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

NOTE
European administrative law in the light of the Treaty of Lisbon: introductory remarks

Briefing Note

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

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

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

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

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

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

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

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

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

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

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

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

2.1. Main Stages of the Development

Only some parts of European administrative law, in the sense of an administrative law for the European Union, are laid down in the written sources of European Union law. Even today, more than half a century after the first Community treaty entered into force, the European Union still lacks a coherent and comprehensive set of codified rules of administrative law.\(^1\) Given this fragmentary nature of written law, case law has a particular significance in the Union especially in the area of administrative law. By far the greatest number of legal principles governing administrative activity in European Union law originate in the creative law-making process of the Court of Justice of the European Union. Thus, administrative law at European level was shaped and developed on the basis of unwritten general principles of law common to the constitutional traditions of the Member States. The landmark decision in the case of *Algera*\(^2\), concerning the question of revocation of administrative acts constitutes the well-known starting point for this judicial practice of the Court of Justice of the European Union. Therein the Court of Justice derived its obligation to creative law-making from the absence of express Treaty provisions on the question concerned. In its reasoning the Court of Justice borrowed from the famous wording of Art. 4 of the French *Code Civil* dealing with the subject matter of “déni de justice” (denial of justice) and held that:

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

The general principles of law – determined and shaped by the Court of Justice by way of an “evaluative comparison of laws” (*wertende Rechtsvergleichung*) – have been used in the case-law of the Court from this point on in order to fill gaps in the existing law and as aids to interpretation.\(^3\) Moreover there is now widespread agreement that the principles of law are to be applied by the institutions of the Union and that the Court of Justice may condemn a breach of these principles just like the breach of any written norm.\(^4\)

The elaboration of certain rules for a specific European administrative law by the Court of Justice led to the recognition of the principle of legality as well as the principles of proportionality, of legal certainty, of the protection of legitimate expectations, of non-

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\(^2\) ECJ, joined Cases 7/56 and 3-7/57, Dineke Algera et al./Common Assembly, ECR 1957, p. 83 et seq.

\(^3\) See to this function of the general principles recently *K. Lenaerts/J. A. Gutiérrez-Fons*, The constitutional allocation of powers and general principles of EU law, CMLR 47 (2010), p. 1629 et seq.; Editorial comments, The scope of application of the general principles of Union law: An ever expanding Union, CMLR 47 (2010), p. 1589 et seq.

discrimination, of a fair administrative process and of effective judicial review. It is the combination of these principles that represent the core and the point of crystallisation for European administrative law today.

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

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

In a second stage this development took a different direction. A reverberating effect of the newly developed European law on national administrative law and thus the development of a system of interaction between national and European administrative law could be observed. In other words, after having been formed by a comparison of administrative law principles of the Member States, this new European law itself started to reflect back on the national law, influencing and modifying it. This development took place on three different levels. Changes in national administrative law have been caused, firstly, by means of European legislation, secondly, by means of leading decisions of the Court of Justice influencing the indirect administration of EU law and, thirdly, even by the voluntary adoption of European standards into national administrative law in its autonomous scope of application. Thereby the jurisdiction of the Court of Justice again played a vitally important role. This development gives rise to the assumption that the national administrative systems of the Member States find themselves in a process of partial convergence.

The general principles of administrative law as elaborated by the Court of Justice have thus become instrument and promoter of an evolution of a common European administrative law. This is highly remarkable, because it was the field of national administrative law which had been characterised in the beginnings as particularly resistant to the methods of comparative law and European influences. In the context of a study of the influence of French administrative law on the development of German law Ulrich Scheuner, law-professor at the University of Bonn, wrote in 1963 that administrative law belongs to those areas of law “in which the national characteristics of the people and the State are revealed most starkly”. In other words: In contrast to constitutional law which since Aristotle has been open to methods of comparative law, administrative law was by its very nature thought to be specifically restricted and thus at least to some extent locked for the approach of com-

