

WORKING DOCUMENT

STATE OF PLAY AND FUTURE PROSPECTS FOR EU ADMINISTRATIVE LAW

*To be submitted to the Committee on Legal Affairs
by the Working Group on EU Administrative Law*

19 OCTOBER 2011

TABLE OF CONTENTS

EXECUTIVE SUMMARY 3

PART ONE - OBJECTIVES, COMPOSITION AND WORKING METHOD..... 4

OBJECTIVES AND COMPOSITION..... 4

WORKING METHOD AND THEMES COVERED..... 4

PART TWO: LEGAL BACKGROUND, SCOPE OF INQUIRY AND TREATY PROVISIONS 7

LEGAL BACKGROUND AND INNOVATIONS CONTAINED IN THE TREATY OF LISBON..... 7

GENERAL PRINCIPLES AND RIGHTS CONTAINED IN PRIMARY LAW AND CASE-LAW 9

CODES OF GOOD ADMINISTRATIVE BEHAVIOUR 11

PUBLIC CONSULTATION 12

JUDICIAL AND NON-JUDICIAL REMEDIES..... 13

PART THREE: ADMINISTRATIVE PROCEDURES EXISTING IN A SELECTION OF DIFFERENT SECTORS..... 14

ACCESS TO DOCUMENTS 14

DATA PROTECTION 15

ANTITRUST, TRADE POLICY AND STATE AID..... 19

THE FINANCIAL REGULATION, PUBLIC PROCUREMENT AND CONTRACTS 21

EU CIVIL SERVICE LAW 22

THE ADMINISTRATIVE PROCEDURES APPLIED BY OLAF IN ITS INVESTIGATIONS..... 24

AGENCIES 25

PART FOUR: LEGISLATIVE OPTIONS UNDER ARTICLE 298 TFEU 27

DO NOTHING 27

CODIFICATION..... 27

DETAILED VS. MORE GENERAL LEGISLATIVE INTERVENTION 28

PART FIVE: RECOMMENDATIONS TO THE COMMITTEE..... 30

ANNEX I: LIST OF BRIEFING NOTES PREPARED FOR THE WORKING GROUP..... 34

ANNEX II: SELECTED LIST OF FURTHER MATERIALS CONSULTED BY THE WORKING GROUP 36

EXECUTIVE SUMMARY

This document presents the work of the Working Group on EU Administrative Law from its launch in July 2010, following a decision of the Committee on Legal Affairs, to its conclusion in October 2011.

The Working Group was tasked to take stock of the body of existing EU administrative law and, as a second step, to propose those legislative interventions it deemed appropriate in the light of the new legal basis relating to "open, efficient and independent administration" introduced by the Treaty of Lisbon and the right to good administration contained in the Charter of Fundamental Rights.

Having made the choice to limit its work to the direct administrative of Union law by the Union's institutions, bodies, offices and agencies, the Group examined generally applicable EU administrative law provisions, such as the rules on access to documents, but also more specific sectoral rules, for instance the antitrust procedures. It found that over the years, the Union has developed an ad hoc series of administrative procedures, whether in the form of law or soft law, without necessarily taking into account the coherence of the whole edifice, sometimes with gaps and inconsistencies, and without the Union legislature having a say in the matter.

Citizens are increasingly faced directly with the Union's administration, without always having the corresponding procedural rights which they could enforce against it. It is this potential inequality of arms between the citizens and the administration, which is in a privileged position with a pouvoir exorbitant, which has preoccupied the Working Group.

The Group suggests that the Committee examine the possibility of preparing a legislative initiative for a single general administrative law binding on the Union's institutions, bodies, agencies and offices, based on Article 298 TFEU, focusing on administrative procedure and providing a minimum safety net of guarantees to citizens and businesses in their direct dealings with the EU's administration.

The Group considers that legally enforceable procedural rights are an essential prerequisite to achieve a culture of good administration and a service ethos, but are not in themselves sufficient to achieve these objectives, and therefore that various soft-law instruments should be closely examined as a complement to hard-law rights.

It goes without saying that the recommendations made in this Working Document can only be treated as an introduction to a much deeper reflection about EU administrative law. That reflection should properly take place within the Committee itself.

PART ONE - OBJECTIVES, COMPOSITION AND WORKING METHOD

Objectives and composition

The objective of the Working Group on EU Administrative Law (hereinafter, 'the Group'), set up by a decision of the Committee on Legal Affairs on 23 March, was to take stock of the panorama of existing EU administrative law and, as a second step, to propose the interventions which it deemed appropriate in the light of Article 298 TFEU.

The Working Group on EU Administrative Law was made up of the following members:

- Luigi Berlinguer [coordinator] - JURI - S&D
- López-Istúriz White [substitute: Alfredo Antoniozzi] - JURI - EPP
- Alexandra Thein - JURI - ALDE
- Gerald Häfner [substitute: Eva Lichtenberger] - JURI - Greens/EFA
- Sajjad Karim - JURI - ECR
- Dimitar Stoyanov - JURI - NI
- Francisco Sosa Wagner - N/A - NI
- Paulo Rangel - AFCO - EPP

The result of the work undertaken by the Group could serve as a starting point for the Committee on Legal Affairs' and European Parliament's future activities in the field of EU administrative law.

Working method and themes covered

The Working Group was assisted in its work by a Project Team, coordinated by the secretariat of the Committee on Legal Affairs, with the participation of the political groups, the legal service, the Policy Department and where relevant, other parts of the EP administration (DG Personnel, DG Finance) and last but not least, the office of the European Ombudsman. The Project Team met as a rule before each Working Group meeting in order to prepare the annotated draft agenda, together with proposed questions for the experts.

In addition to the very extensive literature on EU Administrative Law, the Group benefited from a wealth of oral and written expertise from practitioners, academics, NGOs and Members and officials from other Union institutions, bodies, agencies and offices. Every speaker (except for those from the institutions) was commissioned by the Policy Department to write a briefing note for Members as a basis for the discussions¹.

These documents and the subsequent discussions with experts in the Working Group, together with the results of a conference organised jointly by the European Parliament and the University of León, have fed into the present Working Document, drawn up under the direction of the coordinator, Luigi Berlinguer, and to be submitted to the Group for amendment and approval, and subsequently to the Committee on Legal Affairs at its meeting of 21 November 2011.

¹ Those freely available notes are listed in Annex I below.

Following the adoption of a work programme at its inaugural meeting on 8 July 2010, the Group considered the following themes in the course of its meetings:

– Meeting of 9 September 2010

Presentation from, and exchange of views with, the European Ombudsman, Prof. P. Nikiforos Diamandouros on the European Code of Good Administrative Behaviour and on future perspectives for EU administrative law.

– Meeting of 17 November 2010

Presentation from, and exchange of views with, Professor Mario Chiti (University of Florence) and Professor Jacques Ziller (University of Pavia) on lacunae and inconsistencies in EU administrative law and potential solutions; and on the academic network recently set up on this question ("ReNEUAL").

– Meeting of 8 December 2010

Presentation from, and exchange of views with, Professor Eva Nieto (University of Castilla-La Mancha) on the implications of the entry into force of the Treaty of Lisbon.

– Meeting of 12 January 2011

Exchanges of views on access to documents and data protection, with presentations from Peter Hustinx, European Data Protection Supervisor, Jose Luis Rufas Quintana, European Parliament Register of documents, Professor Deirdre Curtin and Dr Joana Mendes (University of Amsterdam) and Tony Bunyan, Director of Statewatch.

– Meeting of 9 February 2011

Exchanges of views on the administrative procedures linked to the infringement procedure (Articles 258 TFEU), with presentations from Jens Nymand-Christensen, European Commission (Secretariat General), Dr Melanie Smith (University of Cardiff), Marta Ballesteros and Maribel Rodriguez (Client Earth).

– Meeting of 2 March 2011

Exchanges of views on the administrative procedures applicable in the fields of antitrust, state aids and trade: best practices to be extended?, with Hendrik Viaene (Stibbe, Brussels), on antitrust proceedings (Articles 101-105 TFEU), Vittorio Di Bucci, European Commission (Legal Service) on state aids (Articles 107-109 TFEU), and Piet Eeckhout, Director, Centre of European Law, School of Law, King's College London on trade law.

– Meeting of 4 May 2011

Exchanges of views, with Giovanni Kessler, Director General, European Anti-Fraud Office (OLAF) on administrative procedures applicable in its investigations, and presentation by Laure Levi, Partner at Lallemand & Legros; University of Brussels (ULB), on the Staff

Regulations / EU civil service law, with the participation of Bernhard Jansen (European Commission, DG HR).

– *Conference of 27-28 April 2011*

The six panels of the León Conference, which lasted three half-days, covered the following themes:

- From Paris to Lisbon: scope and evolution of EU administrative law (Jürgen Schwarze, University of Freiburg; Michael Gøtze, University of Copenhagen; Agustín Menendez, University of León);
- EU rules on access to documents and data protection: administrative law aspects (Nikiforos Diamandouros, European Ombudsman; Peter Hustinx, European Data Protection Supervisor; Eva Nieto, University of Castilla-La Mancha);
- The infringement procedure: administrative procedures involved (Melanie Smith, University of Cardiff; Manuel Rebollo Puig, University of Córdoba);
- EU administrative procedures in specific sectors: contracts concluded by the EU institutions (Stéphane Braconnier, University of Paris (Panthéon-Assas)), competition law procedures (Hendrik Viaene, Stibbe (Brussels)), EU civil service law (Jesús Ángel Fuentetaja, National Distance-learning University (UNED));
- The fragmentation of, and lacunae in, EU administrative procedures in different sectors: Luis Ángel Ballesteros, University of León; Oriol Mir, University of Barcelona; Päivi Leino-Sandberg, Ministry of Justice, Finland;
- From fragmentation to increased coherence - is a law of administrative procedure for the Union institutions, bodies, offices and agencies necessary?: Helena Jäderblom, Supreme Court Justice, Sweden; Jacques Ziller, University of Pavia.

