

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**ARGUMENTS IN FAVOUR OF A
GENERAL CODIFICATION OF
THE PROCEDURE APPLICABLE
TO EU ADMINISTRATION**

NOTE



DIRECTORATE-GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

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

Briefing 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.

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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
- ECGAB** European Code of Good Administrative Behaviour adopted by the European Parliament on 6 September 2001
- 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
- REFC** Revista Española de la Función Consultiva
- RTDP** Rivista trimestrale di diritto pubblico
- RVAP** Revista Vasca de Administración Pública

- 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 level¹.

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.

¹ The following, inter alia, have participated in this debate (in chronological order): Schwarze, Jürgen, *Europäisches Verwaltungsrecht*, Vol. II, Nomos, Baden-Baden, 1988, p. 1397 et seqq.; Harlow, Carol, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot', *EUI Jean Monnet Chair Papers* 27, 1995, *passim* [also published in *ELJ* 2 (1996), p. 3]; Vedder, Christoph, '(Teil)Kodifikation des Verwaltungsverfahrensrechts der EG?', *EuR*, special edition 1/1995, p. 75 (*passim*); Priebe, Reinhard, 'Diskussionsbeitrag', *EuR*, special edition 1/1995, p. 99 (p. 104 et seqq.); Kahl, Wolfgang, 'Hat die EG die Kompetenz zur Regelung des Allgemeinen Verwaltungsrechts?', *NVwZ* 1996, p. 865 (*passim*); Schwarze, Jürgen, 'Deutscher Landesbericht', Schwarze, Jürgen (Coord.): *Das Verwaltungsrecht unter europäischem Einfluß*, Nomos, Baden-Baden, 1996, p. 123 (p. 218 et seqq.); Schwarze, Jürgen: 'Konvergenz im Verwaltungsrecht der EU-Mitgliedstaaten – Zugleich ein Beitrag zu Chancen und Risiken der Kodifikation allgemeiner Grundsätze des indirekten Vollzugs von Gemeinschaftsrecht –', *DVBl.*, 1996, p. 881 (p. 886 et seqq.) [also published in English, with a few changes: 'The Convergence of the Administrative Laws of the EU Member States', *EPL* 4 (1998), p. 191 (p. 204 et seqq.)]; Sommermann, Karl-Peter, 'Europäisches Verwaltungsrecht oder Europäisierung des Verwaltungsrechts?', *DVBl.* 1996, p. 889 (p. 896 et seqq.); Della Cananea, Giacinto, 'I procedimenti amministrativi della Comunità europea', Chiti, Mario P./Greco, Guido (Coords.), *Trattato di diritto amministrativo europeo. Parte generale*, Giuffrè, Milan, 1997, p. 225 (p. 247 et seqq.); Hatje, Armin, 'Europäische Rechtseinheit durch einheitliche Rechtsdurchsetzung', *EuR*, special edition 1/1998, p. 7 (p. 24 et seqq.); Schmidt-Aßmann, Eberhard, 'Europäisches Verwaltungsverfahren', Müller-Graff, Peter-Christian (Coord.), *Perspektiven des Rechts in der Europäischen Union*, C.F. Müller, Heidelberg, 1998, p. 131 (p. 160 et seqq.); Chiti, Mario P., *Diritto amministrativo europeo*, 2nd ed., Giuffrè, Milan, 2004 (1st ed., 1999), pp. 181 et seqq. and 445 et seq.; Nehl, Hanns Peter, *Principles of Administrative Procedure in EC Law*, Hart Publishing, Oxford, 1999, pp. 4 and 169 et seq.; Schoch, Friedrich, 'Die Europäisierung des Allgemeinen Verwaltungsrechts und der Verwaltungsrechtswissenschaft', *DV*, special edition 2/1999, p. 135 (p. 154); Schily, Otto, 'Die Europäisierung der Innenpolitik', *NVwZ* 2000, p. 883 (p. 888); Schnapauff, Klaus-Dieter, 'Deutsche Verwaltung und Europäische Integration', Magiera, Siegfried/Sommermann, Karl-Peter (Coords.), *Verwaltung in der Europäischen Union*, Duncker & Humblot, Berlin, 2001, p. 13 (p. 20 et seqq.); Kahl, Wolfgang, 'Das Verwaltungsverfahrensgesetz zwischen Kodifikationsidee und Sonderrechtseentwicklungen', Hoffmann-Riem, Wolfgang/Schmidt-Aßmann, Eberhard (Coords.), *Verwaltungsverfahren und Verwaltungsverfahrensgesetz*, Nomos, Baden-Baden, 2002, p. 67 (p. 123 et seqq.); Craig, Paul, *EU Administrative Law*, Oxford University Press, Oxford, 2006, p. 279 et seqq.; Nieto Garrido, Eva/Martín Delgado, Isaac, *European Administrative Law in the Constitutional Treaty*, Hart Publishing, Oxford, 2007, p. 107 et seqq. (with prologue by Carol Harlow; adapted to the Treaty of Lisbon and translated into Spanish in 2010: *Derecho Administrativo Europeo en el Tratado de Lisboa*, Marcial Pons, Madrid); Mir Puigpelat, Oriol, 'La codificación del procedimiento administrativo en la unión administrativa europea', Velasco Caballero, Francisco/Schneider, Jens-Peter (Coords.), *La unión administrativa europea*, Marcial Pons, Madrid, 2008, p. 51 (*passim*); with German translation published in *DV*, special edition 8, 2009, p. 177); Ladenburger, Clemens, 'Evolution oder Kodifikation eines allgemeinen Verwaltungsrechts in der EU', Trute, Hans-Heinrich/Groß, Thomas/Röhl, Hans Chr./Möllers, Christoph (Coords.), *Allgemeines Verwaltungsrecht - zur Tragfähigkeit eines Konzepts*, Mohr Siebeck, Tübingen, 2008, p. 107 (*passim*); Ziller, Jacques, Review of the English version of the book by Nieto and Martín, *LPBR* 7 (2008), p. 590 (p. 590); Kahl, Wolfgang, 'Die Europäisierung des Verwaltungsrechts als Herausforderung an Systembildung und Kodifikationsidee', *DV*, special edition 10, 2010, p. 39 (*passim*).

