Relevant provisions of the Lisbon Treaty on EU Administrative Law

NOTE

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The aim of this paper is to contribute to the debate on whether EU law needs a regulation on a common administrative procedure and, if so, on what its content and scope could be. If an EU administrative procedure regulation is adopted under the legal basis contained by Article 298 (2) TFEU, it shall answer in the first place to the principles of Article 298 (1) TFEU: to an open, efficient and independent European administration. In doing so it will develop mainly the right to good administration but also the rights of access to documents and to protection of personal data. In my opinion procedural rules contained under the right to good administration and their development by the Code of Good Administrative Behaviour constitute *grosso modo* the guidelines for a future Regulation on Administrative Procedure.
1. INTRODUCTION

The aim of this paper is to map out some of the Lisbon Treaty provisions which are relevant for EU administrative law, with special attention to Article 298 of the Treaty on the Functioning of European Union (TFEU). There are also some relevant changes concerning the normative system and judicial protection of the EU from a European public law perspective but time and space reasons preclude their analysis\(^1\).

In my opinion, the Lisbon Treaty considers the whole EU public administration edifice and gives coherence to it from a public law perspective, as it did the Constitutional Treaty project. It implies a step forward that it shall be developed by secondary legislation.

2. TOWARDS AN EU REGULATION ON ADMINISTRATIVE PROCEDURE\(^2\)

In spite of the expansion of EU Administration in the last fifty five years, not only of its competences but also of its bodies and agencies, and its human and economic resources, there is not a common regulation on administrative procedure. Despite this phenomenon, the EU ‘legislator’ has remained passive in the face of questions regarding a regulation of administrative procedure integrating the substantial aspects of the activities of the organs which make up European administration\(^3\). However, as with developments in other areas of EU law, the European Court of Justice has taken the opportunity to formulate a series of general principles which EU executive organs must respect in carrying out their functions (see below).

The situation was well described by Lenaerts and Vanhamme:

“The European Community has no comprehensive legislation on the procedural rights of private parties to be respected throughout the administrative process that precedes the adoption of decisions which might adversely affect the interests of such parties. Rather it has a variety of ad hoc legislative enactments applicable to specific fields of substantive law supplemented with unwritten general principles of law whose observance conditions the legality of administrative proceedings and thus the legality of the decision adopted as a result of these proceedings”\(^4\).

The aim of this section is to contribute to the debate on whether EU law needs a regulation on a common administrative procedure and, if so, on what its content and scope could be.

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\(^1\) See Eva Nieto Garrido and Isaac Martín Delgado in *European Administrative Law in the Constitutional Treaty*, Hart Publishing, Oxford, 2007, Chapters 1 and 5. Also by the same authors, see *Derecho Administrativo Europeo en el Tratado de Lisboa*, Marcial Pons, Madrid, 2010, Chapters 1 and 5.

\(^2\) To this section I follow Chapter 4 of *Derecho Administrativo Europeo en el Tratado de Lisboa*, Marcial Pons, Madrid, 2010.

\(^3\) The European Parliament has, on several occasions in questions put to the Commission, also highlighted the necessity of producing a general regulation on administrative procedure: Question 3093/92 (93/ C 145/38); Question 1275/93 (93/ C 350/93); Question 78/98 (H-0947/98/rev. 1). On each of these occasions, the Commission avoided speaking out in favour of a particular law, deeming the explanatory manuals, the internal rules of procedure and the initiatives to simplify procedure sufficient.

This is not to say that there are not administrative procedures used by the EU public administration. Of course, there are many different procedures\(^5\) but the debate is regarding the codification of procedural rules in a common regulation applied by EU public administration in its everyday workings.

As it happens in relation to the EU normative system, in which the diversity of procedures and legal instruments could have been perceived at the beginning as introducing flexibility and autonomy into the everyday workings of the Union, they were rather considered before the Lisbon Treaty reform as factors causing extreme complexity and lack of transparency, legal certainty and democratic legitimacy in the decision-making process.

Although it is not a new topic, the Lisbon Treaty has raised new questions related to this issue for two main reasons: firstly, because Article 298 of the Treaty on Functioning of the EU provides a legal basis for the development of a Regulation of Administrative Procedure; secondly, the binding force of the Charter of Fundamental Rights of the Union established by Article 6 (1) of the Treaty on the European Union, which includes the right to good administration and other rights, such as the right of access to documents and the right to protection of personal data, that impose some obligations on the EU Administration-administered relationship.

Regarding the contribution of the Court of Justice of the European Union (ECJ) to the development of administrative procedure principles I must say that, as Prof. Cassese noticed, while the essential elements of procedure have been developed by the EU legislator systematically and according to each sector with respect to the specific issues which they regulate, the case-law of the ECJ defines common principles which systematize a general procedure at the European level\(^6\). Thus, it was the Court of Justice and, subsequently the Court of First Instance (now General Court), which carried out the progressive shaping of the essential principles of European administrative procedure through the application of the law\(^7\). Principles such as the principle of legal certainty, the principle of legitimate expectations, the right to a hearing, the right to a defence\(^8\) or the right to good administration\(^9\) were developed by the ECJ case-law.

Along with the development of these procedural rules by the Court, we cannot forget the contribution of the European Ombudsman to ‘maladministration’\(^10\). His reports have

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\(^8\) In relation to the right of defence the Judgment of 11 November 1987, Case C-259/85 France v Commission [1987] ECR 4393 should be emphasized: ‘observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of community law which must be guaranteed even in the absence of any rules governing the procedure in question’ (para. 12). For a complete analysis of the jurisprudence of the Court regarding the rights of defence – broadly understood – in administrative procedure. See E. Barbier de la Serre, ‘Procedural Justice in European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental trends’ (2006) 12 European Public Law 225-250.


contributed to a negative definition or delimitation of the concept of good administration, offering a wide concept of ‘maladministration’ by enumerating examples of acts which would fall within that concept\(^\text{11}\). According to the European Ombudsman, the following acts are included within the concept of ‘maladministration’: administrative omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay, lack or refusal of information\(^\text{12}\). In 1998, a European Parliament Resolution adopted a definition of maladministration proposed by the European Ombudsman, according to which ‘maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it’\(^\text{13}\). Among the initiatives of the European Ombudsman it is worth highlighting the proposal for a Code of Good Administrative Behaviour in the form of draft recommendations to the European Commission, the Parliament and the Council in 1999. Similar recommendations were made to other institutions and bodies in September 1999. However, it was not until 2001 that the European Parliament adopted a Resolution approving a Code of Good Administrative Behaviour which European Union institutions and bodies, their administrations and their officials should respect in their relations with the public (hereinafter the Code)\(^\text{14}\). A new version of the Code was produced in 2005, which explains in more detail what the Charter’s right to good administration should mean in practice (see below).

2.1. **What does administrative procedure mean?**

According to standard legal literature, administrative procedure is both the blueprint for administrative activity and an instrument for the adequate protection – after appropriate consideration – of the interests affected by a decision involving the exercise of public power inherent in the administration\(^\text{15}\). It is defined by a series of concrete acts aimed at gathering and processing information\(^\text{16}\) resulting in the production of a measure capable of producing legal effects, by public or private agents who act in the pursuit of public functions\(^\text{17}\). Although it is a way of adopting an act, it has its own legal effects, and thus fulfills a triple function: a mechanism for guaranteeing the rights of citizens, a method of pursuing the general interest and a vehicle for the participation of individuals in the taking of administrative decisions.

2.2. **Arguments in favour and against codification**

There are some arguments in favour of adopting a common regulation on EU administrative procedure. Firstly, the standardisation of sectoralised rules would lead to a simplification

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\(^{11}\) The First Annual Report of the European Ombudsman in 1995 included the broad concept of maladministration: ‘there is maladministration if a Community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance’. Available at [http://www.euro-ombudsman.eu.int/report95/en/rep95_1.htm](http://www.euro-ombudsman.eu.int/report95/en/rep95_1.htm)

\(^{12}\) Ibid.


