on its assessment of the risks, the contracting authority may decide to waive this certification with contracts of a value of EUR 5,000 or below.

The regulation does not specifically include any additional measures allowing the institutions to ensure that there is no conflict of interests when awarding their contracts.
However, the Community courts ruled against the European Commission for not acting with due diligence to ensure that there was no conflict of interests (Case T-160/03 AFCOn Management Consultants [2005] ECR).

In that particular case, the applicants complained that the Commission had failed to draw conclusions from the conflict of interests between a member of the evaluation committee and one of the tenderers. They considered, in essence, that the Commission had not acted with due diligence once it had discovered that there was a conflict of interests and that it should not have allowed the tenderer to take part in the next stage of the tendering procedure.

The Court of First Instance stated that ‘the fact that a person who helps to evaluate and select tenders for a public contract has the contract awarded to him is highly questionable and constitutes a chargeable offence under the criminal law of several Member States, regard being had to the principle of equal treatment in the award of public contracts, the concern for sound financial management of Community funds and the prevention of fraud (Case T-277/97 Ismeri Europa v Court of Auditors [1999] ECR II-1825, paragraph 112).

After the discovery of a conflict of interests between a member of the evaluation committee and one of the tenderers, the Commission must act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. That obligation derives in particular from the principles of sound administration and equal treatment (see, by analogy, Case T-231/97 New Europe Consulting and Brown v Commission [1999] ECR II-2403, paragraph 41). The Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (see, to that effect, Case C-496/99 P Commission v CAS Succhi di Frutta [2004] ECR I-0000, paragraph 108, and Case T-145/98 ADT Projekt v Commission [2000] ECR II-387, paragraph 164’).

The Court of First Instance considered that once a conflict of interests has been discovered, the institutions must act with due diligence and on the basis of all the relevant information when formulating and adopting their decision on the outcome of the procedure for the award of the tender in question.

However, once a conflict of interests has been discovered the institutions have a certain discretion in determining the measures to be taken concerning the conduct of the subsequent phases of the tendering procedure.

This problem is very similar to the more general problem of objective competitive advantages, which the Court of Justice considered in its judgment of 3 March 2005 in Fabricom SA, when it adopted a rather ambiguous position, allowing the Member States considerable discretion in assessing whether undertakings with a competitive advantage from the outset should be excluded from competitive tendering (Joined Cases C-21/03 and C-34/03 Fabricom SA [2005] ECR). Called upon to decide on the legality of Belgian national rules which exclude as a matter of principle undertakings which have been involved in the preparation of a contract from the competitive tendering procedure for that contract, the Court ruled that 'taking account of the situation in which a person who has carried out certain preparatory work may find himself, therefore, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer’, thereby acknowledging, with certain provisos, that the Belgian rules
requiring contracting authorities to exclude candidates who have been involved in preparing the contract are consistent with the Community directives.

4. ADVERTISING OF PUBLIC PROCUREMENT BY THE COMMUNITY INSTITUTIONS

KEY FINDINGS

- All contracts must, in principle, be published in the Official Journal of the European Union.

- The advertising rules relate to the phase prior to the competitive tendering procedure and the phase after award of the contract.

4.1. The principle of advertising

According to Article 90 of Financial Regulation No 1605/2002, all contracts must be published in the Official Journal of the European Union except those below the thresholds provided for in Articles 105 and 167 of that regulation.

The latter contracts are, like the service contracts referred to in Annex II B of Directive No 2004/18/EC, to be advertised by appropriate means in accordance with the provisions of the implementing rules.

4.2. Advertising rules

4.2.1. Advertising rules for contracts above the thresholds

According to Article 118 of Regulation 2342/2002 publication for contracts with a value equal to or above the thresholds referred to in Articles 157 and 158 of Regulation 2342/2002 must consist of a pre-information notice, a contract notice and an award notice.

4.2.2. Advertising of contracts not covered by Directive 2004/18/EC and for contracts referred to in Annex II B to that directive (Article 119 of Regulation No 2342/2002)

Advertising of contracts with a value below the thresholds laid down in Article 158 of the Financial Regulation and service contracts referred to in Annex II B to Directive 2004/18/EC must involve, if no contract notice has been published, notice of a call for expressions of interest for contracts covering a similar subject with a value equal to or greater than the amount referred to in Article 128(1), and the annual publication of a list of contractors, specifying the subject and the value of the contract awarded, for contracts with a value over EUR 25 000.

Ex ante advertising and the annual publication of the list of contractors for the other contracts is on the Internet site of the institutions; ex post publication takes place by no later than 31 March of the following financial year.

Publication may also be in the Official Journal of the European Communities.
4.2.3. Publication of notices

Article 120 of Regulation 2342/2002 provides that the Publications Office must publish the notices referred to in Articles 118 and 119 of Regulation 2342/2002 in the Official Journal of the European Communities no later than twelve calendar days after their dispatch.

That period is reduced to five calendar days in the case of fast-track procedures.

The contracting authorities must be able to provide evidence of the date of dispatch.

4.2.4. Other forms of advertising

Article 121 of Regulation 2342/2002 states that in addition to the advertising provided for in Articles 118, 119 and 120 of that regulation, contracts may be advertised in any other way, notably in electronic form.

Such advertising may not introduce any discrimination between candidates or tenderers nor contain details other than those contained in the contract notice, if one has been published.

5. SELECTION OF CANDIDATURES AND TENDERS

KEY FINDINGS

- The selection criteria used by the EU contracting authorities must, as a general rule, be clear and non-discriminatory.
- The responsible authorising officer decides to whom the contract is awarded, in compliance with the selection criteria and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

5.1. Selection criteria for requests to participate and tenders

As a general rule, the provisions of Article 135 et seq. of Regulation No 2342/2002 reproduce the requirements of the 2004 general directive. The selection criteria used by the Community institutions’ contracting authorities must thus be clear and non-discriminatory (Article 135(1) of Regulation No 2342/2002).

The award criteria set out in Article 138a of Regulation No 2342/42 are also based on the provisions of Article 53 of Directive 2004/18.

For contracts awarded by the institutions on their own account with a value of EUR 60 000 or below, the European institutions may, however, depending on their assessment of the risks, decide not to require the candidate or tenderer to provide proof of their financial, economic, technical and professional capacity. In such cases no pre-financing is paid unless a financial guarantee of an equivalent amount is provided (Article 135(6) of Regulation No 2342/2002).
5.2. Examination of requests to participate and tenders by the Community institutions

Under Article 98 of Regulation 1605/2002, the arrangements for submitting tenders must ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously.

Article 140 of Regulation 2342/2002 reproduces the provisions of Article 38 of Directive 2004/18 which fixes the minimum time limits for receipt of requests to participate and tenders depending on the procedure followed by the contracting authority.

5.3. Conclusion of contract

Under Article 100 of Regulation 1605/2002, the responsible authorising officer decides to whom the contract is to be awarded, in compliance with the selection criteria and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

Moreover, the contracting authority may, by a substantiated decision brought to the attention of the candidates or tenderers, either abandon the procurement or cancel the award procedure before the contract is signed, without the candidates or tenderers being entitled to claim any compensation (Article 101 of Regulation No 1605/2002).

5.3.1. Information for unsuccessful candidates and tenderers (Article 149 of Regulation 2342/2002)

For contracts awarded by the Community institutions on their own account with a value equal to or above the thresholds fixed by Directive 2004/18/EC and not excluded from the scope of that directive, economic operators who have taken part in the competitive tendering procedure must be given specific information under the provisions of the 2004 general directive. For these contracts the contracting authority must notify each unsuccessful candidate or tenderer individually and simultaneously, by letter, fax or email, that their application or tender has not been successful, at one of the following stages:

- shortly after the adoption of decisions on the basis of the exclusion and selection criteria and before the decision to award the contract, where the procurement procedures are organised in two separate phases;
- for award decisions and decisions to reject a tender, as soon as possible after the award decision, and at the latest during the following week.

5.3.2. Standstill period prior to signature of the contract (Article 158a of Regulation 2342/2002)

Like the 2004 general directive (Article 41), the Financial Regulation provides for a standstill period allowing economic operators claiming to be the victims of an infringement of the advertising and tendering rules to bring proceedings before the relevant court, if appropriate.

The contracting authority must allow a period of fourteen calendar days to elapse before signing the contract or framework contract covered by Directive 2004/18/EC with the successful tenderer.

This period runs from one of the following dates:
the day after the date on which the award and rejection decisions are simultaneously notified;

Where the contract or framework contract is awarded following a negotiated procedure with prior publication of a contract notice, the day after publication of the contract award notice in the Official Journal of the European Union.

In principle, any contract signed before the period referred to in the first paragraph is null and void.

The period does not apply in the following cases:

- open procedures where only one tender has been submitted;
- restricted or negotiated procedures following prior publication of a contract notice, where the tenderer to whom the contract is to be awarded was the only one satisfying the exclusion and selection criteria, provided that the other candidates or tenderers have been informed of the reasons for their exclusion or rejection shortly after the adoption of the corresponding decisions on the basis of the exclusion and selection criteria;
- specific contracts based on a framework contract and awarded under the terms laid down in that framework contract, without competitive tendering;
- Extreme urgency.

6. DISPUTES CONCERNING CONTRACTS AWARDED BY THE COMMUNITY INSTITUTIONS

**KEY FINDINGS**

- In disputes relating to public procurement by an EU institution natural and legal persons with a legal interest in bringing proceedings have three legal remedies.

6.1. Application for an interim order suspending the application of a decision on the basis of Article 278 TFEU

An application may be made for an interim order suspending the application of the following decisions taken in the context of public procurement by a Community institution: a decision rejecting the tender submitted by a candidate in the context of a call for tenders (see, for example, the order in Case T-383/06 *Icuna.Com SCRL v European Parliament* [2008] ECR) and a decision to sign the contract with a company following an invitation to tender (see, for example, the order in Case T-383/06 *Icuna.Com SCRL v European Parliament* [2008] ECR).

6.2. Action for annulment of a measure pursuant to Article 263 TFEU (formerly Article 230 TEC)

The following decisions may be the subject of a direct action for annulment:

- a Commission decision annulling an invitation to tender (see, for example, Case T-13/96 *Team SRL v Commission of the European Communities* [1998] ECR)
- a Parliament decision not to select a tender in the context of an invitation to tender (see, for example, Case T-139/99 *Alsace International Car Services (AICS) v European Parliament* [2000] ECR)
• a Commission decision to award a contract to another tenderer (Case T-437/05 Brink’s Security Luxembourg SA v Commission of the European Communities [2009] ECR).

6.3. **Action for damages**

Lastly, unsuccessful tenderers may bring an action for damages based on the Community’s non-contractual liability under the second paragraph of Article 340 TFEU (formerly the second paragraph of Article 288 TEC). The applicant must then prove the unlawfulness of the conduct alleged against the institution, the fact of damage and the existence of a causal link between the conduct in question and the damage complained of (see, for example, Case T-139/99 Alsace International Car Services (AICS) v European Parliament [2000] ECR).

Whatever the type of action chosen by the applicant, it must first be brought before the General Court [formerly the Court of First Instance] of the European Union (Article 256(1) TFEU and Article 51 of the Statute of the Court of Justice of the European Union). An appeal before the Court of Justice, on points of law only, may be brought against decisions of the General Court (second paragraph of Article 256(1) TFEU).

It is clear from the case-law, particularly of the General Court, that most judgments dismiss actions for annulment brought by unsuccessful tenderers.

It is a fundamental principle that the institutions have a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (Case T-145/98 ADT Projekt v Commission [2000] ECR II 387, paragraph 147, and Case T-169/00 Esedra v Commission [2002] ECR II 609, paragraph 95).

As an example, the General Court stated in its judgment in Case T-195/08 Antwerpse Bouwwerken v Commission [2009] ECR that the Commission enjoyed a broad discretion in the context of invitations to tender and that review by the Court must be limited to checking that no manifest error of assessment had been committed. Although the specifications stated that failure to state prices would result in exclusion, the General Court ruled that the absence of prices was a clerical error for which there might be a simple explanation and it endorsed the Commission’s decision to allow companies to provide further information on certain points in their tenders.
7. CONCLUSIONS

The emergence of European administrative law has been on the cards for some time now, given the combined influence of national administrative law on Community law and, vice versa, of Community law on administrative law. European administrative law should, eventually, be able to encompass all issues which directly or indirectly concern the European institutions’ administrative activities. The action taken by the national administrations and the Community administration very often present similar problems, as we can see from public procurement. This should therefore lead to ‘convergent solutions, in that the social, political and economic contexts are similar’.

This is particularly true in the field of public contracts since the legislation applicable to contracts awarded by the Community institutions and that applicable to contracts awarded by the national contracting authorities share a common root: Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The uniformity between the law applicable to the EU institutions and national legislation in this field is obviously likely to encourage the emergence of a body of European administrative law.

Furthermore, the requirement to protect human rights under the Convention for the Protection of Human Rights and Fundamental Freedoms applies to the Community legal system just as it does to the national legal systems. The case-law of the European Court of Human Rights, which is based on the concept of a ‘democratic society’, pervades administrative law in particular, correcting the structural inequality between the administered citizen and the administrating State. This phenomenon, which is particularly evident in the Member States, is also seen, though in a different form, in the EU administration.

The Court of Justice often takes account of the European Convention on Human Rights as more than just a source of inspiration in defining the general principles of Community law, referring directly to the Convention and the judgments of the European Court of Human Rights (see Cases C-273/99 P and C-274/99 P Bernard Connolly v Commission of the European Communities [2001] ECR I-1575 and 1611).

What is more, and above all, Article 6(2) TFEU expressly provides for the EU to accede to the European Convention on Human Rights and Fundamental Freedoms, as is also now provided for by Protocol 14 to the ECHR, which came into force on 1 June 2010. In this context, the European Commission published negotiating directives in March 2010 for the EU’s accession to the ECHR (IP/10/291). The negotiations began in July 2010.

In acceding to the ECHR the European Union will be placing itself on an equal footing with its Member States as regards the system for the protection of fundamental rights, which the European Court of Human Rights in Strasbourg is responsible for enforcing. It will then itself be liable, before the Court of Human Rights, if any of its secondary legislation, including administrative legislation, where appropriate, infringes the Convention. Once the EU has acceded to the ECHR, the Convention will constitute a common core on which European administrative law can be grounded.

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Even though the system of the European Convention on Human Rights has little impact in the field of procurement (see, however, ECHR, Raffineries grecques Stran and Stratis Andreadis, judgment of 9 December 1994, Series A No 301-B), the Convention is clearly likely to promote the emergence in this sector of a series of common principles on which European administrative contract law might be based.

There are at least three caveats here, however.

The first is constitutional. Article 6(3) TFEU provides that ‘the Union shall respect the national identities of its Member States’. Administrative law, which is a ‘relatively ethnocentric’ discipline, is certainly an element of that national identity. As O. Dubos points out, ‘European administrative law never fundamentally calls into question the national institutions or the concepts of domestic law. At the most it adapts them. European administrative law is not a process of acculturation’.

The second is institutional. Clearly, although the European Union acts as a State, administratively speaking, in that it employs staff, awards contracts and incurs operating expenditure just as any State does, it is not, either de lege lata or de lege ferenda, a State.

That being so, the administrative operation of its institutions, and therefore its administrative law, face problems which are unknown in the national systems. Conversely, it will not face problems familiar to the national administrations.

In the field of public procurement, the Community institutions do not, for instance, have to deal with differences between contracts awarded by the central institutions (the State in particular) and those awarded by local institutions. More generally, organic issues to do with public procurement, particularly those relating to the setting up and operation of the selection committees, are less of a problem in EU law than in national legislation. Similarly, as we have seen, some procedures, such as competitive dialogue, are less relevant in EU law than in national legislation because the needs are different.

Conversely, public contracts awarded by the EU institutions face problems not encountered in national law: special checking procedures, prevention of conflicts of interest, different ways of handling disputes, etc.

At the same time, a principle of territoriality resulting from the unilateral definition of the scope of domestic law tends to predominate in the field of administrative law. A variation on the theory of the immunity of the State, this rule has two consequences. First, administrative measures under French law cannot legally have any effect outside the national territory. Second, and alongside this, foreign administrative measures cannot have any effect outside the territory of the state which adopted them. The idea of joining up legal systems thus, in principle, does not apply to administrative law, which is built around the sovereignty and immunity of the State. Only international or transnational contracts awarded by the administration¹ call this territoriality principle in administrative law into question, and even then only marginally. It thus appears that, territorially, only these international or transnational contracts² can be the subject of a genuinely European administrative contract law.

The third and final reason likely to hinder the emergence of European administrative law in the field of administrative contracts is functional. It seems, from our analysis, that the objectives pursued by the European public procurement legislation, particularly the Directive of 31 March 2004 and the subsequent case-law of the CJEU, differ according to whether the EU institutions or the Member States are involved.

More precisely, the main aim of the European public procurement legislation, when applied to the Member States, is to promote or guarantee the free movement of goods and services within the Union. The aim there is therefore to promote economic rights, which actually or potentially benefits the EU’s economic operators above all. It is only indirectly that the competition which Community law introduces into national public procurement should enable the contracting authorities to get the best value for money when purchasing goods, services and works. In other words, the aim of sound administration appears a more secondary consideration here.

When applied to the EU institutions, however, the main aim of the European public procurement legislation is to ensure that the award process is transparent, Community spending is legal and, in general, that funding from the EU budget is used properly. From this point of view the implementation of the 2004 Directive by the amended 2002 Financial Regulations is clearly focused on the contracting authority, in the form of the Community institutions, rather than on the economic operators who might win contracts. The sound administration of the Community institutions takes precedence here over preserving intra-Community competition.

The different objectives pursued by the two bodies of legislation (the Community financial regulations and the national public procurement legislation), despite their common roots, constitute an obstacle to the establishment of European administrative law, which would tend to be based mainly, or even exclusively, on national laws and practices. Instead they show, if it was not already obvious, that the specific needs of the Community institutions and the particular problems they face mean that this emerging administrative law must, in the procurement field, be dissociated from the contingencies of national legislation and instead have a highly developed European identity.
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VI. EUROPEAN UNION CIVIL SERVICE LAW

Jesús FUENTETAJA

NOTE

Abstract

This briefing note analyses all of the legislative and executive acts forming European Union Civil Service Law, together with the main characteristics of this Civil Service and its contribution to the formation of a European Union Administrative Law.
EXECUTIVE SUMMARY

Right from the start, the institutional structure designed by the European Treaties required the assistance of its own staff to ensure the smooth running of the new European administration. The European Union Civil Service has the same integrationist nature as the European Union itself, lying somewhere between the international civil service and the civil services of the Member States. A unique form of civil service, specific to the European Union, has therefore developed. Given that the legal ties in this civil service are governed by regulations, its most notable characteristics are stable employment and real career prospects, as well as ensuring a balance of reciprocal rights and obligations between the European administration and its staff.

The legal rules governing officials and servants of the European Union consist, firstly, of the European Regulation encompassing both the Staff Regulations of Officials and the Conditions of Employment of other servants and, secondly, the executive development carried out by those institutions, bodies, offices and agencies to which this applies, in some cases by common agreement (common regulations) and in others independently (specific general implementing provisions and also internal directives).

In turn, the European courts and their case-law have not only integrated European Union Civil Service Law, but have also forged a series of public law principles, which govern relations between the European administration and its staff, and which go beyond the strict realm of European public employment to decisively influence the gradual formation of European Union Administrative Law. In this way, both the legislation and case-law on the Civil Service offer general solutions for relations between the European administration and European citizens, which may be helpful in developing an increasingly essential European Union Administrative Law.
GENERAL INFORMATION

KEY FINDINGS

- Systematic study of the rules forming European Union Civil Service Law

- Importance of the general principles of law developed by the European courts on staff matters, in that they offer solutions going beyond the simple administration-official relationship and actually form general principles for relations between the European administration and European citizens

- General characteristics of the European Union Civil Service, as determined by the peculiarities of the law regulating the Civil Service and the unique form of staff management

- Inter-relationship between the European Union Civil Service, the ‘European Administration’ and a new European Union Administrative Law
1. EUROPEAN UNION CIVIL SERVICE LAW

- The Treaty on the Functioning of the European Union (TFEU) not only establishes a legal basis for adopting a European regulation laying down the legal rules governing staff working for the European Union, but also determines the distinction between officials (legal ties governed by regulations) and servants (legal ties governed by contract).

- The Staff Regulations of Officials of the European Union were adopted through a European regulation, which is why they form part of European Union law and are binding on both the European administration (institutions, bodies, offices and agencies) and the Member States.

- The Staff Regulations of Officials and the Conditions of Employment of other servants are the legislative parts of Civil Service Law. They have been developed at executive level, in some cases jointly by the institutions and in others independently, with uniform basic legislation being combined with implementing and management rules specific to each institution, body, office or agency.

- The European courts not only ensure judicial scrutiny of the acts of the European administration in relation to its staff, but have also forged a whole body of principles, which balance the administration’s needs with the rights and obligations of officials and servants.

European Union Civil Service Law is one of the areas most intensely regulated by the European legislature and administration. This body of legislation consists, firstly, of the European Regulation encompassing both the Staff Regulations of Officials and the Conditions of Employment of other servants and, secondly, the executive development carried out by those institutions, bodies, offices and agencies to which this applies, in some cases by common agreement (common regulations) and in others independently (specific general implementing provisions and also internal directives). The result is not only a broad and exhaustive body of legislation regulating the European Union Civil Service, but also the combination of legislation common to the whole European administration with independent developments, which enable both a unique form of application in each institution or body and the development of specific staff policies.

Furthermore, the European courts and their case-law have not only integrated European Union Civil Service Law, but have also forged a whole body of public law principles, which govern relations between the European administration and its staff, and which go beyond the strict realm of European public employment to decisively influence the gradual formation of European Union Administrative Law.
1.1. The European Union Civil Service in the Treaties

Originally, the Treaties establishing the European Communities, unlike the constitutional texts of many Member States, did not contain any substantive rules on the staff regime, but simply established the competence and procedure for adopting that regime. Accordingly, the Treaty on the European Coal and Steel Community (ECSC) assigned that task to a Committee of Four Presidents, whose task was specifically to set ‘the number of employees and the scales of salaries, allowances and pensions’. On 28 January 1956 this Committee finally adopted the first Staff Regulations of Officials, marking the path that the future Communities would follow. The Treaties of Rome effectively built on the situation existing in the ECSC. On the one hand, they established that the staff of the Communities would consist of officials and servants and, on the other hand, they provided that the Council would, acting by means of a unanimous vote and in collaboration with the Commission and after consulting the other institutions concerned, lay down the statute of service for officials and the conditions of employment for other employees of the Community (Article 212 of the Treaty establishing the European Economic Community and Article 186 of the Treaty establishing the European Atomic Energy Community). On that legal basis, the European Economic Community and Euratom adopted a single set of Staff Regulations on 18 December 1961, which entered into force on 1 January 1962.

The Treaty of 8 April 1965 (‘Merger Treaty’) formed the culmination of the institutional merger started in the Treaties of Rome with the unification of the Court of Justice and the Assembly, by creating a single Council and a single Commission of the European Communities. The administrative counterpart to this institutional unification was the confirmation of a ‘single administration’ encompassing the officials and servants of the European Communities. A single Civil Service was also confirmed, which is why it was not deemed necessary to have a specific legal basis for each Community when indicating the competence of the Council with regard to the Staff Regulations of officials and other servants of the Communities (Article 24(2) of the 1965 Treaty).

As a result, officials were not specific to each of the Communities. After 1965 there were no longer ECSC officials and EEC and Euratom officials: there were only officials of the European Communities. However, in reality, this created a fictitious legal situation: this was firstly because the ‘European Communities’ as an entity did not exist, as each of the Communities separately had its own legal personality, despite which, as we have seen, officials did not specifically belong to each one; and this was secondly because there was also no ‘single administration’ with its own legal personality. When the 1965 Brussels Treaty spoke about a ‘single administration’, it was referring to an empty concept, a pipedream, which did not actually exist. Officials legally formed part of the single administration of the European Communities, but were functionally assigned to an institution or body, which was their effective employer.

For its part, Article 9 of the 1997 Treaty of Amsterdam basically replicated the provisions on the single Community institutions, as it simultaneously repealed the Convention of 25 March 1957 on certain institutions common to the European Communities and the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities. Furthermore, Article 6 of the Treaty of Amsterdam inserted, as

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part of the simplification process, in place of Article 212 (which, under the new numbering, became Article 283) of the Treaty establishing the European Community – which had previously been repealed by Article 24(2) of the Treaty of 8 April 1965 – the text of the second paragraph of Article 24(1) of that 1965 Treaty: ‘The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those Communities.’

Finally, the 2007 Treaty of Lisbon re-worded what is now Article 336 of the Treaty on the Functioning of the European Union, as follows: ‘The European Parliament and the Council shall, acting by means of regulations in accordance with the ordinary legislative procedure and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union.’

Firstly, this article stipulates the legislative instrument that must be used by Parliament and the Council to lay down the legal rules governing staff of the European Union: namely, the regulation. This clarification is useful, but was not essential, as, given the two main legislative instruments available to the European Union – the regulation and the directive – the latter, due to its intrinsic characteristics and due to being addressed to the Member States, is clearly not the most appropriate instrument for laying down the legal rules governing the European administration in general and the EU’s Civil Service in particular.

Despite this, it is settled case-law that, exceptionally, a European directive may be a source of European Civil Service Law. ‘The provisions of a directive may, in the first place, be indirectly applicable to an institution if they constitute the expression of a general principle of Community law that it must then apply as such ...Secondly, a directive may also be binding on an institution where the latter, within the scope of its organisational autonomy and within the limits of the Staff Regulations, has sought to carry out a specific obligation laid down by a directive or in the specific instance where an internal measure of general application itself expressly refers to measures laid down by the Community legislature pursuant to the Treaties ...Thirdly, and in any event, it should be noted that the duty to cooperate in good faith which follows from Article 10 EC [now Article 4(3) TEU] not only requires Member States to take all the measures necessary to guarantee the application and effectiveness of Community law ..., it also imposes on the Community institutions mutual duties to cooperate in good faith with the Member States ... In this respect, it is incumbent on the institutions to ensure as far as possible consistency between their own internal policy and their legislative action at Community level, in particular as addressed to Member States.

Secondly, said Article 336 qualifies as ‘legislative’ the regulation laying down the Staff Regulations of Officials and the Conditions of Employment of other servants, insofar as the procedure used to adopt them is the ordinary legislative procedure, with the particular requirement that the Council and Parliament must consult all the institutions (in the strict

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300 Judgments of 30 April 2009 in Case F-65/07, Laleh Aayhan and Others v European Parliament (ECR 2009, not yet published, paragraphs 112-119) and of 4 June 2009 in Joined Cases F-134/07 and F-8/08, Vahan Adjemian and Others (F-134/07) and Colette Renier (F-8/08) v Commission of the European Communities (ECR 2009, not yet published, paragraphs 90-93).
sense\(^{301}\). Thirdly, the Treaty on the Functioning of the European Union (as also the previous Community Treaties) confirms the two categories of staff specific to the Union: on the one hand, officials, and, on the other hand, other servants, with the resulting co-existence of legal ties governed by regulations and by contract, as we will see further on.

Finally, at Treaty level, we should also mention the Protocol of 8 April 1965 on the privileges and immunities of the European Union (PPI) which is currently annexed to the Treaties on European Union and on the Functioning of the European Union. This Protocol formally assigns a series of prerogatives to the Union so that it can carry out its functions independently. One part of this Protocol specifically refers to certain privileges and immunities granted to European officials and servants to help them provide their services to the Communities (Articles 12-16 of the PPI). These privileges and immunities in turn correspond to obligations imposed on the Member States, against which officials and servants can bring proceedings before the national courts in the event of these being infringed\(^{302}\).

### 1.2. The Staff Regulations of Officials of the European Union

Using the legal basis established by the Treaties since 1957, the European legislature has adopted the European regulation which contains the legal rules governing staff working for the institutions, bodies, offices and agencies of the European Union. As the EU Civil Service has historically involved two forms of legal tie (preferably governed by regulations, but exceptionally by contract), the European regulation includes, in its first part, the Staff Regulations of Officials and, in its second part, the Conditions of Employment of Other Servants.

#### 1.2.1. European Union Civil Service Law as an integral part of European Union Law

The delegation of powers contained in the Treaties enabled the adoption of the secondary legislation that was to lay down the legal rules governing staff working for the European institutions. In accordance with the current Article 336 of the Treaty on the Functioning of the European Union, these rules are set out in a regulation which, despite its procedural peculiarities, has also been characterised as another European regulation.

The Court of Justice has in fact continued to apply the general rules of European law to Civil Service Law whenever it has had the opportunity. As a result, it has applied ‘the unitary interpretation of the concept of Community regulation’\(^{303}\) in order to find that ‘the Staff Regulations of Officials were laid down by Regulation No 259/68 of the Council of 29 February 1968 which possesses all the characteristics set out in the second paragraph of Article 189 of the EEC Treaty [now Article 288 TFEU]\(^{304}\), which reinforces the rights of European officials with regard to the Member States. It is because the Staff Regulations

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\(^{301}\) And not according to the broad equivalence in Article 1b of the Staff Regulations of Officials, which, for the purpose of its application, treats the following bodies as institutions: European Economic and Social Committee; Committee of the Regions; European Ombudsman; European Data Protection Supervisor; and European External Action Service.

\(^{302}\) Judgment of 27 October 1982 in Case 1/82, Mr and Mrs D. v Grand Duchy of Luxembourg (ECR 1982, p. 3709).


were provided for in the Treaties that they could be characterised as a European regulation, which ‘shall be binding in its entirety and directly applicable in all Member States’ (Article 288 TFEU)\textsuperscript{305}, something which would not have been possible if they had been based – as might have been the case if the example of many international organisations had followed – on the inherent power of internal organisation. Their procedural peculiarity does not prevent them from being formally characterised as a European regulation.

One of the consequences of their regulatory nature and direct foundation on the Treaties is that they do not solely apply internally, but that their effects extend beyond the European administration properly speaking. The European regulation adopting the Staff Regulations of Officials and the Conditions of Employment of Other Servants does not just regulate relations between the institutions, bodies, offices and agencies and their officials and servants, but also generates obligations for the Member States, insofar as their participation is essential in order to apply both sets of rules\textsuperscript{306}. Compliance with any obligations resulting from the Staff Regulations and Conditions of Employment may be ensured by the Commission bringing the corresponding actions for failure to fulfil an obligation\textsuperscript{307}, although, following an action brought by officials under Article 270 TFEU, it is not for the Court of Justice to determine whether the Commission has properly discharged the supervisory duties incumbent upon it under the Treaties\textsuperscript{308}.

However, the important point is that the rights conferred by European Civil Service Law on officials and servants of the Union correspond to obligations not only incumbent on the European administration but also on the Member States\textsuperscript{309}. European Civil Service Law, as an integral part of the European legal system, confers rights on officials and servants, which can also be infringed by the Member States. In such a case, officials and servants cannot use the means of recourse in Article 270 TFEU, nor any other means of recourse under the Treaty, as in such cases jurisdiction lies with the national courts, which are


\textsuperscript{307} Judgment of 20 October 1981 in Case 137/80, \textit{Commission of the European Communities v Kingdom of Belgium} (ECR 1981, p. 2393): ‘the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty by refusing to adopt the measures necessary for the transfer to the Community pension scheme of sums due to be repaid in respect of or the actuarial equivalent of retirement pension rights acquired under the Belgian pension scheme, as provided for by Article 11(2) of Annex VIII to the Staff Regulations of Officials of the European Communities’. Moreover, in the judgment of 3 October 1989 in Case 383/85, \textit{Commission of the European Communities v Kingdom of Belgium} (ECR 1989, p. 3069), the Court of Justice found that the Kingdom of Belgium had failed to fulfil its obligations under Article 171 of the EEC Treaty by failing to adopt the measures necessary to comply with the Court’s judgment of 20 October 1981 in Case 137/80. A judgment was also issued against Spain that it had failed to fulfil its obligations by failing to take the measures necessary to enable pension entitlements of officials to be transferred to the Community scheme: Judgment of 17 July 1997 in Case C-52/96, \textit{Commission of the European Communities v Kingdom of Spain} (ECR 1997, p. 4637).


\textsuperscript{309} Judgments of 4 December 2003 in Case C-92/02, \textit{Nina Kristiansen v Rijksdienst voor Arbeidsvoorziening} (ECR 2003, p. 1-14597, paragraphs 32-35), and of 14 February 2008 in Case C-449/06, \textit{Sophiane Gysen v Groupe S-Caisse d’Assurances sociales pour indépendants} (ECR 2008, p. 1-553, paragraph 24): ‘Having regard to the direct applicability of Regulation No 259/68 in the legal systems of the Member States, the national court has an obligation to apply it in order to ensure compliance with the principle of non-discrimination. It is for the national court therefore to ensure equal treatment between persons whose child gives rise to entitlement to family allowances under the Staff Regulations and persons whose child gives rise to entitlement to family allowances under national law or an international social security convention in force in the Member State concerned.’
responsible for ensuring the effectiveness of the rights conferred by the European legal system on European citizens. This is the case both if the rights derive from the secondary legislation consisting of the Staff Regulations and if they are directly based on an international instrument, such as the Treaty or the Protocol on Privileges and Immunities.

It is therefore clear that European Civil Service Law is not merely an internal law of the European Union (in the way that international organisations have an internal law for their international officials). One of the consequences of all this is which court has jurisdiction in a dispute. If this dispute is between an official and the European administration, because the latter has failed to fulfil its obligations under European Civil Service Law, the means of recourse is exclusively that provided by Article 270 TFEU. If, however, the dispute is between a European official and a Member State, because the latter has failed to fulfil any of the obligations deriving from that law, the means of recourse is then to appeal to the national courts.

1.2.2. The Staff Regulations of Officials

The Staff Regulations of Officials of the ECSC were adopted on 28 January 1956 and entered into force on 1 July 1956. They were not published in any form, but were simply notified to each official or servant. Based on their model, on 18 December 1961 the Council adopted the Staff Regulations of Officials of the European Economic Community and the European Atomic Energy Community. Both were eventually repealed and replaced by Article 2 of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials of what is now the European Union.

Since then this Regulation has been amended on numerous occasions (almost 80), in particular to adapt and improve the provisions on remuneration and social security benefits, and also other working conditions, to revise the rules on the review of staff acts, to regulate relations with staff associations, to adapt the Staff Regulations in line with certain Court of Justice decisions and to implement wide-ranging structural reforms, such as that in 2004. However, we lack a consolidated official text of the Staff Regulations of Officials (and of the Conditions of Employment of other servants). The legislative technique is actually extremely defective.

Firstly, this is because Regulation No 259/68 did not contain the complete text, but simply referred to the articles of Regulations (EEC) No 31 and (EAEC) No 11, which from the start forced reference to be made to an Official Journal from 1962. Secondly, this is because there is no consolidated version of the Staff Regulations of Officials, as those produced by certain institutions are not official, given that the coordination of regulatory texts can only

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313 In fact, the failure to publish a consolidated version has led to proceedings for infringement of the principles of protection of legitimate expectation, good administration, transparency, democracy and legal certainty. The Civil Service Tribunal, however, considers that the unofficial consolidated version available on the Commission intranet is sufficient for officials and servants to determine the Civil Service Law of the European Union. In addition, no legal provision – and particularly not the principles invoked – imposes an obligation to publish consolidated texts or makes the legality of the Staff Regulations dependent on such consolidation: Judgments of 23 January 2007 in Case F-43/05, Olivier Chassagne v Commission of the European Communities (ECR
be recognised as official where such coordination is carried out by the legislature itself, and as not even the 2007 Treaty of Lisbon delegates legislative power to produce recast texts, as recognised to the executive by certain Constitutions of the Member States. As a result, in the event of a dispute brought before a court, reference must be made to the legislature's text of the Regulation, as published in the Official Journal, and not to the text of any compendium published by an institution or private publisher.

**Officials**, who are subject to these Staff Regulations of Officials and whose posts are permanent, are the most important element in the European Civil Service, both quantitatively and qualitatively speaking. In quantitative terms, this is because over 80% of the nearly 40,000 European employees are officials. In qualitative terms, this is because it is considered that the duties of representation, negotiation and monitoring (especially of European law) or those which involve exercising a discretionary decision-making or assessment power in respect of a proper European policy can only be performed by officials, as such duties constitute public service tasks that may engage the institution's liability and affect its autonomy. However, it is surprising that the 2004 reform did not seize the opportunity to incorporate the case-law approach, which conceptualises European officials in terms of their functions. This would have been relatively coherent with the general lines of the Commission's outsourcing policy, whose limits are based on institutional prerogatives and European public powers. In this respect, Advocate General Ruiz-Jarabo considers that 'the term "Community civil service" should be limited to the tasks of guiding, devising, reviewing, interpreting and implementing the policies of the European Union, carried out by employees covered by the Staff Regulations, either in permanent posts or, depending on the nature of the assignment, in temporary posts, whereas physical, merely auxiliary tasks, could well be governed by a different system, closer to labour law institutions.

### 1.2.3. The Conditions of Employment of Other Servants

Article 3 of Regulation No 259/68 adopted the Conditions of Employment of Other Servants, which (together with the Staff Regulations of Officials, insofar as the Conditions of Employment refer on many occasions to the Staff Regulations) are the only rules applicable to the employment relationships of temporary staff, and also authorise the institutions, bodies, offices and agencies to contract staff subject to local law (local staff), special advisers, contract staff (since 2004) and, in the case of the European Parliament, assistants (since 2009).

The Conditions of Employment of Other Servants (CEOS) provide for five categories of contracted staff. Their main characteristic is precisely that they are contracted, which, in this context, means that their posts are temporary, not only because the general rule is for

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314 For a case-law definition of the 'public service tasks' concept, see judgment of 28 February 1989 in Joined Cases 341/85, 251, 258, 259, 262 and 266/86, 222 and 232/87, Erik van der Stijl and Geoffrey Cullington v Commission of the European Communities (ECR 1989, p. 511). Despite all this, the administration's opportunism when defining public authority or service tasks has been evidenced by the ever-decisive position of accounting officer in executive agencies of the Commission. Accordingly, the financial rules of such executive agencies originally reserved the position of accounting officer for officials. However, given the difficulty that the Commission has faced in finding officials ready to be seconded to such accounting officer positions, it decided to amend this limitation to also allow temporary staff to occupy this post: Commission Regulation (EC) No 1821/2005 of 8 November 2005 amending Regulation (EC) No 1653/2004 as regards the posts of accounting officers of executive agencies (OJ L 293, 9.11.2005, p. 10).


contracts to be temporary, but also because, even in the case of contracts for an indefinite period, the administration can cancel the contract by giving the appropriate prior notice. Although some authors have deemed it unnecessary to continue to have contract staff in the European Civil Service, it is clear that the intrinsic needs of the European administration mean that these staff are required. Furthermore, their role and existence are supported in both constitutional and administrative terms. Constitutionally speaking, this is because the presence of intergovernmental areas within the institutional system increases the permeability of the European political-administrative structure with the Member States, facilitating recourse to temporary staff and even to seconded national officials. Administratively speaking, this is because administrative decentralisation through entities with a legal personality (European agencies) allows for unique contractual systems.

The first category is **temporary staff**, who are used by the administration when necessary and on a temporary basis. These staff have specific knowledge and qualifications which a generalist Civil Service, such as the European Civil Service, lacks. The second category is **local staff** (Articles 120-122 CEOS), who are engaged by the institutions in accordance with the private law of the Member State where they are to work. They perform three types of task: manual, service (in the Representation Offices of the Member States) and any other type, including study and design tasks, at the destinations of external missions. The third category is **special advisers**. These are experts who, by reason of their special qualifications and notwithstanding gainful employment in some other capacity, are engaged to provide assistance and advice to any institution (Articles 123-124 CEOS).

The reform of the Conditions of Employment of other servants, which entered into force in 2004, introduced a fourth category: **contract staff**. The name could not be less appropriate as all servants are actually contract staff, in contrast to officials who are governed by regulations. However, these contract staff are characterised by three elements. Firstly, they are not assigned to a post included in the list of posts. Secondly, they are paid from the overall appropriations in the budget of each institution. Thirdly, they are engaged for the performance of full-time or part-time duties in any of the following destinations: in an institution to carry out manual or administrative support service tasks; in the European agencies or in other entities inside the European Union created by specific legal act issued by one or more institutions allowing for the use of such staff, as will be the case with the executive agencies or offices of the Commission; in Representations and Delegations of Community institutions; and in other entities situated outside the European Union.

Finally, since 2009 the European Parliament has had recourse to the formal and specific category of ‘accredited parliamentary assistants’. This is defined by the Regulation itself as ‘persons chosen by one or more Members and engaged by way of direct contract by the European Parliament to provide direct assistance, in the premises of the European Parliament at one of its three places of work, to the Member or Members in the exercise of their functions as Members of the European Parliament, under their direction and authority

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318 Article 2 of the Conditions of Employment of Other Servants distinguishes between four types of temporary staff: a) temporary staff engaged to fill a post that is temporary; b) staff engaged to fill temporarily a permanent post; c) staff engaged to assist either a person holding an office provided for in the Treaties establishing the Communities, or the elected President of one of the institutions or organs of the Communities, or one of the political groups in the European Parliament; d) temporary staff engaged to fill temporarily a permanent post paid from research and investment appropriations.


and in a relationship of mutual trust deriving from the freedom of choice referred to in Article 21 of Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament’ (Article 5a CEOS). Parliament uses this category in the case of assistants who work at one of Parliament’s three places of work, with contracts being directly concluded and managed by the institution itself, whereas, in the case of assistants working in the Member State and chosen by the Member in question, the latter will conclude an employment or service contract with the assistant in accordance with the national law in question (local assistants).