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 anchorage². 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 Treaty³ (expressions with significant symbolic and identifying value⁴ 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*'⁵, recognising the Commission's power to propose 'Union *legislative acts*'⁶, 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*'⁷, giving the Commission the power to develop (normative) delegated⁸ and implementing⁹ acts, and providing – as a particular innovation in terms of judicial protection – that 'any natural or legal person may ... institute

² The constitutional nature of the Union's primary legislation is confirmed, inter alia, by: von Bogdandy, Armin/Bast, Jürgen (Coords.), *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2006, *passim* (in particular its Preface and the chapter by Möllers, Christoph, 'Pouvoir Constituant-Constitution-Constitutionalisation', p. 183 et seqq.); Schmidt-Aßmann, Eberhard, 'Verfassungsprinzipien für den Europäischen Verwaltungsverbund', Hoffmann-Riem, Wolfgang/Schmidt-Aßmann, Eberhard/Voßkuhle, Andreas (Coords.), *Grundlagen des Verwaltungsrechts I*, C.H. Beck, Munich, 2006, p. 241 (p. 248 et seqq.); Ruffert, Matthias, 'Rechtsquellen und Rechtsschichten des Verwaltungsrechts', Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Coords.), *Grundlagen (ibid.)*, p. 1085 (p. 1101 et seqq.), with subsequent references.

³ Article I-33(1) TECE.

⁴ Ruffert, 'Rechtsquellen' (footnote 2), p. 1105.

⁵ Articles 14(1) and 16(1) of the new TEU.

⁶ Article 17(2) of the new TEU.

⁷ Article 289 TFEU and other corresponding articles.

⁸ Article 290 TFEU.

⁹ Article 291 TFEU.

proceedings against ... a *regulatory act* which is of direct concern to them and does not entail implementing measures¹⁰.

In the same respect, the Treaty highlights the administrative dimension of the Commission when it sets out its functions¹¹ 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'¹² 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 equality¹³, principles of transparency and participation¹⁴, principle of protection of personal data¹⁵ and the principle of judicial protection against EU acts¹⁶. The Treaty also imposes financial control over the EU administration¹⁷ 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 administration¹⁸.

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)¹⁹, 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*²⁰. 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 law²¹ – entails a series of fundamental procedural guarantees established by the Court of Justice and – in part – by the Treaties and secondary legislation²². Included in the CFREU at the request of the then European Ombudsman, the

¹⁰ Fourth paragraph of Article 263 TFEU.

¹¹ Article 17 of the new TEU.

¹² 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.

¹³ Article 9 of the new TEU.

¹⁴ Article 15 TFEU.

¹⁵ Article 16 TFEU.

¹⁶ Articles 263 and 265 TFEU (action for annulment and proceedings for failure to act).

¹⁷ Article 325 TFEU (fight against fraud and protection of the financial interests of the EU).

¹⁸ Article 197 TFEU.

¹⁹ Article 6(1) of the new TEU, conferring on the CFREU the same legal value as the Treaties.

²⁰ Article 41 CFREU.