\(^{15}\) E Schmidt-Abmann, ‘El procedimiento administrativo, entre el principio del Estado de Derecho y el principio democrático’, in Barnés (ed.), *El procedimiento administrativo en el Derecho Comparado* (Madrid, Civitas, 1993), p 318. The notion of administrative procedure as the accumulation of functions which have as their objective the provision of information, communication or interaction with others comes from German law: See J Barnés, ‘Acto y Procedimiento Administrativo’, paper presented at *Diritto amministrativo ed integrazione europea*, Firenze, 5 December 2003, pp 6 y 7.

and rationalisation of the administrative processes of the EU. Secondly, European administrative law is growing with the help of the ECJ, nonetheless, that process could be further legitimised if the legislator established procedural rules. Thirdly, as a consequence of the enlargement of the Union could be more difficult to identify common principles by the ECJ. Finally, enacted rules are clearer and more accessible to the average citizen than principles developed in case-law18.

On the other hand, there are also objections to codification: if codification is characterised by the presence of a State and a long legal tradition, the European Union lacks both; there is no pressing need to codify the administrative procedures of Community law and, in any case, any specific requirements can be satisfied under the current regime of rules and European jurisprudence. Finally, codification can freeze administrative procedure and leave limited room for evolution19. “While it is important to achieve a sufficient protection of individual rights, it is equally important to promote efficiency and dynamism as well as to avoid ossification by over-regulation”20.

2.3. A new debate generated by the Lisbon Treaty contribution to an EU administrative procedure regulation

As I mentioned before the Lisbon Treaty raises the debate on an EU administrative procedure regulation because it contains some provisions that, firstly, provide for a legal basis to act and, secondly, provide for its content, mainly due to the recognition of the legal binding force of the Charter of Fundamental Rights of the European Union.

In the following pages, I analyses the legal basis, the scope, legal form, and content of a hypothetical regulation of administrative procedure of the UE.

2.3.1. Legal basis

One of the arguments against the creation of a generally applicable regulation on common administrative procedure in the European Union is the lack of a legal basis which would allow its adoption. Some authors invoked Article 308 of the EC Treaty as a legal basis for codification21.

However, the Working Group on ‘Complementary Competencies’ (W6 375/1/02) came to the conclusion that Article 308 EC Treaty should be kept within definite limits: it should not be used as a basis for harmonising measures in areas where they are explicitly excluded in the Treaty. In this way, taking into account that administrative cooperation – a new legal basis provided for in the Constitutional Treaty for the performance of the Institutions of the Union – expressly excluded any harmonising measures, it was not possible according to the

21 See Della Cananea, cit., n 19, p 979. E Cobreros Mendazona maintains that the flexibility clause could provide a basis for the creation of a regulation with the same content of the Europe Code of Good Administrative Behaviour, ‘Nota al Código Europeo de Buena Conducta Administrativa’ (2002) 64 Revista Vasca de Administración Pública p 241.
WG to create a law harmonizing administrative procedure binding upon national administrations through Article I-18 of the Constitutional Treaty.

Consequently, in the Constitutional Treaty Article III-398 was introduced for this purpose, which stated that:

“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 III-427, European laws shall establish provisions to that end”.

It was a horizontal provision, applicable to all the public powers of the Union, through which the progressive expansion and the form and function of the European administration were constitutionalised, but it also provided a broad base with which to regulate procedure.

Article III-398 of the Constitutional Treaty is the precedent and origin of Article 298 TFEU. The validity of the afore-mentioned article as a legal basis for the adoption of a European law on procedure is confirmed by the Introduction to the Code of Good Administrative Behaviour published by the European Ombudsman which stated that Art. III-398 established the legal base for the creation of a regulation which included the obligations contained in the Code. Furthermore, Article III-398 of the Constitutional Treaty was originally proposed by the Swedish government’s representative to the Convention on the Future of Europe and the intention was to allow for the adoption of a law on good administration by giving the right to good administration its own legal base in the Treaty.

Taking into account that legal precedent, we can answer the question of the legal basis for adopting an EU administrative procedure regulation by saying that Article 298 (2) provides a legal basis for a new regulation on administrative procedure applied to EU administration according to the conferral principle. That principle limits the Union competences in that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein” (Article 5 (2) Treaty of European Union).

Nonetheless, we have to keep in mind that an EU administrative procedure regulation is only one of the possible tools under Article 298, which set up several principles of administrative law (openness, effectiveness and independence principles) for their development by secondary legislation.

2.3.2. Scope

Article 298(2) TFEU meets the requirements of the conferral principle set up by Article 5(2) of the Treaty of European Union and, as we saw, provides a new legal base for adopting an EU administrative procedure regulation.

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22 CONV 727/3, p 94.
Nonetheless, in order to define the regulation scope it must be kept in mind that Article 5 (1) of the Treaty on the European Union also provides that “The use of Union competences is governed by the principles of subsidiarity and proportionality”. Indeed, a legislative act on administrative procedure shall be applied to EU administration in broad terms, including not only Institutions but also agencies and bodies. However, in principle it shall not be applied to Member States’ administrations, even though they implement EU law, since most of them have developed their own rules of procedure. In addition, EU administrative procedure regulation content will be very similar to those developed by national administrative procedure regulations, since the majority of administrative rules recognised at EU level come from Member States legal traditions.

Furthermore, in accordance with the principle of subsidiarity, “in areas which do not fall within its exclusive competence, 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” (Article 5 (3) Treaty on the European Union). When occasionally EU regulation on administrative procedure harmonises national legislation on that matter, the proportionality principle must be respected.

An EU administrative procedure regulation adopted under the legal basis contained by Article 298 (2) TFEU shall answer in the first place to the principles of Article 298 (1): to an open, efficient and independent European administration. In doing so it will develop mainly the right to good administration, and also the rights of access to documents and to protection of personal data as the Charter recognises (see below).

The development of those rights will lead the EU administrative procedure regulation towards an individual-centred tradition, in which administrative law is an instrument for controlling government and protecting individuals from infringements of their rights. In that context EU administrative procedure law will keep the EU government within its legitimate boundaries and thus regulates the relationship between the EU and the citizens. Such views are often associated with Anglo-Saxon common law countries, which have a single jurisdiction for all types of cases and, in the case of USA, a strong litigation culture.

Nonetheless, an EU administrative procedure regulation will subordinate administrative activity to the rule of law principle. This is one of the traditional function of administrative procedure in countries as Germany, in which the administration is viewed as a mere executants of the law and it falls to the legislator to design administrative procedures in the form of a very detailed administrative procedure act, or in some cases in the form of constitutional provisions.

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25 EU Courts were more successful in the harmonization of procedural rules in fields of EU exclusive competence (e.g. competition, anti-dumping, customs and State aid policy implementation) than in other fields, in which national implementation plays a major role (fields of shared administration such as agricultural policy and structural founds). Nehl has highlighted this idea, namely horizontal convergence, which was easily achieved compared with the much more problematic vertical convergence (the harmonising effect of fundamental procedural standards in the relationship between the Community and national administrations). See, Nehl, cit., p. 7.

26 Case 7/56 Algiera and others v Common Assembly [1957] ECR 39 was the beginning of the jurisprudence of Community Courts in administrative law. In this case the Court had to deal with the revocation of administrative acts which was not provided for by the EEC Treaty. The solution was found by ECJ following the legal principles commonly accepted in the Member States. J Schwarze, ‘Tendencies towards a Common Administrative Law In Europe’, (1991) 16 European Law Review 4-5. Also in J Schwarze, European Administrative Law (London, Sweet and Maxwell, 1992) 1430.


28 Ibid.
According to some national traditions to get an efficient and independent EU Administration, as Article 298 (1) TFEU provides for, is also linked to the adoption of a EU administrative procedure law. Indeed, in France or countries heavily influenced by French legal traditions, such as Spain, administrative law is considered a tool for governments to run an efficient administration. In those countries the most important reason for providing administrative procedure is to ensure the administration act respecting the law 29.