### 1.3. Implementing legislation

Each institution, as an administration employing its own staff, can internally develop and implement secondary legislation. This legislation therefore tends to be primarily executive, in the form of provisions laid down by the administration to implement, develop or apply the legislative provisions (Staff Regulations of Officials and Conditions of Employment of other servants).

As we have said, this legislation is adopted by each institution, although in some cases the Staff Regulations require this to be developed in common by all the institutions, in the case of aspects which not only require harmonised management, but also need to avoid inequalities between officials according to the institution for which they work.

#### 1.3.1. Interinstitutional legislation

The Staff Regulations provide for the development of certain aspects through rules drawn up by agreement between the institutions. Meanwhile, but with the same aim of avoiding distortions in implementation and application according to the institution concerned, a kind of ‘administrative case-law’ has developed from the start, as decided at meetings of the Heads of Administration of each institution.

**A) Rules common to the institutions**

The rules drawn up by agreement are regulatory developments of the Staff Regulations on certain aspects that these Staff Regulations themselves intend to be identical throughout the European administration, without any legislative differences being created between each institution. Insofar as they develop the Staff Regulations, the common rules must respect not only the provisions of these Staff Regulations, but also the objectives pursued in ensuring their common development by the institutions. Furthermore, as developments of the Staff Regulations, these common rules cannot be viewed as a transfer of legislative competence, not so much because Parliament and the Council are clearly involved in all cases in their adoption, as seemed to be understood by the case-law when only the Council had the final decision-making capacity, but because they are not legislative or not part of the regulations – but because they are substantially executive in nature.

The substantive scope of these rules is very broad, ranging from the determination of the list of official holidays for European Union officials to the arrangements for forming the Staff Regulations Committee, including such important aspects as sickness insurance, insurance against accidents and occupational disease for officials, establishment of the arrangements
for transfers of part of the payments of officials or the measures and actions intended to ensure equality between men and women in the areas covered by the Staff Regulations (Article 1d of the Staff Regulations).

B) Opinions of the Board of Heads of Administration of the Institutions

According to paragraph 4 of Article 110 of the Staff Regulations, the administration departments of the institutions shall consult each other regularly concerning the application of the Staff Regulations. To this end, a ‘Board of Heads of Administration’ has been formed, which brings together the staff managers of each institution. Its meetings aim to provide interpretations of the Staff Regulations and common rules, by laying down application guidelines for the various authorities of each institution.

The opinions of this Board must be assimilated and translated by each of the institutions. If the standardisation of administrative practice that is sought through these opinions does not result in an individual developing decision being made by each institution through the subsequent general implementing provisions, their objective will be in vain, as they will not be binding on each competent authority when it adopts individual acts pursuant to one of these opinions.

The interpretations made by the Board of Heads of Administration are not published as a general rule, and are much less the subject of consultations with the Staff Committees or with the Staff Regulations Committee. Under no circumstances may the extent of the beneficiaries of a provision of the Staff Regulations be restricted with regard to a legal interpretation made previously by the same Board.

1.3.2. Institutional legislation

The provisions adopted by the institution to develop the Staff Regulations and the Conditions of Employment of other servants can be of two types. Firstly, these provisions can be essential developments that the Staff Regulations require the institution to make. The institution must comply in accordance with a procedure expressly laid down in the Staff Regulations: prior consultation of the Staff Committee and the Staff Regulations Committee (Article 110 of the Staff Regulations). Secondly, there are all those provisions whose adoption is not explicitly required by the Staff Regulations (which is why the procedure in Article 110 does not need to be followed), but which the institution may adopt either because unilateral development of a particular matter is necessary, despite nothing being stated in the regulations, or to self-regulate the exercise of the discretionary power entrusted to the institution by the Staff Regulations (those provisions relating to the assessment and promotion of Commission officials are particularly important).

322 For example, the opinion of the Board of Heads of Administration of 28 May 1986 proposed that, with regard to the application of Article 4 of Annex VII to the Staff Regulations, an organisation was to be recognised as an ‘international organisation’ if it satisfied the sole criterion of having been ‘created by States or by an organisation which itself was created by States’.
A) General implementing provisions

The general provisions for giving effect to the Staff Regulations of Officials shall be adopted by each institution after consulting its Staff Committee and the Staff Regulations Committee (Article 110 of the Staff Regulations). However, the initiative exclusively lies with the institutions. A distinction must be made between, on the one hand, those general implementing provisions expressly provided for by the Staff Regulations and which the institution is obliged to adopt and, on the other hand, those general implementing provisions adopted by the institution without these being provided for by the Staff Regulations and which are necessarily adopted in those cases where the provisions of the Staff Regulations are not in themselves sufficiently explicit or to avoid arbitrary applications. However, the latter stem from a substantive need for development, but not from any formal obligation expressly provided for in the Staff Regulations, which is why the procedure established by the Staff Regulations does not need to be followed.

The Staff Regulations purely require institutions to bring such provisions to the attention of staff (Article 110 of the Staff Regulations). Given that Article 25 of the Staff Regulations does not regulate the publication of general provisions, but only the notification of individual decisions, general implementing provisions do not need to be notified individually. The Board of Heads of Administration has agreed, in this respect, that general implementing provisions should be published by each institution in the manner specific thereto, with this internal publication determining the date of their validity. In principle, they do not have to be published in the monthly staff bulletin, although each institution can refer to their publication in this bulletin.

General implementing provisions can lay down criteria intended to guide the administration in the exercise of its discretionary power or clarify the scope of provisions of the Staff Regulations, where these are unclear. The Court of Justice has also accepted that the institutions can remedy omissions in the Staff Regulations by using these provisions. However, what they cannot under any circumstances do, in clarifying a clear term of the Staff Regulations, is restrict the scope of said Staff Regulations or derogate from an explicit rule in these. As a result, general implementing provisions are no more than a development and a clarification of the Staff Regulations, which is why they cannot infringe

325 Opinion of the Board of Heads of Administration, 1963, No 18, p. 4.
326 Judgment of 31 March 1965 in Case 16/64, Gertrud Rauch v Commission of the EEC (ECR 1965, p. 135): in which the Court of Justice indicated that the provisions of the Staff Regulations concerning the procedure for competitions were sufficiently clear by themselves, such that there was no need or obligation for the Commission to adopt developing rules in this respect.
329 Opinion of the Board of Heads of Administration, minutes of 39th meeting, 18 November 1966 (Doc. 2451/66).
331 Judgment of 14 December 1990 in Case T-75/89, Anita Brems v Council of the European Communities (ECR 1990, p. II-899), which finds that the Council Decision of 15 March 1976 adopting general provisions for applying Article 2(4) of Annex VII on the concept of ‘dependent children’ is illegal insofar as it excludes from the scope of that provision any person who is between the minimum and maximum age-limits which it imposes and thus deprives the administration of the opportunity to exercise its discretion in each individual case, without therefore respecting the aim of this assimilation, which is simply to respond in a general manner to situations in which an official cannot claim an allowance for a dependent child where he or she is obliged to maintain a person imposing similar expenditure; judgment of 18 May 2009 in Joined Cases F-138/06 and F-37/08, Herbert Meister v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (ECR 2009, not yet published, paragraphs 138-140).
hierarchically superior provisions (such as the Staff Regulations or the general principles of law) nor bind the European courts when interpreting these Staff Regulations.

B) Internal directives

An internal directive is a decision of an institution, notified to its staff, which, although it cannot be regarded as a general implementing provision or a legal rule which the administration must always observe, is a rule of conduct, indicating the practice to be followed, which the administration imposes on itself and from which it may not depart without specifying the reasons which have led it to do so, since otherwise the principle of equality of treatment would be infringed. In this way the European courts have based their legal effectiveness on the principle of equality of treatment. Initially, however, it was argued that there was a vague ‘moral obligation’ to comply with internal directives ‘in the interests of proper administration’. As a result, they have become ‘internal guidelines which do not have the status of rules of law and which, in any event, are not capable of derogating from the mandatory provisions of the Staff Regulations’.

Internal directives are usually the means by which the administration imposes rules on itself in exercising the discretionary power conferred on it by the Staff Regulations; what the administration cannot do, however, is give itself, through an internal directive, a discretionary power not provided for in the Staff Regulations and which limits the exercise of the rights of officials under the Staff Regulations. This self-regulation of its discretionary powers is limited by the rights that may result for the persons concerned from the exercise of such powers. In other cases internal directives set out procedures for the

337 Judgment of 29 September 1976 in Case 105/75, Franco Giuffrida v Council of the European Communities (ECR 1976, p. 1395): the directive in question was also peculiar in having been adopted following a consultation procedure with staff representatives. It provided that internal competitions held from that point onwards in the Council should adopt the mixed competition format (qualifications and competitive examination) and should not just involve a competition based on qualifications.
339 Accordingly, the Court of First Instance, in line with the case-law of the Court of Justice, accepts a document referred to as a Guide pratique à la procedure de promotion as the regulatory framework governing the promotion procedure: Judgment of 18 December 1997 in Case T-142/95, Jean-Louis Delvaux v Commission of the European Communities (ECR-SC 1997, p. I-A-477 and II-1247).
341 Judgment of 5 October 1995 in Case T-17/95, Spyridoula Celia Alexopoulou v Commission of the European Communities (ECR-SC 1995, p. I-A-227 and II-683), in which, under the previous regulation of initial appointments following the selection and recruitment process, the Court of First Instance considered that an institution could not legally raise against the persons concerned an internal directive by which it waived the power conferred on it by the then Article 31(2) of the Staff Regulations, absolutely prohibiting itself from appointing a new official to a grade other than the starting grade, when the above principle required the administration, in certain cases, to examine the possibility of appointing said official to a higher grade.
exercise of rights and obligations laid down in the Staff Regulations. In such cases, the administration must comply with these procedures, as otherwise its administrative acts will be regarded as void by the European courts.\

In any event, internal directives must always comply with hierarchically superior provisions, in particular the Staff Regulations, without being able to limit or restrict their effects, as would be the case in converting a discretionary power into a rule, as the administration cannot, through directives, eliminate any discretion granted to it by the Staff Regulations. In this respect, internal directives are not the most appropriate instrument for legally implementing staff management policies, or rather they are provided that they scrupulously comply with the legislative and executive legislation of the Civil Service. Finally, with even greater reason, ‘administrative communications’ cannot in any way derogate from an explicit rule of the Staff Regulations.

1.4. General principles of law

The assertion that general principles of law apply within the European legal system is facilitated by the general provision in this respect in the former Article 215 of the EC Treaty (now Article 340 TFEU), which, despite indicating this within the context of the Community’s non-contractual liability, expressly refers to the general principles common to the laws of the Member States. Special mention should be made of fundamental rights, whose recognition within the European legal system is particularly significant for European Civil Service Law, as European officials and servants are subject, more than any other European citizens, to the European administration. In this respect, the Charter of Fundamental Rights of the European Union (Article 6 TEU) gives a vital guarantee to European officials and servants.

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347 Judgment of 27 November 2003 in Joined Cases T-331/00 and T-115/01, Laurence Bories and Others v Commission of the European Communities (ECR-SC 2003, p. I-A-309 and II-1479, paragraphs 58-59), in which the Court of First Instance considered that the Commission could not seek the protection of its own decision on the new policy for research staff to prohibit a temporary staff member, who was in a post financed by research appropriations and who held a three-year contract, from applying for a permanent post due to the mere fact that his contractual status would imply, contrary to the guidelines laid down by said decision, an extension of his contract or the conclusion of a new one extending beyond the three-year term. This is all because ‘an internal directive does not have the value of a legislative text and can only be applied in accordance with the principles laid down by the Staff Regulations and the Conditions of Employment of other servants, which, in the matter in question, do not provide any legal basis for this prohibition’.
In this specific context of European Civil Service Law, Advocate General Roemer confirmed that it was possible to fill the gaps in the Staff Regulations bearing in mind the essential principles by which the Staff Regulations are inspired and also the general principles applicable in national civil service law. The Court of Justice was to abide by these principles in the absence of a specific rule to be applied, which primarily occurred, firstly, during the period prior to the Staff Regulations of the Community Civil Service and, secondly, in the absence of specific implementing regulations (i.e. integration operation after the single Staff Regulations were adopted).

These general principles of law have been developed in case-law by the European courts based on criteria of progressiveness and functionality. The first criterion involves establishing ‘the best possible balance between the prerogatives of a public authority, whose intervention is viewed as necessary in the public interest, and the libertas of the citizen, with its untouchable aspect of independence, who must have sufficient guarantees against potential excesses by the public authority’. For its part, the functional criterion ‘means considering that the principle has, as its destination, a specific legal system – the Community legal system – within a dialectic relationship in which the former must demonstrate its ability to enter the Community legal system and the latter its ability to receive it’.

The systematic application of the general principles of European law has always been a very subjective task, which is further complicated when we are in the strict realm of European Union Civil Service Law, as, in addition to the traditional principles designed to guarantee the legality of the action of the public authorities with regard to citizens, there are other more specific principles arising from European law and the relationship between the European administration and the European official.

A) Principles resulting from referring to the constitutional or administrative traditions of the Member States

Case-law confirms the principle of equality, both in general and when specifically applied to equal remuneration. To that end, the Court of Justice does not hesitate to examine the conformity of the Staff Regulations with the principle of equal treatment insofar as that principle constitutes a superior principle of law. According to case-law, the principle of equal treatment requires not only identical treatment in factual and legal circumstances

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349 Opinion of Mr Advocate General Roemer delivered on 16 June 1965 in Joined Cases 27/64 and 30/64, Fulvio Fonzi v Commission of the EEC. ECR 1965, p. 481.
352 For example, Biancarelli, J., ‘Le juge communautaire et le contentieux de la fonction publique communautaire’, Le contentieux de la fonction publique internationale, Société française pour le Droit International, Pedone, Paris, 1996, p. 201. Also, Dalle-Crode, S., Le fonctionnaire communautaire. Droits, obligations et régime disciplinaire, Bruylant, 2008, p. 28, who distinguishes between three categories of principles: those deriving from a ‘Community of Law’, those which strictly have a structural dimension, and those which are designed to guarantee fundamental rights.
355 Opinion of Mr Advocate General Darmon delivered on 13 February 1990 in Case C-37/89, Michel Weiser v Caisse nationale des barreaux français. ECR 1990, p. I-2395, and the judgment itself which declares the provisions of the Staff Regulations to be invalid.
without any essential differences, but also different treatment in different situations\textsuperscript{356}. Equal treatment only applies to legal circumstances. An official cannot therefore, by invoking the principle of equal treatment, take advantage of a practice contrary to the Staff Regulations in order to demand that an illegality committed in favour of someone else is adopted in favour of him\textsuperscript{357}. However, the assertion of this principle is not categorical, as case-law does allow occasions when the existence of discrimination may be justified\textsuperscript{358}. One of the specific applications of the principle of equal treatment is that involving equality between men and women. Case-law considers this to ‘form part of the fundamental rights’, the observance of which is ensured by the European courts\textsuperscript{359}. Case-law confirmed, for the first time, equality between men and women in the famous \textit{Sabatini (Bertoni) v European Parliament} judgment\textsuperscript{360}, which forced a reform of the Staff Regulations in several respects.

Furthermore, full equality between men and women in working life constitutes, for the positive law of the European Union Civil Service, one of the essential elements to be taken into account when applying all aspects of the Staff Regulations of Officials. However, this principle will not prevent the European administration from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers (Article 1d of the Staff Regulations). However, the courts consider that those actions of the administration which are designed, for example, to give preference to women when filling vacancies can only apply if the qualifications of the candidates are equal\textsuperscript{361}.

The \textit{principle of proportionality} requires that the acts of the European administration must not exceed what is appropriate and necessary to attain the objective pursued, on the understanding that, where there is a choice between several appropriate measures, the least onerous measure must be used\textsuperscript{362}. In the disciplinary sphere, for example, the courts have checked whether the administrative penalty is appropriate in relation to the proven facts\textsuperscript{363}. However, this principle applies to all civil service law. The European courts try to reconcile the interests of officials with the interests of the service, basically using the principle of proportionality as their inspiration. Accordingly, given that the annulment, due

\textsuperscript{356} Judgments of 7 February 1991 in Joined Cases T-18/89 and T-24/89, \textit{Harissios Tagaras v Court of Justice of the European Communities} (ECR 1991, p. II-53); of 26 October 1993 in Joined Cases T-6/92 and T-52/92, \textit{Andreas Reinartz v Commission of the European Communities} (ECR 1993, p. II-1047); discrimination involves ‘treating in an identical manner situations which are different or treating in a different manner situations which are identical’; and of 14 April 1994 in Case T-10/93, \textit{A. v Commission of the European Communities} (ECR 1994, p. II-179; ECR-SC 1994, p. I-A-119 and II-387): ‘The principle of equal treatment is breached when two categories of persons whose factual and legal circumstances disclose no essential difference are treated differently or where different situations are treated in an identical manner’.


to a lack of grounds, of the decision not to choose the application of an official to fill the post in question by promotion would necessarily imply the annulment in turn of the decisions not to organise an internal competition and to organise an external competition instead, case-law considers that this would involve an excessive penalty for the illegality committed, in that it could cause damage disproportionate to the rights of third parties. As a result, the European courts consider that granting compensation can constitute fair remedy for the moral prejudice caused to the official due to the institution’s lack of service.

With regard to the legislative activity of the legislature or administration, case-law recognises their wide discretion in terms of the political responsibilities that they have under the Treaty, such that only the clearly appropriate nature of a provision, in relation to the objective that the competent institution must pursue, can affect the legality of that provision pursuant to the principle of proportionality.

**Respect for acquired rights** means that retroactive derogation from a legal provision having conferred subjective rights or similar benefits is contrary to the general principles of law. Furthermore, respect for acquired rights has been carefully observed by the institutions in all those cases in which they have taken on staff who previously enjoyed, either by law or by contract, certain rights or benefits. Therefore, for example, the rules for integrating staff from the European Association for Cooperation were reinforced by establishing objective and automatic criteria for their classification at the time of their appointment, in order to maintain the position that they had previously acquired with their former employer.

The **right to a fair hearing** has been particularly confirmed by case-law in the context of penalty proceedings – although not limited to that scope – and results in a series of procedures and guarantees: reasonable period to prepare the defence; full and exact knowledge of the facts invoked and the circumstances in which the acts were committed; and of 4 February 1970 in Case 13/69, August Joseph van Eick v Commission of the European Communities (ECR 1970, p. 3, paragraphs 24-25).

**Judgments of 23 February 1994 in Joined Cases T-18/92 and T-68/92, Dimitrios Coussios v Commission of the European Communities** (ECR-SC 1994, p. I-A-47 and II-171) and of 1 June 1995 in Case C-119/94 P, Dimitrios Coussios v Commission of the European Communities (ECR 1995, p. I-1439). In the case resulting in the judgment of 5 June 1980 in Case 24/79, Dominique Noëlle Oberthür v Commission of the European Communities (ECR 1980, p. 1743), the applicant argued that a procedure which had resulted in 40 officials being promoted was illegal. The Court of Justice dismissed the application for annulment of these promotions as it considered this to be excessive in light of the principle of proportionality. However, the Court recognised its own right to officially order the Commission to pay compensation of BFR 20 000 (bearing in mind that the applicant could take part in the next promotion procedure) for the moral prejudice caused by this irregularity.

In the same respect, see judgment of 27 October 1987 in Joined Cases 176 and 177/86, Arlette Houyoux and Marie-Catherine Guery v Commission of the European Communities (ECR 1987, p. 4333).


**Judgment of 5 June 1980 in Case 24/79, Dominique Noëlle Oberthür v Commission of the European Communities** (ECR 1980, p. 1743), the applicant argued that a procedure which had resulted in 40 officials being promoted was illegal. The Court of Justice dismissed the application for annulment of these promotions as it considered this to be excessive in light of the principle of proportionality. However, the Court recognised its own right to officially order the Commission to pay compensation of BFR 20 000 (bearing in mind that the applicant could take part in the next promotion procedure) for the moral prejudice caused by this irregularity.


and assistance from a lawyer. However, no breach of the right to a fair hearing in a procedure will result in annulment of the act in question, as the courts consider that, if this irregularity had not occurred, the procedure could have produced a different result. The right to a fair hearing applies even in the absence of a text, particularly where an adversarial procedure is required prior to the adoption of the decision. If the administration respects all the guarantees laid down for officials by the Staff Regulations, the courts then prefer to talk about the principle of good administration and, more specifically, about the counterpart to this, the duty of care, according to which an administration, which has to take decisions, even legally, that may cause serious detriment to the interests of its staff, must allow the latter to make known their points of view.

Finally, reference should be made, in this context, to respect for trade union freedoms, which, according to Luxembourg case-law, forms a general principle of employment law.

B) ‘Functional’ principles forged by the European courts in response to the specific needs of European law

The right to claim protection of legitimate expectation is regarded as a fundamental principle of European law and extends to any individual in whose mind the administration has conceived legitimate expectations, precise assurances or precise guarantees. To that end, the administration must not only have given the official or servant

374 Judgment of 13 December 1990 in Case T-20/89, Heinz-Jörg Moritz v Commission of the European Communities (ECR 1990, p. II-769): the fact that, in a procedure to fill a Grade A2 post pursuant to Article 29(2) of the Staff Regulations, a consultative committee, charged with examining the applications, proceeds to hear, in the absence of a candidate, the Director-General to whom the person filling the post will be answerable and who is the immediate superior of the person concerned, in order to have a clear idea of the qualifications required for the post, does not constitute a breach of the right to a fair hearing.
375 Judgment of 28 May 1990 in Joined Cases 33/79 and 75/79, Richard Kuhner v Commission of the European Communities (ECR 1980, p. 1677), although, for Advocate General Mayras, where respect for this duty implies granting certain procedural guarantees to officials before they are subject to measures causing serious detriment to their situation, the duty of care might be confused with the right to a fair hearing.
assurances of obtaining a certain benefit or similar, but must also have indicated that such assurances are precise. Obviously, no type of assurance given by the administration should be taken into account where the latter enjoys discretionary power, as is the case with the reorganisation of its departments, which is why it should not be considered that, in such cases, legitimate expectations might be breached. Likewise, only the competent administrative authority can offer these assurances, and no other administrative service or unit of the institution or body.

Case-law has more of a bearing on the precision of assurances given by the administration. Accordingly, legitimate expectations cannot be created in cases of administrative silence on requests submitted by an official for the confirmation of his rights, also, if the administrative interpretation is incorrect, a situation of legitimate expectations cannot result from this, as an official cannot validly breach European law nor can the notification of an incorrect interpretation engage the administration’s liability. In short, promises which do not respect the provisions of the Staff Regulations cannot create legitimate expectations in the mind of the person to whom they are given.

In this context, the principle of legitimate expectations modulates the retroactive revision, i.e. with ex tunc effects, of favourable administrative measures. Case-law recognises that the administration has the ‘right’ to revise, with retroactive effect, any measure vitiated by an illegality, although it subjects this to two strict and exclusive conditions: firstly, the revision must occur within a reasonable period; and, secondly, the revision can be limited by the need to respect the legitimate expectations of the beneficiary of the

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381 Judgment of 7 December 1995 in Joined Cases T-544/93 and T-566/93, Giovanni Battista Abello and others and Gerhard Riesch v Commission of the European Communities (ECR-SC 1995, p. I-A-271 and II-815): ‘With regard to the establishment of weightings, officials cannot invoke legitimate expectations because they cannot be regarded as being in a situation in which the administration has created legitimate expectations, given that the latter has never given any assurances with regard to the application of a particular statistical method or an automatic increase in remunerations in the context of the adaptation and revision of weightings’.


390 Opinion of Mr Advocate General Tesauro delivered on 18 June 1996 in Case C-90/95 P, Henri de Compte v European Parliament (ECR 1997, p. 1-1999), in which he asserts: ‘These then, and no others, are the only conditions to which the possibility of retroactively revoking a measure is subject’ (paragraph 16).

391 In the judgment of 12 July 1957 in Joined Cases 7/56, 3/57 to 7/57, Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel
measure, who may have relied on the lawfulness of that measure. Therefore, according to case-law, on the one hand, once acquired, legitimate expectations of the lawfulness of a favourable administrative measure cannot subsequently be questioned, unless, depending on the circumstances of each case, it is considered that the public interest prevails over the private interest of the beneficiary in maintaining a situation that the latter could have regarded as stable.

The principle of protection of legitimate expectation also applies in the case of legislative amendments to civil service law. Although, in theory, this principle cannot be raised against this legislative activity, even where the legislature has the power to make amendments at any time to the rules of the Staff Regulations, where it considers such amendments to be in line with the general interest, and to adopt provisions of the Staff Regulations which are more unfavourable for the officials affected, without prejudice to allowing, where applicable, a transitional period of sufficient duration, this activity is conditional on these amendments applying in the future, i.e. that the new rules will apply only to new situations and to the future effects of situations arising under the validity of the previous rule.

The principle of legal certainty also forms part of the European legal system and requires that any administrative measure producing legal effects is clear and precise and is notified to the person concerned so that he can know with certainty the point when this measure will come into existence and start to produce its legal effects, particularly with regard to the possibility of bringing the actions provided for by law or the Staff Regulations. This principle therefore establishes the requirement for appropriate publication of the rules affecting staff, although there are no rules as to how this requirement should be met. As a general rule, the principle of legal certainty prevents a European provision from becoming effective prior to the time of its publication. Exceptionally, however, the opposite can occur, when the objective pursued requires this and when the legitimate expectations of the persons concerned are duly respected.

Case-law has also linked the principle of legal certainty to the principle of legality such that any decision harmful to an official requires the presence of an express, precise and unambiguous legal basis. The former Court of First Instance argued that European officials...
and servants are subject to the exercise of wide discretionary powers by the European administration in staff matters, which is only partly limited by the duty of care imposed on that administration. That is why the Court felt that it was essential that any individual measure, adopted as a consequence of this wide discretion and causing harm to the official and therefore affecting his personal legal situation, should at least be based on an express and sufficiently clear and precise legal basis for this purpose. Furthermore, only through unconditional respect for the principle requiring an express legal basis, deriving from the principles of legality and legal certainty to which the European institutions, bodies, offices and agencies are subject in the management of their staff, can a minimum level of predictability and transparency be guaranteed with regard to the scope of individual measures that may be adopted with regard to an official in the exercise of said wide discretionary powers by the European administration⁴⁰⁰.

The principle of good administration⁴⁰¹(referred to on occasions as the ‘principle of sound management’⁴⁰²) has been deduced by case-law ‘from all the rules governing the action of the institutions and imposing on the latter a level of behaviour which allows a balance to be achieved between respect for the rights of the persons administered, the promotion of Community unity and the continued smooth running of the Community system as a whole’⁴⁰³. In this way, case-law has modulated the action of the European administration with regard to its staff, which is why, on occasions, its potentiality is confused with the duty of care, which reflects the balance of reciprocal rights and obligations that the Staff Regulations has created between the administration and its staff⁴⁰⁴and under which, when the latter decides on the situation of an official, it must take account not only of the interests of the service, but also of the official affected⁴⁰⁵. The principle of good administration requires the administration to exercise its powers under the Staff Regulations in a particular way and to take special care in the application of legislation. Although the breach of that principle would not normally result in the annulment of the administrative action (particularly in terms of non-urgent deadlines⁴⁰⁶), it does not prevent the administration’s liability for the harm that may have been caused to the official from being recognised⁴⁰⁷.

⁴⁰⁷ Judgment of 24 January 1991 in Case T-63/89, Edward Patrick Latham v Commission of the European Communities (ECR 1991, p. II-19) and of 24 January 1991 in Case T-27/90, Edward Patrick Latham v Commission of the European Communities (ECR 1991, p. II-35). On the other hand, in the judgment of 30 May 1973 in Case 46/72, Robert de Greef v Commission of the European Communities (ECR 1973, p. 543), the Court of Justice found that a sub-delegation or deviation from the internal division of responsibilities in an institution could only result in the nullity of an administrative measure if it were capable of affecting one of the guarantees given to officials by the Staff Regulations or of affecting the principles of good administration in matters of staff management.
C) Principles developed to protect fundamental rights

In this final section, we can refer to the right to a fair trial or the right to privacy, in accordance with which the performance of a medical examination on recruitment cannot be contrary to respect for the privacy of candidates, as a general principle of European law. Finally, we should highlight recognition of freedom of expression, from which officials benefit despite the obligation for loyalty towards the Union, as the latter cannot be regarded as contrary to the freedom of expression, which is a fundamental right whose respect must be ensured by the Court in the context of European law. However, the obligations that the Staff Regulations impose on officials to refrain from any action or behaviour which might reflect adversely upon their position (Article 12) and to assist and tender advice to their superiors (Article 21, first paragraph) constitute 'reasonable limits on the exercise of this fundamental right in the interests of the service'.

1.5. Case-law

Regardless of whether or not case-law is characterised as a source of European law, it is clear that the latter cannot be studied without taking into account the work of the European courts. While this can be stated in general terms, there is also no doubt that this is a clear reality in the case of European Union Civil Service Law. From the first judgment delivered by the Court of Justice on staff matters to now, the Luxembourg courts have developed a formidable body of case-law, which it is impossible to ignore when assessing the European Union Civil Service.

The work of the European courts is not limited to the previously mentioned forging of the general principles of public law, through which it has been attempted to complete the legal system of the European Union Civil Service, but has, on numerous occasions, involved an integrationist aspect, which has determined both the model of European Civil Service and its practical functioning. Therefore, in the case of contracts prior to the Staff Regulations, 'the Court of Justice was required to construct a system of guarantees for the benefit of officials, based on the general principles applicable to administrative contracts'. Subsequently, the integrationist interpretation given by the courts of various texts 'avoided the lack of control by the Court of Justice of the Communities at the precise moment when the organisation of the new Communities was posing particular problems'.

The specific problems posed by disputes in the European Civil Service have also served as a fertile breeding ground for general solutions, as is the case with the assertion of

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fundamental rights in the European legal system. Accordingly, the principle of equality and the assertion, at the time, of the functional unity of the European Communities, \textit{inter alia}, confirm that disputes in civil service may precede general disputes in the development of a new rule\textsuperscript{416}. The judgments of 7 June 1972 in the \textit{Sabbatini-Bertoni} and \textit{Chollet-Bauduin} cases\textsuperscript{417} and those of 20 February 1975 in the \textit{Airola}\textsuperscript{418} and \textit{Van den Broeck}\textsuperscript{419} cases set out the concept of gender equality, which was then enshrined in the \textit{Defrenne}\textsuperscript{420} case as a fundamental right of the person.

In their work, the European courts have used the same methods of analysis and interpretation as those used in the rest of the European legal system, which, for example, have resulted in solutions whether the case involved determining if a measure of a European institution constituted a decision\textsuperscript{421} or whether the case involved defining what the requirement to consult Parliament meant\textsuperscript{422}.

The European courts have, as a result, developed into genuine advocates of European Civil Service Law. Their case-law has always been inspired by the objective of ensuring the viability of a legal system of which it was, as the last resort, its only guarantor. To that end, it has attempted to maintain a delicate balance between the needs of the administration and the rights of staff. Accordingly, whilst, with regard to the latter, the Luxembourg courts have been described as protecting their rights (i.e. remuneration, career, legal guarantees) against the requirements deriving from administrative powers in staff management, on the other hand, their case-law has been extremely flexible, by limiting its control of administrative discretion and endorsing management practices and procedures that frame, in more than one case, the lawfulness of the Staff Regulations (i.e. the separation between grade and post, the admission through the Staff Regulations of recruitment procedures based on organisational power, etc.).

With the passage of time, the number of innovations has reduced. The times of legal and regulatory vacuums, in which the Court of Justice integrated the Staff Regulations or simply provided a non-existent solution, have long gone. This process has also involved the institutional evolution of the Court of Justice itself, basically through the internal creation of the Court of First Instance (now the General Court) and, more recently, the European Union Civil Service Tribunal. On the one hand, this is because the latter have resulted in the disappearance of the Advocate General in civil service cases. The Advocates General have formed an extremely valuable element in the case-law of the Court of Justice on staff matters, with their comparative studies of the civil services of the Member States and in terms of shaping the initial interpretations of the Staff Regulations. In this respect, the first two Advocates General should be particularly mentioned: the German Advocate General, Mr

\textsuperscript{416} Dubois, L., \textit{L’évolution de la fonction publique communautaire \ldots op. cit.}, p. 135.
\textsuperscript{418} Judgment of 20 February 1975 in Case 21/74, Jeanne Airola v Commission of the European Communities (ECR 1975, p. 221).
Roemer, and in particular the French Advocate General, Mr Lagrange, who, in their opinions, highlighted the initial French and German influence on the European Union Civil Service system.

On the other hand, the innovative capacity of the Civil Service Tribunal is limited by its subordination to the General Court through the appeal process, making the latter into the body most likely to develop more original solutions, as the Civil Service Tribunal will always find it more difficult to escape from the ‘orthodoxy’ of the case-law. However, this does not mean that the role of the Civil Service Tribunal is limited to that of a mere ‘administrator’ of the European acquis inherited from the Court of Justice and the General Court. This was previously the case with the latter, which has, however, managed to surprise with innovative interpretations involving significant shifts in the previously even-tempered spectrum of European Civil Service disputes (i.e. the Carrasco Benítez\textsuperscript{423} case, in which the Court of First Instance found that internal competitions aimed exclusively at temporary staff for the purpose of their establishment were unlawful, which, until that point, had been a common practice for including, within the Community administration, staff members from the offices of Commissioners, who had been contracted through contacts).

2. CHARACTERISTICS OF THE EUROPEAN UNION CIVIL SERVICE

**KEY FINDINGS**

- The most original characteristic of the European Union Civil Service is that the legal ties between officials and the European administration are governed by regulations, which guarantees stable employment and real career prospects for staff

- This approach of the legal tie being governed by regulations was the option chosen by the original authors of the Staff Regulations to guarantee the legal independence of officials, bearing in mind the responsibilities and powers held by the Communities at the time and by the Union today

- The ‘geographical balance’ reflects the multinational, multilingual and multicultural nature of the European administration, which is a sociological reality that continues to have legal importance

Three main problems generally characterise the law for officials of international organisations, which is fundamentally different from the law for national officials: a) the problem of geographical distribution; b) the problem of dual loyalty; and c) the problem of the independence of officials with regard to their countries of origin. Furthermore, independence and loyalty are the two sides of the same reality, but seen from different positive and negative perspectives. In principle, ‘neither the supranational competences granted to the Communities nor the public law nature of officials offer a solution to any of these three very difficult issues’\textsuperscript{424}.


Geographical balance and independence of officials and servants differentiate the European Civil Service from national models, but at the same time make it similar to international civil services. The latter in turn have characteristics which, drawn from national civil services, make the European public employment system a foreign element within the family of international organisations. This stems from the fact that the legal tie between officials and the Union is governed by regulations, which, by ensuring permanence in employment, allow a career system to be established.

Finally, the internal organisation of the European Civil Service model was based right from the start on tension between unitary elements (legal system) and independent elements (development and management by each institution), which has manifested itself in diverse procedures and in current trends towards management unity, although functional decentralisation through specialised bodies or agencies is creating a new scenario of diverse legal systems, particularly in intergovernmental contexts.

2.1. Legal tie governed by regulations

The first characteristic of the European Civil Service that should be highlighted is therefore the fact that the legal tie between officials and the European Union is governed by regulations. Historically this option proved to be necessary due to the integrationist nature of the then European Communities, and was an absolute innovation in the general panorama of bureaucracies of international organisations. In almost all international organisations, their relations with their staff are based on contracts. The fact that the international organisation has Staff Regulations does not mean that it has a system governed by regulations, as the important factor is the negotiated procedure for determining the legal rules and the nature of the appointment process, which fundamentally stems from the bilateral play of supply and demand425.

The European Union, due to its integrationist nature, has gone beyond the mixed system of the service relationship and opted for a system clearly governed by regulations. This system governed by regulations is fundamentally apparent from the unilateral determination of the legal rules applicable to officials, from the nature of the act through which officials join the administration, from the power to unilaterally amend the Staff Regulations and, by extension, from the power of internal organisation.

The initial expression of a civil service governed by regulations is the unilateral determination of the legal rules applicable to staff. It is the legislature which independently establishes the provisions that will govern the work situation of officials. The rights and duties of officials form part of a general and impersonal legal situation which is inevitably imposed on officials. The latter can only ‘adhere’ or submit to the conditions already determined in an impersonal manner, without there being any room for negotiation, whether individual or collective. In the first case, this is because the official does not sign any contract with the administration in which the content of the service relationship (grade, remuneration, etc.) is individually negotiated. In the second case, this is because the consultation with trade unions and staff associations (TUSAs) has not resulted, via collective bargaining, in any of the sources of European Civil Service Law being eliminated. The transfers of competence from the Member States have produced a decision-making process in which the latter do not waive their ultimate legislative capacity. The lack of direct legal effectiveness of agreements between the institutions (in their capacity as

administrations) and the staff show, once again, that the European Civil Service is not merely an internal matter of the European Union. In the case of the Commission (which holds the monopoly over legislative initiative), case-law has found that it ‘must act with full independence when proposing to the Council a Community legislative act’, in which case ‘neither agreements on internal relations between the Commission, as employer, and its staff, nor the organisation of the consultation of Commission staff through a referendum can be invoked to contest the validity of a regulation’\textsuperscript{426}. With regard to agreements between the institutions and the trade unions and staff associations, these would aim only to govern collective relations between the parties, without therefore creating, for each official considered individually, any obligation or any right. According to the European courts, such agreements would ‘not fall within the sphere of individual working relations between the employer and the official, but in the wider context of relations between an institution and the TUSAs’\textsuperscript{427}.

Case-law has been clear and unequivocal on this point: ‘it can be stated that the legal situation of the applicant, an official of the High Authority subject to the provisions of the Staff Regulations, is not derived from a contract concluded between two parties but was governed by statute and regulation and to his benefit and his detriment is governed by the general and impersonal provisions of the Staff Regulations’\textsuperscript{428}.

In addition, appointment and establishment are both unilateral acts\textsuperscript{429}. In the same way that, under the civil service law of many EU Member States, ‘the appointment of an official is the act-condition of the application of the Staff Regulations established by law and internal regulations, under the Community legal system, appointment will also be the act-condition of the Staff Regulations’\textsuperscript{430}, with these Staff Regulations being laid down by the legislature in exercise of the powers conferred on it by the Treaty. It is settled case-law that: ‘according to Article 3 of the Staff Regulations, the appointment of an official necessarily has its origin in a unilateral instrument of the appointing authority stating the date on which the appointment takes effect and the post to which the official is appointed’\textsuperscript{431}.

As a corollary to the above, the power to unilaterally amend the Staff Regulations is confirmed as a consequence deriving directly from the legal nature of the Staff Regulations and therefore from the fact that the employment relationship is governed by regulations. The Advocates General were the first to accept this power of amendment on numerous occasions.

\textsuperscript{429} Judgment of 30 September 2010 in Case F-36/05, Gudrun Schulze v European Commission, not yet published, paragraph 48.
\textsuperscript{430} Bastid, S., La nature réglementaire ou contractuelle ... op. cit., p. 144; Henry, G., La fonction publique européenne, C. Risold & Fils, Lausanne, 1961, p. 49: ‘it seems that, in the system governed by regulations, acceptance by the official is a simple condition of the act of appointment, whereas in the contractual system it is considered that the “act of appointment” and its acceptance form a contract between the official and the international public administration’.
occasions. In fact, 'the principle of the regulatory system is that broad power of amendment is reserved for the competent authority in the interests of the service'. That is why the Court of Justice categorically asserts that, as the legal tie is governed by regulations, it follows 'that the rights and obligations of officials may be altered at any time by the legislature'.

This power of unilateral amendment is conditioned, firstly, because it can only apply to future situations, without therefore having any retroactive effect, and, secondly, due to the effect of the ambiguous concept of 'acquired rights', which, under the Staff Regulations, are limited to those rights where the event giving rise to them occurred under a specific rule predating the amendment decided.

Although the Staff Regulations make no reference to acquired rights, the European courts have ruled on these based on the fact that the legal tie that binds the official with the European Union is governed by regulations. Both the legislature (for legislative acts) and the administration (for common or independent developments) may, as a result and at any time, make the changes that they deem appropriate in the interests of the service. They will only come up against acquired rights of officials if the event creating that right occurred while a given rule applied, predating the amendment decided by the European authority. As a result, for the Court of Justice, 'a right is considered to be acquired when the event giving rise to it occurred before the legislative amendment. However, that is not the case when the event creating the right did not take place under the legislation that has been amended'. Therefore, monetary benefits due as a result of termination of service are set by the regulations in force at the time when that termination occurred. A new salary scale or a new age-limit for retirement will be applicable to those officials who were in service on the day when the measure laying down that new salary scale or that new age-limit entered into force.