²¹ Article 41 CFREU expressly limits its subjective scope to the institutions, bodies, offices and agencies of the EU, thereby replacing the general rule on the scope of the CFREU, contained in Article 51 thereof [Schmidt-Aßmann, Eberhard, 'Grundrechte als Organisations- und Verfahrensgarantien', Merten, Detlef/Papier, Hans-Jürgen (Coords.), *Handbuch der Grundrechte in Deutschland und Europa*, II, C.F. Müller, Heidelberg, 2006, p. 993 (1029); Grzeszick, Bernd, 'Das Grundrecht auf eine gute Verwaltung – Strukturen und Perspektiven des Charta-Grundrechts auf eine gute Verwaltung', *EuR* 2006, p. 161 (p. 167 et seqq.); Ruffert, Matthias, 'Art. 41 GRCh', Calliess, Christian/Ruffert, Matthias (Coords.), *EUV/EGV Kommentar*, 3rd ed., C.H. Beck, Munich, 2007, p. 2682 (p. 2685), with subsequent references]; Ladenburger, 'Kodifikation' (footnote 1), p. 116. The following have a different opinion: Rengeling, Hans-Werner/Szczekalla, Peter, *Grundrechte in der Europäischen Union. Charta der Grundrechte und Allgemeine Rechtsgrundsätze*, Heymanns, Cologne, 2004, p. 898; Galetta, Diana-Urania, 'Inhalt und Bedeutung des europäischen Rechts auf eine gute Verwaltung', *EuR* 2007, p. 57 (p. 79 et seqq.); Nieto Garrido/Martín Delgado, *European* (footnote 1), pp. 86 et seqq., 118 and 124.

²² See Section 2 below.

Finn Jacob Söderman, this right now occupies a central position in the constitutional design of the EU administration²³.

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'²⁴, and requires the European Parliament and the Council to adopt, in accordance with the ordinary legislative procedure, the regulations needed to that end²⁵. 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 Commission²⁶.

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'²⁷.

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 administration²⁸, 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 plural²⁹, 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.

²³ Ruffert, 'Art. 41 GRCh' (footnote 19), p. 2683.

²⁴ Article 298(1) TFEU.

²⁵ Article 298(2) TFEU.

²⁶ Swedish Agency for Public Management, *Principles of Good Administration. In the Member States of the European Union*, 2005, <http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf>, pp. 7 and 9 *et seqq.*; Ladenburger, 'Kodifikation' (footnote 1), p. 118. On both codes, see *Section 2.2* below.

²⁷ Paragraph 12 of the European Parliament resolution of 25 November 2010 on the 26th Annual Report on Monitoring the Application of European Union Law (2008) (2010/2076(INI)). The working group was set up on 22 March 2010, as apparent from the Minutes of the European Parliament's Committee on Legal Affairs of that date (JURI_PV(2010)0322_1).

²⁸ In this respect, Craig, *EU Administrative Law* (footnote 1), p. 280; Nieto Garrido/Martín Delgado, *European* (footnote 1), pp. 37, 108 and 118 *et seqq.*; Ladenburger, 'Kodifikation' (footnote 1), p. 119 (according to whom this provision also contains a mandate to develop a general codification); Kahl, 'Europäisierung' (footnote 1), p. 58.

²⁹ 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 States³⁰.

As has also happened in many Member States, this praetorian phase has been followed by the increasing positivisation of procedural law through *sectoral secondary legislation*³¹. 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 codifications³².

The following are notable examples of *sectoral codifications*:

- Regulation (EC) No 1/2003 on defence of competition³³
- Regulation on concentrations³⁴
- Regulation on control of State aid³⁵
- Regulation on the Structural Funds and the Cohesion Fund³⁶
- Single Regulation on the common organisation of agricultural markets³⁷

³⁰ On those principles, among many others, see Schwarze, *Europäisches* (footnote 1), p. 1135 et seqq.; Muñoz Machado, Santiago, 'Los principios generales del procedimiento administrativo comunitario y la reforma de la legislación básica española', REDA 75, 1992, p. 329 (p. 344 et seqq.); Della Cananea, 'I procedimenti amministrativi della Comunità' (footnote 1), p. 226 et seqq. [more recently, Della Cananea, Giacinto, 'Il diritto amministrativo europeo e i suoi principi fondamentali', Della Cananea (Coord.), *Diritto amministrativo europeo. Principi e istituti*, Giuffrè, Milan, 2006, p. 1 (p. 25 et seqq.)]; Arzo Santisteban, Xabier, *Concepto y régimen jurídico del acto administrativo comunitario*, IVAP, Oñati, 1998, p. 473 et seqq.; Nehl, Principles (footnote 1), passim; Parejo Alfonso, Luciano, 'Los principios generales del Derecho administrativo comunitario', in Parejo Alfonso, Luciano/De la Quadra-Salcedo, Tomás/Moreno Molina, Ángel Manuel/Estella de Noriega, Antonio, *Manual de Derecho administrativo comunitario*, Centro de estudios Ramón Areces, Madrid, 2000, p. 39 (p. 66 et seqq.); M. P. Chiti, *Diritto amministrativo europeo* (footnote 1), p. 416 et seqq.; Tridimas, Takis, *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford, 2006, p. 370 et seqq.; Craig, *EU Administrative Law* (footnote 1), p. 349 et seqq.