EU administrative procedure regulation can be a source of development of rights and principles, such as the right to good administration and the rule of law principle. In addition, it shall be a way of developing the democratic principle, that is considered in recent years essential to every EU activity. For instance, the White Paper on European Governance proposed the opening up of the policy-making process with the aim of getting more people and organisations involved in ‘shaping and delivering EU policy’ 30. This is linked to the principles of transparency and participation in administrative issues, which can be implemented through a EU administrative procedure law.

2.3.3. Legal form

Regarding the legal form of the EU administrative procedure law Article 298 (2) TFEU provides for a legislative measure adopted by the Council and the European Parliament in accordance with the legislative ordinary procedure. Therefore, the European Regulation seems to be the more adequate legal instrument to contain such measure. A European Regulation does not need implementing measures by Member States because it is directly applicable and has a general binding force (Article 288 TFEU) 31.

2.3.4. Content

The Lisbon Treaty, as with the EC Treaty, establishes certain rules related to administrative procedure: the duty to state reasons (Article 296 TFEU), the duty of consultation (Articles 300 and 304 TFEU), and the right of access to documents (Article 15 TFEU and 42 of the Charter of Fundamental Rights of EU). Along with this, the Lisbon Treaty establishes rights and principles which affect procedure: the rule of law (which is subject to the control of the ECJ as established in Articles 263 and 275 TFEU), the principle of equality (Article 9 of the Treaty on European Union for citizens 32 and 4 for Member States); the principle of subsidiarity (Article 5 (3) Treaty on the European Union); the principle of transparency (Article 11 Treaty on the European Union); publicity and notification principles (Article 297 TFEU); and finally rights contained by the right to good administration (Article 41 of the EU Charter on Fundamental Rights) 33, the right to protection of personal data (Article 8 of the EU Charter and 16 TFEU).

Some of these rules and principles were developed by the ECJ case law before being codified by the Treaties. The interpretation of the right to good administration is also aided by the Code of Good Administrative Behaviour approved at the request of the European Ombudsman 34. In my opinion procedural rules contained in Article 41(1)(2) of the Charter

29 Ibid.
31 See Eva Nieto Garrido e Isaac Martín Delgado, (2010), cit., Chapter 1.
32 This provision deserves special mention for establishing the principle of equality from a democratic perspective, in requiring that all Union citizens receive equal attention from its institutions, organs and bodies.
33 See below.
and their development by the Code constitute *grosso modo* the guidelines for a future Regulation on Administrative Procedure. Among those rules, the Code establishes, for instance, the obligation to personally notify private persons whose rights or interests may be adversely affected by individual acts of the Institutions. The notification should be in writing containing the decision, indicating the options available to challenge the decision, and a statement of the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision. Only in the case of a large number of persons being affected by the same decision, where standard replies are made, is the statement on the grounds of the decision made available only on request.

The following pages are focused on the content and implications of rights to good administration, of access to documents and to protection of personal data after the Charter of Fundamental Rights of EU got legal binding force.

3. EUROPEAN ADMINISTRATION AND FUNDAMENTAL RIGHTS: IMPLICATIONS OF THE EU CHARTER ON FUNDAMENTAL RIGHTS

Rights to good administration, access to documents and data protection affect European administration powers and contribute to develop a growing body of European public law. This section analyses briefly their content and more deeply their implications after the EU Charter of Fundamental Rights got binding force when the Lisbon Treaty entered into force.

In my opinion the development of these rights by secondary legislation is other of the possible tools under Article 298 TFEU to get an open, efficient and independent administration.

3.1. The Right to good administration

The right to good administration (art. 41 of the Charter) includes several rules on administrative performance developed by the EU Court of Justice.

The European Charter of Fundamental Rights contains the first positive delimitation of the right to good administration. Prior to its proclamation in December 2000, there was a

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35 Article 41 of the EU Charter on the right to good administration states that:
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.

36 Arts. 18, 19 and 20 of the Code.
37 Art. 18(3) of the Code.
38 Article 6 (1) of the Treaty on the European Union.
39 1st December 2009.
concept of maladministration, given by the European Ombudsman\(^{40}\), and a set of procedural rules that, according to the jurisprudence of the Community Courts, made up the principle of good administration. The limits to the right of good administration were set by the drafters of the European Charter of Fundamental Rights taking into account the Community Courts’ case-law and the rights already recognised by the EC Treaty\(^{41}\).

The provision on the right to good administration within the Charter contains three main rights, the first one accompanied by three subdivisions, whose interpretation is aided by the Code of Good Administrative Behaviour\(^{42}\). The first one is ‘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’\(^{43}\). This provision gives a new wording to the principle of care or due diligence that together with the duty to give reasons were used by the Community Courts, mainly, for judicial control of an administrative discretion\(^{44}\). According to the principle of care or due diligence the administration must impartially and carefully collect and consider the relevant facts and legal points of each individual case before taking a decision on it\(^{45}\). A reasonable time for handling affairs by the Community administration is related to the idea that a slow administration is a bad administration, as postulated by Advocate General Jacobs\(^{46}\). Also, it is related to the idea of the good administration of justice. Although there are no precise time-limits on administrative action in EU law, the Court of Justice established in the Lorenz case\(^{47}\) a precise time-limit of two months for the Commission to give its opinion with regard to a proposal of state aid notified by the Member State. And, since then, the idea of a reasonable time-limit for taking decisions has been considered two months\(^{48}\).

As mentioned before, the first provision in Article 41(1) of the Charter includes three more rights\(^{49}\). The first one is the right of defence, ‘the right of every person to be heard, before any individual measure which would affect him or her adversely is taken’. This right is commonly accepted in national legal orders as an essential administrative procedural rule and central standard of administrative justice. It is linked to the rule of law and the right contained in Article 6 of the European Convention on Human Rights. The first domain in EU law in which it was recognised was competition law, being subsequently developed and introduced into a wide range of administrative procedures in which the applicant may be negatively affected by the outcome\(^{50}\). This right is developed

\(^{40}\) See previous section.
\(^{43}\) Art. 41(1) of the Charter and II-101(1) of the Constitutional Treaty.
\(^{44}\) HP Nehl, cit., pp 119 and 163.
\(^{45}\) Several provisions of the European Code of Good Administrative Behaviour explain the meaning of Article 41(1) of the Charter. These impose the obligations on Community’s officials and other servants in their relations with the public such as acting according to the principle of equality of treatment and avoiding any unjustified discrimination (Art. 5), that the measures taken be proportional to the aim pursued (Art. 6), not to abuse power (Art. 7) and ensure impartial treatment, such that officials are not biased when dealing with an issue and exercising their powers (Art. 8). The right would also imply that officials must be objective when they take decisions which means that they should only take relevant factors into account, giving each factor due weight in the decision (Art. 9). The meaning of fairness is established by the Code as acting impartially, fairly and reasonably (Art. 11).
\(^{48}\) That time-limit is foreseen in the Code of Good Administrative Behaviour (Art. 17) in general terms, although due to the complexity of the matters involved these may be solved after the time-limit of two months expires. In that case a definitive decision should be notified to the author in the shortest possible time (Art. 17.2).
\(^{49}\) Art. 41(2) of the Charter.
\(^{50}\) Initially the right to be heard was recognised in procedures in which a sanction or penalty was to be imposed, but later the ECJ abandoned that formalistic interpretation in favour of a more liberal approach, accepting the
by the Code as the core of the rights of defence, implying the submitting of written comments and, when needed, the presentation of oral observations before the decision is taken\(^5\).