PART TWO: LEGAL BACKGROUND, SCOPE OF INQUIRY AND TREATY PROVISIONS

Legal background and innovations contained in the Treaty of Lisbon

The European Union was first conceived in the Treaty of Rome primarily as an entity where the legislation adopted at supranational level was then implemented and administered at Member State level. Over the years, and in particular since the 90s, the Union took over a number of tasks which involved either its institutions acting together with national administrations to implement Union policies, or, in a limited number of cases, the institutions *directly* administering those policies or procedures. Numerous bodies, offices and agencies sprang up, some of which also carry out administrative functions. In addition, the Union's institutions are today increasingly in direct contact with citizens and economic operators, for example when administering funding contracts, when investigating a complaint or when responding to a request for a document.

Article 41 of the Charter of Fundamental Rights of the Union now enshrines a legally binding "right to good administration".

Article 41

Right to good administration

- 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
- 2. This right includes:*
 - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
 - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - (c) the obligation of the administration to give reasons for its decisions.*
- 3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
- 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.*

As a follow-up to that provision, Parliament adopted a resolution on 6 September 2001 approving a Code of Good Administrative Behaviour (hereinafter, "the Code") prepared by the European Ombudsman which the European Union's institutions and bodies, their administrations and their officials should respect in their relations with the public.

In a further development, the Treaty of Lisbon introduced a new legal base, Article 298 TFEU, which provides that:

1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.

2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end. (emphasis added)

These developments raise fundamental questions concerning the rules of administrative law developed by EU institutions for more than half a century. Indeed, over the years, the Union has developed an *ad hoc* series of administrative procedures and laws without necessarily taking into account the coherence of the whole edifice and without the Union legislature having a say in the matter.

It could be said that there is no single EU administrative law but that there are a series of different administrative law regimes applying to different areas of the institutions' activities.

For almost two decades, the academic world has been debating whether a codification of general EU Administrative Law, taking inspiration from the numerous national experiences, is warranted².

Scope of Inquiry

The Working Group decided from the outset to focus on a practical contribution, that is, one which came within the limits of Article 298 TFEU. The balance of academic opinion is quite clear that that article only provides a legal basis for action in the field of direct Union administration³, as opposed to administration of Union law by the Member States. The Group therefore chose to limit its work to the multitude of different rules of administrative law which form part of the direct execution of Union law by the Union administration, understood to be the administration of the institutions, bodies, agencies and offices of the Union. This excludes any harmonisation of national administrative law.

² See, among many others, Schwarze, Jürgen, *Europäisches Verwaltungsrecht*, 2 Aufl. 2005, S. XCV ff.

³ Hetmeier, *Article 298 TFEU*, in Lenz, Borchardt and Bitterlich, *EU-Verträge: Kommentar nach dem Vertrag von Lissabon*, 5th ed. (Bundesanzeiger Verlag, Köln 2010), pp. 2722-2733; Ladenburger, Clemens, *Evolution oder Kodifikation eines allgemeinen Verwaltungsrecht in der EU* (Mohr Siebeck, 2008) at p. 119; Ziller, Schwarze, at *León Conference*, although Schwarze considered that indirect administration had to be tackled *de lege ferenda* even though the EU had no competence in the matter, perhaps by a future treaty amendment. As Prof. Schwarze further noted, it is arguably paradoxical that the Union has increased its competences over the years but that it still largely lacks uniformity in administrative execution.

Dispersion of EU Administrative Procedures

Administrative procedures at Union level are scattered across a wide variety of sources: primary law, case-law of the Court of Justice of the European Union, secondary legislation, soft law (published and unpublished) and unilateral commitments by the Union's institutions⁴. They vary from the most general bundle of rights (the Charter) which is applicable across the board, to extremely detailed procedures specific to certain areas (e.g. the competition rules). They include many different actors and situations, in particular:

- the Union administration's relations with the public in general (e.g. correspondence, dealing with infringement complaints, dealing with requests for access to documents, consultation of interested parties, rules on interest representation, etc.)
- more specific regimes where the Union's administration acts as a regulator or adjudicator, taking decisions which affect natural or legal persons directly (antitrust, anti-dumping, public procurement and contracts, EU civil servants i.e. the administration's own staff) or indirectly as third parties (state aids decisions addressed to Member States).

Administrative law could also be separated into a number of distinct issues, following the distinction made by the European Ombudsman in his presentation to the Group:

- *Administrative structures*, that is, institutions and their internal organisation;
- *Procedures* for performing administrative tasks of various kinds;
- *Supervision, review and remedies* (both internal and external; and both judicial and non-judicial);
- *General rights and principles*, which the administration should respect.

The diversity of administrative procedures at EU level is complemented by a diversity of administrative cultures between the different Union institutions, but also within their different components (e.g. directorates-general).

Due to the specific nature of the Union, the dividing line between administrative law and constitutional law is not always clear-cut. As a general rule, the Group opted for a wide interpretation of administrative law, including among other categories contracts and regulatory acts.

General principles and rights contained in primary law and case-law

The Treaties set out a number of general principles which, although not phrased as subjective rights, nevertheless shape administrative law and procedure:

- Principle of the lawfulness of administration⁵
- Principle of proportionality⁶
- Principle of openness⁷ and of publication of legal acts⁸

⁴ Nieto and Martin (2007) use the expression "normative dispersion".

⁵ Article 2 TEU: "The Union is founded on the values of ... the rule of law ..."

⁶ Article 5(4) TEU "4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties ..."

⁷ Article 10(3) TEU:

"Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen."

⁸ Article 297 TFEU.

- Principle of effectiveness⁹
- Principle of proximity¹⁰

The Treaties, backed up by the case-law of the Court of Justice, contain a number of rights applicable generally in interactions with the Union's administration:

- Right to equal, impartial and fair treatment / non-discrimination¹¹
- Right of access to documents¹²
- Right to receive a reply in official language¹³
- Right to have one's affairs handled within a reasonable time-limit¹⁴
- Right to be given reasons¹⁵
- Right to be heard¹⁶
- Right of access to the file¹⁷
- Right to protection of personal data¹⁸
- Right to be notified of administrative decisions¹⁹
- Right to an effective remedy²⁰

⁹ Article 298 TFEU, see above.

¹⁰ Article 10(3) TFEU.

¹¹ Article 9 TEU: "the Union shall observe the principle of equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies". Charter, Article 41(1): "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union."; Article 298(1) "...independent". See also Article 18 TFEU: "(...) any discrimination on grounds of nationality shall be prohibited" and Article 10 TFEU.

¹² Article 15(3) TFEU: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. ... Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph. ..."; Charter, Article 42: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

¹³ Article 24 fourth subparagraph TFEU: "Every citizen of the Union may write to any of the institutions or bodies ... in one of the [official] languages ... and have an answer in the same language."

(note: EU agencies not covered) = Article 20(2)(d) TFEU = Charter, Article 41(4) (but wider: "every person").

¹⁴ Article 24 fourth subparagraph TFEU = Article 20(2)(d) TFEU = Charter, Article 41(4); Charter, Article 41: "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union."

¹⁵ Charter Article 41(2)(c): the right to good administration includes "the obligation of the administration to give reasons for its decisions."; TFEU, Article 296 subparagraph 2: (note: wider scope) "Legal acts shall state the reasons on which they are based".

¹⁶ Charter, Article 41(2)(a): The right to good administration includes: "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken"; Article 11(1) and (3) TEU (on a more general level): "1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent."

¹⁷ Charter, Article 41(2)(b): The right to good administration includes: "the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;"

¹⁸ Article 16(1) TEU: "Everyone has the right to the protection of personal data concerning them." ; Charter, Article 8 *Protection of personal data*

¹⁹ Article 297(2), third subparagraph TFEU: "Other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification."

²⁰ Charter, Article 47: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

- Right to legal aid²¹
- Right to complain about maladministration²²
- Right to call an institution to act²³
- Right to apply for annulment of an administrative decision²⁴
- Right to reparation²⁵

Certain rights are judicial creations such as the principle of legitimate expectations²⁶.

Codes of good administrative behaviour

Developed by the Commission, Parliament and Council and various other EU bodies (eg. the European Chemicals Agency) under the impulse of the European Ombudsman's Code of Good Administrative Behaviour, these "soft law" codes and guides elaborate in more detail on the Treaty rights listed above, and in certain respects go beyond those obligations to cover new ground such as the:

- Duty to be service-minded, correct, courteous and accessible²⁷;
- Duty on the administration to keep adequate records²⁸;

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

²¹ Charter, Article 47: "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

²² Article 24 TFEU = Article 20(2)(d); Article 228(1) TFEU (conditions).

²³ Article 265 TFEU: "Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act. The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months. Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion."

²⁴ Article 263 TFEU, fourth to sixth subparagraphs:

"... Any natural or legal person may, ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."; Article 263 TFEU, second subparagraph: grounds for review: "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."

²⁵ Charter, Article 41(3): "Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States." = Article 340 subparagraph 2 TFEU

²⁶ See for instance, case C-1/73 *Westzucker* 1973 ECR 723

²⁷ Ombudsman "*Code of Good administrative behaviour*", Article 12 *Courtesy*: "The official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked ..."

²⁸ Ombudsman "*Code of Good administrative behaviour*", Article 24 - *Keeping of adequate records*: "The Institution's departments shall keep adequate records of their incoming and outgoing mail, of the documents they receive, and of the measures they take."

- Duty on the administration to give information on remedies (internal and external)²⁹;
- Right to receive information on administrative procedures³⁰.

They could be said to produce legal effects to the extent that they bind the institution that promulgated the code in question. However, they fall short of granting legally enforceable rights to individuals³¹.

Public consultation

A number of administrative innovations developed since the Commission's White Paper on Governance³² could come within this heading, such as the rules on public consultation³³.