³¹ On the reasons for this increasing proceduralisation of the EU's secondary legislation, see Mir Puigpelat, 'Codificación' (footnote 1), p. 57 et seqq.

³² This briefing uses the concept and types of codification indicated by Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 83 et seqq.

³³ 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.

³⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

³⁵ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

³⁶ Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999.

- 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 Market³⁸, the Community Plant Variety Office³⁹, the European Medicines Agency⁴⁰, the European Aviation Safety Agency⁴¹ or the European Chemicals Agency⁴²

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

- Regulation on periods⁴³
- Regulation on the languages to be used by the EU⁴⁴
- Regulation on the right of access to documents of the EU institutions⁴⁵
- Regulation on the protection of personal data with regard to its processing by the EU institutions and bodies⁴⁶
- Financial Regulation⁴⁷ (which also incorporates rules governing the contracts awarded by the EU administration)
- Staff Regulations of EU officials⁴⁸
- new Regulation on comitology⁴⁹, which repeals and replaces the Decision on comitology⁵⁰ (with a large number of EU regulations referring to its procedural rules)
- General Regulation on Community inspections⁵¹
- or Regulation (EC) No 58/2003 on the EU executive agencies (which contains particular procedural rules applicable to all agencies)⁵²

³⁷ Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation).

³⁸ Council Regulation (EC) No 207/2009 of 27 February 2009 on the Community trade mark (codified version).

³⁹ Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.

⁴⁰ Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

⁴¹ Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC.

⁴² Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

⁴³ Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits.

⁴⁴ Regulation No 1 [of 1958] determining the languages to be used by the European Economic Community.

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

⁴⁸ 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.

⁴⁹ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

⁵⁰ Council Decision (1999/468/EC) of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

⁵¹ 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 acts⁵³, administrative appeals, review on the initiative of the authorities themselves or non-contractual liability of administration⁵⁴.

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)⁵⁵ and other countries outside the EU, such as, in particular, the United States⁵⁶, this process of the gradual development of administrative procedure has not – yet – culminated, in the case of the EU, in a *complete*⁵⁷ *general codification applicable to the EU administration*.

2.2. Codes of good administrative behaviour

The closest we have to this type of general codification at EU level is the various *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^{58 59}.

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 2000⁶⁰, the said Code is intended to develop that article⁶¹. It therefore includes both substantive and

⁵² 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.

⁵³ On the administrative act concept under EU law, see Arzo Santisteban, 'Concepto' (footnote 30), p. 66 *et seqq.*

⁵⁴ See, for example, Article 21 *et seqq.* of Regulation (EC) No 58/2003 on executive agencies or the regulations on the aforementioned European agencies.

⁵⁵ See the references to these codifications in Sommermann, Karl-Peter, 'Konvergenzen im Verwaltungsverfahren- und Verwaltungsprozeßrecht europäischer Staaten', DÖV 2002, p. 133 (p. 137 *et seqq.*); Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 94 *et seqq.*; Swedish Agency for Public Management, *Principles* (footnote 24), p. 73.

⁵⁶ 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 *United States Code* (Sections 551 *et seqq.* and 701 *et seqq.*).

⁵⁷ No general codification of procedure, not even those regarded as the most extensive, such as the German *VwVfG* or Spanish Law No 30/1992 of 26 November 1992 on the legal rules governing the public administrations and the common administrative procedure, can be strictly qualified as truly *complete* codification, as there are always aspects that are excluded (in the case of both the aforesaid laws, tax, social security or administrative rulemaking procedures for example). However, it is clear that these are more extensive (less partial) general codifications than those indicated above under EU law, and that they are intended to be complete and to have a 'leading' position in the area of law that they cover. I will hereinafter refer to this type of codification simply as general.

⁵⁸ European Parliament resolution on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (A5-0245/2001, OJ C 72, 21.3.2002, p. 331). Both the first (March 2002) and second editions of the Code (5 January 2005, in which there was no substantial change) are available on the European Ombudsman's website at: <http://ombudsman.europa.eu/code/en/default.htm>.