The second right included in Article 41(2) of the Charter is ‘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’. The right of access to information in the early days was conceived as a necessary element to the effective exercise of the right to be heard in the course of an administrative procedure. Its highest development by the ECJ took place in EU competition cases, in which the Commission has an administrative legal framework for direct implementation\(^5\). In that area the Commission had and has incisive supervisory and investigative powers over individuals, mostly legal persons with the possibility to impose pecuniary sanctions for anti-competitive behaviour\(^5\). The right of access to documents was included into primary law by the Treaty of Amsterdam and is still a prerequisite of the right to be heard, a fundamental element of the right to defence\(^5\). Together with the right of access to documents the Code includes the right to access information, which is currently a factor increasing transparency, participation and democratizing the decision making-process within the European Union Administration. The right of access to information establishes that the official who has responsibility for the matter concerned shall provide members of the public with the information that they request, taking care that this is clear and understandable. Furthermore, officials shall advise the person concerned to formulate his or her demand in writing and, if they are not competent in the matter, advise which institution or agency is competent to deal with and attend his or her request\(^5\).

The third clause in Article 41(2) of the Charter is related to ‘the obligation of the administration to give reasons for its decisions’. The duty to give reasons was seen as the element that would allow judicial control of administrative discretion,\(^5\) a way to test whether the EU administration had fulfilled its duty of care\(^5\) and an essential element for the defence of individuals affected by administrative decisions\(^5\). The importance of the duty is highlighted by the fact that the courts can detect a problem of inadequate reasoning on their own initiative and, therefore, annul the appealed decision on that ground\(^5\). Under this duty, the reasoning must disclose the essential elements explaining why the decision has been taken; in other words, it must express the *ratio decidendi* of the decision\(^6\). To fulfil this obligation, institutions do not need to refer to every legal or

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\(^5\) Art. 16 of the Code.


\(^5\) K Lenaerts and J Vanhamme, cit., p 564. According to them, there are two categories of administrative decisions in which the statement on the grounds of the decision is more relaxed. First, decisions that are taken to comply with a judgment annulling a previous decision, need not reiterate all the factual and legal elements on which it is based. And, second, measures resulting from an administrative procedure in which the addressee has actively participated and during which he has acquired extensive knowledge of the facts taken into account
factual aspect relevant to the decision. This obligation was included in primary law but it had a different scope. Article 253 EC Treaty imposed on the European Parliament, the Council and the Commission the obligation to state the reasons and the proposals or opinions on which regulations, directives and decisions are based. However, Art. 41 (2) of the Charter imposes the obligation on the EU administration, Commission, agencies and bodies, to give reasons for every decision they take which may adversely affect the rights or interests of a private person. On the one hand, the subjective scope of this obligation is narrower than that included in Article 253 EC Treaty, because it is not addressed to the European Parliament or the Council when acting as legislators, but the EU administration. On the other hand, its scope will better reflect the current situation in which not only the Institutions are subjected to the obligation to give reasons, but agencies and bodies must also express the grounds for their decisions.

In conclusion, as I said in the previous section, with respect to procedural rules contained in Article 41(1)(2) of the Charter and their development by the Code constitute *grosso modo* the guidelines for a future European regulation on administrative procedure.

To continue with the analysis of Article 41 of the Charter, the second right established in provision, is the right to compensation for damages caused by the Institutions and servants of the European Union in the performance of their duties. This clause is a reproduction of that contained in Article 288 EC Treaty regarding the non-contractual liability of the Community that, according to which the general principles common to the laws of the Member State, 'shall make good any damage caused by its institutions or by its servants in the performance of their duties' . The third paragraph of Article 288 EC Treaty extended this clause to the European Central Bank and its servants. The measure causing the damage may be of a legislative or administrative nature. In order to have the non-contractual liability of the Community recognised, the applicant must show that the act was illegal, that he or she suffered damage and that there was a causal link between that conduct and the damage suffered. However, when the measure (legislative or not) is discretionary, the applicant must show that there has been a violation of a superior rule of law for the protection of individuals (it could be a Treaty provision or a principle of law,

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62 Art. 18 (1) of the Code.
65 In one case the CFI admitted EU non-contractual liability although the damage was not a consequence of an illegal act. The Court held that 'when damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met (Case C-237/98 Dorsch Consult v Council and Commission [2000] ECR I-4549, para 19). Case T-69/00 FIAMM and FIAMM Technologies v Council and Commission [OJ C 135, 13 May 2000], para 160. However, the action was dismissed because it had not been established that the applicants suffered damage in excess of the limits of the risks inherent in their export operations.
such as proportionality, legal certainty or legitimate expectation), that was sufficiently manifest and grave to cause the damage.\(^66\)

Regarding compensation for damages caused by a violation of the right to good administration as a superior rule of law, in cases T-344/00 and T-345/00 the inaction of the Commission for a long period of time was considered ‘a clear and serious breach of the principle of sound administration giving rise, in principle, to liability on the Community’s part’.\(^67\) However, the Judgment of the Court of Justice of 12 July 2005 overturned the CFI decision on those cases (now General Court).\(^68\)

The Code of Good Administrative Behaviour does not contain any provision that explains in more detail this clause of non-contractual liability of the EU possibly because the ECJ case-law has delimited its meaning and limits. There is no modification in its wording; it simply reproduces the provision of Article 288 EC Treaty. There is no need to mention agencies and bodies because the case-law on Article 288 EC Treaty extended the term “institutions” to all bodies and agencies. The Court of Justice ruled that the term “institutions” used in the second paragraph of Article 288 EC Treaty must not be understood as referring only to the EU institutions listed in Article 7 EC Treaty. The term also covers, with regard to the system of non-contractual liability established by the Treaty, all other EU bodies established by the Treaty and intended to contribute to the achievement of the EU objectives. Measures taken by those bodies, in the exercise of the powers assigned to them by EU law, were attributable to the EU, according to the general principles common to the Member States referred to in the second paragraph of Article 288 EC Treaty.\(^69\) Therefore, although agencies’ regulations include clauses on compensation for damages caused by them and their servants, those have only declaratory effects.\(^70\)

The last right recognised under the heading of the right to good administration (Article 41 of the Charter), is the right to official correspondence in one’s own language.\(^71\) This provision reproduces the right guaranteed by the third paragraph of Article 21 of the EC Treaty, currently Article 24 (4) of the TFEU. In spite of its reference to ‘every person’, which was probably taken from the Code of Good Administrative Behaviour,\(^72\) this right is to be applied under the conditions and within the limits defined by the Treaties (Article 52(2) of the Charter) and, therefore, it only applies to citizens of the Union like the right included within Article 21(3) EC Treaty (now Article 24 (4) TFEU). Furthermore, this right

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\(^{67}\) Cases T-344/00 and T-345/00, ibid, para 103.

\(^{68}\) Case C-198/03, Commission v CEVA Santé Animale SA and Pfizer Enterprises Sàrl [2005] ECR I-6357, paras 69 and 89. The ECJ held that the CFI had erred in law in holding, without having established the scope of the discretion enjoyed by the Commission, that the latter’s inaction constituted a clear and serious breach of Community law giving rise to liability on the part of the Community. Taking into account the extent of the discretion available to the Commission and to all of the factual circumstances, in particular the scale of divergence in the scientific data, it did not appear that the inaction of the Commission, which made a decision after the date the administration of progesterone was banned, was a clear violation of the limits of its discretion.


\(^{71}\) Art. 41(4) of the Charter.