It is worth noting that most of these rules have the status of mere administrative guidelines³⁴ and the case-law remains underdeveloped. There is for example no legally enforceable "right to be consulted", despite Protocol No.2 on the application of the principles of subsidiarity and proportionality which states in its Article 2 that:

Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

²⁹ Commission "*Code of Good administrative behaviour*", Point 3, third indent:

- "Where Community law so provides, measures notified to an interested party should clearly state that an appeal is possible and describe how to submit it, (the name and office address of the person or department with whom the appeal must be lodged and the deadline for lodging it).
- Where appropriate, decisions should refer to the possibility of starting judicial proceedings and/ or of lodging a complaint with the European Ombudsman in accordance with Article 230 or 195 of the Treaty establishing the European Community."

Ombudsman "*Code of Good administrative behaviour*", Article 19 - *Indication of the possibilities of appeal*

- "A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them.
- Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles [263] and Articles [228 TFEU]."

³⁰ Commission "*Code of Good administrative behaviour*", Point 2, second indent: such information shall be provided "within the deadline fixed for the procedure in question"; Ombudsman "*Code of Good administrative behaviour*", Article 22 *Requests for information*

³¹ For further detail, please see: Mendes, Joana, Good administrative in EU law and the European Code of Good Administrative Behaviour, EUI Working Paper 2009/09

³² *European Governance: A white Paper*, Brussels, 25.7.2001, COM(2001) 428 final.

³³ 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/2002/0704 final

³⁴ See, e.g., Communication from the President to the Commission - Framework form Commission expert groups: Horizontal rules and public register, C(2010) 7649 final and accompanying Working Document, SEC(2010) 1360 final; Commission Communication on the collection and use of expertise by the Commission: Principles and Guidelines, COM(2002) 713 final

Lobbying and the Transparency Register

Following on from the Commission's European Transparency Initiative, the Commission and the Parliament have set up a joint Transparency Register for interest representatives³⁵. The Register includes a set of guidelines for registrants, a code of conduct to which they must sign up and a complaints procedure which includes a set of administrative sanctions for registrants found to be in breach of the code of conduct.

Judicial and non-judicial remedies

Articles 263 (annulment action), 265 (action for failure to act), 340 TFEU (action for damages) and in certain specific cases 267 (preliminary reference procedure) provide the main judicial remedies in this context.

The right to complain to the European Ombudsman about instances of alleged maladministration by the Union's institutions, agencies, bodies and offices with the exception of the CJEU acting in its judicial role³⁶ has led to many incremental improvements in the quality of the Union's administration³⁷, backed up by the Code of Good Administration endorsed by the European Parliament.

The Committee could give further consideration as to whether non-judicial procedures developed in certain areas (e.g. SOLVIT in the Internal Market³⁸) are conducive to a more efficient administration and whether they can obstruct judicial remedies for example through the elapsing of judicial time-limits.

³⁵ Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, available at: http://europa.eu/transparency-register/pdf/agreement-transparency-register_en.pdf

³⁶ Article 228 TFEU.

³⁷ See for instance the Ombudsman's 2010 Annual Report available here: <http://www.ombudsman.europa.eu/en/activities/annualreports.faces>

³⁸ SOLVIT deals with problems with a cross-border element that are due to bad application of EU law by public authorities within the EU member states; see: http://ec.europa.eu/solvit/site/index_en.htm

PART THREE: ADMINISTRATIVE PROCEDURES EXISTING IN A SELECTION OF DIFFERENT SECTORS

The Group decided to examine in more detail a selected number of areas of Union direct administration for which specific administrative procedures had been developed.

Access to documents

In a detailed development of the meaning of the right to a reasoned reply, within a reasonable time and of the consequences of a failure to reply, Regulation 1049/2001 on Access to Documents of Parliament, Commission and Council sets out the following procedural guarantees:

- Initial applications must be handled "promptly" (Article 7(1));
- An acknowledgement of receipt shall be sent to the applicant (Article 7(1));
- Decision on access within 15 working days³⁹ from registration of the application (Article 7(1));
- Obligation to issue a statement of reasons if total or partial refusal of initial application (Article 7(1));
- Failure to reply to initial request within time-limit entitles applicant to confirmatory application (i.e. equated with refusal) (Article 7(4));
- Confirmatory applications to be handled "promptly" (Article 8(1));
- Decision on access within 15 working days⁴⁰ from registration of the application;
- Obligation to issue a statement of reasons if total or partial refusal of confirmatory application (Article 8(1));
- Failure to reply to confirmatory application within time-limit entitles applicant to avail himself of remedies (court proceedings and/or Ombudsman) (i.e. equated with refusal) (Article 8(3)).

Regulation 1049/2001 also elaborates on the right to information about remedies:

- If total or partial refusal of initial request: information on right to make a confirmatory application within 15 working days of receiving the institution's reply (Article 7(1) and (2));
- If a confirmatory application is totally or partly refused, then there is an obligation to inform the applicant of the remedies open, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman (Article 8(1)).

Regulation 1049/2001 also sets out a general obligation on the institutions to "develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation" (Article 15(1)).

Although the legislation on access to documents, having been preceded by soft-law codes, is relatively recent (2001), extensive requests and litigation have caused this area of law to develop quickly. Two legislative proposals to revise the Regulation are currently in first reading, one substantive and the other limiting itself to widening the scope of the Regulation

³⁹ Extendable in exceptional cases - Article 7(3) but applicant must be notified in advance and "detailed reasons" must be given. Examples given are: "very long document" and "very large number of documents".

⁴⁰ *ibid.*

to cover the Union's institutions, bodies, offices and agencies. The Commission's latest report on the implementation of the current Regulation concludes the following:

Ten years after the Regulation was adopted, its implementation has led to a consolidated administrative practice with regard to the citizen's right of access to Commission documents. Through the case law, the Court of Justice and the General Court have significantly contributed to this consolidation. Therefore, the Commission remains convinced that the revision of the Regulation should build on what has been achieved in the past ten years⁴¹.

Leaving aside the actual level of access to documents which could be a matter for a another discussion, the Group was left with the impression that this recently codified area of general law has quite clear administrative procedures in place. Furthermore, the legally binding nature of those procedures has meant that any ambiguous parts of the Regulation have been clarified by subsequent case-law. The intention is to codify most of this case-law in any review of the Regulation.

For further information on the administrative procedures applicable to the area of administrative transparency, please see the briefing notes prepared by Prof. Nieto and Prof. Curtin and Mendes for the Group⁴².

Finally, any discussion of transparency would be incomplete without a specific mention of the Aarhus Regulation which applies an international convention limited to the environmental field to the Union's institutions and bodies⁴³. This act establishes special rules on access to information, public participation and access to justice in the environmental field. For instance, it creates a *sui generis* procedure for the internal (and then judicial) review of administrative acts with strict deadlines and a privileged position for certain non-governmental organisations⁴⁴.

Data Protection

Regulation 45/2001⁴⁵, the basic regulation concerning the protection of data held by Union institutions and bodies implementing the fundamental right to data protection contained in Articles 7 and 8 of the Charter and Article 16 TFEU, includes a number of administrative procedures, in particular:

- Section 4: Information to be given to the data subject
- Section 5: Rights of the data subject (e.g. right of access, rectification, blocking and erasure of personal data)

⁴¹ European Commission, Report from the Commission on the application in 2010 of Regulation 1049/2001 regarding public access to European Parliament, Council and Council documents, Brussels, 3.3.2010, COM(2010) 70 final

⁴² Nieto, Eva, *Relevant provisions of the Lisbon Treaty on EU Administrative Law*, December 2010; Curtin, Deirdre and Mendes, Joana, *Citizens and EU Administration - Direct and indirect links*, January 2011.

⁴³ [Regulation \(EC\) N° 1367/2006](#) of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p.13

⁴⁴ Articles 10-12.

⁴⁵ Regulation (EC) No 45/2001 of 18 December 2000, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data; OJ L 8/1, 12.1.2001.

- Chapter III: Remedies, including judicial remedies and the right of data subjects to lodge a complaint with the European Data Protection Supervisor (Article 32(2)), a form of external non-judicial review.
- Articles 47 (Powers) and 49 (Sanctions)

The European Data Protection Supervisor has recently outlined his approach to monitoring and ensuring compliance with Regulation 45/2001, in particular with regard to the right of individuals to lodge a complaint and to EDPS's powers of inspection and enforcement⁴⁶.

From a reading of the Regulation together with the practical insights provided by the EDPS, the Group witnessed in this area a number of rights, but without any corresponding administrative safeguards to put them into effect.

Of particular interest in this context is the Commission's statement from November 2010 that it intends to strengthen the "modalities for the actual exercise of the rights of access, rectification, erasure or blocking of data e.g. by introducing deadlines for responding to individuals' requests, by allowing the exercise of rights by electronic means or by providing that the right of access should be ensured free of charge as a principle"⁴⁷.

The Infringement Procedure (Article 258 TFEU)

The infringement procedure has survived essentially unchanged since its first appearance in the Treaties in the 1950s. The relevant Treaty article, Article 258 TFEU, is rather skeletal. It is a crucial legal instrument enabling the Commission to discharge its duty as "guardian" of the Treaties⁴⁸.

Article 258 TFEU (ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

As can be seen from the above, the Treaties are largely silent as to the precise procedure to be followed by the Commission in investigating infringements, be it from the perspective of Member States being investigated or from the perspective of complainants. The Group focused on the Commission-complainant relationship, rather than the Commission-Member State relationship, which is arguably beyond the realm of administrative law. It is worth noting that individual complaints are recognised as the single most important resource for

⁴⁶ European Data Protection Supervisor, Monitoring and Ensuring Compliance with Regulation (EC) 45/2001, [Policy paper](#), Brussels, 13 December 2010

⁴⁷ COM(2010) 609 final, Commission Communication on *A comprehensive approach on personal data protection in the European Union*, 4.11.2010, page 8.

⁴⁸ The Commission "shall oversee the application of Union law under the control of the Court of Justice of the European Union" (Article 17(1) TEU).

detecting infringements, given that the Commission itself has limited investigative powers and resources⁴⁹.

Discussions in the Group distinguished three main issues.