⁵⁹ On this Code see, *inter alia*, Martínez Soria, José, 'Die Kodizes für gute Verwaltungspraxis', *EuR* 2001, p. 682 (*passim*); Cobreros Mendazona, Edorta, 'Nota al Código Europeo de Buena Conducta Administrativa', *RVAP* 64 (2002), p. 237 (p. 237 *et seqq.*); Tomás Mallén, Beatriz, *El derecho fundamental a una buena administración*, INAP, Madrid, 2004, pp. 89 *et seqq.* and 271 *et seqq.*; Rengeling/Szczekalla, *Grundrechte* (footnote 19), p. 892 *et seqq.*; Ponce Solé, Juli, 'Good Administration and Administrative Procedures', *IJGLS* 12, 2005, p. 551 (p. 565 *et seqq.*); Grzeszick, 'Gute Verwaltung' (footnote 19), p. 176 *et seq.*; Galetta, 'Gute Verwaltung' (footnote 19), *passim*; Nieto Garrido/Martín Delgado, *European* (footnote 1), pp. 29 *et seqq.* and 123 *et seqq.*; Ladenburger, 'Kodifikation' (footnote 1), p. 114 *et seq.*

⁶⁰ On this process of parallel gestation, see Cobreros Mendazona, 'Nota' (footnote 58), p. 239. As indicated by Martínez Soria, 'Kodizes' (footnote 58), p. 687 *et seq.*, the Finnish nationality of the then European Ombudsman, Jacob Söderman, was undoubtedly an influence in the impetus given to both initiatives as, in Finland, the principle of good administration is enshrined in the Constitution.

⁶¹ This is indicated in its preamble and in the foreword and introduction to the second edition from 2005.

procedural principles aimed at all the institutions, bodies, officials and servants of the EU⁶² in their external relations with the public⁶³. However, its central points add little to what has already been established by EU case-law⁶⁴.

Nevertheless, like other similar codes at EU level (such as, in particular, the Commission's Code of Good of Administrative Behaviour⁶⁵), it is not binding and is merely a typical European instrument of *soft law*⁶⁶.

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)^{67 68}.

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 Union⁶⁹. 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*⁷⁰.

⁶² Article 2 ECGAB. It does not therefore apply to the administrations of the Member States.

⁶³ Article 3 ECGAB.

⁶⁴ Ladenburger, 'Kodifikation' (footnote 1), pp. 114 *et seq.* and 128.

⁶⁵ 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 58), *passim*; Tomás Mallén, *Buena administración* (footnote 58), pp. 91 *et seqq.* and 271 *et seqq.*; Ladenburger, 'Kodifikation' (footnote 1), p. 114 *et seq.*

⁶⁶ As observed by Ruffert, 'Art. 41 GRCh' (footnote 19), p. 2684; Schöndorf-Haubold, Bettina, *Die Strukturfonds der Europäischen Gemeinschaft. Rechtsformen und Verfahren europäischer Verbundverwaltung*, C.H. Beck, Munich, 2005, p. 400, footnote 186; Tomás Mallén, *Buena administración* (footnote 58), pp. 89 *et seq.* and 275 *et seqq.*; Rengeling/Szczekalla, *Grundrechte* (footnote 19), 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 58), p. 697 *et seqq.* 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 19), p. 177 *et seq.*

⁶⁷ Martínez Soria, 'Kodizes' (footnote 58), p. 700 *et seq.* (in relation to the Commission's Code); Tomás Mallén, *Buena administración* (footnote 58), pp. 89 *et seq.* and 275 *et seqq.*; Rengeling/Szczekalla, *Grundrechte* (footnote 19), p. 892. In general, on the mediate legal effectiveness of the EU's *soft law*, see Alonso García, Ricardo, *Sistema Jurídico de la Unión Europea*, Thomson-Civitas, Madrid, 2007, pp. 120 *et seqq.* and 235 *et seq.* The self-binding nature of the Code on the Commission was confirmed by the Court of First Instance in the Order of 21 March 2002 in Case T-218/01, *Laboratoire Monique Remy SAS v Commission of the European Communities* (ECR 2002, p. II-2139), paragraphs 25-30.

⁶⁸ 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.

⁶⁹ Paragraph 1 of said European Parliament resolution of 6 September 2001 adopting the ECGAB (see footnote 58 above) and paragraph 9 of the Introduction included in the second edition of the ECGAB, written by the European Ombudsman (see footnote 58 above).

⁷⁰ Mandelkern Group on Better Regulation: *Final Report*, 13 November 2001.

These communications define and develop in a very innovative manner important aspects for the governmental-administrative phase⁷¹ of the EU rulemaking procedure, such as the *consultation* of interested parties and the public in general⁷², and the economic, social and environmental *impact assessment* (RIA) of the proposed measures^{73 74}.

In some Member States, as in the United States, the administrative rulemaking procedure is governed by legally binding general codifications⁷⁵.

⁷¹ 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.

⁷² Commission of the European Communities. *Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, COM(2002) 704 final, 11 December 2002, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0704en01.pdf (its non-binding nature is confirmed and defended by the Commission on page 9 *et seq.*).