\(^{72}\) The Code refers to ‘every citizen of the Union or any member of the public’, Art. 13. This provision extends it to legal persons such as associations (NGOs) and companies.
is related to the correspondence maintained with the institutions, not with agencies or bodies. Agencies may limit their working languages without infringing the principle of non-discrimination.\footnote{Case T-120/99 Kik v OHIM [2001] ECR II-2235, para 62. The CFI ruled in the Kik case [in which a Dutch trade mark agent, saw her application rejected because she refused to indicate one of the five languages of the Office for Harmonization in the Internal Market as a secondary language for the opposition, revocation or invalidity proceedings (these five language do not include Dutch)], that the limitation did not involve an infringement of the principle of non-discrimination. According to the CFI, the provision of the Office for Harmonization in the Internal Market’s regulation that imposes the duty on the applicants indicate a second language from among French, English, German, Italian and Spanish ‘was adopted for the legitimate purpose of reaching a solution on languages in cases where opposition, revocation or invalidity proceedings ensue between parties who do not have the same language preference and cannot agree among themselves on the language of proceedings’. The CFI held that the applicant was not entitled to rely on Article 21 (3) EC Treaty, according to which every citizen of the Union may write to any of the institutions or bodies referred to in that provision or in Article 7 EC Treaty or Article 21 EC Treaty (Ibid, para 64). It is worth noticing Case C-160/03 Kingdom of Spain v Eurojust [2005] ECR I-2077, in which the Kingdom of Spain sought the annulment of seven calls for applications for the recruitment of temporary staff issued by Eurojust of the point concerning documents to be submitted in English by persons submitting their application form in another language, and of the various points concerning candidates’ qualifications in respect of knowledge of languages. As AG Pollares Maduro’s Opinion pointed out, the case was important because provided the Court once again with an opportunity to examine the meaning and scope of the language regime of the institutions and bodies of the European Union. In Kik case the Court gave a decision on the language regime applicable to the registration procedures in an agency of the European Community (the Office for Harmonisation in the Internal Market), whereas in Spain v Eurojust case was called upon to give a decision concerning the language regime applicable to the recruitment procedures and internal proceedings of Eurojust, a European Union body. However, the Court declared the application inadmissible because the acts contested were not included in the acts of the legality of which the Court may review under Article 230 EC Treaty (para 36-38).}

Implications of a Binding Right to Good Administration for the EU Administration

In order to analyse the implications of a binding right to good administration for EU administration it is worth asking whether the right to good administration is really a subjective right or only a principle of EU law. The Preamble and Article 51 (1) of the Charter declares that there are rights and principles within the Charter, but it does not say how to distinguish rights from principles. Obviously, this distinction has significant effects: only if we conclude that Article 41 of the Charter contains a subjective right could, its breaches by an administrative decision be challenged by means of an application before the General Court. But if we conclude that Article 41 of the Charter contains a general law principle, it would be a general mandate for public administration to promote and safeguard its optimization within real and legal possibilities, prohibiting any public action detrimental to that goal.\footnote{R Alexy, Teoría de los Derechos Fundamentales, Centro de Estudios Constitucionales, Madrid, 1993, p 87; A Garcia Figueroa, Principios y Positivismo Jurídico, Centro de Estudios Políticos y Constitucionales, Madrid, 1998, p 186.}

The Court of Justice defined the good administration as a general law principle in Max.Mobil case amended the CFI decision on the same case.\footnote{Case C-141/02, Commission v max-mobil [2005] ECR I-1283, para 72, and case T-54/99 Max. Mobil v Commission [2002] ECR II-313.} Nonetheless, to my opinion there is some evidence that the right to good administration is a subjective right.

- Firstly, the wording of Article 41 of the European Charter of Fundamental Rights suggests that it is a subjective right and not only a principle of EU law.\footnote{K Kanska, ‘Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights’, (2004), p 304.} The Final Report of Working Group II, on ‘Incorporation of the Charter/ accession to the ECHR’, after declaring that there are principles and rights within the Charter, confirms the idea
of the Convention that produced the Charter that it should express clearly the nature of each provision in the wording of the respective articles77.

- Secondly, the content of Article 41 shows that is composed of subjective rights recognised by ECJ case-law and, moreover, rights that were recognised in the text of the EC Treaty, though scattered and fragmentary throughout its text.
- Thirdly, some subjective rights from Article 41 of the Charter (such as access to administrative file, right to be heard, a time-limit decision) come not only from Member States’ common traditions but also are procedural rights that integrate the essential content of Article 6 European Convention of Human Rights (right to a fair trial).

Consequently, this evidence leads to the conclusion that Article 41 of the Charter recognises a subjective right. But what does it mean? Is it a new fundamental right or only a subjective right? According to Chapter VII of the Charter, it distinguishes between rights and principles, but the Charter does not establish any difference in legal consequences among the rights recognised therein, and does not contain any distinction between “fundamental” or “subjective” rights. In my opinion, rights recognised by the EU Charter on Fundamental Rights are fundamental rights because they are contained in a formal instrument of EU law, that is Charter, which forms part of the Lisbon Treaty. 78 Furthermore, they are fundamental rights because they limit legislative action according to Article 52(1) of the Charter. This provision states that:

“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”.

In other words, according to the sources of EU law provided by the Lisbon Treaty, any limitation on rights’ content must be lay down by a legislative act adopted following the legislative ordinary procedure (Article 294 TFEU). European Parliament participation will ensure respect for the principle of proportionality on the exercise of the right limitations to be established. In addition, the legislative act that develops the right to good administration of Article 41 will be reviewed by the ECJ in order to guarantee that the European legislator respected the essential content of that right and that limitations established are due and proportional to the objective of EU’s general interests or to third parties’ liberties and rights protection.

Furthermore, Article 41 of the Charter contains a new fundamental right (the right to good administration) because it recognises for the first time in one provision subjective rights recognised firstly by EJC case-law and, secondly, introduced into EC Treaty but in a scattered and fragmentary way (the right to be heard, the right of access to your file, the obligation to give reason and so on). In addition, in some cases, such as the obligation to give reasons, the scope of the rule under the Charter it is different than the scope recognised by Article 253 of EC Treaty. The last one only bound the European Parliament, the Council and the Commission to give reasons when regulations, directives and decisions were adopted. However, Article 41 of the Charter obliges to the EU Administration, included

78 The formal element as the determiner of the creation of fundamental Rights is stated by F Rey Martínez, “¿Cómo nacen los derechos? (Posibilidades y límites a la creación judicial de derechos)”, en Integración europea a través de derechos fundamentales: de un sistema dual a otro integrado, J García Roca y P Antonio Fernández (coords), Centro de Estudios Políticos y Constitucionales, 2009, pp 329-330.
agencies and bodies, to give reasons of every decision they take and that affects negatively to third party interests.

Finally, the right to good administration development will contribute to a “growing body of ius publicum europaeum”\(^79\). Furthermore, the Charter makes the fundamental rights recognised by the European Union more visible and in doing so, facilitates their invocation by individuals and private parties\(^80\).

### 3.2. The right to access to documents of Articles 42 of the Charter and 15 of the Treaty on the Functioning of the EU

The right of access to documents was conceived at first as a procedural right linked to the right of the defence, as an inherent part of the right to be heard. Access to files was recognised by the Court of Justice early in the competition law cases as an essential element of a proper defence. In parallel to the development of the right of access to documents as a procedural right within the right of defence or, specifically, as an inherent part of the right to be heard, concerns regarding the democratic deficit of the institutions prompted the development of a constitutional style right, adopting measures to improve public access to the information available to the institutions. Since the 90s, the openness of the action of public authorities has been considered closely and linked with the democratic nature of the institutions. The fact that citizens are aware of what the administration is doing is considered a guarantee that it will operate properly. The introduction of openness and transparency as principles of the decision-making process, with the aim of increasing the democratic nature of the Community and bringing it closer to citizens, prompted the introduction of a new provision into the EC Treaty (Article 255 now 15 of the TFEU).

After the Treaty of Amsterdam came into force (1 May 1999), the scope, limits and arrangements for exercising the access to documents were established in Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001. Besides pre-existing rules and principles in EC Law on this matter (see previous section), this Regulation introduced some innovations that, on the one hand, highlight the constitutional perspective of the right to access to documents related to the democratic nature of the European public administration and, on the other, reflect the current state of the case-law on access to documents with a long list of exceptions to the general principle of ensuring the widest access possible\(^81\).

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Although Regulation No 1049/2001 departs from the general principles on access to documents established by the Code of Conduct it is much more ambitious. Its purpose is not only to ensure the widest possible access to documents, but also to establish rules ensuring the easiest possible exercise of this right and to promote good administrative practice with respect to access to documents. Furthermore, in order to ensure the full application of its provisions to all activities of the Union, the Regulation establishes that all agencies of the Union should apply these principles. Among the new features introduced by the Regulation, the abolition of the author rule is worth noticing; also the obligation to balance the interests by the Institution concerned; the obligation to give partial access to those parts of the documents not covered by an exception; and the addition of some exceptions, such as defence and military matters and legal opinions.