Amendments included in a legislative provision apply, unless otherwise stipulated, to the future effects of situations created under the application of the former law. As a result, the amendment of the conditions for granting a survivor’s pension creates *ex nunc* pension rights for widows, even if their spouse died before the new rule entered into force. All this means that the European administration must respect the principle of no retroactive effect of administrative measures and, individually, the rule of the inviolability of established situations, i.e. that, if the provision confers subjective rights, it cannot in

433 Bastid, S., *La nature réglementaire ou contractuelle ... op. cit.*, p. 146.
principle be revised if it is lawful440, whereas, if it is unlawful, on the one hand, retroactive annulment of an unlawful measure is permitted where the absence of an objective legal basis for that measure affects the subjective right of the person concerned and justifies revocation of the measure, but only for a reasonable period of time, and, on the other hand, the ex nunc annulment of an unlawful measure creating subjective rights is always possible without any time-limit, without it being possible to invoke the principle of respect for acquired rights441. Understood in this way, legal opinion on acquired rights adds nothing to the principle of no retroactive effect and does not object to the immediate effectiveness of regulations442.

Finally, the fact that the legal tie is governed by regulations reinforces the authority of the organisation over its staff. The exclusive competence recognised to institutions, bodies, offices and agencies with regard to the internal organisation of their administrative departments is also a discretionary power443. This discretionary power of the administration is limited by the following elements: interests of the service444, respect for the equivalence of posts445 and the rights and legitimate interests of the official446. This approach involves a balance between the interests of the service and the interests of officials, with both concepts having to be taken into account in each case. In between them is an element objectified by the Staff Regulations, such as the equivalence of posts, which is not only a safety mechanism for officials and servants, but also a clarification of what the Staff Regulations anything to support the argument that the grade to which an official is appointed cannot create vested rights such as to prevent revocation of a wrongful or erroneous decision.

Permanence is the compensation that officials acquire for agreeing to be subject to rules in whose establishment they have not taken part. In an administration such as the European administration, which works for institutions, bodies, offices and agencies fulfilling the goals entrusted to a permanent international organisation, the legal tie that binds the


441 Judgments of 1 June 1961 in Case 15/60, Gabriel Simon v Court of Justice of the European Communities (ECR 1961, p. 115) and of 9 March 1978 in Case 54/77, Antoon Herpels v Commission of the European Communities (ECR 1978, p. 585): the irregular grant or continued payment of elements of remuneration cannot create vested rights such as to prevent revocation of a wrongful or erroneous decision.


445 Judgment of 23 March 1988 in Case 19/87, Andre Hecq v Commission of the European Communities (ECR 1988, p. 1681): for a measure for the reorganisation of departments to adversely affect this principle of grade-post correspondence (Articles 5 and 7 of the Staff Regulations), it is not sufficient that it should bring about a change in or even any diminution of the official's responsibilities, but it is necessary that, taken together, his new responsibilities should fall clearly short of those corresponding to his grade and post, taking account of their character, their importance and their scope; judgment of 12 July 1990 in Case T-108/89, Hans Scheuer v Commission of the European Communities (ECR 1990, p. II-411), according to which it is impossible to find in the Staff Regulations anything to support the argument that the grade to which an official is appointed depends upon the number and status of his subordinates; judgment of 20 May 1976 in Case 66/75, Margherita Maciavichius v European Parliament (ECR 1976, p. 593).

administration to its employees cannot be anything other than permanent. The service relationship is not therefore subject to any explicit or implicit term. In addition, the reasons for termination of service are limited to those typically laid down by regulations (resignation, retirement, removal due to disciplinary offence or termination due to professional incompetence), ignoring the case of the post being eliminated (as the status of official is acquired by establishment, which confers a personal grade, and not through appointment, which is to a post) and reducing termination in the interests of the service to those cases in which the status of official was acquired by selection.

Finally, the security of stable employment allows a staff structure to be developed which favours the career prospects of officials. In international organisations, employees have no right to promotion to a higher grade, with their ‘career’ being limited to mere advancements in step with purely remunerative effects447. In this context, career prospects are one of the distinctive elements of the European Civil Service. As a result, the refusal of the then European Communities to adhere to the Model Staff Regulations of the European Civil Service offered – on the part of the Communities – an authorised interpretation of what the latter understood by a civil service system: ‘there could not be a true civil service if officials were not offered sufficient career prospects’ and if there were no provision for a ‘certain degree of flexibility in the classification of functions’, and also ‘taking particular account of the applications of servants already working for the institutions’448.

Initial hesitations during the running-in process of the European administration, despite the clarity of the regulatory texts, prevented the career system established by the European Civil Service, which was innovative in the context of international organisations, from being properly appreciated. Perhaps that was why there were initially numerous references back to their national administrations449. However, the impetus afforded by case-law, which interpreted the Staff Regulations in light of the principle of reasonable career prospects450 and the logical staff management made European officials aware of the right to a career that their Staff Regulations gave them.

These career prospects are ensured by the Staff Regulations both in structural terms and from an organisational point of view. Accordingly, “the "structuralism" of a closed civil service, by hierarchically organising staff into categories [now function groups] and grades, by the competition rule prevailing over that of personal choice after appointment, by organising promotion and transfers, by granting servants social benefits and pensions ... constitutes a set of rules and ties appropriate to developing a career. With the exceptions established by the Staff Regulations or contingencies in administrative life, career prospects are therefore, at least in principle, the primordial characteristic of a recruitment system governed by regulations451. From a more organisational perspective, career prospects are

447 On the impossibility of establishing a career system in international organisations, see Bettati, M., ‘Recrutement et carrière des fonctionnaires internationaux’, Recueil des Courses. Académie de Droit International, 204(IV), 1987, p. 376 et seqq.
448 The Model Staff Regulations of the European Civil Service were adopted on 6 July 1967 by delegates from 13 European governments and were the result of work by an intergovernmental conference which, within the framework of the Council of Europe, had undertaken the task of producing model Staff Regulations for the staff of the numerous European international organisations. Their practical interest was zero, although the theoretical studies carried out are one of the best efforts at analysing the problems posed by the international civil service. See Aubenas, B., ‘Réflexions sur une fonction publique européenne’, AFDI, 1967, pp. 587-606.
guaranteed by the extremely important principle of European preference, under which, before resorting to external staff, the internal transfer, promotion or competition possibilities should be examined, and also by the articulation of ‘career prospects’, i.e. the grouping of grades within a post to facilitate promotion. Finally, we should not forget promotion itself, as a technique for advancement, as, despite being a discretional option of the administration, all institutions have made efforts to objectify procedures, by involving staff in these, which ensures a certain transparency and equality.

2.2. Independence

The independence of EU officials forms the essential element on which the whole European Civil Service system is based and organised. The supranationality of the international organisation did not by itself solve the problem, which, moreover, is common to all international organisations. However, it did condition the solutions to the issue raised by the situation of an individual holding the nationality of a State but working for a community whose activities are not limited to satisfying the interests of a single State, but the common interests of all the Member States of the organisation.

Despite the fact that these common interests of the Member States may or may not be the same as the European interests pursued by the Union, it is clear that the competences transferred by the Member States require that the new international organisation should enjoy, both institutionally and administratively, the necessary independence in its action. That is why Smit and Herzog could state, in such a convincing manner, that the second subparagraph of Article 24(1) of the 1965 Merger Treaty extended the independence of the Community institutions to their staff and administrative departments.

Within the European Civil Service there is interaction between centrifugal and centripetal forces. Elements such as integration in an institutionalised organisation, the European spirit inspiring that organisation or the legal rules binding and making officials equal constitute a number of cohesion factors, which, however, come up against the unavoidable and aprioristic reality of the multicultural and multilingual environment. The European administration consists of officials from all the Member States of the European Union, who, despite continuing to be citizens of their respective countries, must, however, institute and implement a European project that does not necessarily identify with national interests. Officials therefore have to deal with situations in which they represent the Union as opposed to their own country of origin: due to their status and function, they embody a public entity other than the one to which they are linked by life. This results in an ambiguous situation in which they are forced to distance themselves from their origins and put aside, where applicable, the natural tie that binds the individual to his roots.

However, paradoxically, this is only the case with regard to the outside, in the permanent relationship between the institutions and the Member States, as centrifugal forces flourish within the European administration. In the context of cohabitation between the various nationalities, differences re-emerge on the surface of the tempestuous European sea: countries of the north and countries of the south, rationality and irrationality, reason and emotion, realism and idealism, different ways of conceiving the relationship between administration and politics, between public and private, French speakers, English speakers, 

etc. The sword of Damocles always hangs above European unity due to the plurality of cultures and connections.\footnote{See Abélès, M., Bellier, I. and Mcdonald, M., \textit{Approche anthropologique de la Commission Européenne}, (unpublished), 1993, pp. 6 and 7.}

All this must be taken into account as this interaction of dichotomic forces forms a structural element of the European Civil Service: identity \textit{versus} otherness, exterior \textit{versus} interior, centripetal \textit{versus} centrifugal. This tension helps to create a rich and complex administrative universe, which manifests itself, for example, in the circulation of information, where, in parallel to the official organisation (organisation charts, hierarchies, etc.), unofficial circuits develop which reflect the struggle to monopolise the areas of decision-making power.

It can be deduced from all the above that independence and loyalty are the two sides of the same reality, but seen from different perspectives: independence of the official from the authorities in his country of origin and from pressure groups (negative perspective) and loyalty or obligation to serve the Union in an appropriate manner (positive perspective). According to Reuter, there are two ways of tackling this problem: either establish the obligations and rights of an international official with regard to his State of origin, or establish the factual and legal conditions so that international officials are effectively independent.\footnote{Reuter, P., \textit{Les rapports entre les fonctionnaires européens et leur pays d’origine}, \textit{Colloque sur la fonction publique européenne (Bruxelles, 27-29 mai 1960)}, I.I.S.A., Brussels, 1960, p. 34.} The latter is, without doubt, the most appropriate to ensure this independence. However, international organisations do not recognise this principle in their Staff Regulations, and are content with mere undertakings due to budgetary constraints (lack of own resources of the organisations), the geographical distribution rule, the relative mobility of staff (need to not be isolated from national contexts), and the relativity and uncertainty of careers.\footnote{Reuter, P., \textit{Les rapports entre les fonctionnaires ... op. cit.}, p. 35.}

Firstly, the necessary legal and factual conditions must be guaranteed to prevent Member States interfering in any way with European officials. In this respect, it should be noted that the legislation forming European Civil Service Law, as a result of being qualified as secondary legislation and not merely as an internal law of the organisation, enjoys the characteristics of primacy and direct applicability, and also imposes obligations on the Member States. One of these obligations, despite its rather evanescent content, is to respect the independence of European officials. The Staff Regulations indicate this, however, as an obligation of the official, who shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Communities’ (Article 11 of the Staff Regulations).

The most obvious instance of respect for this obligation arises particularly with regard to national officials who enter the European Civil Service. These officials must keep their distance, firstly, from their previous national administrations and, secondly, from their governments.\footnote{Ruzie, D., \textit{Indépendance à l’égard des États et allegance à l’égard des Communautés au sein de la fonction publique européenne}, \textit{Annales de la Faculté de Droit et des Sciences économiques. Université de Clermont-Ferrand}, No 3, 1966, p. 16.} Clearly it is not appropriate, albeit technically desirable, for a former national official who starts working for the European administration to break off all ties with his former administration. We say that this is not appropriate as, although Monnet himself...
included this condition in the first drafts of the Staff Regulations of Officials of the ECSC\textsuperscript{457}, this posed a series of practical obstacles in attracting quality staff to the administrative services of the institutions. As a result, the option of administrative situations in which people may go and work for the European administration is permitted in all the Member States, which are the first to be interested in having their nationals working for the Union, although, from the point of view of the officials, their return to their countries of origin is not always straightforward.

We have said that the Member States are the first to be interested in having known personnel working for the European administration because this makes their relations with the European administrative services more fluid, from which they can therefore more easily obtain information. This must not result, however, in any breach of obligations by the official nor any pressure or espionage in Member States. If we look at the case of the Commission, one of the characteristics of its administration is precisely its permeability to outside sources, in particular to the Member States\textsuperscript{458}. Permanent contact between Commission departments and national administrations is one of the mechanisms that has developed in practice to guarantee the implementation of European law. In fact, exchanges of opinions and joint consultations have become commonplace in the ordinary life of the Commission. Furthermore, pressure put on European officials by Member States is exceptional, as, although they are all considered 'Eurocrats' without distinction\textsuperscript{459}, political influence over decision-making is restricted to Commissioners and their offices and, to a lesser extent, to the Directors-General.

Another form of protection of the European Civil Service from Member States is the latter’s inability to amend its legal rules, as this must always occur on a Commission initiative. There has occasionally been a desire to remove this power of initiative, which has traditionally reinforced the importance of the Commission within the decision-making process, due to a number of Member States being eager to develop a more intergovernmental Civil Service, which is docile to national interests\textsuperscript{460}.

The fact that European officials are required to be totally independent of their countries of origin does not mean that they become rootless or stateless persons, as they have sometimes been scornfully described. The status of European official does not entail eliminating the affective and emotional ties between them and their countries of origin, in which they continue to enjoy their political rights. Furthermore, the Staff Regulations establish a series of mechanisms to guarantee that neither the official nor his family lose touch with their roots (paid travel, special permissions, transfer of part of their remuneration to the currency of their country of origin, etc.), and even case-law has confirmed the existence of a general principle of European Civil Service Law according to


\textsuperscript{460} Thus, for example, Germany, in the general context of its demands to reduce its contribution to the European budget and with the aim of reducing the remuneration of officials, presented to the 1997 Intergovernmental Conference a proposal to amend Article 24 of the 1965 Merger Treaty in order to eliminate the Commission’s proposal to reform the Staff Regulations, with power to amend the Staff Regulations of Officials resting exclusively with the Council, subject to consultation of the institutions concerned.
which the official must be given the possibility of maintaining personal relations with the place where his main interests are located\textsuperscript{461}.

### 2.3. Geographical balance

‘Geographical balance’ is the European version, modestly established by the authors of the Staff Regulations, of the traditional obligation for national quotas imposed on the international civil service\textsuperscript{462}. There is no other aspect in which the European Civil Service so clearly appears to be an international civil service. The Staff Regulations were developed based on the example of the national civil services, and it is this origin which the European Civil Service likes to highlight in order to differentiate itself from the other international organisations. The fact that the legal tie is governed by regulations and the structure of the career system reinforce its distance from these organisations. However, and much to its regret, the European administration cannot completely ignore the intrinsic international elements which form its strength and its weakness.

The requirements deriving from the geographical balance mean that the criteria of qualifications and capacity and, to a lesser extent, equality must be subject to compliance with representation quotas with regard to nationals from the various Member States. The human resources of the European administration must consist of a proportional representation of citizens from the Member States. In any event, a geographical balance must exist in the European Civil Service because ‘an international administration with not only a technical vocation but also a political vocation, such as the European Communities, cannot be completely indifferent to the criterion of nationality in recruitment operations, whether internal or external. A balance must be found between a harmonious geographical distribution and the competence objectives pursued by the competition procedure in the interests of the service. It cannot generally be said that such a balance is necessarily achieved between both trends. One can prevail over the other, and vice versa, without therefore disregarding the principle of equal treatment\textsuperscript{463}. Therefore, the need for the Community administration to remedy a geographical disequilibrium in the posts within its departments when recruiting must give way to the requirements of the interests of the service and the consideration of the personal merits of the candidates\textsuperscript{464}, and also the principle that proper regard should be had for the career prospects of officials must take precedence, in certain cases, over considerations relating to the maintenance of a geographical balance in the composition of the staff of the Union\textsuperscript{465}.

The criteria when applying the principle mean that different Member States must be treated differently, bearing in mind, fundamentally and in accordance with the general European legal system, the populations\textsuperscript{466} of the various Member States. However, the geographical balance is always moderated by the essential nature of the European Civil Service, namely: under no circumstances can the independence of European officials with regard to the


\textsuperscript{463} Vandersanden, G., Le recrutement des fonctionnaires ... op. cit., p. 675.

\textsuperscript{464} Judgment of 29 October 1975 in Joined Cases 81 to 88/74, Giuliano Marenco and others v Commission of the European Communities (ECR 1975, p. 1247).

\textsuperscript{465} Judgment of 6 May 1969 in Case 17/68, Andreas Reinarz v Commission of the European Communities (ECR 1969, p. 61).

\textsuperscript{466} However, see Lassalle, C., ‘Contribution à une théorie de la fonction publique supranationale’, RDP, 1957, p. 491, who considers this criterion to be completely at odds with the interests of the Communities.
Member States be limited, particularly with regard to their State of origin\textsuperscript{467}. The geographical balance has become a criterion that guides the whole staff policy of all the institutions and does not just affect officials. Due to the stated aim of preventing units or departments (and indirectly the policy of an institution) from being monopolised by one Member State, it is compulsory to ensure harmonious representation, as stated above, in all staff categories: temporary staff, contract staff, seconded national experts, agency workers and, to split hairs, stagiaires.

Article 27 of the Staff Regulations provides that European officials shall be ‘recruited on the broadest possible geographical basis from among nationals of Member States of the Communities’. This wording is not original\textsuperscript{468}, although this could not have been expected to be otherwise in order to solve such a problem. Furthermore, it should be noted that the geographical balance criterion is taken into account only when recruiting, and not when promoting, although this is true only in terms of the theoretical wording of the Staff Regulations, as, when filling any post, and particularly in the delicate case of promotions, the nationality that the official must have is an element that consciously or subconsciously influences the decision.

In any event, the geographical balance rule is observed according to the political influence inherent in posts: it is not applied to posts for which the appointment criterion is specifically political (members of the institutions); it is also not applied to posts at the lower end of the scale (i.e. local staff), as their political influence is zero; and it is also not – although not automatically – applied to posts in the language service, as in these language qualifications are normally linked to nationality. In any case, this balance must not be pursued within administrative or organisational units, as this would add another factor of rigidity to staff management.

As can be seen, the European administration is therefore the setting for a conflict between the selection of people according to their capabilities and individual skills, based on an assessment of their personality, a scientific approach to recruitment and the independence of the international civil service, and an overall numerical selection, which resurrects, through geographical distribution, the anachronistic theory of international officials as representatives of national interests.

Despite everything, geographical balance cannot be regarded as a necessary evil or as the very negation of the supranationality or originality of the Union, without adequately assessing the positive effects inherent in this structural element of the European Civil Service. ‘Geographical distribution’ according to Kern ‘is based on the need to combine the whole gamut of national characteristics in dealing with the difficulties and problems that continually arise in the course of international cooperation’\textsuperscript{469}. In the European Union, geographical distribution is in itself an integrating factor\textsuperscript{470}. The fact that officials of different nationalities can be found in the Council, in Parliament and in the Commission is a factor of international cooperation that should not be forgotten. While this is certainly true, it is perhaps too audacious for Dubois to assert that geographical distribution, rather than


\textsuperscript{468} The term ‘broad geographical basis’ also appears in the Staff Regulations of the former Organisation for European Economic Cooperation (Article 7a and b) and in those of the European Organisation for Nuclear Research (Article 7(2)). For their part, the Staff Regulations of the Council of Europe (Article 7) and Protocol IV on the Agency of Western European Union for the Control of Armaments (Article 1) talk about ‘fair geographical distribution of posts and positions’ and ‘staff drawn equitably from nationals’ respectively.


being an agreed and inevitable evil, was expressly included in the Staff Regulations to ensure the best possible harmony between the Community’s action and that of the Member States.471

In any event, geographical balance actually responds to the interests of the service: it enables better understanding of national realities and mentalities, and is a guarantee of the quality of European action. The essence of geographical balance lies in the fact that, in serving the same European interests, there are as many mentalities, cultures and ways of tackling problems and finding solutions as there are Member States involved in European integration.

However, geographical balance can also have perverse effects. We have already shown how it impacts on recruitment – which Dubouis notably termed ‘political mortgage’472 – by sidestepping the principles of qualification, capacity and equality. Geographical balance actually entails real discrimination based on nationality, which case-law not only has accepted \textit{a posteriori}473 but, which is worse, \textit{a priori}, by allowing very specific requirements which predetermine the nationality of the candidate (think, for example, of those competitions which require perfect knowledge of a specific language or given legal system474).

However, geographical balance also impacts on the whole organisation and staff management. Horizontal mobility is negatively impacted due to the difficulty in adjusting national balances in both the Directorate-General of origin and the Directorate-General of destination. This affects the career opportunities of officials, reducing their prospects and making cooperation between the Directorates-General much more difficult than it is in other cases. Efficiency is also affected by the difficulty in easily transferring people when necessary to other Directorates-General. The accent on nationality also distorts the disciplinary system, making it very complicated to remove an official from a post in the event of incompetence, particularly if that official does not want to leave. In such cases, the superior is accused of discriminating against the nationality of the subordinate, who can seek assistance from his national office, thereby politicising the matter. Superiors who are aware of and sensitive to the problem either keep the subordinate, with the resulting prejudicial effects on the organisation, or try to promote the individual in question out of their unit, thus passing on the problem. Promotions are also weakened by nationality, given the requirement for a balance of nationalities in the various grades of the hierarchy. The result can be that the best qualified person for a post is not necessarily the one who will occupy it if they do not have the right nationality.475

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2.4. Unity of the system and institutional autonomy

The European Civil Service system has always pivoted between the centripetal force of the unity of the system and the centrifugal force of the autonomy that the institutions, bodies, offices and agencies enjoy. However, it is difficult to identify which of the two has conceded to the other. It seems that, at the time when the Staff Regulations were drawn up, certain institutions (such as the then Assembly\(^{476}\)) insistently pushed for the establishment of Staff Regulations by and for each institution. This was not the view that prevailed in the end. The Staff Regulations had to be unique and identical for all the institutions, as, in a framework of interinstitutional cooperation, this criterion was essential both for the functionality of the administrative management and for the guarantee of respect for the equal treatment of officials and servants of the Communities.

We should not forget that the first to be interested in this unity were the officials themselves. ‘It would be easy to demonstrate that, the more unified the European civil service is, by removing the barriers between one Community and another and even, insofar as possible, between one institution and another, the easier and more rational it will be to manage staff and the more possibilities there will be to ensure that officials enjoy career satisfaction, which is a real basis for their independence. To put it another way, the formation of a significant and comprehensive body of officials is not an insignificant factor in their independence\(^{477}\).

However, the European Civil Service has always been bound by institutional or organic autonomy. The Treaties, by giving each of the institutions, bodies, offices and agencies the capacity to set their own internal rules, recognises their administrative autonomy, which is expressed, *inter alia*, in the following aspects. Firstly, they enjoy the competence to determine which authorities will be invested with the power to carry out appointments, i.e. to determine, by delegation, their internal organs which will exercise the competences under the Staff Regulations of Officials. Secondly, each institution exclusively determines its own staff needs: this stems from the fact that each institution draws up the provisional statement of its administrative costs and is expressed, for example, in the capacity of the institutions to fill or not fill a post that has become vacant\(^{478}\). However, between the determination of its staff needs and the decision to fill a vacant post lies an essential and compulsory operation: namely, the budgetary phase of the recruitment. It is in this phase that the autonomy of the institutions is limited, with regard to both the Member States and between the institutions.

Thirdly, it is the institution itself that selects officials. This is an exclusive competence, firstly of the administration – which not even the Court of Justice can assume\(^{479}\) by replacing administrative decisions with its judgments – and secondly of the competent authority of each institution\(^{480}\) (second paragraph of Article 30 of the Staff Regulations).

\(^{476}\) *Written question No 692/74* (OJ C 86, 17.4.1975, p. 65).


\(^{478}\) Judgments of 14 December 1965 in Case 11/65, *Domenico Morina v European Parliament* (ECR 1965, p. 1259) and of 14 December 1965 in Case 21/65, *Domenico Morina v European Parliament* (ECR 1965, p. 1279): ‘assessment of the expediency or necessity of organizing a competition lies within the exclusive domain of the appointing authority’; judgment of 16 June 1971 in Case 61/70, *Gianfranco Vistosi v Commission of the European Communities* (ECR 1971, p. 535): ‘the Appointing Authority may in the interest of the service transfer a post from one Directorate-General to another where it considers that such a post is more useful in the department to which it is allocated than in that from which it is removed’.


\(^{480}\) Judgment of 12 July 1957 in Joined Cases 7/56, 3/57 to 7/57, *Dineke Algera, Giacomo Ciccsonardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community*
Fourthly, it is the institution that decides on the internal administrative organisation of each institution (management and operating structures), and also on the description of the duties and powers attaching to each type of post (subject to an opinion from the Staff Regulations Committee and based on the table in Annex I to the Staff Regulations, which establishes the correspondence between each type of post and career: Article 5(4) of the Staff Regulations).

In short, we must bear in mind, on the one hand, the competence in terms of administrative organisation recognised to each institution by case-law and, on the other hand, that each institution is responsible for determining its own staff needs and for proposing, each year to the budgetary authority, in the statement of its forecast costs, a new organisation chart for its departments. As Roblot concludes, the functional autonomy of the institutions can only be guaranteed insofar as each institution has its own administration: ‘each institution must possess its own authorities invested with the power of appointment; each institution must be able to alone assess its staff needs and alone decide whether or not to recruit officials; finally, each institution must be able to select its own officials.

It follows from all this that we can only talk about a European Civil Service in general terms, which, firstly, is based on the same Staff Regulations (recruitment, structure, career, rights and obligations) and, secondly, has occasional common management structures (pensions and social security scheme, selection office). Beyond this, European Civil Service Law must respect an institutional heterogeneity, which resists administrative homogeneity in terms of both organisation and staff management. The institutional goals of each institution, body, office or agency require the confirmation, on the one hand, of its internal administrative autonomy and, on the other, its independence from the other institutions.

Right from the start, not even the existence of three Treaties and three Communities could prevent the gradual advance towards unity. The first step was institutional unity, which began in 1957 with the Assembly and the Court of Justice, and which culminated in 1965 with the merger of the ‘executives’, the Commission and the Council. The next step occurred when the 1965 Brussels Treaty confirmed the existence of a ‘single administration’, which was a legal fiction based on the functional unity that case-law had previously confirmed. In fact, it was specifically in the context of European Civil Service disputes that the principle of functional unity of the European Communities was confirmed for the first time. In the words of Advocate General Roemer: ‘the European Treaties therefore constitute no more than the partial achievement of a far-reaching general programme which is characterised by the overriding concept of a more extensive integration of European States. This elementary fact takes precedence over the consideration that various treaties and various communities were established to ensure the

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481 Judgment of 17 December 1956 in Case 1/56, M. René Bourgaux v Common Assembly of the European Coal and Steel Community (ECR 1954-1956, p. 361): ‘following a reorganization of its administration for reasons of economy it [the Assembly] effected staff reductions’. This competence was not questioned by the Court of Justice. For his part, Mr Advocate General Roemer, in his opinion delivered on 4 July 1960 in Joined Cases 43/59, 45/59 and 48/59, Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt v Commission of the European Economic Community (ECR 1960, p. 463), indicated that the EEC Commission ‘had the power to freely determine its final organisation within the framework of the Treaty, bearing in mind future decisions of the Council’.

legal achievement of the plan ... While it is true that at present legal unity of the three European Communities cannot be said to exist, the fact must not be overlooked that already existing legal links between the three Communities and the unity of ideals of the institutions constitute a reality giving impetus to closer legal unity.\footnote{Opinion of Mr Advocate General Roemer delivered on 10 May 1960 in Joined Cases 27/59 and 39/59, Alberto Campolongo v High Authority of the European Coal and Steel Community (ECR 1960, p. 391).}

This unifying trend has developed both through rules laid down by the legislature or by agreement between the institutions and through case-law of the European courts. As a result, the movement towards unity has occurred through a triad of elements: legislation, case-law and management.

The first to undermine the institutional autonomy were the Merger Treaties, both in 1957 and in 1965. According to the Treaties, the autonomy that the various institutions enjoyed was only effective in the relations between them. "That autonomy does not apply to the law on officials, as it does not create the law on officials for just one institution ... The Treaty aims to establish a law on officials common to the various institutions and, as a result, the distribution of responsibilities between the institutions must not be taken into consideration."\footnote{Partsch, K.J., ‘Les rapports de droit entre les agents européens et les Communautés qui les emploient’, Colloque sur la fonction publique européenne (Bruxelles, 27-29 mai 1960), I.I.S.A., Brussels, 1960, p. 26.} The ‘single administration’ provided for by the Merger Treaty and the provisions on officials and servants contained in the same text had, as their objective, ‘not to merge into one the administrations of the four common institutions, but to establish a single set of Staff Regulations applicable to all officials, regardless of whether they had been initially recruited by the ECSC, by the EEC or by Euratom and regardless of which institution they belonged to at the time when the Merger Treaty came into force."\footnote{Roblot, D., Le recrutement ... op. cit., p. 125.}

Clearly, the merger of the institutions – both in 1957 and in 1965 – unavoidably resulted in the establishment of a more unified Civil Service.\footnote{See Bowett, D.W., ‘Tenure, Fixed-term, secondment from governments: The United Nations Civil Service and the European Civil Service Compared’, N.Y.U. J. Int’l Law & Pol., 14, 1982, p. 800.} That is why in 1968 a single set of Staff Regulations was adopted for all officials of the European Communities, regardless of the institution for which they worked. Exceptionally, just a few European bodies, due to their specialised work, are excluded from the common Staff Regulations: the European Central Bank, the European Investment Bank, and certain agencies such as Europol or Eurojust.

It is at the third level – i.e. implementing legislation – where this legislative unity, rather than being curtailed, must make the first concessions to the axiomatic institutional autonomy. Even so, as we have seen, there is a form of legislative development imposed by the Staff Regulations, with a view to interinstitutional harmonisation, which involves adoption by agreement between all the institutions.

The case-law of the European courts forms an important unifying factor within the European Union Civil Service. Despite these rulings clearly always being made with regard to one particular institution or body in order to resolve specific disputes, the interpretations that they make of the Staff Regulations and implementing legislation (particularly the common rules) involve general assertions that are valid for the whole European Civil Service, both where they enshrine general principles of law or of the European Civil Service (fundamental rights, structural principles of the employment system, etc.) and where management problems are solved, which may directly prove to be paradigmatic for the other institutions or bodies not directly affected.
Case-law has confirmed the administrative autonomy of the institutions since its first judgments\(^ {487}\), although the Campolongo case\(^ {488}\) sowed some confusion by proclaiming the principle of functional unity of the European Communities and its institutions, which was subsequently somewhat attenuated by the *principle of unity of the European career system*\(^ {489}\). Finally, following these vacillations, subsequent case-law went back to unequivocally recognising that each institution had ‘the competence and the duty to interpret the wording’ of the Staff Regulations\(^ {490}\), by enshrining their competence ‘to exercise, with regard to such servants ... the powers of an employer: appointment, dismissal, etc.’, which competence is the ‘peculiar and exclusive capacity of an institution’\(^ {491}\).

In terms of management, mechanisms have also been created to avoid excessive diversification when applying the rules. The first of these mechanisms is the *Board of Heads of Administration of the Institutions*. In accordance with a mandate laid down by Article 110 of the Staff Regulations, the staff managers of the various institutions periodically meet in sessions which culminate in the adoption of common criteria for interpreting the Staff Regulations and the implementing legislation. Clearly, the Board’s opinions do not have any direct legislative value, as they must be subsequently taken on board by the institutions when adopting specific decisions through the authorities designated to exercise legislative competence. Also, the Staff Regulations – or, more correctly, the specific common rules – have laid down a common management rule for aspects such as pensions and social security benefits (for which the Commission is responsible).

Interinstitutional cooperation was eventually incorporated in the Staff Regulations in 1992\(^ {492}\) through the inclusion of a new subparagraph in Article 2, authorising two or more institutions to entrust, to one of them or to an interinstitutional body, the exercise of the powers conferred on the appointing authority in respect of recruitment with regard to any area of management, other than decisions relating to appointments, promotions or transfers of officials. Under this provision, for example, the *Personnel Selection Office* was created through a joint Decision\(^ {493}\) of the European Parliament, the Council, the

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\(^{487}\) Judgment of 19 July 1955 in Case 1/55, *M. Antoine Kergali v Common Assembly of the European Coal and Steel Community* (ECR 1954-1956, p. 151): the Assembly ‘has the power to organise its secretariat as it wishes and in the interests of the service’; judgment of 12 December 1957 in Joined Cases 7/56, 3/57 to 7/57, *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community* (ECR 1957-1958, p. 39): ‘The institutions are autonomous within the limits of their powers’ and ‘the functional autonomy of the Assembly exists only within the limits of the tasks assigned to it by the Treaty’; opinion of Mr Advocate General Roemer delivered on 23 November 1956 in Case 1/56, *M. René Bourgaux v Common Assembly of the European Coal and Steel Community* (ECR 1954-1956, p. 361): under the principle of the ‘independence of the institutions’ of the ECSC, ‘the Common Assembly ... could not assign the applicant to a post which was vacant in another institution of the Community’.


\(^{489}\) In the judgment of 11 July 1968 in Case 3/68, *Fernand De Schacht v Council of the European Communities* (ECR 1968, p. 399), the Court faced the issue of determining whether the movement of an official, who was passed from one institution to another, could be likened to a termination of service. The Court of Justice replied in the negative, but without resorting to the *principle of functional unity* of the European Communities and its institutions, but rather to the new *principle of unity of the Community career system*.

\(^{490}\) Judgment of 1 June 1961 in Case 15/60, *Gabriel Simon v Court of Justice of the European Communities* (ECR 1961, p. 115: The President of the Court cannot be denied the competence and duty to interpret the Staff Regulations which he is called upon to apply subject to review by the Court of the correctness of this interpretation.


\(^{493}\) Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European
Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman. However, this does not exclude said Office also selecting staff for 'a body, office or agency established by or in accordance with the Treaties', at the request of said body, office or agency (Article 2(2) of the Decision). The Office, as its name suggests, is a ‘selection’ office. To that end, at the request of an institution or body, the Office will organise open competitions in order to draw up reserve lists with a view to the appointment of officials and the contracting of servants. The competitions will be organised in compliance with the Staff Regulations and the notice of vacancy, on the basis of harmonised criteria laid down by the institutions and bodies and in compliance with the work programme approved by the Management Board of the Office. The Office will only draw up lists of suitable candidates or reserve lists. The competent authority of each institution, body, office or agency will then decide on the appointment of the persons selected. In other words, the recruitment phase continues to be the exclusive competence of each institution, with attempts to harmonise the use of reserve lists not having succeeded.

2.5. **Special rules within the specialised administration of the European Union and staff not subject to Civil Service Law**

Outside the Regulation containing the Conditions of Employment of other servants and as part of the creation of European bodies, offices and agencies with specialised administrative tasks, special contractual rules have been established for these entities, in which the contractual tie is supplemented by general rules specifying the conditions of employment: European Central Bank; European Investment Bank; European Union Satellite Centre; European Union Institute for Security Studies; European Defence Agency; Europol and the European Foundation for the Improvement of Living and Working Conditions. However, in these cases as well, the European courts have not hesitated to resort to the Staff Regulations of Officials in order, by analogy, to fill any gaps that may appear in this ‘special law’.

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Draft Agreement between the Secretaries-General of the European Parliament, the Council and the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, together with the representative of the mediator setting out the common principles for a shared selection and recruitment policy and the principles for managing reserve lists, COM (2002) 126 final, Brussels, 6 March 2002.

494 Draft Agreement between the Secretaries-General of the European Parliament, the Council and the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, together with the representative of the mediator setting out the common principles for a shared selection and recruitment policy and the principles for managing reserve lists, COM (2002) 126 final, Brussels, 6 March 2002.

495 Conditions of Employment for Staff of the European Central Bank, 1 July 2003.

496 Staff Regulations of the European Investment Bank, 20 April 1960 (last revision 24 June 1998).


However, in general, the agencies that were created after the 1990s referred, for their staff rules, to those of the Staff Regulations and the Conditions of Employment of other servants, as at that time the criterion imposed was that of a single Community Civil Service, which is why the regulations establishing these agencies refer to the rules and regulations applicable to officials and other servants of the Union. The latest developments in this area of human resources in agencies have involved, on the one hand, the emergence of a new staff category – the employee working under contract – which is specifically intended for work, among other options, in European agencies, and, on the other hand, the development of the possibility of seconded national experts working temporarily for agencies. The 2004 reform of the Staff Regulations aims ‘to ensure that there is a single European civil service’, with its scope of application also being extended to agencies ‘in order to safeguard the harmonious application’ of staff rules and ‘to ensure staff mobility’ (Fifth and sixth recitals of Regulation No 723/2004). The new second paragraph of Article 1a indicates that the formal definition of ‘official of the Communities’ shall also apply to persons appointed by Community bodies to whom these Staff Regulations apply under the Community acts establishing them (hereinafter “agencies”). Any references to “institutions” in these Staff Regulations shall apply to agencies. This does not add a great deal to the existing situation, as the Staff Regulations subject their own application to the provisions contained in the regulations establishing each European agency, which is why almost all of these regulations refer, on staff matters, to the Staff Regulations of Officials. Finally, in accordance with the new Financial Regulation, the establishment plan for staff of the European agencies shall be decided by the budgetary authority (Article 46(3)(d) FR).

The all-encompassing vocation of the official-servant dichotomy suffered a crisis in the 1980s when the Commission, faced with the lack of budgetary funds to cover the new competences assumed by the Communities, gradually and surreptitiously proceeded to contract staff outside the categories stipulated in the legislation. The Court of Justice allowed this practice, firstly because it considered that neither the Staff Regulations of Officials nor the Conditions of Employment of other servants represented exhaustive legislation which prohibited contracting other staff outside the established legislative framework, given that the capacity attributed by Articles 272 and 333 of the Treaty to the Community to establish contractual relations regulated by the law of a Member State includes the conclusion of employment or service contracts. Secondly, this was because the tasks performed by these staff helped to ensure the smooth running of the institution, without, however, constituting duties attributed by the Treaties to those institutions. In other words, they were ancillary and non-permanent duties. The courts imposed two limits: firstly, where the Union, when defining the contractual conditions, did so not in accordance with the needs of the service, but with the aim of bypassing European Union Civil Service Law, this would constitute a failure to observe the correct procedure; and secondly, to check that the institution had not failed to observe the correct procedure.

504 Accordingly, under the second subparagraph of Article 19(2) of Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency: ‘the Agency may also employ officials seconded by Member States on a temporary basis and for a maximum of five years’.
it was not sufficient to assess whether the institution might have legitimately considered that the various types of contract provided for in the Conditions of Employment of other servants and subject to the competence of the Community courts were not appropriate for the situation of the employees to whom it wanted to entrust certain humanitarian aid missions, but that it should also be checked whether the working conditions offered to the applicant met the minimum social requirements existing in any rule of law.

2.6. A specialised European Tribunal for disputes in the European Union Civil Service

Article 270 TFEU establishes an exclusive and independent judicial procedure for the legal protection of staff working for the European administration, such that these staff are restricted to this procedural route for their legal requirements and are excluded from invoking Articles 268 and 340 TFEU when claiming compensation and Article 263 when requesting the annulment of an act of an institution. Originally, the Court of Justice had jurisdiction to hear actions brought by European officials and servants, but this jurisdiction was granted to the Court of First Instance on its creation. Under the possibilities opened up by the reform of the Treaty of Nice, a specialised court was created for disputes in the European Civil Service: the European Union Civil Service Tribunal.

The procedure for disputes in the European Civil Service is essentially based on the original French administrative disputes procedure. This dispute procedure involves two forms of action: on the one hand, an action for annulment, whereby the lawfulness of an administrative measure is contested (on the grounds of lack of competence, formal defect or procedural error, infringement of the Staff Regulations or general principles of law, or misuse of power) and, on the other hand, an action for damages, brought to hold the administration liable for damages suffered due to unlawful conduct by the latter. Both forms of action have been characterised by the nature of the powers that the European courts can exercise in each case, with these being either annulment powers or unlimited jurisdiction powers.

The action for damages is, by nature, an unlimited jurisdiction procedure in which the Tribunal is asked to place on record the administration’s unlawful conduct, which, by causing harm to the person concerned, entitles the latter to claim damages for the harm suffered. For its part, the action for annulment typically involves annulment powers, with the aim being the annulment of a measure, without the judgment being able to include specific orders against the administration. However, thirdly, the Staff Regulations establish that, where the aim of the action for annulment is pecuniary in nature, the Tribunal may exercise unlimited jurisdiction powers whereby, in such cases – which are characterised by the existence not just of an interest but of a genuine subjective right of pecuniary content deriving directly from the legislation – the action for annulment offers specific options, as these unlimited jurisdiction powers are added to the traditional annulment powers. These unlimited jurisdiction powers allow the Tribunal not only to annul the administrative measure but also to replace said annulled measure with its own decision, ordering the administration to pay the financial amounts due.

508 Order of 12 November 2008 in Case F-88/07, Juan Luis Domínguez González v Commission of the European Communities, paragraph 87.
The two forms of action are independent, as their assumptions and consequences differ, despite which there is an intimate relationship of interdependence between them. The unlawfulness of the administration’s conduct is the meeting point which determines that claims for damages should accompany the annulment claims and that, where the action for damages is closely linked to the action for annulment (the alleged damage has its origin in a lack of service dependent on the measure which is the subject of the annulment claims), the latter must precede the former, and it is not possible to get round the time-limits for holding the administration liable by bringing an action for damages which is not preceded by the action for annulment. However, it is the inter-relationship existing between the two actions that, on occasions, hinders their clear differentiation. The peculiar way in which the European courts exercise their unlimited jurisdiction powers can metamorphose a pure action for annulment into a new action for damages, thereby inventing an unlimited jurisdiction which no one has invoked, resulting in claims for damages that no one has made, and granting damages in the guise of compensation for which no one has asked. This is due to the need to offer sufficient judicial protection to the applicant who, by the mere annulment of the measure, would not see his interests satisfied, or due to the inappropriateness of annulling a measure which would have disproportionate effects for the administration or third parties.

In terms of procedure, the legal action must be preceded by an administrative review phase, which, as a review, requires the administrative procedure to be split into a prior request, where applicable, producing an administrative measure. The dispute process, for its part, is subject to conditions of admissibility deriving from the assumptions of the process in itself, from the parties or from the procedure. Firstly, the assumptions of the process concern the exercise of judicial power by the European courts. This judicial power is granted to them by reason of the subject matter (ratione materiae), as European Civil Service Law is another area of the European legal system, which can only be interpreted and applied by the European courts. The subsequent distribution of this judicial power determines the jurisdiction of those courts: disputes between staff and the European administration are heard by the European courts (in general by the Civil Service Tribunal and, on appeal, by the Court of First Instance, which has become the General Court under the TFEU), whereas disputes that may arise between European officials and servants and Member States shall be heard by national courts.

As regards the parties, in addition to the general requirements of capacity and representation, they must be entitled to bring the action and they must have an interest in the case. Active entitlement is often confused with a non-existent jurisdiction or racione personae competence, and has been interpreted very broadly by case-law to allow officials and servants access to the process. The same cannot be said about the concept of interest, which is a term that has been assessed in an irregular and erratic manner by the European courts, but which in a way should be regarded as the suitability of the claim to

513 Therefore, this includes candidates in an external competition (judgment of 31 March 1965 in Case 23/64, Thérèse Marie-Louise Vandevyvere v European Parliament (ECR 1965, p. 157)), dependents of an official or servant (judgment of 16 June 1971 in Case 18/70, Anne Duraffour v Council of the European Communities (ECR 1971, p. 515)) and, in general, all those persons who claim the status of official or servant (judgment of 6 December 1989 in Case C-249/87, Françoise Mulfinger and others v Commission of the European Communities (ECR 1989, p. 4127).
eliminate the harmful effects that the applicant is suffering to his legal situation. Furthermore, the dispute procedure can only take place when the prior administrative phase has been exhausted. This requires, on the one hand, that the subject matter of both phases is the same and, on the other hand, that said subject matter is definitively determined in the administrative phase, which, however, does not prevent flexible interpretation to allow for connected or implicit grounds or claims.

3. CIVIL SERVICE, EUROPEAN ADMINISTRATION AND EUROPEAN ADMINISTRATIVE LAW

KEY FINDINGS

- European Union Civil Service Law has not only governed relations between the administration and officials, but has helped, in legal terms, to forge the European administration and could serve as a basis for developing a new European Union Administrative Law

The European Civil Service forms the subjective element of the European administration, and for decades has been its most visible and legally most organised component. The intense and continuing relationship that the European administration has with its staff has required very exhaustive regulation of both the organisation and powers of the institutions, bodies, offices and agencies with regard to staff matters and of the rights and obligations of officials and servants. This legislative regulation has been decisively supplemented by the case-law of the European courts, which, by applying Civil Service Law, have developed a formidable set of general principles of law that govern the relationship between the administration and its staff.

The legislative and judicial solutions that European Union Civil Service Law has developed transcend the strict realm of European public employment and are decisively influencing the gradual development of an Administrative Law for the European Union, both with regard to the organisation and functioning of the European administration when implementing EU law and in relations between the public authority (administrative) and the citizen.

As we have seen, the European Union Civil Service has been the administrative and judicial catalyst of both the European administration and of an important part of European Union Administrative Law. Thanks to the European Civil Service and the case-law that it has generated, the existence of a single administration was confirmed in the Merger Treaty, by building on the case-law on the functional unity of the Communities, and principles and rights inherent in an administrative system have been developed: continuity of public service; principle of proportionality; respect for acquired rights; right to a fair hearing; principle of protection of legitimate expectation; principle of legal certainty; right to a fair trial; right to privacy; freedom of expression; or the fundamental assertion of the principle of equality.

More recently, we can see how European Union Civil Service Law has been at the judicial genesis of the right to good administration514, even though neither that law

nor the European courts have dared to transform the principle of good administration into a fundamental right. In the end, the right to good administration, despite all its shortcomings and defects, represents the constitutionalisation not just of the European administration but also of European Administrative Law.

The fact that systematising and rationalising the European administration has not been attempted until substantial progress has been made in the integration process has not prevented a European Administrative Law from gradually being forged, which governs not only the organisation and functioning of the European administration but also relations between the European public authority and citizens. European Union Civil Service Law has led the way in this work, with regulations suited to European law, with procedures appropriate for the European administration and with valid principles for shaping a European Union Administrative Law.

In any event, the European Civil Service, European administration and European Administrative Law need each other and also create and make each other. The precariousness of its law unfaillingly limits the functioning of the administration. There is a need, therefore, to confirm the existence of a European Administrative Law legislature, which can establish a common legal framework for a European administration that is organically fragmented. As a result, the enshrinement in the Charter of Fundamental Rights of the European Union of a right to good administration must form the basis and starting point from which the European legislature equips the European administration with its own specific Administrative Law, as a legal instrument allowing it to fulfil its functions and achieve its objectives.

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515 Judgment of 22 May 2007 in Case F-99/06, Adelaida López Teruel v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), paragraph 92, in which the Civil Service Tribunal found that the principle of good administration does not by itself give rights to officials, except where it constitutes an expression of specific rights, such as the right to have your affairs handled impartially, fairly and within a reasonable time, the right of access to files, and the obligation of the administration to give reasons for decisions, as laid down by Article 41 of the Charter of Fundamental Rights of the European Union. In general terms, the Court of First Instance defined the scope of this right in the judgment of 4 October 2006 in Case T-193/04, Hans-Martin Tillack v Commission of the European Communities (ECR 2006, p. II-3995), as subsequently confirmed by the judgment of 18 June 2008 in Case T-410/03, Hoechst GmbH, formerly Hoechst AG v Commission of the European Communities (ECR 2008, p. II-881). In terms of legal opinion, see Dutheil de la Rochère, J., ‘The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration, Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs (Eds. A. Armul, P. Eckhout and T. Tridimas), OUP, 2008, pp. 157-171, and Wakefield, J., The Right to Good Administration, Kluwer, 2007, p. 65. However, in favour of regarding the ‘right to good administration’ as a true subjective right, see Nieto Garrido, E., ‘Administración europea y derechos fundamentales: los derechos a una buena administración, de acceso a los documentos y a la protección de datos de carácter personal’, Nieto Garrido, E. and Martín Delgado, I., Derecho Administrativo europeo en el Tratado de Lisboa, Marcial Pons, 2010, pp. 65-68.


**BIBLIOGRAPHY**


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VII. ADMINISTRATIVE PROCEDURES PRIOR TO THE ACTION FOR FAILURE TO FULFIL AN OBLIGATION

Dr Manuel Rebollo-Puig

NOTE

Abstract

This information note analyses the procedures prior to the litigation stage in the action for failure to fulfil an obligation, which are primarily carried out by the Commission and the Member States. The analysis distinguishes between actions for failure to fulfil an obligation covered by Articles 258, 259 and 260(1) and (2) TFEU, with the aim of discovering the particular features that these procedures have in each case. Finally, it analyses the role of the complainants in these procedures.
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<table>
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<td>para.</td>
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<td>C</td>
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<td>CAP</td>
<td>Common agricultural policy</td>
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<td>CFREU</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>EAEC Treaty</td>
<td>Treaty establishing the European Atomic Energy Community</td>
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<td>ECSC Treaty</td>
<td>Treaty establishing the European Coal and Steel Community</td>
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<td>EEC Treaty</td>
<td>Treaty establishing the European Economic Community</td>
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<td>ECB</td>
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<td>Judgment of the CJEU</td>
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EXECUTIVE SUMMARY

Background
The Member States are the pillars upon which the construction of the European Union as a whole rests. That is why one of the most important general principles of the EU’s legal system is the principle of sincere cooperation by the Member States, and why the Treaties solemnly state the obligation imposed upon them to take all appropriate measures ‘to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’ (second paragraph of Article 4(3) TEU). As a result, the measures to counter failure to fulfil these obligations become an extremely important matter.

These measures may be taken both by individuals and by national bodies or EU bodies and institutions, and may be taken either within an intra-State or a supranational context. Of all these measures, however, the one that stands out is the action for failure to fulfil an obligation, governed, primarily, by Articles 258-260 TFEU. Within this action there is a pre-litigation stage, handled, fundamentally, by the Commission, and a litigation stage, heard before the CJEU.

Aims

- Locating the action for failure to fulfil an obligation within the wider framework of the other existing mechanisms for countering failures by the Member States to fulfil obligations, and indicating the existence of pre-litigation procedures other than those governed by Articles 258-260 TFEU.

- Analysing the various arrangements that may be present in the pre-litigation stage, paying attention to the various entities that act during this stage and the differing content that the subsequent litigation stage may have.

- Examining, specifically,
  - proceedings for failure to fulfil an obligation initiated by the Commission (Article 258 TFEU);
  - proceedings for failure to fulfil an obligation initiated by the Member States (Article 259 TFEU);
  - proceedings for failure to fulfil an obligation brought against Member States which have not complied with previous judgments declaring that they have failed to fulfil their obligations and requesting that an obligation be imposed on them to pay a lump sum or penalty payments, both in the extended version (Article 260(2) TFEU) and in the simplified version introduced by the Treaty of Lisbon (Article 260(3) TFEU).

- Analysing the concept of the complainant of infringements and, specifically,
  - examining its position within the action for failure to fulfil an obligation;
determining the specific basis for the rights that they may have and the differing levels of protection which, as a result, correspond to those rights;

- putting forward alternative models for protecting their interests.

**GENERAL INFORMATION**

**KEY FINDINGS**

- Articles 258-260 TFEU govern, almost completely, actions for failure to fulfil an obligation. The action for failure to fulfil an obligation is only one of the various channels created by the EU’s legal order to respond to failures by the Member States to fulfil their obligations within a supranational context.

- Although there are different variants within the action for failure to fulfil an obligation as governed by Articles 258-260 TFEU, they all attribute to the CJEU responsibility for declaring a failure to fulfil an obligation, with the Commission and Member States having the responsibility of initiating actions.

The entities that form part of the European Union’s structure have various channels for responding to failures by the Member States to comply with EU law. The primary channel, and the one that we are going to be predominantly concerned with here is the channel primarily governed by Articles 258-260 TFEU. These articles come from the original Treaty of Rome, although Article 260 TFEU has undergone amendments to its original wording made by the Treaty of Maastricht and the Treaty of Lisbon, as will be seen below\(^{518}\). In parallel, the EAEC Treaty contained, up until the Treaty of Lisbon, a substantially identical provision\(^{519}\).

In this first channel, it is for the CJEU to declare that a Member State has failed to fulfil a particular obligation. This is the ‘action for failure to fulfil an obligation’. The provisions set out govern both the litigation stage (heard before the CJEU) and the so-called pre-litigation stage (handled by the European Commission).

These provisions also establish the entities entitled to bring the action for failure to fulfil an obligation, and the entities against which the action may be brought. According to these provisions, the only entities entitled to bring an action are the Commission (Article 258 TFEU) and the Member States (Article 259 TFEU)\(^{520}\). In any case, such actions may only be brought...
against the Member State alleged to have failed to fulfil an obligation and never against its internal bodies, even though these may be the true authors of the alleged infringement521.

Nevertheless, one should not lose sight of the existence of other mechanisms which also aim to put an end to these situations where Member States have failed to fulfil their obligations, where the roles of the Commission and the CJEU are reversed. Thus, it is possible to find areas where the Commission – acting by itself, without the need to call upon the CJEU – declares the Member State to have failed to fulfil an obligation and imposes upon it appropriate obligations to ensure that it puts an end to this failure. Where relevant, it is the Member State which has been declared not to have fulfilled an obligation that challenges this decision before the CJEU, if it considers this appropriate. This was the general mechanism provided for in the ECSC Treaty522 and it is also the mechanism currently contained in Article 108(2) TFEU and its implementing provisions523. However, mechanisms substantially identical to this are also set out in the provisions of secondary legislation524.

Similarly, the Council may also adopt direct enforcement measures against a Member State in the event of failure to fulfil obligations imposed upon it with regard to the public deficit, extending to the imposition of fines (Article 126(11) TFEU). For these cases, in addition, the possibility of bringing actions under Articles 258 and 259 TFEU is expressly ruled out (Article 126(10) TFEU)525.

In all these cases, the failure by a state to fulfil an obligation is declared in an administrative procedure, while in situations covered by Articles 258 and ff. TFEU it is declared in a judicial process in which there is only a pre-litigation stage (not constituting, strictly speaking, an administrative procedure) without any enforceable or enforcing decision being reached.

Similarly, there are certain variations to both the pre-litigation stage and the entities entitled to bring an action for failure to fulfil an obligation under Articles 258-260 TFEU.

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521 Without prejudice to what is said below on the action for failure to fulfil an obligation brought directly by the ECB against national central banks, settled case-law has repeated that ‘though each Member State may freely allocate areas of internal legal competence as it sees fit, the fact remains that it [the State] alone is responsible to the Community under Article 226 EC for compliance with obligations arising under Community law’, judgment of the CJEU of 16 December 2004, *Commission v Austria*, Case C-358/03, paragraph 13.

522 Until it expired in July 2002, Article 88 ECSC Treaty stipulated that ‘if the High Authority considers that a Member State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned decision after giving the State concerned the opportunity to submit its comments. It shall set the State a time-limit for the fulfilment of its obligation.’ Once the time-limit set by the Commission has passed and, if applicable, once any action brought by the Member State before the Court of Justice has been dismissed, the Commission had various means at its disposal through which to enforce its decision that the Member State had failed to fulfil an obligation. As indicated in note 3, Article 89 ECSC Treaty laid down the possibility for Member States to bring actions against each other before the Court of Justice, either for failure to fulfil obligations deriving from the Treaty (paragraph 1), or pursuant to the arbitration clause (paragraph 2).


524 This is the case, most significantly, of the ‘financial corrections’, governed by Article 31 of Regulation No 1290/2005 and imposed as a result of the implementation of a ‘conformity clearance’ procedure. These corrections allow expenditure incurred by the Member States within the framework of pillar 1 of the CAP in a way that has infringed Community rules to be excluded from Community financing. The precondition for financial corrections is the existence of an ‘irregularity’, failure to comply with EU law by the Member State involved, which must be declared by the Commission in the same two-party proceedings that give rise to the imposition of the corrections. The Member State is entitled to challenge the Commission’s decision imposing such corrections before the CJEU, if it considers this to be appropriate.

525 However, and pursuant to the judgment of the CJEU of 13 July 2004, *Commission v Council*, Case C-27/04, the Commission is entitled to act against the Council in the event, for example, that the Council refuses to adopt recommendations submitted by the Commission concerning the excessive deficit that certain Member States may have acquired.
Regarding the structure of the pre-litigation stage, it is useful to set out, as a minimum, the following clarifications:

- Article 114(9) TFEU allows either the Commission or the Member States to dispense with the pre-litigation stage and to refer the matter directly to the CJEU where there is improper use by other Member States of restrictions on or exceptions to the approximation or harmonisation provisions adopted in accordance with the previous paragraphs of that article.

- Article 348(2) TFEU also permits the pre-litigation stage to be dispensed with in the event of a challenge before the court to the acts of the Member States in the sphere of national security and the production of or trade in arms, munition and war material, when they adversely affect competition in the internal market and have been adopted pursuant to Articles 346 and 347 TFEU.

- Finally, some provisions of secondary legislation also provide for distinct, and possibly alternative, procedures to the pre-litigation stage under Articles 258 and 259 TFEU.

With regard to the entities entitled to bring an action for failure to fulfil an obligation before the CJEU, or to have such an action brought against them, the following exceptions, at least, should be noted:

- Article 271(a) TFEU states that the Board of Directors of the EIB is entitled to combat directly before the CJEU failures to fulfil obligations deriving from the Statute of the EIB by the Member States, referring, for all other relevant matters, to Article 258 TFEU.

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526 This is the case with the ‘Strawberry Regulation’ (Regulation No 2679/98, adopted because of the blockades on Spanish strawberries by farmers in France), where an accelerated procedure is established in the event of grave disruption to the rules of free movement of goods between Member States. Although this is not certain, the CJEU might have rejected the idea of this procedure replacing the pre-litigation procedure under Article 258 TFEU. Specifically, the judgment by the CJEU of 11 November 2005 in Commission v Austria, Case C-320/03, states that ‘the regulation does not in any way restrict the Commission’s powers under Article 226 EC’, expressly referring to the Conclusions of Advocate-General Geelhoed, presented on 14 July 2005, which had clearly stated that the procedure under Regulation No 2679/98 neither introduces preliminary requirements nor replaces the procedure under Article TFEU, given that ‘the Commission’s powers under Article 226 EC [now Article 258 TFEU] cannot […] be qualified or restricted by acts of secondary Community law’. Thus, the judgment does not clearly rule out the procedure under Regulation No 2679/98 being able to replace that under Article 258 TFEU. It is the Advocate-General who states it clearly. It is interesting to note that both the judgment and the Advocate-General’s conclusions refer to the judgment of the CJEU of 2 June 2005, Commission v Greece, Case C-394/02, although this decision does not clarify the situation either. In the latter judgment there is an examination, specifically, of whether the Commission was obliged to use a procedure specifically laid down in Directive 92/13/EEC (procurement in sectors) in the event of failure to fulfil obligations by the Member States (the Commission was permitted to intervene directly and order the suspension of the award of the contract at issue) instead of the procedure under Article 258 TFEU. The judgment found, following previous case-law, that even should the use of the procedure envisaged by the directive be preferable, ‘such a procedure is a preventive measure which can neither derogate from nor replace the powers of the Commission under Article 226 EC […] The fact that the Commission used or did not use that procedure is therefore irrelevant where it is a matter of deciding on the admissibility of infringement proceedings’. As a result, this judgment does not contain a sufficient basis for ruling out, as clearly as Advocate-General Geelhoed did, the idea that the procedure under the ‘Strawberry Regulation’ might replace the pre-litigation stage. Rather the reverse: it could be thought that the Commission may freely choose between them under its discretionary powers.

527 Alongside this possibility, Article 24 of the Protocol on the Statute of the European Investment Bank also stipulated that ‘If a Member State fails to meet the obligations of membership arising from this Statute, in particular the obligation to pay its share of the subscribed capital or to service its borrowings, the granting of loans or guarantees to that Member State or its nationals may be suspended by a decision of the Board of Governors, acting by a qualified majority. Such decision shall not release either the Member State or its nationals from their obligations towards the Bank’. 

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• Article 271(d) TFEU, similarly, states that the Governing Council of the ECB is entitled to bring an action for failure to fulfil obligations against the national central banks for infringements of EU law. It should be noted that this provision not only changes the rule of entitlement to bring an action, granting it to an institution other than the Commission, but that there is also an alteration to the bodies against which such an action may be brought, since it may be brought directly against national central banks (and not their respective Member States), and these shall be the entities required to implement the judgment that is taken.

Alongside any of these mechanisms are failures by the Member States to fulfil obligations under the CFSP (Article 24(1) TEU, without prejudice to the provisions of Article 40 TEU). Similarly, in relation to the former third pillar, and in a more complicated way, during the five years following the entry into force of the Treaty of Lisbon the Commission may not rely upon Article 258 TFEU to challenge failures by the Member States to fulfil obligations relating to acts of the Union in the field of police and judicial cooperation in criminal matters adopted prior to the entry into force of the said Treaty (Article 10(1) of the Protocol on Transitional Provisions)528.

Finally, and even though this is a very different matter, this overview should also include consideration of the measures laid down for acting before national bodies regarding failures by States to fulfil obligations under EU law. In fact, these should be seen as the normal and usual means available to individuals for taking action. The principles of direct effectiveness, consistent interpretation, financial liability for failure to comply with EU law, etc., require this. There is no reason to rule out the possibility that these national channels, together with the mechanism of the request for a preliminary ruling, may allow the CJEU to take decisions, indirectly, on failures by States to comply with EU law. It is not appropriate here to dwell on any of this, but it is useful to remember it as an explanation, and perhaps a justification, for the restrictive entitlement to bring an action that is provided in connection with the action for failure to fulfil an obligation.

### 1. THE PRE-LITIGATION STAGE UNDER ARTICLE 258 TFEU

**KEY FINDINGS**

- The formal procedures that make up the pre-litigation stage of the action for failure to fulfil an obligation under Article 258 TFEU must be deduced both from the Treaty and from the case-law of the CJEU.

- In this first type of action for failure to fulfil an obligation the wide discretion granted to the Commission in the various procedures stands out, although the case-law has made this obvious discretion subject to certain limits.

528 More generally, the stipulations on judicial control regarding the former third pillar have now been added to by the new Article 276 TFEU, which stipulates that ‘In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’.
Article 258 TFEU governs the pre-litigation stage of the action for failure to fulfil an obligation when the latter is initiated by the Commission acting on its own initiative, which is the most usual situation. This article also applies in cases where the party entitled to bring the action is the EIB or the ECB. We will deal with this provision now and in the following section we will address the pre-litigation stage in the action for failure to fulfil an obligation brought by the Member States, governed by Article 259 TFEU.

From Article 258 TFEU all that can be deduced is that: a) the Member State alleged to have failed to fulfil an obligation shall be allowed to submit observations; b) the Commission shall deliver a reasoned opinion on the alleged infringement; c) the opinion shall lay down a period for compliance with it; and d) if the Member State does not comply with the Commission’s opinion within the said period, the latter ‘may bring the matter before the Court of Justice of the European Union’.

In practice, which is largely shaped by the case-law of the CJEU and by the usual procedure followed by the Commission itself, action takes place as follows:

- Once the Commission has identified a possible infringement (irrespective of the means through which it has become aware of it) it is usual for informal contacts to be established with the Member State alleged to be in contravention with the aim of obtaining proper information regarding the matters in dispute. The result of these initial contacts may make it possible either for the State to remedy its position or for the Commission to ascertain that there is no infraction, deeming the matter to have been resolved. However, there is no reference to this preliminary action in Articles 258-260 TFEU.

- The pre-litigation stage, strictly speaking, begins with a ‘letter of formal notice’ sent by the Commission to the Member State with the aim of allowing the latter to ‘submit its observations’ on the possible failure to fulfil an obligation. This letter contains a note of the alleged infringement, as well as an indication of the provision alleged to have been infringed. In addition, it sets out a period during which observations may be submitted; during this period, naturally, the Member State may also comply with the law or undertake to do so.

- If the Member State has not submitted any observations, or if they have not convinced the Commission, the latter may deliver a ‘reasoned opinion’. The opinion is just that, i.e. it is not an act imposing a decision upon the Member State alleged to have failed to fulfil an obligation. Instead, the Commission restricts itself to delivering an opinion on the existence of an infringement. This infringement may, in turn, only be declared to exist by the CJEU. Nevertheless, this opinion includes a new period during which the Member State may agree to fulfil the obligation which it is alleged to not have fulfilled and specified by the Commission in its opinion.

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529 We repeat that, pursuant to Article 271(a) TFEU, the Commission’s role may be performed by the EIB’s Board of Directors. In the same way, pursuant to Article 271(d) TFEU, the ECB’s Governing Council may also take on the role of the Commission, while the national central banks occupy the place of the State that has failed to fulfil an obligation, with the charge and the sentence and any demand being addressed directly to them.

530 Compare with the system for dealing with failures by Member States to fulfil an obligation laid down in the sphere of the ECSC or with the mechanisms that still exist with regard to State aid or ‘financial corrections’, referred to above.
The Member State may fulfil the obligation within this period or afterwards. However, fulfilment of the obligation after an action for failure to fulfil an obligation has been brought does not necessarily mean that the latter will be withdrawn\(^{531}\).

What this opinion basically involves is a request to fulfil an obligation already established by the legal system, which is the reason for the existence of a period during which the Commission will not bring the case, in order to allow the Member State that has been requested to fulfil the said obligation. In principle, the opinion under Article 258 TFEU will not make any pronouncements concerning the possible consequences of failure to fulfil an obligation (penalty or penalty payment). This is without prejudice to what is said below concerning Article 260(3) TFEU.

Both the letter and the opinion are addressed only to the infringing Member State and only the latter may respond to the Commission; under no circumstances may third parties or internal bodies of the Member State intervene in any way.

In accordance with consistent case-law, the Commission enjoys broad discretion in relation to the action for failure to fulfil an obligation. The Commission is not obliged to take action against any alleged instance of failure to fulfil an obligation, not even if it deems it proven. Therefore, it has discretion as to whether or not to start up informal preliminary contacts; whether or not to draft a letter of formal notice and to decide upon the alleged infringement, as well as the period granted to the Member State; to decide, even if it has drafted a letter and not received a satisfactory response from the State, whether or not to deliver a reasoned opinion, as well as the relevant period for complying with it; and whether or not to bring a case, regardless of the fact that it has so far been unsuccessful, and to decide upon when to do so, as well as to withdraw from a case when it so deems appropriate. Finally, the Commission can even select which one or more of the Member States, which are in similar situations of default, to address\(^{532}\). All this applies without there being in any case a requirement for it to prove a legitimate interest in the Member State fulfilling its obligations\(^{533}\). Rather than discretion, even though this is how it is usually referred to, this is probably freedom of assessment and evaluation of a greater scope than discretion alone, and of a different nature.

\(^{531}\) As is well known, settled case-law has stated for decades that, in addition 'the Commission still has an interest in bringing an action under Article 226 EC even when the alleged infringement has been remedied after the expiry of the period prescribed in the reasoned opinion', judgment of the CJEU of 6 October 2009, Commission v Spain, Case C-562/07, para. 23; judgment of the CJEU of 14 April 2005, Commission v Luxembourg, Case C-519/03, para. 19. We should not lose sight of the fact that the declaration by the court of infringement may also serve as the basis for possible financial liability on the part of the infringing Member State. In fact, 'even where the infringement has ceased after the expiry of the period prescribed in the reasoned opinion, there is still an interest in the proceedings continuing in order to establish the foundations of the liability that a Member State might incur, as a result of its failure to fulfil an obligation, particularly in relation to those who acquire rights as a result of the said failure', judgment of the CJEU of 6 March 2008, Commission v Spain, Case C-196/07, para. 27.

\(^{532}\) As made clear by the judgment of the CJEU of 19 May 2009, Commission v Italy, Case C-531/06, paras. 23 and 24, 'it is for the Commission, in performing the task conferred upon it by Article 211 EC, to ensure that the provisions of the Treaty are applied and verify whether the Member States have acted in accordance with those provisions. If the Commission considers that a Member State has infringed provisions of the Treaty, it is for it to determine whether it is expedient to take action against that State and what provisions the State has infringed, and to choose the time at which it will initiate infringement proceedings; (...) the Commission is free to initiate infringement proceedings against only some of the Member States which are in a comparable position from the point of view of compliance with Community law. It may thus, in particular, decide to initiate infringement proceedings against other Member States subsequently, after becoming aware of the outcome of the earlier proceedings'.

\(^{533}\) Case-law has not only ruled out the need for the Commission to prove any type of interest, but has stated that it is irrelevant that the failure to fulfil an obligation may not have caused any detriment at all. Thus, it is stated that 'an action for failure to fulfil obligations is objective in nature (...) failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute the breach, and the fact that such a failure had no adverse effects is irrelevant', judgment of the CJEU of 13 July 2006, Commission v Portugal, Case C-61/05, para. 32.
This extremely broad scope for assessment, however, does have some (albeit few) limits, recognised by the CJEU. While the Commission can decide whether or not to send a letter of formal notice and, afterwards, whether or not to deliver a reasoned opinion and, finally, whether or not to bring a case, the CJEU, in order to ensure that the right of defence is assured\(^{534}\), requires that all these stages have a substantially similar content\(^{535}\). Similarly, it imposes limits on the use of time-limits by the Commission\(^{536}\).

2. **THE PRE-LITIGATION STAGE UNDER ARTICLE 259 TFEU**

**KEY FINDINGS**

- The pre-litigation stage in actions for failure to fulfil an obligation initiated by a Member State requires, in all cases, the participation of the Commission, giving rise to a complex trilateral relation between the Commission, the Member State bringing the action and the Member State against which the action is brought.

- Specifically, the position of the Commission and the Member State bringing the action is particularly complex in relation to the possible links existing between their separate pre-litigation documents.

This channel has been very rarely used. There are only three cases in which a Member State has ended up bringing an action for failure to fulfil an obligation against another Member State before the CJEU\(^{537}\).

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\(^{534}\) Among many other cases, the judgment of the CJEU of 9 November 1999, *Commission v Italy*, Case C-365/97, established that ‘the opportunity for the State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the infringement procedure’ (para. 23), and consequently, ‘the Member State must be afforded the opportunity, in the course of the pre-litigation procedure, to refute in their entirety the allegations made against it by the Commission’ (para. 24, italics added).

\(^{535}\) In settled case-law, the CJEU has confirmed that ‘the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for in that provision and that, consequently, the formal notice, the reasoned opinion and the application must be based on the same objections’ (judgment of the CJEU of 17 January 2008, *Commission v Germany*, Case C-152/05, para. 9; judgment of the CJEU of 9 November 1999, *Commission v Italy*, Case C-365/97, para. 26, among many others). As a result, the Court has ruled inadmissible actions for failure to fulfil obligations, in full or in part, both where the case brought by the Commission widened the content of the letter of formal notice (judgment of the CJEU of 18 December 2007, *Commission v Spain*, Case C-186/06, para. 15 and ff.) and where the content of the reasoned opinion was expanded (judgment of the CJEU of 14 October 2010, *Commission v Austria*, Case C-535/07, para. 41 and ff.).

\(^{536}\) In the face of excessive delay in the response by the Commission, the Member States may legitimately decide that the replies given to the letter of formal notice or the reasoned opinion have been satisfactory to it, so that the start of a new stage (reasoned opinion or launch of the litigation stage) could be deemed incompatible with the principles of legitimate expectations or legal certainty. The case-law of the CJEU has stated that ‘the excessive duration of the pre-litigation procedure is capable of constituting a defect rendering an action for failure to fulfil obligations inadmissible’; however, it restricts such consequences to only ‘where the conduct of the Commission has made it difficult to refute its arguments, thus infringing the rights of defence’. Additionally, it is for the Member State ‘to provide evidence of such a difficulty’ (judgment of the CJEU of 6 October 2009, *Commission v Spain*, Case 562/07, para. 21; judgment of the CJEU of 12 May 2005, *Commission v Belgium*, Case C-287/03, para. 14).

\(^{537}\) These are the judgment of the CJEU of 4 October 1979, *France v United Kingdom*, Case 141/78; the judgment of the CJEU of 16 May 2000, *Belgium v Spain*, Case C-388/95; and the judgment of the CJEU of 12 September 2006, *Spain v United Kingdom*, Case C-145/04.
Administrative procedures prior to the action for failure to fulfil an obligation

In the same way as with the Commission, this channel is open to any Member State without the need to prove that it has a specific interest in relation to the failure to fulfil an obligation that has been identified.

In formal terms, the procedure starts with a ‘request’ by the Member State addressed to the Commission in which it ‘brings the matter’ before the Commission. This ‘request’ gives rise to a bilateral procedure, dealt with by the Commission, in which the oral and written participation of ‘the States concerned’ is provided for. The procedure may end with a reasoned opinion from the Commission, adopted within three months of the submission of the ‘request’. If the Commission does not deliver a reasoned opinion within this period, the litigation stage shall be open to the Member State bringing the action (Article 259(4) TFEU).

However, there are many aspects which are unresolved by this provision. In addition, the rare occurrence and the very small amount of case-law based on Article 259 TFEU have meant that it has not been possible to clarify its specific arrangements. In particular, the following issues are especially problematic:

- **If, following the bilateral procedure, the Commission should take the view that no infringement has been committed by the Member State in question, the Commission will not deliver any reasoned opinion**. That is to say, under no circumstances will it deliver an opinion declaring that the failure to fulfil an obligation does not exist, which reinforces the idea that the pre-litigation stage is not really an administrative procedure, but in fact a pre-trial procedure, directed solely towards the trial.

- **In relation to the link between the request submitted by the Member State concerned, the opinion of the Commission and the charge finally brought by the Member State, it seems reasonable for the Member State to be bound, in terms of its charge, by its initial document. However, it is less certain that it is bound by the opinion of the Commission. It is also open to question whether the Commission may deliver a reasoned opinion upholding the request in part. It is almost certain, having regard to the case-law based on Article 258 TFEU that the charge issued by the Member State bringing the action may not deviate from the reasoned opinion. According to this case-law, to do otherwise would be detrimental to the defence of the Member State against which the case is brought. As a result, and with the aim of respecting the entitlement of the Member State bringing the action, the Commission could never depart, in its opinion, from the request submitted initially. That is to say, the request would be tied to the request presented to the Commission and to the reasoned opinion delivered by it, and so the opinion, necessarily, must be bound to the request.**

- **It is worth raising the possibility that, once the reasoned opinion has been delivered, the Commission might, if the Member State that has allegedly failed to fulfil an obligation does nothing, bring a case on its own initiative for failure to fulfil an obligation before the CJEU. This possibility could occur either with the Commission replacing the Member State which originally submitted the request and which**,

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538 This is exactly what happened in the cases settled by the judgment of the CJEU of 16 May 2000, Belgium v Spain, Case C-388/95, and the judgment of the CJEU of 12 September 2006, Spain v United Kingdom, Case C-145/04. In the first of these, the Commission refused to support Belgium in its charge that Spain had not correctly implemented an earlier judgement, considering it ‘inappropriate to persist with Treaty-infringement cases’. In the second, and although it adopted a favourable attitude towards the action taken by Great Britain, the Commission pointed to the ‘the sensitivity of the underlying bilateral issue’ as grounds for declining to deliver the reasoned opinion requested by Spain in connection with the regulations covering the right of the citizens of Gibraltar to vote adopted by the British Parliament. The Commission ended up, in both cases, acting to intervene on behalf of the State against whom it is sought to bring an action.
subsequently, decides not to bring the charge, or in parallel with the charge brought by the said Member State, should the latter decide to initiate legal proceedings. In this respect, the bilateral procedure under Article 259 TFEU would make it possible to replace the pre-litigation procedure under Article 258 TFEU.

- Despite the fact that there is an applicant Member State, it seems that in these cases the Commission must be given the same discretion that it enjoys pursuant to Article 258 TFEU (except for the time-limit of three months within which it must deliver, if it so deems appropriate, the reasoned opinion, and the link to the initial 'request' that has been pointed out above). Thus, it will be for the Commission to decide upon the duration of the period granted to the Member State in the reasoned opinion to put an end to its infringement.

- Once the Commission has delivered a reasoned opinion, the Member State may fulfil the obligation within the period allotted, or afterwards. However, fulfilment of the obligation after an action for failure to fulfil an obligation has been brought does not necessarily mean that the latter will be withdrawn.\(^\text{539}\)

3. THE PRE-LITIGATION STAGE UNDER ARTICLE 260(2) TFEU

**KEY FINDINGS**

- The pre-litigation stage deriving from the mechanism laid down in Article 260(2) TFEU is initiated where a previous judgment has not been complied with. This gives rise to certain specific features deriving from its similarity to procedures to enforce judgments.

- There are significant doubts regarding the persons entitled to initiate this stage and, specifically, whether the Member States may be included in this number.

Paragraph 2 of Article 260 TFEU originates from the Treaty of Maastricht. As a way of mitigating the absence of a mechanism for enforcing judgments under which a Member State had been declared to have failed to fulfil an obligation, this provision laid down the possibility of compelling the Member States in default to pay certain sums.\(^\text{540}\) In order to achieve the imposition of these sums, the authors of the Treaties considered it appropriate to require the bringing of a new action for failure to fulfil an obligation, with an object separate from that of the previous one, although closely connected with it, and with all its procedures. It was only with the Treaty of Lisbon that this mechanism was partially simplified, removing the need for a reasoned opinion to be delivered in the pre-litigation stage of this second case.

Apart from what has been indicated above, the pre-litigation stage has other specific features when the infringement consists in the failure to comply with a judgment declaring a previous failure to fulfil an obligation, namely, a judgment within the framework of an action for failure

\(^{539}\) An application by analogy of the settled case-law cited in note 14 in connection with Article 258 TFEU makes it possible to draw this conclusion.

\(^{540}\) In fact, prior to this amendment, the only remedy vis-à-vis Member States which had not complied with judgments against them was to bring a new action for failure to fulfil an obligation against them, this time with the aim of obtaining a declaration of failure to comply with the first judgment: judgment of the CJEU of 13 July 1972, *Commission v Italy*, Case 48/71.
to fulfil an obligation. In reality, these procedural differences are justified because, in the end, and significantly, we are dealing with a procedure for enforcing a judgment rather than a new, genuine case\textsuperscript{541}.

In any event, the differences between the two cases is based upon the fact that the judgment which results from this second action for failure to fulfil an obligation will impose upon the Member State (doubly) in default the obligation to pay certain sums. This has an effect on the pre-litigation stage (or from the other point of view, post-litigation stage) of this second action for annulment, since ‘the Commission shall specify the amount (…) to be paid by the Member State concerned (…)’ (end of the first paragraph of Article 260(2) TFEU).

What the provision does not make clear is when the Commission must give this indication: whether it is first given in the charge, or in its initial letter of formal notice. It is reasonable to suppose, in the light of the existing case-law on respect for the defence rights of the Member State alleged to have failed to fulfil an obligation, that the Commission would be obliged to supply this information to the Member State in the letter of formal notice\textsuperscript{542}. This, in addition, reinforces the persuasive nature of these measures and facilitates the resolution of disputes without the need to embark upon the litigation stage.

It should be noted that Article 260(2) TFEU refers solely to the Commission. Undoubtedly, the Commission may rely upon this provision to enforce judgments handed down as a result of an action for failure to fulfil an obligation brought by itself (Article 258 TFEU) or by any Member State (Article 259 TFEU).

Indeed, since Article 260(2) TFEU refers precisely and exclusively to the Commission, a literal interpretation of this provision would mean that a Member State would have no access to this mechanism. Thus, it would have only the procedure under Article 259 TFEU, including for challenging failure to comply with a prior judgment. This is the case both if the Member State itself was the applicant in the first judgment, and if the applicant was the Commission or any other Member State, and whether or not it appeared in the two latter cases as a joined third party. In any event, recourse to this mechanism is expressly guaranteed by the third paragraph of Article 260(2) TFEU, which states that ‘this procedure shall be without prejudice to Article 259‘. That would mean, in short, that a Member State could obtain a new judgment declaring that a previous judgment had not been complied with, but not a judgment imposing payment of a sum.

However, despite the wording of Article 260(2) TFEU, and the enigmatic phrase ‘without prejudice‘ in its final paragraph, it should not be considered completely out of the question that this procedure might be available to Member States. A systematic (Article 259 TFEU) and a teleological interpretation (higher interest of the legal order of the Union in ensuring its achievement by the Member States, Article 4(3) TEU) makes it possible to posit this.

\textsuperscript{541} Moreover, the CJEU itself has recognised it as such, stating that ‘the procedure laid down in Article 228(2) EC must (…) be regarded as a special judicial procedure for the enforcement of judgments, in other words as a method of enforcement‘, judgment of the CJEU of 12 July 2005, Commission v France, Case C-304/02, para. 92.

\textsuperscript{542} On this point, it should be borne in mind that the CJEU has extended to Article 260(2) TFEU its case-law generated in relation to Article 258 TFEU, on the link between the letter of formal notice, the reasoned opinion and the charge. Thus, in the judgment of the CJEU of 10 September 2009, Commission v Portugal, Case C- 457/07, para. 68, it is averred that ‘the reasoned opinion and the action provided for in Article 228(2) EC [current Article 260(2) TFEU] must set out the Commission’s complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the extent to which the judgment finding a failure to fulfil obligations has been complied with, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a continued failure to fulfil obligations‘.
It has to be admitted, however, that accepting this would not be unproblematic.

If it were to be accepted that a Member State could have recourse to the procedure under Article 260(2) TFEU, doubts would arise regarding the exact structure of the pre-litigation stage. To start with, it is not even certain that a pre-litigation stage would be necessary, although, in view of the fact that this stage is compulsory in all the cases expressly governed by the action for failure to fulfil an obligation (Articles 258, 259 and 260(2) TFEU), it seems reasonable to suppose that this would also hold true in this case. If the above is accepted, doubts arise in relation to the type of pre-litigation stage that would have to be adopted and, specifically, whether it should be bilateral (applying solely to the two Member States involved) or trilateral (including the Commission as well).

4. **ARTICLE 260(3) TFEU AND ITS REFLECTION IN THE PRE-LITIGATION STAGE**

**KEY FINDINGS**

- This method, introduced by the Treaty of Lisbon, makes it possible for the payment of a lump sum or penalty payment to be imposed in the first judgment declaring failure to fulfil an obligation. This special feature affects, to a large extent, the usual content of the pre-litigation stage.

The dual nature of proceedings set out is not necessary in the case governed by Article 260(3) TFEU: when the failure to fulfil an obligation challenged by the Commission consists in not notifying the measures to transpose a directive adopted under a legislative procedure, the Commission may ask the CJEU to declare that there has been a failure to fulfil an obligation and, at the same time, to impose payment of the sums envisaged under Article 260(2) TFEU upon the Member State in default. Thus, it would not be necessary to refer once again to the CJEU should the Member State refuse to comply with the first judgment: the judgment itself would already contain the measures necessary to ensure that it was complied with. In other words, a single trial would comprise what would normally be the object of the trial under Article 258 TFEU and the trial under Article 260(2) TFEU. This means that the pre-litigation stage in this type of case will address both the failure to fulfil the duty to notify and also the possible sums that the Member State in default can be compelled to pay. Once again, there are doubts regarding whether the letter of formal notice and the reasoned opinion must make reference to the amounts which the Commission requests in its charge, as well as on their binding nature.

In any event, the terms used in Article 260(3) TFEU (‘may’) make it clear that the Commission is simply enabled, but not obliged, to make use of this procedure. That is to say, there is nothing to stop the Commission, in the exercise, once again, of a wide discretion, and in the face of a failure to fulfil the duty to notify the transposition of a legislative

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543 It should be remembered, however, that Articles 114(9) and 348(2) TFEU expressly state that a Member State may directly bring a case against another Member State before the CJEU, without the need to hold a preliminary pre-litigation stage, in the event of failure to fulfil an obligation on aspects governed by the said provisions.

544 In reality, and despite the fact that this provision refers to the accomplishment of a mere formal duty to provide information, it has been the practice of the Commission and the CJEU to deem that what is meant here is the actual transposing of the directives. A particularly clear example of the confusion between the duty to transpose and the duty to notify the transposition can be found throughout the communication entitled ‘Implementation of Article 260(3) of the TFEU’ (OJEU C 12, 15.1.2011) and, in particular, point 19 thereof.
directive, to have recourse solely to Article 258 TFEU and, subsequently, if relevant, to Article 260(2) TFEU\textsuperscript{545}.

It should be noted that in this case too, Article 260(3) TFEU refers solely to the Commission. Once again, it makes it possible to rule out the Member States being able to make use of this provision. However, and in contrast to what was said in relation to Article 260(2) TFEU, this exclusion seems, in principle, more justified. In fact, it would not be easy for a Member State to have a significant interest in another Member State fulfilling its duty to notify that it had transposed a particular directive. In any event, it could have recourse to the procedure under Article 259 TFEU.

Article 260(3) TFEU certainly represents an advance in terms of the effectiveness of EU law. However, this progress is very restricted and cautious, given its limited scope of application. It would be desirable for this procedure or a similar one to be extended to other instances of failure to fulfil an obligation. This would have the effect of extending the dissuasive effect that this article confers upon the pre-litigation action by the Commission to many other spheres. It would also rationalise the tortuous system for the enforcement of judgments that is laid down, as a general rule, by Article 260(2) TFEU. In order to achieve this aim, it would be more reasonable for the Member States too to be able to have recourse to this mechanism in their claims regarding failures by other Member States to fulfil obligations.

5. THE ESTABLISHMENT OF THE AMOUNT OF THE LUMP SUM AND THE PENALTY PAYMENT BY THE COMMISSION

**KEY FINDINGS**

- The paucity of information in the Treaties regarding the nature and extent of the lump sum and the penalty payment has meant that they have had to be supplemented by the case-law of the CJEU and by the internal rules of the Commission.

- The imposition of these measures is, once again, predetermined by the action taken in the pre-litigation stage; more in the case of Article 260(3) TFEU than in the case of Article 260(2) TFEU.

As has been seen, both in a judgment handed down pursuant to Article 260(2) TFEU and in one based on an action under Article 260(3) TFEU, the CJEU may impose upon the Member State in default payment of ‘a lump sum or a penalty payment’. As we have seen, this also has an effect on the pre-litigation stage. As a result, it is useful to examine, albeit briefly, the way in which the Commission deals with this matter.

Firstly, it should be pointed out that, despite the clarity of the provision, which unquestionably uses the alternative ‘or’ between the ‘lump sum’ and the ‘penalty payment’, the CJEU has deemed that it is possible to employ both types of measures in respect of a

\textsuperscript{545} In fact, the Commission itself has stated, in point 17 of its communication entitled ‘Implementation of Article 260(3) of the Treaty’ (OJEU C 12, 15.1.2011) that, although it ‘considers that the Article 260(3) instrument should be used as a matter of principle in all cases of failure to fulfil an obligation covered by this provision’, it does not rule out the possibility that ‘there might be special cases in which it would not deem it appropriate to seek penalties under Article 260(3)’.
single infringement\textsuperscript{546}. The Commission, making use of this possibility, has announced that, as a general rule, provided that it is relying on Article 260(2) TFEU, it will apply to the CJEU for the imposition of both measures\textsuperscript{547}. On the other hand, in relation to Article 260(3) TFEU, and since in this case the measures would be imposed at ‘a much earlier stage’, the Commission has indicated that, as a general rule, it will only ask for a penalty payment to be imposed and that only in exceptional cases will it add a request for a lump sum to be imposed\textsuperscript{548}.

It may seem surprising that no provision establishes the amount either of the penalty payment or of the lump sum. This is particularly true of the latter, whose proximity to wholly punitive measures is very clear. The CJEU has insisted on the fact that these penalties should be tailored to the circumstances and should be proportional both to the failure to fulfil an obligation that has been proved and the capacity of the Member State in question to pay\textsuperscript{549}, so that, in reality, its amount is not made much more predictable, nor is a maximum ceiling imposed.

Mitigating this state of affairs, in part, the Commission has adopted various communications in which it lays down a set of criteria to guide its calculations for an application for penalty payments and lump sums\textsuperscript{550}. Even so, and as could not be otherwise, given the very broad terms in which Article 260(2) and (3) TFEU confers discretion upon the Commission, in this sphere too these communications make it clear that this is merely a statement of intent from which, in particular cases, and with good reasons, it would be possible to deviate.

In any event, it should be added that, in a case under Article 260(2) TFEU, the CJEU has full jurisdiction. This means that it may grant these financial penalties even if the Commission has not requested it to or, when it has so requested, in higher or lower quantities than requested by the Commission\textsuperscript{551}. On the other hand, and for no particular reason, in a case under Article 260(3) TFEU, and in accordance with the wording of that provision, the Court

\footnotesize\textsuperscript{546} Judgment of the CJEU of 12 July 2005, \textit{Commission v France}, Case C-304/02, para. 82. To be exact, and as is to be expected, the CJEU only gave a decision in the said judgment and in those which later confirmed it in relation to Article 260(2) TFEU. However, as Article 260(3) TFEU uses the same expression and the same alternative ‘or’, it is reasonable to suppose that here too both measures may be imposed together. The Commission has also said as much in point 20 of its communication entitled ‘Implementation of Article 260(3) of the TFEU’ (OJEU C 12, 15.1.2011).

\footnotesize\textsuperscript{547} It stated as much in point 10.3 of its communication entitled ‘Application of Article 228 of the EC Treaty’, SEC (2005) 1658.

\footnotesize\textsuperscript{548} Specifically, the Commission has stated in point 21 of its communication entitled ‘Implementation of Article 260(3) of the TFEU’ (OJEU C 12, 15.1.2011) that it ‘hopes that the penalty payment will prove sufficient to achieve the innovation's objective', although it warns that it may also propose a lump sum payment, 'where warranted by the circumstances of a case'.

\footnotesize\textsuperscript{549} Word for word, the judgment of the CJEU of 4 July 2000, \textit{Commission v Greece}, Case C-387/97, para. 90, states that ‘a penalty payment must be set that will be appropriate to the circumstances and proportionate both to the breach which has been found and to the ability to pay of the Member State concerned’. The judgment of the CJEU of 25 November 2003, \textit{Commission v Spain}, Case C-278/01, para. 41, extends the application of these criteria to the establishment of the lump sum, which is reiterated in subsequent decisions. Among the most recent is the judgment of the CJEU of 7 July 2009, \textit{Commission v Greece}, Case C-369/07, para. 114.

\footnotesize\textsuperscript{550} Such calculation methods are, basically, contained in the communication, cited above, entitled ‘Application of Article 228 of the EC Treaty’, SEC (2005) 1658, although the subsequent updates to the calculation coefficients laid down in the communication’s text should be taken into account. The first of these took place with the communication entitled ‘Application of Article 260 of the Treaty on the Functioning of the European Union. Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings’ SEC (2010) 923/3.

\footnotesize\textsuperscript{551} ‘In that connection, it must first of all be pointed out that the Commission’s suggestions cannot bind the Court and merely constitute a useful point of reference (…) Similarly, while guidelines such as those in the notices of the Commission do not bind the Court, they do help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty’, judgment of the CJEU of 4 June 2009, \textit{Commission v Greece}, Case C-109/08, para. 27; judgment of the CJEU of 12 July 2005, \textit{Commission v France}, Case C-304/02, para. 85; and judgment of the CJEU of 14 March 2006, \textit{Commission v France}, Case C-177/04, para. 70.
may only impose payment ‘not exceeding the amount specified by the Commission’. Therefore, the amount specified by the Commission at the pre-litigation stage (and, therefore, respect for the levels self-imposed by the Commission) is much more significant in the procedure under Article 260(3) TFEU than that under Article 260(2) TFEU. As a result, in this procedure it will also be much more important for the Member State alleged to have failed to fulfil an obligation to challenge the penalty which the Commission proposes to request: if it succeeds in convincing the Commission to request lower amounts, it may pay less attention to the assessment that the CJEU makes; in the case of Article 260(2) TFEU, on the other hand, the claims that it submits in the pre-litigation stage before the CJEU will be as or more important than those it has submitted previously, in the pre-litigation stage, to the Commission, since, regardless of the proposal made by the latter in its request, the final decision lies with the CJEU.

6. THE COMPLAINANT AND THE ACTION FOR FAILURE TO FULFIL AN OBLIGATION

KEY FINDINGS

- The activities of complainants are vital in helping to identify instances of failure by Member States to fulfil obligations, but this does not transform them into persons party to the action for failure to fulfil an obligation.

- The rights of complainants depend on the entity with entitlement to which they submit their complaint. Nevertheless, in all circumstances the rights conferred upon complainants by primary law must be respected.

- If complainants bring a matter before the Commission, this does not in any way lessen the broad discretion conferred upon it by the Treaties in connection with the action for failure to fulfil an obligation. Nonetheless, it must fulfil its undertakings with regard to providing reasons for its decisions in the pre-litigation stage and informing the complainant of its actions.

Under the Treaties, no entity other than those already referred to (Commission, Member States, EIB and ECB) is entitled to bring an action for failure to fulfil an obligation. Although there may be entities who have, in a particular case, a legitimate interest that has been damaged by the failure of a Member State to fulfil an obligation, the EU’s legal order does not confer the said entitlement upon anyone else. The only thing that a person in the above situation can do is to bring a complaint concerning the alleged infraction before the entities entitled, so that they, if applicable, may initiate the procedure. The issue is what sort of protection extends to him or her as a mere complainant. It should also be noted that the complainant will occupy this position, whatever it may be, at a stage even earlier than what we have referred to as the pre-litigation stage.

None of the provisions governing the action for failure to fulfil an obligation refer to a possible complainant. It is a matter of indifference how the Commission (or the Member States, or the other entities entitled) become aware of possible failures by Member States to fulfil obligations. Among many other circumstances, information offered by some person may be
the source, and in fact is so very often\footnote{The Commission has on numerous occasions stated the great significance of complainants as sources of information. In 2007, 35.9\% of cases involving failures to fulfil obligations initiated by the Commission originated in a complaint, and this figure rose to 54\% in 2008. 25th annual report from the Commission on monitoring the application of Community law (2007), COM (2008), 777; 26th annual report on monitoring the application of Community law (2008), COM (2009), 675.}. What this person formulates is, strictly speaking, merely a complaint. This is the case regardless of the particular language used to dress it up (complaint, request, petition, etc.). That is to say, under no circumstances is he or she, strictly speaking, making a claim. Therefore, the person is, simply, a complainant.

Anyone may be a complainant, whether a public or private entity, a natural or legal person, which means that individual citizens, civic associations, trading companies, constitutional or statutory bodies, universities, chambers of commerce, professional associations, etc. may all act as complainants, provided that, in each case, their respective procedural rules allow them to do so. The same can be said in connection with entities belonging solely to the EU’s structure and, in particular, regarding Community bodies or institutions without entitlement to bring an action (European Parliament, European Ombudsman, Council, agencies, etc.): any of these may act as a complainant. Moreover, nothing stands in the way of, and it may even be a matter of course for, entities that are entitled to bring an action for failure to fulfil an obligation themselves to act, if they prefer to do so, as complainants (in fact, this seems to be the usual practice of Member States in relation to the Commission, as far as can be deduced from the very rare use that the Member States have made of Article 259 TFEU).

Although, as has been indicated, these complainants may have a certain legitimate interest, the existence or absence of such an interest is, in reality, irrelevant. In fact, alongside complainants with a legitimate interest there may be other complainants who may have no interest at all and who, nonetheless, will receive exactly the same treatment as the former\footnote{The CJEU has had occasion to state expressly that it is irrelevant for the purposes of the action for failure to fulfil an obligation that the Commission is acting on the basis of complaints submitted by persons who have no legitimate interest. Thus, the judgment of the CJEU of 22 April 2010, Commission v Spain, Case C-427/07, para. 77, deemed that ‘the argument of the Kingdom of Spain that the Commission decided to institute the present proceedings for failure to fulfil obligations following complaints lodged by parties having no connection with the contested procedure, and not by other tenderers actually or potentially interested in the award of the concession at issue, cannot succeed’.}.

Certainly, any of these complainants may bring a matter before the Commission, and it is not out of the question that it may also bring the matter before other bodies which are entitled (for example, before a Member State particularly sensitive to the failure to fulfil an obligation, which would not necessarily have to be its own Member State) in order for them to exercise their judicial prerogatives. It is even possible for one person to be able to bring the same failure to fulfil an obligation before various entities entitled to bring an action at the same time, thus increasing the likelihood that one of these might end up bringing an action for failure to fulfil an obligation.

Without prejudice to what is said below in connection with the CFREU, the treatment to which complainants have a right will depend upon the body entitled to bring an action which they contact. In other words, each body entitled to bring an action may decide, in principle, what treatment it will give to those who choose to act as complainants in connection with failures by a Member State to fulfil an obligation; therefore, such treatment may be different where different bodies are approached. In fact, the rights which the Commission may grant to those who come before it as complainants do not have to be observed by the Member States in relation to those who come before them as complainants. Nor do they even have to be observed by the other two EU institutions which are also entitled to bring these actions (the EIB and the ECB), even though the latter should perhaps be qualified with regard to the
rights of complainants that have been recognised, in general terms, by the case-law of the CJEU and by primary law, to which we will refer below.

Similarly, the mechanisms for protecting the rights which the complainant has, in each case, also vary, depending on the entity entitled to bring an action. Thus, respect for the rights granted to complainants by the Commission will be protected by the European Ombudsman and guaranteed by the CJEU. The rights which each one of the Member States may have granted to its complainants will, for their part, be protected in accordance with the provisions of their respective internal legal systems and through their national bodies.

In any event, it seems possible to state that it is within the context of the EU that complainants’ rights have received the greatest degree of recognition and, more specifically, in relation to complainants who bring a complaint before the Commission. In this respect, there is considerable administrative experience and a rich case-law, partially based on some provisions of primary law, which have been added through the adoption of various provisions of ‘soft law’ by the Commission itself. This differing origin of the rights granted to complainants bringing a complaint before the Commission should not be forgotten, since it is key in determining how far the Commission is bound by these rights.

In fact, the foundation for the rights of complainants can be found in the text of the Treaties and, to that extent, it is compulsory for the Commission (and for the other EU institutions) to respect them. We refer, firstly, to the right ‘to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language’, currently listed as one of the rights of EU citizens in Article 20(2)(d) TFEU and, in similar terms, although referring to a much wider range of persons, in Article 41(4) of the CFREU. Secondly, we refer to the right of ‘every person (...) to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union’, according to the provisions of Article 41(1) CFREU, which includes the right to have any complaints which they might submit handled, as has been recognised by the case-law.

Thirdly, we refer to the right ‘of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy [Article 41(2)(b) CFREU, in conjunction with Article 15(3) TFEU]. Fourthly and finally, we refer to the right, which becomes an obligation for the administration, for it to give reasons for its decisions [Article 41(2)(c) CFREU].

The recognition of these rights at the highest level makes it possible to assert that they must be respected, at least, by all the EU institutions that are entitled to bring an action for failure to fulfil an obligation, namely not only by the Commission, but also by the EIB and the ECB. It is more open to question, although it cannot be ruled out, whether complainants also have the same rights when they bring a matter before the Member States. The wording of Article 51(1) CFREU makes it possible to suggest this: ‘the provisions of this Charter are addressed to the institutions and bodies of the Union (…), and to the Member States only when they are implementing Union law’. It is not certain whether making use of Article 259 TFEU is an

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554 In fact, whereas Article 20(2)(d) TFEU enshrines a right belonging to ‘citizens of the Union’, Article 41(4) CFREU extends this right to ‘every person’.

555 It should be acknowledged, however, that the said case-law has been based on subjects relating to State aid, which might have resulted in a particular qualification to the Commission’s obligation to deal appropriately with the complaints submitted to it. In any event, see the judgment of the CJEU of 2 April 1998, Commission v Sytraval, Case C-367/95, para. 62, ‘the Commission is required (...) to conduct a diligent and impartial examination of the complaint’, and the judgment of the Court of First Instance of 30 January 2002, max.mobil, Case T-54/99, para. 48: ‘the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41(1) of the Charter of Fundamental Rights of the European Union (…) confirms that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union’.
instance of ‘implementing’ Union law, but what is clear is that this is a prerogative granted by Union law and not by national legal systems.

Alongside these observations, and as has been alluded to previously, the Commission, in light of these principles and (at least at first) the reports submitted by the European Ombudsman to the European Parliament relating to its maladministration, began to publish certain documents, which were gradually expanded and consolidated, in which it makes public the internal guidelines for handling complaints submitted to it under Article 258 TFEU and, as a result, the complainants’ rights it recognises.

In these documents, the Commission lays particular stress on the fact that these rights do not reduce by one jot its discretion in relation to strictly procedural decisions which it takes pursuant to Article 258 TFEU (and, it should be added, also pursuant to Article 259 and Article 260 TFEU). In particular, the Commission is careful to point out that complainants do not have a right, even if the infringement is confirmed, to ensuring that the Commission instigates the pre-litigation stage nor that it brings an action nor that it does so within a certain time-limit. On this point, the CJEU has consistently stated that actions for omission (where the Commission does not take action) and actions for annulment (of a decision by the Commission to archive the complaint which, in any case, does not meet the requirements to be appealable under Article 263.4 TFEU) are inadmissible. It has also pointed out that the Commission’s discretion in this sphere also relates to the decision on the most appropriate time to instigate (or continue) procedures in an action for failure to fulfil an obligation. There is no need to object to this, since it clearly follows from the Treaties (as well as the case-law of the CJEU, as we have indicated).

However, precisely because it also follows clearly from the Treaties, the Commission’s statements to the effect that the rights granted to complainants merely constitute an indication of its normal practice and that, therefore, they may be abandoned at any moment, must be rejected. This can only be the case with the rights which the Commission has granted on its own initiative, but not, therefore, with the rights which are listed in primary law and to which we have already referred.

This is not the appropriate place to dwell on the effectiveness of these rights or possible ways of improving them. It is sufficient to make three final statements:

- Firstly, it is necessary to be aware that, in the long term, the route of strengthening the complainant’s position is unsuccessful. Given his or her institutional position, the complainant remains in any event at the margin of an action for failure to fulfil an obligation, with which he or she is only indirectly linked and, at best, at a stage prior to initiation proper (after this, the most the complainant can aspire to is that he or she is kept informed of the various procedural stages and the Commission’s decisions on them; under no circumstances does the Commission have to make its reasons for these decisions public).

- Secondly, a real qualitative change in relation to the position of the complainant would only be possible in the event that he or she in fact ceased to be a complainant. On this point, there was nothing to stop the authors of the Treaties having decided, in the past (or stopping them from deciding in the future) to extend

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556 On this point, it is usual to point to the early judgment of the CJEU of 1 March 1966, Lütticke, Case 48/65; the judgment of the CJEU of 14 February 1989, Star Fruit, Case 247/87, paras. 11-13; or the judgment of the CJEU of 17 July 1998, Sateba, Case C-422/97, para. 42.

557 On this point, see Melanie Smith, ‘Administrative procedures linked with Article 258 TFEU proceedings: an academic perspective’, document submitted to this Conference.
the small number of entities that are currently entitled to bring actions for failure to fulfil an obligation. In fact, and above and beyond the highly justified reasons relating to wishing to avoid an increase in litigation, there is no reason to oppose any entity with a legitimate interest being able to bring a Member State that is contravening EU law before the CJEU.

- Thirdly, and finally, it should not be forgotten that complainants have at their disposal other mechanisms that are capable, at least, of neutralising failures by a Member State to fulfil obligations: the direct effect of directives, consistent interpretation, financial liability of the Member State in default, etc.
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NOTE

Abstract
This study provides an overview of administrative proceedings in the area of EU competition law, more in particular, Articles 101 and 102 Treaty on the Functioning of the European Union and merger control, while focusing on different levels of procedural protection for complainants, interested third parties, and parties subject to investigation. It thereby aims to provide insight as to where – at a practical level – the prevailing procedural provisions provide an effective safeguard for the parties involved and where there is scope for improvement. The study concludes that the current body of procedural safeguards is a rich source of inspiration for any envisaged horizontal legislation concerning administrative procedures.
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ECMR</td>
<td>Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the 'EC Merger Regulation')</td>
</tr>
<tr>
<td>Form CO</td>
<td>Official form for standard merger notifications</td>
</tr>
<tr>
<td>Short Form CO</td>
<td>Official form for simplified merger notifications</td>
</tr>
<tr>
<td>Form RS</td>
<td>Official form for referral requests</td>
</tr>
<tr>
<td>IR</td>
<td>Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (the 'Implementing Regulation')</td>
</tr>
<tr>
<td>MoR</td>
<td>Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (the 'Modernization Regulation')</td>
</tr>
<tr>
<td>NCA</td>
<td>National Competition Authority</td>
</tr>
<tr>
<td>SO</td>
<td>Statement of objections</td>
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INTRODUCTION

The Working Group on EU Administrative Law is taking stock of the administrative law acquis at EU level. This exercise is performed with the wider objective of developing horizontal administrative procedural rules. The aim is to, where relevant, draw inspiration from past experiences with administrative proceedings in the areas of EU law where such administrative proceedings are highly developed.

I was asked to (i) provide an overview of administrative proceedings in the area of EU competition law, more in particular, Articles 101 and 102 of the Treaty on the Functioning of the European Union (‘TFEU’) and merger control; (ii) focus on different levels of procedural protection for complainants, interested third parties, and parties subject to investigation; and (iii) provide insight as to where – at a practical level – the prevailing procedural provisions provide an effective safeguard for the parties involved and where there is scope for improvement.

Proceedings at the national level, or the scope for judicial review before the European Courts, are not explored. Given the wealth of case-law, the Commission’s decision-making practice and of Commission Notices on distinct aspects of the procedure, the present memo is necessarily limited to a cursory overview, without aspiring to be exhaustive. More detailed guidance can be found in the different Commission Notices regarding, for instance, the ‘handling of complaints’ or ‘access to file’, in the Commission’s ‘Best Practices’ for mergers and antitrust cases respectively, as well as in a variety of authoritative handbooks focusing specifically on EU competition procedures.

Given the fundamentally different nature and the practical differences between antitrust and merger procedures, both will be dealt with separately. Section 2 will first look at the antitrust procedure. Section 3 will subsequently elaborate upon the merger procedure.

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1. PROCEEDINGS CONCERNING ARTICLES 101 AND 102 TFEU

Proceedings at the EU level concerning Articles 101 TFEU (regarding agreements and concerted practices that are restrictive of competition) and 102 TFEU (regarding abuse of a dominant position) are governed by two key legal instruments, notably Regulation 1/2003 (the Modernization Regulation, hereafter ‘MoR’) and Regulation 773/2004 (the Implementing Regulation, hereafter ‘IR’).

Other relevant Commission documents relevant for EU antitrust proceedings are:

- Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 EC and Council Regulation (EC) No 139/2004\(^{561}\)
- Notice on the Handling of Complaints by the Commission\(^{562}\)
- Commission Notice on cooperation within the Network of Competition Authorities\(^{563}\)
- Commission Notice on Immunity from fines and reduction of fines in cartel cases\(^{564}\)
- Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003\(^{565}\)
- Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Regulation 1/2003\(^{566}\)

It should also be noted that the Commission is working on Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU (hereafter ‘Best Practices’) as well as on Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (hereafter ‘Guidance’).\(^{567}\) Both drafts were published for consultation on 6 January 2010.\(^{568}\) Interested parties could submit comments until 3 March 2010.\(^{569}\) At the time of writing of this contribution, 28 February 2011, the final versions of the Best Practices and the Guidance are not yet published. Our contribution will take into account the improvements suggested by the draft Best Practices and Guidance and consider those to be in place already. Suggestions for improvement will, therefore, assume the existence


\(^{563}\) Commission Notice on cooperation within the Network of Competition Authorities, \textit{OJ} 2004, C 101/43.

\(^{564}\) Commission Notice on Immunity from fines and reduction of fines in cartel cases, \textit{OJ} 2006, C 298/17.


\(^{567}\) At the same date, the Commission also published Draft Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases.

\(^{568}\) The consultation document and responses can be found at http://ec.europa.eu/competition/consultations/2010_best_practices/index.html

\(^{569}\) See footnote 568.
of the Best Practices and Guidance. This approach is warranted as the Commission indicated that it would already start applying practices described in the documents.\textsuperscript{570}

EU antitrust proceedings can essentially be initiated as a result of three different events:

- as a result of a \textit{complaint} by an undertaking, an individual or (exceptionally) a Member State (either a formal complaint in accordance with Article 5 IR or a more informal complaint);\textsuperscript{571}
- at the Commission’s \textit{own initiative} (\textit{ex officio}),\textsuperscript{572} or;
- pursuant to information submitted by a cartel member acting as a \textit{whistleblower} in return for immunity/reduction of fines (under the Leniency Notice)\textsuperscript{573}.

At any point in time, the Commission may decide to close its investigation. In the event of an \textit{ex officio} investigation or leniency application, such action stops the investigation. However, in case of a formal complaint, further procedural safeguards have been put in place: the complainant is heard, the Commission has to take a decision and, as an ultimate remedy, the complainant can appeal the Commission’s decision to the General Court.

Below we will first describe the investigative phase, i.e., the powers of the Commission and the rights of undertakings under investigation, complainants, and third parties up to the point where the Commission decides (i) to issue a Statement of Objections, (ii) that it intends to close the investigation, or (iii) that commitments may be discussed.

The second part will then focus on particular procedural rights in case the Commission intends to adopt a prohibition decision. Part three will discuss more in detail the procedure for (i) taking a commitment decision and (ii) rejecting a formal complaint. Finally, the last section will set out some considerations on adopting and publishing a decision.

Where useful, we will make suggestions for improvement\textsuperscript{574}.

\textbf{1.1. The investigative phase (first phase)}

\textbf{1.1.1. The Commission’s Powers of Investigation}

Insofar as the Commission decides that a case merits further scrutiny (and does not re-allocate the case to a national competition authority (hereafter ‘NCA’)),\textsuperscript{575} the Commission

\textsuperscript{570} Note, however, that the Best Practices do not deal with specific procedures. The Best Practices, at footnote 4 mention imposing fines on undertakings having provided misleading information. Other examples could be, e.g., fines for obstructing the investigation or breaking the seal during a dawn raid. Neither do they cover decisions on finding inapplicability (Article 10 MoR) or decisions on interim measures (Article 8 MoR).

\textsuperscript{571} In order to submit a formal complaint, interested parties should show a legitimate interest in the sense of Article 5 IR and should submit a completed version of Form C, annexed to the implementing regulation.

\textsuperscript{572} Note that investigations started by the Commission as a result of informal complaints, such as e-mails, letters, etc. will also be considered \textit{ex officio} investigations.

\textsuperscript{573} Limited to cartels, the leniency notice does not cover other types of agreements (horizontal or vertical) caught by Article 101, nor abusive behavior prohibited by Article 102. See Commission Notice on Immunity from fines and reduction of fines in cartel cases, \textit{OJ} 2006, C 298/17, \textsection 1.

\textsuperscript{574} Our suggestions for improvement are by no means unique as many of them have also been made in at least one reaction the Commission received during the public consultation on the Best Practices.

\textsuperscript{575} For the concept of best placed competition authority, see the Commission Notice on cooperation within the Network of Competition Authorities, \textit{OJ} 2004, C 101/43, \textsection 8.
can use its powers of investigation, as laid down in Articles 17-22 MoR. Three such powers are quintessential for present purposes and will be discussed below.

It should be noted that the Commission’s exercise of its investigative powers is not contingent upon the ‘initiation of proceedings’, viz. the formal decision by which the Commission indicates its intention to adopt a decision under Regulation 1/2003 with regard to possible infringements of Article 101 and/or 102 TFEU (Art. 2(3) IR). According to Article 2(1) IR, proceedings may be initiated at any time throughout the investigative phase, but no later than the date on which it issues a preliminary assessment with a view to a ‘commitment decision’ (Art. 9(1) MoR), a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which it publishes a concise summary of the case (Art. 27(4) MoR), whichever is the earlier. Unless this would harm the investigation, the decision to open proceedings can be made public (via DG COMP’s website and a press release), albeit that the parties subject to the investigation should be informed first. Complaints may also be rejected without initiating proceedings (Art. 2(4) IR).

1.1.1.1. Requests for information

First, the Commission is empowered to require undertakings and associations of undertakings to provide it with all necessary information. Such request can be addressed to undertakings that are the subject of the investigation but also to any other undertaking the Commission assumes will have relevant information, e.g., competitors, customers, suppliers, market research companies, etc.

The Commission may thereby choose to issue a ‘simple request’ (Art. 18(2) MoR) or a ‘decision’ (Art. 18(3) MoR). The main difference between the two is that in the former case, the addressee of the request is not obliged to respond, whereas in the latter case, there is a legal duty to do so (within the time-limit fixed by the Commission). Experience shows that the Commission mostly uses simple requests, even when it concerns requests addressed to the undertaking(s) under investigation.

Fines may be imposed should the addressee (intentionally or negligently) submit incorrect or misleading information (Art. 23(1) MoR). In addition, in case of a ‘decision’ in the sense of Article 18(3) MoR, fines can be imposed when the addressee submits incomplete information or fails to reply within the fixed time-limit.

In view of the sanctions attached to not fully responding to such requests, procedural safeguards have been put in place. The Commission must state the legal basis and the purpose of the request, specify what information is required, fix the time-limit for reply and identify possible penalties under the MoR. In the latter case, the Commission must also make explicit the right to have the decision reviewed by the Court of Justice.

The Commission enjoys a wide margin of appreciation in requesting information, although it must still have regard to the principle of proportionality and refrain from going on a

576 The opening of proceedings relieves the national competition authorities of their competence to apply Articles 101-102 TFEU (Art. 11(6) MoR). See also Commission Notice on cooperation with the Network of Competition Authorities, OJ 2004, C 101/43, § 52.
578 Up to 1% of the total turnover in the preceding business year.
579 An application for annulment must be lodged at the General Court. An appeal against the General Court’s judgment must be filed with the Court of Justice.
complete ‘fishing expedition’.\(^{580}\) Furthermore, the principle of protection against self-incrimination\(^{581}\) remains in full force. According to the Commission’s Best Practices, the time-limit set upon the addressees will normally be at least two weeks from the receipt of the request.\(^{582}\) If the scope of the request is fairly limited, it may, however, be reduced to less than one week. Conversely, addressees may ask for an extension of this deadline through a written and motivated request.

One of the recurring criticisms on the request for information is the language in which the requests are drafted. The Best Practices indicate that the 'simple requests' will always be in English.\(^{583}\) However, this is not always a language that is understood by the recipient of such requests. The cover letter will be in the language of the location of the addressee and will indicate that translations can be requested. In practice, obtaining translations takes time, thus often necessitating a request for extension of the deadline, as explained hereafter. Therefore, proceedings would be streamlined if the time-limit is automatically extended by the time it takes for the translation to arrive at the addressees.

Indeed, the time-limits, although not binding in case of a simple request, are often very tight, especially when the request comprises numerous questions on multiple issues. The Best Practices indicate a time-limit of at least two weeks, but in practice it will take an undertaking at least four weeks to respond. This requires asking for an extension of the deadline at least once, which unnecessarily burdens both the undertakings concerned and the Commission.\(^{584}\) Therefore, automatically granting a month in case of a request does not appear to be exaggerated. Furthermore, when requests are sent out just before a holiday period, it would be wise to automatically extend the deadline by at least the duration of the public holiday.\(^{585}\)

1.1.1.2. **Surprise inspections – dawn raids of undertakings and of private homes**

The Commission may also conduct inspections of undertakings and associations of undertakings (Art. 20 MoR). In the course of these ‘surprise inspections’ or ‘dawn raids’, the Commission is notably empowered to enter premises; examine books and other records (including electronic records); take or obtain copies or extracts from them (insofar as relating to the subject-matter and purpose of the inspection); seal premises, books or records to the extent necessary for the inspection;\(^{586}\) ask for explanations of facts or documents and record the answers.\(^{587}\) As will be explained in more detail below,\(^{588}\) the Commission has to respect legal professional privilege and the privilege against self-incrimination.


\(^{581}\) Explained in more detail below at footnote 44.

\(^{582}\) Best Practices, §§ 34-36.

\(^{583}\) Best Practices, §26.

\(^{584}\) Imagine twenty requests for information are sent out (a number that is not uncommon), in a worst case scenario the Commission has to respond to twenty requests for extension, sometimes even more if the additional extension is insufficient.

\(^{585}\) Typical examples are requests sent out before the Christmas/New Year holiday or during the summer holidays. Many employees already planned holidays and are not willing to cancel them to respond to questionnaires. Quality of the responses significantly increases when the employees concerned are granted sufficient time to draft them.

\(^{586}\) The sealing of premises may be useful when an inspection continues overnight (Recital 25 MoR suggests that seals should not be affixed for more than 72 hours). In 2008, the Commission imposed a fine of € 38 million on E.ON for breaching a seal during an inspection. See Commission Decision C(2008) 377 final of 30 January 2008 relating to a fine pursuant to Article 23 paragraph 1 lit. e) of Council Regulation 1/2003 for breach of a seal. The decision was upheld by the General Court. See Case T-141/08 E.ON Energie AG v. Commission [2010] ECR I-000.

\(^{587}\) See also Article 4 IR on oral questions during inspections.

\(^{588}\) See footnote 44 and 45.
By analogy with the two modes for requesting information, the Commission can carry out inspections either on the basis of a 'written authorization' (Art. 20(3) MoR) – in which case the undertaking is under no legal obligation to submit to the inspection –, or on the basis of a 'decision' by the Commissioner for Competition (Art. 20(4) MoR) – which is compulsory. There is no obligation on the part of the Commission to announce an upcoming inspection, or to first go through the ‘voluntary’ option. Most inspections are surprise inspections based on a decision.

In case of a decision pursuant to Art. 20(4) MoR, undertakings are under a positive duty to assist Commission officials, subject to the limitations imposed by the privilege against self-incrimination and legal privilege. If the undertaking fails to cooperate, penalties may be imposed in accordance with Art. 23(1) MoR. In addition, failure to cooperate may be regarded as an ‘aggravating circumstance’ when it comes to setting the fine for an infringement of Article 101 or 102 TFEU. At the same time, in case of opposition, Commission officials are not entitled to enter forcibly premises or to open furniture. To this end they will need to rely on the assistance of the Member State, requesting where appropriate the assistance of the police (Art. 20(6) MoR). Under Articles 20(5)-(8) MoR, the Commission can indeed request the assistance of national officials (although this may require authorisation from a judicial authority according to national rules).

The Commission’s inspection practice is further explained in the Explanatory note on inspections which states, among other things, that officials may enter the premises and occupy officers without waiting for the undertaking to consult its lawyer and which indicates that the Commission will only accept a short delay (of some 20-30 minutes) before proceeding if there is no in-house lawyer available.

A controversial issue that may impinge on the rights of defence of the undertaking under investigation is the statement in the abovementioned Explanatory Note on copying information from the hard disk or other data bearers. Indeed, when faced with not having enough time to finalise its inspection, the Commission claims it has the right to make a copy of such data bearer and to put it in a sealed envelope. The envelope is subsequently opened by Commission officials at the Commission’s premises in the presence of representatives of the undertaking concerned. This practice may result in disclosure of information covered by legal privilege, a de facto fishing expedition, etc.

Where the Commission has reason to believe that the individuals responsible for cartels/abusive practices are keeping relevant information at home, it may also, in accordance with Article 21 MoR, conduct inspections at private premises. To that end, the Commission must obtain the prior authorization of the national judicial authority. The latter authority may not, however, directly challenge the necessity of the inspections.

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590 On a practical level, undertakings often allow Commission officials to enter the premises when the inspection is based on a written authorisation. Indeed, a decision can follow very quickly when the written authorisation does not open the doors.
591 Remark: these fines are imposed on the undertaking itself. Regulation 1/2003 does not provide for fines to be imposed on individuals.
592 See also Case C-94/00 Roquette Frères v. Commission, [2002] ECR I-9011.
1.1.1.3. Power to take statements

Under Article 19 MoR and Article 3 IR, the Commission has the power to take statements, by which it can conduct and record interviews with natural or legal persons for the purpose of collecting information. The interviewee is free to decline the Commission’s invitation and cannot be sanctioned for refusing to be interviewed. Nor can the interviewee be penalized for refusing to answer specific questions, for giving incorrect information, etc. (contrary to what is the case for oral explanations in the course of a dawn raid)\(^{594}\).

The interviewee will be reminded, at the beginning of the interview, of the purpose of the interview and of the Commission’s intention to make a record of the interview.\(^{595}\) A copy of the record will be made available to the interviewee for approval. The Commission can set a time-limit for corrections, after which the recording will be deemed to be the definitive statement.

1.1.2. Rights and role of the investigated parties and the complainant

Against the broad investigative powers described above, legislation, case-law and Commission practice also recognize a role for the investigated parties and the complainant in this phase of the procedure and grant them certain protective rights.

At the outset it is noted that, at the moment of the first investigative measure addressed to them,\(^{596}\) undertakings are informed of the fact that they are subject to a preliminary investigation as well as about the subject-matter and purpose of such investigation.\(^{597}\) This allows the parties concerned to verify the proportionality of the Commission’s actions and to verify that it does not exceed the scope of the investigation (e.g., by copying, in the course of a dawn raid, documents that are unconnected to the subject-matter of the investigation). Upon their request, DG COMP will also at later stages inform the parties of the status of the case.\(^{598}\) In case of complaints, the Commission as a first step often sends a non-confidential version of the complaint to the undertaking(s) that allegedly are infringing Articles 101 and/or 102 TFEU.

As for possible complainants, DG COMP normally endeavors to inform them of the action that it proposes to take within an indicative time frame of four months from the receipt of the complaint\(^{599}\).

During inspections of undertakings or of private homes, as well as during any other phase in the course of an antitrust proceeding, the undertaking(s) are entitled to assistance by legal counsel, either in-house or external. It is not a coincidence that the Commission typically accepts to wait for 20-30 minutes until the external counsel’s arrival before starting an inspection. Such assistance is needed to make sure that the scope of the investigation is respected, and that both types of privilege identified below are not neglected.

\(^{594}\) For the sake of completion, it is noted that under Article 17 MoR, the Commission can also request information (subject to penalties) in the course of a so-called sector inquiry, which may lead to the publication of a sectoral report.

\(^{595}\) Article 3(1) IR.

\(^{596}\) This may be a request for information or an inspection. In general, if an inspection visit is organized, this will occur before the company receives requests for information.

\(^{597}\) Best Practices, §14.

\(^{598}\) Ibid. DG COMP will also inform the parties when it decides not to further investigate a case.

\(^{599}\) Ibid., § 15.
Established case-law recognizes that undertakings under investigation can invoke the privilege against self-incrimination\(^{600}\). In other words, the duty to actively cooperate with the Commission does not mean that the undertaking has to incriminate itself by admitting to infringements of the competition rules. Undertakings cannot, however, refuse to produce documents on grounds of self-incrimination.

Case-law also recognizes that legal professional privilege (LPP) is attached to communications between the undertaking under investigation and an independent lawyer entitled to practice in one of the Member States (as opposed notably to in-house counsels), insofar as the documents concerned are made for the purposes and in the interests of the clients' rights of defense.\(^{601}\) In light of this case-law, the Best Practices explain that it is for the undertaking claiming LPP to adduce elements so as to justify this claim.\(^{602}\) If the Commission is not convinced, it may decide to order the production of the document(s) in question – a decision against which the undertaking may lodge a request for annulment with the General Court. In many cases, a cursory look by DG Competition officials may be sufficient to convince them that a document is protected by LPP. Should the undertaking be unwilling to allow even a cursory glance at the document and should there be indications that the document may be protectable, the Commission may opt for the ‘sealed envelope’ procedure.\(^{603}\) Note that the latter statement deviates from the procedure described by the Court of First Instance in \textit{Akzo}, where it is stated that the sealed envelope procedure \textit{will}, and not \textit{may}, be applied.

As indicated in the Best Practices, in the course of the investigative phase, the Commission may hold informal meetings (or phone calls) with the parties subject to the proceedings, complainants or third parties (either upon request or at the Commission’s own initiative).\(^{604}\) In general, the parties, complainants or third parties are invited after such meetings or substantive calls to substantiate their positions in writing. A non-confidential version of any written documentation prepared by the undertakings which attended a meeting held by DG COMP, together with a brief note prepared by the latter’s services, will be made accessible to the parties subject to the investigation at the stage of access to file (cf. infra).

A point of criticism, which came to light in \textit{Intel}\(^{605}\) is that the Commission does not draft reports of all meetings it has with undertakings. The wording used in the Best Practices does not alleviate all concerns. It can be presumed that crucial meetings will be reported on. However, in \textit{Intel}, the content of such an unreported meeting was used as incriminating evidence to find abusive behavior. The Ombudsman therefore stated, at §111: “principles of good administration require that the Commission should ensure that a proper record is made, in some form, and subsequently included in the file, of all the ‘information relating to


\(^{602}\) Best Practices, §§ 48 et seq.

\(^{603}\) In such scenario, officials may place a copy of the contested document in a sealed envelope and then remove it and bring it to DG Competition's premises. If the company brings an action for annulment and applies for interim relief, the Commission will not open the envelope and will not read the documents until the EU Courts have decided on this application for interim measures. Best Practices, §§ 50-51.

\(^{604}\) Best Practices, §§ 38-41.

The subject-matter of an investigation’ that was gathered by the Commission in the course of an investigation”.

The Commission may also, at its own initiative or upon request, invite the (individual) parties subject to the proceedings to so-called State of Play meetings. No State of Play meetings are held with complainants or third parties. One such meeting will normally be held shortly after the opening of proceedings so as to inform the parties of the issues identified and to allow them the opportunity to react initially. A second meeting is generally organized at a more advanced stage in the investigation in order to give the parties an opportunity to understand the Commission’s preliminary views. Exceptionally, the Commission may also take the initiative to invite all parties involved in the investigation to a so-called ‘triangular’ meeting, if it deems it desirable to hear the views of all parties in a single meeting. In addition, it is normal practice to offer the parties subject to the proceedings an opportunity to discuss the case either with the Competition Commissioner, the Director-General, or the Deputy DG for antitrust.

Save in the context of cartel enforcement, the Commission will normally provide the parties with the opportunity of commenting on a non-confidential version of the complaint. It may also request the parties to comment on other key submissions made by the complainant or other parties or to comment on documents found in inspections.

At the end of the investigative phase, the Commission has essentially three options. First, it can issue a Statement of Objections (SO) with a view to adopting a prohibition decision. Second, insofar as commitments are being offered, the Commission may initiate the commitments procedure. Third, if the Commission finds there are no grounds to pursue the case, it may decide to close the case (e.g., by rejecting a formal complaint). Each of these options is further elaborated upon below.

1.2. Procedure leading up to a Prohibition Decision (second phase)

Once the Commission has decided to proceed to the second stage of the procedure with the aim of adopting a prohibition decision, the right of the parties under investigation to be heard becomes of key importance. Thus, Article 27(1) MoR emphasizes that the Commission ‘shall base its decisions only on objections on which the parties concerned have been able to comment.’

The current Commission practice already contains a large number of safeguards aimed at protecting the right to be heard. The most important ones will be discussed hereafter.

1.2.1. Hearing Officer

Hearing Officers are officials administratively attached to the Competition Commissioner but which are considered to be independent. They are specifically entrusted with...
ensuring that the rights of defence are safeguarded. The Hearing Officer is an independent arbiter that can review disagreements arising between DG Competition and a party to the procedure. In order to carry out its tasks, the Hearing Officer has been attributed decision-making powers concerning extension of deadlines, access to file and confidentiality.\textsuperscript{611} The Hearing Officer also organizes and conducts the oral hearings.\textsuperscript{612} He/she also decides on the admission of third parties to the oral hearings.\textsuperscript{613} At the end of the procedure, the Hearing Officer drafts a report on whether the procedural safeguards have been respected throughout the proceedings.

The Hearing Officers’ tasks during the investigative phase are very limited, but they sometimes intervene in discussions concerning the right to be informed about the scope and purpose of the investigation, the privilege against self-incrimination, and the right to be represented by a lawyer. Sometimes they also intervene in confidentiality issues during the first phase.\textsuperscript{614} It is generally felt within the legal community that the Hearing Officer’s role only comes into play after issuing the SO, contrary to what may be the perception when reading the Guidance. Indeed, the Hearing Officer should be a protector of the rights of defence throughout the entire procedure. This could be achieved by broadening the current mandate of the Hearing Officer and making sure that he/she is aware of all ongoing investigations.

The Hearing Officer’s decisions are in principle not open to separate judicial review. One exception to this are the ‘Article 9 Letters’ whereby the Hearing Officer does not accept a claim for confidentiality. The Guidance explains in more detail the procedure that must be followed when confidentiality is discussed.\textsuperscript{615} This procedure is also referred to as the “Akzo”-procedure.\textsuperscript{616} The Hearing Officer verifies first whether the information is confidential per se. If the answer is in the affirmative, the Hearing Officer subsequently carries out a balancing test, weighing the interest in confidentiality for the undertaking against the addressee’s interest to be effectively heard on the information. When the Hearing Officer comes to the conclusion that partial or full disclosure is required, the information provider will be (i) informed via a ‘pre-Article 9 letter’ and (ii) granted a deadline within which to react. If the information provider continues to object to the disclosure, the Hearing Officer – if he maintains his position – will issue the Article 9 decision. The information provider can appeal that decision to the General Court and can request interim measures. The information provider is requested to inform the Hearing Officer of its intentions to initiate such proceedings as the Hearing Officer will wait to disclose the disputed information until the President of the General Court has issued an order.

The function was introduced as a reaction to persistent criticism as to the poor observance of the rights of defence in the course of competition proceedings before the Commission, yet this development has admittedly failed to put an end to these objections.

One of the criticisms that can be voiced is that the Hearing Officer comes from within the ranks of the Commission. As such, it creates at least the impression that a Hearing Officer will not always be impartial.

\textsuperscript{611} Terms of Reference, Articles 10, 8 and 9 respectively.
\textsuperscript{612} Terms of Reference, Article 4(1).
\textsuperscript{613} Terms of Reference, Article 6 and 7.
\textsuperscript{614} Guidance, §11.
\textsuperscript{615} Guidance, §§19-24.
1.2.2. Statement of Objections (‘SO’) and written reply

An important implication of the parties’ right to be heard in this context pertains to the obligation on the part of the Commission to inform the parties of the case against them. To this end, the Commission will issue a so-called Statement of Objections (SO) (Art. 10(1) MoR), which sets out the Commission’s factual findings, its preliminary legal analysis, as well as the duration and gravity of the alleged infringement of Articles 101 and/or 102 TFEU. The SO will also indicate whether the Commission intends to impose a fine and what behavioral or structural remedies (if any) it is contemplating. While the SO is an important catalyst in the second stage of the proceedings, the factual findings and legal views contained in the SO are not binding upon the Commission. The SO’s purpose is to inform the parties and, based on the parties’ response, the Commission can modify its views on the facts, the legal findings or the amount of the fines. Therefore, the SO is not an act against which an action for annulment can be brought.

By analogy with the parties under investigation, Article 6(1) IR stipulates that complainants shall be provided with a copy of the SO (albeit a non-confidential version) and will be granted the opportunity to express their views. Furthermore, Article 13(1) IR states that other natural or legal persons that apply to be heard and show a sufficient interest may submit their views in writing to the Commission.

Within the time limit set by the Commission – this may range between a minimum of four weeks (Art. 17(2) IR) to 2 or 3 months for more complex cases – the addressees of a Statement of Objections can submit their written replies. Furthermore, the Commission may give one or more of the parties a copy of (excerpts of) the non-confidential version of the (other) parties’ written replies to the SO and give them the opportunity to comment. The Commission may also decide to do so with respect to complainants and third parties who have a sufficient interest to be heard.

An important imperfection in the current system is that an undertaking under investigation may not obtain access to the written replies of any of the other undertakings under investigation. Indeed, the wording of the Best Practices appears to leave room for unequal treatment of the undertakings concerned as the Commission “may” decide to grant access to another undertaking’s response. However, as statements made by one undertaking may affect the legal position of another undertaking, access should be organised, just as is the case with submissions made by any undertaking before the SO.

1.2.3. Access to the file - Confidentiality

In order to prepare their written replies to the SO (cf. infra) and to organize their defense, the addressees of the SO are granted access to the Commission’s file, in accordance with Article 27(2) MoR and Articles 15-16 IR, as elaborated further in the Commission’s Notice on access to file (hereafter ‘Access Notice’). According to well-established case-law 622

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618 Shortly after receipt of the SO by its addressees, the Commission will normally publish a press release setting out the key issues (with the exception of settlement procedures in the context of cartels). Best Practices, § 79.
619 As will be explained below, complainants do not have access to the Commission’s file.
620 Best Practices, § 87. Upon reasoned request, parties may also request an extension of the deadline (Art. 17(4) IR).
621 Best Practices, § 89.
622 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 2005, C 325/07. As a general rule, several provisions emphasize that access to the file is granted on condition that it
‘access to the file’ is considered an integral part of the right to be heard. It entails an obligation for the Commission to make available to the undertakings under investigation all documents, whether in their favour or otherwise, which it has obtained in the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.\textsuperscript{623} In light of the ‘equality of arms’ between the Commission and the parties investigated, it is not for the Commission alone to decide which documents may be of use for the latter’s defence.\textsuperscript{624} Accordingly, the Commission must give the advisers of the undertaking concerned the opportunity to examine all documents which may be relevant so that their probative value for the defence can be assessed.

Case-law holds that for the failure to communicate an \textit{exculpatory} document to give rise to a breach of the rights of the defence, it is sufficient for the undertaking to show that it would have been able to use the exculpatory document in its defence.\textsuperscript{625} As for incriminating documents, the undertaking must show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence.

As indicated in Article 15(2) IR, ‘access to the file’ does not extend to internal documents of the Commission,\textsuperscript{626} nor to ‘business secrets’\textsuperscript{627} or ‘other confidential information’.\textsuperscript{628} In order to allow for the protection of sensitive information,\textsuperscript{629} Article 16 IR provides that parties making known their views or providing information in the course of the procedure are required to clearly identify any material which they consider to be confidential, giving reasons, and to provide a separate non-confidential version. If parties fail to do so within the specified time, the Commission may assume that the documents or statements concerned are non-confidential (Art. 16(4) IR).

When conflicting views arise as to the confidential nature of certain documents/statements – as is often the case –, the matter will be dealt with by the Hearing Officer.

\textsuperscript{623} See e.g. Case T-7/89 Hercules \textit{v. Commission} [1991] ECR II-1711. Now enshrined in Article 15(2) IR.

\textsuperscript{624} See e.g., Case T-30/91 Solvay \textit{v. Commission} [1995] ECR II-1775.

\textsuperscript{625} Case C-204/00 P Aalborg Portland A/S and others \textit{v. Commission} [2004] ECR I-123, §§ 74-75: “It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence (…), in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission’s assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine (…).” Also Case T-161/05 Hoechst GmbH \textit{v. Commission} [2009] ECR II-3555 and Case T-53/03 BPB \textit{v. Commission} [2008] ECR II-1333.

\textsuperscript{626} Access Notice, §12. The underlying idea being that these documents can neither be exculpatory nor incriminating of themselves. Remark: Article 15(2) IR also excludes access to correspondence between the Commission and the NCAs or between the latter.

\textsuperscript{627} Access Notice, §18: “In so far as disclosure of information about an undertaking’s business activity could result in a serious harm to the same undertaking, such information constitutes business secrets. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking’s know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.”

\textsuperscript{628} Access Notice, §19: “The category ‘other confidential information’ includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking.” This applies e.g. to information whose disclosure would give rise to retaliatory measures against its author. Remark: a special treatment is moreover provided in respect of corporate statements made by applicants for Leniency. See: Commission Notice on immunity from fines and reduction of fines in cartel cases, \textit{OJ} 2006, C 298/17, §§ 33-34.

\textsuperscript{629} Cf. Articles 28 (‘professional secrecy’) and 30 MoR.
Given the difficulties relating to access to file and the scope of confidentiality, the Commission’s Best Practices spell out two alternative procedural practices, whereby (for reasons of efficiency) information providers would (partially) waive their rights to confidentiality in return for which the party being granted access would limit access to the information to a restricted circle of persons (e.g., only to external counsel), viz. the ‘negotiated disclosure procedure’ and the ‘data room procedure’.

By contrast, in accordance with the Court’s AKZO judgment, complainants do not enjoy the same access to the file as the parties under investigation (otherwise undertakings could lodge complaints simply in order to obtain access to other undertakings business secrets). Other natural or legal persons that apply to be heard and show a sufficient interest shall be informed by the Commission in writing of the nature and subject-matter of the procedure. However, no access to the file whatsoever is granted.

### 1.2.4. Oral Hearing

Parties under investigation not only have the right to reply in writing to the Commission’s SO, they also have the right to call for an oral hearing, so as to further develop their written arguments (Art. 12 IR). Oral hearings are held behind closed doors. They are held in the presence of senior management of DG Competition, representatives of the member states and are supervised by the Hearing Officer (Art. 14 IR). The Hearing Officer will report on the hearing (in light of the parties’ right to be heard) to the Competition Commissioner. This report, however, is not made available to the parties. Only the Hearing Officer’s (much shorter) final report, which is attached to the draft decision submitted to the College of Commissioners, is made known to the parties.

In addition to the parties’ right to an oral hearing, the Commission may also, where appropriate, (and upon request) afford complainants or other natural or legal persons showing a sufficient interest, the opportunity to develop their arguments at the oral hearing of the parties (Art. 6(2) and 13(2) IR). The Commission may also invite other persons to express their views in writing or to attend the oral hearing insofar as deemed useful (Art. 13(3) IR).

It is at the oral hearing that it becomes most evident that the Commission is investigator, prosecutor and judge. Indeed, all three aspects of the Commission’s task come to the fore during the hearing.

Undertakings under investigation often are under the impression that the oral hearing offers little chance for an actual defence, let alone, are useful to convince the decision-makers not to follow the SO or, as the case may be the SO and the Supplementary SO. The closed door nature of the entire hearing also does not bode well for transparency. In regular court proceedings, the principle is that proceedings are open to the public, except when there is an explicit decision to the contrary.

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633 In fact, the Hearing Officer.
1.2.5. Supplementary Statement of Objections and Letter of Facts

Finally, when new evidence is identified which the Commission wishes to rely upon, the Commission may adopt a Supplementary Statement of Objections (hereafter “Supplementary SO”) or a Letter of Facts. The aforementioned principles pertaining to the right to be heard apply mutatis mutandis in these scenarios. However, it would appear that access to the file in this scenario is limited and leaves too much discretion to the Commission. Indeed, the process of the Supplementary SO is limited to situations where the Commission finds new evidence justifying the issuance of additional objections or modifying the intrinsic nature of the infringement with which an undertaking is charged. In other words, the wording of the Best Practices do not appear to impose a duty to disclose exculpatory evidence. Although it can be expected the Commission would communicate such information, it would contribute to legal certainty if this duty were to be included in the Best Practices.

Another issue related to the rights of defence can be taken with the Letter of Facts. This will be sent when additional evidence corroborates the objections already raised. This practice is now finally made public via the Best Practices. Even though its use is limited, it may be considered a limitation on the rights of defence as the addressees have no right to separately dispute and discuss the documents in question.

1.2.6. Possible decisions

The second phase of the antitrust procedure may give rise to a variety of Commission decisions. First, the Commission may adopt procedural decisions, for instance settling the question of the confidentiality of documents. Under Article 8 MoR, the Commission has the power to take decisions ordering interim measures, for instance, by ordering a dominant undertaking to resume supplies to a client. Article 8 MoR nonetheless makes clear that this possibility is limited to cases of urgency due to the risk of serious and irreparable damage to competition.

Otherwise, leaving aside for the moment the possibility to adopt commitment decisions under Article 9 MoR (cf. infra), Article 7 MoR allows the Commission to take a decision finding that there is an infringement of Articles 101 or 102 TFEU and requiring the undertakings to bring the infringement to an end. Thus, the Commission can adopt negative decisions, calling upon undertakings to refrain from certain conduct. Furthermore, insofar as proportionate, it can also impose positive behavioral remedies, which it did for example by ordering Microsoft in 2004 to make available certain interoperability information through its Windows operating system. If there are no equally effective behavioral remedies available (or if such behavioral remedy would actually be more burdensome for the undertaking), the Commission can exceptionally impose structural remedies, changing the structure of an undertaking, for example, by ordering the divestment of parts of the company. In practice, however, structural remedies are mainly used in the context of commitment decisions (cf. infra).

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634 Best Practices, §§ 95-98.
635 Remark: it must be recalled that the Commission may also decide to drop the case at the end of the second phase.
637 The relevant parameters are further elaborated in the European Courts’ case-law. See e.g., Case T-184/01 R IMS Health [2001] ECR II-1.
638 For an example of a judgment finding that the Commission has violated the proportionality principle when imposing behavioral remedies, see T-395/94 Atlantic Container Line AB v. Commission [2002] ECR II-875.
Article 10 MoR further enables the Commission, ‘where the public interest relating to the application of Articles 101 and 102 so requires’, to find that the cited Articles are not applicable to the case under investigation. Article 10 MoR may be relevant for exceptional cases where there is a need to clarify the law or to ensure its consistent application. In practice, however, the provision has so far remained dead letter.

Articles 23 and 24 MoR spell out the Commission’s competence to impose fines and periodic payments respectively. Fines may relate to either procedural infringements (Art. 23(1)) or to substantial infringements (Art. 23(2)). Fines for procedural infringements can go up to 1 per cent of the undertaking’s total turnover in the preceding business year. Fines for substantive infringements can go up to 10% of the undertaking’s total turnover in the preceding business year. Periodic penalty payments may be imposed as a means to compel undertakings to put an end to an infringement pursuant to a decision adopted under Article 7 MoR, but also to submit to an inspection etc. Periodic penalty payments shall not exceed 5 per cent of the average daily turnover in the preceding business year per day.

The Commission’s policy on setting fines is further explained in the 2006 Fining Guidelines, which notably identify possible aggravating or mitigating circumstances, and which acknowledge that an undertaking’s ‘inability to pay’ may exceptionally result in a reduction being granted. Another important Commission instrument concerns the 2006 Leniency Notice. This document spells out the terms and conditions under which undertakings may obtain immunity from fines when they are the first to submit evidence that enables the Commission to find a competition law infringement, or may obtain reduction in fines when they produce information of 'significant added value'. A more in-depth analysis of these mechanisms is beyond the aim of the present memo. Suffice it to note that in light of the European Courts’ unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or a periodic penalty payment (recognized in Article 31 MoR), there is considerable case-law as to the legal principles governing fining, such as the ne bis in idem principle or the proportionality principle.

Although the Leniency Notice will not be discussed in more detail, it is cause for some concern, also as regards due process and the right of defence. Many recent cartel decisions are the result of immunity or leniency applications. In other words, hardcore cartels are uncovered as a result of one or more undertakings’ initiative, rather than the Commission’s market scrutiny. As the information is sent to the Commission, and undertakings also submit corporate statements confessing their wrongdoing, there is little reason for the Commission to thoroughly investigate whether all statements and claims made actually correspond to reality. Indeed, in view of the high stakes involved – fines often amount to many million Euros – undertakings have an incentive to produce (i) evidence that allows the Commission to carry out an inspection or find an infringement of Article 101 TFEU or (ii) evidence that has a significant added value with respect to the evidence the Commission already has in its possession. For companies it becomes very difficult to defend themselves against statements from an immunity applicant when there is no documentary evidence available. These statements, however, may result in the finding that

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639 The limitation period is laid down in Article 25 MoR; the limitation period for the enforcement of penalties in Article 26 MoR.
641 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006, C 298/17.
643 This is, next to being the first, a condition for immunity.
644 This is one of the conditions for leniency.
a cartel, e.g., lasted longer or encompassed a company that effectively already had exited the cartel, thus resulting in higher fines for that company than might otherwise have been the case.

1.2.7. The settlement procedure

While applications for leniency have virtually no effect on the conduct of the procedure or the scope of the right to be heard, the situation is somewhat different in respect of cartel cases where the Commission follows the settlement procedure. Note that the Best Practices are not applicable to settlement or leniency/immunity procedures.

The settlement procedure was introduced in 2008 in order to enable the Commission to deal with complex cases more efficiently. In essence, it constitutes a simplified procedure, whereby undertakings unequivocally acknowledge their liability for a competition law infringement in return for an (additional) reduction of 10% on the fine that would otherwise have been imposed. The particular features of the settlement procedure are laid down in Article 10a IR and in the Commission’s Settlement Notice.

Under Article 10a(1) IR, the Commission may initiate the settlement procedure by inviting parties to indicate within a given time limit whether or not they are prepared to engage in settlement discussions. The undertakings will be informed by the Commission of the objections it envisages to raise against them; the evidence relied upon; non-confidential versions of any specified accessible document listed in the case file at that point in time, insofar as a request by the party is justified for the purpose of enabling the party to ascertain its position, and; the range of potential fines.

If settlement discussions progress, the Commission may set a time limit within which the parties may submit (orally or in writing) a final settlement submission, acknowledging their liability and indicating the maximum fine they would accept. In reaction thereto, the Commission may notify a statement of objections to the parties. Upon the parties’ subsequent replies to this statement of objections, confirming their commitment to settle, Article 10a IR allows the Commission to proceed, without any other procedural step, to the adoption of an infringement decision. On the other hand, the Commission is free to discontinue settlement discussions at any time (Art. 10a(4) IR).

Under the settlement procedure, investigated undertakings consent to a curtailment of their right to be heard. Thus, they confirm that they will in principle not request access to the file or request an oral hearing (Art. 12(2) IR and 15(1)a IR). The (potential) procedural rights of other actors may also be affected as a result. Thus, in cases where the settlement procedure applies, complainants will not receive a copy of the non-confidential version of the SO, but will simply be informed in writing of the nature and subject matter of the procedure (Art. 6 IR).

The Commission adopted its first settlement decision on 19 May 2010 in the DRAM cartel. In the meantime, the Commission has also adopted a so-called ‘hybrid’ settlement

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645 See, however, as regards corporate statements of leniency applicants, Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006, C 298/17, §§ 33-34.
646 Best Practices, §3.
647 Remark: the settlement procedure can fully be combined with applications for leniency.
decision, i.e., a settlement decision in a case where not all of the cartel participants agreed to settle (thus at least reducing the aspired efficiency gains).\(^{650}\) It may finally be observed that while actions for annulment are unlikely, undertakings are not legally prevented from lodging an action for annulment against settlement decisions.

### 1.3. Other aspects of the Commission’s antitrust procedure

#### 1.3.1. Closing of a case without any decision

As indicated earlier, the Commission may also at any stage of the proceedings decide to close the case. In such scenario, the parties having been subject to investigative measures will be informed thereof.\(^{651}\) If proceedings have been formally opened, or if DG Competition has otherwise made public the fact that it was investigating a given case, the fact of the closure will similarly be made public on the Commission’s website and/or via a press release\(^{652}\).

#### 1.3.2. Procedure leading up to a Commitment Decision

In cases where the Commission intends to adopt an infringement decision without, however, imposing fines (thus excluding hardcore cartels), the Commission may also opt for the commitment procedure. The essence of this procedure consists in the fact that the Commission does not find an actual infringement of competition law, but rather adopts a decision under Article 9 MoR, rendering binding (for a specified period) the behavioral and/or structural remedies offered by undertakings on a voluntary basis\(^ {653}\).

As the Best Practices indicate, undertakings may at any point in time signal their interest in discussing commitments (and preferably at an early stage)\(^ {654}\). A State of Play meeting will then be offered to the parties with the aim of assessing the ‘genuine willingness’ of the undertakings to offer effective remedies. If the meeting is constructive, the Commission will normally issue a Preliminary Assessment (replacing the SO),\(^ {655}\) summarizing the competition concerns at stake.

After receiving the Preliminary Assessment, the parties will normally have one month to formally submit unambiguous and effective commitments. If need be, a trustee can be appointed to monitor the implementation.

Before rendering the commitments binding, the Commission will first market test them. To this end, the Commission publishes the full text of the commitments on its website and issues a press release setting out the key concerns and the proposed remedies. Interested third parties are invited (sometimes actively) to submit their observations within a fixed time-limit (of no less than one month).

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\(^{650}\) Commission Press Release IP/10/985, 20 July 2010 (with regard to the animal feed phosphates cartel).

\(^{651}\) Best Practices, § 14.

\(^{652}\) Best Practices, § 70.

\(^{653}\) For the latter undertakings, the commitment procedure offers a possibility to escape a formal condemnation. From the Commission’s perspective, the procedure allows for faster proceedings and lower administrative costs. In addition, it sometimes allows the Commission to clarify its views on certain issues quicker than it would have been able to had it followed the regular procedure.

\(^{654}\) Best Practices, §§ 104 et seq.

\(^{655}\) It may also be the case that an SO was already sent to the parties. This in itself does not exclude that commitments may still be accepted.
After market-testing, a second State of Play meeting will be held. Should the market test engender a positive response, the Commission may proceed to adopting an Article 9 Decision. Otherwise, the Commission may revert to the Article 7 procedure. It may also be that the undertaking(s) offer(s) a modified version of the commitments, which then are also market-tested. Under certain conditions (e.g., in case of non-compliance with the remedies), the Commission may also reopen proceedings after having issued a commitment decision (Art. 9(2) MoR).

1.3.3. Rejection of complaints

Special rules apply when an investigation has been opened as a result of a formal complaint (by means of the submission of a 'Form C') by any ‘natural or legal person who can show a legitimate interest.’ The Commission is not obliged to handle complaints within a specific time limit, provided that it acts within a reasonable period. The Notice on Handling Complaints nonetheless indicates that the Commission proposes to take on a complaint within an indicative time frame of four months (§ 61).

Apart from the complainant’s right to be heard in the course of the procedure as considered above, the Commission, insofar as it does not wish to pursue a case, will first inform the complainant in a meeting or by phone that it has come to the preliminary view that the case (1) lacks ‘Community interest’; that (2) the complaint is insufficiently substantiated, or that; (3) the Commission has a lack of competence to deal with the case.

If, in reaction hereto, the complainant does not withdraw the complaint, the Commission shall inform the complainant by a formal letter that there are insufficient grounds for acting and will set a time-limit (of at least four weeks) for written observations (Art. 7(1) IR). In this context, the complainant also has the right to request access to the documents on which the Commission bases its provisional assessment (albeit that this access shall not extend to business secrets and other confidential information of other parties) (Art. 8 IR). If the complainant does not react within the set time-limit, the complaint shall be deemed to have been withdrawn (Art. 7(3) IR). If the complainant does respond, the Commission must either initiate a procedure (if the submissions are convincing), or decide to reject the complaint by formal decision pursuant to Article 7(2) IR. This decision is then open to judicial review by the General Court.

656 Both the Commission and the undertakings concerned may at any time decide to discontinue commitment negotiations.

657 On the application of the principle of proportionality to the Commission’s margin of discretion in accepting commitments as well as on the procedural rights of interested parties, see: Case C-441/07 P European Commission v. Alrosa [2010] ECR-000.

658 Art. 5 IR (and Annex). Remark: interested parties may also decide merely to inform the Commission of their concerns, without, however, submitting a formal complaint. In such scenario their procedural rights will be more limited. Undertakings are also required to submit their complaint to the authority most likely to be well placed to deal with the case (e.g., an NCA). Guidance on who is best placed can be found in the Commission’s Notice on cooperation with the NCAs ([2004] O.J. C-101/43, §§ 8-15).

659 The requirement of a ‘legitimate interest’ is broadly interpreted in existing case-law. See e.g. Case C-125/07 Erste Bank der österreichischen Sparkassen v. Commission, [2009] ECR I-08681. Examples of potential complainants can be found in the Commission’s Notice on the Handling of Complaints by the Commission under Article 81 and 82 EC, OJ 2004, C 101/65, §§ 35-40 (referring a.o. to consumer associations or local or public authorities).


661 The notion of ‘Community interest’ reflects the discretion of the Commission in prioritizing cases before it when allocating resources. The relevant criteria are spelled out in the Notice on Handling Complaints at § 44. See also Case T-24/90 Automec Srl v. Commission [1992] ECR II-2223.

662 E.g. because the alleged infringement is unlikely to have any effect on trade between Member States and/or because an NCA is dealing, or has dealt, with the case.

663 See Article 17(2) IR. In accordance with Article 17(3) IR, the complainant may request an extension of the time-limit.
1.3.4. Adoption and publication of decisions

Finally, a word on the adoption and publication of final decisions pursuant to Articles 7, 9 and 23 MoR. All these decisions are adopted by the Commission, upon proposal of the Competition Commissioner. Parties are provided with a certified copy of the full text of the decision as well as a copy of the Hearing Officer’s final report. Complainants shall receive a non-confidential version of the decision.

After adoption of the decision, a press-release will normally be issued and a summary of the decision will be published. In addition, pursuant to Article 30(2) MoR, a non-confidential version of the decision will be published as soon as possible on DG COMP’s website. Decisions rejecting complaints, which are of general interest, may also be made public on DG COMP’s website.

1.4. General remark on the decision making process of DG COMP

As already mentioned, the Commission currently combines the role of investigator, prosecutor and judge. This combination has been criticized in the past and opposition has become stronger in view of the fines that are being imposed on companies, particularly in the area of cartels and abuse of dominant position.

A number of member states (e.g., Belgium and Sweden) have a system where one entity carries out the investigation and drafts a SO. However, as a next step, the case is brought before an (administrative) court which then will hear all parties concerned. It is that court that will ultimately decide on the fines. Such a system appears more in line with the requirements of impartiality and independence in the proceedings as required in Article 6(1) of the European Convention on Human Rights.

It is to be expected that a challenge of a Commission decision based on this argument will be launched now that it is likely that the European Union will become a member of the ECHR as a result of the Lisbon Treaty.

2. THE EU MERGER PROCEDURE

Contrary to antitrust investigations discussed in the previous chapter, merger control proceedings are adhering to very strict timelines. Nevertheless, it is fair to say that the procedural rights of the notifying party(ies) are safeguarded to a large extent. This is the case, mainly, because of the existence of pre-notification contacts with the Commission, regular state of play meetings, multiple informal contacts, the existence of an SO, the right to a hearing, etc. Furthermore, the Commission has been put on “high alert” after the then Court of First Instance (now General Court) annulled a number of Commission decisions. This showed that effective judicial scrutiny of the Commission’s merger decisions occurs.

In accordance with Article 4(1) of the EC Merger Regulation (hereafter ‘ECMR’), every ‘concentration’ – as that term is understood in Article 3 ECMR and further explained in the Commission’s Jurisdictional Notice – which exceeds the turnover thresholds laid down in Articles 1(2) and 1(3) ECMR and which is therefore deemed to have a ‘Community dimension’, must be notified to the European Commission.

Concentrations with a Community dimension should normally be notified prior to their implementation and following the conclusion of a binding agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notifications may also be submitted at an earlier stage if the undertakings concerned demonstrate a good faith intention to conclude an agreement, or; in the case of a public bid, the acquirer has publicly announced an intention to make such a bid (Art. 4(1) ECMR).

Notified concentrations may not be put into effect or completed unless and until they have been declared compatible with the common market by the Commission or are presumed to be compatible due to the absence of a timely decision of the Commission (Art. 7(1) ECMR). Breach of the standstill obligation may give rise to penalties not exceeding 10 per cent of the aggregate turnover of the undertaking(s) concerned (Art. 14(2)(b) ECMR). Upon reasoned request, the Commission may nonetheless permit (conditional) derogations from the standstill obligation (Art. 7(3) ECMR). Article 7(2) ECMR also provides for an automatic derogation from the standstill obligation in a limited number of specific cases.

Notification in principle involves the submission of a completed Form CO together with the necessary supporting documents.

Given the large amount of information that ought to be included in a Form CO and given the concomitant workload for notifying parties, Annex II to the (Merger) Implementing Regulation identifies certain notifications that, in principle, do not raise substantial competition concerns, and which may therefore be notified by means of a Short Form CO.
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(such notifications will in turn result in a short-form decision). The Commission may nonetheless insist on the submission of a more lengthy Form CO if it considers that the conditions of Annex II are not fulfilled, or if it deems this necessary for an adequate investigation of possible competition concerns. Conversely, the Commission may waive the obligation to provide any particular information or documents, or with any other requirement specified in Form CO or Short Form CO, where it deems such obligations or requirements not necessary for the examination of the case (Art. 4(2) MIR).

2.1. The different stages of EU Merger Proceedings

2.1.1. The pre-notification stage

The Commission’s Best Practices on Merger Proceedings (hereafter ‘Merger Best Practices’) invite undertakings to contact the Commission prior to actual notification to discuss various jurisdictional and other legal issues, even in seemingly non-problematic cases. Pre-notification contacts should preferably be initiated at least two weeks before the expected date of notification (depending on the complexity of the case). They should be launched with a submission which allows the case-team to engage in a preliminary examination of the background of the transaction and its possible impact on competition. The aforementioned submission may give rise to oral or writing comments on the part of the Commission, but may also give rise to one or more pre-notification meetings.

Irrespective of whether pre-notification meetings take place, the parties are encouraged to provide a substantially complete draft of the notification at least five working days before filing a formal notification, so as to allow the Commission to comment on its adequacy.

The pre-notification stage, which takes place in strict confidence, serves various purposes. It allows parties to obtain the Commission’s views on jurisdictional issues (e.g., to assess whether the concentration indeed has a ‘Community dimension’); on the completeness of the notification (thus avoiding unnecessary delays) and the possibility of ‘waivers’ from the strict requirements of Form CO, as well as; on the appropriateness of the submission of a Short Form CO. Pre-notification contacts also allow for a more ‘tailor-made’ notification, in that the notifying party/ies can properly address concerns identified by the case-team.

In the course of the pre-notification stage, undertakings may also, through the submission of so-called ‘Reasoned Submissions’ (using the Form RS in Annex III to the (Merger) Implementing Regulation), request the application of a case allocation mechanism laid down in Articles 4(4) ECMR and 4(5) ECMR. The former Article provides that where a concentration has a Community dimension, the notifying parties may, prior to notification to the Commission, make a reasoned submission that a concentration may significantly affect competition in a distinct market in a Member State and should therefore be examined in whole or in part in that Member State. The latter Article deals with the converse situation: when concentrations do not have a Community dimension, but are capable of being reviewed under the national competition laws of at least three Member States, undertakings may indeed request that the concentration be examined by the Commission.

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672 E.g. when there is no horizontal or vertical overlap between the parties, or when a part is to acquire sole control of an undertaking over which it already has joint control. See also: Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation No. 139/2004, OJ 2005, C-56/32.

In both scenarios, the Commission informs all Member States without delay. The Member States concerned by the request have 15 working days to signal their consent/opposition. If the relevant Member State (Art. 4(4) ECMR) or one of the relevant Member States (Art. 4(5) ECMR) opposes the transfer, the request will be rejected. Otherwise, in case of a request under Article 4(4) ECMR, the Commission has a period of 25 working days from receiving the Form RS to determine whether or not to refer the case to the Member State identified. Furthermore, if no relevant Member State objects to a request under Article 4(5) ECMR (in a timely manner), the request will similarly be granted.

It should finally be observed that the Merger Regulation also provides for other flexible mechanisms for the transfer of merger reviews from the Commission to the national level and vice versa. These mechanisms, however, are triggered at the initiative of either the Commission or the national authorities (rather than the undertakings concerned) after actual notification. A more in-depth review falls beyond the scope of the present memo.

2.1.2. Phase I investigations

Upon receipt of a formal notification, the Commission will initiate the Phase I investigation and will publish a notice in the Official Journal as well as on DG COMP’s website. Within a period of 25 working days following the receipt of a complete notification, the Commission will then have to conclude its preliminary examination of the case, so as to adopt one of the following decisions: (1) a decision pursuant to Article 6(1)(a) ECMR, finding that it does not have jurisdiction; (2) a (conditional) clearance decision pursuant to Article 6(1)(b) allowing the concentration to go through, or; (3) a decision pursuant to Article 6(1)(c) initiating the Phase II investigation.

When the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market or where the Commission receives a request from a Member State to refer the case to it, the 25-day time limit will be extended by an additional 10 working days (Art. 10(1) ECMR). In addition, Article 9 MIR acknowledges that the time period may be suspended under certain circumstances for instance when the Commission has ordered investigative measures or when the parties fail to inform the Commission of material changes in the facts.

The large majority of notifications are cleared unconditionally in the course of the Phase I investigation. However, clearance decisions may also be adopted after the notifying parties have modified the notified transaction and/or put forward certain commitments (Article 6(2) ECMR), which are subsequently rendered binding by the clearance decision. Insofar as the Commission has ‘serious doubts’ within the meaning of Article 6(1)(c) ECMR with regard to the compatibility of the concentration, it will normally provide the notifying parties an opportunity to take part in a ‘State of Play’ meeting before the expiry of 15 working days into Phase I. If the Commission fails to adopt a decision within the legal

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674 Articles 9, 21(4) and 22 ECMR. See also the Commission Notice on Case Referral in respect of concentrations, OJ 2005, C 56/2.
675 Article 4(3) ECMR.
676 According to Article 5(2) MIR, where the information, including the documents, contained in the notification is incomplete in any material respect, the Commission shall inform the notifying parties without delay. In such cases, the notification shall only become effective (thus triggering the different time-limits) on the date on which the complete information is received by the Commission. See also: Merger Best Practices, § 23.
677 On the communication and publication of these decisions, see: Art. 6(5) ECMR.
678 Merger Best Practices, § 33. Such meeting may enable the notifying undertakings to propose certain remedies.
2.1.3. Phase II investigations

Insofar as the Commission has serious doubts with regard to the compatibility of the concentration with the common market, it initiates the in-depth ‘Phase II’-investigation, the aim of which is to assess whether the concentration could ‘significantly impede effective competition’, in particular as a result of the creation or strengthening of a dominant position.

Again, the Merger Regulation sets out strict time limits, the respect for which is of crucial importance given the commercial interests at stake. In principle, the Commission has a period of 90 working days following the initiation of Phase II to make its assessment (Art. 10(3) ECMR). This time period may be extended by 15 working days where commitments are offered by the parties after the 54th working day, and/or by (another) 20 working days where the parties so request, or at the request of the Commission with the consent of the parties. By analogy with what is the case for Phase I investigations, the Phase II time limits may be suspended in the scenarios identified in Article 9 MIR (e.g., a party refuses to submit to an inspection ordered by the Commission).

At the end of the proceedings, the Commission may adopt one of the following decisions: (1) a decision pursuant to Article 8(1) ECMR unconditionally clearing the concentration; (2) a conditional clearance decision under Article 8(2) ECMR, attaching certain conditions and obligations intended to ensure that the undertakings comply with the commitments they have entered into vis-à-vis the Commission, or; (3) a prohibition decision pursuant to Article 8(3) ECMR, declaring the concentration incompatible with the common market.

Any Phase II proceeding should be concluded by means of a decision under Article 8 ECMR, unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration (Art. 6(1)(c) ECMR).

The legal framework governing the offering of commitments as well as the procedural rights of the parties involved and third parties are further dealt with below.

2.2. The powers of the Commission

Both in the course of Phase I and Phase II, the Commission can have recourse to a variety of investigative measures which by and large correspond to those available in the context of antitrust proceedings (cf. supra). Thus, under Article 11 ECMR, the Commission can request information from the undertakings which are a party to the concentration or from third parties (e.g., customers, suppliers, competitors), either by means of a simple request or through a decision compelling the addressee to supply the information concerned. In both cases, the Commission must notably indicate the legal basis and purpose of the request and set a time-limit for reply.

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679 Such request should be made within 15 days and can be made only once (Art. 10(3) ECMR).
680 On the communication and publication of these decisions, see: Art. 8(8), 20 ECMR.
681 Guidance as to how parties may demonstrate that the transaction has been abandoned can be found in the Jurisdictional Notice (§§ 119-120). The Commission will have exceeded its powers if, in spite of the fact that the parties abandoned the concentration, it nonetheless adopts a prohibition decision. See Case T-310/00 MCI v. Commission [2004] ECR II-3253.
The Commission can also interview natural or legal persons that consent to be interviewed for the purpose of collecting information (Article 11(7) ECMR). It can similarly launch inspections at undertakings’ premises (both premises of the parties concerned as well as of third parties) (Art. 13 ECMR) or request the NCAs to do so (Art. 12 ECMR). As with antitrust proceedings, inspections can be based on a written mandate (in which case the addressee is not obliged to submit) or on a decision (which is binding on the addressee). The activities which the inspectors can undertake (e.g., sealing of premises, making copies, etc.) are essentially the same as in antitrust procedures. On the other hand, contrary to Regulation 1/2003, the Merger Regulation does not refer to the possibility of launching inspections at private premises. Contrary to antitrust enforcement, inspections at the undertaking’s premises are extremely rare practice, this would occur only if a company is suspected of breaching commitments.

As indicated earlier, non-compliance with investigative measures may result in a suspension of the time-limits on the part of the Commission (Art. 9 MIR).

By analogy with Articles 23 and 24 MoR (antitrust proceedings), Articles 14 and 15 ECMR spell out the Commission’s competence to impose fines and periodic payments respectively. The relevant rules are by and large identical. Fines may relate to either procedural infringements (Art. 14(1)) or to substantial infringements (Art. 15(2)). Fines for procedural infringements (e.g., the submission of incorrect or misleading information) can go up to 1 per cent of the undertaking’s total turnover in the preceding business year. Fines for substantive infringements (e.g., violations of the stand-still obligation) can go up to 10% of the undertaking’s total turnover in the preceding business year. Periodic penalty payments may be imposed as a means to compel undertakings to comply with the conditions imposed in a conditional clearance decision (Phase I or Phase II), or in the context of a conditional derogation from the standstill obligation, but also to compel undertakings to submit to an inspection etc. Periodic penalty payments shall not exceed 5 per cent of the average daily turnover in the preceding business year per day.

Furthermore, where a concentration is declared incompatible with the common market and the parties have already completed the transaction – either because the transaction was not notified or because the stand-still obligation was violated –, the Commission disposes of comprehensive powers, including the power to adopt interim measures (Art. 8(5) ECMR) or to adopt restorative measures (Art. 8(6) ECMR). Thus, the Commission may require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore effective competition, or may order ‘any other appropriate measure’. The aforementioned powers can also be exercised when a concentration is implemented in breach of a condition or obligation.

Finally, Phase I or Phase II clearance decisions may be revoked by the Commission if it is discovered that they rest on false information for which one of the undertakings was responsible or information obtained by deceit, or where the undertakings concerned committed a breach of an obligation attached to the decision (Articles 6(3) and 8(6) ECMR). The Commission will then re-examine the transaction in the context of a renewed Phase I or Phase II proceeding.

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682 Fines and/or periodic payments can only be imposed after the parties have been heard. See: Art. 18(1) ECMR, Article 14(3) MIR.
683 According to Article 7(4) ECMR, the validity of transactions that are implemented in breach of the stand-still obligation hinges on the Commission deciding on its compatibility with the common market.
2.3. The parties’ right to be heard and the role of third parties

2.3.1. The right to be heard and access to the file

Article 18(1) ECMR provides that, before taking a final adverse Phase II decision (other than a non-conditional clearance decision), the Commission shall give the persons and undertakings concerned the opportunity to make known their views on the Commission’s objections to the transaction. Article 18(3) ECMR explicitly emphasizes the rights of defence of the parties directly involved, asserting that the Commission shall base its decision only on objections on which the parties have been able to submit their observations. Article 18(4) ECMR adds that natural or legal persons showing a ‘sufficient interest’ shall be entitled, upon application, to be heard. Insofar as it deems this necessary, the Commission is free to hear other natural or legal persons.

The basic principles of Article 18 ECMR are further elaborated in Articles 11-18 MIR. These Articles generally distinguish between three categories, notably ‘the notifying parties’, ‘other involved parties’, and ‘third persons’. While the notion of ‘notifying parties’ is fairly straightforward, ‘other involved parties’ refers to parties to the proposed concentration other than the notifying parties (such as the seller and the target). ‘Third persons’ are ‘natural or legal persons, including customers, suppliers and competitors, that demonstrate a ‘sufficient interest’ (in particular members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees, as well as consumer associations).

First, as for the notifying parties, their right of defence is catalyzed by the issuing of a Statement of Objections (SO), which is addressed to them in writing, and which sets out the objections of the Commission in respect of the transaction (Art. 13(2) MIR). ‘Other involved parties’ are moreover ‘informed in writing’ of the Commission’s objections (without receiving the full SO). ‘Third persons’ are normally supposed to apply in writing to be heard themselves, after which the Commission shall inform them in writing of the ‘nature and subject matter of the procedure’ (Art. 16(1) MIR). Where third parties do not make an application to be heard, the Commission is under no obligation to keep them informed. The Commission may also invite other third parties to submit their observations at its own initiative. In each of the aforementioned scenarios, the Commission will set a time limit for reply.

When submitting their comments to the Commission’s objections, both the notifying parties and ‘other involved parties’ are entitled to request the opportunity to develop their arguments in a formal oral hearing (Art. 14(1)-(2) MIR). ‘Third persons’ will similarly be afforded the opportunity to participate in a formal hearing, insofar as they so request and the Commission deems this appropriate (without having an actual right thereto). Otherwise, the Commission is free to invite other natural or legal persons to a formal hearing on its own initiative (Art. 16(3) MIR). By analogy with antitrust proceedings, oral hearings are supervised by a Hearing Officer and take place behind closed doors.

Prior to the issuing of a Statement of Objections, there is no formal right of access to the Commission’s file, albeit that the Commission generally aims to give the notifying parties

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685 The article also refers to decisions under Article 6(3) ECMR, Article 7(3) and Articles 14-15 ECMR.
687 The Commission shall not be obliged to take into account comments received after the expiry of a time limit which it has set (e.g. Art. 13(2) MIR).
access to non-confidential versions of key documents (such as third party submissions contradicting the parties’ own contentions) at an earlier stage in Phase II. 688 Once an SO has been issued, the notifying parties have a formal right to request access to the Commission’s file (Art. 17(1) MIR) in accordance with the Commission’s Access to File Notice. 689 The scope of the access to the file is mutatis mutandis the same as in antitrust proceedings and does not extend to documents containing business secrets, other confidential information or internal documents of the Commission or other authorities. ‘Other involved parties’, have a right of access to the file insofar as this is necessary for the purpose of preparing their observations (Art. 17(2) MIR). Third parties have no right of access to the file as such. The Commission’s Best Practices nonetheless foresee the possibility that third parties may be provided with an edited non-confidential version of the SO 690.

In order to enable the Commission to comply with its obligation to respect professional secrecy (Art. 17 ECMR), Article 18(2) MIR states that any person making known its views or comments or submitting information to the Commission in the course of the merger procedure shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission. Article 18(3) MIR adds that the Commission may also require persons and undertakings to identify any part of the SO, case summary or formal decision which contains business secrets. Disputes concerning (non-)confidentiality may be referred to the Hearing Officer.

2.3.2. Other aspects regarding the involvement of the undertakings concerned and of third parties

Apart from the strict provisions on the right to be heard and access to the file, the Merger procedure foresees various formal and informal ways in which the undertakings concerned as well as third parties may be involved. Thus, as indicated earlier, already in the pre-notification stage, the notifying parties may meet with the Commission in the context of so-called pre-notification meetings. It is also possible that the Commission will, prior to notification, initiate informal market contacts to obtain information from relevant persons, undertakings or authorities. Such pre-notification contacts/enquiries would only take place, however, if the existence of the transaction is in the public domain and once the notifying parties have had the opportunity to express their views on such measures 691.

Upon notification, the concentration is published in the Official Journal in accordance with Article 4(3) ECMR. It is customary in such scenario for the Commission to invite third parties to comment within a short period, usually 10 days from the date of publication. In addition, the Commission may actively solicit comments from third parties with a sufficient interest, e.g., by sending out questionnaires. In doing so, the Commission may make use of the different investigative instruments at its disposal (cf. supra). When the notifying parties offer commitments (cf. infra), the Commission will similarly ‘market test’ these by allowing interested third parties to share their views in this respect.

688 Merger Best Practices, § 45.
689 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 EC and Council Regulation 139/2004, OJ 2005, C-325/7. The notifying parties will also be given the opportunity to have access to documents received after the issuing of the SO (Merger Best Practices, § 43).
690 Merger Best Practices, § 36.
It should finally be observed that the Commission’s Best Practices foresee the possibility of organizing ‘State of Play’ meetings with the notifying parties. ‘State of Play’ meetings take place on a voluntary basis and are normally offered at five different points in the Phase I and Phase II procedure:

- before the expiry of 3 weeks into Phase I, where it appears that ‘serious doubts’ within the meaning of Article 6(1)(c) ECMR are likely to be present;
- within 2 weeks following the adoption of the Article 6(1)(c) decision;
- before the issuing of an SO;
- following the reply to the SO and the oral hearing, and;
- before the Advisory Committee meets.

DG COMP may similarly invite other involved parties or third parties, together with the notifying parties to participate in ‘triangular meetings’.

2.4. Commitments

Where a notified transaction gives rise to serious competition concerns, the parties may avert a negative decision by the Commission by offering remedies that fully and effectively remove the cited concerns. Commitments may be offered both in the course of Phase I and in Phase II. In Phase I, commitments should be submitted within 20 working days from the date of notification (Art. 19(1) MIR). In Phase II they should normally be submitted within 65 working days from the initiation of Phase II proceedings (Art. 19(2) MIR). Depending on the date of submission, this may lead to an extension of the regular time-limits for the treatment of cases in Phase I or Phase II (Art. 10 ECMR).

Commitments may be either structural or behavioral, although given that the Merger Regulation is directed at the maintenance of a competitive market structure and given the fact that behavioral commitments may be harder to monitor, preference is given to the former. Further information on the appropriateness of remedies can be found in the Commission’s Remedies Notice. The Commission has also published model texts for divestiture commitments and trustee mandates, together with a series of best practices guidelines.

Insofar as ‘market testing’ gives rise to a positive outcome, the Commission may render a clearance decision to which certain obligations or conditions are attached (Art. 6(1)(b) or Art. 8(2) ECMR).

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692 Merger Best Practices, §§ 30 et seq.
694 In Phase II, however, it is for the Commission to demonstrate that the proposed remedies are insufficient (rather than for the parties to prove that they eliminate the competition concerns). See Case T-87/05 EDP v. Commission [2005] ECR II-3745.
3. CONCLUSIONS

As evidenced by this report, there is a well-developed corpus of hard and soft law governing enforcement proceedings concerning Articles 101 and 102 TFEU as well as merger control. As the European Commission’s decisions in both fields have an important impact on the undertakings concerned, effective safeguards of the procedural rights of all parties involved are required.

In the field of merger control, most concerns have been acquiesced by measures taken by the Commission over the years.

In the area of Articles 101 and 102 TFEU, however, there is still ample room for improvement. The main criticisms can be summarized as follows. First, the Commission unites the functions of investigator, prosecutor and judge. This puts into doubt the independence and objective nature of the entire procedure. The creation of the Hearing Officer is a step in the right direction, but his powers are limited, especially before the sending of the SO. Moreover, the Hearing Officers are all Commission officials which again raises questions about their independence. Second, access to the file and general transparency of the proceedings should be further improved. Again, the Best Practices alleviate some concerns, but more should be achieved in this respect. Indeed, companies, especially in cartel or abuse of dominance investigations often face an investigation covering many years. In the meantime the companies face uncertainty, which could be lessened if even in these proceedings stricter timetables are adhered to.

Notwithstanding the room for improvement, the European Union’s strongly developed body of procedural safeguards in the area of competition law enforcement can serve as an inspiration for horizontal legislation on administrative proceedings. Having an institutionalised practice whereby (i) companies and citizens are aware of the scope, aim and content of administrative proceedings carried out against them, (ii) are granted access to the investigative file, (iii) are appraised of the status of the investigation/administrative proceeding at defined intervals (i.e., state of play meetings and other informal contacts with the administration), (iv) are given the possibility to defend themselves against a pending administrative measure (i.e., Statement of Objections, a hearing, etc.), and (v) have at least a minimal guarantee of objectiveness, correctness, confidentiality, etc. of the proceedings (via the institution of a Hearing Officer), are the minimal requirements for an administrative proceeding operating under the rule of law and intending to respect the rights of defence as well as other procedural rights of the parties involved.
Abstract

This note sheds light on EU administrative law and its Scandinavian inspirations in retrospect and for the future. EU Administrative law does not only draw on the case law of the CJEU and the principles of EU law but also on national laws as sources of inspiration. This note focuses on transparency and the EU Ombudsman as concrete manifestations of Nordic inspirations. Moreover, the note discusses the duty to inform citizens of their EU rights as a future development in EU law on a Nordic backdrop.
1. INTRODUCTION

**KEY FINDINGS**

- EU administrative law is partly based on national sources of inspiration
- The note focuses on two past Nordic inspirations – transparency and the ombudsman – and one possible and future inspiration - the duty to inform citizens of their rights.

1.1. The national sources of EU administrative law

This note encapsulates a range of Nordic sources of inspiration to the evolution of EU administrative law. It is a common ground that national administrative laws are subject to European influence and inspiration (the question of the EU law sources of national administrative law) whereas the counter-inspirations (the question of the national sources of EU administrative law) are generally somewhat less emphasized. This note deals with the latter.

EU Administrative law and of general EU law are inspired not only by French, German and English law but also by Nordic law in various areas. This note comprises the administrative law traditions of Denmark, Sweden and Finland as Scandinavian members of the EU since 1973, 1995 and 1995 respectively. In addition, the EFTA states Norway and Iceland are members of the European Economic Area Agreement since 1994.

Although there are differences between Nordic administrative law traditions, they share a number a common features. Administrative law traditions are relatively well-developed in all countries and they comprise a variety of distinct legal principles on both formal and substantive matters such as fundamental principles of transparency and openness. In addition, all Scandinavian countries are characterised by relatively influential ombudsman offices as part of a diverse system of control bodies protecting citizens’ rights.

1.2. Structure of the briefing note

Section 2 of the briefing note deals with Nordic contributions to internal EU administrative law and the analysis comprises two specific and significant parts of EU administrative law namely the Regulation on access to documents and the EU Ombudsman institution. This part of the note is retrospective. Section 3 of the note discusses the duty to inform citizens of their EU rights. There is no general principle of EU law on this issue. However, the note envisages a possible development of a general principle of EU law governing national implementation of EU law. This development could be triggered and inspired by recent cases, especially in Danish administrative law, on the government’s duty not only to protect the rights of citizens but also to actively inform citizens of their rights. There is a current debate in Denmark on the failure of national immigration authorities of informing citizens in Denmark of their rights, in particular those related to the principles of free movement of workers and citizens. This national evolution may backfire on EU law and thus manifest itself as part of a general principle of EU law or as a specific right. Following the discussion of potential cross-fertilization between EU law and Scandinavian law, the note concludes in section 4 with a reference to the right to good administration in the Charter.
2. EU TRANSPARENCY AND THE EU OMBUDSMAN ON A NORDIC BACKDROP

**KEY FINDINGS**

- The evolution of the EU transparency regulation forms part of legal and political attempts to bring EU closer to Nordic administrative law thinking
- The European ombudsman model is based on the Scandinavian ombudsman one

### 2.1. National law as a basic source of inspiration

National law inspires EU administrative law in different ways. These may be specific or general.

There is rarely an explicit reference in secondary legislation or the case law of the CJEU (the Court) to national law inspirations. As to the Court, however, the General Advocates in their investigations often make explicit comparative studies of the national legal systems of the Member States in order to create or develop a European concept. National law can thus constitute a basic source of inspiration for the introduction of a specific EU concept.

National law can also be a source of general inspiration. An example can be found in the EU Ombudsman’s European Code of Good Administrative Behaviour that states what the citizens have the right to expect from the European institutions and European civil servants. In the foreword of the Code the Ombudsman states the following: “Since the beginning of the Ombudsman’s office in September 1994 we have worked to define maladministration, based on the case law of the Court of Justice and the principles of European Administrative law. The national laws on the subjects have also been a valuable source of inspiration”. Although there is no mention of Nordic administrative law traditions, there is no doubt that these traditions form part of the general pool of national inspirations during the process of drafting the Code. The foreword dates back to 2001 and is signed by the former EU Ombudsman Jacob Söderman. He held office from 1995 to 2003 until the present EU Ombudsman took over in April 2003. Prior to his European career Jacob Söderman was the National Parliamentary Ombudsman of Finland (1989-1995), and this in itself indicates a general Nordic inspiration to the initial evolution of EU administrative law.

### 2.2. The EU transparency Regulation

Transparency is an umbrella term which covers a variety of elements. A key element is the citizens’ right of access to documents, which is dealt with in the Transparency Regulation (Regulation No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents). According to the Regulation any citizen of the Union has a right of access to the documents of EU institutions. The Regulation encompasses also a number of exceptions to the right to access to documents. The general purpose of the Regulation is to define the principles, conditions and limits, on grounds of public or private interest, governing the right of access to the documents of EU institutions and to promote good administrative practice.

The Transparency Regulation is a product of an evolutionary process following inter alia Declaration No 17 on the right of access to information annexed to the Maastricht Treaty
and the European Council meetings held at Birmingham, Edinburgh and Copenhagen. The conclusions of the three European Council meetings stressed the need to introduce greater transparency into the work of the Union institutions and the Regulation consolidates these initiatives. These stages of the evolution are summarised in the preamble of the Regulation (recitals 1-3).

The substantive contents of the Regulation are partly inspired by Nordic law. Transparency and access to public documents are cardinal elements in the administrative law frameworks of Sweden, Finland and Denmark. In Sweden and Finland, the principle has a constitutional basis that is in the Swedish Freedom of the Press Constitutional Act and in the Finnish Constitution. In Denmark the citizen’s right of access to government documents is regulated in a general and comprehensive Act on Access to Public Administration Files.

In a political context, moreover, the promotion of an EU transparency principle and the Regulation itself can be seen as a response to widespread scepticism against the EU in Scandinavia. Thus, the emphasis on transparency in the EU has been described as a political attempt of the original twelve Member states to sugar-coat the pill of accession which Scandinavian countries such as Sweden and Finland swallowed in the early 1990s. The no-vote by the Danish population to the Maastricht Treaty in 1992 in itself called for bridging the gap between the European Union and its citizens and for a legal clarification of the citizen’s right of access to documents as means of persuading the Danes to changes positions towards Europe. The Danish yes-vote was cast in a subsequent referendum in 1993.

Both from a legal and a broader political perspective it is interesting that the Transparency Regulation at the time of writing (March 2011) is in the process of being revised in an attempt to improve citizens’ access to the documents of the EU institutions.

The Charter on Fundamental Rights of the European Union (EU-Charter) and its Article 42 echoes the need for legal counter-measures towards fundamental reservations in e.g. Scandinavian countries towards the EU. Thus, Article 42 reiterates and confirms the right of access to documents. The European Code on Good Administrative Behaviour states that the EU official shall deal with requests for access to documents in accordance with the general principles and limits laid down in Regulation No 1049/2001. Lastly, the EU has consolidated its commitment to transparency by signing the EEC/UN Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters at the Inter-Ministerial Conference in 1998 in Aarhus, Denmark.

2.3. The EU Ombudsman institution

The European Ombudsman is the cornerstone of institutional EU administrative law. The EU Ombudsman was established on the basis of Article 195 of the EC Treaty and the institution protects and develops substantive EU Administrative Law. Substantively, the Ombudsman investigates complaints about maladministration against the institutions and bodies of the EU. Maladministration occurs if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights. The European Parliament appoints the Ombudsman for the term of Parliament and his/her term is renewable. The EU Ombudsman cannot investigate complaints against administrations in the Member States even when the complaints are about EU matters.

The EU Ombudsman is originally inspired by Nordic law. The ombudsman idea as such has strong Scandinavian connotations and the Swedish Parliamentary Ombudsman is the oldest
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in the world dating back to 1809. The general framework of the Scandinavian ombudsman model is that the holder of the office is appointed by the Parliament and enjoys independence from both the executive and the judiciary. The task of the institution is to safeguard the interest of the citizens by ensuring administration according to law, discovering instances of maladministration and eliminating defects in administration.

National ombudsman offices were created in Finland in 1920, in Denmark in 1954, in Norway in 1962, and in Iceland in 1987. Although it is difficult to measure the exact impact of the various ombudsmen in Scandinavia, the Danish Ombudsman is arguably the most influential ombudsman within the national context. The statutory and functional powers of the Danish institution are wide and the Danish ombudsman enjoys a priori sympathy from the Danish Parliament and the media. There are no specialised administrative courts in Denmark - as opposed to Sweden and Finland - and the Danish ombudsman is thus to some extent unrivalled on the legal scene as a specialist protector of good administration.

The idea of creating an EU Ombudsman was pushed actively forward by inter alia the Danish government. In 1991 the Danish government provided a set of draft Treaty Articles on the EU Ombudsman which had close resemblance to the rules governing the Danish Ombudsman. In addition, the Spanish government called for an EU Ombudsman coupling the institution with the concept of European citizenship as a key element in EU law.

The ongoing impact of national ombudsman practices on EU Administrative Law is explicitly reflected in the European Network of Ombudsmen (ENO). The ENO consists of the EU Ombudsman and some 90 ombudsman offices in 32 European countries. The Network includes the national and regional ombudsmen of the Member States, the candidate countries for EU membership, and certain other European countries, as well as the Committee on Petitions of the European Parliament. The Network was established in 1996 and reinforced in Strasbourg in 2007 with the adoption of a formal statement. The Strasbourg statement emphasizes that national and regional ombudsmen make a vital contribution to ensuring that citizens and residents of the EU can know and enjoy their rights. In addition, national and regional ombudsmen may ask the European Ombudsman for written answers to queries about EU law and its interpretation including queries that arise in their handling of specific cases. The EU Ombudsman has up till October 2010 reportedly received 37 queries of which Nordic ombudsmen have contributed with a series.
3. A DUTY TO INFORM CITIZENS OF THEIR RIGHTS

KEY FINDINGS

- There is no general principle of EU law as to the active dissemination of information to citizens concerning their EU rights. This may change as a result of a multi-level interaction between EU law and national law.
- The duty of the administration to proactively disseminate information is an evolving Danish legal concept.
- The Court may be exposed to cases bearing on the legal consequences of misinformation by national authorities and may in that context promote a right to information.

Having dealt with Nordic sources of inspiration to internal EU administrative law in the preceding parts of the note, we now turn to Nordic sources of inspiration for a possible future evolution of the general principles of EU law concerning national implementation of EU law. The analysis revolves around potential cross-fertilization and multi-level interaction between EU law and current cases in especially Danish law on the administration’s duty to inform citizens of their rights. At the time being, the duty to inform is a much debated issue in Denmark and the duty to proactive information is an evolving legal concept. This process may backfire on the general principles of EU law and perhaps evolve into a general principle of information or into a specific right of the citizens to receive information concerning their rights.

The level of citizens’ knowledge of their rights and the content of the administration’s duty to provide information about rights are basic questions and challenges in most legal systems. As to the EU, a recent study by the EU Ombudsman shows that some 72 % of European citizens do not feel informed about the Charter of Fundamental Rights. A further 13 % have never heard of the Charter (Press release no 6/2011, 18 March 2011, EU Ombudsman). This substantial lack of knowledge of EU rights is a significant challenge for the EU.

3.1. General principles of equivalence and effectiveness

Existing EU law does not encompass a clear-cut and general principle of proactive dissemination of information on EU rights. However, the Court has laid down basic principles which must be observed by national courts and authorities in claims involving EU law. Of interest to my analysis are the general principles of effectiveness and equivalence. The Court has consistently held that:

“In the absence of Community rules it is for the domestic systems of each Member states to designate the courts having jurisdictions and the procedural conditions governing actions at law intended to ensure the protection of the rights which subjects derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature nor render virtually impossible or excessively difficult the exercise of the rights conferred by Community law.”
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(See inter alia case 33/76, Rewe, case C-312/93, Peterbroeck, cases C-430/93 and C-431/93, Van Schijndel and case C-201/02, Wells).

The procedural autonomy of Member States in administrative law matters is not unrestricted and the cited principles of equivalence and effectiveness must be complied with. Accordingly, a national court cannot discriminate between national law and EU law and is required to ensure that remedies for breach of EU law guarantee the full and effective protection for citizens’ rights enshrined in EU law.

These principles of EU law are broad and have been applied by the Court in various circumstances such as interim relief, damages, restitution, time-limits and state liability. So far, however, there is no specific case law of the Court requiring national authorities to ensure an equal level of information of citizens of their EU rights as of their domestic rights (as integral part of the equivalence principle) or to provide citizens with information on EU rights (as integral part of the effectiveness principle). This may change in the future.

3.2. Provisions on right to information in EU Directives

As to formulating a duty of information as integral part of the basic EU law principles of equivalence and effectiveness, the Court may find partial inspiration in recent secondary EU legislation. Thus various significant directives encompass explicit and extensive provisions on information within their ambit. An emphasis on information activity is included in e.g.:

- The Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market). The Directive requires Member States to establish points of single contact (POSCs) ensuring effective access to all national procedures and formalities on service activities (Article 6) and to ensure the right to information of service providers and recipients (Article 7). This Directive aims to establish a proactive duty to inform the citizens concerned, that is, a duty to inform *ex officio* via points of single contact on matters concerning service activities.

- The Patients’ Directive (Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare). The Directive requires Member States to establish one or more national contact points for cross-border healthcare. In order to enable patients to make use of their rights in relation to cross-border healthcare, these national contact points shall provide them with information concerning healthcare providers, including, on request, information on specific provider’s right to provide services as well as information on patients’ rights, complaints procedures and mechanisms for seeking remedies (Article 6).

In addition to legal requirements of Directives as to informing citizens of their rights, it can be inserted that the Commission in general is highly supportive of information efforts and campaigns as to EU matters. For instance, the DG EMPL unit dealing with social security coordination (B/4) has recently published a call for proposals “Actions for Cooperation and Information on Social Security Coordination” (VP/2011/004). The objective of the call is among other things to support “initiatives and actions with a transnational dimension, which aim at developing cooperation between social security institutions and/or at improving information of the public about their rights and obligations deriving from the coordination Regulations when exercising the right of free movement”.

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3.3. **Active information – an evolving Danish concept**

Furthermore, a potential European development of a principle of proactive dissemination of, or right to, information may look to current cases, notably in Danish law. The multi-level interaction between national and EU law is illustrated by the fact that the current Danish discourse as to the duty to information in itself revolves around substantive EU rights of residence and family reunification.

In the wake of inter alia the Court’s decision in the Metock case (Case C-127/08, Blaise Metock), the Danish immigration authorities were reproached for not providing correct and updated information to potential applicants for residence in Denmark. The case clarified and extended the rights under the Residence Directive 2004/38 (EC) of third country nationals who are family members to citizens of the Union. Prior and subsequent to Metock, the general practice of the Danish authorities, however, was to inform potential applicants solely of the – highly restrictive - national Danish immigration legislation and the extensive list of conditions for obtaining residence but not on the - wider - possibilities of obtaining residence and family reunification on the basis of Metock and the free movement of workers and citizens.

The investigation on information practices was initiated by Danish journalists who phoned the immigration authorities in Copenhagen simulating typical requests of advice on the range of rights by potential applicants for residence and family reunification. The answers given by the authorities on the phone were recorded on tape by the journalists. In the wake of the press coverage and the Court’s handing down of Metock the Danish Ombudsman decided to launch an investigation on his own initiative. In his concluding report the Ombudsman voiced criticism as to several elements of the case handling by the immigration authorities. A significant part of the criticism is based on principles on the right of information in the Danish General Administrative Procedures Act. As to the duty of the authorities not only to give advice to citizens on request but also to provide a bulk of information proactively and ex officio on their homepage, the ombudsman states that:

"... public authorities are obliged to ensure that information is easily accessible, correct and sufficiently detailed in order to inform the individual citizen of the legal possibilities which are relevant to the citizen ... " (Annual Report of the Danish Parliamentary Ombudsman, 2008, p. 328 et seq. My translation of the conclusion on item IV in the report, see p. 341).

Thus, the Ombudsman emphasizes that authorities are under an obligation to proactively and loyal update information on their homepages. If the Court in Luxembourg clarifies and develops EU rights that render the existing information on the homepage imprecise or incorrect, the authorities must react accordingly and sufficiently promptly.

As to the administration’s usage of digital communication it is an interesting scenario that a duty to **compulsory** use of homepages and internet communication of information is proposed in a current Draft Bill for a revised Danish Act on Access to Public Administration Files. It is stipulated in the Draft Bill that an authority is obliged to provide regular information on a homepage about their activities to citizens. The provision is denoted as “a duty to provide active information” (White Paper No 1500/2009 on a Draft Bill Access to Public Administration Files). When this provision is adopted, the duty to proactive information gains momentum and transforms into an even more constraining legal concept.
3.4. Towards an EU principle of effective information of rights?

The Danish evolution can give partial impetus to an evolution of EU law and thus backfire on a principle of EU law of information in relation to the implementation of EU law. It is of course difficult to say in specific terms how an EU principle of information could crystallize. A general EU principle of information could evolve as an integral part of the cited principle on effectiveness or it could evolve as a specific right. In both instances, a European legal development could be fuelled by e.g. Scandinavian law as a general source of inspiration.

With a view to Danish law, it is not unlikely that the cross-fertilization can take the form of a specific inspiration in the sense that the Court at some point may be exposed to the specific Danish cases mentioned above. These particular cases are reportedly to be reviewed by national courts in claims for damages. If the arguments of the plaintiff are based on EU law and on principles of EU law on damages for infringement of individual EU rights, the national courts might ask the Court for a preliminary ruling on the interpretation of the EU law. The question of substantiating a duty to inform citizens of EU rights and the consequences of non-compliance can thus – as a concrete Nordic input - reach the Court.

4. CONCLUSION – THE RIGHT TO GOOD ADMINISTRATION AFTER LISBON

The EU-Charter is legally binding after Lisbon.

The Charter is directed to EU institutions according to Article 51. The Member States are only bound by the provisions of the Charter when they are implementing EU law. Even though Article 51 (1) is narrowly phrased, it should, however, be interpreted broadly. The Member States shall comply with the Charter when acting within the scope of application of EU law (see P. Craig and G. de Búrca, EU law - Text, cases and materials, 2007, Oxford University Press, p. 402). Such wide interpretation of Article 51 is both in conformity with the Court's case-law e.g. case C-109/01 Akrich and the explanatory memorandum to the EU-Charter (cf. P. Craig, EU Administrative Law, Oxford University Press, 2006, p. 502-503).

Article 41 of the Charter stresses the citizen’s right to good administration as not only a right but a fundamental right. The right of good administration is contained in Chapter V of the Charter which is explicitly dedicated to the citizens’ rights. Likewise the right to good administration was the first to be judicially cited in EU case law by the Court of First Instance (see case T-54/99, max.mobil Telekommunikation Service GmbH, para. 48).

Even though Article 41 does not explicitly mention a right to information, it is interesting to note that Article 41 (1) is a lex generalis. The specific rights that are listed in its second paragraph (the right to be heard, the right to have access to his/her file and the obligation of the administration to give reasons) are thus not exhaustive and the right to information is not excluded from the concept of right to good administration.

Consequently, it could be argued that Article 41 of the Charter could be used as a legal basis for the right of citizens to be informed about their EU rights. The Court might thus at some point turn the emphasis on the concept of good administration – in conjunction with e.g. national inspirations from Scandinavia – into a releasing factor for a further evolution and strengthening of the citizen’s right to information as part of EU administrative law.
NOTE

Abstract

A more comprehensive definition of ‘good administration’ is lacking in the EU. While the Treaties and the Charter establish a number of useful rights, these provisions ought to be developed and made more precise through horizontal rules applicable to all EU institutions in all policy fields. The existing policy-specific rules and soft law regulation have not proved satisfactory. A regulation on good administration applicable to the EU institutions, bodies and agencies ought to be adopted based on Article 298 TFEU.
LIST OF ABBREVIATIONS

**CJEU**  Court of Justice of the European Union

**OJ**    Official Journal

**TEU**   Treaty on European Union

**TFEU**  Treaty on the Functioning of the European Union
1. INTRODUCTION

Under the terms of the request for this briefing note, I have been asked to discuss the fragmentation of EU administrative procedures and the possible lacunae that might currently exist in such rules. It was suggested I do this from a ‘Nordic administrative law perspective’, in particular with respect to good governance and transparency, and that I conclude with a comment on the possibilities for increased coherence in the area of administrative law under the Lisbon Treaty.

First, let me try to define what I mean by rules of ‘general’ administrative law in the EU context. Such provisions may relate for example to procedural questions, the organisation of administration, cooperation between different administrative branches, time limits, language arrangements, administrative supervision and controls, administrative sanctions, access to documents (privileged and public access), data protection, remedies and questions of responsibility. In principle, such rules ought to be horizontal and concern the EU institutions and the EU administration as a whole.

Some of these elements – both procedural and substantive - are included in Article 41 on the Right to Good administration in the EU Charter of Fundamental Rights, which, according to Article 6(1) TEU after the entry into force of the Treaty of Lisbon, has ‘the same legal value as the Treaties’. According to Article 41 of the Charter:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

The Charter thus contains indications as to what kind of elements the right to good administration builds on. Furthermore, in the light of the explanations of the Charter, the wording of Article 41 is based on case law and provisions in the TFEU and TEU. Indeed, various indications of the existence of ‘European administrative law’ may be found in EU primary law.

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697 Explanations relating to the Charter of Fundamental Rights, OJ 2007/C 303/02.
However, despite these references it can still be argued that a more comprehensive definition of 'good administration' is currently lacking at the level of secondary law, which is generally both needed and used for implementing the general Treaty provisions and making them more precise. In particular, there is no single piece of secondary legislation that would regulate EU administration comprehensively and horizontally. Good administration, despite its importance, has remained, if not a dead letter, then at least largely undefined. It is only after 1995 that a definition of the opposite of good administration, ‘maladministration’ - bad administration- was attempted by the first European Ombudsman, Jacob Söderman, who in his 1995 Annual Report defined maladministration as 'failures to act in accordance with EC law'. Even other things could constitute maladministration, such as administrative irregularities and omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay and lack or refusal of information.698

In this briefing note I will first argue that the current EU rules on good administration have serious gaps both from a procedural and a substantive point of view. I will demonstrate why new more comprehensive rules on general administrative law ought to be adopted. I will then examine the possibility opened by Article 298 TFEU in terms of discussing what could, and should, be regulated. Finally, I will conclude with some observations on the exercise from a Finnish perspective.

2. WHY ARE THE CURRENT EU RULES ON GOOD GOVERNANCE NOT SUFFICIENT?

**KEY FINDINGS**

- There is no direct lack of horizontal rules of administrative law in EU primary law. Significant provisions are included in the TFEU and TEU, and in the Charter of Fundamental Rights.

- At the level of secondary legislation, despite various instruments laying down rules for the implementation of a particular policy or task, the EU does not have comprehensive administrative law rules that would regulate its institutional apparatus as a whole.

- In the case law, the Court has applied principles relating to good administration only to a limited extent.

- ‘Soft law’ does not seem satisfactory to address the current weaknesses in the EU administrative law system, since it always leaves the option of implementing such norms to the institution that is supposed to apply it.

- In the post-Treaty of Lisbon legal framework, the right to good administration is a right that citizens ought to be able to invoke. This would presume the existence of a sufficient legislative framework, something that is currently largely lacking.

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2.1. Fragmentation of administrative law

The EU Charter together with the EU’s general principles of law offer a solid starting point for administrative law, as well. In addition, various provisions that can be characterised as falling under the definition of ‘general administrative law’ can be found in the Treaties. For example, Article 296 TFEU establishes that ‘legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties’. Article 296 TFEU includes provisions about publication of acts, notification and entry into force. Article 340 TFEU establishes the principle of non-contractual liability, stating that ‘the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties’. Article 15 and 16 TFEU include provisions on openness of union activities, access to documents held by the institutions and the protection and processing of personal data. Under Article 20, paragraph 2(d) TEU, EU citizens have the right ‘to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language’. All of these provisions lay down significant - albeit widely formulated – principles. The principles prescribed therein seem satisfactory from an administrative law perspective, but in view of their rather general wording they would need to be specified further in secondary legislation.

As regards secondary legislation, there are plenty of rules of a general administrative law character in place in different pieces of legislation applicable in specific policy sectors. For example, Council regulation (EC) No 659/1999 codifies and reinforces the procedural rules and principles to be applied by the Commission in the area of state aid, notably with regard to the cooperation between the Commission and Member State authorities. Similarly, in the area of competition law, Council regulation (EC) No 1/2003 establishes rules for effective enforcement of competition rules and the cooperation mechanisms between the Commission and Member State authorities. The ‘service directive’ includes a number of provisions i.e. on controls, quality of service, transparency and publication of information, consultation with interested parties and out-of-court dispute resolution. In the area of food safety, Council regulation (EC) No 178/2002 establishes provisions to guarantee that the European Food Safety Authority operates independently and transparently, and remains open to contacts with consumers and other interested groups. Moreover, various provisions of administrative law included in secondary legislation mainly affect Member State administration, for example in the area of structural funds and common agricultural policy.

It could thus be simply concluded that the EU already has sufficient provisions of administrative law in place. Perhaps regulation has already been adopted in those areas where it has been deemed necessary? Why are the current provisions not sufficient?

699 Compared to this, the Charter extends the obligation of reasoning also to decisions that are of an administrative nature. Note, however, that according to Article 52(2) of the Charter, ‘[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties’.
A major defect in current regulation is that it is very fragmented. Various questions are touched upon in the Treaty or the Charter, but by no means are they exhausted, and some are actually treated at a very superficial level.

Regulation in secondary legislation in particular policy sectors is uneven, there is little attempt of coherence when regulation exists, many matters remain unregulated and, even where regulation exists, it is not clear whether the level of protection is satisfactory. A significant amount of rules are currently merely regulated in the institutions’ internal rules, in particular their Rules of Procedure. In addition, ‘soft law’ regulation exists in the form of codes of good behaviour and ethical codes, most notably the European Ombudsman’s ‘European Code of Good Administrative Behaviour’ endorsed by the European Parliament704, and the Commission’s ‘Code of Good Administrative Behaviour’.705

As Smith has noted706, administrative principles do not currently apply across the administrative practices of Union institutions, or even across the administrative practices of the same institution in different policy sectors. Even the administrative practices of one and the same institution are not the same in different policy sectors. Principles apply to a varying standard in different policy areas, which is understandable in view of the different needs, while in some of those areas they are absent altogether. When compared to a national administrative setting, it is noteworthy that, while some sectors of institutional administration have been required to uphold extensive administrative procedure rights on the basis of secondary legislation, there is no general application of such principles or practices to the EU administration as a whole.707

Such fragmentation of applicable rules affects not only the coherence of the applicable standards but also their accessibility from the point of view of the citizens that might have an interest in invoking them.

2.2. The Court of Justice jurisprudence

It would of course be wrong to argue that the Court's case law is of no relevance at all for the development of European administrative law. As indicated by the Charter explanations, the Court has touched upon various principles of administrative law that are of importance for the current discussion. In UNECTEF v Heylens,708 for example, the Court established that

‘... the competent national authority is under a duty to inform [Community workers] about the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request. In view of their aims those requirements of Community law, that is to say, the existence of a judicial remedy and the duty to state reasons, are however limited only to a final

704 European Parliament Resolution A5-2045/2001
707 Ibid.
708 Case 222/86, paras 15-16. In ORKEM v Commission, Case 374/87, para 35, the Court established that ‘the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove.’ In Lisrestal v Commission, Case T-450/93, para 42, the Court underlined the need to respect for the rights of defence: ‘That principle requires that any person who may be adversely affected by the adoption of a decision should be placed in a position in which he may effectively make known his views on the evidence against him which the Commission has taken as the basis for the decision at issue.’
Similarly in *Hoechst*\(^{709}\) the applicant claimed a breach of the principles of sound administration and equal treatment, in connection with access to a file. The Court established by reference to its earlier jurisprudence that a principle of sound administration was to be observed:

'It must be borne in mind that during an administrative procedure before the Commission, the Commission is required to observe the procedural guarantees provided for by Community law. Among the guarantees conferred by the Community judicial order in administrative procedures is, in particular, the principle of sound administration, which entails the obligation for the competent institution to examine carefully and impartially all the relevant elements of the case. As regards the principle of equal treatment, the Commission cannot [...] ignore that general principle of Community law, which, according to consistent case-law, is breached when comparable situations are treated differently or when different situations are treated in the same way, unless such treatment is objectively justified.' (paras 128-130)

The Court has also established that a failure by the Commission to reply by the expiry of a time limit is to be held to constitute an implied decision.\(^{710}\)

The lacunae in regulation discussed in Section 2.1 have affected the Court's jurisprudence, since the rights that can be enforced by citizens are few and very diverse. Most comprehensive rules and principles can be found in the internal documents of the institutions, in particular their Rules of Procedure, and in soft law documents. It is of course difficult for an external observer to evaluate how Commission officials, for example, experience that the existence of a Code of Good Administrative Behaviour has contributed to a positive change in the internal administrative culture of that particular EU institution. In practice, however, the Court has not proved willing to grant these Codes a very extensive interpretation. To my knowledge, there are no cases in which the Court made reference to the Commission’s or the Ombudsman’s Code on Good Administration. This supports the argument that ‘soft law’ cannot exist unless it is also legally binding.\(^{711}\) But, perhaps even more importantly, the choice of ‘soft law’ underlines the powers of the institution implementing it, since, in practice, the latter always has the final choice of either implementing the soft law norm or disregarding it.\(^{712}\) Similarly, soft law leaves the Court always in a position to decide what emphasis it might grant to the norm in a particular situation.

As regards the soft law regulation on good governance, the Court has proved reluctant to ‘read in’ legal obligations for the institutions with reference to a ‘principle of proper administration’.\(^{713}\) In general, the individuals seeking to enforce what they have deemed as...
their rights with reference to a principle of ‘good’ or ‘sound’ administration have, in fact, lost their cases.\footnote{See e.g. Z v Parliament, [2001] ECR I-9197.} While it is true that there exists a significant amount of case law with references to a principle of ‘sound administration’, it is difficult to identify a case where the principle alone would have been determinative; and even when this has been the case, the finding has been directed towards flaw in the Member States’ own administrative procedures and not the EU institutions.\footnote{Theodore Fortsakis, ‘Principles Governing Good Administration’, 11(2) European Public Law (2005), 207-217 at 210.}

As Fortsakis has demonstrated, the principle of good administration has a ‘fuzzy form’,\footnote{Deidre Curtin and Joana Mendes, ‘Citizens and EU Administration – direct and indirect links’, Briefing paper prepared for the Committee on Legal Affairs, 2011.} visible also in how references to a ‘right to good administration’ signify some uncertainty about the precise meaning of the principle.

“For in order to be of use, i.e. capable of serving as a legal basis that would enable users to obtain effective judicial protection, any reference to this general principle needs to be specific, indicating the precise rule derived from this principle in a given case.”\footnote{Ibid., 210.}

Moreover, as a matter of principle, rule-making in general is much better off – and not only from a democratic point of view - if undertaken by the legislature, based on an overall plan of some sort, and not simply through the Court’s case law, which after all is always dependent on the particular cases and the facts the Court has had the opportunity to address.

It seems clear that in the matter at hand, it is not the Court we must trust to develop more detailed rules on good administration, but the legislature, as it rightly ought to be.

### 2.3. Some examples of existing lacunae

Various examples can be given of the existing 'lacunae' in administrative law. First, as Curtin and Mendes have previously highlighted, provisions on the right to be heard in EU administrative action that takes effect through the adoption of non-legislative normative acts (i.e. administrative rulemaking) are lacking.\footnote{Deidre Curtin and Joana Mendes, ‘Citizens and EU Administration – direct and indirect links’, Briefing paper prepared for the Committee on Legal Affairs, 2011.} Another example that has been put forward in the discussions held by this Committee is that of infringement proceedings (Article 258 TFEU), an area in which the Court has traditionally proved reluctant to use its imagination to develop procedural guarantees for the complainants.\footnote{See e.g. Case C-141/02P Commission v T-Mobile Austria GmbH, [2005] ECR I-1283.} So far, the status of individual complainants and the rights they might enjoy in the procedure has been largely dependent on the Commission’s own rules and recommendations, and thus on its own choices as regards its internal working methods.

The latter question relates to a wider discussion on access to information in the institutions’ files. The argument can be made that, in some policy sectors, access of persons (natural or legal) to their own information in Commission files is so restricted under the current rules applying in particular policy sectors, that the implementation of the EU rules of public
access under Regulation No 1049/2001 might in fact generate a more generous outcome for the applicant.\textsuperscript{720} As the Commission itself has repeatedly pointed out, this creates pressure on the public access rules, which has resulted in a number of Court cases concerning the relationship between different access rules. The recent TGI affair,\textsuperscript{721} for example, referred to two separate investigations concerning a Member State’s notification to the Commission of various measures designed to consolidate TGI’s financial position. Both procedures had ended with a Commission decision finding the state aid measure incompatible with the common market. TGI – the recipient of the challenged aid - had submitted its observations, requested the Commission to give it access to a non-confidential version of the file and the opportunity to submit, subsequently, further observations, but its requests had been rejected. TGI had also challenged the decisions in vain before the General Court. Under the state aid procedure,\textsuperscript{722} interested parties may submit comments to the Commission, and will later receive a copy of its decision, but the rules make no provision for access to its files. In its ruling of 29 June 2010 the CJEU established that the lack of party access under the state aid rules affected the interpretation of the rules on public access, so that a ‘general presumption’ of no public access could be upheld.\textsuperscript{723}

In general, the Court has been reluctant to use the rules on public access to compensate defects in other access regimes. In Sison the Court underlined the purpose of Regulation No 1049/2001 ‘to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them’.\textsuperscript{724} According to the Court, ‘the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected […]’ (para 47). In short, the Court has pointed out that the matter of access for interested parties to a file ought to be settled elsewhere than under the public access rules. In some areas rules on privileged access exist, in others there are no such rules in place.

The relationship between a public interest and a particular private interest is currently not completely clear. The Commission has repeatedly argued that public access rules should not be used to circumvent more specific rules in other legislation, and that public access ought to be limited accordingly.\textsuperscript{725} However, it can hardly be a sustainable option that special access rules, no matter how limited, would always restrict public access,
independently of whether granting access to the information would cause any harm or not. It is particularly the question of possible harm that forms the core of public access rules in the EU, and a similar principle would seem to be useful for other access regimes as well, since only harm would be a solid enough reason to limit access to information in a Union ‘in which decisions are taken as openly as possible’. Therefore, one can only wonder whether this kind of anomaly – of the possibility of public access to a file being wider than the right to ‘privileged’ access to one’s own file – would not create impetus to revise the other access regimes. This could be usefully done in the context of adopting general rules on administrative law, which could include provisions on the central principles and applicable minimum standards.

Furthermore, when observing the case law flowing from the implementation of Regulation No 1049/2001, it is easy to conclude that many of the cases have little to do with the actual substance of public access. Instead, such ‘satellite litigation’ concerns the principles of good governance in general, and the administrative procedure established by the Regulation for the handling of individual applications, in particular: the time limits, the duty of reasoning and the duty of an institution to adopt a decision (instead of an implicit one). The existence of case law of this kind indicates that the implementation of these principles is currently less than satisfactory. Moreover, Regulation No 1049/2001 on access to documents is a piece of legislation with detailed rules on the applicable administrative process. In other areas no similar provisions exist, which makes it even more difficult for citizens to claim their rights.

Instead of addressing each of the problematic policy fields one by one, it might be more useful to agree on generally applicable, horizontal rules of administration, which could, when necessary, be complemented by special provisions applicable to a particular policy sector. Such rules would concern the action of EU administration, not merely when it is exercising a particular function or task.

3. WHAT COULD THE FUTURE REGULATION PROVIDE?

KEY FINDINGS

- It is possible to adopt ‘hard law’ regulation, which leaves room for institutional choices without being too restrictive on the citizens’ rights.

- A regulation on administrative law ought to lay down the most central substantive and procedural principles of administrative law applicable to Union institutions, bodies, offices and agencies. This is largely a codification exercise with the aim of enhancing the coherence of current regulation and making it more precise.

- Article 298 TFEU refers to ‘open, independent and efficient European administration’. All elements, as well as the provisions on good administration provided in the Charter, are equally important, intertwined and interdependent.

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726 See Article 4 of Regulation No 1049/2001.
727 Article 1 TUE.
728 See e.g. the action brought on 26 June 2010, T-291/10, Martin v Commission, OJ C-234/51, in which the applicant seeks the annulment of the ‘implicit’ decision by the Commission, breach of time limits and a failure to state adequate reasons for its implicit refusal.
3.1. **Soft law or hard law**

The possible need to adopt more comprehensive rules of good administration has been discussed for quite some time, especially before and after the adoption of the Commission 2001 White Paper on European Governance\(^{729}\) - even if the Commission itself only referred to the possibility of ‘complementing the EU’s policy tools more effectively with non-legislative instruments’\(^{730}\). In practice two alternatives for the codification of applicable administrative law principles have been suggested. Especially predating the entry into force of the Lisbon Treaty, a formally non-binding soft law instrument seemed a feasible option, and has already resulted in the codes of good administration by the European Ombudsman and by the Commission. Second, the entry into force of the Lisbon Treaty has strengthened the calls for a regulation on the matter to be adopted.

The proponents of softer methods of regulating administration have argued that a scheme based on legally enforceable rules might risk to ‘deflect attention from the more important need to promote a more responsible and service-oriented administrative culture’.\(^{731}\) Normative steering of the administration might, some argue, hinder its efficiency, pointing out that laws and other legal norms might even be largely detrimental for the administration. Efficiency might be best served if the administration were given open and broad goals with decisions on concrete details and means to be left to the administration.\(^{732}\)

Others emphasise how such a ‘soft law’ approach might endanger the rights and interests of individuals and that a state (or the Union) governed by the rule of law must acknowledge the principle of lawfulness of administration. They point out that the aim of legally binding rules is to protect individuals from the arbitrary behaviour of the administration;\(^{733}\) after all, ‘[m]uch of the activity of the public administration is so important that it should be based on law even when the direct interests of individuals are not at stake.’ While public administration is to apply the law, it should still aim at efficiency.\(^{734}\) Indeed, binding regulation and efficiency are not mutually exclusive: it is totally feasible to make laws that increase the efficiency of administration, were this deemed necessary, by enabling different means of steering administrative action.\(^{735}\) To take an example, with regard to the Article 258 TFEU procedure the adoption of binding rights in a horizontal instrument would not need to limit the Commission discretion, but could focus on procedural matters such as time-limits and the duty to give reasons.\(^{736}\)

The European Parliament already called on the European Commission in September 2001 when adopting the Ombudsman’s Code to submit a proposal for a regulation containing the Code, the adoption of which would emphasise the binding nature of the rules and principles and their uniform application to all EU institutions and bodies, thereby promoting transparency and consistency.

While there might have been previously some question marks concerning a possible legal basis for such a proposal, after the entry into force of the Treaty of Lisbon, these do not

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\(^{730}\) Ibid., 2.


\(^{732}\) For a discussion, see Outi Suviranta, ‘Good Administration and Efficiency in Administration – Principles and Legislation’ in Matti Niemivuo and Tuula Majuri (Eds.) Outlooks on democratic Institutions in the Baltic Sea Region (Helsinki 1999) 86-91 at 88.

\(^{733}\) Ibid. 90.

\(^{734}\) Ibid.

\(^{735}\) Ibid.
stand any longer. Article 298 TFEU would seem to establish a suitable legal basis for the adoption of a regulation on general administrative principles and rules:

1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.

2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.

The Ombudsman has continued to emphasise the added value of transforming the Code into a European law on good administration:

“This would help eliminate the confusion currently arising from the parallel existence of different codes for most EU institutions and bodies, would ensure that the institutions and bodies apply the same basic principles in their relations with citizens and would underline, for both citizens and officials, the importance of such principles.”

The experiences from Regulation No 1049/2001 would also suggest that the adoption of legally binding rules is an effective way of influencing the everyday institutional practices: compared to the period before its adoption, a greater number of documents are now being released by the institutions, either automatically or following requests by citizens. Moving the matter outside the institution’s own discretion also subjects the implementation of the rules and principles contained to external control - something that has so far been largely lacking with the exception of the soft law methods of control exercised by the European Ombudsman.

3.2. A codification exercise

Since a significant bulk of ‘general administrative law’ already exists, the challenge at hand can be largely considered a codification exercise. Useful provisions are already included in the Treaty, in secondary legislation, in the courts’ case law, in the existing ‘soft law’ codes and codified by the Council of Europe. Moreover, partial codification has already been undertaken in relation to certain matters, such as data protection or access to documents.

When codifying the applicable norms and principles, also their internal coherence will be evaluated. In some instances provisions in secondary legislation that are currently applicable only in some sectors may form a useful basis for generally applicable rules.

736 Melanie Smith, ‘Administrative procedures linked with Article 258 proceedings: an academic perspective’, briefing note for the Committee on Legal Affairs at p 14.
737 Foreword to the Code by the European Ombudsman, page 9.
739 According to Article 228 TFEU, the Ombudsman is ‘empowered to receive complaints […] concerning instances of maladministration […]. He or she shall examine such complaints and report on them. In addition, the Ombudsman shall conduct inquiries, the results of which he reports to the institution concerned and the European Parliament.
740 For a summary, see Matti Niemivuo, ‘Good Administration and the Council of Europe’, 14(4) European Public Law (2008), 545–563. Apart from the Council of Europe Recommendation on Good Administration (2007), the most useful source is the Handbook “The administration and you. Principles of administrative law concerning the relations between administrative authorities and private persons. A handbook” Council of Europe Publishing, 1996 presents those principles of substantive administrative law and administrative procedure
In particular, the codes of good administration adopted by the Ombudsman and the Commission are attempts to undertake a codification of generally applicable rules and can provide inspiration, even a model, for such an exercise. Simultaneously, they demonstrate that the most significant challenge consists in determining the appropriate level of detail to be contained in any Code provisions. Apart from having a wider scope than the Treaty provisions, an eventual regulation ought to be more specific than the provisions already included in primary law. For example, the Ombudsman’s Code is a blend of provisions; some reflect existing law, and are as such dependent on the Court's jurisprudence; others deal for example with courtesy and do not naturally lend themselves to legal enforcement.741 Widely formulated general principles alone do little to guide policies but ought to be complemented by more detailed provisions on how these principles are turned into decisions.742 At the same time, the future regulation ought to avoid going to details that are better regulated in the institutions' Rules of Procedure.

3.3. “... the institutions, bodies, offices and agencies of the Union...”

The legal basis in Article 298 TFEU already provides some indications of the content of a future regulation on EU administrative law. As regards the scope of the future regulation, the legal basis refers to 'European administration'. While it is clear that the EU institutions, bodies, offices and agencies fall under this definition, it is also possible to interpret the term as referring to the Member State authorities as well. After all, the administration of the Union in general is handled jointly by Union institutions and Member State authorities.

However, noting how Article 6 TFEU specifies administrative cooperation as an area in which the Union, based on Article 2, paragraph 5 TFEU, ‘shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas’ and where ‘[l]egally binding acts of the Union […]shall not entail harmonisation of Member States’ laws or regulations’, it would seem that the focus of any future regulation would need to be on Union institutions, bodies, offices and agencies, excluding thus any harmonisation of Member State legislation in the field. Such a finding would also be in line with Article 41 of the Charter, which refers exclusively to ‘the institutions, bodies, offices and agencies of the Union’. The idea with the drafting of the Charter was not to ‘interfere with the procedural autonomy of the Member States, which have their long established rules and practices of judicial review in the area of administrative law’.743

From a practical point of view, a code of good administration for the institutions, offices, bodies and agencies would also be the code that is most urgently needed, noting that Member States have national provisions applicable to their national administration.

which are considered to be of primary importance for the protection of private individuals in their relations with the administrative authorities.

742 A good example is provided by the ‘principles of good governance’ provided by the Commission White Paper on European Governance, COM (2001) 428, which enumerates openness, participation, accountability, effectiveness and coherence as the core principles for more democratic governance. While there is no doubt about the potential of each of these principles to good governance, they need to be turned into actual policy measures in order to have a clear added value.
3.4. ‘...shall have the support of an open, efficient and independent European administration’

Likewise, the reference to ‘open, efficient and independent European administration’ in Article 298 TFEU provides indications of some of the core elements to be included in any future regulation. Since the European Parliament has specifically requested, for the purpose of this note, for a comment on the project from the point of view of openness and transparency, that is the first of the three criteria of a ‘good administration’, I shall focus on this one. At the same time, it should be made clear that all three are intertwined and dependent on each other. By no means should they be treated as conflicting interests. For example, the linkage between good administration and openness is also recognised in Article 15(1) TFEU, which establishes that ‘[i]n order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.’ The background vision – which it is easy to subscribe to - is that openness improves the quality and legitimacy of administration.\footnote{For a number of thoughtful contributions on the theme, see Christopher Hood & David Heald (Eds.), Transparency. The Key to Better Governance? (The British Academy and Oxford University Press: 2006).}

It is equally clear that there are instances in which openness affects the way in which administration can be organised efficiently. Open government is largely realised through the principle of documents being accessible to the public. In practice, requests for access to documents seldom come in handy for the administration that is under an obligation to deal with them; without a recognition of the ‘greater purpose’ served by the obligation the task obviously seems burdensome and occasionally out of proportion.\footnote{For a discussion, see Päivi Leino, ‘Just a little sunshine in the rain. Comment on the 2010 jurisprudence by the European Court of Justice on access to documents’, forthcoming in Common Market Law Review (2011).} As regards the EU administration, the Commission and the Council have tended to argue that this administrative burden is a threat to the ‘interests of good administration’\footnote{For a discussion, see Päivi Leino Case annotation, C-353/99 P, Council v. Heidi Hautala, 39(3) Common Market Law Review (2002) 621–632 at 631-632. See also Opinion of Advocate General Kokott, delivered on 8 September 2009 in Case C-139/07 P, Commission v Technische Glaswerke Ilmenau, para 62: The Commission fears that the reviewing of aid will also suffer if the competent services are forced to spend too much time dealing with applications for access. It says that it cannot be the objective of Regulation No 1049/2001 to hinder the Commission in the performance of its real tasks.} and, surprisingly, this sort of thinking has found some authoritative support in the Court case law as well. For example in the case \textit{Hautala}, in which the Court accepted the principle of partial access to documents, the Court acknowledged that:

\begin{quote}
\textit{the principle of proportionality would allow the Council, in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the interest in public access to those fragmentary parts against the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration.}\footnote{C-353/99 P Council v Hautala and others [2001] ECR I-9565, para 86.}
\end{quote}

Similarly, more recently in \textit{VKI},\footnote{Case T-2/03, Verein für Konsumenteninformation v Commission, [2005] ECR, p. II-1121.} the General Court considered the necessity of individual examination of each requested document, which otherwise is a core principle of the public access rules, and noted that the institution has a right ‘to seek a ‘fair solution’ together with the applicant’, reflecting how account can be taken ‘of the need, where appropriate, to reconcile the interests of the applicant with those of good administration’ (para 101):

\begin{quote}
\textit{An institution must therefore retain the right, in particular cases where concrete, individual examination of the documents would entail an unreasonable amount of}
\end{quote}
administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration. However, that possibility remains applicable only in exceptional cases’ (para 102-103).

In its recent TGI ruling749 the CJEU, regrettably, did not see a need to repeat the criteria relating to the request concerning a ‘manifestly unreasonable amount of documents’ and their examination resulting in substantially paralysing the proper working of the institution it had previously established (cf VKI para 112). In the TGI case, the Commission did not in any way even attempt to demonstrate that it had considered other possible ways of dealing with the request than blank refusal or that it had 'genuinely investigated all other conceivable options', a requirement set in VKI (para 115). For example, the Court did not require any attempt to use administrative means to deal with a wide request. In general, from the point of view of this observer, the setting in which openness and efficiency are approached as conflicting interests, and access to documents is treated as a threat to good administration, is a strange perspective, and one that certainly is not in line with Article 15(1) TFEU cited above.

Moreover, even if Regulation No 1049/2001 is quite clear in its orientation to guarantee openness in all areas of Union activity,750 the Court also underlined in TGI the difference between the cases where Union institutions act in the capacity of a legislature,751 and documents relating to procedures that fall within the framework of administrative functions specifically allocated to the institutions (para 60). This is the same logic that the General Court invoked in MyTravel, where it considered that a report requested by the applicant fell 'within the purely administrative functions of the Commission’.752 In the view of the Court,

'[t]hose who were primarily concerned by the appeal proceedings that were considered and by the improvements discussed in the report were the undertakings affected [...] and by concentrations in general. Consequently, the interest of the public in obtaining access to a document pursuant to the principle of transparency [...] does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply rules governing the control of concentrations or competition law in general, as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator (para 66)'.

An appeal in MyTravel is currently pending before the CJEU, and in its appeal Sweden claims that the principle of openness and access to documents is of great importance in all the institutions' activities, and thus also in the administrative procedure within an institution. In the view of Sweden, the reasoning of the General Court is not consistent with the principle of the greatest possible openness.753 Therefore, the role of openness in administrative matters is a question that the CJEU is still in a position to reconsider, as has been recently suggested by its Advocate General, and in fact, align it with the wording of Regulation No 1049/2001.754 The legislature would however do no harm in reminding the connection in the context of the regulation to be adopted on the basis of Article 298 TFEU. Even if transparency in legislative matters is of a pivotal importance, openness in purely administrative contexts also serves a significant function. As the preamble of Regulation No

749 C-139/07 P Commission v Technische Glaswerke Ilmenau, judgment of the Grand Chamber of 29 June 2010, not yet reported.
750 See Article 2(3) of Regulation No 1049/2001.
752 Case T-403/05, MyTravel Group plc v the Commission.
753 Sweden v MyTravel and Commission, OJ C 55 of 07.03.2009, p.6, para 1.
1049/2001 establishes, ‘[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system’.

Despite my strong emphasis on openness, it is clear that even the other elements mentioned in Article 298 TFEU are of a crucial importance. As Advocate General Jacobs once famously put it, ‘slow administration is bad administration’.755 In order to be good, public administration must also be efficient. But at the same time, its structure and methods are to be constructed so that the democratic legitimacy and the protection of individuals in their relation to the administration are respected.756 Similarly, openness improves the independence of governance.

If governance is good, this results also in efficient governance; and when governance is bad, problems emerge, also hindering the administration from operating efficiently. Clear rules result in less time being spent fighting in court. Good administration is also responsive to the wishes of the governed. For example, the recently concluded Bavarian Lager saga757 is hardly an example of good, responsive administration: the Commission spent 14 years arguing, against the advice of both the European Ombudsman and the European Data Supervisor, and even appealing the case to the CJEU, about access to five names in a meeting protocol with a company that had reasonably solid grounds for having access to them. Good and efficient administration is not about trying to secure one’s power at any cost.

4. GOOD GOVERNANCE – THE NORDIC PERSPECTIVE

**KEY FINDINGS**

- While national experiences can serve as a source of inspiration, it is unlikely that any national model as such would be suitable for the EU institutional framework.

- In Finland good administration is treated as a fundamental right enshrined in the Constitution and regulated in the Administration Act, which is applied unless specific provisions contained in other legislation provide specific rules.

- Openness is a central factor in ‘good administration’, but not by any means the only one.

Finally, I was specifically asked to comment on the theme of the seminar from a Finnish or Nordic perspective. While responding to this request, I wish to emphasise, that both the context and the needs are different in the EU as compared with our own. What I can say is that ‘open government’ and the idea of codifying the central elements of good administration in a legal code is a model that has been implemented in Finland for quite some time now. Our own experiences are primarily positive. If this is a model that is of interest at this historical moment of deciding on the future EU norms, then we are of course glad to contribute with some of our experiences.

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757 Judgment of the Grand Chamber of 29 June 2010, not yet reported.
When I say the model has been in use for some time now I refer back to a gracious ordinance of December 1766, when one of the greatest achievements of Anders Chydenius, a Finnish priest and Member of Parliament, and the foremost Finnish social thinker of the Eighteenth Century, saw the light: King Adolphus Frederick of Sweden issued His Majesty’s gracious Ordinance Relating to Freedom of Writing and of the Press. The King declared, having considered the ‘greater opportunities to each of Our loyal subjects to gain improved knowledge and appreciation of a wisely ordered system of government’, that all previous regulations issued on the matter were to be removed. It was

‘Our gracious will and command that all Our loyal subjects may make use of a complete and unrestricted freedom to make generally public in print everything that is not found to be expressly prohibited in the three first paragraphs or otherwise in this gracious ordinance [...].’

The main principle of this legislation dating back to 1766, the principle of open government and public access to government documents, became part of the constitution, thus playing an important role in the building of democracy both in Finland and in Sweden. Even though this constitutional principle of openness has been interpreted and applied in various ways over the centuries, the principle itself has prevailed, denoting the assumption of openness.

The state of openness in the European Union, and the potential effect of the Union’s secretive administrative culture on our national practices, was a matter of great concern when accession to the Union was being contemplated. The principle of open governance was deemed so precious that when signing its Treaty of Accession to the European Union in 1995, Finland adopted a declaration in which it welcomed ‘the development now taking place in the Union towards greater openness and transparency’ but underlined that

‘[i]n Finland, open government, including public access to official records, is a principle of fundamental legal and political importance, and that we would continue to apply this principle in accordance with our rights and obligations as an EU member’.  

Today, the specific rules on public access to EU documents included in Regulation No 1049/2001 are very well compatible with our national legislation, since under both, openness is the main rule, and secrecy the exception. Even in the EU, access to documents is no longer dependent on the discretion and good will of the EU institutions, but constitutes a right of the citizens. The adoption of rules on public access constituted a useful first step in reforming the EU; now the time has come for more comprehensive rules on EU administration.

From a Finnish-Nordic perspective, openness is a central element of good governance, but not the only factor. To my knowledge, Finland is the only country in the EU where a right to good administration is included in the Constitution:

Section 21 - Protection under the law

Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations


759 See 45. Declaration by the Republic of Finland on transparency.

760 See Act on the Openness of Government Activities (621/1999).
reviewed by a court of law or other independent organ for the administration of justice.

Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.\footnote{761}{The Constitution of Finland 11 June 1999, (731/1999, amendments up to 802 / 2007 included), Inofficial translation by the Ministry of Justice.}

In the court practice the reference to the obligation of the administration to function ‘appropriately’ has received an extensive interpretation, which certainly encompasses the qualities – open, independent and efficient – that Article 298 TFEU attaches to European administration.

In the Nordic tradition good administration – and its opposite, maladministration – is closely connected to detailed codes on public administration and administrative practices.\footnote{762}{In addition to the Administrative Procedure Act (434/2003), especially the Act on the Openness of Government Activities (621/1999) and the Language Act (423/2003) are significant. For a discussion of the Finnish Paradigm, see Päivi Leino, ‘The Wind is in the North - The First European Ombudsman (1995-2003)’, 10(2) European Public Law (2004) 333–368, 341-345.}
The Finnish Administration Act (434/2003), the revised version of which entered into force in 2003, aims at achieving and promoting good administration and access to justice in administrative matters, and to promote the quality and productivity of administrative services. Section 6 on ‘Legal principles of administration’ establishes that

\begin{quote}
[a]n authority shall treat the customers of administration on an equal basis and exercise its competence only for purposes that are acceptable under the law. The acts of the authority shall be impartial and proportionate to their objective. They shall protect legitimate expectations as based on the legal system.
\end{quote}

The Act includes four main elements: regulation of the foundations of good administration, interaction between citizens and administration, codification of administrative procedure legislation and provisions for administrative procedure. The Act is based on the ‘service principle’: customers’ interaction with the authority should be organised in as flexible and service-oriented manner as possible.\footnote{763}{See Marietta Keravuori, ‘Good administration in the Nordic Countries – some Examples’, paper presented at a seminar "Good Administration – from the Legal Protection Point of View" in Joensuu, 14-15 March 2005.} Formal correctness and the existence of legal remedies is thus not deemed enough but the obligations of providing a good service go beyond that. Reflecting the arguments discussed in Section 3.1. that normative steering might hinder the efficiency of administration, it can certainly be pointed out that in our experience normative steering has not had such an effect on the administration, and that in many ways normative steering helps the administration to function more effectively.
5. CONCLUSIONS

Why are procedural questions so terribly important? From the perspective of the citizens they are often the only guarantee that a matter has been thoroughly considered before decision-taking takes place. In particular in the EU, taking your matter to a court is often not possible, and even when the requirements of standing are fulfilled, most citizens do not have the means to claim their rights through a court system. While the European Ombudsman naturally offers another possible avenue for correcting instances of maladministration, the establishment of legally enforceable rights and duties would strengthen even his position.

We have come a long way since the adoption of the gracious Ordinance of 1766, which I quoted earlier. Quite crucially, even in the European Union, we have moved from the age of believing that citizens’ rights in relation to administration are granted to the loyal subjects as an act of grace, to a time where it is a right that citizens can, when need be, enforce in a court of law. Fortunately, I have never met anyone who would claim a right to ‘bad administration’. We believe that citizens have a right to evaluate, not only the outcome of an administrative process but also the manner in which the Union is governed, and that the process through which the Union is governed affects the outcome. Or as the Commission argued in 2001,

'Reforming governance addresses the question of how the EU uses the powers given by its citizens. It is about how things could and should be done. The goal is to open up policy-making to make it more inclusive and accountable. A better use of policies should connect the EU more closely to its citizens and to more effective policies.'

Article 298 TFEU provides a good basis and an opportunity for giving these and other central principles of good administration some concrete substance. This is no promise of an ‘administrative revolution’, but a question of creating greater coherence and more easily applicable standards for EU administration in areas where such norms are currently lacking. At the same time, the administration will be able to function more efficiently. The project at hand involves the adoption of certain minimum standards which can certainly be exceeded, in the name of providing good service. While the adoption of norms is only a partial solution, it is a necessary one, on the way towards a more open, efficient, independent and responsive EU administration.

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XI. FROM FRAGMENTATION TO INCREASED COHERENCE: A USER-FRIENDLY EU ADMINISTRATIVE LAW

Helena Jäderblom, Justice

NOTE

Abstract

The EU has scattered rules and principles relating to the principle of good administration. To the benefit of both officials of the Union administration and of Union citizens, a comprehensive and user-friendly European Administrative law should be adopted. The law should codify the principles relating to good administration in the sense of an individual right and thus govern the obligations of the Union administration in its contacts with the citizens.
LIST OF ABBREVIATIONS

OJ
Official Journal

TFEU
The Treaty of the Functioning of the European Union

TEU
The Treaty on European Union
INTRODUCTION

I have been asked to give my views on whether an EU Administrative Law is necessary. The answer is yes. The reasons why will be presented in this paper.

The principle of good administration has no exact definition at Union level. There’s more than one way to approach the idea of an EU Administrative Law, depending on the aims of such legislation. It could be seen as an instrument intended to guide the officials of the European Union institutions and bodies in their day-to-day business. Or it could serve as the basic tool for the citizens to exercise their individual right to good administration. In my opinion, it could, and should, do both. In this paper, I will primarily focus on the citizens’ perspective.

Citizens have a fundamental right to good administration, recognized by the Charter of Fundamental Rights of the EU. In order to be able to exercise that right in practice, citizens first of all need to grasp its practical meaning. Rules and principles governing the relationship between citizens and administrations with powers over them must be accessible and easy to understand. Legal and linguistic clarity of procedural rules is of great importance. Administrative principles, such as the principles of legality, impartiality and proportionality, must be expressed in the rules and give explicit and accessible answers to a number of questions: How is my matter going to be handled? Will I get a chance to comment on statements made by the other party? Can I get access to all relevant material in the matter? Can I appeal? Within what time-limit? Whereto?

Citizens are increasingly involved in administrative matters at Union level. With the Union’s increased powers in fields of law such as the area of freedom, security and justice, it becomes all the more apparent that the necessary safeguards for the citizens in their relations with Union institutions need to be clarified. In December 2009, the European Council concluded that “the priority for the coming years shall be to focus on the interests and needs of the citizens and other persons for whom the EU has a responsibility. The challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe. It is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law and international protection rules are coherent and mutually reinforcing.”\textsuperscript{765} The European Council also stated that “[t]he area of freedom, security and justice must above all be a single area in which fundamental rights are protected. Respect for the human person and human dignity and for the other rights set out in the Charter of Fundamental Rights and the European Convention on Human Rights are core values.”\textsuperscript{766}

The right to good administration is, as stated above, one of the rights recognised by the Charter of Fundamental Rights. It is also inherent in many of the rights of the European Convention of Human Rights and Fundamental Freedoms, to which the European Union is about to accede.

With regard to the new Chapter on democratic principles in the Lisbon Treaty, which puts focus on transparency and citizen participation in Union matters, and in accordance with the overall ambition stated by the European Council to focus on the citizens and to

\textsuperscript{765} OJ C 115/4 4.5.2010.
\textsuperscript{766} Ibid.
safeguard individual rights, the adoption of a set of general administrative rules, binding on all institutions, bodies, offices and agencies of the European Union, would be a natural step for the Union legislator to take.

In this paper I will briefly present the basic reasons for which clear rules on transparency and good administration should be an inherent part of a democratic society, why it is not enough to have fragmented rules and rulings guiding the administration and the citizens, what the scope of the law ought to be and finally what basic principles should be included in an EU Administrative Law.

1. PREVENTION OF CORRUPTION AND INCREASED LEGITIMACY

KEY FINDINGS

- Good administration and transparency are key tools for preventing corruption and reinforcing legitimacy of administrations.
- The European Union has adopted coherent and binding rules on access to European Parliament, Council and Commissions documents. It is now time for the adoption of comparable administrative rules.

Ever since Sweden negotiated the accession to the European Community in the early 1990’s, it has advocated the need for clear rules on transparency, and especially on public access to documents. Sweden was not satisfied with the existing, non-binding, fragmented rules on access to documents, adopted by each of the institutions in accordance with their respective rules of procedure. Sweden argued that uniform, binding rules would create more clarity and ultimately more transparency. The Swedish opinion is that transparency both prevents corruption and enhances citizens’ confidence in the administration, and that clear rules on access to documents are at the core of democracy. Drawing on experience from the Swedish constitutional right of access to documents, stemming from 1766, Sweden was convinced that rules on access to documents would, if adopted, help decrease the democratic deficit which the Union was suffering from at the time and prevent corruption.

The rules on access to EU documents adopted in 2001 have indeed contributed to increased transparency of the Union institutions. In addition, Council meetings have been made public to a greater extent and the Commission is increasingly communicating with and consulting interested parties before presenting proposals. The Union’s internet based information service is working well. The European Commission has set up a voluntary lobby register, with ethical guidelines to be followed.

The rules on access to documents have not only given citizens a legal right to information, the rules have also contributed to a cultural change within the institutions. There is now a different, more open-minded approach, from the institutions.

Rules on good administration and rules on public access to documents serve, to a large degree, the same purposes, which are to prevent corruption and to provide the citizens with the possibility to take active part in matters which concern them. Such rules also promote confidence in the administration and, thus, the legitimacy of its decision-making.
The positive effects of the rules on public access to EU documents support the idea of adopting EU rules on good administration.

2. WHY A COMPREHENSIVE LAW?

### KEY FINDINGS

- Existing rules and principles on good administration are scattered. A comprehensive law will make it easier for the citizens to understand their administrative rights under Union law.

- With the entry into force of the Lisbon Treaty, and Article 298 TFEU in particular, the Union now has the legal basis for adopting a general administrative law.

Without going into detail on existing rules and principles on good administration, a few should be mentioned, in order to highlight the fragmented picture and thus prove the need for a set of comprehensive rules.

Both in the Treaty and in secondary legislation, there are *inter alia* the right of access to documents (Article 15 TFEU and Regulation 1049/2001 on access to EU documents) and the obligation to give reasons for decisions (Article 296 TFEU). Other principles are recognized through the case law of the European Court of Justice, such as equality before the law, the right to an effective remedy before a court and the citizens’ right to have their matters handled impartially, fairly and within a reasonable time. Other texts are also applied, although they are not legally binding, e.g. the Ombudsman’s European Code of Good Administrative Behaviour. The European Parliament has adopted that Code in its resolution of 6 September 2001. In addition, the Commission has adopted its own guidelines on good administration in the *Code of Good Administrative Behaviour for staff of the European Commission in their relations with the public*. In the Council, there are guidelines to be found in *Decision of the Secretary-General/High Representative of 25 June 2001 on a Code of Good Administrative Behaviour for the General Secretariat of the Council of the EU and its staff in their professional relations with the public*.

The abovementioned examples already show that the Union’s existing rules and principles on good administration are scattered. Furthermore, since they are not laid down in a single instrument, it is evident that the citizens have difficulties in finding out what safeguards exist. Treaty and secondary legislation rules are in practice fairly accessible to the public, but case law is primarily a source of information for lawyers. Codes or guidelines of different institutions are not general and, for a large part, not binding. In certain respects, some of these rules and principles also differ substantially from one another, and the general principles are thus even more difficult to grasp.

Although scattered, EU administrative law cannot be said to be flawed. Compared to most national legislations and practices, the basic administrative principles are also recognized one way or another in EU law. But this is still not enough.
One of the main reasons for adopting a comprehensive law for the Union is to better inform the citizens of their rights in contacts with the Union administration. It is also evident that a single set of rules would be of value for the officials involved in administrative procedures.

For the purpose of filling the gaps in the legislation and at the same time making the legislation understandable to the citizens, Sweden and other Member States consequently proposed an explicit legal basis for an EU Administrative law about a decade ago. This legal basis is now, slightly redrafted, to be found in Article 298 TFEU.

In the interest of clarity, one single law encompassing all basic principles of good administration is the best option. There are arguments against such a law, which basically depart from the theory that written law would somehow hinder the administration to perform at its best. Arguments like these have also been put forward in relation to the adoption of rules on access to documents, but are not convincing. Administrations rest on the powers conferred to them by the citizens, and unless they act under defined rules and principles, they stand to lose their legitimacy. Rules and principles do not necessarily have to be laid down in legal instruments, they do not need to be detailed, but they must be sufficiently clear and accessible in order for the citizens to evaluate the administration’s application of them. To strive for a soft law solution, or for different rules for different institutions, bodies, offices and agencies, is not ambitious enough.

And on that note, a recent proposal to amend a national legislation could be a source of inspiration. The current Swedish Administrative Act is not particularly difficult to understand, but still, it contains its fair share of legal expressions not entirely familiar to everyone. In order to further enhance accessibility, the responsible Government committee (which was chaired by the Swedish former Judge at the European Court of Justice, Hans Ragnemalm) has proposed to delete from the law all expressions which are “too legal”, and to structure the law in a manner which reflects the chronological order of the handling of individual matters. The committee has also proposed to add “layman headings” to the different chapters to even further assist the reader in finding what he or she is looking for.

The same thinking about language seems to be the basis for the Ombudsman’s Code, referred to above. In this code, principles are described in a clear, yet not too simplified way. This should be the way forward.
3. THE SCOPE OF THE LAW

**KEY FINDINGS**

- Article 298 TFEU provides for a legal basis for an administrative law which is binding on EU institutions and bodies.

- This law should not include rules relating to good governance in the wider sense. Such rules should, if needed, be adopted separately.

- There is no legal basis for adoption of rules binding on the administrations of the Member States.

- The administrations of the Member States will nevertheless be obliged to act in consistency with the future law, due to the principle of loyal cooperation laid down in Article 4.3 TEU.

Article 298 TFEU reads:

"1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.

2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end."

The new legal basis hence defines the effects to be achieved – an open, efficient and independent European administration, and the means to achieve it. Paragraph 2 refers to the adoption of laws, in plural. This is to be welcomed. The concept of good administration is not precisely defined and it can encompass many different principles, which in different ways would characterize an open, efficient and independent administration. There are the principles relating to the individual’s right to good administration and there are principles relating to the much wider concept of good governance. The wording of Article 298 is thus wisely chosen, and gives the legislator the opportunity to adopt different laws on different types of administrative issues.

The general starting point should be to create an administrative law defining the individual’s right to good administration. A law adopting such a perspective should focus on the principles governing the handling of individual cases, to which a citizen is a party, and other situations where an individual has direct or personal contact with the Union administration. The adoption of such a law in no way hinders the adoption of another law containing principles defining good administration in the broader sense.

Furthermore, it follows from the wording of Article 298 TFEU that it is the institutions, bodies, offices and agencies which are to be covered by the law. To limit the scope of the legal basis to laws binding on the Union bodies accords with Articles 2 and 6 TFEU as well as Article 41 of the Charter. Consequently Member States should not be bound by the future law. Notwithstanding this conclusion, Article 4.3 TEU obliges Member States to act in
accordance with the principle of sincere cooperation, and they are therefore expected to respect the basic administrative principles when implementing Union law.

4. PRINCIPLES TO BE INCLUDED IN AN EU ADMINISTRATIVE LAW

KEY FINDINGS

- A future EU Administrative Law should include basic procedural rules, aimed at safeguarding the rights of citizens in their contacts with Union institutions and bodies.
- The procedural rules to be included should be based on existing Union law principles and additional core principles common to the Member States.

One of the apparent advantages with the Regulation on public access to EU documents is that it focuses on the core principles, both materially and procedurally. This makes the Regulation fairly easy to understand, and the citizens can exercise their rights to the fullest.

The EU administrative law should be of the same kind. The main purpose should be to inform the citizens of relevant rights in their relations with the Union administration.

So what are the core principles of Union administrative law? The principles suggested below are by no means the only ones, but they may constitute a reasonable minimum selection. They can be divided into two sub-groups:

General principles governing the administration

- The principle of lawfulness
  Article 4 of the European Code of Good Administrative Behaviour

- The principle of non-discrimination
  Article 5 of the European Code of Good Administrative Behaviour

- The principle of proportionality
  Article 6 of the European Code of Good Administrative Behaviour

- The right of access to documents
  Article 15 TFEU, Regulation 1049/2001 and Article 42 of the Charter of Fundamental Rights

- The obligation to keep registers
  Article 24 of the European Code of Good AdministrativeBehaviour

- The obligation to document administrative processes
  Article 24 of the European Code of Good Administrative Behaviour

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771 They have been discussed in a comparative study on administrative laws and practices of the Member States, commissioned by the Swedish government and conducted by the Swedish Agency for Public Administration. The study can be found on the Internet: www.statskontoret.se/good_administration.
The obligation to be service-minded  
Article 12 of the European Code of Good Administrative Behaviour

**Principles relating to the handling of a specific matter**

- **The right to have ones affairs handled impartially and fairly and within a reasonable time**  
  Article 41.1 of the Charter of Fundamental Right
- **The right to be heard before any individual measure is taken that would affect the citizen adversely**  
  Article 41.2 of the Charter of Fundamental Rights
- **The right to have access to his or her file, regarding any individual measure that would affect him or her**  
  Article 41.2 of the Charter of Fundamental Rights
- **The obligation to state reasons in writing for all legal acts**  
  Article 296 TFEU and Article 41.2 of the Charter of Fundamental Rights
- **The obligation to notify all persons concerned by a decision**  
  Article 20 of the European Code of Good Administrative Behaviour
- **The obligation to give an indication of remedies available to all persons concerned**  
  Article 19 of the European Code of Good Administrative Behaviour

The inclusion of these basic principles, which are of differing legal value, in an administrative law for the Union would certainly contribute to legal clarity, and it would be a statement from the Union to its citizens that they are both invited and expected to participate in Union matters.

No great difficulties should be foreseen as regards the possibility to reach agreement among the Member States on the contents of the law. Today, there should be broad unity among Member States about basic principles on good administration and enough experience of national and international legislation to recognize that we now have a momentum for launching this legislative project.
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