⁷³ Commission of the European Communities. *Communication from the Commission on impact assessment*, COM(2002) 276 final, 5 June 2002, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0276en01.pdf.

⁷⁴ 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: 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 7, 2007, p. 59 (p. 70 *et seq.*) (available on the website of that institution: <http://cja.gencat.cat>); Smeddinck, Ulrich, 'Optimale Gesetzgebung im Zeitalter des Mandelkern-Berichts', *DVBl.* 2003, p. 641 (p. 643 *et seq.*), with subsequent references.

⁷⁵ 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).

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 systems⁷⁶, there are still 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 union⁷⁷. 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*⁷⁸).

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

⁷⁶ Trute, Hans-Heinrich, 'Die demokratische Legitimation der Verwaltung', Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (Coords.), *Grundlagen* (footnote 2), p. 307 (p. 375 et seqq.); Ruffert, 'Rechtsquellen' (footnote 2), 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 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.).

⁷⁷ See Mir Puigpelat, 'Codificación' (footnote 1), p. 60 et seqq.

⁷⁸ Schmidt-Aßmann, 'Verfassungsprinzipien' (footnote 2), pp. 258 and 274.

case⁷⁹), 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*⁸⁰. 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 design⁸¹.

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 legislature⁸².

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

⁷⁹ Judgment of 3 December 1992 in Case C-97/91, *Oleificio Borelli SpA v Commission of the European Communities* (ECR 1992, p. I-6313).

⁸⁰ The following highlight these problems in the current European administrative union: Galera Rodrigo, Susana, *La aplicación administrativa del Derecho comunitario. Administración Mixta: tercera vía de aplicación*, Civitas, Madrid, 1998, pp. 31, 81 et seqq. and 151 et seqq.; Sydow, Gernot, 'Die Vereinheitlichung des mitgliedstaatlichen Vollzugs des Europarechts in mehrstufigen Verwaltungsverfahren', *DV* 34, 2001, p. 517 (pp. 536 et seqq. and 540); Della Cananea, Giacinto, 'I procedimenti amministrativi composti dell'Unione europea', *RTDP*, special edition 1/2004, p. 307 (p. 328 et seqq.); Chiti, Mario P., 'Le forme di azione dell'amministrazione europea', *RTDP*, special edition 1/2004, p. 53 (p. 81 et seqq.); Chiti, Mario P., *Diritto amministrativo europeo* (footnote 1), pp. 443 et seq. and 536 et seq.; Hofmann, Jens, 'Rechtsschutz und Haftung im Europäischen Verwaltungsverbund', Schmidt-Aßmann, Eberhard/Schöndorf-Haubold, Bettina (Coords.), *Der Europäische Verwaltungsverbund*, Mohr Siebeck, Tübingen, 2005, p. 353 (p. 359 et seqq., summarising what he develops more fully in his 2004 work of the same name); Gnes, Matteo, 'Le garanzie', Della Cananea (Coord.), *Diritto amministrativo europeo* (footnote 30), p. 117 (p. 148 et seqq.); Schmidt-Aßmann, 'Verfassungsprinzipien' (footnote 2), pp. 258 et seq., 274 et seq., 277 et seq. and 289 et seq.; Trute, 'Demokratische Legitimation' (footnote 76), p. 379 et seqq.; Ruffert, Matthias, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund', *DÖV* 2007, p. 761 (p. 767 et seqq.), with subsequent references.

⁸¹ Commission of the European Communities. *Communication from the Commission to the European Parliament and the Council: European agencies – The way forward*, COM(2008) 135 final, 11 March 2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0135:FIN:EN:PDF>.

⁸² 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 80), p. 379 et seqq.; Schmidt-Aßmann, 'Verfassungsprinzipien' (footnote 2), p. 258 et seq.

instrument for steering the administration's action as the administrative procedure is currently⁸³.

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.

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 conduct⁸⁴.

In addition, the regulatory appearance of the provisions of the codes examined⁸⁵ 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 conversion⁸⁶.

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 through '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).

⁸³ See Mir Puigpelat, 'Codificación' (footnote 1), p. 57 *et seq.*; Harlow, 'Codification' (footnote 1), p. 13 *et seq.*; Della Cananea, 'I procedimenti amministrativi della Comunità' (footnote 1), p. 247; Ponce Solé, Juli, *Deber de buena administración y derecho al procedimiento administrativo debido. Las bases constitucionales del procedimiento administrativo y del ejercicio de la discrecionalidad*, Lex Nova, Valladolid, 2001, pp. 110 *et seq.* and 685 *et seq.* (in general).

⁸⁴ 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, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd ed., 2004, pp. 387, 392 and 399; Schmidt-Aßmann, Eberhard, 'Verfassungsprinzipien' (footnote 2), p. 264.