General principles included guaranteeing the widest access to documents as possible, that is, documents not falling under an exception (in order words, when disclosure does not infringe a specific public or private interest); the applicants, natural or legal persons, do not have to justify their applications; documents containing all information kept in any form whatsoever referred to areas within the competence of the institution concerned; refusal to disclose a document must be based on an analysis of the harm that would be caused by disclosure to either the public or private interests. To that end, the institution in response to a request has to make an individual examination of the documents referred to, applying the principle of proportionality, before refusing access to the documents applied for (Case T-2/03, Verein für Konsumenteninformation v Commission [2005] ECR II-1121, para 107); and finally, all decisions refusing even partial access may be the subject of an administrative appeal to the institution concerned which must give reason for its refusal.

The protection of certain interests must be balanced with the public interest in the disclosure and if the latter is preponderant, the exception on the right of access would not be applicable. The principle of proportionality is the key factor. In the Verein für Konsumenteninformation case, the CFI held that the Commission refusal to examine concrete and individual documents was a breach of the principle of proportionality. Case T-2/03, Verein für Konsumenteninformation v Commission, [2005] ECR II-1121, para 100.

The Commission then referred to the case-law. In case T-76/02, Messina v Commission [2003] ECI II-3203. In the Co-Frutta case, the CFI held that when there is a doubt as to the authorship of a document it is important to construe and apply the authorship rule strictly (confirmed in C-41/00 Interporc v Commission [2003] ECI I-2125, para 70), but not in cases where there are no doubts, since the Member States alone are the authors of the documents in question as in this case. Case T-47/01 Co-Frutta Soc. Coop.ri v Commission [2003] ECR II-4441, para 61. The abolition of the author rule occurred when Regulation No 1049/2001 entered into force on 3 June 2001 and applied only from then.

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In order to establish rules ensuring the easiest possible exercise of the right of access to documents and, therefore, promoting the constitutional nature of this right, it is worth noticing that Regulation No 1049/2001 obliges each institution to keep a register of documents open to the public and to give direct access to it in electronic form. Furthermore, the institutions shall provide information and assistance to the citizens on how and where applications for access to documents can be made. This rule is connected to the development of good practices to facilitate the exercise of this right by the EU administration, such as to inform the public of the rights they enjoy under this Regulation and to establish an inter-institutional committee to examine best practice, to analyse possible conflicts and discuss future developments to this right.

Substantive rules to ensure the easiest possible exercise of this right are accompanied by detailed procedural rules on how to get access to documents, promoting good administrative practice. For instance, the Administration has a shorter time-limit to give an answer (fifteen days and not a month as before) and, another fifteen for the processing of a successful application. Failure by the institution to reply within that period of time is considered a negative reply which entitles the applicant to institute court proceedings against the institution and/or make a complaint to the European Ombudsman.

According to Regulation 1049/2001, the Council, the Commission and the European Parliament are obliged to give access to the document or documents held by them. Furthermore, the three institutions adopted a joint declaration to the Regulation in which they committed themselves to extend the scope of this right to any agency or body of the European Union. Indeed, the regulations governing each agency were amended in order to guarantee the right of access to their documents and that an agency decision denying access can be the subject of a complaint before the Ombudsman under Article 195 EC Treaty (now Article 228 TFEU), or the subject of an action before the Court of Justice of the European Community under to 230 of EC Treaty (now Article 263 TFEU).

The provision contained in Article 255 EC Treaty (now Article 15 TFEU) mentioned a minimum group of beneficiaries which was extended through secondary legislation. Article 255 EC Treaty and Regulation No 1049/2001 guaranteed access to documents for citizens and residents of the European Union and to all legal persons whose registered offices were located in a Member State. The Council, Commission and Parliament’s implementing decisions extended this right to all natural and legal persons even when not citizens of the European Union or not having registered offices in a Member State. However, this does not mean that those persons have the right to access documents which is, according to the Charter of Fundamental Right of the European Union, a right of citizenship.

89 Arts. 11 and 12 of the Regulation No 1049/2001.
90 Art. 6 (4) of the Regulation No 1049/2001.
91 Ibid, Art. 15.
92 Ibid, Art. 14 (1).
93 Ibid, Art. 15 (2).
94 Ibid, Arts. 6, 7 and 8.
A paradigmatic example of case-law adopted from a constitutional perspective is the Hautala case, in which the main idea is that although the right of access to documents is not absolute and its exercise may imply some restrictions, these should correspond to objectives of general interest of the European Union and respect the principle of proportionality. In the Hautala case, AG Léger held that it is necessary to assess whether the exceptions contained at that time in Decision 93/731 were applied in a proportionate manner, respecting the right of access to documents introduced into the European Charter of Fundamental Rights. The Council’s appeal against the Judgement of 19 July 1999 of the Court of First Instance, in which the Court recognized Ms. Hautala’s right to get partial access to the documents applied for, was dismissed by the Court of Justice, following the Opinion of AG Léger.

Recent case-law shows the relationship between the right of access to documents and the right to data protection. It shows how the right to protection of personal data can be used by the Institutions, in the case by the Commission, to deny access to documents. In the case C-28/08 P ECJ declared void the General Court judgement that considered illegal the Commission decision denying access to documents that could affect the right to protection of personal data of some participants in a meeting, because the data applicant didn’t justify why those documents were so relevant to him.

Right of access to documents forms part of the right to good administration in the Code of Good Administrative Behaviour. The right to good administration has been used to highlight the need for a concrete and individual examination of the exception before denying access to documents applied for.

Implications of a Binding Right of Access to Documents for the EU Administration

The previous pages show that under the Article 255 EC Treaty (now Article 15 TFEU) and Regulation 1049/2001 the right of access to documents covered the documents and information of the institutions as well as those kept by the institutions and agencies or bodies of the European Union. As we saw, agencies and bodies adapted their regulations in order to guarantee the effectiveness of this principle. From the point of view of the beneficiaries, the institutions modified their procedural rules in order to give access to their documents not only to citizens of the European Union and legal persons registered in a Member State, as Article 255 EC Treaty stated, but also to citizens and legal persons of third countries.

97 See n 87. In the recent Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen, the Court of Justice declared partially invalid the European Union legislation on the publication of information relating to the beneficiaries of the European agricultural funds. It established the obligation to publish the names of natural persons who were beneficiaries of such aid and the exact amounts which they have received and the Court of Justice concluded that with regard to the objective of the transparency it was a disproportionate measure. Also in the Case C-139/07 P, Commission v Technische Glaswerke Ilmenau GmbH, the Court of Justice annulled the judgment of the CFI and stated that the right of access to documents is subject to certain limits based on reasons of public or private interest. In the case, the Court of Justice confirmed the Commission decision denying access to documents of which disclosure is sought do indeed fall within an activity of “investigation”, within the meaning of the Access to Documents Regulation.

98 Opinion of AG Léger, Case C-353/99 Council v Heidi Hautala, para 112.

99 Case C-28/08 P, Commission v Babarian Lager, OJ C 234 from 28.08.2010, p. 3.

100 Art. 23 of the Code. The European Ombudsman launched, on 15 April 1997, an initiative stressing the need for the Commission to increase the development of procedural rights for private complainants under the Article 169 procedure as a matter of good administrative behaviour. See J Söderman, 'The Role and Impact of the European Ombudsman in Access to Documentation and the Transparency of Decision-Making' in V Deckmyn and I Thomson (eds), Openness and Transparency in the European Union (Maastricht, European Institute of Public Administration, 1998), pp 75-76.

Article 42 of the Charter is identical to the wording of Article 255 EC Treaty and in the explanatory notes to the Charter it says that the scope and meaning of the right introduced into the Charter is the same as that recognised by Article 255 EC Treaty.