- The first issue is the full discretion of the Commission to take Member States to the Court of Justice. This stems from the Treaties and the established case-law of the Court of Justice.
- The second question concerns the criteria used by the Commission to make policy choices giving a certain priority in the handling of a potential infringement. There may well be a case for increased political accountability here, but the Group considered that such an issue went beyond its remit.
- The third and final issue is the question of the procedural rules applicable to the Commission when it acts under Article 258 TFEU. Just because the Commission has a discretion to decide whether to proceed does not mean that it has a full discretion to decide *in what way* to proceed i.e. whether to answer a complaint, whether to provide reasons for its decisions, whether to treat complaints diligently. This last angle was the one chosen by the Group in its examination of the infringement procedure.

Unlike other areas for which the Union legislator established advanced administrative procedures (eg. competition law, state aid, public procurement), the Commission developed its procedures in a relative vacuum on the basis of its discretionary power to organise its own work. Since the late 90s, and in part, due to the activity of the European Ombudsman, a series of procedural commitments were made by the Commission in relation to complainants⁵⁰.

These include commitments to:

- acknowledge within 15 working days any correspondence;
- register any correspondence which is "likely to be investigated as a complaint". 15 working day time-limit for communication within COM in case of doubt. If not considered a complaint, reasons are given and where necessary alternative forms of redress for.
- assign an official reference number to admissible complaints, and send an acknowledgement of receipt to the complainant within one month of first acknowledgement;
- respect confidentiality of identity vis-à-vis the Member State if requested by the complainant (in accordance with access to documents and data protection rules);
- keep the complainant informed of the course of any infringement procedure (i.e. each step: letter of formal notice to Member State, reasoned opinion to Member State, referral into the Court of Justice);
- endeavour to take a decision to open infringement proceedings or to close the case within 12 months of registration of the complaint ("as a general rule"). If time-limit exceeded, commitment to inform the complainant;

⁴⁹ Brussels, 1.10.2010, COM(2010) 538 final, Report from the Commission, 27th Annual Report on Monitoring the Application of EU law (2009), Annex I, table 1.1 (for 2009: 772 infringements detected from complaints (as opposed to 356 on the Commission's own initiative and 531 due to non-communication of measure by Member States out of a total of 1659 infringements detected).

⁵⁰ See Commission [Communication](#) on *Relations with the complainant in respect of infringements of Community law*, COM (2002) 141.

- notify the complainant in advance with reasons if it plans to close the case, with a possibility for comments with a 4-week deadline (unless exceptional circumstances require urgency)⁵¹;
- in case of "multiple" complaints, all the communication can take place instead by publication in the Official Journal and on a dedicated website⁵².

Of late, the Commission has taken the view that many complaints should be treated more effectively "through initial information exchange and cooperative problem-solving", with court proceedings as a last resort. For this reason, the Commission has reformed its internal administrative procedure for dealing with infringements in 2008 (initially, as a pilot exercise, hence its current name: "EU Pilot") in the following manner:

Where an issue requires clarification of the factual or legal position in the Member State, it would be transmitted to the Member State concerned. Unless urgency requires immediate action and when the Commission considers that the contact with the Member State can contribute to an efficient solution, the Member States would be given a short deadline to provide the necessary clarifications, information and solutions directly to the citizens or business concerned and inform the Commission. When the issue amounts to a breach of Community law, Member States would be expected to remedy, or offer a remedy, within set deadlines. When no solution is proposed, the Commission would follow-up, taking any further action, including through infringement proceedings, in accordance with existing practice⁵³.

The Commission has evaluated the use of EU Pilot as of February 2010 and has concluded that it constitutes a success and that it should be broadened and extended to all Member States not yet participating. A further evaluation is scheduled for 2011⁵⁴.

EU Pilot creates a de facto new administrative procedural framework for complainants. Two "new" phases are:

- a) the Member State investigation and response once notified through EU Pilot and
- b) the Commission analysis of the Member State response.

For phase a), the Commission aims at a target of 10 weeks and notes 33% non-compliance by Member States with this target. For phase b), the Commission has not fixed itself any time-limit in evaluating Member State responses. 60% of Commission evaluations took more than ten weeks, with one taking 473 days.

On the whole, according to the Commission, the average number of days taken to complete the whole process in EU Pilot is 169 days⁵⁵.

⁵¹ *ibid* and see explanatory note relating to COM standard [complaint form](#) published in 1999, OJ C 119, 30.4.1999, p.5.

⁵² See for instance, [Acknowledgement of receipt](#) in complaint No CHAP/2010/723 on doctors working for the public sector in Navarra, Spain.

⁵³ Commission Communication [A Europe of Results: Applying Community law](#), COM (2007) 502.

⁵⁴ Commission Report: EU Pilot evaluation report, COM (2010) 70, SEC (2010) 182.

⁵⁵ *Ibid*, at p. 17

The Commission states that the Member State can respond directly to the complainant but can also let the Commission provide all of the information later. This means that the complainant can either receive:

- a Member State response, and then a Commission response with its evaluation; or
- a Commission response with the Member State's response and the Commission's evaluation.

The Group was left with a mixed impression of the position of complainants, who have a rather uneasy part to play in this administrative procedure, which is largely closed and bipolar in nature and focuses on dialogue and mutual accommodation between Commission and Member States.

For further details on the administrative procedures applicable to the infringement procedure, please see the briefing notes prepared by Smith, Rodriguez and Rebollo⁵⁶ and the relevant Commission communications⁵⁷.

Antitrust, trade policy and state aid

Since the early sixties, detailed and comprehensive administrative procedures were developed in certain sectors, with the most prominent example being antitrust⁵⁸ whilst other examples are the rules on state aid, anti-dumping and anti-subsidy. The Working Group explored possible reasons for such a "sectoral codification"⁵⁹, including the volume of work involved, the magnitude of the economic interests at stake, and the special powers of the Commission in those areas.

In these areas, the Group found an interplay of administrative procedures laid down in (several layers of) legislation, rights derived from the case-law of the Court of Justice, and "soft law" instruments detailing the Commission's administrative practices ("Notices"⁶⁰, "Guidelines" and "Best practices"⁶¹).

Antitrust

⁵⁶ Smith, Melanie, *Administrative procedures files linked with Article 258 TFEU proceedings: an academic perspective*, January 2011; Rodriguez Valero, Maria Isabel, *Administrative procedure in environment files linked with Article 258 TFEU proceedings: a lawyer's perspective*, March 2010; Rebollo Puig, Manuel, *Administrative procedures prior to the action for failure to fulfil an obligation*, March 2011.

⁵⁷ European Commission, Report from the Commission EU Pilot evaluation report, Brussels, 3.3.2010, COM(2010) 70 final; European Commission, Commission communication to the EP and the European ombudsman on relation with the complainant in respect of infringements of Community Law, Brussels, 20.3.2002; COM(2002) 141 final.

⁵⁸ See EEC Council Regulation No 17/62: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204–211, and then 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, OJ L 1, 4.1.2003, p. 1–25.

⁵⁹ Ladenburger (2008) uses the term "*Bereichskodifikation*" as opposed to a "*Gesamtkodifikation*".

⁶⁰ e.g. Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Text with EEA relevance) *Official Journal C 101*, 27/04/2004 P. 0065 - 0077

⁶¹ DG Competition, [Best Practices](#) on the conduct of proceedings concerning Articles 101 and 102 TFEU

In the area of antitrust, different levels of procedural protection could be distinguished, such as the rights of the defence afforded to undertakings under investigation (e.g. access to the file) and the more limited rights afforded to complainants.

According to the Commission, complainants are “closely associated with the proceedings”⁶². If they are able to show a legitimate interest (more than a general pro bono interest) and provide comprehensive information⁶³, then they benefit from a range of procedural rights. The Commission is under an obligation to “examine carefully” the complaint, to decide on it within a “reasonable time” (indicative time frame of four months⁶⁴) and to subsequently involve the complainant to an extent in the procedure should it be opened (copy of non-confidential statement of objections, oral hearing, etc.). There is also a detailed procedure for rejecting complaints⁶⁵.

The role of the “Hearing Officer” was discussed with a view to ascertaining its wider relevance as a best practice. This specific figure, who reports directly to the Commissioner responsible, was established in order to safeguard the procedural rights of the parties, in particular the right to be heard⁶⁶. During the discussions within the Group, one practitioner, Mr Viaene, criticised the Hearing Officer's lack of complete independence from the Commission. This was echoed by Prof. Eeckhout in the trade policy area where a similar figure exists.

Trade policy

Anti-dumping and anti-subsidy procedures are generally only triggered by complaints⁶⁷, and therefore specific procedures have been developed in this area. As in the area of anti-dumping, complainants must provide very detailed information to the Commission and are even advised to contact producers in other Member States before making a complaint.

Anti-dumping and anti-subsidy procedures, but also common rules for imports, are strictly limited in time, with practically each stage being subject to a strict time-limit. A parallel in a different context could be the Merger Regulation⁶⁸. DG Trade has also implemented the office of the Hearing Officer.

Prof. Eeckhout, during the discussions in the Group, commented on the practice of “sampling” which allows the Commission to limit its investigation to a statistically valid sample of parties, products or transactions in cases where the number of complainants, exporters, importers, types of product or transactions is large⁶⁹. For him, this was an example

⁶² Best Practices, paragraph 90. See also Notice on the handling of complaints (2004).

⁶³ Article 7 of Regulation (EC) No 1/2003; Articles 5-9 of Regulation 773/2004.

⁶⁴ Notice on complaints, paragraphs 60-63.

⁶⁵ Article 7 of Regulation 774/2004. This procedure involves access to certain Commission information and can end with a Commission decision rejecting the complaint (normally published if of general interest) which is open to challenge before the courts

⁶⁶ [Commission Decision 2001/462 of 23 May 2001](#) on the terms of reference of hearing officers in certain competition proceedings, Official Journal L 162, 19.06.2001, pages 21-24 ; Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (ex- articles 81 and 82 EC) 06.01.2010.

⁶⁷ Article 10 of Anti-subsidy parent regulation and Article 5 of Anti-dumping parent regulation.

⁶⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the [control of concentrations between undertakings \(the EC Merger Regulation\)](#), OJ L 24, 29.01.2004, p. 1-22

⁶⁹ Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version) OJ L 343/51 9 22.12.2009 Article 17(1).

of an administrative procedure giving some priority to administrative efficiency over the individual rights of the complainants. Prof. Eekhout also noted the wide definition of "interested parties" for the purposes of trade defence acts, which he considered a possible best practice, which could be contrasted with the narrower approach in the area of state aids.

State aid

The Group heard from the Commission's legal service on the question of state aids. Mr Di Bucci explained that procedural legislation arrived rather late in the day (1999)⁷⁰, with some soft-law complements⁷¹, mainly due to the fact that the Treaty itself was already rather detailed on the procedures to be followed. Case-law established in which situations complainants have the right to challenge the validity of a Commission decision to take no further action on their complaint or whether the exchanges with the Commission merely constitute "informal communication" not leading to any legal rights⁷².

For further information on the administrative procedures applicable to these areas of EU "economic" law, please see the briefing notes prepared by Mr Viaene (antitrust)⁷³, and Prof. Eekhout (trade)⁷⁴ for the Group.

The Financial Regulation, public procurement and contracts

The present Financial Regulation⁷⁵ was enacted in the aftermath of the resignation of the Santer Commission and establishes general principles and procedures which cover *inter alia* the institutions' implementation of funds from the EU budget. More detailed technical arrangements are laid down in the rules for the implementation of the Financial Regulation, adopted by the Commission⁷⁶.

During the debate at the León Conference, Prof. Ziller insisted on the importance of a further reflection on the whole area of contracts, which went far wider than public procurement. There was a dearth of administrative rules dealing with the management of contracts, for example grants under a financial programme of the Union. The European Ombudsman added that there was a complete lack of support to subcontractors in such a framework. In a previous

⁷⁰ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1; Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1.

⁷¹ Code of Best Practice for the conduct of State aid control procedures (2009/C 136/04)

⁷² Case C-521/06 P, *Athinaiki v Commission*; Case T-152/06 *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v Commission*.

⁷³ Viaene, Hendrik, Administrative proceedings in the area of EU competition law, March 2011

⁷⁴ Eekhout, Piet, Administrative procedures in EU trade law, March 2011

⁷⁵ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, *Official Journal L 248*, 16/09/2002, p.1 - 48; see also the Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, COM(2010)71 final of 03.03.2010.

⁷⁶ Consolidated version of the Commission Regulation (EC, EURATOM) No 2342/2002 of 23/12/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, 01/05/2007.

written contribution, he had already criticised the lack of information about legal remedies to recipients of grants⁷⁷.

The general impression during the discussion within the Group was that the present Financial Regulation was enacted at a very specific juncture with a very specific goal in mind (sound financial management) but without factoring in other important considerations, such as the rights of citizens, subcontractors and affected third parties, user-friendliness and possibly effectiveness. The result was that what could and should have constituted general administrative law procedures are rather uncomfortably embedded in a text with an entirely different focus.

Such an impression is confirmed in a recent Commission report on the evaluation of a specific financial programme which states that:

*"Current procedures lead to unacceptably long delays between the publication of calls for proposals and the start-up of projects. They are caused by a plethora of administrative steps that are disproportionate to the amounts involved (deadline for submitting proposals, internal procedures of the Commission, discussions on budgets with the recipients, committee procedures, etc.)."*⁷⁸

For further information on the administrative procedures applicable to the area of public procurement, please see the briefing note prepared by Prof. Braconnier for the Group⁷⁹. It should be further noted that the Commission has proposed a revision of the Financial Regulation⁸⁰ and has started a discussion on reforms of the public procurement rules⁸¹.

EU Civil Service Law

Back in 1962, the Staff Regulations were adopted in order to "secure for the Communities the services of staff of the highest standard of independence, ability, efficiency and integrity ... and at the same time to enable such staff to discharge their duties in conditions which will ensure maximum efficiency"⁸². Despite having been amended many times, they remain the backbone of EU civil service law. Since the Treaty of Lisbon the ordinary legislative procedure applies⁸³.

Over the years, the Staff Regulations have been a fruitful source of case-law at the Court of Justice, and equally fertile ground for administrative principles, procedures, remedies and case-law⁸⁴.

⁷⁷ Response to the public consultation on review of the Financial Regulation, Strasbourg, 17 December 2009

⁷⁸ European Commission, 15.6.2011, COM(2011) 351, *Interim evaluation report on the results obtained from and the qualitative and quantitative aspects of the implementation of the Civil Justice financing programme*, p. 24

⁷⁹ Braconnier, Stéphane, *Public procurement by the European Union institutions*, March 2011.

⁸⁰ Brussels, 22.12.2010, COM(2010) 815 final, 2010/0395 (COD), Proposal for a Regulation on the financial rules applicable to the annual budget of the Union.

⁸¹ Brussels, 27.1.2011, COM(2011) 15 final, Green Paper on the modernisation of EU public procurement policy: *Towards a more efficient European Procurement Market*.

⁸² Second visa. OJ P 45, 14.6.1962, p.1385. Note: most of the comments apply equally to the rules applicable to temporary and contract agents, the *Conditions of Employment of Other Servants of the Union*.

⁸³ Article 336 TFEU.

⁸⁴ See in particular: Article 25 on reasoning, communication and publication of decisions of the Appointing Authority; Article 26 on the personal file; Article 29 on recruitment; Articles 43 and 45 on assessment and

Under Article 90(1), an EU civil servant can formally request that the Appointing Authority (i.e. his or her employer) take a reasoned decision relating to him or her. If four months expire without such a decision, then the request is deemed to have been rejected. Under Article 90(2), an EU civil servant can submit a complaint to the Appointing Authority against an act adversely affecting him or her (within three months of that decision's adoption). If no answer has been provided within four months, the complaint is deemed to have been rejected.

The implied or express rejection of such a complaint is a necessary precondition for the EU civil servant to be able to take his or her institution to the CJEU (more specifically, the EU Civil Service Tribunal)⁸⁵. This judicial appeal is open for three months following the express or implied rejection of the complaint.

The whole pre-judicial phase has been criticised as unsatisfactory⁸⁶ due to its length, its confrontational nature and because of the procedural hurdles involved. Alternatives have been suggested, taking inspiration from the Mediation Directive⁸⁷ and the Statute of the Civil Service Tribunal and its reference to amicable dispute resolution⁸⁸.

This is one side of the coin, i.e. the EU civil servants as the *administrés* vis-à-vis their institutions. It should be noted that the Staff Regulations also lay down certain rules of conduct for officials in order to ensure good administration⁸⁹.

A further important aspect raised by Prof. Levi is the question of the accessibility of the sources of EU civil service law. Although the Staff Regulations are obviously published, a number of implementing rules, practices and internal decisions are not systematically published and are sometimes not even the subject of a formal administrative decision.

The European Ombudsman carried out a public consultation in the spring of 2011 on a "[draft statement of public service principles for EU civil servants](#)" intended to complement existing rules by focusing on the spirit in which they should be applied.

For further information on the administrative procedures applicable to the area of EU civil service law, please see the briefing note prepared by Prof. Levi for the Group⁹⁰.

promotion of staff; Articles 72, 73 and 78 on medical costs, accidents and invalidity; Articles 90-91 on appeals; Annex IX on disciplinary proceedings.

⁸⁵ Article 91 of the Staff Regulations (consolidated version).

⁸⁶ G. Vandersanden, « La procédure et les voies de recours dans le domaine de la fonction publique communautaire » in : I. Govaere et G. Vandersanden (dir.), *La fonction publique communautaire. Nouvelles règles et développements contentieux*, Bruxelles, Bruylant, 2008, spéc. p. 111 ; G. Vandersanden, « Pour une réforme de la procédure préalable dans le contentieux de la fonction publique communautaire » in *Liber Amicorum en l'honneur de Bo Vesterdorf*, Bruxelles, Bruylant, 2007, p. 295. (cited in the study by Prof. Levi)

⁸⁷ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3–8.

⁸⁸ Article 7(4) of Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, 2004/752/EC, Euratom, OJ L 333, 9.11.2004, p. 7: "At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement".

⁸⁹ See for example: Article 11 - the duties of loyalty, objectivity and impartiality; Article 11a - the duty not to deal with a matter in which the official has a personal interest; Article 17 - the duty to remain discreet, even after the end of service.

⁹⁰ Levi, Laure, *Administrative procedure in EU civil service law*, April 2011.

The administrative procedures applied by OLAF in its investigations

OLAF was established in 1999 by the Commission as one of its departments in order to conduct administrative fraud investigations internally (within EU institutions, bodies, offices and agencies) and externally. OLAF has at its disposal a number of means to achieve its objectives, for example access to all premises of the institutions, bodies, offices and agencies and to all information and documents held by them⁹¹.

Civil servants may submit a complaint to the Director-General of OLAF against acts adversely affecting them as part of an internal investigation⁹². However, it should be borne in mind that under the case-law of the Court of Justice, only binding acts can be challenged before the Court and OLAF only takes "procedural preparatory measures" which are not challengeable⁹³.

Apart from this provision, the applicable legislation is quiet on the specific procedural safeguards for those investigated. On the other hand, the Director-General of OLAF has issued detailed procedural instructions to his staff in the form of a Manual of Operational Procedures. In his own words: these instructions "are not intended to have any legal force: they simply determine the practice to be followed in order to implement the applicable legal framework"⁹⁴.

Parliament, on 20 November 2008, in its first reading of a proposal to reform the OLAF's procedures argued for a "Procedural Code for OLAF Investigations" to be subject to inter-institutional consultation and published in the Official Journal⁹⁵.

An amended Commission proposal is now on the table, with the stated intention to make the procedural guarantees "clearer and more transparent". The Commission is proposing to expressly provide for a number of rights, including in particular:

- the right for the person concerned by an investigation to make his/her views known before conclusions referring by name to him or her have been drawn;
- the right to be given a summary of the matters under investigations and to be invited to comment on these matters;

⁹¹ Article 4 of Regulation 1073/1999.

⁹² Article 90 of the Staff Regulations, Article 14 of Regulation 1073/1999.

⁹³ Case of 20 May 2010, *Commission v. Violetti*, T-261/09 P.

⁹⁴ Foreword to Manual, p.2, 1 December 2009, <http://ec.europa.eu/dgs/olaf/legal/manual/OLAF-Manual-Operational-Procedures.pdf>

⁹⁵ (2008)553, Article 15a: Procedural code for OLAF investigations

1. The Office shall adopt a "procedural code for OLAF investigations" incorporating the judicial and procedural principles adopted under the present regulation. It shall take account of the Office's operational practices.
2. The procedural code for OLAF investigations shall set out the practices to be observed in implementing the mandate and statute of the Office, general principles governing investigative procedures, as well as the main investigative acts, the legitimate rights of the persons concerned, procedural guarantees, provisions relating to data protection and policies on communication and access to documents, provisions on review of legality and the means of redress open to the people concerned.
3. Before adoption of the procedural code for OLAF investigations, the European Parliament, the Council, the Commission and the Office's Supervisory Committee shall be consulted. The Supervisory Committee shall ensure the independence of the Office in adopting the procedural code for OLAF investigations.
4. The procedural code for OLAF investigations may be updated at the proposal of the Director General of the Office. In this case the adoption procedure referred to in this Article shall apply.
5. The procedural code for OLAF investigations adopted by the Office shall be published in the Official Journal of the European Union.

- the right to be assisted by a person of his/her choice during an interview;
- the right to use the EU language of his or her choice;
- the principle that any person concerned by an investigation shall be entitled to avoid self-incrimination⁹⁶.

A further point of interest in the Commission proposal is the possibility for those investigated to ask within one month of the closing of the investigation for an administrative review procedure. The independent body within OLAF charged with this review would provide an opinion within one month on whether all procedural guarantees were in fact respected⁹⁷.

During the debates in the Group, Prof. Levi criticised the current lack of a right to access to the file in OLAF investigations which made the presentation of observations by those investigated difficult. The Group perceived this as being a symptom of a larger problem of lack of transparency and lack of rights of the defence in relation to OLAF's investigations.

Agencies

Following limited legislative intervention in 2003⁹⁸, in a 2008 Communication, the Commission relaunched a debate on the role of agencies and their place in the governance of the EU from the standpoints of consistency, efficiency and transparency with a view to reaching an inter-institutional "common approach"⁹⁹. E. Chiti comes to the conclusion that agencies are very variable in their procedural designs, some affording fully codified statutory procedures¹⁰⁰, others providing for some procedures without certain procedural guarantees¹⁰¹ and others simply lacking administrative procedures entirely¹⁰². The level of procedural detail will inevitably vary between agencies given their widely differing tasks - for instance, to adopt the Commission's classification, OHIM (the Office for Harmonisation in the Internal Market) adopts individual decisions which are legally binding on third parties, EMA (the European Medicines Agency) provides direct assistance to the Commission and, where necessary, to the Member States, in the form of technical or scientific advice and/or inspection reports, whilst EMCCDA (the European Monitoring Centre for Drugs and Drug Addiction) gathers, analyses and forwards objective, reliable and easy-to-understand information.

During the discussion in the Working Group, the issue of agencies was highlighted on numerous occasions by experts as an example of an area where administrative procedures are lacking or nebulous and where systematic legal structures were needed as a priority. The Commission-sponsored evaluation of EU decentralised agencies appears to confirm this by noting that newly established agencies tend to lack "sufficient guidance, support and transfer of lessons learned with regard to administrative issues"¹⁰³.

⁹⁶ See Article 7a of the Amended Proposal.

⁹⁷ See Article 7b of the Amended Proposal.

⁹⁸ 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, OJ L 11, 16.1.2003, p. 1–8

⁹⁹ European agencies – The way forward, 11.3.2008, COM(2008) 135 final.

¹⁰⁰ The example given is OHIM which administers the Union trademark. Chiti, Edoardo, *The Emergence of a Community Administration: the case of European agencies*, 37 CMLRev (2000), pp. 309-343

¹⁰¹ The example given is EMA which is responsible for scientific evaluation of applications for European marketing authorisations of medicines.

¹⁰² The example given is EMCCDA.

¹⁰³ Ramboll, Eureval, Matrix, Final Report Volume I, Study produced for the European Commission, December 2009.

This issue is all the more pressing since new decentralised bodies continue to be created, such as the European (financial) Supervisory Authorities and given extensive rule-making powers¹⁰⁴.

An Inter-institutional working group on decentralised agencies, following on from the above-mentioned Commission Communication, is scheduled to finish its work towards the end of 2011.

¹⁰⁴ See in particular the European Supervisory Authorities (the European Securities and Markets Agency (ESMA), the European Banking Agency (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA)) and their role in the drawing-up by the Commission of delegated acts. See for instance Recital 23 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, Official Journal L 331 , 15/12/2010 P. 0012 - 0047: "The Commission should endorse those draft regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in order to give them binding legal effect. They should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets. Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation. The Commission should not change the content of the draft regulatory technical standards prepared by the Authority without prior coordination with the Authority. To ensure a smooth and expeditious adoption process for those standards, the Commission's decision to endorse draft regulatory technical standards should be subject to a time limit."

PART FOUR: LEGISLATIVE OPTIONS UNDER ARTICLE 298 TFEU

Several options, outlined below, were examined by the Group in the course of its work. It should be noted that the European Commission, for its part, is still in the process of examining the potential of Article 298 TFEU with a view to coming to a conclusion as to whether any proposal would be desirable.

Do nothing

Parliament could consider that existing legal and non-legal instruments provide the European administration with sufficient openness, efficiency and independence, thus making legislative intervention under Article 298 TFEU superfluous at this stage.

This would leave the existing instruments in place, such as the primary law (Treaties and Charter), all relevant general and sectoral legislation and soft-law, the case-law and the Ombudsman's and the institutions' Codes.

Codification

Both Ladenburger (2005), Ziller (2011) and Mir (2011) set out the pros and cons of codification as follows:

- for: greater predictability, accessibility, simplicity and transparency; systematic approach; uniformity; the possibility to innovate, better judicial protection; possible export of a model to third countries¹⁰⁵, and (depending on one's viewpoint) influence of national administrative law systems, the existence of default rules to fill gaps in existing law in the absence of specific legal rules, greater accountability of the institutions, less cost for citizens;
- against: crystallisation of rules in a given area; rigidity as compared with unwritten law; oversimplification¹⁰⁶.

Ladenburger distinguishes various forms of codification:

- Sectoral codification (*Bereichskodifikation*), with the obvious examples being the areas of antitrust and trade law described above. A notable example, straying for a moment into the realm of "mixed administration" with the Member States, is the Union's Modernised Customs Code¹⁰⁷ and its implementing provisions¹⁰⁸. Further examples from the fundamental freedoms would be the Citizenship Directive¹⁰⁹ and

¹⁰⁵ See argument by Mir p.20 (2011).

¹⁰⁶ Ladenburger, Clemens, *Evolution oder Kodifikation eines allgemeinen Verwaltungsrecht in der EU* (Mohr Siebeck, 2008); Ziller, Jacques, *Is a law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects*, March 2011; Mir Puigpelat, Oriol, *Arguments in favour of a general codification of the EU administrative procedure*, March 2011

¹⁰⁷ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code OJ L 302 of 19 October 1992; Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code).

¹⁰⁸ Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as amended last in 2010 by Regulation 197/2010.

¹⁰⁹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

the Services Directive¹¹⁰. It is worth noting that certain sectoral codifications bring with them detailed measures on administrative cooperation or administrative "networks" between Union and Member State administrations¹¹¹.

- Partial codification (*Teilkodifikation*), i.e. codification of a specific aspect of general Union administrative law,
 - early examples were the regulations on the Union's official languages¹¹², on the computation of dates¹¹³, on implementing acts¹¹⁴ (and previously on "comitology"¹¹⁵).
 - more recent developments have included the Financial Regulation (2002), the Regulation on Access to Documents (2001) and the Regulation on Data Protection (2001), Agencies (2003)¹¹⁶
- Horizontal codification (*Gesamtkodifikation*) encompasses exercises of wider scope aimed at establishing a framework for an administration, although not necessarily an exhaustive one. The Codes of Good Administrative Behaviour and several articles of the Charter of Fundamental Rights (Articles 41-47) could both be seen as steps in this direction.

Pure codification vs. "innovative" codification

- Pure codification (*Codification à droit constant*) amounts to "establishing a legally binding consolidated version of existing legislation"¹¹⁷. Ziller rightly comments that this is mainly a technical exercise which can be undertaken by and large without involving the legislator.
- Innovative codification is "the exercise whereby a new law takes over existing principles which are usually dispersed in different laws and regulations and in the case-law of courts, and modifies existing principles and rules if needed, adding new principles or rules if necessary"¹¹⁸.

Detailed vs. more general legislative intervention

amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) OJ L 158, 30.4.2004, p. 77–123

¹¹⁰ Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ L 376/36, 27.12.2006.

¹¹¹ See for instance, Services Directive, Chapter II *Administrative Simplification*, and in the area of competition law: the European Competition Network: recitals 15-18 of Regulation 1/2003, the Commission Notice on cooperation within the Network of Competition Authorities" and the "[Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities](#)".

¹¹² EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, *Official Journal* 017, 06/10/1958 P. 0385 - 0386

¹¹³ Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, *Official Journal* L 124, 08/06/1971 P. 0001 - 0002.

¹¹⁴ 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 OJ L 55/13, 28.2.2011

¹¹⁵ Council decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999/468/EC, OJ L 184, 17.7.1999, p. 23, as amended last in 2006.

¹¹⁶ 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, OJ L 11, 16.1.2003, p. 1–8

¹¹⁷ Ziller, Jacques, *Is a law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects*, March p.22

¹¹⁸ *ibid*

A law of administrative procedure regulating EU direct administration in detail could be difficult or impossible to achieve in practice and would not be able to take account of the specificities of different areas of Union activity which the Group clearly witnessed.

On the other hand, a law of general administrative law principles, providing minimum guarantees to citizens in their interaction with the EU's administration could leave most detailed issues to sectoral law whilst providing a safety net for citizens.

PART FIVE: RECOMMENDATIONS TO THE COMMITTEE

1. An examination of administrative procedures applied by the Union's institutions, bodies, agencies and offices has revealed internal contradictions which may lead on the one hand to over-complex administrative procedures and formalities, and on the other hand to gaps resulting in a risk of maladministration or improvisation. These flaws are arguably due at least in part to the incremental way in which such rules developed during the past half-century, and the fact that most EU administrative rules are sector-specific. These reasons may explain such gaps but should in no way serve to justify their existence - individual rights are at stake and the staff of the Union's administration should not have to work in a legal vacuum.
2. "Soft law" administrative procedures, which are not systematically made available and which can be modified unilaterally by the institution concerned cannot, taken alone, be considered to sufficiently protect the individual's right to good administration. Nowhere is this failure more glaring than in the case of OLAF, where the results of investigations will then be passed on to national prosecutors for possible criminal investigations.
3. Citizens are increasingly faced directly with the Union's administration, without always having the corresponding procedural rights to enforce against it. It is this potential inequality of arms between the citizens and the administration, which is in a privileged position with a *pouvoir exorbitant*, which has preoccupied the Working Group. In a 21st century administrative democracy, citizens should not be viewed as mere passive receivers of administrative decisions but rather should be called upon to actively participate in the exercise of public power.
4. Although EU administrative law is comparatively young, many significant codification exercises have already taken place at EU level, some sector-specific, others codifying a particular area of general administrative law. This laboratory of procedural innovation has allowed a number of different systems to be tested whilst also forming a complex and overlapping procedural puzzle. For instance, it is unclear whether a codification of a specific aspect of general EU administrative law (e.g. access to documents) should trump a sector-specific rule on the same subject (e.g. Regulation 1/2003 on the procedures in the area of antitrust)¹¹⁹. Furthermore, many procedures adopted in different sectors are similar in nature and inspiration but not exactly identical, sometimes without objective justification.
5. Over the years, EU administrative law has been enriched by debates and interactions between various actors: the Union's administration(s), the Court of Justice, the European Ombudsman, academia, citizens and legal practitioners. Despite its many individual incursions in the area of administrative law, the Union's legislature has yet to find its voice in this debate. More specifically, legislating on administrative law should be seen as a tool

¹¹⁹ It is perhaps no coincidence that, apart from the Commission Secretariat-General, DG COMP is the Commission DG receiving the most requests under Regulation 1049/2001 - see Commission 2010 Report *op cit.* at p.13 (in 2010, 9.07% of requests).

for the European Parliament to fully discharge its function of political control, thus making the Commission and the agencies more accountable to it¹²⁰.

6. The time has come to make EU administrative procedures more coherent and provide more legal certainty and minimum guarantees for citizens and economic operators. The entry into force of the Treaty of Lisbon provides the Union legislature with a new tool, Article 298 TFEU, to approach the question more systematically than was the case previously.
7. In order to achieve this, a single general administrative law binding on the Union's institutions, bodies, agencies and offices based on Article 298 TFEU and focusing on administrative procedure is needed in order to provide a minimum safety net of guarantees to citizens in their interaction with the EU's administration.
8. This general law should be limited to direct EU administration, in accordance with Article 298 TFEU.
9. This general law should apply as a baseline *lex generalis* across the board to all areas of Union activity. It would have the advantage of filling any gaps in the system, with rules applicable by default. Such a law would bring clarity and greater simplicity to the legal situation which, through several decades of case-law, has grown extremely complex. It would give greater legitimacy to the decisions of the Union's administration thereby increasing the citizens' trust in the work of the Union. It would give the European Ombudsman a legally binding tool, as opposed to the current "soft law" codes, to fulfil his or her mission of fighting instances of maladministration.
10. Such a general law should adopt the form of an innovative codification, not a mere technical exercise which could result in a petrification of the *acquis*.
11. The challenge for the Union legislature will be to find the right level of detail to provide added value over and above the Treaties and the Charter without hampering the effectiveness of the Union's administration in all areas of its activity.
12. The particular position of third parties in administrative procedures should be thoroughly and specifically considered as part of this legislative initiative.
13. The question of internal review of administrative decisions (or in other words, a preliminary administrative appeal) is treated in many different ways throughout different sectors of EU activity (competition law, trade law, civil service law, environmental law, rules on access to documents, OHIM and trademark law, possibly soon OLAF investigations) with varying levels of success. Any general instrument should attempt to draw conclusions from past experience and incorporate some generally applicable provisions which foster alternative dispute resolution without prejudice to judicial remedies.
14. The Union has the benefit of decades of experience of highly developed sectoral regimes of administrative procedure. Best practices must be harvested from these areas, on the basis of their effects on the rights of those affected, on administrative efficiency and on

¹²⁰ Article 14(1) TEU

democratic legitimacy and, where relevant and proportionate, applied more generally. For example, the Group has examined several practices which would merit further consideration and which include a form of independent yet internal office within an organisation to ensure good administration.

15. Any horizontal piece of legislation providing for minimum procedural guarantees should include the Union's agencies, bodies and offices. It is unacceptable that the scope of the legally enforceable right to access documents still remains limited to the Parliament, the Council and the Commission¹²¹.
16. Any Commission proposal should be accompanied by a detailed impact assessment *inter alia* quantifying the costs of administrative procedures.
17. The specificity of certain areas means that certain sectoral administrative procedures will remain necessary. These *lex specialis* procedures should however not go below the general minimum standards established. They should not set up unnecessary administrative procedures and formalities when these could adequately be dealt with using the general regime.
18. A degree of flexibility through interpretation by the Court of Justice will be inevitable and indeed desirable, all the more so since this time it would be based on a democratically legitimate intervention by the Union legislature.
19. Given that many administrative procedures are inextricably linked to IT systems (e.g. EU PILOT for infringements, CHAP for COM communication with complainants, ARES for COM document management, GEDA and EPADES for EP document management, etc.), the Group recommends further examination of this aspect and how to ensure the relevant IT systems are devised from the outset with the right to good administration in mind.
20. Complex jargon is liable to frustrate citizens faced with procedures with which they are not familiar. It could also make the identification of the rights at stake more difficult. Building on the Commission's positive use of plain language in its "citizens' summaries" of legislative proposals, and in its Clear Language Campaign, the existing use of clear language in EU administrative practice should be independently evaluated across the different institutions (and across different directorates-general) by means of spot checks and certain best-practice drafting standards developed.
21. Although it is clear that "slow administration is bad administration"¹²² and that an administration which does not function properly because of an excess of rules and procedures is not in the public interest, if administrative procedures are carefully enough devised, there need be no contradiction between on the one hand, properly enforced subjective rights to good administration, and on the other hand, an effective Union administration. The Group further underlines the fact that Article 298 TFEU places the efficiency of administration at the same level as the criteria of independence and openness.

¹²¹ On which see the pending proposal for a Regulation amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM/2011/0137 final/2, COD 2011/0073

¹²² AG Jacobs, in Case C-270/99 P *Z. v European Parliament*, paragraph 40 of his Opinion.

22. Legal rules, although an essential prerequisite to achieve a high standard of administration, are not in themselves sufficient to ensure this. To paraphrase the European Ombudsman, good administration is more than just respecting the law. For example, open administration is not achieved merely by reacting to requests for documents, but rather by proactively disseminating the information concerned in a way which is understandable to citizens. Likewise, it is fraught and arguably self-defeating to attempt any legal definition of "courtesy". Non-legal concepts such as the culture of public service, and the principle of an administration with a service ethos should be further developed. Furthermore, a series of ethical principles applicable to all parts of the Union administration should also be developed to complement the black-letter law obligations. This latter aspect can seemingly be dealt with more appropriately by way of "soft law" and the European Ombudsman would have a key role in developing such a system.
23. The "soft law" approach and alternative dispute resolution in which the European Ombudsman continues to play a crucial role at all levels with the Code of Good Administrative Behaviour should have a positive impact on the administrative culture of the EU administration so long that it is backed up by "hard law" granting enforceable rights and remedies to individuals.
24. Any action under Article 298 TFEU will require extensive expertise and input from all relevant stakeholders including practitioners, judges, civil society, legal practitioners, persons with experience of facing EU administrative practice, the European Ombudsman, the European Data Protection Supervisor, academia, and the EU institutions, bodies, offices and agencies; in this respect the Group welcomes the creation of an academic network in the field of EU administrative law ("ReNEUAL").
25. It would be appropriate to examine how the concept of good administration underlying Article 298 TFEU has been implemented in other legal systems and in particular in international organisations outside of the European Union (e.g. the United Nations), bearing in mind the fact that the "global administrative arena is not precisely defined, [...] loosely structured and not always enforceable before a judge" and that "global proceduralism is at an elementary stage of development" (Cassese, 2011). The "Open Government Partnership" formally launched by Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, United Kingdom, United States on 20 September 2011 should be considered in this respect. Conversely, any administrative procedures binding on the Union by virtue of international law (e.g. WTO procedures) should be borne in mind when considering a legislative initiative.
26. It goes without saying that the recommendations contained in this Working Document can only be treated as an introduction to a much deeper reflection about EU Administrative Law; that should properly take place within the Committee itself, thus allowing definite policy conclusions to be drawn.

Annex I: List of briefing notes prepared for the Working Group

All the briefing notes listed here are available for download [here](#).

Ballesteros Moffa, Luis Ángel, *The application of EU law: relevant aspects of European administrative procedure*, March 2011

Braconnier, Stéphane, *Public procurement by the European Union institutions*, March 2011

Chiti, Mario, *Towards an EU Regulation on Administrative Procedure*, October 2010

Craig, Paul, *EU Administrative Law - The Acquis*, December 2010

Curtin, Deirdre and Mendes, Joana, *Citizens and EU Administration - Direct and indirect links*, January 2011

Eekhout, Piet, *Administrative procedures in EU trade law*, March 2011

Fuentetaja, Jesús, *European Union civil service Law*, March 2011

Götze, Michael, *The evolution of EU administrative law and the contributions of Nordic administrative law*, March 2011

Jäderblom, Helena, *From fragmentation to increased coherence: A user-friendly EU administrative law*, March 2011

Leino-Sandberg, Päivi, *Minding the gap in European administrative law: on lacunae, fragmentation and the prospect of a brighter future*, March 2011

Levi, Laure, *Administrative procedure in EU civil service law*, April 2011

Mir Puigpelat, Oriol, *Arguments in favour of a general codification of the EU administrative procedure*, March 2011

Nieto, Eva, *Relevant provisions of the Lisbon Treaty on EU Administrative Law*, December 2010

Rebollo-Puig, Manuel, *Administrative procedures prior to the action for failure to fulfil an obligation*, March 2011

Rodriguez Valero, Maria Isabel, *Administrative procedure in environment files linked with Article 258 TFEU proceedings: a lawyer's perspective*, March 2010

Schwarze, Jürgen, *European administrative law in the light of the Treaty of Lisbon: introductory remarks*, March 2010

Smith, Melanie, *Administrative procedures files linked with Article 258 TFEU proceedings: an academic perspective*, January 2011

Viaene, Hendrik, *Administrative proceedings in the area of EU competition law*, March 2011

Ziller, Jacques, *Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law*, October 2010

Ziller, Jacques, *Is a law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects*, March 2011

Annex II: Selected list of further materials consulted by the Working Group

Auby, Jean-Bernard, *Le projet de constitution européenne et le droit administratif*, *Riv. Ital. Dir. Pubbl. Comunitario* 2004, p.1089

Barnes, Javier, *Transforming Administrative Procedure - Towards a third generation of administrative procedures*, Workshop on Comparative Administrative Law Yale Law School, May 7-9, 2009

Bermann, George A., *A restatement of European Administrative Law: problems and prospects*, ReNEUAL Website

Bignami, Francesca, *From expert administration to accountability network: a new paradigm for comparative administrative law*, Jean Monnet Working Paper 1/10.

Bonner, Peter Gjerloeff, *Institutional Attitudes in Context: A Comment on Rawlings' "Engaged Elites Citizen Action and Institutional Attitudes in Commission Enforcement"*, *European Law Journal*, Vol. 7, No. 1, March 2001, pp. 114-119

Cassese, Sabino, *European Administrative Proceedings*, *Law and Contemporary Problems*, Vol 68:21 (2004).

Cassese, Sabino, *Per una nuova disciplina dei diritti dei privati nei confronti delle pubbliche amministrazioni* (editorial), *Giornale di diritto amministrativo* 1/2007.

Cassese, Sabino, *A Global Due Process of Law?*, in *Value in Global Administrative Law* eds. Anthony, Auby, Morison and Zwart (Hart, 2011).

Chiti, Edoardo, *The Emergence of a Community Administration: the case of European agencies*, 37 *CMLRev* (2000), pp. 309-343

Chiti, Edoardo, *Administrative proceedings involving European agencies*, Vol. 68:219, (2004)

Chiti, Mario P., *Diritto amministrativo europeo*, Giuffrè, 1999

Chiti, Mario P., *Forms of European Administrative action*, *Law and Contemporary Problems*, Vol 68:37

Chiti, Mario P., *Do we need Codes and/or Laws for better Administrative Procedure and Conduct of Officials?*, 2008

Chiti, Mario P, Guido Greco, *Di diritto Pubblico Comunitario*, *Revista italiana di diritto pubblico comunitario*, Anno XIX, Numero 3-4/2009

Committee of Ministers of the Council of Europe, *Recommendation to member states on good administration*, CM/Rec(2007)7

Council of Europe, *The administration and you - A handbook*, Council of Europe Publishing (1998)

DG Competition, [Best Practices](#) on the conduct of proceedings concerning Articles 101 and 102, TFEU (2010)

Due, Ole, *Le respect des droits de la défense dans le droit administratif communautaire*, CDE, 1987, p. 383 (396)

European Commission, *Code of Good Administrative Behaviour, Relations with the public*, OJ L 267, 20.10.2000

European Commission, *Report from the Commission EU Pilot evaluation report*, Brussels, 3.3.2010, COM(2010) 70 final

European Commission, *Report from the Commission on the application in 2010 of Regulation 1049/2001 regarding public access to European Parliament, Council and Council documents*, Brussels, 3.3.2010, COM(2010) 70 final

European Commission, *Commission communication to the EP and the European ombudsman on relation with the complainant in respect of infringements of Community Law*, Brussels, 12.8.2011; COM(2011) 492 final

European Commission, *Communication from the Commission to the EP and the Council - European agencies – The way forward*, Brussels, 11.3.2008, COM(2008) 135 final, SEC(2008) 323

European Commission, *Hearing Officer*, [Guidance](#) on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (ex- articles 81 and 82 EC)

European Commission, [Decision 2001/462 of 23 May 2001](#) on the terms of reference of hearing officers in certain competition proceedings, Official Journal L 162, 19.06.2001, pages 21-24 ; 06.01.2010.

European Commission, *DG Competition*, [Best Practices](#) on the conduct of proceedings concerning Articles 101 and 102 TFEU

European Data Protection Supervisor, *Annual Report 2009*, Luxembourg: Publications Office of the European Union

European Data Protection Supervisor, *Monitoring and Ensuring Compliance with Regulation (EC) 45/2001*, [Policy paper](#), Brussels, 13 December 2010

European Ombudsman, *Speaking notes for exchange of views with the Working Group on EU administrative law*, 9 September 2010

European Ombudsman, *The European Code of Good Administrative Behaviour* (2001)

European Ombudsman, [2010 Annual Report](#), 14 February 2011

European Ombudsman, *Response to the public consultation on review of the financial regulation*, Strasbourg, 17 December 2009

European Ombudsman, [Public consultation](#) on the draft statement of public service principles for EU civil servants, January-June 2011

European Parliament, *Guide to the obligations of officials and other servants of the EP - Code of conduct adopted by the bureau*, 7 JULY 2008

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*, C5-0438/2000 - 2000/2212 (COS), 21.3.2002, C 72 E/331

European Parliament, *Annual Report 2009 on public access to documents, (Regulation (EC) No 1049/2001 – Article 17), (Pursuant to Rule 104(7) of Parliament's Rules of Procedure)*

Franchini, Claudio, *European principles governing national administrative proceedings*, Law and contemporary problems, Vol. 68:183

Georgakakis, Didier, *L'administration de l'Union européenne à la croisée des chemins*, Revue française d'administration publique n° 133, [2010/1](#)

Gil Ibáñez, Alberto J., *Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States*, European Law Journal, Vol. 6, No. 2, June 2000, pp. 148-175

Harlow, Carol, *Codification of EC administrative procedures? Fitting the foot to the shoe or the shoe to the foot*, ELJ (1996) 2 pp. 3-25

Hetmeier, *Article 298 TFEU*, in Lenz, Borchardt and Bitterlich, *EU-Verträge: Kommentar nach dem Vertrag von Lissabon*, 5th ed. (Bundesanzeiger Verlag, Köln 2010), pp. 2722-2733

Hjelm-Wallen, Lena, Swedish Government Representative, note on "Good administration, efficiency and openness", Brussels, 30 July 2002, European Convention, Working Group V, Working document 13

Kańska, Klara, *Towards administrative human rights in the EU. Impact of the Charter of fundamental rights*, ELJ (2004) 10, pp. 296-326

Ladenburger, Clemens, *Evolution oder Kodifikation eines allgemeinen Verwaltungsrecht in der EU* (Mohr Siebeck, 2008)

Mashaw, Jerry L., *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, November 2007

Mendes, Joana, *Good administrative in EU law and the European Code of Good Administrative Behaviour*, EUI Working Paper 2009/09

Meuwese, Anne, Ymre Schuurmans, Wim Voermans, *Towards a European Administrative Procedure Act*, REAL (2009) II(2), pp. 3-35

Nehl, Hans-Peter, *Principles of Administrative Procedure in EC law*, Hart Publishing, 1999

Nieto-Garrido, Eva and Martin Delgado, Isaac, *European administrative law in the Constitutional Treaty*, Chapter 4 "Towards the a Law on Administrative Procedure" (Hart, 2007)

Prete, Luca and Smulders, Ben, *The coming of age of infringement proceedings*, CMLRev. 2010, pp. 9-61.

Rawlings, Richard, *Engaged Elites Citizen Action and Institutional Attitudes in Commission Enforcement*", European Law Journal, Vol. 6, No. 1, March 2000, pp. 4-28

Research Network on European Administrative Law (ReNEUAL), *Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law*, version: 22/03/2010

Savino, M., "The Right to Open Public Administrations in Europe: Emerging Legal Standards", 2010, Sigma Papers, No. 46, OECD Publishing

Schwarze, Jürgen, *Enlargement, the European Constitutions and Administrative law*, ICLQ vol 53, October 2004 pp. 969-984

Scott, Joanne, *REACH and the Evolution of EU Administrative Law*, Comparative Administrative Law conference May 7-9, Yale Law School

Shapiro, Martin, *Codification of Administrative law: the US and the Union*, ELJ (1996) 2 pp. 26-47

Smith, Melanie, *Developing administrative principles in the EU: a foundational model of legitimacy?*, Keywords: EU legitimacy; administrative principles; administrative law

Smith, Melanie, Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process, European Law Review Issue 6, 2008

Schwarze, Jürgen, *Europäisches Verwaltungsrecht*, 2nd edition, 2005

Staskontoret (Sweden), [Principles](#) of Good Administration in the Member States of the European Union (2005)

Vedder, Christoph, *Europäischer Verfassungsvertrag* (2007), Artikel III-398

Vedel, Georges, *Le droit administratif peut-il être indéfiniment jurisprudentiel?*, Etudes et Documents du Conseil d'Etat 1979-1980, p. 31 ff

Vilella, Giancarlo, *The European Civil Servant* (euroEditions, 2008)