⁸⁵ 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.

⁸⁶ Ladenburger, 'Kodifikation' (footnote 1), p. 112.

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 highlighted⁸⁷.

Such codification would firstly increase *legal clarity and certainty*⁸⁸. 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 Report⁸⁹.

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 codifications⁹⁰.

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 extent⁹¹, 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

⁸⁷ In general, on the functions and dysfunctions of any codification, see the interesting observations made by Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 89 *et seq.*

⁸⁸ 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 1), p. 30; Vedder, '(Teil)Kodifikation' (footnote 1), pp. 89 *et seq.* and 97; Schwarze, 'Konvergenz' (footnote 1), pp. 886 and 889; Schily, 'Innenpolitik' (footnote 1), p. 888; Schnapauff, 'Integration' (footnote 1), p. 25; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 124; Nieto Garrido/Martín Delgado, *European* (footnote 1), p. 116 *et seq.*

⁸⁹ 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).

⁹⁰ In addition, as will be noted further on, those more specific sectoral regulations should not disappear.

⁹¹ In this respect, see Ladenburger, 'Kodifikation' (footnote 1), p. 128.

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.

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 procedure⁹² 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)⁹³, encouraging the development of the necessary mutual trust between the various administrations making up the European administrative union⁹⁴ and *simplifying*

⁹² As proposed by Craig, *EU Administrative Law* (footnote 1), p. 279 *et seq.*, and Ladenburger, 'Kodifikation' (footnote 1), p. 129.

⁹³ 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 1), p. 97; Schwarze, 'Konvergenz' (footnote 1), p. 887 *et seq.*; Schnapauff, 'Integration' (footnote 1), p. 25; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 124.

⁹⁴ 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

*its relations*⁹⁵. 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.

4.3. Regulation's innovation

As with any codification⁹⁶, 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 above⁹⁷.

As a legislative codification, it would be an innovation invested with *democratic legitimacy*⁹⁸, 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 developments⁹⁹.

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 justified¹⁰⁰, 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 out¹⁰¹. 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.

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 84), p. 392.

⁹⁵ Cosculluela Montaner, Luis, 'La posición ordinal de la Ley 30/1992 y los principios y efectos de la misma', Santamaría 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.

⁹⁶ Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 91.

⁹⁷ See Section 3.1 above.

⁹⁸ 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.

⁹⁹ Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 92 *et seq.* (in general, on any codification).

¹⁰⁰ Schmidt-Aßmann, 'Europäisches' (footnote 1), p. 161; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 99 (in general).

¹⁰¹ Schmidt-Aßmann, 'Europäisches' (footnote 1), p. 161.

As has occurred with many national codifications¹⁰², it would serve as a model that could be exported to other regions of the world¹⁰³, 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.

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 legislation¹⁰⁴.

Given the central role that any general codification of procedure occupies in the respective legal system¹⁰⁵ 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*¹⁰⁶.

In particular, from an academic perspective, it would significantly help to develop a systematic *science of European administrative law* based on shared foundations¹⁰⁷.

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*¹⁰⁸. 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

¹⁰² On the influence that the Spanish Law on administrative procedure of 17 July 1958 had on Latin America and other countries, see García de Enterría, Eduardo, 'Introducción: un punto de vista sobre la nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común de 1992', Leguina Villa, Jesús/Sánchez Morón, Miguel (Eds.), *La nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, Tecnos, Madrid, 1993, p. 11 (p. 11). On the influence exerted on Eastern Europe and Asia by the VwVfG and the Austrian Federal Law on administrative procedure of 21 July 1925, see Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 94 *et seqq.*

¹⁰³ Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 94 *et seqq.* (in general).

¹⁰⁴ On the 'codification-breaking' (*Kodifikationsbrecher*) nature of the current international and European law on administrative procedure, see Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 112 *et seqq.*

¹⁰⁵ García de Enterría, 'Un punto de vista' (footnote 102), p. 11 *et seq.*

¹⁰⁶ On the capacity – and limits – of law to forge national and European identity, see von Bogdandy, Armin, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?', *VVDStRL*, Vol. 62, 2003, p. 156 (*passim*); von Bogdandy, Armin, 'Constitución Europea e identidad europea. Potencialidades y peligros del Proyecto de Tratado por el que se instituye una Constitución para Europa», *REDC* 72, 2004, p. 25 (*passim*), with subsequent references.

¹⁰⁷ Schwarze, 'Konvergenz' (footnote 1), p. 888; Schoch, 'Europäisierung' (footnote 1), p. 154; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 97 *et seq.* (in general, on the function of promoting scientific debate of any codification). Schmidt-Aßmann considers that the development of European administrative law represents the most important future challenge for administrative legal science: Schmidt-Aßmann, *Ordnungsidee* (footnote 84), p. 377.

¹⁰⁸ In this respect also, see Ladenburger, 'Kodifikation' (footnote 1), p. 128.

are currently occurring, in order to thus reduce the risk of *petrification and obsolescence*¹⁰⁹. 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-law¹¹⁰.

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*¹¹¹.

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 fulfil 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 phase¹¹² 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 involved¹¹³.

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 systems¹¹⁴.

¹⁰⁹ 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 1), p. 104 *et seq.*].

¹¹⁰ 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.

¹¹¹ The following highlight the importance of this process: Voßkuhle, Andreas, 'Kodifikation als Prozeß – Zur Bedeutung der Kodifikationsidee in heutiger Zeit unter besonderer Berücksichtigung der Arbeiten an einem Umweltgesetzbuch', Schlosser, Hans (Coord.), Bürgerliches Gesetzbuch 1896-1996, C.F. Müller, Heidelberg, 1997, p. 77 (pp. 78 and 85 *et seq.*); Schmidt-Aßmann, 'Europäisches' (footnote 1), p. 162; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 98.

¹¹² 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.

¹¹³ García de Enterría, 'Un punto de vista' (footnote 102), p. 12; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 102.

¹¹⁴ 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 24)]. 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 ('ReNEUAL – Research Network on EU Administrative Law': <http://www.reneual.eu/>).

A good codifying process would bear positive fruit – particularly scientific – even if it does not culminate in codification¹¹⁵.

¹¹⁵ Voßkuhle, 'Kodifikation als Prozeß' (footnote 111), p. 86 *et seq.*; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 98, with both giving the example of the planned German codification of environmental law (*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 administrations¹¹⁶, 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 this¹¹⁷.

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.

¹¹⁶ This view is shared by many of those who have participated in the debate on codification: Harlow, 'Codification' (footnote 1), p. 29 et seqq. (expressly rejecting the German model and favouring codification of the 'general principles of good administration'; however, she gave a different opinion – against any codification – more recently in her prologue to Nieto Garrido/Martín Delgado, *European* (footnote 1), p. ix); Vedder, '(Teil)Kodifikation' (footnote 1), p. 88 et seqq. (albeit with doubts about the practical results that its international negotiation might achieve); Schwarze, 'Landesbericht' (footnote 1), p. 219 et seqq.; Schwarze, 'Konvergenz' (footnote 1), p. 886 et seqq. (changing his previous position); Della Cananea, 'I procedimenti amministrativi della Comunità' (footnote 1), p. 247 et seqq.; Schmidt-Abmann, 'Europäisches' (footnote 1), p. 160 et seqq. (proposing to start by codifying the procedural law applicable to the EU administration); M. P. Chiti, *Diritto amministrativo europeo* (footnote 1), p. 445 et seq.; Nehl, *Principles* (footnote 1), p. 169 et seq.; Schoch, 'Europäisierung' (footnote 1), p. 154; Schily, 'Innenpolitik' (footnote 1), p. 888 (subscribing to the proposal made by Schmidt-Abmann); Schnapauff, 'Integration' (footnote 1), p. 25 et seq.; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 123 et seqq.; Nieto Garrido/Martín Delgado, *European* (footnote 1), p. 115 et seqq. and 137 et seqq.; Mir Puigpelat, 'Codificación' (footnote 1), p. 73 et seqq.; Kahl, 'Europäisierung' (footnote 1), p. 58 et seqq. (favourable only to minimal codification). The following are against or particularly sceptical, however: Priebe, 'Diskussionsbeitrag' (footnote 1), p. 104 et seqq.; Sommermann, 'Europäisierung' (footnote 1), p. 896 et seqq.; Hatje, 'Rechtseinheit' (footnote 1), p. 26.

¹¹⁷ Vedder, '(Teil)Kodifikation' (footnote 1), p. 90 et seqq.; Schwarze, 'Konvergenz' (footnote 1), p. 886 et seqq.; Kahl, 'Kompetenz' (footnote 1), p. 869; Kahl, 'Verwaltungsverfahrensgesetz' (footnote 1), p. 123; Kahl, 'Europäisierung' (footnote 1), p. 59 et seqq.; Ladenburger, 'Kodifikation' (footnote 1), p. 119 et seq. and 124. However, the following assert that this legal basis does exist: Della Cananea, 'I procedimenti amministrativi della Comunità' (footnote 1), p. 247 et seqq.; Bleckmann, Albert, *Europarecht*, 6th ed., Heymanns, Cologne, 1997, p. 474 et seqq.; Nieto Garrido/Martín Delgado, *European* (footnote 1), p. 37, 108 and 118 et seqq.; Mir Puigpelat, 'Codificación' (footnote 1), p. 80 et seqq.

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.

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