Article 255 EC Treaty (now Article 15 Treaty on the Functioning of the EU) contained a subjective right invoked before the ECJ and consequently there is a rich case-law on it. As we saw concerning the right to good administration implications, according to Chapter VII of the Charter, it distinguishes between rights and principles, but the Charter does not establish any difference between rights regarding its legal consequences of being recognised as fundamental or subjective rights. In my opinion, rights recognised by the EU Charter on Fundamental Rights are fundamental rights because they are contained in a formal instrument of EU law, that is Charter, which forms part of the Lisbon Treaty. Furthermore, they are fundamental rights because they limit legislative action according to Article 52 (1) of the Charter. In other words, according to the sources of EU law provided by the Lisbon Treaty, any limitation on rights content must be laid down by a legislative act adopted following the legislative ordinary procedure (Article 294 TFEU). European Parliament participation will ensure respect for the principle of proportionality when limitations to the right are established. In addition, the legislative act that develops the right of access to documents of Article 42 will be reviewed by the ECJ in order to guarantee that European legislator respected the essential content of that right and that limitations established are due and proportional to objective of EU’s general interests or to third parties’ liberties and rights protection.

Nonetheless, the right of access to documents differs from the right to good administration because the first one is not a new fundamental right of EU Law, it is a pre-existing right of EU Law, although its regulation by the Charter is a step forward in the process of its recognition and strengthening in the EU’s legal system and the ranking of fundamental rights.

3.3. Right to Protection of Personal Data

Two features distinguish the right to protection of personal data from the rights to good administration and access to documents. The first one is the origin of the right to protection of personal data in secondary legislation and not in the ECJ case-law. The second one is that the right to protection of personal data does not apply only to EU Administration, but also to Member States when they implement EU law.

Regarding the first issue, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, is an important turning point for the recognition of the right to data protection as an autonomous right, not only as an element of the right to privacy as it was considered by ECJ case law.

Regarding the second issue, rules imposed on Member States by Directive 95/46/EC were not applicable to the EU administration until Regulation No 45/2001 was approved. The

102 The formal element as the determiner of the creation of fundamental Rights is stated by F Rey Martínez, “¿Cómo nacen los derechos? (Posibilidades y límites a la creación judicial de derechos)”, en Integración europea a través de derechos fundamentales: de un sistema dual a otro integrado, J García Roca y P Antonio Fernández (coords), Centro de Estudios Políticos y Constitucionales, 2009, pp 329-330.

103 Before the Directive quoted, the ECJ dealt with cases in which personal data protection was at stake but considered it a breach of the right to respect of privacy (Article 8 ECHR) as the applicant alleged (For instance, Case C-404/92 X v Commission [1994] ECR I-4737).
Treaty of Amsterdam put an end to this anomalous situation, generated by Directive 95/46/EC, in which Member States had to respect the Directive provisions on personal data protection when implementing EU law whereas EU Institutions and bodies were not subject to those rules. Article 286 EC Treaty, introduced by the Treaty of Amsterdam, required the application the Community acts on the protection of individuals regarding the processing of their personal data and the free flow of such data to the EU institutions and bodies. Its second paragraph contains the legal basis used to enact Regulation No 45/2001, 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 which was approved. This Regulation is inspired by the same principles as Directive 95/46/EC and establishes an independent supervisory authority, called the European Data Protection Supervisor, to ensure that the fundamental rights and freedoms of natural persons, in particular their right to privacy, are respected by EU institutions and bodies. Furthermore, a Data protection officer, who will report to the European Data Protection Supervisor, was appointed in each EU institution and body to ensure compliance with Regulation No 45/2001.

The provisions of Directive 95/46/EC give substance to and develop principles of personal data protection contained in the Convention of the Council of Europe of 1981 adopting, also, its structure in defining some concepts, such as processing of personal data, personal data filing systems, processors, third party, recipient and the data subject, followed by some principles applying to data processing and their exceptions, concluding with sanctions and remedies for infringement. The principles of Directive 95/46/EC have been translated into specific rules for the telecommunications sector through Directive 97/66/EC of the European Parliament and of the Council, of 12 July 2002, concerning the processing of personal data and the protection of privacy in the telecommunications sector. This has been adapted to developments in the markets and technologies for electronic communications services by Directive 2002/58/EC.

Among the principles legitimating the processing of personal data, Directive 95/46/EC establishes that it must be done fairly and lawfully. The collection of data must be for specified, explicit and legitimate purposes and in a way that is not excessive in relation to the purposes for which they are collected. Data must be accurate and kept up to date and should be stored for shortest time possible depending on the purpose for which it was collected. Member States must respect these principles when determining precisely the conditions under which the processing of personal data is lawful, but it must be taken into account that personal data may be processed only if the data subject has unambiguously given his consent or when the processing is necessary for the performance of a contract to which the data subject is party, or processing that is necessary for compliance with a legal obligation to which the controller is subject, or where it is necessary to protect the vital interests of the data subject, etc.

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105 Arts. 41-48.
106 Art. 24-25.
108 Arts. 6 and 7 of Directive 95/46/EC.
With regard to the processing of personal data by the EU administration, Regulation No 45/2001 also limits its scope to the old first pillar. In consequence, the European Data Protection Supervisor does not have competence to monitor the collection, storage and processing of personal data carried out by Europol or any other body outside the old first pillar.

The ECJ decisions have contributed decisively to the delimitation of the scope of personal data protection within the current Treaties. Case law on this matter departs from two premises. Firstly, the limitations in both Directive 95/46/EC and Regulation 45/2001 apply to first pillar acts. And, secondly, the legal basis of the Directive on harmonization of national legislation for the completion of the common market (Article 95 EC Treaty now 114 TFEU). The \textit{Rundfunk} and \textit{Linqvist} cases are the leading cases in relation to personal data protection, in which the ECJ adopted a broad interpretation of the scope of Directive 95/46/EC. However, this broad interpretation suffered a serious restriction in the PNR case.

Implications of a Binding Fundamental Right to Protection of Personal Data

Nonetheless, in spite of these normative instruments, personal data protection is far from being a right with a uniform guarantee in EU Law. Normative instruments in this field have limited scope. On reading the preamble of Directive 95/46/EC and certain provisions of Regulation No 45/2001 the first impression is that their scope is limited with respect to acts of the old first pillar. Directive 95/46/EC declared that the principles that it contains were applicable to all processing of personal data by any person whose activities are governed by Community law. Consequently, activities referred to in Titles V and VI of the previous Treaty of the European Union regarding public safety, defence, State security or the activities of the State in the area of criminal laws fell outside the scope of the Directive provisions. To eliminate any doubt on this limitation, the Directive declared in the same paragraph that the processing of personal data relating to State security matters remained outside the scope of the Directive.

Consequently, as I said previously, in view of those elements of the right to protection of personal data, the Lisbon Treaty approval has more important implications in relation to this right than regarding the rights to good administration and of access to documents. On the one hand, because from being a right regulated by secondary legislation is now recognised as fundamental right by the Charter. And, on the other hand, because from being applied only to first pillar matters goes now to link EU legislator action across all matters of its competence.

The right to protection of personal data is regulated by the Treaty on the Functioning of the EU as a logic consequence of the civil society participation principle in public affairs and the right to access to documents. Furthermore, the right to protection of personal data is regulated by the Charter within the Title dedicated to liberties (Article 8).

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110 This Regulation shall apply to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law'. Art. 3 of Regulation No 45/2001.
115 Article16 TFEU.
To introduce this right in the Charter means to recognise its fundamental right character and to make it more visible and in doing so, facilitating their invocation by individuals and private parties. As it happens with rights to good administration and access to documents, the right to protection of personal data constitutes a limit to the EU legislator because when establishing limits to it he must respect its essential content and the proportionality principle.

Two innovations come from its regulation by the Treaty on the Functioning of the EU: firstly, a new legal basis related to the right to data protection (Article 16 TFEU) that covers data processing both by the Union’s institutions, bodies and agencies and by Member States acting within the scope of Union Law. In the future, Union legislation on data protection by Member States will not be considered as an ‘annex’ to the internal market as was the case until now, due to the fact that it was based on Article 95 EC Treaty. Secondly, the new legal basis covers all data processing within the scope of Union Law, including the old Second and Third Pillars. Indeed, the Lisbon Treaty has a great impact on this right, due to the elimination of the pillar structure, because it will be applicable to all fields of EU law with the limitations being imposed only by legislative acts.