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5 See ECJ, Case 17/74, Transocean Marine Paint Association/Commission, ECR 1974, p. 1063 et seq.
8 U. Scheuner, Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsordnung, DÖV 1963, p. 714 et seq.
Comparative law. According to Prof. Scheuner, the legal position of administrative personnel, the relationship between the administration and the citizen, the level of centralisation and the entire style of administration are “to a large extent the expression of national particularities”. This impermeability is to some extent understandable, especially if the innovations are difficult to incorporate into an existing system without significantly changing traditional structures. On the other hand administrative law is only able to meet future challenges if the preservation of established administrative traditions and principles does not obscure the view on new problems that can only be solved by innovation and change. In this respect, we can at least identify a trend towards common standards of modern administrative law among the Member States of the EU. This development has led to a situation for which the term of Europeanization of administrative law has been applied\(^9\) – a new trend of administrative law in Europe, that the famous French law professor Jean Rivero\(^10\) was one of the first to comment on.

### 2.2. The Actual Status of European Administrative Law

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

- First of all, it has to be noted that in contrast to the beginning of European integration under the Treaty of Rome a new discipline of legal rules and reasoning, called “European administrative law” has emerged over the last decades and is nowadays more or less commonly accepted in the political and administrative practice as well as by the legal literature.\(^11\)

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

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

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

- In the area of direct execution of European Union law by the institutions of the Union – still the exceptional form of implementation – European competition law pre-

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


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sent prominent examples for codified standards of European administrative law, above all the Regulation (EC) No. 1/2003 which determines the procedure in anti-trust matters. It involves the national competition authorities and courts in the process of implementing European competition law and creates a network of the competition authorities of the Member States and of the European Commission.

- Furthermore, there are partially new rules of secondary law regarding the direct implementation of administration in the area of merger control, anti-dumping rules, the control of state aid, trademark law and the law on the civil service of the EU.
- In the domain of indirect implementation of European Union law – still the main form of implementation – there has also been a noticeable trend for some time to create at least certain uniform legal standards for the implementation of EU law by means of secondary legislation in specific areas, for instance the European Customs Code from 1992\textsuperscript{12} or the Regulation on genetically modified food and feed from 2003\textsuperscript{13}.
- The fundamental distinction between direct implementation by the authorities of the Union itself and indirect implementation by the Member States as it has just been mentioned is still applicable today. It also remains true that the implementation of European Union law is left to the administrative authorities of the Member States as a rule – a fundamental principle which has even been explicitly stipulated by the Treaty of Lisbon\textsuperscript{14} (the latter is discussed in more detail in the following section). However, if one looks at the administrative reality of the Union, a straightforward separation of tasks and functions of the Union on the one hand and the Member States on the other hand has been replaced nowadays by various forms of administrative cooperation between the authorities of the Union and the Member States.\textsuperscript{15}

The competition network which has just been mentioned is an outstanding example for these new types of cooperation which are nowadays at least to some extent typical for the administration within the system of the European Union.

The assessment of the current status of European administrative law therefore leads to a multilayered conclusion. The unwritten general principles of law – developed by the Court of Justice and further refined and concretized by the General Court (former Court of First Instance)\textsuperscript{16} – still dominate the perception of European administrative law from outside.

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

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

\textsuperscript{12} Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.
\textsuperscript{13} Regulation (EC) No 1829/2003 on genetically modified food and feed.
\textsuperscript{14} Art. 291 paragraph 1 TFEU.
\textsuperscript{16} On the establishment of the Court of First Instance and its influence on the development of European administrative law see J. Schwarze, European Administrative Law, revised 1\textsuperscript{st} edition, London 2006, p. cxviii et seq.
3. THE IMPACT OF THE TREATY OF LISBON

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

Therefore, in the majority of cases there continues to be a divergence between the competence of the organs of the EU to actually make European Union law on the one hand, and the responsibility of national authorities to enforce the Union’s law on the other. It is this divergence that poses the main problems to ensure the uniformity of European Union law in practice. This situation has hardly been changed by the Treaty of Lisbon. Nevertheless, the Lisbon Treaty also brings about some vital changes in the area of European administrative law.

3.1. General Alterations

The Treaty of Lisbon reconfirms the importance of the rule of law.17 It also underlines the significance of the general principles of law in Art. 6 paragraph 3 TEU, which states that “fundamental rights (...) shall constitute general principles of the Union’s law.” Even though this statement expressly refers only to the fundamental rights as constitutional principles, it does not preclude the continued applicability of other general principles, in particular principles of administrative law which often refine general principles of constitutional character. This means that the Treaty of Lisbon does not change the existing legal status quo in this regard. In the same context, it is generally accepted that the term “law”, formerly used in Art. 220 EC, now in Art. 19 TEU which describes the parameters for the level of control exercised by the European courts does comprise not only codified rules but also unwritten legal principles.18

Irrespective of any separation into written and unwritten law the entire acquis communautaire is meant to remain in force. The Court of Justice of the European Union expressly remains in charge of the interpretation of European Union law.19 Besides, the Treaty of Lisbon affirms the commitment of administrative practice to the rule of law by attributing to the Charter of Fundamental Rights of the European Union (ChFR) the same legal value as the Treaties20.

3.2. Changes Concerning the Rules on European Administration

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

17 See the Preamble of the TEU and its Art. 2 and 21.
18 See in detail J. Schwarze, European Administrative Law, revised 1st edition 2006, Chapter 1 C.
19 Art. 19 paragraph 1 clause 2 TFEU.
20 Art. 6 paragraph 1 clause 2 TEU.
3.2.1. Administrative Cooperation According to Art. 197 TFEU

First of all, a new Title XXIV on Administrative Cooperation which was already designated within Art. III-285 of the Constitutional Treaty has been introduced to the Treaty on the Functioning of the European Union. From this Art. 197 TFEU some general conclusions on vertical administrative cooperation (between national and European authorities) can be drawn. Its first paragraph affirms that the “effective implementation of Union law by the Member States […] shall be regarded as a matter of common interest”. The Union can ultimately achieve its character as a community based on the rule of law only if its law is applied as consistently as possible in all Member States. Although Art. 197 paragraph 1 TFEU surely is of high symbolic significance, it does not create any obligations. This can be concluded from its third paragraph which explicitly underlines that Art. 197 TFEU is without prejudice to the obligations of the Member States to implement Union law. Taking into consideration the already existing duty of the Member States to cooperate sincerely with the institutions of the European Union stemming from Art. 4 paragraph 3 TEU, the autonomous legal value of Art. 197 TFEU might be questioned. Hence, the administrative cooperation laid down in Title XXIV is to be characterized as voluntary cooperation. The Union only possesses supportive competences in this field, notably excluding any harmonisation of Member States’ laws or regulations.21 Art. 197 paragraph 2 TFEU contains the Union’s offer to support the Member States in their efforts to improve their administrative capacity to implement European Union law. This support may include facilitating the exchange of information and of civil servants as well as supporting training schemes.22 Art. 197 paragraph 2 clause 3 TFEU stresses, however, that no Member State is obliged to avail itself of such support.

3.2.2. The Distinction Between Delegated Acts and Implementing Acts

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

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

Art. 290 TFEU allows the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act, as long as this legislative act or the Treaty itself delegates the power to do so.25 However, such power to delegate is not unlimited. Art. 290 TFEU itself establishes certain prerequisites which re-

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21 Compare Art. 6 clause 2 lit. g) and Art. 2 paragraph 5 TFEU. Regarding the division of competences after the Treaty of Lisbon see M. Ruffert, Institutionen, Organe und Kompetenzen – der Abschluss eines Reformprozesses als Gegenstand der Europawissenschaft, EuR supplement 1/2009, p. 31 (36 et seq.). Regarding the prohibition of harmonisation especially in the field of administrative cooperation see Art. 197 paragraph 2 clause 4 TFEU.

22 Art. 197 paragraph 2 clause 2 TFEU.

23 Regarding the legal acts of the Union and their hierarchy after the Treaty of Lisbon see T. von Danwitz, Europäisches Verwaltungsrecht, Heidelberg 2008, p. 270 et seq.


semble for instance those of German constitutional law. Thus, the delegating legislative acts have to define the objectives, the content and the scope of the rules which may be enacted by the Commission. Furthermore, the essential elements of an area shall be reserved for the legislative act and might not be subject to a delegation of power.

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

In contrast to Art. 291 TFEU, Art. 290 TFEU is self-sufficient and thus, does not require the adoption of any binding instrument of secondary legislation to ensure its implementation. In December 2009 the Commission released a Communication stating its point of view about the general framework within which such delegations of power should operate. The Parliament published a Resolution on the power of legislative delegation in May 2010.

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

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

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26 Art. 80 paragraph 1 clause 2 of the German Grundgesetz.
29 Under strict conditions it is also possible to confer implementing powers on the Council, compare Art. 291 paragraph 2 alternative 2 TFEU.
32 See Recital No 8. According to the Regulation, Parliament and Council are not involved any more in the new procedures. This is due to the allegation of Art. 291 paragraph 3 TFEU that it is for the Member States and not for the Union’s institutions to control the implementing powers of the Commission. See however the “Right of scrutiny for the European Parliament and the Council” in Art. 11 of the Regulation.
34 Compare Art. 202 bullet point 3 EC. In practice, Commission and Parliament had established manifold ways of cooperation by means of interinstitutional agreements, see Official Journal 2008 No C 143, p. 1 et seq.
3.2.3. Consequences in the Area of Judicial Review

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

At first, the hierarchy of norms which has been introduced by the Lisbon Treaty inter alia in Art. 290 TFEU raises questions in the context of Art. 263 TFEU which in its paragraph 4 deals with the legal protection of individuals before the European Courts. According to the newly added last alternative of Art. 263 paragraph 4 TFEU any natural or legal person may institute proceedings “against a regulatory act which is of direct concern to them and does not entail implementing measures”. Whether only “non-legislative acts of general application” as formulated in Art. 290 TFEU are such “regulatory acts” in the sense of Art. 263 TFEU or whether “regulations” within the meaning of Art. 288 paragraph 2 TFEU are “regulatory acts” too, is a question that has led to doctrinal discussion and, finally, will have to be decided by the European Courts. The uncertainty regarding the interpretation of “regulatory act” in Art. 263 paragraph 4 TFEU arises due to the fact that the Treaty of Lisbon only partially incorporates provisions from the Constitutional Treaty while it discards others, without properly adjusting the adopted formulations to each other. In the context of the question concerned, the Treaty of Lisbon has dropped the new denominations of the legal acts of the Union provided in the Constitutional Treaty which were the “European law”, the “European framework law” and the “European regulation”, and has stuck to the traditional legal forms of “regulation” and “directive”. On the other hand, it has maintained the formulation “regulatory act” from Art. III-365 paragraph 4 of the Constitutional Treaty in Art. 263 paragraph 4 TFEU.

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

3.2.4. Formal Requirements for Administrative Actions

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

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35 J. Ziller, Il nuovo Trattato europeo, Bologna 2007, p. 163 et seq.
37 See e.g. Protocol 36 to the Treaty of the European Community on the Privileges and Immunities of the European Communities.
3.3. Guarantees of the Charter of Fundamental Rights of the European Union

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

3.3.1. The Right to Good Administration, Art. 41 ChFR

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

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

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

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

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

42 S. Magiera, ibid., Art. 41 ChFR, note 2.
43 Regarding the control of administrative procedures under existing law cf. J. Schwarze, Judicial review of European administrative procedure, Public Law 2004, p. 146 et seq.
This can be seen as an illustration of the general trend of European administrative law to evolve from unwritten law towards written law; it furthermore, it reveals a specific relationship between guarantees that can be found in constitutional law and their more concrete forms in administrative law.

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

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

As Advocate-General Léger has pointed out – in opposition to the right to good administration – ECJ case law has not yet educed a common principle of law concerning a right of access to documents as part of the common constitutional traditions of the Member States.

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

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

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

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

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46 Opinion GA Léger, Case C-41/00 P, Intercorp, ECR 2003, I-2125, note 80.
47 Compare Art. 52 paragraph 2 ChFR.
48 The Court of Justice has recently dealt with and further elaborated on the problematic relation between the protection of personal data and the right of access to documents without explicitly mentioning Art. 42 ChFR. See ECJ, Case C-28/08 P, Bavarian Lager, EuZW 2010, p. 617 et seq.
50 The right to good administration is closely connected to the principle of transparency, see S. Prechal, M. de Leeuw, Dimensions of Transparency: The Building Blocks for a New Legal Principle?, Review of European Administrative Law 2007, p. 51 et seq.
52 See European Council Presidency Conclusions from 29/30 October 2009.
Conclusively, I want to point out one final aspect regarding the Charter of Fundamental Rights. The Charter further strengthens the influence which the European Convention on Human Rights (ECHR) – besides the constitutional traditions of the Member States – already has on the development of general principles of EU law. In the context of the protection of fundamental rights in Europe, the ECHR serves according to the explicit wording of Art. 52 paragraph 3 ChFR from now on as a minimum standard in EU law wherever the Charter contains rights which correspond to rights guaranteed by the ECHR. Due to the fact that the ECHR contains particularly distinct procedural guaranties which further substantiate the rule of law, this correlation will significantly influence the future of European administrative law.

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

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

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

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

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

Finally, it should also be considered which intrusion into the administrative competences of the Member States appears to be more severe: either a Union-wide codification of administrative principles in particular for the indirect implementation of administrative law, or the extremely detailed provisions for the implementation of rules regarding specific matters which can currently be found as an annex to various substantial rules of secondary European law.

55 For further details, see J. Schwarze, European Administrative Law, revised 1st edition, Baden-Baden 2006, Chapter 1 G II.


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

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

All difficulties which a reform of the Treaties would undoubtedly encounter should, however, not prevent us from reflecting about solutions which are not actually at hand, at least not in an international colloquium devoted to an analysis of the state of the European Union’s administrative law and to a debate on its perspectives in the future.

I am aware of the fact that my arguments for a (partial) codification of the basic parameters for the implementation of European Union law - de lege ferenda - will face significant

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59 O. Due, Le respect des droits de la défense dans le droit administratif communautaire, Cahiers de Droit Européen 1987, p. 383 (396).
counter-arguments and be greeted with considerable doubt. However, in the first place, I do not argue for a comprehensive codification of administrative law in general, but rather for a (partial) codification of the substantive principles regarding the implementation of EU law. This area of law is in need of a systematic order because of its rich subject-matter, its complexity and its growing importance. Secondly, it will always be debatable whether the time has come for a codification project. Nonetheless, such a suggestion at the least deserves to be discussed in the context of an analysis of the further development of European administrative law. Thereby, one basic element needs further appreciation: it creates inherent imbalances in the evolution of the European Union if its legislation is constantly extended (which is currently a noticeable trend), whilst there are no corresponding guarantees that an adequate level of uniformity in the implementation of these jointly agreed legal rules may be achieved.

Given therefore the legal situation as it stands today, the problem of how to ensure the uniformity of European law in the process of its application will be a crucial issue – perhaps the key-issue – of administrative functions in particular in a Union, which has enormously grown over the last years and which definitely needs a coherent _acquis communautaire_ in the area of administrative law.
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