Nonetheless, we have to keep in mind that Article 16 (2) TFEU states that:

“The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union”.

Article 39 of the Treaty on European Union is located among the specific provisions on the Common Foreign and Security Policy and states that “the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities”.

Article 39 of the Treaty on European Union will be applied to data processing by Member States when implementing the Common Foreign and Security Policy. That provision allows the Council to harmonize data protection in that field. An independent authority firstly, and national courts secondly, will monitor compliance with the Council decision.

However, it will be in the Area of Freedom, Security and Justice where the right of data protection will play a major role. Within this area, it is worth noticing the impact that the Lisbon Treaty will have on the activities of Europol and Eurojust. Both will be subjected to democratic control of the European Parliament (that monitors limits imposes on the right to protection of personal data by Europol and Eurojust processing data), to an independent authority designated and, finally, to judicial control of their decisions by the ECJ. Let us say a few words on those bodies.

Europol was created by Council Act of 26 July 1995, which drew up a Convention based on Article K.3 of the Treaty on European Union on the establishment of a European Police Office (Europol Convention) to improve the effectiveness and cooperation of the

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117 Article 39 of EU Treaty is located in Chapter 2, within Title V, dedicated to General Provisions on the Union’s External Action and Specific Provisions on the Common Foreign and Security Policy.
competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organized criminal structure is involved within two or more Member States. The Convention entered into force in 1999 and Europol activities have been focused, since then, on the collection, transmission and processing of information related to unlawful drug trafficking, illegal immigration networks and other serious forms of international crime.

During the Convention period, several documents on the field of Justice and Home Affairs expressed concern with respect to Europol’s activities which are subject neither to democratic control by the European Parliament nor to judicial control by the Court of Justice. Under the current arrangements, the data subject has the right to ask Europol for the deletion of his or her data when the proceedings against the person are dropped or if he or she is acquitted. But, if the enquirer is not satisfied with Europol’s reply or if there is no reply within three months, the only option that remains is to refer the matter to a joint supervisory body established by the Europol Convention. This body was established by Article 24 of the Europol Convention, with the function of reviewing the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and illegal utilization of the data held by Europol. It is composed of members or representatives of each of the national supervisory bodies (not more than two for each Member State).

The same situation is applied to Eurojust’s processed data. Every person has the right to access his or her own personal data processed by Eurojust and to ask for correction and deletion if they are incorrect or incomplete. If access is denied or the applicant is not satisfied with the reply given to his or her request or if there is no answer, an appeal may be made against that decision before a Joint Supervisory Body. As we saw with Europol’s Convention, the decision of the Joint Supervisory Body is final and binding on Eurojust.

According to the Lisbon Treaty Europol and Eurojust may be under the supervision of the European Data Protection Supervisor. The European Data Protection Supervisor is an independent supervisory authority responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right of privacy, are respected by the EU institutions and bodies.

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119 The adoption of a common position by the Council did not require the consultation of the European Parliament (old Art. 32 EU Treaty) in spite of a Protocol that amended the Europol Convention with the aim of introducing Parliamentary control upon the action of Europol (Council Act of 27 November 2003 drew up a Protocol amending the Europol Convention on the basis of Article 43 (1) of that Convention, [2004] OJ C/2/1). This Protocol imposed the duty on the President of the Council, assisted by the Director of Europol, to inform the European Parliament or discuss general questions relating to Europol (Art. 34 (2) Europol Convention). Prior to this Protocol, Europol’s Convention established that the President of the Council had to forward a special report to the European Parliament each year (Art. 34).
121 Art 8(5) of the Europol’s Convention.
122 Ibid. Art. 20 (4).
123 Ibid.
126 The Joint Supervisory Body monitors Eurojust activities collectively to ensure that the processing of personal data is carried out correctly. It is composed of one judge for each Member State. The judges should not be members of Eurojust. Art 23 of the Eurojust’s Council Decision.
Eurojust should make these bodies subject to the supervision of the European Data Protection Supervisor. In that case, the legislative act would have to determine the fate of the Joint Supervisory Body of Europol and Eurojust, whose role would be redundant. The European Data Protection Supervisor decisions may be challenged before the Court of Justice.\(^\text{128}\)

The Lisbon Treaty will have less impact upon other systems of information and data collection, such as the Schengen Information System (SIS), the Customs Information System (CIS) and Eurodac.

Although the SIS was created within the third pillar, using a legal basis of Title VI of the Treaty of European Union, under the heading of ‘Provisions on Police and Judicial Cooperation in Criminal Matters’, it was included within the Community pillar, under the supervision of the ECJ.\(^\text{129}\) A decision of the ECJ in the case C-503/2003 *Commission v Spain* \(^\text{[2006] ECR I-1097,}\) declared that the Kingdom of Spain failed to fulfil its obligations under Article 1 to 3 of Council Directive 64/221/EEC, of 25 February 1964, on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, by refusing entry into the territory of the States party to the Schengen Agreement to two third countries nationals who are the spouses of Member States nationals, on the sole ground that they were persons for whom alerts were entered in the Schengen Information System for the purposes of refusing them entry, without first verifying whether their presence constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. This judgment is an example on how the ECJ supervises the integration of the Schengen *acquis* within the Community *acquis*.

The CIS (Customs Information System) was established by 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, therefore within the institutional and legal framework of the old Community pillar.\(^\text{130}\) The CIS consists of a database accessible via terminals in each Member State and at the Commission. The rights of persons with regard to their personal data in the CIS, in particular their right to access the data, are governed by the national law of the State in which such rights are invoked. Indeed, someone who wants to bring an action or complaint relating to the processing of his or her data by the CIS, must do it before the national court or authority designated for this purpose.\(^\text{131}\) When in any Member State a court or other authority designated for that purpose makes a final decision to amend, supplement, correct or delete data in the CIS, the CIS must be amended accordingly. This provision is also

\(^{128}\) Ibid, Art. 32.


\(^{130}\) [1997] OJ L82/1. The aim of the CIS is to assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation, by increasing, through more rapid dissemination of information, the effectiveness of the cooperation and control procedures of Member States competent authorities (Art. 23 (2) of Regulation No 515/1997).

\(^{131}\) Art. 36 (5) of Regulation No 515/1997.
applicable to the Commission when its decision on data contained in the CIS is declared void by the ECJ\textsuperscript{132}.

Council Regulation (EC) No 2725/2000, of 11 December 2000,\textsuperscript{133} established Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, determines the State responsible for examining applications for asylum lodged in one of the Member States of the European Union.\textsuperscript{134} Eurodac consists of a Central Unit established within the Commission that operates a computerized central database of fingerprint data which is transmitted between the Member States and the central database. The Preamble of Regulation No 2725/2000 establishes the application of Directive 95/46/EC to Member States when processing personal data within the framework of the Eurodac system.\textsuperscript{135} The Preamble also refers to the application of that Directive to the Commission, by virtue of the old Article 286 of EC Treaty. This reference must be understood with respect to Regulation No 45/2001, which developed the provision contained in Article 286 after the Regulation on Eurodac was approved. The Eurodac Regulation provides for data-protection rules and for a joint supervisory authority, endowed with the task of monitoring the activities of the central unit to ensure that the rights of data subjects are not violated by the processing or the use of the data. It also monitors the lawfulness of the transmission of personal data to the Member States by the central unit. After the Lisbon Treaty these duties will be assumed by the European Data Supervisor, that will replace the joint supervisory authority envisaged in Eurodac Regulation (Article 20 (11)) and will exercise all the powers conferred on it.

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\textsuperscript{132} Ibid, Art. 32 (5).
\textsuperscript{134} [1997] OJ C/254/1.
\textsuperscript{135} Council Regulation No 2725/2000, Preamble, para 15.
Policy Department C

Citizens' Rights and Constitutional Affairs

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents