

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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



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**CHECKS AND BALANCES
OF SOFT EU
RULE-MAKING**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES

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

LEGAL AFFAIRS

CHECKS AND BALANCES OF SOFT EU RULE-MAKING

STUDY

Abstract

This report has been drafted upon the invitation of the European Parliament to perform a study on the provisions, instruments or areas of activity of EU institutions, bodies, offices and agencies, where judicial review is not possible. As the judicial reviewability of EU soft administrative and regulatory rule-making is particularly problematic, this type of rule-making has been put central. The report aims at highlighting the institutional, procedural and judicial framework within which soft rule-making is used and what actions may be required for a better design thereof.

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CONTENTS

EXECUTIVE SUMMARY	8
1. MAPPING THE STUDY	10
1.1. Background and Focus	10
1.2. Soft EU Rule-Making	11
1.2.1. Soft Regulatory Rule-Making	12
1.2.2. Soft Administrative Rule-Making	14
1.2.3. Problems and Risks Involved	16
1.3. Aim and Research Questions	17
1.4. The Testing Framework	18
1.5. Structure and Approach	19
2. EXISTING CHECKS AND BALANCES	20
2.1. Introduction	20
2.2. 'First generation' institutional principles	21
2.2.1. The principle of conferral and the requirement of a legal foundation	21
2.2.2. Balancing of principles; limits to the choice of instrument	24
2.3. 'Second generation' good governance requirements	26
2.3.1. Introduction	26
2.3.2. The principles of openness and transparency	26
2.3.3. The principles of consultation and participation	28
2.3.4. The principle of equal treatment	32
2.3.5. The principle of good administration	33
2.3.6. Balancing of principles; procedural requirements vis-à-vis effectiveness and coherence	34
2.4. Specific procedural requirements & institutional practices	36
2.4.1. Regarding the Commission's soft administrative rule-making	36
2.4.2. Regarding networks	38
2.4.3. Regarding agencies	42
2.4.4. Regarding OMC processes: the example of economic governance	50
2.5. Tools and mechanisms to ensure compliance and enforcement	54

2.5.1. Judicial review by the European Court of Justice	54
2.5.2. Administrative review by the European Ombudsman	58
3. PUTTING THE EXISTING CHECKS AND BALANCES TO THE TEST: ASSESSMENT AND POSSIBLE AVENUES	63
3.1. General Assessment	64
3.1.1. Institutional and procedural problem areas	64
3.1.2. Problem areas of judicial review	68
3.1.3. A predominantly effectiveness-based approach in general EU law 70	
3.2. The plea for enhanced proceduralisation	71
3.2.1. Specific EU law insights	71
3.2.2. Comparative law insights	73
3.3. Possibilities of enhanced ex-ante and ex-post review	78
3.3.1. Impact assessment	78
3.3.2. The role of the European Court of Justice	79
3.3.3. The role of the European Ombudsman	81
4. FINAL CONCLUSIONS AND RECOMMENDATIONS	83
REFERENCES	85

LIST OF ABBREVIATIONS

AAI	Autorité Administrative Indépendante (in France)
ACER	Agency for Cooperation of Energy Regulators
AMF	Autorité des Marchés Financiers (in France)
ART	Autorité de Régulation des Télécommunications (in France)
BEPG	Broad Economic Policy Guidelines
BEREC	Body of European Regulators for Electronic Communications
BR	Better Regulation (strategy)
CEBS	Committee of European Banking Supervisors
CEN	European Committee for Standardization
CENELEC	European Committee for Electrotechnical Standardization
CLWP	European Commission Legislative Work Programme
COREPER	Committee of Permanent Representatives
CVPO	Community Plant Variety Office
EASA	European Aviation Safety Agency
EBA	European Banking Authority
ECHA	European Chemicals Agency
ECJ	European Court of Justice
ECN	European Competition Network
ECOFIN	Economic and Financial Affairs Council
ECOSOC	Economic and Social Council
EDP	Excessive Deficit Procedure
EEA	European Environment Agency

EEC	European Economic Community
EIOPA	European Insurance and Occupational Pensions Authority
EIP	Excessive Imbalance Procedure
EMEA	European Medicines Agency
EMSA	European Maritime Safety Agency
EMU	Economic and Monetary Union
ENISA	European Network and Information Security Agency
EO	European Ombudsman
EP	European Parliament
ERA	European Railway Agency
ERG	European Regulators Group
ESA	European Supervisory Agency
ESC	European Securities Agency
ESMA	European Securities and Markets Authority
GALA	General Administrative Law Act (Netherlands)
IA	Impact Assessment
IAB	Independent Administrative Bodies (Netherlands)
IIA	Inter Institutional Agreement
IMPEL	EU Network for the Implementation and Enforcement of Environmental Law
NCA	National Competition Authority
NDPB	Non-Departmental Public Bodies (UK)
NGO	Non governmental Organization
OHIM	Office of Harmonization for the Internal Market

- OMC** Open Method of Coordination
- PAD** Proposal for Airworthiness Directive
- SGP** Stability and Growth Pact
- SR** Smart Regulation (strategy)
- TEU** Treaty on the European Union
- TFEU** Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background

Both soft regulatory and administrative rule-making is 'booming business' in the context of the EU. This trend has ramifications in many different directions. Soft EU regulatory rule-making concerns the establishment of new rules of conduct or policy directions that are not contained or implied in the existing primary and/or secondary EU law, cast in for instance Council recommendations. They seek to bring about certain (changes of) behaviour on the part of the Member States and other involved parties with a view to realising certain regulatory or policy goals, without using legally binding instruments. Administrative practice shows that the exercise of implementing powers by the Commission does not only lead to the adoption of legally binding acts – in particular decisions, delegated and implementing acts – but also of administrative soft law acts, cast in communications, notices, guidelines, codes and circulars. As such, they seek to provide further rules and guidance to national authorities and interested parties on the interpretation, transposition, application and enforcement of EU law, with a view to enhancing the transparency, legal certainty and correct and uniform interpretation of EU law. This type of soft law is thus always related to already existing – hard - Union law.

Importantly, soft administrative rule-making is no longer the prerogative of the Commission, as agencies and networks are not only 'mushrooming' in many different policy areas but are also gaining in general rule-making powers, despite the Meroni doctrine. In some cases it even appears that these powers are not necessarily linked to technical implementation matters, but actually amount to policy-making and (soft and sometimes hard) coordination of Member States activities coming close to legal harmonization. At the level of direct administration, this soft administrative rule-making activity is highly relevant as it influences single-case decision-making by these Union entities, such as on the lawfulness of company behaviour and agreements, state aids and the granting of licences and market authorizations. At the level of indirect administration, the Union's soft administrative rule-making activity has not only effects on the national legislator responsible for the transposition of EU law, but also for administrative bodies (such as national regulatory and supervisory authorities in specific sectors) that have to apply EU law and national courts.

These developments raise the question what the institutional-procedural-judicial framework of the Union's soft rule-making activity actually is and whether this can be considered adequate from the point of view of legitimacy and good governance demands. While the Treaty of Lisbon has sought to reinforce the standards to meet those demands, it appears that it has left as much flexibility as possible when it comes to soft rule-making activity by the Commission and agencies. As the institutional daily reality of the EU has changed, the need for adapting the legal framework accordingly must be considered.

Aim

In line with the terms of reference of the EP-tender document, the overall aim of this study is to produce a normative assessment of the current institutional and judicial framework of and procedural conditions under which soft EU rule-making as a 'grey area' of EU law comes about and to identify relevant arguments regarding the necessity/desirability of a (re)design of the EU system in this respect. In addition, it seeks to identify possible

avenues and best practices for enhancing the Union's procedural legitimacy with regard to soft rule-making.

In view of this, the study aims at finding answers to the following questions:

- What checks and balances do the Treaties (and possibly the Charter of Fundamental Rights) provide on the *ex ante* level, in terms of institutional and procedural requirements for the use of soft administrative and regulatory rule-making?
- What checks and balances do general secondary and tertiary sources of law provide for, which are or may be considered applicable to soft administrative and regulatory rule-making (e.g. the Inter-Institutional Agreement on Better Law-making, the Communication on the guidelines on the consultation of interested parties, the Impact Assessment guidelines)?
- What checks and balances can be found in selected specific secondary law sources and institutional practices regarding soft rule-making activity?
- What checks and balances do the Treaties, secondary and/or tertiary law provide for on the *ex post* level, in terms of possibilities of administrative review (European Ombudsman) and judicial review (by the ECJ) vis-à-vis soft rule-making activity?
- What problem areas in these checks and balances have been or can be identified in the light of the demands legitimacy and good governance principles impose?
- What suggestions for improvement have been made or steps taken to remedy shortcomings?
- What insights can be gained from other legal systems and legal doctrine regarding further proceduralisation and/or enhanced administrative and judicial review of soft regulatory and administrative rule-making?

In dealing with these questions, the study also aims at establishing relevant links between the 'Better Regulation Strategy' and the current efforts to enhance good administration. In particular, it seeks to identify legal avenues for shaping a 'Better Administration Strategy' and important elements of such a strategy, as far as the use and functioning of soft EU rule-making is concerned.

1. MAPPING THE STUDY

1.1. Background and Focus

Since the Treaty of Rome, law has functioned as the main tool to shape the European integration process. A special system of secondary law sources was created with features that are quite distinct from the national constitutional and administrative legal orders, both in terms of terminology and of type of instrument.¹ The Treaty of Lisbon has introduced a number of changes to this system. Some of these changes (seek to) strengthen the legitimacy and coherency of the system of sources of law, e.g. the new hierarchy of legal acts.² However, they also raise new questions, e.g. regarding the relation between legislative, delegated and implementing acts. Unmistakably, the focus on the EU's regulatory system must be viewed as a sign of growing attention for and importance of the institutional design of the system of EU legal acts and attention for their proper use. The Better Regulation/Smart Regulation initiatives and the development of the Impact Assessment mechanism are other signs of this.³

However, the **post-Lisbon system of legal sources** in the TEU and TFEU does not adequately reflect all relevant institutional developments. Indeed, in recent decades EU institutions have not only relied on the formal legal instruments laid down in the Treaties to shape European law and policies. Legislative, administrative and policy practices have evolved to include more informal, flexible and soft bottom-up regulatory governance instruments and processes. This reveals a shifting political attitude towards the EU integration process: European integration is not to ensue necessarily or only from a formal, rather top-down and hard law-making process. Yet, such practices have developed and remained mostly outside the Treaty framework. In the relevant literature, the failure of the Treaties to deal with such new governance phenomena, including soft EU rule-making instruments and processes, has been caught under the 'gap thesis'.⁴ Consequently, their place and function in the EU system of sources of law is still quite obscure. One way of viewing such instruments and processes is to consider them as alternatives to 'hard law' instruments. Yet, given the practice in the EU (see section 1.2) a more valid perspective is to consider hard and soft law instruments as being part of a 'hybrid' system⁵ and as elements of a composite 'toolkit' that characterizes many policy areas, supplementing and strengthening each other.

Against the background of this obscurity, this study will focus on the **legal positioning of soft EU rule-making**, in particular on the gaps in the procedural checks and balances that the Union's institutional system provides for their use and in their judicial and administrative reviewability. There are three additional reasons for taking this focus.

The first reason relates to the fact that soft EU rule-making has evolved to the extent that it now reflects a general trend or feature of the Union's institutional and regulatory landscape and does not concern a merely sector-specific issue. As such, it constitutes a

¹ The former Article 249 EC provided for regulations, directives and decision as legally binding instruments and for recommendations and opinions as instruments having no binding force.

² See Articles 289 to 291 TFEU.

³ See inter alia S. Weatherill (ed.), *Better Regulation*, Hart Publishing, Oxford, 2007.

⁴ G. De Burca and J. Scott, 'Introduction: New Governance, Law and Constitutionalism', in: G. De Burca and J. Scott, *Law and New Governance in the EU and the US*, Hart Publishing Oxford, 2006, pp. 4-5.

⁵ *Ibid.*

‘grey area’ of a general nature that reveals a number of fundamental problems in the Union’s institutional design and functioning that merits further attention.

The second reason is the fact that the Treaty of Lisbon has not only explicated a number of **good governance principles** to be complied with by the Union institutions (see section 1.4), but also introduced a new power for the EU in Article 298 TFEU to adopt a binding general codification of administrative procedure for EU institutions, bodies, offices, and agencies. Framing administrative procedure on this legal basis in the light of the requirements set by the good governance principles will mark another important step in strengthening the legitimacy and coherency of administrative action at the EU level. This administrative action is not only hard but also soft in nature. Furthermore while one may be tempted to think that such administrative action is limited to decision-making in individual cases, and as a result rules for administrative procedure as well, this is not the case. Ziller has already convincingly argued that the future administrative procedure law should apply to general rule-making powers as well.⁶ Such an approach can also be found in the Council of Europe Code of Good Administrative Behaviour (see section 3.3.3).

The third reason concerns the related development regarding **impact assessment** in decision-making and rule-making procedures. In particular, the Better Regulation/Smart Regulation strategy (BR/SR strategy) of the Commission marks the desire for a stronger and more systematic approach towards the use of informal, flexible and soft legal and policy instruments, wherever possible, rather than hard legislative instruments.⁷ An important principle underlying this strategy, in addition to that of conferred powers and of subsidiarity, is the proportionality principle, stipulating that intervention on the part of the EU (legislator) should not go beyond what is necessary, both in terms of content and form.⁸ At the same time, both soft regulatory and administrative rule-making trigger the question of how to meet the standards of (democratic) legitimacy and good governance. Impact assessment is an important tool for putting the better regulation principles into practice, including the consideration of both hard and soft law options, but for this reason these need to be weighed against other core values and principles underlying the EU integration process. Not only the legislator but also the administration is bound by these principles (see section 2.2.2). Consequently, the further development of the BR/SR strategy, of impact assessment and of a European administrative procedures law are in fact closely connected.

1.2. Soft EU Rule-Making

Before explaining in more detail in the next section the aim and research question of the study, we first need to clarify the concept of soft EU rule-making, the different types of acts that are involved and the way in which they fit into the overall EU system of sources of law. The terms of reference of the EP-tender document in this regard refer to ‘new governance tools’, including soft law, self-regulation and co-regulation’. Soft law may be defined as ‘rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.’⁹ Based on the notion of hierarchy, soft law acts may be qualified as tertiary sources of law, defining the hierarchical relation between various sources of law and determining (in principle) the prevailing rule in case of a conflict

⁶ J. Ziller, Note on Alternatives in Drafting an EU Administrative Procedure Law, *PE* 462.417, p. 11.

⁷ Cf. the Inter-institutional Agreement on Better Law-Making, *OJ* 2003, C 321/01.

⁸ See the reformulated Article 5, Paragraph 4 TEU.

⁹ L. Senden, *Soft law in European Community law*, Hart Legal Publishers, Oxford, 2004, p. 112. The discussion in this section draws on this earlier publication.

between them. Yet, as such 'soft law' is a heterogeneous phenomenon, it needs further qualification on the basis of the nature and function the various soft law instruments fulfil. Taking these as our focal point, we make a distinction here¹⁰ between **soft regulatory rule-making**, involving para-law policy-steering instruments, and **soft administrative rule-making**, involving post-legislative guidance instruments.¹¹ Although not all soft law acts will neatly fall into one of these categories and may be 'hybrid' to a certain extent, this classification is nonetheless helpful because it elucidates the different *raison d'être* of EU soft law and the functional relation between the various sources of EU law. Moreover, it sheds more light on the way in which the system of indirect administration in the EU evolves and how this connects to the direct administration of EU law.

1.2.1. Soft Regulatory Rule-Making

The first category is that of soft EU regulatory rule-making, which concerns the establishment of **new rules of conduct or policy directions** that are not contained or implied in the existing primary and/or secondary EU law. They seek to bring about a certain - change of - behaviour on the part of the Member States and other involved parties with a view to realising certain regulatory or policy goals, without using legally binding instruments.¹² As such, we can say that these rules fulfil a para-law function. This type of rule-making manifests itself in different ways, first of all by the Council's use of instruments that are not provided for in the Treaties, such as conclusions, declarations, resolutions and codes of conduct. Whereas conclusions and declarations mainly guide or direct future Union action, by marking the political acceptance of the starting points and general principles for this action, resolutions and codes of conduct are usually of a more normative nature, by laying down concrete and general rules of conduct that are to be implemented and applied directly by their addressees, in particular the Member States. As such, these are mainly directed at the establishment of closer cooperation or a concerted approach of the Member States in respect of a certain matter. Secondly, soft regulatory rule-making comes about by way of both the Commission's and Council's use of the recommendation, a legal instrument that is provided for in Article 288 TFEU. From this use it appears that recommendations are usually of a normative, general and external nature and thereby can and are being used as an alternative to legislation. This is not to say that this use is geared towards the establishment of unification or harmonisation of laws, rather the contrary. It is often directed towards establishing **closer cooperation or coordination** between the Member States. A huge incentive for soft regulatory rule-making of this nature has been the development of the **Open Method of Coordination (OMC)**.

The OMC, initially developed in the field of the Union's employment strategy, can be typified as a regulatory mode geared towards policy coordination on two levels: *idealistic or cognitive convergence*,¹³ meaning that a joint understanding is created of the relevant policy objectives on national and European level and how they can be best achieved, and *actual policy convergence*, by improving knowledge, exchanging information and

¹⁰ We disregard the instruments that can be qualified as preparatory and informative instruments, including in particular white papers, green papers and certain communications and notices, because strictly speaking these cannot be qualified as soft law instruments for lack of establishing rules of conduct themselves.

¹¹ For the latter qualification, see J. Scott, 'In legal limbo: post-legislative guidance as a challenge for European administrative law', in: *CMLRev* 2011, 48, pp. 329-355.

¹² We qualify this as 'regulatory' from the perspective that the notion of regulation is related to the necessity felt on the level of public authorities to intervene in the market for a variety of reasons, including the correction of market failure and ensuring the fairness of market functioning, and to steer it into a certain direction. See e.g. S. Weatherill (ed.), *Better Regulation*, Hart Publishing, Oxford, 2007, pp. 5-6 and S. Breyer, *Regulation and its Reform*, Harvard University Press, 1982, p. 15.

¹³ C. M. Radaelli, *The Open Method of Coordination: A New Governance Architecture for the European Union?*, Swedish Institute for Economic Policy Studies (SIEPS) report, 2003, p. 9.

establishing and praising best practices and identifying, criticizing and changing bad practices through peer review and peer pressure.¹⁴ It claims to be inclusive and participatory by its very nature, alluding to the involvement of other actors than those usually involved in the exercise of public power, such as relevant stakeholders, NGOs, social partners, civil society and regional and local authorities. No formal rules exist, however, to further shape this requirement of participation.

While OMC processes may differ from one policy area to another as to their level of sophistication,¹⁵ they share these essential aims¹⁶ and also their set of tools for realising them — mainly non-binding recommendations, guidelines, conclusions and codes of conduct. Much leeway and discretion is thus left to the Member States for deciding how to proceed and to decide whether implementation of such acts can come about best by way of establishing national policy and/or legislation.

Most importantly, in itself the OMC does not strive for legal approximation of any kind. As such, it represents a lower level of regulatory intensity than legislative unification and harmonisation under the Community (now Union) method. The OMC must thus – in principle – be seen as complementary and not as replacing hard regulatory approaches, as each of them fulfils a proper and independent role in the integration process. This conclusion is also borne out by the new competences catalogue in Articles 2 to 6 TFEU. While we do not mean to say that there is a one-on-one relationship in the Union's actual legislative and policy-making practice, analytically we can identify a strong connection with the establishment of common policy in areas of exclusive EU competence by way of regulations (e.g. customs union, common commercial policy), with the approximation or harmonisation of laws in areas of shared competence of the EU with the Member States by way of directives (e.g. internal market), and with policy coordination in areas of supporting, coordinating or supplementing competences in which the Member States retain their legislative competence by way of recommendations, guidelines and codes of conduct (e.g. health, education, culture, social policy, economic governance).

A **regulatory mix** in a certain policy area may come about intentionally, in the sense that deliberate political choices are made about the level of interference, but also unintentionally, as a result of developments on different – legislative, administrative, policy or judicial – levels.¹⁷ Resorting to the OMC is also sometimes a necessity, because of lacking legislative powers of the EU or because the Union legislator does not manage to adopt legislation or only to a (too) limited extent as a result of the applicability of the unanimity requirement and national sovereignty objections (e.g. taxation). In view of these structural features and difficulties of the European decision-making process, the OMC and the concomitant use of certain soft law devices can indeed be considered 'part of an inherent logic within the EU',¹⁸ as in such cases the OMC may prove to be the only way

¹⁴ See Article 153(2)a TFEU for these elements and also A. Schäfer, *Beyond the Community Method: Why the Open Method of Coordination was Introduced to EU Policy-making*, *EIoP*, vol. 8(2004), no. 13, p. 10.

¹⁵ E. Szyszczak, *Experimental Governance: The Open Method of Coordination*, *ELJ*, vol. 12, no. 4, July 2006, p. 494, e.g. distinguishes between 1) developed areas of the OMC (the employment strategy and the broad economic guidelines); 2) adjunct areas (social protection, social inclusion, pensions and healthcare); 3) nascent areas (innovation and R&D, education, information society, environment, migration and enterprise policy); and 4) unacknowledged areas (taxation). See also section 2.4.4.

¹⁶ Which is not to say at the same time that they actually materialize. Cf. Radaelli 2003, *op. cit.*, p. 9, and V. Hatzopoulos, *Why the Open Method of Coordination is Bad For You: A Letter to the EU*, *ELJ*, vol. 13, no. 3, May 2007, at pp. 311-316.

¹⁷ Cf. T. Hervey, *The European Union and the Governance of Health Care*, in: De Burca and Scott 2006, *op. cit.*, pp. 179-210.

¹⁸ In this sense, Szyszczak 2006, *op. cit.*, p. 487.

forward with a view to realizing certain transnational socio-economic goals that cannot be addressed otherwise.

Public actors play a central role in the soft rule-making processes described above. Yet, soft regulatory rule-making may also come about by **self-regulation**, on the part of private actors. Point 22 of the Inter-Institutional Agreement on Better Lawmaking defines self-regulation as

'[...] the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt **amongst themselves** and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).'

'Pure' self-regulation clearly follows a rather bottom-up approach, as it concerns a regulatory mechanism which is primarily initiated by the stakeholders themselves, resorted to independently of the prior adoption of a legislative act by the EU.¹⁹ This means that the use of self-regulation can also more readily be considered as an alternative to the use of legislation. Since the focus of this study is on soft rule-making action that can be linked to EU entities, we will not further discuss self-regulation in this report.

1.2.2. Soft Administrative Rule-Making

Traditionally, the Union's administration has been analysed in a triadic way, distinguishing between direct administration, indirect administration and cooperative or shared administration.²⁰ Direct administration occurs at the Union level and is often put on a par with administrative decision-making or single-case decision-making, such as the Commission's individual decisions in the area of competition law. Yet, it must also be understood to encompass administrative rule-making²¹ or the exercise of general implementing powers by EU entities. Indirect administration concerns the implementation of EU law into national administrative systems. Shared administration is considered to occur where the two levels work together.²²

The second category of soft administrative rule-making must clearly be viewed from the perspective of **shared administration**. Practice shows that the exercise of implementing powers by the Commission does not only lead to the adoption of legally binding acts – in particular of delegated and implementing acts as now provided for in Articles 290 and 291 TFEU – but also of administrative soft law acts. These are cast primarily in instruments like communications, notices, guidelines, codes and circulars. This forms an increasingly important category of soft law that fulfils a post-law function,²³ by seeking to provide further rules and guidance to national authorities and interested parties on the interpretation, transposition, application and enforcement of EU law.²⁴ This occurs with a view to enhancing the transparency, legal certainty, correct and uniform interpretation of EU law, its predictability and the equal treatment of those concerned. This type of soft law is thus always related to already existing – hard - Union law.

¹⁹ Cf. E. Best, 'Alternative Regulations or Complementary Methods? Evolving Options in European Governance', *Eipascopes* (2003) 1, p. 3.

²⁰ C. Harlow, Three Phases in the Evolution of EU Administrative Law, in: P. Craig and G. De Burca, *The Evolution of EU Law*, OUP, 2011, at p. 443. Cf. also W.T. Eijsbouts, J.H. Jans, A. Prechal and L.A.J. Senden, *Europees recht. Algemeen deel*, Europa Law Publishing, 2010, third revised edition, p. 28. Cf. also Hofmann and Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar, 2009.

²¹ Cf. also J. Ziller, Alternatives in Drafting an EU Administrative Procedure Law, *PE* 462.417, p. 11.

²² Harlow 2011, *op. cit.*

²³ Senden 2004, *op. cit.*

²⁴ Cf. Scott 2011, *op. cit.*, pp. 329-355.

As such, soft administrative rule-making acts may be geared towards the **level of direct administration**, by explaining how the Commission will use its own decision-making powers in individual cases (**decisional acts**).²⁵ An example is the Commission's communication on the application of penalty payments and lump sum payments in the framework of the infringement procedure.²⁶ Yet, such acts will clearly also bear effect on the organization of the implementation of EU law on the national level and thereby on the **level of indirect administration**. Interestingly, more recently we also witness the emergence of Commission decisional acts that are specifically geared towards the level of indirect administration, by seeking to guide the way in which Member States use their discretionary powers in implementing EU law. The Handbook on Implementation of the Services Directive provides an example of this. Another category of soft administrative acts indicates or summarizes the way in which – according to the Commission – Union law should be understood and applied (**interpretative acts**). These may not only relate to indirect administration (giving guidance to national authorities), but may be relevant in the context of direct administration as well. The objective may then be to provide guidance to other EU institutions, bodies and agencies, as well as to provide transparency and legal certainty for stakeholders and citizens on how EU law will be interpreted and applied by the EU administration.

When it comes to soft administrative rule-making, not only the levels of direct and indirect administration are thus very much **intertwined**, but in fact also the levels of general rule-making and single-case decision-making. The underlying rationales of soft administrative rule-making and its increasing importance for legal practice underline this. While the focus in this study is on soft administrative rule-making, it should be understood that it builds on this connection to single-case decision-making. Combined with the weak institutional and procedural embedding of soft administrative rule-making (as this study will show), we think that it is essential to also include this type of rule-making in the debate on the development of an EU administrative procedures act.²⁷

Very importantly, it must also be observed that more recently certain EU-level committees (e.g. the Customs Committee),²⁸ networks and agencies have been gaining soft rule-making powers as well with a view to securing the actual implementation and enforcement of EU law and policy. This development is therefore included in our analysis. In itself, the use of soft EU administrative rule-making by such entities indicates a **maturing European administrative bureaucracy**, as this to a certain extent parallels developments at the national administrative level where we can find counterparts of interpretative and decisional rules, as well as of agencies.²⁹ Although differences in this regard must be duly considered, one may learn from national experiences and approaches in this respect. Legal comparison may therefore be a useful method to gain more insight into the procedural conditions and level of reviewability that would be advisable (see section 3.2.3).

²⁵ For the use of this terminology, see Senden 2004, *op. cit.*

²⁶ Commission communication on the Implementation of Article 260(3) TFEU, COM 2010 1371 fin.

²⁷ Cf. the plea of Ziller, *op. cit.*, for including hard law rule-making in this debate.

²⁸ It is not clear from the outset whether the rules established by such a committee are to be attributed to the Commission or not. See for example the Conclusions of the Customs Committee in Case C-311/04, *Algemene Scheeps Agentuur Dordrecht*, [2006] ECR I-609.

²⁹ See e.g. G. Winter, *Sources and categories of European Union law: a comparative and reform perspective*, 1. Auflage, Nomos, Baden-Baden, 1996, concerning the British, Danish, Dutch, French, Spanish, Italian and German legal systems. Cf. also J.H. van Kreveld, *Beleidsregels in het recht*, Kluwer, 1983; H. Bröring, 'Administrative Rules in British Law', *MJEL* 1(1994), p.273; R. Baldwin en Houghton, 'Circular arguments: the status and legitimacy of administrative rules', *Public Law*, 1986, p. 239; A. Bok, 'Policy Rules in German Law', *MJEL* 1(1994), p. 255; B. Roozendaal, 'Self-Restraint of Discretionary Authority in French Administrative Law', *MJEL* 1(1994), p. 285.

Finally, we also need to draw attention here to the feature of **co-regulation** and how this fits into the above sketch of EU administration. Point 18 of the Inter-Institutional Agreement on Better Law-making defines co-regulation as

[...] the mechanism whereby a **Community legislative act** entrusts the attainment of the objectives defined by **the legislative authority** to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).

From this description, one can infer that in the context of the EU, co-regulation is regarded as an implementing mechanism, presupposing the prior adoption of a piece of European legislation. Consequently, co-regulation also presupposes the direct involvement of a public actor in this regulatory process. In line with this, one may also speak of co-regulation as a regulatory mechanism that is primarily considered or understood to take a 'top-down' approach.³⁰ That is to say, its use implies that the European legislator first sets the essential legal framework, that the stakeholders or parties concerned then fill in the details and that public authorities, usually the Commission, monitor the outcome or that sometimes the European legislator validates those more detailed rules by turning them into binding legislation (such as in the case of the European Social Dialogue). Co-regulation can therefore be rather considered as a complement to legislation than as an alternative to it. The establishment in legislative acts of the basic requirements (of safety or otherwise) and the delegation of setting the non-binding technical standards to standardisation bodies such as CEN and CENELEC is a clear illustration of this.

1.2.3. Problems and Risks Involved

The rather weak embedding of soft rule-making in the Union's institutional and legal structure, as will be discussed in section 2 of this report, entails or exacerbates a number of legitimacy risks that we will just briefly sketch here. First, the legal effect and judicial protection/reviewability of soft law acts may induce **legal uncertainty**. Although soft law instruments by definition lack legally binding force as an inherent feature, they may indeed still generate various legal effects *inter alia* on the basis of the principles of legitimate expectations and equal treatment and by functioning as standards of administrative and judicial interpretation and review.³¹ Yet, the **judicial reviewability** of soft law acts is quite problematic and affects the legal protection of individuals.

Other risks are related to the **democratic and procedural legitimacy** of both soft administrative and regulatory rule-making: how is their accountability ensured and to what extent can this make up for the lack of parliamentary involvement? Apart from this general problem, specific legitimacy risks arise when the Commission interprets EU law in soft law acts in a – too – flexible and subjective manner, creating confusion about and sometimes even adding to the existing legal obligations.³² This obviously has consequences for democratic decision-making and institutional balance, but also for transparency and legal certainty of those involved, as in a subsequent case the Court may have a different

³⁰ Best (2003), *supra* note 44, p. 3.

³¹ See e.g. Case C-317/08-C-320/08, *Allassini*, Par. 40C, judgment of 18 March 2010 and Case C-415/07, *Lodato*, [2009] ECR I-2599. See for more detail, L.A.J. Senden and H. Luijendijk, 'De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde', *Sociaal Economische Wetgeving (SEW)*, 59(7-8) and Senden 2004, *op. cit.*

³² S. Levefre, 'Interpretative communications and the implementation of Community law at national level', *European Law Review*, 2004, 29, at p. 809 distinguishes passive and active interpretation, the latter involving in fact subjective opinions of the Commission on the interpretation of the applicable law. This creates a confusing situation for those charged with applying the law at national level, as it may be difficult for them to distinguish between the authoritative interpretation of the Court of Justice and the opinions of the Commission.

interpretation. Another risk identified in the literature is that these acts do not in fact ensure the uniform application of EU law in the Member States, because of the basically non-legally binding force of these instruments, but also because of the lack of clarity about their legal effects in the domestic legal order. This is problematic for the legal unity of the EU.³³ Substantive inadequacy and non-transparency of the decision-making process are other issues that are considered problematic.³⁴

1.3. Aim and Research Questions

In line with the terms of reference of the EP-tender document, the **overall aim** of this study is to produce a normative assessment of the current institutional and judicial framework of and procedural conditions under which soft EU rule-making as a 'grey area' of EU law comes about and to identify relevant arguments regarding the necessity/desirability of a (re)design of the EU system in this regard.

In view of this, the **main research question** is: Can the identified checks and balances regarding the use and functioning of soft administrative rule-making and soft regulatory rule-making by the EU institutions be considered sufficient in the light of the requirements legitimacy and good governance principles impose?

This entails consideration of the following **subquestions**:

- What checks and balances do the Treaties (and possibly the Charter of Fundamental Rights) provide on the *ex ante* level, in terms of institutional and procedural requirements for the use of soft administrative and regulatory rule-making?
- What checks and balances do general secondary and tertiary sources of law provide for, which are or may be considered applicable to soft administrative and regulatory rule-making (e.g. the Inter-Institutional Agreement on Better Law-making, the Communication on the guidelines on the consultation of interested parties, the Impact Assessment Guidelines)?
- What checks and balances can be found in selected specific secondary law sources and institutional practices regarding soft rule-making activity?
- What checks and balances do the Treaties, secondary and/or tertiary law provide for on the *ex post* level, in terms of possibilities of administrative review (European Ombudsman) and judicial review (by the ECJ) vis-à-vis soft rule-making activity?
- What problem areas in these checks and balances have been or can be identified in the light of the demands legitimacy and good governance principles impose?
- What suggestions for improvement have been made or steps taken to remedy shortcomings?

³³ Cf. A. Sanchez Graells, 'Soft Law and the Private Enforcement of the EU Competition Rules', paper presented at the International Conference on the Private Enforcement of Competition Law, University of Valladolid, 14-15 October 2010. See: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639851

³⁴ Scott 2011, *op. cit.*

- What insights can be gained from other legal systems and legal doctrine regarding further proceduralisation and/or enhanced administrative and judicial review of soft regulatory and administrative rule-making?

1.4. The Testing Framework

The normative assessment this study aims at requires a testing framework, in particular a specification of what (democratic) legitimacy implies and what requirements and standards good governance principles impose. For the purposes of the present study, we take a functional approach to this issue and not a doctrinal one.

Legitimacy can be said to lie 'mostly in the recognisability and identifiability of a political system as inherently and naturally bound up with its citizens.'³⁵ In relation to the legitimacy of the regulatory branch and in the context of the EU institutions, Majone³⁶ has distinguished between **procedural legitimacy** and **substantive legitimacy**. Procedural legitimacy is understood to imply that regulatory authorities are created by democratically enacted statutes which define their legal authority and objectives; that the regulators are appointed by elected officials; that decisions are justified and open to judicial review and that decision-making follows formal rules, often requiring public participation. Substantive legitimacy is considered to relate to features of the regulatory process such as policy consistency, the expertise and problem-solving capacity of the regulators and the precision of the limits within which regulators are expected to operate.³⁷ Importantly, the realization of 'full' legitimacy presupposes an adequate balancing of both dimensions of legitimacy. This perspective on legitimacy does not only consider legitimacy and effectiveness as strongly connected notions, but also those of democracy, legitimacy and constitutionalism, especially when understanding constitutionalism as 'a term which seeks to capture the idea that public power is or should be limited and subject to some higher form of control by reference to the law.'³⁸

Good governance principles are helpful in concretising or operationalising the different constituent elements of the above conceptualization of legitimacy: post-Lisbon good governance principles are increasingly positioned in the Treaties as relevant standards or benchmarks in assessing the (democratic) legitimacy of the functioning of the Union's institutions, agencies and bodies on all levels of EU interference (legislative, policy-related, administrative and judicial). The EU institutions will thus need to uphold these principles, as a matter of binding, primary EU law. They include:

- The principles of openness and transparency (Article 15 TFEU), stipulating that 'In order to promote good governance and ensure the participation of civil society, the

³⁵ In this sense A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, The Hague, Kluwer Law International, 2002 and 'Democratic Life in the European Union, According to its Constitution', in: D. M. Curtin and R.A. Wessel (eds.), *Good Governance and the European Union. Reflections on Concepts, Institutions and Substance*, Intersentia, 2005, p. 157.

³⁶ G. Majone, *Regulating Europe*, Routledge, London and New York, 1996, pp. 291-292. Cf. also J.H.H. Weiler, 'After Maastricht: Community legitimacy in post-1992 Europe', in Adams (ed.) *Singular Europe*, Ann Arbor: The University of Michigan Press, 1992.

³⁷ This view relates to the notions of input and output legitimacy as developed by F. Schrapf, *Governing in Europe: effective and democratic*, OUP, 1999.

³⁸ C. Scott, *Regulatory Governance and the Challenge of Constitutionalism*, *EUI Working Paper RSCAS 2010/07*, p. 1. Available through www.eui.eu.

Union institutions, bodies, offices and agencies shall conduct their work as openly as possible';³⁹

- The principle of equality in its political meaning and as a principle of good administration (Article 9 TEU), stipulating that 'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies;
- The principles of representative, participatory and direct democracy (Article 11 TEU), the last one imposing a duty of consultation and dialogue on the EU institutions with civil society, citizens, representative organizations and concerned parties and creating the possibility of a European citizens' initiative for legislation;
- The principle of effectiveness (Article 13 TEU);
- The principles of coherence, consistency and continuity (Articles 11(3), 13 TEU and 7 TFEU);
- The principle of good administration (Article 41 of the Charter of Fundamental Rights).

These '**second generation**' **good governance principles** add to the 'classic' or '**first generation**' **institutional principles** for ensuring the lawfulness of the Union's actions: those of conferred powers, subsidiarity and proportionality (Article 5 TEU).

Yet, at the same time these principles still very much constitute a grey area of EU law themselves, their exact meaning, scope and applicability being far from clear as yet. The Treaties are therefore rather silent on what the principles of effectiveness, participation, coherency, consistency and continuity mean and entail. To ensure that these principles are not simply rhetoric or just act as window dressing, they need a certain level of concretisation and enforceability. Taking a functional approach to this issue as well, we will not start a doctrinal discussion on the conceptualization of good governance principles, but rather focus in the next sections on what their significance may be in relation to soft EU rule-making and how they may translate into specific checks and balances in this regard.

1.5. Structure and Approach

In section 2 an overview will be presented of how currently legitimacy and good governance concerns are reflected in the institutional, procedural and administrative and judicial review requirements and guarantees that apply to soft regulatory and administrative rule-making, both on a general and on a specific level. Based on this, in section 3 we will be able to make an assessment of the extent to which soft rule-making modes comply with good governance principles and the requirement of (democratic) legitimacy, highlighting both existing problem areas and possible best practices. Within the framework of this assessment, we will consider the plea for further proceduralisation and enhanced judicial and administrative review. In the final section 4 we will formulate some conclusions and recommendations regarding possible consequences of the analysis for the reshaping of the EU's legal and institutional design.

³⁹ The principle of transparency and access to documents was already contained in the previous version of the Treaties, but not explicitly linked to the notion of good governance.

2. EXISTING CHECKS AND BALANCES

KEY FINDINGS

- Although the basic Treaties remain largely **silent** on the issue, **soft administrative and regulatory rule-making** by Union institutions, networks and agencies is an institutional practice that has been **growing rapidly**.
- The existence and exercise of EU powers is subject to **'first generation' institutional principles**. This encompasses the use of soft law instruments.
- Although the principles of **openness and transparency** are relevant for soft law instruments as well, many of the concrete obligations in this respect **do not (fully) apply** to such instruments.
- The principles of **consultation and participation lack precision** in general and their application to soft law instruments is even more problematic. This is equally true for the principles of good administration and equal representation.
- The principles of **coherency** and **effectiveness** do not merely regard the output of policies, but are equally relevant for **procedural guarantees**, especially in relation to soft law rule-making.
- The Commission, networks and agencies generally enjoy **wide discretion** to shape 'second generation' good governance/administration principles. Specific legal obligations and institutional practices, however, reveal interesting avenues for **further substantiating** these principles, including the use of **comitology**.
- The problem with **judicial review** is threefold: 'second generation' principles are so far hardly judicially enforceable, *locus standi* for individuals is still extremely limited and soft law instruments are usually regarded as not intended to produce legal effects.
- The mandate of the **European Ombudsman** to investigate cases of maladministration has proved its potential to foster elements of 'second generation' principles.

2.1. Introduction

Soft rule-making instruments have a long history in the context of the EU, yet their place and function in the EU system of sources of law are still quite obscure because of the rather general denial in the Treaties of their very existence. The Treaty of Lisbon has maintained the status quo in the new hierarchy of sources it has introduced (Articles 288-291 TFEU), only listing the two soft law instruments that have always been part of the Union's institutional design - the recommendation and the opinion - and stating that these do not have binding force. Yet, the newly added Articles 292 and 296 TFEU now condition their use to some extent (section 2.2.1).

Consequently, with a view to charting the legal framework within which soft administrative rule-making and regulatory rule-making operate, an analysis first needs to be made of the legal foundations of this type of rule-making and the limits that can be identified when resorting to it. This requires a scrutiny of the ‘first generation’ institutional principles determining the power balance in the EU (section 2.2). We subsequently analyse ‘second generation’ principles as established in primary, secondary and tertiary sources of law, with a view to establishing the general procedural conditions that may apply to the use of soft rule-making (section 2.3). We then turn to the consideration of procedural requirements that have developed in specific areas or administrative/regulatory regimes and to institutional practices that have developed in this regard. This consideration by no means claims exhaustiveness, but merely seeks to be indicative of the type and nature of specific procedural checks and balances that are being established in the Union’s practice, which may be helpful for the identification of best practices (section 2.4). Following on from this, we will focus on the most relevant tools and mechanisms for ensuring compliance and enforcement with procedural guarantees, in particular on the role of the European Ombudsman and the ECJ (section 2.5).

Being geared towards establishing an inventory of what the current state of the law is regarding checks and balances that apply to soft rule-making, this part of the study is descriptive in nature. The chronological-narrative approach that we take for this purpose does not seek to establish full causal explanations for the appearance and evolution of soft EU rule-making, but to chart the **institutional-procedural conditions** under which this comes about and the possibilities for its administrative and judicial reviewability and how these have (or have not) evolved through time, especially post-Lisbon.

2.2. ‘First generation’ institutional principles

2.2.1. The principle of conferral and the requirement of a legal foundation

The existence and exercise of EU powers is determined by the institutional principles now listed in Article 5 TEU: the principle of conferred powers, at the basis of the division of power between the EU and its Member States since the inception of the EEC, and the principles of subsidiarity and proportionality, guiding the exercise of the Union’s powers since the Treaty of Maastricht. The Treaty of Lisbon has considerably reinforced these three principles, reflecting the desire on the part of the Treaty drafters to enhance the formal or procedural legitimacy of the EU. The Treaties now explicitly state that competences which have not been conferred on the Union remain those of the Member States (Articles 4(1), 5(2) TFEU); that proportionality concerns not only the contents but also the form of Union action (Article 5(4) TEU); that the national parliaments also have a duty in checking compliance with the subsidiarity principle, providing a procedure for this (Article 12 TEU and Protocols 1 and 2) and introducing a competence catalogue (Articles 2 to 6 TFEU).

Considering the relevance of these principles for soft rule-making, the view is often defended that the principle of conferred powers only applies to legally binding Union acts and that there is an **unlimited competence** for the EU to adopt soft law acts.⁴⁰ This view needs to be **rejected** for several reasons. Firstly, the separate Treaty provisions

⁴⁰ E.g. Ch.-A. Morand, ‘Les recommandations, les résolutions et les avis du droit communautaire’, *Cahiers de droit européen*, vol. 6(1970), no. 2, p. 623 and R. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie*, Kluwer, Deventer, 1999, p. 34.

themselves demonstrate a different approach, as they define in what areas the EU may act, what the scope of such action may be, who is to act, under what procedure and with what instruments. In some cases, such provisions exclusively concern the adoption of non-binding instruments. The new competence catalogue confirms this, by expressly recognizing complementing and coordinating competences as a separate category, which is not to lead to any legislative harmonization. Secondly, despite their formally non-binding status, the ECJ has recognised certain legal effects of soft law instruments.⁴¹ In view of this, one is to understand that also the use of soft law does require some accounting for in terms of competence and that its use may be limited in certain cases (see section 2.2.2).⁴² Thirdly, the principle of conferral is not to be considered merely as a principle of legality, but also fulfils the functions of ensuring legal protection and of protecting the horizontal and vertical division of powers and democracy. While the principle of conferral does not apply to (true) soft law acts in the sense that a specific legal basis in the Treaties is to be identified for their lawful adoption, the principle does require some legal foundation for their use in the Treaties with a view to protecting the other functions it fulfils. As we will see below, this is corroborated not only by the Court's case law, where it has deemed it necessary to clarify the power to adopt soft law instruments, but also by the Union legislator, where it has deemed it necessary to stipulate the competence of the Commission to adopt such instruments.

The post-Lisbon **Article 292 TFEU** now reveals a similar approach by the Treaty drafters, stipulating the procedure the Council has to follow when adopting recommendations: it needs to act on the basis of a proposal from the Commission where the Treaty prescribes that it adopts acts on a Commission proposal and it shall act unanimously where the Treaty requires this for Union acts. These conditions imply that the Council identifies a legal basis for its recommendations and follows the same procedure that would be required for the adoption of a binding Union act. The concerns underlying these conditions can be said to relate in particular to the respect of the institutional balance and the vertical division of powers. What is striking is that neither Article 292 TFEU nor any other provision imposes any similar requirement on the Commission, whose recommendations may raise legitimacy concerns more often than those of the Council. In fact, the latter already has a well-established practice of indicating a legal basis in its recommendations and of following the decision-making procedure prescribed by it.⁴³

Post-Lisbon, the Treaties remain silent on **soft administrative rule-making** and hence we still need to trace the **legal foundation** for this type of rule-making activity by the Commission back to the competences and duties that have been assigned to it. For interpretative acts this concerns Article 17, Paragraph 1 TEU, according to which the Commission shall promote the general interest of the Union, taking all the 'appropriate initiatives' to that end, and shall ensure the application of the Treaties and of other measures of the institutions. The use of interpretative acts thus fits in with the general task of the Commission as guardian of the Treaties and enables it to take ex-ante action, directed towards correct and uniform implementation of EU law and the prevention of infringements. The case law of the ECJ provides support for this view.⁴⁴ Some authors have

⁴¹ E.g. Case C-322/88, *Grimaldi*, [1989] ECR 4407. See Senden 2004, *op. cit.*, for a general discussion of this issue.

⁴² Cf. also A. von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform', *CMLRev.*(2002), vol. 39, p. 233.

⁴³ See Senden 2004, *op. cit.*, pp. 183-186.

⁴⁴ See Case C-146/91, *KYDEP v. Council and Commission*, [1994] ECR I-4199, Paragraph 30. This ruling also refers to the Commission's administrative task.

argued that there even exists a duty to adopt such acts,⁴⁵ but this is difficult to maintain on the basis of the current institutional framework.

The competence of the Commission to adopt decisional rules can be traced back to its general administrative task under Article 17 TEU as well, but such rules may also find a specific legal foundation in other Treaty provisions or secondary law acts. The ECJ has thus recognised that in areas where the Commission has an administrative power to adopt individual measures by which it applies EU law to a concrete case, it has an implied power to adopt general rules setting out how it will apply EU law in such cases.⁴⁶ This concerns for instance (new) Articles 107 and 108 TFEU in the area of state aid.⁴⁷ But we can also identify secondary law acts that are considered to empower the Commission to adopt decisional rules, such as the Coordination Regulation.⁴⁸ Secondary legislation sometimes even imposes an obligation to that effect. This development has manifested itself within the framework of the network-governance approach in the area of competition law and electronic communication and telecommunications. The Framework Directive⁴⁹ thus imposes an explicit obligation on the Commission to adopt a recommendation on the relevant product and service market and to also publish guidelines for market analysis and the assessment of considerable market power. Interestingly, the administrative rule-making taking place within such a context may very well entail procedural requirements (see section 2.4.1). In such cases, clearly an important power is imposed on the Commission – or delegated in a sense – to adopt soft administrative rules, which it needs to execute in certain cooperation with national bodies.

Not only within the framework of **networks** but also that of **agencies** we increasingly witness the adoption of soft administrative and even regulatory rule-making. While being an increasingly important part of the Union's institutional framework, a general provision in the Treaties stipulating their place and function in the Union system as well as rules regarding their establishment and powers is lacking. Consequently, they are generally established by secondary law acts (often regulations), on the basis of a specific Treaty provision, such as Articles 114 and 352 TFEU. These provisions confer powers on the EU to bring about certain (substantive) laws and policies, but have been interpreted by the EU legislator so as to include the power to establish Union organs to supervise or facilitate the implementation of the laws and policies at issue. While the ECJ has established that powers may be delegated to such organs, it made it clear that this must be confined to clearly defined executive powers and does not extend to powers involving a wide margin of discretion.⁵⁰ This famous **Meroni doctrine** thus excludes the delegation of general regulatory powers to agencies. Yet, this doctrine is put under pressure by the currently developing institutional practice, as certain agencies have developed policy-making activity that comes close to full regulatory powers.⁵¹ While these general rule-making powers are soft by the label, they are often hard in practice.

⁴⁵ G. Meier, 'Die 'Mitteilung' der Kommission: ein Instrument der Normensetzung der Gemeinschaft?', in: J. Baur and K. Hopt (eds.), *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*, De Gruyter, Berlin/New York, 1990, p. 1303.

⁴⁶ E.g. Case C-169/95, *Spain v. Commission*, [1997] ECR I-315, Paragraph 19.

⁴⁷ Case T-149/95, *Ducros v. Commission*, [1997] ECR II-2031, Paragraph 61.

⁴⁸ Council Regulation (EEC) No. 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No. 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ 1994, L178/43. See also Case C-443/97, *Spain v. Commission*, [2000] ECR I-2415.

⁴⁹ Directive 2002/21/EC, OJ 2002, L108/33 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC, OJ 2009, L337/37 and Regulation 544/2009, OJ 2009, L167/12.

⁵⁰ Case 9/56, *Meroni*, [1958] ECR 133, 152.

⁵¹ In this sense, M. Shapiro, 'Independent agencies', in: P. Craig and G. De Burca, *The Evolution of EU Law*, OUP, 2011, pp. 112-115.

Regarding **soft regulatory rule-making** within the framework of OMC-type policy coordination processes, we do not see this third level of regulatory interference reflected in the relevant sources and decision-making provisions (Articles 288 to 292 TFEU). Regulation of the OMC in the Treaties was discussed and recommended in the working groups of the European Convention leading up to the Constitutional Treaty for Europe,⁵² but no agreement could be reached on it. Nonetheless, the Treaties appear to provide for a legal foundation of the use of the OMC in at least three ways. Firstly, the TFEU contains provisions that explicitly provide a legal foundation for the OMC as a process of coordination or convergence of national policies, such as in the areas of social policy and economic policy (see section 2.4.4). In addition to these 'developed' OMC areas,⁵³ soft regulatory rule-making occurs in areas in which a legislative competence is lacking, such as healthcare, but in respect of which the Treaty provides for coordinating or supporting competences on the part of the EU without (fully) describing these in OMC-procedural terms.⁵⁴ The third legal foundation for the OMC and soft rule-making has been found in Treaty provisions conferring a legislative power on the EU, regarding for instance taxation. Yet, there are good reasons for arguing that in the EU the choice of the governance mode and its concomitant instruments is not a totally free one and that whoever is allowed to do more, may not always confine himself to doing less.

2.2.2. Balancing of principles; limits to the choice of instrument

The desired level of regulatory interference and intensity at EU level – and therewith the choice of instrument – may have been quite clearly defined by the Treaty drafters. Here one must distinguish between three different types of legal bases in the Treaties. At one end of the spectrum we have the '**prohibiting**' **legal bases**, ruling out legislative harmonisation.⁵⁵ At the other end, we find the '**obliging**' **legal bases** such as Article 46 TFEU, imposing a clear obligation to act by way of legislation. Taking less far-reaching action should then be considered as a springboard to legislation or as supporting or complementing a legislative framework. These two types of legal bases in fact confine the scope of application of the subsidiarity and proportionality principles mainly to the substance and contents of the acts to be adopted. In between these two, there is the third category of '**enabling**' **legal bases**, with varying degrees of discretion left to the Union legislator. Article 67(3) TFEU provides an example of this, stipulating amongst others that the Union 'shall endeavour' to ensure a high level of security through 'measures' to prevent and combat crime and through 'measures for coordination and cooperation' between police and judicial authorities and possibly through the 'approximation' of criminal laws.

Clearly, this provision imposes some obligation on the EU to act, but leaves it a lot of leeway for deciding how to do that and in what (legal) form. As such, it allows for a certain 'regulatory mix', possibly combining a legislative approach with a soft convergence approach under the OMC. Yet, the ECJ has established an important limit to this discretion, ruling that the institutions are obliged to choose the instrument that is most appropriate for realising the aims of the measure in question and the Treaty provisions that underlie it. For instance where the Treaty aims to realise a common transport policy, it is quite obvious that this cannot be realised with an exclusive reliance on soft law measures.⁵⁶ So, the choice of the rule-making mode and instruments must be proportionate to the Treaty

⁵² See CONV 424/02, 29 November 2002, p. 7.

⁵³ E. Szyszczak 2006, *op.cit.*

⁵⁴ E.g. Articles 166-168 and 180-181 TFEU.

⁵⁵ E.g. Article 168(5) TFEU.

⁵⁶ See Case 13/83, *Parliament v. Council*, [1985] ECR 1513.

objectives that are being strived for, implying an **appropriate means-end approach** to be carried out. To a certain extent, the notions in the Treaties of 'common policy', 'harmonisation' or 'approximation' and (policy) 'coordination' or 'cooperation' can be taken as indicators for this.

The Court's 'appropriate means-end' approach in these cases also requires that the **principles of subsidiarity and proportionality** be balanced with the principle of effectiveness. In fact, under the old Protocol on Subsidiarity and Proportionality, their application was to stand the test not only of the principle of effectiveness but also of those of institutional balance and sincere cooperation. Quite remarkably, in its post-Lisbon version, the Protocol no longer refers to other legal principles against which they need to be weighed. Yet, the newly added Article 296 TFEU contains some further guidance as to how the institutions have to deal with the discretion allowed by enabling Treaty provisions, stating that:

'Where the Treaties do **not specify the type of act** to be adopted, the institutions shall select it on a **case-by-case basis**, in compliance with the **applicable procedures** and with the principle of **proportionality**. [...] When considering draft legislative acts, the European Parliament and the Council **shall refrain** from adopting acts not provided for by the relevant legislative procedure in the area in question.'

The first sentence of this provision could raise the impression that in the case of enabling Treaty articles, the choice of the level of regulatory interference and instrument is to be decided mainly on the basis of the proportionality principle, it being quite unclear what 'applicable procedures' this provision actually refers to. The second sentence, however, can be read as an implicit reference to – and concretisation of – the principles of institutional balance and legal certainty: for instance, if the Council decided to start an OMC-like process and/or adopt recommendations, this would interfere with the Commission's right of legislative initiative when a Treaty provision allows for or commands the adoption of legislation and the Commission has already started developing proposals. When covering the same ground, such a simultaneous two-track approach may not only be ineffective and affect the Commission's position, but also create confusion for those that will be affected by the rules or policies thus established.⁵⁷ One should note here again that acts adopted by the Commission are not covered by this provision.

It should also be understood that, no matter what is explicitly stipulated in the Treaties in this regard, all institutions are under a general duty to comply with **all (also unwritten) general principles of law** that apply within the EU law context and that not doing so may give cause to judicial proceedings (see section 2.5.1). The institutions will thus need to take account of other general principles that may impose certain legal limits to regulatory choice, such as those of transparency and legal certainty. For instance, where soft rule-making seeks to bring about new legally binding rules, these principles may be infringed as well as those of conferral and institutional balance. In this respect, mention must also be made of the Inter-Institutional Agreement (IIA) on Better Law-making, concluded between the Commission, the Council and the European Parliament, which was explicitly supportive of alternative instruments, while also setting certain limits to their use.⁵⁸ Interestingly, however, it did so only regarding co-regulatory and self-regulatory devices, abstaining from making any reference whatsoever to soft administrative rule-making or the OMC. Such devices are only to be resorted to when they have an 'added value for the general interest,' which excludes situations

⁵⁷ See also the final report of the Convention Working Group IX on 'Simplification', concluding that the use of atypical instruments in legislative areas can raise the impression that the Union establishes legislation through such instruments, CONV 424/02, 29 November 2002, pp. 6-7.

⁵⁸ OJ 2003, C 321/01. See sections 18-23 of the IIA.

'[...] where **fundamental rights or important political options** are at stake or in situations where the rules must be applied in a **uniform** fashion in all Member States. They must ensure **swift and flexible regulation** which does not affect the principles of **competition** or the **unity of the internal market**.' [point 17]

This assessment needs to be made on the basis of consultations and impact assessments.⁵⁹ The fact that the IIA does not cover soft administrative and regulatory rule-making by the Union institutions and other bodies supports the view that the institutions have wanted to keep their use as flexible as possible. A decade having passed since its adoption, the question is whether this course of action should still be upheld.

2.3. 'Second generation' good governance requirements

2.3.1. Introduction

The Union's aim to enhance the (democratic) legitimacy of both its legislative and - direct and indirect - administrative activities can be identified in different modifications of the Treaties, amongst which the strengthening of the ordinary legislative procedure, the enhancement of the position of the EP and the introduction of the hierarchy of norms. Within that framework it has sought to improve not only the democratic control of the EP on legislative acts, but also on the adoption of delegated and implementing acts by the European Commission. Furthermore, judicial control has been enhanced, by allowing individuals locus standi against 'regulatory acts' under the procedure for annulment of Article 263 TFEU (see section 2.5.1).

The explicit introduction and confirmation of good governance principles in the post-Lisbon Treaties must be seen within this broader context and can be seen as a next step in ensuring the overall legitimacy and accountability of the EU system and as providing important building blocks for this. Yet, quite a number of these principles are still rather undefined, both in the Treaties and in secondary legislation, which makes both case law and tertiary sources particularly relevant with a view to grasping their actual scope, operationalisation and enforcement under EU law. Such sources have been adopted in particular within the framework of the Better Regulation Strategy, pursuant to the Commission's White Paper on governance (2001),⁶⁰ concretising good governance principles to some extent. In this section we will consider in particular the general application and applicability of these principles to soft rule-making activities.

2.3.2. The principles of openness and transparency

Ensuring the legitimacy and accountability of the Union organs in respect of their soft rule-making activity will depend in the first place on the extent to which those affected by it have the position to be informed about this activity and to have access to all the relevant information and documents. What does EU law provide for in this respect and what institutional practice may one discern?

Openness and transparency have been the first procedural good governance principles to be developed within the framework of the Treaties, on the basis of the old Article 255 EC.

⁵⁹ See points 15 and 25-31 of the IIA.

⁶⁰ COM(2001) 428 fin.

The Treaties now contain several references to openness and transparency of the Union, Article 15 TFEU providing in particular that:

'1. In order to promote **good governance** and ensure the **participation of civil society**, the Union institutions, bodies, offices and agencies shall conduct their work as **openly** as possible.'

The third paragraph of this Article stipulates that the Union institutions, bodies, offices and agencies conduct their proceedings transparently and it also provides for the right of access to documents, in accordance with the general principles laid down in regulations of the European Parliament and the Council and with the specific provisions laid down in the rules of procedure of such organs. Importantly, the Treaty of Lisbon has thus also declared the principles of openness and transparency and the ensuing **right of access to documents** for all EU citizens and those legally residing in the EU **applicable to all Union organs**, be they formal institutions or any other type of body. Article 42 of the Charter of Fundamental Rights confirms this right in the same terms. Yet, both provisions abstain from specifying in any way what falls within the **scope of 'documents'**, in particular whether this would also include soft rule-making acts.

This question is all the more important, given the fact that Article 297 TFEU only requires the publication in the Official Journal of the European Union of legislative acts and of non-legislative acts adopted in the form of directives and regulations which are addressed to all Member States and of decisions which do not specify to whom they are addressed. Legally non-binding acts are thus excluded from the publication requirement. Still, the Commission has developed the practice of publishing both its interpretative and decisional acts and also draft versions of the latter in the C-series of the Official Journal. Recommendations of both the Commission and the Council – which are an important tool of the OMC – are generally published in the L-series. Draft recommendations of the Commission, leading up to Council recommendations, are generally published in the C-series. Yet, it also occurs that certain soft law acts are merely published as COM-documents or made accessible on the Internet.

Later on, the transparency principle was elaborated in secondary law, in particular Regulation 1049/2001/EC dealing with the issue of access to documents and partly codifying case law of the ECJ.⁶¹ This regulation stipulates the right of access to documents only vis-à-vis the Council, Commission and European Parliament and clarifies that 'document' shall mean 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility' (Article 3(a)). This broad definition clearly also encompasses soft rule-making acts.

While the effectiveness of the current legislative and jurisprudential framework in ensuring the right of access to documents for individuals has shown that it leaves quite something to be desired, this seems not to concern soft law acts more than hard law acts.⁶²

Regarding legal obligations to enable or ensure access to EU soft law acts, mention must also be made of Protocol 1 on the role of the national parliaments, attached to the Treaty of Lisbon. Its Article 1 provides that the Commission shall forward Commission consultation documents (green and white papers and communications) to national parliaments directly upon publication, as well as its annual legislative programme and 'any other instrument of legislative planning or policy', at the same time as sending them to the EP and the Council.

⁶¹ Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents, *OJ* 2001, L145/43.

⁶² H. Kranenborg, 'Tien jaar Eurowob: reden voor een feestje?', *SEW* 2011, pp. 217-230.

This provision mainly seems to be geared towards the preparatory acts that the Commission produces, leading up to new law and policy initiatives, and not to include its soft administrative and regulatory rule-making acts.

Article 21 of the Code of Good Administrative Behaviour, adopted by the European Ombudsman to further substantiate the right to good administration contained in Article 41 of the Charter of Fundamental Rights, concerns the **right to information**. While this provision does not seem to exclude access to information related to soft rule-making, it mainly seems to be geared towards instances of direct administration in the sense of single-case decision-making.

2.3.3. The principles of consultation and participation

Building on the principles of openness and transparency, the introduction in the Treaties of the principles of consultation and participation in a more general way marks another step in the aim to develop good governance practices in the EU and to bring citizens closer to the Union's decision- and rule-making processes. In addition to framing **representative, parliamentary democracy** as the foundation of the EU, Article 11 TEU – as part of the new Title II on Democratic Principles – thus introduces the **notion of participatory democracy**,⁶³ by stipulating that:

'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.

2. The **institutions** shall maintain an **open, transparent and regular dialogue** with representative associations and civil society.

3. The **European Commission** shall carry out **consultations** with parties concerned in order to ensure that the Union's actions are **coherent** and **transparent**.'

Article 2 of the Protocol on Subsidiarity and Proportionality also stipulates that

'Before proposing legislative acts, the Commission shall **consult widely**'.

Only in cases of exceptional urgency, it need not conduct such consultations, giving reasons for its decision in its proposal. Furthermore, Article 15 TFEU, discussed in the previous section, mentions ensuring the participation of civil society.

For the purposes of our analysis, these provisions raise **two important questions**:

- 1) Do the principles of participation (dialogue) and consultation also cover soft rule-making activity of the Union institutions and other entities?
- 2) If so, are they merely principles of good governance/administration to be followed by the institutions at their own discretion or do they entail some kind of consultation and participation rights and if so, for whom?

Article 11 is not formulated in an unequivocal way when it comes to the intended scope of these principles, given for instance that different actors are mentioned in each of the paragraphs. The Treaty drafters have also refrained from referring to already existing participation and consultation practices such as those applied within the framework of the European Social Dialogue and OMC processes. Furthermore, one should note that Article 11 does not envisage nor create a legal basis for the adoption of secondary legislation to set

⁶³ Even if the Treaty of Lisbon abandoned this terminology, in contrast to its predecessor the Constitutional Treaty for Europe. Given that the European Citizen's Initiative contained in the fourth paragraph of Article 11 is not of direct relevance to our analysis, we will disregard it.

further conditions for the participation and consultation process, unlike it did for the European Citizen's Initiative that is contained in Article 11, fourth paragraph.⁶⁴ We therefore need to turn to other sources to find an answer to the above questions.

Regarding the first question, we note that Article 11 is framed very broadly and does not contain any limitation regarding the **area or nature of Union action that is to be subject to dialogue and consultation**. By contrast, the provision in the Protocol is framed more narrowly, being mainly geared towards consultation in the context of developing proposals for legislation. Very importantly, the duty to consult in this provision and Article 11(3) only concerns the Commission and none of the other Union institutions or organs. So, these entities have no general Treaty-based duty to consult parties concerned. The scope for participation through platforms for the exchange of views and dialogue is broader, given that the duty to engage in dialogue does concern the other institutions as well. Yet, this cannot be taken to cover all other Union bodies, institutes and agencies since these are not explicitly referred to, as is the case for other amendments introduced by the Treaty of Lisbon.

If we take Article 11(3) as the constitutional anchoring of the institutional practice that has been in place within the Commission for quite some time now, the **soft consultation guidelines** it established for this in 2002 must be considered to be a leading source for its interpretation.⁶⁵ These guidelines aimed to set general principles and minimum standards for consultation of interested parties by the Commission. With a view to enhancing the Union's openness, accountability, participation, effectiveness and coherence, the guidelines set minimum standards regarding the content of the consultation process, the determination of the target groups, publication, time limits for participation, acknowledgement and feedback. Without delving into the actual standards here, it is clear from the document that they are only considered applicable in respect of 'major policy initiatives,' without prejudice to more advanced practices applied by Commission departments or specific rules regarding certain policy areas. Explicitly excluded from their scope are specific consultation frameworks provided for in the Treaties (e.g. the European Social Dialogue and the ESC), the comitology process and the consultation frameworks for experts⁶⁶ and regional and local government. The guidelines stipulate that major policy initiatives are those initiatives that are subject to an extended impact assessment.

Importantly, the consultation process is thus not only linked to but even made dependent on the impact assessment (IA) process. According to the current **Commission impact assessment guidelines**, the IA requirement applies to:

- (i) all legislative initiatives – whether or not included in the Commission Legislative and Work Programme (CLWP) – having clearly identifiable economic, social and environmental impact;
- (ii) comitology decisions which are likely to have significant impact and;
- (iii) all non-legislative initiatives (such as white papers, recommendations, action plans, expenditure programmes, and negotiating guidelines for international agreements) which define future policies and which set out commitments for future legislative action.⁶⁷

⁶⁴ Since then these conditions have been set. See L.A.J. Senden, *Het Europees burgerinitiatief. Symboolwetgeving of daadwerkelijke democratische versterking van de Unie?*, *NtEr* afl. 9, November 2011, pp. 308-315.

⁶⁵ Communication from the Commission. Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, *COM(2002)704 final*, 11 December 2002.

⁶⁶ Communication from the Commission – On the collection and use of expertise by the Commission: principles and guidelines. Improving the knowledge base for better policies, *COM(2002)713 final*, 11 December 2002.

⁶⁷ European Commission, *Impact assessment guidelines*, *SEC(2009)92*, 15 January 2009, pp. 15-16.

The fact that both the consultation and impact assessment guidelines only concern the Commission's decision-making process, leads us to conclude that OMC processes are only covered by IA and consultation according to the minimum standards to the extent that the Commission is involved in these processes through the issuing of recommendations. However, this is certainly not the case for every OMC process (see section 2.4.4). Furthermore, on the face of it, soft administrative rule-making acts in the form of Commission notices, communications, guidelines etc. seem excluded from the IA obligation, due to them not being geared towards establishing new policies and legislation but towards implementation of existing policies. This then also leads to the conclusion that the minimum standards are not applicable to this type of acts, even if the consultation guidelines state that the Directorates-General are encouraged to apply the minimum standards to any other consultation exercise they intend to launch.⁶⁸ Interpreting Article 11(3) in the light of the soft guidelines consultation thus means that there is **no Treaty-based obligation for consultation on soft administrative rule-making**.

Yet, institutional practice not only shows that the Commission may very well conduct IAs on such type of acts,⁶⁹ but also consult on its proposed decisional acts.⁷⁰ As will be described in section 2.4.1, the latter may also occur on the basis of secondary law acts that provide a legal basis for such acts and that may even impose a duty to consult. In reality, consultation on this type of soft rule-making by the Commission is thus still very much organized in an ***ad hoc* fashion**, as is the case for consultation by agencies and networks (see sections 2.4.2 and 2.4.3). Consultation occurs in particular by way of consultation documents, such as green and white papers, through the Commission's website Your Voice in Europe,⁷¹ press releases and mailings, but also through meetings with experts and stakeholders and informal platforms.

On the basis of the foregoing, the realization of the aim of building coherence of the Union's consultation processes that underlies the adoption of the consultation guidelines can be very much doubted.⁷²

So, only to a limited extent do the general principles of consultation and participation as enshrined in the Treaty *de iure* cover soft rule-making acts. Where they do, the next question is whether they are merely principles of good governance or administration to be followed by the institutions at their own discretion or whether they entail some kind of **consultation and participation rights** for parties concerned? We can only deal with this complex question very summarily here, highlighting some general issues, while observing that the question is of equal importance for soft and hard rule-making and also for single-case decision-making.⁷³

First of all, the previous considerations already lead to the conclusion that while unmistakably the Treaties now provide for an obligation to consult for the Commission that

⁶⁸ *Ibidem.*, p. 15.

⁶⁹ See e.g. the impact assessment report adopted on 20 December 2011 on the Communication from the Commission (notice) on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, to be found on: http://ec.europa.eu/governance/impact/ia_carried_out/cia_2011_en.htm.

⁷⁰ See Senden 2004, *op. cit.* pp. 152-153 and also the Commission's website Your Voice in Europe, http://ec.europa.eu/yourvoice/index_en.htm, last accessed on 22 February 2011.

⁷¹ http://ec.europa.eu/yourvoice/index_en.htm.

⁷² Cf. other specific legal frameworks that have been created for consultation in certain policy areas, most importantly Regulation (EC) No. 1367/2006 on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ* 2006, L264/13.

⁷³ For an in-depth study into this issue, see J. Mendes, *Participation in EU-Rulemaking. A Rights-Based Approach*, OUP, 2011.

can be seen as reflecting a principle of good governance or administration, its **modalities** are still **far from clear**, not applicable to all its acts and only cast in soft guidelines. Secondly, the duty to consult in Article 11(3) is explicitly formulated with a view to ensuring the coherence and transparency of the Commission's action and not so much with a view to bringing about any **citizen empowerment**. Thirdly, the fact that the Treaties do not as such provide for an obligation to adopt secondary legislation for the further substantiation of the conditions under which consultation has to be carried out, can also be taken as an indication that citizen empowerment is not envisaged and that it seeks to leave as much **flexibility and discretion** as possible to the Commission in this regard. As such, this reflects the same approach as is contained in the consultation guidelines, stating that the guiding principle for the Commission is to give interested parties a voice and not a vote and that a legally binding approach to consultation is to be avoided, in particular the situation that a Commission proposal could be challenged in Court on the ground of an alleged lack of consultation of interested parties. The Commission deems such an 'over-legalistic' approach incompatible with the need for timely delivery of policy and with the expectations of citizens that the European institutions should deliver on substance rather than concentrating on procedures.⁷⁴ It thus remains unclear what interested parties and citizens may expect in return for their effort to participate in a consultation process, and the 'constitutionalisation' of the duty of consultation does little to improve the current practice of the Commission that has been repeatedly criticized for the unsatisfactory feedback on contributions to consultations.⁷⁵ Fourthly, the **ECJ** has not appeared very willing to recognize participation or consultation rights.⁷⁶ In this respect, the principles of transparency, consultation and participation should be considered in conjunction with the giving reasons requirement,⁷⁷ contained in Article 296 TFEU, stating that:

'Legal acts shall state the reasons on which they are based and **shall refer** to any proposals, initiatives, recommendations, **requests or opinions** required by the Treaties.'

This requirement applies not only to administrative decisions, but to all legal acts, including legislative, delegated and implementing acts. As Craig and De Burca state, this is noteworthy since many national legal systems do not or only in limited circumstances impose such an obligation for legislative acts.⁷⁸ The policy rationale underlying the duty to give reasons lies in particular in rendering the decision-making process **more transparent**, so that affected parties know why a measure has been adopted, and in facilitating judicial review. The degree of particularity required by the ECJ may be greater in the case of individual measures than of legislative measures.⁷⁹ Of particular importance here is the extent to which the Court requires the Union institutions to respond to arguments that parties have presented during the decision-making process, possibly pursuant to public and targeted consultations. The Court has been reluctant to recognize such a '**dialogue dimension**' in its case law.⁸⁰ As Shapiro has argued, if the only instrumental value of giving reasons is transparency, the courts will resist such demands because the institution's actions and purposes can be discovered without the need for the institution to rebut every opposing argument. If the ECJ were to stick to transparency as the sole goal of (now)

⁷⁴ P. 10.

⁷⁵ See the Communication of the Commission, 'Follow-up to the Green Paper – European Transparency Initiative, COM(2007)127 def, pp. 6-7.

⁷⁶ P. Craig and G. De Burca, *EU Law. Text, Cases and Materials*, OUP 2011, p. 521. Mendes 2011, *op.cit.*

⁷⁷ And, in fact, also the principle to be heard. See on this connection, J. Mendes, Participation and participation rights in EU law and governance, in: H.C.H. Hofmann and A. Türk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar, 2009, pp. 257-287.

⁷⁸ *Ibid.*, pp. 522-524.

⁷⁹ *Ibid.*

⁸⁰ M. Shapiro, The Giving Reasons Requirement, 1992 *U Chic Legal Forum* 179, pp. 203-204, as cited in Craig and De Burca 2011, *op.cit.*, p. 524.

Article 296 TFEU, it is unlikely to move towards a dialogue requirement. Yet, participation in government by parties affected by government decisions presents an increasingly compelling value in contemporary society,⁸¹ which we can see reflected in the new Treaty basis in Article 11 TFEU for dialogue, consultation and participation. The Court's approach may require reconsideration in the light of this development (regarding the Court's role see also sections 2.5.1, 3.1.2 and 3.3.2).

2.3.4. The principle of equal treatment

Article 11(1) to (3) TEU raises a particular issue in relation to Article 9 TEU, also added by the Treaty of Lisbon, which states that:

'In all its activities, the Union shall observe the principle of equality of its citizens, who shall receive **equal attention** from its institutions, bodies, offices and agencies.'

Both provisions are contained in the new Title II on Democratic Principles of the EU and the equal treatment principle has been clearly formulated in this context as a principle of good administration. As such, it raises numerous issues, but here we want to focus in particular on the question of how this duty to respect the equal treatment principle may relate to the consultation duty of the Commission.

In this respect it is important to observe that the new Treaty framework is **framed openly yet not very consistently**, by mentioning consultation with 'parties concerned', dialogue with 'representative associations and civil society' and giving 'citizens and representative associations' the opportunity to make known their opinions. Are we to understand that a deliberate distinction is to be made between these different groups and the different activities involved? There is no secondary legislation to clarify this matter, so again we need to turn to the Commission's soft consultation guidelines in order to gain a clearer understanding of its approach to this issue.

In the guidelines the Commission has stressed that it wishes to maintain an **inclusive approach** in line with the principle of open governance and that every individual citizen will be able to provide the Commission with input. Yet, it has also stressed the need to define the target group prior to the launch of a consultation process and to develop sound criteria for this, and to do the same for those cases where access to consultation is to be restricted for practical reasons. It is specified that for consultation to be equitable, the Commission should ensure adequate coverage in the consultation process of those affected by the policy, those who will be involved in its implementation, or bodies that have stated objectives giving them a direct interest in the policy. In determining the relevant parties for consultation, it should also take the following elements into account: the wider impact of the policy on other policy areas; the need for specific expertise and knowledge; the need to involve non-organised interests; the track record of participants in previous consultations; the need for proper balance between the representatives of social and economic bodies, large and small organizations or companies, wider constituencies and specific target groups; and organizations in the EU and in non-member countries. It is also added that where formal or structured bodies exist, the Commission should take steps to ensure that their composition properly reflects the sector they represent. If this is not the case, the Commission should consider how to ensure that all interests are being taken into account.⁸² The guidelines also emphasise the issue of representativeness of comments made, but

⁸¹ *Ibid.*

⁸² Consultation guidelines, *op.cit.*, pp. 19-20.

mainly in the context of ensuring the accountability of interested parties taking part in the consultation process: it must be clear which interests they represent and how inclusive this representation is.

Yet, the guidelines do not provide sufficient **operational instructions** for the application of these starting points and requirements,⁸³ nor do they require the Commission to actually conduct open and public consultations. While in the meantime a joint Transparency Register of the European Parliament and the Commission has been established (2011), regulating the registration of lobby organizations, the Commission is still left with a large discretionary power as to who to actually involve in a consultation process and to consider as an interested, privileged party. As De Jesús Butler has established on the basis of a series of interviews with Brussels-based NGOs and members of the EP and the Commission, even for high-profile legislative files, such as the Services Directive, open consultations are not always initiated by the Commission, leaving such organizations only with informal ways of trying to influence the Commission.⁸⁴ The relation between the Treaty framework and the Commission's consultation guidelines is therefore not evident. The combination of the principle of equal access to the decision-making process from the Treaty and the principle of inclusiveness from the guidelines seems at odds with the view on consultation that the type of involvement would vary depending on categories of stakeholders.

The **discretionary power** that the Commission has in conducting its consultation process carries a **risk of arbitrariness** that does not match with the principle of equal treatment. This may also have a bearing on judicial protection, because the Court has recognised *locus standi* under (now) Article 263 TFEU for companies the Commission had involved in its decision-making process,⁸⁵ but has categorically refused this for representative associations that have only been able to take part in public consultations or to inform the Commission on a voluntary basis.⁸⁶ However, precisely for organisations that have been excluded from the decision-making process – and so have had no means of exerting any direct influence on the adopting institution and the contents of its decision – the desire for judicial control and access to court may be greater than for the privileged companies that have been involved in the pre-decision-making stage.⁸⁷

2.3.5. The principle of good administration

Article 41 of the Charter of Fundamental Rights has in so many words established the 'right to good administration.' This Article emphasises the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. The right is said to include the right of every person to be heard before any individual measure that would adversely affect him or her is actually taken, the right of access to his or her file and the obligation of the administration to give reasons for its decisions. Furthermore, one is entitled to having the Union make good any damage caused by its institutions.

⁸³ D. Obradovic and J.M. Alonso Vizcaino, Good governance requirements concerning the participation of interest groups in EU consultations, *CMLRev* 43, 2006, pp. 1083-1084.

⁸⁴ I. de Jesús Butler, Non-governmental Organisation Participation in the EU Law-making Process: The Example of Social Non-governmental Organisations at the Commission, Parliament and Council, *ELJ*, Vol. 14, No. 5, 2008, pp. 567-568.

⁸⁵ Cf. Case 264/82, *Timex*, [1985] ECR 849 and Case 169/84, *COFAZ*, [1986] ECR 391.

⁸⁶ Case C-321/95, *Greenpeace*, [1995] ECR I-1651. See also A. Cygan, Protecting the interests of civil society in Community decision-making. The limits of Article 230 EC, *ICLQ* vol. 52, October 2003, pp. 995-1012.

⁸⁷ Cf. Mendes 2011, *op.cit.*

In itself Article 41 is formulated rather narrowly, focusing in particular on instances of direct administration that involve single-case decision-making by the Union institutions and bodies and seemingly not geared towards measures of a general rule-making nature. Yet, the formulation also leaves scope for bringing in other aspects of good administration. As such, Article 41 'merely sets out **a bundle of procedural principles and rights**'. The case law of the ECJ also suggests that the principle or term 'good administration' has no specific legal content and purpose of its own.⁸⁸ It refers and connects in fact to many more principles than those explicitly mentioned in Article 41, such as those discussed above: openness, transparency, participation, etc. As Nehl notes, irrespective of the fact that it does not mirror a specific process principle, the indeterminate notion of 'good administration' 'continues to play its part in the debate on the development of a coherent supranational administrative system in which this notion purports to reflect a set of meaningful basic principles of procedural legality'.⁸⁹ The right to good administration thus bears an **important potential**, also for further conditioning the use of soft rule-making of a general nature through the development of certain procedural standards (see also section 3.3.3). The more open-ended approach of the European Ombudsman also leaves considerable leeway for this, as the leading notion in his activities is that of 'maladministration', which is considered to occur 'when a public body fails to act in accordance with a rule or principle which is binding upon it'⁹⁰ (see also section 2.5.2).

2.3.6. Balancing of principles; procedural requirements vis-à-vis effectiveness and coherence

Article 11(3) TEU discussed above also emphasizes the necessity to ensure the coherence of the Union's actions. In addition, Article 13 TEU stipulates:

'The Union shall have an **institutional framework** which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and **ensure the consistency, effectiveness and continuity of its policies and actions**.' [our emphasis]

Article 7 TFEU states that the Union

'**shall ensure consistency between its policies and activities**, taking all of its objectives into account and in accordance with the principle of conferred powers.' [our emphasis]

Thereby, the Treaty of Lisbon has also explicitly introduced the notions of effectiveness, coherence, consistency and continuity in the Treaty framework. Where the good governance principles discussed above emphasise the realization of input or procedural legitimacy, these notions emphasise the realization of output or substantive legitimacy (see section 1.4). This parallel development underlines the need to properly balance both dimensions of legitimacy in the Union's actions and policies. Yet, neither the Treaties nor secondary legislation include any guidance on the precise meaning and scope of these notions, let alone on the balancing thereof. We confine ourselves here to making some observations on this and on how they can be linked to the trend of soft rule-making.

⁸⁸ See H.P. Nehl, Good administration as procedural rights and/or general principle? In: H.C.H. Hofmann and A. Türk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar Publishing 2009, p. 325 and 336, with reference to Case T-167/04, *Detlef Nölle v. Council*, [1999] ECR II-2589 and Case C-16/90, *Eugen Nölle v. Hauptzollamt Bremen-Freihafen*, [1991] ECR I-5163.

⁸⁹ *Ibid*, p. 338.

⁹⁰ Annual Report of the European Ombudsman 1997, accessible on: <http://www.ombudsman.europa.eu/en/activities/annualreports.faces>.

A first observation concerns the **meaning** of the notions of 'consistency', 'coherence' and 'continuity': the Treaties do not seem to be consistent (!), using the terms interchangeably. The literature is divided on whether or not a distinction needs to be made, but following the view of Den Hertogh and Stross in a recent paper we argue that coherence is a somewhat wider notion than consistency. Policy consistency can then be defined as the absence of contradictions within and between individual policies, while policy coherence refers to the synergic and systematic support towards the achievement of common objectives within and across individual policies. Or, policies may be consistent but not necessarily coherent in the sense that they realize overarching common objectives.⁹¹ The notion of coherence therefore appears central.

Different levels of coherence can be identified and a rather usual classification distinguishes between internal coherence, horizontal coherence and vertical coherence. **Internal coherence** concerns coherence within a policy sphere, concerning goal setting, planning and implementation. **Horizontal coherence** concerns coherence between a policy and other, internal and external, policies of one and the same political entity. **Vertical coherence** concerns coherence between a policy at Union level and the individual EU Member States' policies in the same sphere.⁹²

A second observation is that the introduction of these notions in the Treaty can be traced back to the Commission's **White Paper on European Governance** (2001). From this document we can gain some further understanding as to why coherence of EU policies is considered important, in particular also from a citizen's perspective. The step-by-step integration in the Union's development has tended to slice policies into sectoral strands with different objectives and different tools, which over time has diminished the capacity to ensure coherence. A certain logic, geared towards the realization of the overarching aims of the EU and not being internally contradictory, is essential with a view to citizens reaping the benefits of the EU and making full use of the rights the system confers on them. Coherence is necessary with a view to maximizing such benefits and thus a prerequisite for the effectiveness of the system.⁹³

In the White Paper the Commission has mainly taken a **substantive, policy-oriented approach** towards building coherence, focusing on the identification of long-term objectives and the formulation of cross-cutting agendas. Yet, legal doctrine has also identified and distinguished between **different groupings of legal rules** that contribute to coherence:⁹⁴

- 1) rules of hierarchy, such as the primacy rule;
- 2) rules of delimitation, such as the principles of conferral, subsidiarity and proportionality;
- 3) rules of cooperation and complementarity, such as the principle of sincere cooperation and citizens' participation.

Linking these insights to soft rule-making, soft administrative rule-making can be said to be particularly relevant to building internal and vertical coherence, by providing a legal mechanism geared towards cooperation and complementarity with a view to ensuring

⁹¹ L. den Hertogh and S. Stross, *Policy Coherence in the EU System. Concepts and Legal Rooting of an Ambiguous Term*, Conference paper 'The EU as global player, Madrid, 7-8 April 2011, p. 5. Accessible on: http://www.exact.uni-koeln.de/fileadmin/home/stross/Den_Hertogh_Stross_2011_-_Policy_Coherence_in_the_EU_System_Concepts_and_Legal_Rooting_of_an_Ambiguous_Term.pdf.

⁹² *Ibid*, p. 8.

⁹³ COM(2001)428final.

⁹⁴ M. Cremona, Coherence through law: what difference will the Treaty of Lisbon make?, *Hamburg review of social sciences*, Vol. 3, No. 1. 11-36, as cited in Den Hertogh and Stross 2011, *op. cit.*

effective and uniform implementation of EU law in the Member States. Soft regulatory rule-making within the framework of OMC-type processes also seems particularly relevant to ensuring internal and external coherence,⁹⁵ being geared towards policy coordination between the EU and the Member States and also among Member States, and establishing certain steps to realise this. In itself, soft rule-making therefore has an important potential to develop coherence in the EU system,⁹⁶ but at the same time it also bears the risk of being a threat to coherence, e.g. when it simply is not 'hard' enough to tackle the problems at hand (see section 2.4.4) or when it is too far out of step with the main body of legislation or policy direction.

Importantly, the above legal rules also refer to **links between the notion of coherence and procedural principles and requirements**. The findings in section 2.3.3 regarding the necessity the Commission itself identified to develop a coherent consultation and participation approach confirm the existence of such links and the fact that coherence also regards the Union's procedural actions and policies. This is relevant in particular from the perspective of ensuring horizontal coherence of the EU system, and in-between the various policies and policy areas of the EU. In section 2.3.5 it was described that the umbrella notion of 'good administration' carries an important - horizontal - coherence-building capacity as well.

The Commission's statement in the White Paper that incoherent and inconsistent policies and legal rules are ineffective in that they make the system incomprehensible, that they lead to (legal) uncertainty and entail potentially high costs – which in turn may lead to distrust in the overall system - is therefore relevant to both the Union's substantive and procedural actions and policies.

2.4. Specific procedural requirements and institutional practices

In this section we will consider what kind of specific procedural requirements in relation to soft rule-making may have developed either on the basis of secondary law provisions in certain areas or on the basis of institutional practice. First we will turn to requirements that have developed regarding soft administrative rule-making by the Commission, networks and agencies respectively, and then to those within the framework of soft regulatory rule-making processes. With regard to the latter, we will focus on the example of economic and fiscal governance. As observed, these discussions do not seek to be exhaustive but indicative of developing procedural rules and practices.

2.4.1. Regarding the Commission's soft administrative rule-making

Given the fact that interpretative acts of the Commission are adopted within the framework of its general task as guardian of the Treaties and that no specific secondary acts underlie their adoption (see section 2.2), specific procedural requirements do not emerge on such grounds. **Interpretative acts** are adopted on the basis of the Commission's own initiative, with no specific outside involvement.⁹⁷ Yet, consultation on interpretative acts does

⁹⁵ Cf. also the Lisbon European Council, Presidency Conclusions, 24 March 2000, where the OMC is brought under the heading of 'Putting Decisions into Practice: A More Coherent and Systematic Approach.

⁹⁶ Cf. M. de Visser, *Network-based governance in EC law. The example of EC competition law and EC communications law*, Hart Legal Publishers, 2009, p. 329.

⁹⁷ Cf. Senden 2004, *op.cit.*, p.487.

occasionally occur in the Commission's practice,⁹⁸ without it being possible to discern a deliberate, consistent approach in this respect. As seen in section 2.3.2, they are usually published.

Decisional acts are of particular importance when it comes to the Commission's single-case decision-making, as they set out how the Commission intends to apply EU law to individual cases at hand. So, these acts are adopted in areas where the Commission enjoys (wide) discretionary implementing powers, such as in the fields of competition law and state aid. Direct administration by the Commission as expressed in its individual decision-making will thus very much depend on the existence and contents of such general rule-making acts, underlining that these two aspects of direct administration should be considered very much in conjunction.

Increasingly, the practice is that the Commission first adopts and publishes a draft version of its decisional acts. These drafts are drawn up on the basis of developments that have taken place in legislation, case law, and policy (re)views, and interested parties are invited to comment on these draft versions. Both the draft versions and the outcome of the **consultation process** are **regularly published**, e.g. in informative communications. The finally adopted decisional rules may also be publicly notified, in addition to publication in the C-series. But this occurs at the discretion of the Commission. It remains largely unclear when such a (broad) consultation process is considered obligatory, whether the period for reaction is sufficient and what account the Commission actually takes of the observations made by interested parties, and whether all the interests involved and views expressed are equally balanced, including those of other Union institutions. Yet, one should note that in some cases a more formal consultation process regarding the adoption of decisional acts applies and in others a far more **obscure process**.

A telling example as regards the latter situation is provided in the 'Guidelines on a common understanding of Article 11b(6) of Directive 2003/87/EC as amended by Directive 2004/101/EC.' The threat of fragmentation in the EU carbon market created pressure for clearer regulation which led the Commission at the request of Member States and carbon market participants to launch a process of 'voluntary coordination' of Member State regulation of large hydro projects.⁹⁹ The resulting guidelines aim to arrive at a common understanding of the relevant provisions in the Directive and to ensure that Member States use the same criteria of assessment. They were drawn up by an ad hoc working group and subsequently endorsed by the Climate Change Committee comprising of representatives of the Member States. As Scott notes, the guidelines were adopted on the basis of a procedure 'characterized by an extreme absence of transparency.'¹⁰⁰ The Commission's website barely contains any information on the procedure, the participating stakeholders have not been identified and no information has been provided about their views. While the document can be found on the Internet,¹⁰¹ it has not been formally published in the Official Journal or as a COM-document. A possible explanation for this is the fact that the guidelines are a joint document, it being said in the introduction to stem 'from an attempt to reach an agreement among the Member States and the Commission on the interpretation and application of Article 11b(6) of the Linking Directive.'

The consultation process may be **more formal** if secondary legislation underlies the adoption of a decisional act. Such legislation sometimes enables – or even obliges - the

⁹⁸ Cf. Levefre 2004, *op.cit.*, p. 821.

⁹⁹ This account draws on Scott 2011, *op. cit.*, pp. 334 et seq.

¹⁰⁰ *Ibid.*, p. 336.

¹⁰¹ http://ec.europa.eu/clima/policies/ets/linking/ji-cdm/docs/art11b6_guide_en.pdf.

Commission to adopt a decisional act, while stipulating at the same time certain procedural requirements. A clear example is in Directive 2010/40,¹⁰² of which Article 9 states:

'The Commission may **adopt guidelines and other non-binding measures** to facilitate Member States' cooperation relating to the priority areas in accordance with the **advisory procedure** referred to in Article 15(2).'

In a similar vein, Article 23(4) of Directive 2010/63 on the protection for animals used for scientific purposes¹⁰³ provides that:

'**Non-binding guidelines** at the level of the Union on the requirements laid down in paragraph 2 may be adopted in accordance with the **advisory procedure** referred to in Article 56(2).'

The advisory procedure envisaged in both cases is that under Articles 3 and 7 of Decision 1999/468/EC (the old Comitology Decision), also having regard to its Article 8. This procedure allows for a certain involvement in and control of the Commission's exercise of implementing powers by national representatives and the European Parliament. Certain directives may even provide for more stringent control of national representatives and the European Parliament, as Directive 2011/24/EC on the application of patient's rights in cross-border healthcare¹⁰⁴ illustrates. This Directive provides that the Commission 'shall adopt guidelines supporting the Member States in developing the interoperability of ePrescriptions', according to the regulatory procedure as contained in the Comitology Decision. It does not specify whether these guidelines are to be of a binding or non-binding nature.

From these examples one can already infer that the legal framework that the Treaty of Lisbon has introduced for the control of the Commission's exercise of implementing powers in Article 291 TFEU, in particular in its Paragraph 3, is not necessarily restricted to the adoption of legally binding acts but can also be declared applicable to soft implementing acts of the Commission. Both types of act are thus **potentially subject to control under the comitology system**. The new Comitology Regulation, replacing Decision 1999/468/EC allows for such a reading, given that it speaks in a general way of 'implementing acts' without distinguishing between binding and non-binding acts.¹⁰⁵

On a side note, we also observe here that it can be inferred from case law of the ECJ that in areas where a specific duty of cooperation between the Commission and the Member States exists, such as in the area of state aid, the Commission may not proceed to unilateral modification of decisional rules that have been adopted in such an area, if they have been accepted by the Member States and have become binding on them.¹⁰⁶

2.4.2. Regarding networks

Networks have developed in many areas and sectors of EU law, including those of competition law (ECN), telecommunications (ERG) and the environment (IMPEL, EEA). In

¹⁰² Directive 2010/40 of the European Parliament and the Council on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, *OJ* 2010, L207/1.

¹⁰³ Directive 2010/63 of the European Parliament and the Council on the protection of animals used for scientific purposes, *OJ* 2010, L276/33.

¹⁰⁴ Directive 2011/24/EU of the European Parliament and the Council on the application of patients' rights in cross-border healthcare, *OJ* 2011, L88/45.

¹⁰⁵ Regulation (EU) 182/2011 of the European Parliament and the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* 2011, L55/13.

¹⁰⁶ See e.g. Case C-135/93, *Spain v. Commission*, [1995] ECR I-1673, Paragraph 38.

certain cases, such networks have culminated in the creation of agencies, for instance in the area of energy (ACER) and the financial markets (EBA, EIOPA, ESMA) (see section 2.4.3). Networks are predominantly geared towards the administration of legal rules and the effective enforcement of law.¹⁰⁷ The network trend has been analysed in terms of infiltration into national policy areas in different stages, labelling them as **Trojan horses**.¹⁰⁸ In the most far-reaching stage, they have important centralising effects on the EU-level and *de facto*, national supervisory authorities will work more as the extended arm of the Commission than for their own Member State.¹⁰⁹ The institutional and procedural design and functioning of networks raises a number of issues from the perspective of input or procedural legitimacy and judicial protection, both at the level of direct and indirect administration. We confine ourselves here to briefly indicating these problems in relation to the **European Competition Network** (ECN), often seen as the mother of all networks, while also highlighting the checks and balances that it provides for.¹¹⁰

The ECN's main task is to ensure effective decision-making and consistent application and enforcement of EU competition rules at both EU and national level. The Network has a **weak legal basis**, as its establishment can only be traced back to two provisions¹¹¹ which impose a duty of cooperation and of exchange of information, the creation of a network between the Commission and the national competition authorities (NCAs) merely being mentioned in recital 15 of the preamble of the Regulation. The Network was created by way of a Commission notice only, as a forum for discussion and cooperation, lacking the independent legal personality European agencies have.¹¹² Yet, the ECN has developed into more than just such a forum, as it also has **decision-making power**. In particular, it may decide on the most appropriate forum to deal with a case (the best placed authority).¹¹³ The allocation of a case¹¹⁴ can have huge consequences for the complainant since it can be viewed as an implicit way of deciding that the European competition rules have not been violated and therefore the complaint will not be found admissible. However, these allocation decisions have a soft law status and are therefore not open to appeal. There is also the practice of 'informal discussions'. While the exchange of information can have important consequences - for detection, private enforcement and leniency -, there is no right of access to records (if they exist) or right of appeal.¹¹⁵

The ECN also **issues policy guidelines**. Although these qualify as soft law, national supervisory authorities in practice usually comply with them. Since these authorities are part of the Network and collaborate in the drawing up of the European guidelines, it is because of principles of good governance such as legitimate expectations, due care and equal treatment that they also have a duty to act in accordance with them.¹¹⁶ National

¹⁰⁷ De Visser 2009, *op.cit.*, p. 207.

¹⁰⁸ A. De Moor-van Vugt, Netwerken en de europeanisering van het toezicht, *SEW* nr. 3, maart 2011, pp. 94-102.

¹⁰⁹ *Ibidem*. See also A. Ottow, Europeanisation of the supervision of competitive markets, *European Public Law*, 2012, no. 1.

¹¹⁰ The discussion below on the ECN has also benefited from the presentation of Wouter Devroe on the European Competition Network at the Ius Commune Conference at Utrecht University on November 20, 2011.

¹¹¹ Arts. 11 to 16 of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* 2003, L1/1.

¹¹² Commission Notice on cooperation within the Network of Competition Authorities, *OJ* 2004, C101/03.

¹¹³ Article 11 (2) and (3) oblige the national supervisory authorities and the Commission to inform each other of cases which will be dealt with in accordance with the procedures of the ECN.

¹¹⁴ Art. 11 Reg. 1/2003.

¹¹⁵ Art. 12 Reg. 1/2003.

¹¹⁶ See also S. Lavrijssen-Heijmans and L. Hancher, European Regulators in the Network Sectors: Revolution or Evolution? *TILEC Discussion Paper*, 2008-024, pp. 10-11. Accessible on: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162164

courts also take these policy guidelines into account because they have been agreed on by the national authorities and because they may not possess the specialized expertise to pass judgments on these texts.¹¹⁷ However, since these guidelines have a soft law status, they cannot be challenged under Art. 263 TFEU, unless it can be established that they intend to have legal effects.¹¹⁸ An additional problem concerns the extent to which networks qualify as a Union 'body' in the sense of this provision at all (see section 2.5.1).¹¹⁹

While legal-institutional arrangements of separate networks may be quite different, depending on the 'stage of infiltration', the example of the ECN clearly shows that, while such a network is generally perceived as an efficient device of cooperation between the EU and national level, it raises **fundamental problems for individuals** from the point of view of transparency, legal certainty and judicial protection. It is therefore essential to consider what kind of procedural guarantees are provided for in its legal framework. In the discussion below, we will briefly contrast this with procedural guarantees that can be found within BEREC (Body of European Regulators for Electronic Communications) in the area of telecommunications, which has recently replaced the European Regulators Group (ERG).¹²⁰

Openness and transparency

The primary tool which these two networks use to ensure transparency is through their **website**. The BEREC website contains considerably more information than the website of the ECN. The rules of professional secrecy that apply to the ECN members could be an explanation for that. Except for the information which is subjected to these rules, the ECN-related information is available online.¹²¹ The agenda and conclusions of the meetings of the Plenary are published on the BEREC's website. Plenary meetings are mostly accompanied by press releases and public debriefings to which all interested parties are invited through the website or an email alert. In terms of **access to documents**, the BEREC has committed itself to Regulation 1049/2001 on Access to Documents for EU Institutions.¹²² The ECN has an Advisory Committee on Restrictive Practices and Dominant Positions according to Article 14 of Regulation 1/2003. The Advisory Committee can recommend the publication of its opinion. If the Commission agrees to this publication, it will take place simultaneously with the publication of the Commission's decision.¹²³

Participation and consultation

The aforementioned **Advisory Committee** is the comitology committee for competition matters.¹²⁴ This Committee shall be composed of representatives of national competition authorities when individual cases are discussed. For matters other than individual decisions,

¹¹⁷ De Visser 2009, *op.cit.*

¹¹⁸ For a more elaborate discussion of the problem of judicial protection in the context of networks, see De Visser 2009, *op.cit.* and M. Eliantonio, Effectieve rechtsbescherming en netwerken: een problematische verhouding, *SEW* 2011, nr. 3, pp. 116-122.

¹¹⁹ De Visser 2009, *op.cit.*, p. 328 denies such a status to networks.

¹²⁰ Regulation 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications and its Office, OJ 2009, L337/1. Institutionally, BEREC (replacing the former European Regulators Group) finds itself in-between a network and an agency, so it appears. From recital 6 of the Regulation, it appears that "BEREC should neither be a Community agency nor have legal personality. BEREC should replace the ERG and act as an exclusive forum for cooperation among NRAs, and between NRAs and the Commission, in the exercise of the full range of their responsibilities under the EU regulatory framework."

¹²¹ De Visser 2009, *op.cit.*, p. 58.

¹²² Art. 22 of Regulation 1211/2009, *op.cit.*

¹²³ Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C 101/03, par. 68.

¹²⁴ De Visser 2009, *op.cit.*, p. 210.

an additional Member State representative competent in competition matters may be appointed. It is a forum where experts from various competition authorities discuss individual cases and general issues of EU competition law. In a number of situations the Commission can take a decision only after prior consultation of the Committee.¹²⁵ The Commission has to take 'utmost account' of the opinion and inform the Committee of the manner in which it has done so.¹²⁶ Yet, this only concerns single-case decision-making instances. If the Commission is of the opinion that a case dealt with by a NCA should be discussed by the Advisory Committee, it can put this case on the agenda of the Committee, but only after having the respective NCA informed. However, the Committee does not give a formal opinion on this. Furthermore, the Committee can function as a forum for the discussion of allocating cases. Apart from this, the Committee will be consulted on draft Commission regulations as well as the notices and guidelines which the Commission can adopt.¹²⁷ The law does not stipulate any due process criteria for the ECN nor can such rules be found in self-authored soft law instruments.¹²⁸ It is noteworthy though, that even in the absence of such rules, within the framework of the ECN **public consultations** are conducted when it comes to the adoption or revision of policy guidelines.¹²⁹ Yet, the initiative seems to lie mostly with the Commission in this regard.

By contrast, the **BEREC** is mandated by law to take **due care of process rights**. With regard to consultation, Article 17 of the BEREC Regulation stipulates that "Where appropriate, BEREC shall, before adopting opinions, regulatory best practice or reports, consult interested parties and given them the opportunity to comment within a reasonable period." Except for cases of confidentiality as provided for in the Regulation, the results of the consultation procedure have to be made publicly available. Following the procedures developed within the ERG, the consultative document is published on the BEREC's website and responses are solicited either through written submissions or through participation in a public hearing.¹³⁰ The draft document and the opinions received and the final document are all available online. Which modality is used will be determined on a case by case basis. However, most frequently a 'normal' consultative procedure is followed as opposed to a public hearing. With a few exceptions, the input has been given by market participants and major trade organisations. Consumers and end-users hardly make their opinions known. BEREC furthermore organizes regular meetings with stakeholders, for instance prior to plenaries or by means of workshops on major regulatory challenges. The BEREC has committed itself to **reflect the input of contributions** received in its final document. It explicitly indicates why it does or does not agree with a comment. The BEREC documents furthermore generally state the reason on which they are based.¹³¹ It must also be noted that under Article 15 of the revised Framework Directive¹³² the Commission itself has been obliged to adopt a recommendation on the relevant product and service market, but only "after public consultation including with national regulatory bodies and taking the utmost

¹²⁵ I.e. decisions pursuant to arts. 7, 8, 9, 10, 23, 24(2) or 29(1) of the Regulation.

¹²⁶ Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C 101/03, para. 59.

¹²⁷ *Ibid.*, paras. 48-68.

¹²⁸ De Visser 2009, *op.cit.*, p. 353.

¹²⁹ http://ec.europa.eu/competition/ecn/index_en.html

¹³⁰ E.g. BoR(10)27 final, 'BEREC procedures for public consultations held by BEREC' [2010]. Accessible on: http://erg.eu.int/doc/berec/bor_10_27_rev1.pdf

¹³¹ De Visser 2009, *op.cit.*, pp. 354-355./ BEREC procedures for public consultation held by BEREC, *op.cit.*, article 4.

¹³² Directive 2002/21/EC, OJ 2002, L108/33 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC, OJ 2009, L337/37 and Regulation 544/2009, OJ 2009, L167/12.

account of the opinion of BEREC". After its revision in 2009, this provision also prescribes that a comitology procedure be followed in the adoption of the recommendation.

Administrative and political accountability

At the level of ex-post administrative review, it should be considered what the potential role of the **European Ombudsman** (EO) is. De Visser has concluded that as the ECN and the ERG (now BEREC) do not formally have the status of a Union body, it is not clear whether the Ombudsman is competent to assess complaints regarding their functioning. In this regard, cases brought before the EO indicate that parties tend to present their complaint to the Commission whenever the conduct of the Network is at stake. These cases have regarded access to documents¹³³ and the leaking of confidential information.¹³⁴ The EO has encouraged the Commission and the national regulatory authorities to explore appropriate mechanisms to ensure the security of such information and documents. The situation for the BEREC seems different now, however; even if it has not been given legal personality, it has been established by way of a Regulation on the basis of the old Article 95 TEC (now 114 TFEU) and equipped with an office. As such, its actions should be admissible for administrative review by the EO.

Regarding its political accountability, the BEREC is required to submit **annual reports** on its functioning to the Commission, the Parliament, the Council, the Economic and Social Committee and the Court of Auditors (Article 5(5)). No separate reports on the functioning of the ECN exist. Information on the Network is provided by the Commission's annual reports on competition policy, which includes a separate section on the ECN. The reports of both networks are publicly available through their websites. The BEREC is not directly responsible to the European Parliament, but the **European Parliament** may request the Chair of the Board of Regulators to address it on relevant issues relating to the activities of the BEREC. Since the ECN does not have a chair, a similar possibility does not exist for the ECN. The Parliament also monitors the Commission through the asking of oral and written questions (Article 230 TFEU).

2.4.3. Regarding agencies

Agencies have been established on a case-by-case basis and with a wide variety of functions. As this may give rise to problems of transparency, legal certainty and accountability, the Commission has tried to develop a common framework for their governance. This has led to the adoption of a Regulation on executive agencies.¹³⁵ Regulatory agencies are as yet not subject to such a common framework, although the Commission has made a proposal for an inter-institutional agreement.¹³⁶ In 2008, the Commission tried to re-launch the discussion, but so far without concrete results.¹³⁷ The content of these policy documents largely reflect existing practices with a view to generalising them.

¹³³ Case: 2681/2007/PB (ERG). Accessible on: <http://www.ombudsman.europa.eu/decision/en/072681.htm>

¹³⁴ Case: 1342/2007/FOR (ECN). Accessible on:

<http://www.ombudsman.europa.eu/cases/decision.faces/en/3972/html.bookmark>

¹³⁵ 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* 2003, L11/1.

¹³⁶ Proposal for an inter-institutional agreement on the operating framework for the European regulatory agencies, *COM* (2005) 59 fin.

¹³⁷ Communication from the Commission to the European Parliament and the Council, 'European agencies – The way forward', *COM* (2008) 135 fin.

For the purposes of this report it is necessary to focus on those **agencies** that *de iure* or *de facto* engage in the **exercise of general (both hard and soft) rule-making powers**. Following Chiti, we can understand by European agencies, bodies: (i) aimed at establishing and managing a plurality of cooperative relationships involving both the Commission and the Member States' administrations, and (ii) enjoying a certain degree of autonomy from the Commission, but not fully isolated from the Commission's influence.¹³⁸ The ECJ in its judgment in the **Meroni** case has prohibited the delegation of powers involving a wide margin of discretion, i.e. of regulatory decision-making powers to third parties.¹³⁹ The institutional landscape of the EU has, nevertheless, developed in such a way as to create agencies and impose tasks on them that come quite close to regulatory decision-making and policy-making powers, and even increasingly so.¹⁴⁰

The **typology** elaborated by Chiti gives great insight, as he distinguishes agencies on the basis of how they are involved in the exercise of rule-making powers:¹⁴¹

- (i) European agencies provided with genuinely final administrative decision-making powers;
- (ii) European agencies coordinating common systems providing an advisory or technical assistance to European and national institutions;
- (iii) European agencies coordinating common systems responsible for the production and dissemination of high-quality information in certain specific sectors of EU action.

The third category will be excluded from our analysis, as information agencies are not formally granted any rule-making powers, nor do they appear to engage in *de facto* rule-making. The so-called executive agencies which coordinate EU programmes, based on Regulation 58/2003/EU,¹⁴² are excluded for the same reason.

Agencies of the first category include the Office for Harmonization in the Internal Market (Trademarks and Designs - OHIM), the Community Plant Variety Office (CPVO), the European Chemicals Agency (ECHA) and, most recently, the three new European Supervisory Authorities (ESAs): the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). Most of these agencies are engaged in some sort of **regulation by soft law**.¹⁴³ The newly established ESAs have even been delegated the task to develop draft regulatory technical standards in areas that fall within the scope of the powers delegated to the Commission under EU financial services law according to Article 290 TFEU. The Commission may 'rubberstamp' these standards or reject them fully or in part and/or adopt amendments, but the latter two options only after consultation of the ESA in question. Experience has taught us, however, that the Commission, with regard to older agencies, tends to opt for the former alternative ('rubberstamping') which increases the *de facto* power of the agencies EU even more.¹⁴⁴ These ESAs may also develop draft implementing technical standards in those areas of financial services law that provides the Commission with implementing powers under Article 291 TFEU.¹⁴⁵

¹³⁸ E. Chiti, An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies, *CMLRev.* 2009, p. 1395 et seq. Cf. also Shapiro 2011, *op. cit.*

¹³⁹ Case 9-56, *Meroni*, [1958] ECR 133, 152. See also section 2.2.1.

¹⁴⁰ E. Chiti, 'European agencies' rule-making. Powers, procedures and assessment', paper presented at the ReNEUAL Workshop – Rulemaking Working Group, November 4, 2011, Luxembourg. Not (yet) published. On file with the authors.

¹⁴¹ *Ibid.*

¹⁴² OJ 2003, L 11/1, *op. cit.*

¹⁴³ Chiti 2011, *op. cit.*, p. 5.

¹⁴⁴ R. Dehousse, 'EU Law and the Transformation of European Governance' in: C. Joerges and R. Dehousse, *Good Governance in Europe's Integrated Market*, Oxford: Oxford University Press 2002, p. 223.

¹⁴⁵ Chiti 2011, *op. cit.*, pp. 5-6.

The second category concerns European agencies that coordinate common systems providing advisory or technical assistance to European and national institutions. This category includes the European Network and Information Security Agency (ENISA), the Agency for Cooperation of Energy Regulators (ACER), the European Maritime Safety Agency (EMSA) and the European Railway Agency (ERA). The European Aviation Safety Agency (EASA) does not merely assist the Commission in exercising rule-making powers, but also adopts **technical guidelines** directly which are subject to the 'comply or explain'-rule.¹⁴⁶ The European Medicines Agency (EMA) is an example of an agency that has *de facto* engaged in issuing technical, scientific and procedural guidance concerning the implementation of the EU pharmaceutical legislative framework.¹⁴⁷

Focussing on these two types of agencies, differences between older and newer agencies catch the eye. The institutional frameworks of older agencies are of an *ad hoc* nature, whereas the institutional designs of newer agencies reveal a **more systematic approach**, e.g. in terms of composition, possibilities of appeal etc. The regulations establishing the new European Supervisory Authorities - the EBA, ESMA and EIOPA - are thus highly comparable: identical choices have been made e.g. regarding the involvement of stakeholders. Yet, the issues and challenges with which both newer and older agencies are faced are still highly similar. Procedural guarantees with the objective of applying good governance principles are therefore relevant to all agencies. The various strands of **procedural guarantees** that can be distinguished concern:

- openness and transparency;
- participation and consultation;
- giving reasons;
- judicial review;
- accountability.

In the following paragraphs, each of these elements will be analysed in further detail by comparing the institutional arrangements for various agencies.

Openness and transparency

A wide range of obligations has been included in the regulations establishing agencies with a view to making their actions and decisions public. The difference between older and **newer agencies** is clearly manifest: the establishing regulations of newer agencies generally include a **broader collection of transparency obligations**. Furthermore, new agencies are increasingly subject to a more radical transparency obligation, e.g. to publicise the results of public consultation processes.

Various agencies pursue their own transparency policy, partly executing the obligations resulting from its establishing regulations, partly in addition to them. The EMA for instance hosts a website containing actions this agency has taken (recommendations, evaluation, reports), as well as documents on the internal procedures. It not only targets the medicine industry, but also patients and carers, healthcare professionals and the media.¹⁴⁸ The public is addressed by including summaries especially intended for non-professionals. The EMA does not just publish final decisions on authorization, but as from 1 March 2012 also

¹⁴⁶ Article 18(c) and Article 19(2)(b) Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, *OJ* 2008, L 79.

¹⁴⁷ Chiti 2011, *op. cit.*, pp. 7-8.

¹⁴⁸ Website: www.ema.europa.eu.

applications from the industry, opinions and recommendations.¹⁴⁹ The transparency policy of the EMEA has therefore been substantially broadened, after a European Ombudsman recommendation to this end issued in 2010.¹⁵⁰ The new ESAs pursue similar, perhaps even stronger transparency policies. EIOPA for instance publishes a wide range of documents online, from its annual reports, its submissions to the Commission to reports and letters of comments (from committees and institutions other than the European Commission).¹⁵¹

The scope of the transparency policies of **older agencies** is often limited, and **more *ad hoc*** in nature compared to the systematic approach pursued by the newer agencies. Formal transparency obligations are usually limited as well, but substantial transparency policies have nevertheless been developed in the practice of such agencies, even in the absence of formal obligations. The OHIM for example publishes information on refused trademarks, opposition decisions, cancellation decisions and Board of Appeal decisions.¹⁵²

More generally, the following transparency obligations appear in the establishing regulations of the agencies under consideration here, but not with the same frequency. The list runs from the most frequently applied obligations to the more specific obligations applied by only a few agencies:

- periodical publications, e.g. annual reports on the functioning or work programmes of the agency in question;
- internal rules of procedure;
- application of the Regulation on Access to Documents, active publication of decisions (not just upon request) (e.g. trademarks);
- general obligation for agencies that are entrusted with the task of gathering and analysing data and statistics to make such information available, e.g. through databases;
- exchange of information between EU agencies and national authorities;
- results of consultation (e.g. advice of experts).

The first two types of transparency obligations are very common and have been formulated by the Commission in its proposal for an **Institutional Agreement for regulatory agencies**.¹⁵³ Adoption of this Agreement would in this respect amount to codification of an existing practice according to which agencies are already subject to such obligations. Also the Access to Documents Regulation is now generally applied to agencies. With regard to newer agencies, a reference to this regulation is a standard provision of the establishing regulations. Amendments of such establishing regulations have included references to the Access to Documents Regulation to include them in the scope of application as well. Oppositely, the obligation to make public the results of consultation procedures is specific to the new ESAs (many other agencies are not legally obliged to consult stakeholders, see below).

These obligations on the basis of the founding regulations of agencies seem rather complete. Shapiro recently concluded in the same vein that EU agencies allow for fairly high levels of transparency.¹⁵⁴

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http://www.ema.europa.eu/ema/index.jsp?curl=pages/news_and_events/news/2012/02/news_detail_001437.jsp&mid=WC0b01ac058004d5c1.

¹⁵⁰ <http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/4810/html.bookmark>.

¹⁵¹ <http://eiopa.europa.eu/publications/index.html>.

¹⁵² <http://oami.europa.eu>.

¹⁵³ COM(2005) 59 fin, *op. cit.*, Article 16.

¹⁵⁴ Shapiro 2011, *op. cit.*, p. 119.

Participation and consultation

As discussed in sections 2.3.1 and 2.3.2, the TEU and TFEU contain several provisions regarding the participation and consultation of civil society, parties concerned, citizens and representative associations. However, while Article 15 TFEU has been seen to impose a mere duty of openness on EU institutions, bodies, offices and agencies alike with a view to ensuring participation of civil society, Article 11 TEU only covers the EU institutions and as regards the duty of consultation only the Commission. Participation is especially relevant to agencies, which strengthen technocratic legitimacy at the expense of democratic legitimacy. However, quite some regulations do not contain any specific provisions on the participation of stakeholders. A few of the pre-Lisbon agencies, nevertheless, already included mechanisms for participation. The regulations establishing the OHIM and the CVPO thus contain **'light' forms of participation**, with Article 122(2) of the OHIM Regulation providing that 'The members of the Administrative Board may, subject to the provisions of its rules of procedure, be assisted by advisers or experts.' As the assistance of advisers and experts must be laid down in the rules of procedure of the Administrative Board, involvement of the advisers is not entirely at the discretion of the authorities concerned. The same is true for the CVPO whose establishing regulations contain a similar provision. Participation within the framework of the CVPO and the OHIM is particularly geared at **bringing in expertise** in the decision-making process and therefore at strengthening the content of the decision ('output legitimacy'). A broad representation of relevant stakeholders ('input legitimacy') seems to be less relevant.

By contrast, the post-Lisbon **ESMA, EIPOA and EBA** Regulations contain much **more far-reaching mechanisms** to consult stakeholders. The respective articles from these regulations read:

'Article 30(1)

The Authority shall periodically organise and conduct **peer reviews** of some or all of the activities of competent authorities, to further strengthen **consistency** in supervisory outcomes. To that end, the Authority shall **develop methods** to allow for objective assessment and comparison between the authorities reviewed. When conducting peer reviews, existing information and evaluations already made with regard to the competent authority concerned shall be **taken into account**.'

The three agencies further contain provisions with regard to the involvement of the stakeholders in the decision-making process, such as Article 37(1) from the Regulation on the European Banking Agency (EBA):

'Article 37(1)

To help facilitate consultation with stakeholders in areas relevant to the tasks of the Authority, a **Banking Stakeholder Group** shall be established. The Banking Stakeholder Group shall be **consulted** on actions taken in accordance with Articles 10 to 15 concerning regulatory technical standards and implementing technical standards and, to the extent that these do not concern individual financial institutions, Article 16 concerning guidelines and recommendations. If actions must be taken urgently and consultation becomes impossible, the Banking Stakeholder Group shall be informed as soon as possible.'

Interesting elements of these regulations concern the institutional embedding of stakeholders into a Stakeholder Group, the specification of the type of activities on which they must be consulted and the use of peer review in order to increase consistency of the policies. Also, the involvement of these stakeholder groups is explicitly acknowledged in these regulations. In practice, the ESAs pursue consultation policies that are perhaps even more far-reaching. The Board of Supervisors of EIOPA has adopted a decision on the

Public Statement of Consultation Practices.¹⁵⁵ This decision includes policies on who to consult (not just market participants but also consumers and end users); on how to consult (on the basis of a special work programme, use different ways of consultation: hearings, written submissions etc.); and on the follow-up of consultation (publicise all results, giving reasoned feedback, publish final decisions and advice in which ‘due consideration’ will be given to the results of consultation). The purpose of consultation is defined as a **mix of input and output legitimacy arguments**:

‘1.1 The aim of consultation is to build consensus where possible between all interested and affected parties on what regulation or supervisory practice is appropriate and to improve the decision making process of EIOPA by:

- a) Benefiting from the expertise of market participants, consumers and beneficiaries, notably in assessing and analysing regulatory or supervisory issues and possible solutions;
- b) Assisting in the determination of whether a problem exists which requires a regulatory or a supervisory action, and the form of appropriate action;
- c) Providing opportunities for alternative approaches to a given issue to be considered;
- d) Obtaining information and views on the potential impact of proposals;
- e) Obtaining feedback on EIOPA’s work;
- f) Promoting understanding of the work of EIOPA and its role.’

Older agencies are not necessarily obliged to pursue such extensive and explicit consultation policies, but nevertheless do so increasingly. An interesting example is – again – taken from OHIM. In its process to move toward a more consistent interpretation of absolute grounds for rejection of registrations (thus underlining the output aspects), it identified a large number of stakeholders to be invited to react.¹⁵⁶

Stakeholder involvement runs the **risk of imbalanced involvement** of actors, as the decision-making process most of all increases the opportunities of those actors with the technical resources and specific motivation to participate.¹⁵⁷ The strong institutional embedding of stakeholder groups may even exacerbate this problem of imbalanced involvement, if no guarantees for balanced representation are provided for at the same time. This ‘deficit’ between participation and representation is a common issue with regard to independent agencies in any institutional system. When participation is linked to accountability, the issue emerges that accountability to the ‘**epistemic community**’ (a group of expert actors that share the same value, often know each other personally etc.) will play a much bigger role than accountability to society as a whole, the Member States etc.¹⁵⁸ In the context of stakeholder participation, the risk is therefore that stakeholders represented in stakeholder boards (or otherwise involved in the decision-making process), are members of the same epistemic community as the members of the agency in question. Without guarantees that members of such stakeholder groups represent broader societal interests, agency and stakeholders will form a closed circle of actors.

The issue of **independence** of agencies is closely linked to this problem. Officials of agencies are part of the same epistemic community as the employees of companies they are involved with. The move of an EFSA Head of Unit to a biotechnology company has resulted in a complaint of a German NGO to the European Ombudsman. The Ombudsman concluded that the EFSA had not properly carried out an investigation into the potential

¹⁵⁵ https://eiopa.europa.eu/fileadmin/tx_dam/files/consultations/Public_Statement_Consultations_Practices.pdf, June 2011.

¹⁵⁶ http://oami.europa.eu/ows/rw/resource/documents/QPLUS/convergence/figurative_marks.pdf.

¹⁵⁷ Shapiro 2011, *op. cit.*, p. 116.

¹⁵⁸ *Ibid.*

conflict of interest and called upon the EFSA to strengthen its rules and procedures in such 'revolving doors' cases.¹⁵⁹

Giving reasons

Agencies are subject to the obligation to give reasons for the decisions they adopt. In the **Artegodan case**, which will be analysed in more detail below, the ECJ held that this obligation not only applies to legally binding (individual) decisions but also to other acts which have legal effects, *in casu* scientific opinions of the EMEA. The failure to give reasons is a ground for annulment of the subsequent Commission decision.

Judicial review

Since the entry into force of the Treaty of Lisbon the ECJ has been granted general jurisdiction under Article 263 TFEU over acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties (see also section 2.5.1). The predecessor of Article 263 TFEU (Article 230 TEC) only referred to acts of EU institutions and, consequently, regulations establishing agencies had to include an explicit reference to this provision with a view to enabling judicial review. This arrangement was indeed included in various regulations.

Obviously, it depends on the powers of the agency in question whether judicial review of acts of agencies is imperative. Judicial review is especially necessary with regard to agencies with final administrative decision-making powers. The above-mentioned EBA, ESMA and EIOPA fall within this category and the respective establishing regulations indeed include possibilities to contest decisions of the authorities of the agencies in question 'in accordance with Article 263 TFEU'. Being based on 'post-Lisbon' regulations, the added value of such provisions in secondary legislation lies in the **specification of the type of acts** that are susceptible to judicial review. The general principle is that agencies with administrative decision-making powers first allow for an internal, administrative procedure of review. This procedure takes the form of an appeal to an **internal board of appeal**. Only decisions of such boards of appeal are subsequently susceptible to judicial review by the ECJ (except if decisions of authorities are not subject to appeal to their internal board of appeal).

Since the entry into force of the Treaty of Lisbon, Article 263 TFEU also includes the power for the EU legislator to 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'.

On the basis of the wording of this provision the EU legislator may allow for broader access for individuals to the ECJ. This may be understood from the greater distance of agencies to democratically legitimised institutions. Indeed, the viewpoint that a higher level of democratic legitimacy affects possibilities for judicial review is manifested in another post-Lisbon amendment to the procedure of Article 263 TFEU: the introduction of the concept of '**regulatory acts**' with regard to which individuals no longer have to prove 'individual concern'. The idea underlying this amendment is that as the European Parliament is not involved in the adoption of regulatory acts (i.e. delegated and implementing acts),¹⁶⁰

¹⁵⁹ <http://europa.eu/rapid/pressReleasesAction.do?reference=EO/11/20&format=HTML>. Cf. also the recent investigation of the EP into the functioning of agencies, including the recruitment of staff directly from industry by the EFSA, EASA, EMEA and ECHA. See <http://euobserver.com/18/115429>.

¹⁶⁰ As was clarified by the General Court in recent judgments: Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECR [2011] II-000, Paragraph 56; see also Case T-262/10, *Microban v Commission*, ECR 2011, II-000, Paragraph 21.

access to the ECJ should be subject to lower thresholds than in the case of legislative acts because citizens have at least been indirectly involved in their adoption through representation in parliament. For agencies the lack of indirect involvement of individuals is an even bigger issue, explaining the Treaty-based possibility to lower admissibility thresholds. However, the effect of the provision so far has been limited. For the pre-Lisbon agencies the provision is not relevant, unless the EU legislator decides to change them or proceeds to adopt a general act setting specific conditions for agencies. But the post-Lisbon regulations also fail to include any provisions to ease the admissibility criteria for individuals. The regulations establishing the EBA, ESMA and EIOPA do include judicial review possibilities, but simply refer to the text of Article 263 TFEU. The **strict admissibility criteria** therefore continue to apply.

Pre-Lisbon, the ECJ allowed for judicial review of acts of agencies even if the founding regulations were silent on that subject. In *Artegodan* the Court of First Instance concluded that given the 'vital role' of the scientific opinions issued by the Committee for Proprietary Medicinal Products, a **minimum level of judicial review** should be possible.¹⁶¹ It did not review these opinions directly, but via the Commission's decision that was based on them. The scope of review of such opinions has, however, been limited to the proper functioning of the committee, the internal consistency of the opinion and the statement of reasons.¹⁶² The ECJ affirmed this line of reasoning in the *Olivieri* case.¹⁶³ Although the Court recognized that the opinion of the EMEA was a preparatory measure and therefore as such not challengeable, the Court asserted its power to review the opinion of the EMEA in the light of an action for annulment of the Commission's decision.

Another observation regarding Article 263 TFEU concerns the wording of acts **intended to produce legal effects**' (see also section 2.5.1). This wording, which is a key element of Article 263 TFEU 1st paragraph, is also applied in the context of acts of agencies, thereby excluding judicial review of acts that *de facto* produce legal effects but without an explicit intention on the part of the agency to achieve this effect. In the context of agencies, acts concerning the interpretation of EU legislation warrant attention in this regard (e.g. in the form of decisions by the executive director concerning certification specifications and guidance material). Such interpretations may indeed produce legal effects when they result in a presumption of conformity when they are complied with, whereas additional proof needs to be submitted in case of non-conformity. The exact status of such acts is, however, unclear as no case law exists as yet on this point.¹⁶⁴

Although falling outside the scope of judicial review *strictu sensu*, the possibility to address the **European Ombudsman** should be mentioned here as well. Obviously, the admissibility is not a significant issue. The Ombudsman has explicit powers to review activities of European 'institutions and bodies'.¹⁶⁵ Even though the European Ombudsman's mandate for review (maladministration) is different from that of the ECJ (legality), the possibility to address the European Ombudsman to some extent mitigates the difficulties of access to court (see further section 2.5.2).

¹⁶¹ Joined Cases T-74/00, *Artegodan GmbH v. Commission*, [2002] ECR II-4945.

¹⁶² Paragraph 42 of the judgment.

¹⁶³ Case T-326/99, *Nancy Fern Olivieri v. Commission of the European Communities and European Agency for the Evaluation of Medicinal Products*, [2003] ECR II-6053.

¹⁶⁴ M. Busuioc, *The Accountability of European Agencies: Legal provisions and ongoing Practice*, Eburon: Delft, 2010, pp. 170-171.

¹⁶⁵ Article 2 of the Decision adopted by Parliament on 9 March 1994, OJ L 113/15 and amended by its decisions of 14 March 2002, OJ L 92/13 and 18 June 2008, OJ L189/ 25.

2.4.4. Regarding OMC processes: the example of economic governance

As seen in section 2.2.1, the open method of coordination lacks a general legal foundation and regulation in the Treaties, unlike the ordinary legislative procedure whose modalities are specified in Article 294 TFEU. In the areas in which this procedure has been declared applicable, it is therefore clear what the role and powers of the various institutions are. In cases where the OMC is being resorted to, however, it will depend on the specific, underlying legal basis what their role and powers will be, especially when it comes to the position of the Commission and the European Parliament. To illustrate this, in the two areas in which the Treaties can be said to provide rather explicitly for the use of the OMC, the **formal institutional modalities differ**. In the framework of Article 121 TFEU, the Council acts on the basis of a Commission recommendation with a view to issuing a recommendation for the broad economic guidelines of the Member States and of the Union, the European Parliament only being informed of this recommendation. According to Article 153(2)a TFEU, it is the European Parliament and the Council that may adopt measures to encourage cooperation between Member States with regard to different aspects of employment policy. This provision does not in fact envisage a role for the Commission in this process.¹⁶⁶ Interestingly, one must note that under the old text of this provision (Article 137(2)a TEC), the European Parliament was not assigned a role at all. Regarding the democratic legitimacy of OMC processes, some take the view that all institutions lose in the OMC, except for the European Council.¹⁶⁷

The above also implies that **no other uniform procedural guarantees** are provided for, in particular as regards the proclaimed inclusion in the decision-making process of other actors than those usually involved in the exercise of public power, such as relevant stakeholders, NGOs, social partners, civil society and regional and local authorities. The Treaties nor secondary legislation provide for any specific formal rules to shape this element of participation in OMC processes and as seen in section 2.3.2, the newly added Articles 11 TEU and 15 TFEU and the soft consultation guidelines do little to improve this situation. Importantly, empirical evidence also shows that so far democratic legitimacy is not sufficiently ensured through this proclaimed 'bottom-up' involvement of stakeholders and other interested parties.¹⁶⁸

Clearly, the legal foundation on which an OMC process is based and the soft rules and institutional practice that develop in this process will then determine what procedural guarantees apply and what their scope is. As Zeitlin has concluded, there is indeed no single template for the OMC but rather a collection of varying processes.¹⁶⁹ By way of example, we make a brief inquiry here into one such process, which has been qualified in the literature as a **'developed' OMC area**:¹⁷⁰ **economic and fiscal governance**. This area is particularly interesting for our purposes because it not only shows an interesting

¹⁶⁶ The text of the Treaty is not very clear on this point, as one might conclude on the basis of a reading of the whole second paragraph of Article 153 that such cooperation measures would have to be adopted pursuant to the ordinary legislative procedure. Yet, such a conclusion seemingly contradicts the new hierarchy of norms contained in Articles 288-289 TFEU, which link up form and procedure: acts adopted pursuant to the ordinary legislative procedure are legislative acts and (must) take the form of regulations, directives and decisions. These instruments are all legally binding instruments, leading to unification or harmonization of laws of the Member States. Article 153(2)a explicitly excludes the latter. The applicability of the ordinary legislative procedure can therefore logically only relate to Article 153(2)b.

¹⁶⁷ Hatzopoulos 2007, *op. cit.*, pp. 320-322.

¹⁶⁸ *Ibid.*

¹⁶⁹ J. Zeitlin, 'Introduction; The Open Method of CO-ordination in question', in: J. Zeitlin et al (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E.-Peter Lang, 2005, pp. 19-35.

¹⁷⁰ Szyszczak 2006, *op.cit.*, p. 486.

mix of soft and hard law approaches and instruments, but also a progressive development of procedural guarantees. It should be noted here again that we do not seek to be exhaustive in this analysis but rather aim at signalling relevant developments in this regard.

The development of the EMU governance structure has been described as '**learning by doing**'.¹⁷¹ Important legal documents regard the Treaty of Maastricht, the SGP in 1997 (amended in 2005)¹⁷² and the so-called 'six-pack' (2011), a legislative package consisting of five regulations and one directive providing for a new set of rules for economic and fiscal surveillance. Some mention will be made of the new Europact (2012) as well, but not with regard to the Eurozone-specific provisions.

Key element of the EU's fiscal policy is the Stability and Growth Pact (SGP), which was adopted in 1997 by way of the European Council Resolution on the SGP.¹⁷³ Next, two Council regulations more or less translated the content of the Resolution directly into hard law.¹⁷⁴ The Treaty of Maastricht already provided for the necessary legal bases to adopt these regulations. Although direct legal bases for legislation on these matters were available in the Treaty (Article 103(5) TEC, now Article 121 TFEU, and Article 104c TEC, now Article 126 TFEU respectively) and an additional Protocol, the Resolution of the European Council was considered necessary. The key factor in explaining this concerns the possibility to involve the European Council in the decision-making process, as this institution is not included in the legislative procedure. Here, the use of a soft law instrument therefore does not result from the wish to exclude hard law effects. Interestingly, the EU legislator in Regulation 1466/97/EC explicitly included the Resolution as a constitutive part of the SGP.

Although the nature of the two regulations is by definition hard law, they contain **softer elements** as well, such as the instruments for sanctioning Member States which include warnings, opinions, recommendations (which may be publicised) and reports to the EP. In terms of procedure, it contains softer elements as well, as sanctions are not automatically imposed on Member States that do not fulfil the criteria. Also, the European Commission may not initiate an infringement procedure for most aspects. In the words of Snyder: 'Though 'hard law', the EDP is full of the permissive language of politics.'¹⁷⁵ But soft law may not be as soft as one may think. Following the Council's decision not to adopt the Commission's recommendations to address the budget deficits in France and Germany, the Commission challenged these decisions before the ECJ in an action for their annulment.¹⁷⁶ The ECJ first of all ruled that - although not legally binding - these decisions indeed produce legal effects and should therefore be subject to judicial review. Secondly, it concluded that the rules governing the EDP are laid down in the Treaty and secondary legislation. As such, they provide an obstacle for the Council to adopt recommendations on the basis of an alternative procedure. **Procedural rules** such as those at issue are

¹⁷¹ I. Begg, Hard and soft economic policy coordination under EMU: problems, paradoxes and prospects, CES working paper series no. 103 p. 6.

¹⁷² Regulation 1055/2005/EC amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* 2005, L 174/1 and Regulation 1056/2005/EC amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ* 2005, L 174/5.

¹⁷³ *OJ* 1997, C236/1.

¹⁷⁴ Regulation 1466/97/EC on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* 1997 L 209/1; Regulation 1467/97/EC on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ* 1997 L 209/6.

¹⁷⁵ F. Snyder, EMU: 'Integration and Differentiation: Metaphor for the European Union', in: P. Craig and G. De Burca, *The Evolution of EU law*, 2011, pp. 687-716, p. 700.

¹⁷⁶ Case C-27/04, *Commission v Council*, [2004] ECR I-6649.

therefore **binding on the institutions** involved in the decision-making process. In this ruling, the ECJ assigned itself a role, whilst the possibilities for judicial review in the area of the EMU had previously been limited.¹⁷⁷ The new fiscal treaty¹⁷⁸ adds another element to this: the obligation to lay down fiscal discipline rules in national constitutions or similar legislative text. The enforcement of this element will even be subject to ECJ scrutiny. However, the jurisdiction of the ECJ will be limited to scrutinizing whether the Member States have adopted the mentioned provisions. The actual functioning of the rules on fiscal discipline is subject to the EDP governed by the Commission and the Council.

A similar pattern is revealed with regard to macroeconomic monitoring. The Broad Economic Policy Guidelines (BEPGs) were the key instruments here, until recently. They are directly based on Article 121 TFEU. Softer elements of the BEPG procedure concern inter alia the Commission's recommendation to the Council to adopt draft BEPGs and the subsequent Council recommendations (as well the European Council's conclusions). All concern non-legally binding instruments. Also the possible enforcement by warnings and recommendations to the Member States concerned are soft law instruments. Such recommendations may be publicised. Another accountability mechanism concerns the reports on the results of the multilateral surveillance procedure which the President of the Council and the Commission must make available to the European Parliament (Article 121(5) TFEU). The recent 'six-pack' has strengthened macroeconomic monitoring by introducing the Excessive Imbalance Procedure (EIP).¹⁷⁹ **Sanctions** similar to those applicable to the EDP may now be imposed on Member States which experience excessive imbalances.¹⁸⁰ Not only are sanctions a novelty in the area of macroeconomic coordination, but they have also been made subject to a rather high level of automatism by applying the reverse qualified majority rule to impose them (meaning that a QMV is necessary to block sanctions rather than to impose them). Also, in the first stage of the procedure, the Council may no longer simply ignore a recommendation by the Commission to issue a warning. It will need a majority of the Eurozone members to do so.

The alert mechanism for the detection of macroeconomic imbalances (Regulation 1176/2011/EU) is shaped by several **procedural guarantees** as well. The Commission must draft an annual report on the basis of a scoreboard which in turn is to be based on a set of indicators to be publicised by the Commission (Article 4(6)). The annual report must be sent to the Council, ECOSOC and the EP. The Council and the Eurogroup are then required to discuss the report (Article 3(5)). In case of problems, the Commission will start an in-depth review of the Member States concerned, the results of which are also to be publicised (Article 5(3)). The next step in the procedure is the opening of the Excessive Imbalance Procedure. The Council presents recommendations to the Member State concerned, which must then submit a corrective action plan. The Council examines this plan and will set a deadline for the measures to be taken. The Council may adopt a decision establishing non-compliance.¹⁸¹ The Regulation provides that most of these measures must be publicised or – alternatively – may be publicised by way of extra sanction.

The beginnings of all EMU procedures are thus 'soft' in nature, starting with the Commission adopting reports or recommendations. This has not changed by the

¹⁷⁷ The Excessive Deficit Procedures in question, however, ended in December 2004 when the Commission concluded that 'no further steps are necessary at this point under the excessive deficit procedure', Commission Communication of 14 December 2004, COM(2004) 813 fin.

¹⁷⁸ The text of which is available at: http://european-council.europa.eu/media/628439/st00tscg26_en12.pdf.

¹⁷⁹ Regulation 1176/2011/EU, OJ 2011, L 306/33.

¹⁸⁰ Regulation 1174/2011/EU, OJ 2011, L 306/ 8; Regulation 1177/2011/EU, OJ 2011, L 306/ 25.

¹⁸¹ It is yet unclear in what way the procedure from the Regulation will relate to the existing procedure regarding the Broad Economic Policy Guidelines.

consecutive changes to the governance system of the EMU. The **softer instruments** of the system are, however, more and more **complemented by a 'shadow' of possible sanctions** later on in the process. Also, the weaker position of individual Member States vis-à-vis the Commission and the Council in the decision-making process as well as greater openness of the procedures and the documents produced add to this shift in the balance between softer and harder elements.

With the latest amendments, the **role of the European Parliament** also warrants attention. Its position on both the softer and the harder elements of the procedure has improved: on the former through procedures such as the **Economic and Monetary Dialogue**, contained in Article 3 of Regulation 1173/2011/EU. This dialogue is meant to enhance transparency and accountability and entails the right for the EP to hear the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup. Yet, it is too early to conclude whether this new procedure will enable the European Parliament to effectively overcome the practical obstacles which are connected to the BEPG procedure. The position of the EP in the 'harder' parts of the EMU has been strengthened by a greater involvement in the legislative procedures. In particular its role in the adoption of this 'six-pack' has increased considerably, especially in light of the role that was assigned to the EP by the Treaty of Maastricht. Back then, the consultation procedure and the cooperation procedure were applicable in the area of the EMU, thereby withholding the European Parliament decisive power in the decision-making process. Some areas within the EMU are now subject to the ordinary legislative procedure, whereas others are still subject to a 'special' legislative procedure (consultation). Within the framework of the six-pack, the EP has treated the proposals (subject to different procedures) as a package, thereby including full scrutiny of those proposals that are formally subject to consultation only. A point of concern relates to the limited involvement of national parliaments, e.g. in the process of adopting national action plans.¹⁸²

Participation

Participation in the various areas of the EMU seems rather inclusive in terms of input of institutional actors and Member States. With regard to the BEPG procedure Deroose et al¹⁸³ refer to the following institutions and actors being involved: the Commission, the Economic and Financial Committee, the Economic Policy Committee, the Employment Committee, ECOSOC, COREPER, ECOFIN, the Employment, Social Policy Health and Consumer Affairs Council, the Competitiveness Council and the European Council. This affects output as well: it leads to stronger institutionalisation of the BEPG and contributes to a **'harder' institutional embedding** than may be expected based on the nature of its elements alone. Several **points of concern** have, however, been raised for instance (but not exclusively) with regard to the BEPG. Despite the number of institutions involved, important other actors and institutions still play no significant role. Popular involvement is even at a lower level. Chalmers et al¹⁸⁴ also point at the composition of the Council (ECOFIN) which may be problematic given the wide range of issues the BEPG may relate to. These conclusions may be applied to other areas of the EMU as well. Moreover, even after the adoption of the legislative six-pack the EMU remains characterized by cooperation

¹⁸² D. Chalmers et al, *European Union law* (2nd edition), Cambridge University Press 2010, p. 742.

¹⁸³ S. DeRoose, D. Hodson and J. Kuhlmann, 'The Broad Economic Policy Guidelines: Before and After The Re-Launch of the Lisbon Strategy', *JCMS* (2008), pp. 827-848, p. 828.

¹⁸⁴ *Ibid.*

between EU institutions and the Member States, mostly excluding any participation of societal stakeholders.

Effectiveness

Another point of concern relates to effectiveness. In a legal sense, enforcement possibilities in areas of the EMU are limited and will mostly rely on political dynamics. However, the trend in the EMU is clearly going in the direction of more effective ways of enforcement. Both the BEPG procedure and the SGP are cases in point regarding the strengthening of procedural guarantees, most notably with regard to the obligations of Member States to report to the European Commission. Doubts have been expressed, however, whether these guarantees actually lead to better realization of European economic policies. Also, guarantees in the form of such **reporting mechanisms** run the risk of becoming policy priorities in their own right, thereby losing the direct link with the underlying substantive rules, especially when such rules are wide-ranging and diverse. The instrument of peer pressure, which is part of the BEPG procedure, only works in a limited way.¹⁸⁵ Furthermore, early warning procedures such as against Germany and Portugal in 2002 and against Italy in 2004 failed because of the political nature of the decision-making process in the Council. Since then, however, the position of the Commission has been strengthened as it has become more difficult for the Council to ignore actions of the Commission. Other efforts to increase the effectiveness of the procedure have been geared to the **information obligations** for Member States (the 2005 reforms as well as the so-called 'six-pack'). The Member States are now subject to more intense and detailed obligations to report to the European Commission. Schelkle has observed, however, that this will not necessarily lead to a 'hardening' of the procedure.¹⁸⁶ The actual effects of the new rules for reporting to the Commission on the national priorities in economic policies, let alone the way such policies are effectuated, are therefore unclear.

2.5. Tools and mechanisms to ensure compliance and enforcement

In this section we move to the discussion of judicial and administrative review as two important devices for upholding the institutional and procedural principles and requirements in the context of soft rule-making.

2.5.1. Judicial review by the European Court of Justice

The issue of how to deal with the (non-)existence of procedural guarantees regarding soft regulatory and administrative rule-making acts must also be considered in connection with the level of judicial review and protection that is provided for regarding such acts. One may argue that the lower the level of judicial review that the system allows for of such acts, the higher the need will be for certain procedural guarantees in their adoption process. One can also argue the other way around; the less procedural guarantees are provided for in the soft rule-making process, the higher the need will be for judicial review of such rule-making. As will be seen below, the case law of the ECJ in relation to the consultation of interested parties seems to indicate a different logic.

¹⁸⁵ S. DeRoose et al 2008, *op. cit.*, p. 835.

Furthermore, while judicial review of legally binding, individual administrative decisions is largely ensured, the judicial review procedures contained in the TFEU present a **problem of access to court** – *locus standi* – for individuals in the case of claims for annulment of general EU acts and regarding the judicial review of soft law acts. As a result, the level of judicial protection against (possibly) unlawful soft rule-making is low. We will discuss this by considering the annulment procedure (Article 263 TFEU) and the preliminary rulings procedure (Article 267 TFEU).

The procedure for annulment

According to Article 263(4) TFEU ‘any natural or legal person’ can initiate an annulment procedure before the Court of Justice, provided that:

- (i) the act is addressed to him;
- (ii) the act is of direct and individual concern to him; or
- (iii) the act is a regulatory act which is of direct concern to him and does not entail implementing measures.

If the contested act is not addressed to the individual claimant, s/he therefore needs to meet certain *locus standi* conditions. Regarding possibility (ii), a measure is of direct concern if it directly affects the legal situation of the applicant and leaves no discretion to the addressees of the measure, who are entrusted with its implementation.¹⁸⁷ For the establishment of individual concern the **Plaumann test** is still leading:¹⁸⁸

‘Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them **by reason of certain attributes** which are peculiar to them or by reason of circumstances in which they are **differentiated from all other persons** and by virtue of these factors distinguishes them individually just as in the case of the person addressed.’¹⁸⁹

This test is difficult to meet and it has been concluded that it has prevented virtually all direct actions by private parties to challenge decisions addressed to others, except where the challenged decision had a retrospective impact.¹⁹⁰ Yet, the ECJ has appeared unwilling to loosen this interpretation, considering this to be a task for the European legislator.¹⁹¹

The Treaty drafters – in the Constitutional Treaty for Europe and its successor the Treaty of Lisbon – have indeed somewhat loosened the *locus standi* requirements for individuals by providing for the aforementioned possibility (iii): the *Plaumann* test can be avoided if the contested act qualifies as a ‘regulatory act’ that does not entail implementing measures. In that case, there is no longer any need to prove individual concern. Yet, the Treaties fail to give a definition of the term ‘**regulatory act**’: neither Article 263 TFEU nor the sources catalogue of Article 288 TFEU *et seq.* include a definition. The General Court has filled this gap in recent case law:

‘In view of the foregoing, it must be held that the meaning of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering **all acts of general application apart from legislative acts**. Consequently, a legislative act may form the subject-matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them.’

‘A measure is of general application if it applies to objectively determined situations and **produces legal effects** with respect to categories of persons envisaged generally and in the abstract [...]’¹⁹²

¹⁸⁶ W. Schelkle, EU Fiscal Governance: Hard law in the Shadow of Soft law?, *CJEL* (2007) 13, p. 717.

¹⁸⁷ Craig and De Búrca 2011, *op. cit.*, p. 491. See e.g. Case C-354/87, *Weddel & Co. BV v Commission* [1990] ECR I-03847, Paragraph 19.

¹⁸⁸ Craig and De Búrca 2011, *op. cit.*, p. 494.

¹⁸⁹ Case 25-62, *Plaumann & Co. v Commission*, [1963] ECR English special edition 00095.

¹⁹⁰ Craig and De Búrca 2011, *op. cit.*, p. 494.

¹⁹¹ See Case C-50/00P, *UPA*, [2002] ECR I-6677.

From this we may firstly conclude that while this amendment has enhanced the *locus standi* of individuals against delegated acts and implementing acts provided for in Articles 290 and 291 TFEU, it remains virtually impossible for them to obtain standing against legislative acts of the Union. Secondly, on the face of it the Court's ruling seems to exclude soft rule-making acts, given that regulatory acts are understood to be acts producing legal effects. Yet, many soft law acts can in fact be considered to produce some kind of legal effect, be it on the basis of principles such as legitimate expectations and equality or as a result of judicial interpretation.¹⁹³

A related issue that needs clarification is whether there is a distinction to be made between acts *producing* legal effects and acts *intended to produce* legal effects, as the first paragraph of Article 263 TFEU requires. According to this paragraph:

'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council **intended** to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union **intended** to produce legal effects *vis-à-vis* third parties.'

By their very nature, soft rule-making acts **lack the intent** of legal effects, but they may very well **produce legal effects**. While in its post-Lisbon version the above paragraph has enhanced the legal protection of natural and legal persons against administrative acts by providing for the possibility to initiate an annulment procedure also against acts of bodies, offices and agencies of the Union, this protection seems limited to binding, individual acts and seems to exclude those acts of agencies that involve the exercise of general soft rule-making powers. If the first paragraph is to be interpreted narrowly, this may only be otherwise if some intent of legal effects of such acts can be demonstrated. If it is to be interpreted more broadly, an action for annulment could also be initiated if one demonstrates that such an act produces legal effects.

The case law of the ECJ does not appear unequivocally clear in this regard. In the *IBM* case the ECJ decided that not only the formal legal acts of (now) Article 288 TFEU (regulations, directives, decisions) can be subject to review under (now) Article 263, but that one needs to look at the substance of an act and that the form in which it is cast is, in principle, immaterial. It specifically held that:

'According to the consistent case-law of the Court any measure **the legal effects are binding on**, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under article 173 for a declaration that it is void.'¹⁹⁴

From this quotation one might infer that the Court not so much emphasises the intent of legal effects, but rather the effects effectively producing themselves. Yet, in other cases the emphasis lies on intent. In the Case *Spain v Commission* (C-443/97), the Court declared inadmissible an action for annulment with regard to 'the Commission's internal guidelines concerning net financial corrections in the context of the application of Article 24 of Council Regulation (EEC) No. 4253/88'. According to the ECJ, these internal guidelines only reflect the Commission's 'intention to follow a particular line of conduct in the exercise of the power granted to it by Article 24 of the coordination regulation, [and] cannot therefore be

¹⁹² Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, [2011] ECR II-000, Paragraph 63; see also Case T-262/10, *Microban v Commission*, [2011] ECR II-000, Paragraphs 21 and 23.

¹⁹³ See for more detailed information Senden 2004, *op. cit.*

¹⁹⁴ Case 60/81, *IBM v Commission*, [1981] ECR 2639, Paragraph 9.

regarded as intended to produce legal effects.¹⁹⁵ The Case *France v Commission* (Case C-57/95) gives a clear example of a situation in which an action against a 'fake' soft law act has been declared admissible for challenge under Article 263 TFEU. In this case France started an annulment procedure against the 'Commission Communication on an Internal Market for Pension Funds'. The Commission contended that the Communication is of an interpretative and not of a binding nature.¹⁹⁶ The Court however concluded that it constituted an act intended to have legal effects of its own.¹⁹⁷ In more recent case law, the emphasis on the one hand is on intent, by stating that it is settled case law that acts open to challenge 'are any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects.' On the other hand, however, in applying this rule to the decision in case, the Court examines whether it produces binding legal effects, concluding that this is the case.¹⁹⁸ We are therefore still left with some uncertainty here, also as to the nature of the legal effects that may be considered sufficient in this regard (see also the discussion below on the preliminary rulings procedure).

Claimants can sometimes avoid the tough requirements of Article 263 by invoking **the plea of illegality**, provided by Article 277 TFEU, meaning the invocation of the non-applicability of an act of general application adopted by an institution, body, office or agency of the Union in a case before the ECJ. In the case *Dansk Rørindustri* the ECJ concluded that the Guidelines on the method of setting fines were rules of conduct designed to produce external effects. Given that such rules are of general application and may have binding effects, on certain conditions and depending on their content, the Court held that they can be the subject of a plea of illegality. However, this finding does not mitigate the problem that regular soft law acts that do not result in binding legal effects, but only have factual implications, are not eligible for annulment.¹⁹⁹

The preliminary rulings procedure

The preliminary rulings procedure of Article 267 TFEU offers natural and legal persons another possibility to obtain judicial protection against Union acts. The ECJ has jurisdiction to issue preliminary rulings concerning questions of national courts regarding (i) the interpretation of the Treaties and ii) the validity and interpretation of Union acts. For our analysis, two observations are in place. Firstly, the Treaty of Lisbon has added the general possibility of asking the ECJ also about the interpretation and validity of acts adopted by bodies, offices and agencies of the Union. Hence, this no longer depends on what the founding acts of such entities stipulate in terms of judicial reviewability of their actions, thereby enhancing the level of legal protection against them. Secondly, this category is broadly framed in the sense that 'acts' in general are eligible for review under Article 267, which seemingly includes soft law acts as well. The Court has confirmed this view. In the *Grimaldi* case the ECJ stated that while the review of acts with the nature of recommendations would not be possible under the annulment procedure, a preliminary ruling can be given on 'the validity and interpretation of all acts of the institutions without exception'.²⁰⁰ The Court has recently confirmed this view in the case *VB Pénzügyi Lízing Zrt.*²⁰¹

¹⁹⁵ Case C-443/97, *Kingdom of Spain v Commission*, [2000] ECR I-02415, Paragraphs 34-36. Cf. also Case T-185/05, *Italy v Commission*, [2008] ECR II-03207, Paragraph 41.

¹⁹⁶ Case C-57/95, *France v Commission*, [1997] ECR I-01627, Paragraph 14.

¹⁹⁷ Case C-57/95, *France v Commission*, [1997] ECR I-01627, Paragraph 23.

¹⁹⁸ Case C-370/07, *Commission v Council (CITES)*, [2009] ECR I-08917, Paragraphs 42-44.

¹⁹⁹ Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri* [2005] ECR I-05425, Paragraphs 211-212.

²⁰⁰ Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles*, [1989] ECR 04407, Paragraph 8.

²⁰¹ Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, [2010] ECR I-000, Paragraph 38.

In the cases *Friesland Coberco Dairy Foods* and *Algemene Scheeps Agentuur Dordrecht BV* the Court made it even clearer that soft law acts fall within the formula of 'all acts of the institutions of the European Union without exception'. In these cases it confirmed that a ruling can be given on the validity and interpretation of acts which do not intend to have legal effects.²⁰² For their **reviewability under Article 267 TFEU** the Court seems to consider it sufficient for these acts to generate some legal effect, for instance through judicial interpretation or through interpretation by national rule-making bodies.²⁰³ This seemingly offers **better opportunities of legal protection** against Union soft law acts for natural and legal persons than under the annulment procedure of Article 263. While this in itself adds to the level of individual legal protection, a drawback is that an individual cannot start a preliminary rulings procedure himself, but will first have to initiate a national procedure and then have to convince the national court to refer a preliminary question to the ECJ. As the national court is not required to act on such a request, there is quite some uncertainty (and time) involved in following this path as well.

If the threshold for admissibility of a validity case is indeed lower for Article 267 than for Article 263, this not only affects the access to court, but also the **legal certainty** of those concerned and the coherence of EU law.

2.5.2. Administrative review by the European Ombudsman

The European Ombudsman (EO) has a mandate to receive complaints on maladministration in the activities of the EU institutions, bodies, offices and agencies (Articles 228 TFEU and 43 CFR). The **concept of maladministration** *prima facie* seems an ideal starting point for developing general good governance principles into concrete norms and to enforce them in the context of soft rule-making. The first Ombudsman, Jacob Söderman interpreted this concept as follows:

'Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'.²⁰⁴

Initially, however, this resulted in a rather narrow interpretation of maladministration according to which only **breach of clear legal rules** was key. The EO was criticized for this, as it would not allow for review of discretionary action by the Union institutions, which are not constrained by strict legal rules.²⁰⁵ The EO has now moved to a broader interpretation, which also includes '**principles of good administration**'. This opens up the possibility of reviewing behaviour of EU institutions regarding other than concrete legal provisions.

As such, the role of the EO with regard to soft rule-making appears twofold: the EO activities themselves are a source of soft law norms on good administration and these norms (may) also condition soft rule-making by other EU institutions, bodies, offices and agencies, thereby limiting their discretionary powers. Moreover, the EO is not only entitled to adopt individual decisions on the basis of **individual complaints**. He may also start **investigations** on his own initiative and may adopt a more horizontal approach in advocating better administrative behaviour, by adopting reports and recommendations on horizontal issues. As such, the EO has better possibilities to place issues on the agenda of

²⁰² Luijendijk and Senden 2011, *op.cit.*

²⁰³ *Ibid.*

²⁰⁴ Annual report of the European Ombudsman 1997, p. 23.

the EU institutions than the ECJ. Not only is the ECJ fully dependent on other EU institutions, Member States and individuals, but as described above the admissibility criteria with regard to individuals are also very strict. We will briefly consider here how the EO has pursued the implementation of good governance principles and strengthened the position of individuals in a number of different areas and its possible relevance in relation to EU soft rule-making.

Access to documents

The European Ombudsman's quest to have the EU institutions adopt a 'citizen-friendly' policy on access to documents has been very arduous. In fact, this fight has not been fully fought yet, now that a new Access to Documents Regulation is still under way. Transparency in the European Union has nevertheless come a long way from the highly restrictive Joint Code of Conduct from the Council and the Commission²⁰⁶ in 1993, to becoming a binding fundamental right under Article 42 of the CFR as a result of the entry into force of the Treaty of Lisbon. The Joint Code of Conduct was indeed meant to restrict access rather than to enable it. With regard to this issue, the Commission has been much more reluctant and the ECJ adhered to a 'disappointingly narrow view of access to documents'.²⁰⁷ Throughout its 17 years of existence, a substantial part of the complaints lodged before the EO concerns access to documents.

The EO has taken careful steps in **broadening public access to documents**. In its first years after the creation of the office, the Ombudsman more or less accepted the Commission's word that refusal was appropriate.²⁰⁸ In 1997, the Ombudsman recommended all EU institutions to adopt access to documents rules and the Commission to keep a public register.²⁰⁹ A restricted proposal for an Access to Documents Regulation was heavily criticized by the Ombudsman, including in the media, which led to a much more generous proposal.²¹⁰ But the tendency of the Commission to be more restrictive remained. The public register which had been set up following the adoption of the Access to Documents Regulation was still very limited. Now, the European Parliament also supported the Ombudsman's call for a proper public register. Such a register would also include soft rule-making acts, as the Regulation applies to all documents 'held' by the institutions or bodies of the EU and is therefore not limited to acts containing legally binding norms (see also section 2.3.1). This does require institutions and agencies to make their practices explicit in documents and codes. The Ombudsman regularly calls on institutions and other bodies to do so.

Also with regard to **agencies** the Ombudsman has underlined the transparency principle. A case lodged by a Polish citizen against OHIM²¹¹ concerned language: the website only has a limited choice of languages and he received a reply in English. OHIM decided to change its practice and answer in the same language although pointing out that it was under no obligation to do so. The Ombudsman pointed out that it creates a disadvantage for citizens who do not speak one of the five languages of the Office and advised the OHIM to make the

²⁰⁵ R. Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement', 6 *European Law Journal* (2002), 4-28, pp. 15-17.

²⁰⁶ *OJ* 1993, L 340/1.

²⁰⁷ P.P. Craig, *EU Administrative Law*, OUP 2006, p. 353 et seq.

²⁰⁸ A. Tomkins, 'Transparency and the emergence of a European Administrative Law', in: P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 1999-2000*, OUP 2000, p. 239.

²⁰⁹ E.M. Lae, 'The Impact of the European Ombudsman on the European Commission, Improvements in methods of Operation and Evolving Principles of European Good Governance', available at: www.ssrn.com/abstract=1936629.

²¹⁰ P. Bonner, 'The European Ombudsman, a Novel Source of Soft Law in the European Union', 25 *European Law Review* (2000), pp. 46-49.

²¹¹ 2413/2010/MHZ.

website available in all EU languages. The OHIM subsequently accepted this friendly solution proposal suggested by the European Ombudsman.

The duty to consult

In one case, the European Ombudsman has also held that not acting in conformity with its own consultation guidelines amounts to maladministration on the part of the Commission.²¹² Yet, complaints on the Commission's non-compliance with its own consultation guidelines so far seems fairly rare. A study of De Jesús Butler, conducted on the basis of interviews with members of the European Parliament, Commission and Brussels-based NGOs, sheds some light on this. While many interviewees have considered that in case of such non-compliance they could legitimately request the EO to examine the case, there is little explicit reliance on the guidelines because of the possibilities to engage in informal dialogue with the Commission.²¹³

The Code of Good Administrative Behaviour

Following its conclusion that none of the EU institutions, bodies and agencies had adopted a **Code of Good Administrative Behaviour** in the relationship between officials and the public, the Ombudsman decided that such a Code of Good Administrative Behaviour should be adopted.²¹⁴ It concluded that numerous complaints the office had received could have been avoided had there been clear rules. The EO thus recommended the adoption of such a code dealing exclusively with the relation between the public and the officials, taking into consideration the Code annexed by the Ombudsman to the recommendation. Furthermore it stressed that the adopted Code should be published for accessibility purposes. The European Parliament approved the Code in 2001. In the context of the discussion on the adoption of the Charter on Fundamental Rights, the Ombudsman changed its strategy. Before it had advocated the Code as a blueprint for EU institutions to develop their own rules, but from then on he considered the Code in terms of binding administrative law to be adopted in the **form of a regulation**.²¹⁵

Some elements of the Code are certainly not new as the Code contains a number of general principles such as legality, non-discrimination, legitimate expectations and transparency. These therefore concern principles that may (now) be judicially enforced. The Code also includes a number of good governance principles which are not enforceable in court, such as the need to act courteously, the duty to advise the public on the handling of cases, to acknowledge the receipt of a letter or complaint and provide information on who is dealing with the matter and to indicate the possibilities of appeal. Mendes argues that even for the already existing rights and principles the Code in some cases extends the scope of such rights. This is also true with regard to the existing codes of practices of various institutions. The Code contains no references to general administrative acts, although it applies to administrative behaviour in general. This may be explained by the fact that the Code is directed at individual officials of the EU rather than the institutions or bodies in general. So far, the effect of the Code has been limited, regardless of its endorsement by the European Parliament. Some institutions have adopted their own codes of conduct, but usually with a different content. Moreover, the Commission has been reluctant in proposing a general regulation to be adopted.

²¹² Decision 948/2004/OV, 4 May 2005. To be accessed on the website of the European Ombudsman: <http://www.ombudsman.europa.eu/home/en/default.htm>.

²¹³ I. de Jesús Butler, 'Non-governmental Organisation Participation in the EU Law-making Process: The Example of Social Non-governmental Organisations at the Commission, Parliament and Council', *ELJ*, vol. 14, no. 5, 2008, p. 568.

²¹⁴ Draft recommendation to the European institutions, bodies and agencies OI/1/98/OV.

²¹⁵ J. Mendes, 'Good administration in EU law and the European Code of Good Administrative Behaviour', *EU Working Paper* 2009/09, p. 2.

Agencies

Some agencies have been subject by European Ombudsman scrutiny only with regard to staff cases. Other agencies have had to face complaints regarding other aspects of maladministration as well. A complaint against OHIM regarded the **right to be heard**.²¹⁶ An application was made for revocation of the trademark of the complainant. The complaint was lodged because the applicant had had four and a half months to submit observations whilst the complainant whose trademark was threatened only had one month to respond. The Ombudsman however noted the discretion of the OHIM to set time limits, and decided that there was no infringement of the right to be heard. Maladministration could therefore not be proved. The CPVO has been subject to an own-initiative inquiry by the EO regarding **public access to documents**.²¹⁷ The CPVO informed the Ombudsman of the legal provisions which provide for the possibility of public inspection and of a Decision adopted by its Administrative Council establishing rules on public access to documents produced by the Office. This decision included a publishing requirement. On the basis of this information, the Ombudsman found no evidence of maladministration.

In a number of other cases, the European Ombudsman considered the matter to be settled given the steps that had been taken by the agency concerned since the lodging of the complaint. Examples are a complaint against the European Banking Authority (EBA), again regarding public access to documents.²¹⁸ A Swedish national working for a trade union was denied access to the list of participants to a public hearing held by the CEBS (now EBA) where he was present. The Ombudsman notes that the Authority had subsequently provided the complainant with the document requested and that at the time it was in the process of finalising practical measures for applying Regulation 1049/2001 regarding public access to documents. The Ombudsman therefore considered the case as having been settled by the Authority. An interesting case against the European Aviation Safety Agency (EASA) regarded the **status of the Proposal for Airworthiness Directive** (PAD).²¹⁹ The PAD aimed at aircraft belt systems required to possess certain maintenance data which the German companies did not have, although they complied with national legislation. This document, although not binding, was to have negative effects on German companies, putting them at a disadvantage. Following a complaint by the German companies, the PAD was replaced by a Safety Information Bulletin highlighting the illegal nature of certain maintenance. The Ombudsman considered the matter settled due to this withdrawal. Another complaint against the European Aviation Safety Agency (EASA)²²⁰ regarded fees for certification. The Ombudsman found two cases of maladministration. The first one being the wording of the formal warning letter for recovery which was considered threatening and the second regarding failure to reply to one of the complainant's letters. The EASA was asked to apologise, it did so and informed the Ombudsman that it had changed its template for formal warnings.

While the EO can thus investigate a wide range of issues of maladministration with regard to different Union entities, one must recognize that there are also **important limits** to its powers. These limits are acknowledged by the office itself. They may concern the discretion of the institution at issue, e.g. to determine whether a less strict approach should have

²¹⁶ Case 1999/2007/FOR.

²¹⁷ Case 01/1/99/IJH.

²¹⁸ Case 2497/2010/FOR.

²¹⁹ Case 0407/2010/(FS)BEH.

²²⁰ Case 1182/2009/(BU)JF.

been adopted,²²¹ the content and merit of legislation,²²² or the decision that confidentiality or protection of public interest outweigh the right to access to documents.²²³

²²¹ Case 1193/99/GG.

²²² In case 1999/2007/FOR the Ombudsman considered that allegations concerning the merit of legislation rather than its application fall outside of the scope of maladministration.

²²³ In the context of combating terrorism, Case 202/2001/OV (Europol).

3. PUTTING THE EXISTING CHECKS AND BALANCES TO THE TEST: ASSESSMENT AND POSSIBLE AVENUES

KEY FINDINGS

- The **lack of a coherent typology and regulation** of soft law instruments leads to a certain level of confusion on soft rule-making which affects legal certainty.
- The newly introduced good governance/good administration principles have been framed in only **limited** and **general** ways.
- The general legal framework of EU administration has focussed intensely on **effectiveness** and on **balancing of supranational and national interests**, thereby reducing the scope for developing 'second generation' principles.
- There is an **incremental proceduralisation** of soft rule-making taking place in specific EU law provisions and institutional practice.
- A more **systematic proceduralisation** would not necessarily lose on **flexibility**. The practices of **comply-or-complain** or **notice-and-comment** make for interesting examples in this regard.
- Although the **Member States** are faced with similar issues and challenges as the EU itself, some of the experiences are worth noting such as their experiences regarding **classification and legal embedding** of soft law instruments and their efforts in developing a **uniform legal framework for agencies**.
- Other ways to strengthen procedural guarantees with regard to soft rule-making should be sought in broadening the Union's **Impact Assessment** to include more soft rule-making processes as **object** of such assessments and 'second generation' principles more explicitly as **normative principles** for that purpose.
- An **EU administrative procedures act** would be useful in furthering the application of 'second generation' principles to soft law rule-making, thereby enhancing the level of judicial review as well.

This study focuses on the main question whether the existing checks and balances regarding the use and functioning of soft administrative rule-making and soft regulatory rule-making by EU institutions and bodies can be considered sufficient in the light of the requirements of input/procedural legitimacy and good governance. The aim is to consider the necessity of a possible redesign of the EU system in this regard. In this section, we will therefore turn to a normative assessment of the findings in the previous part of the report.

As set out in our project proposal, from a legal perspective there is no unequivocal and correct answer on how to strike the concrete balance between input/procedural legitimacy and output/substantive legitimacy for the regulation of soft EU rule-making. This is, ultimately, a political decision. However, legal research can contribute to this process by

analysing the existing legal situation and by identifying relevant and sound arguments based on a variety of legal materials.²²⁴ In view of this, the assessment in this final part of the report will proceed in two stages. First, we will summarize and highlight those elements in the existing checks and balances regarding soft rule-making that have appeared problematic from the point of view of input/procedural legitimacy and good governance, including judicial protection. This will allow us to draw a more general conclusion as to how in the current framing of its checks and balances, procedural legitimacy concerns are being balanced with substantive legitimacy concerns. The perspective of the coherence of the overall EU legal system will be considered in this assessment as well (section 1). While this assessment will in itself produce arguments for further proceduralisation and enhanced judicial and administrative review, we will in the second stage proceed to the identification of further arguments for this and also of possible best practices. These will not only be drawn from the discussion in the previous part of the report, in particular regarding specific provisions of EU law and institutional practices, but also from national sources of law and legal doctrine. This variety of arguments and insights can provide useful building blocks for the future shaping of the institutional and procedural framework for soft administrative and regulatory rule-making, also within the context of the debate on the establishment of a European administrative procedures act (sections 3.2-3.3).

3.1. General assessment

3.1.1. Institutional and procedural problem areas

It has appeared from our analysis that both soft EU administrative and regulatory rule-making is '**booming business**'. This trend has ramifications in many different directions. Clearly, soft administrative rule-making is no longer the prerogative of the Commission, as agencies and networks are not only 'mushrooming' in many different policy areas but also appear to be gaining in general rule-making powers, despite the Meroni doctrine. It has even been held in legal doctrine that these powers are not necessarily linked to technical implementation matters, but actually amount to policy-making and a level of (soft and sometimes hard) coordination of Member States activities that is considered to come close to legal harmonization.²²⁵ At the **level of direct administration**, this soft administrative rule-making is highly relevant as it influences single-case decision-making by these Union entities, such as on the lawfulness of company agreements and state aid but also regarding e.g. the granting of licences. Furthermore, the example of economic and fiscal governance has illustrated the importance soft regulatory rule-making may have for shaping whole policy fields and how this interacts and ties in with hard rule-making processes. There are no signs that this trend will change, rather to the contrary.²²⁶ It is therefore becoming ever more urgent to scrutinize the institutional and procedural conditions under which these soft rule-making processes are taking place and whether they provide sufficient input legitimacy guarantees. Here we will focus in particular on problem areas and gaps that have emerged from the analysis in section 2.

²²⁴ J. Smits, *Omstreden rechtswetenschap. Over aard, methode en organisatie van de juridische discipline*, Den Haag: Boom Juridische Uitgevers, 2009.

²²⁵ Shapiro 2011, *op. cit.*, pp. 115-116.

²²⁶ Cf. Harlow 2011, *op. cit.*

A first problem area concerns the **legal-institutional foundation** of soft rule-making processes and instruments in the Treaties. Neither soft administrative rule-making nor soft regulatory rule-making through the OMC are recognized in the Treaties as a general institutional phenomenon of the EU. Their instruments and processes and partly also the actors involved (agencies and networks) have therefore remained largely unregulated at the level of primary EU law. The **lack of a coherent regulation and typology of instruments** leads to a certain level of confusion on soft rule-making which affects legal certainty. This lack raises questions for instance as to how this rule-making relates to the new hierarchy of norms and concomitant procedures. While the competence of the Commission to engage in soft administrative rule-making can be traced back to the general controlling powers and executive tasks the Treaties and secondary legislation assign to it, it is not fully clear how this fits in with the newly introduced categories of delegated and implementing acts and the procedures that apply for their adoption (see also section 3.2.1). It also leads to problems at the level of indirect administration, where for instance national regulatory authorities adopt decisions that are in compliance with Commission guidelines but which are quashed by national courts because they are considered to infringe national law.²²⁷

Furthermore, the Treaties are completely silent on the establishment, powers and tasks of agencies and networks. Consequently, they are created by secondary law acts, adopted on the basis of a specific legal basis in the Treaties only. Because of the absence of any Treaty rules and general secondary legislation on the possibility to delegate general implementing powers to other entities than the Commission and the Council, the powers of such entities are still subject to the limits the Court formulated in the *Meroni* case. While these limits prevent the conferral of general rule-making powers upon them, our analysis has shown that the *Meroni* doctrine is not considered to stand in the way of allocating soft rule-making powers to agencies, and that this is a growing trend. Soft rule-making therefore seems to be a device to **circumvent the *Meroni* constraints**. This is problematic because the soft rule-making acts of agencies often prove to be a smokescreen for hard law (effects): not only does the Commission in some cases simply ‘rubberstamp’ these soft rule-making acts into legally binding ones, but many actors may also act on and apply them as if they were legally binding. In as far as national authorities collaborate in their establishment, they may also in fact be required to act on such acts on the basis of the principles of Union loyalty and legitimate expectations. In this process, agencies, which on the basis of the law and for reasons of lack of democratic legitimacy should not have far-reaching general rule-making powers, increasingly obtain them *de facto*. Consequently, the *Meroni* doctrine and the non-regulation of delegation of powers to agencies in the Treaties increasingly appear out of step with the daily institutional and legal reality.

European agencies that *de iure* or *de facto* independently engage in establishing independent policies, through soft law or otherwise, also raise concerns of **coordination or consistency**: the Commission, Council and European Parliament may be proponents of

²²⁷ A concrete, very topical example concerns a decision taken by the Dutch telecom regulator (OPTA), adopting a decision in compliance with the Commission’s recommendation on the methodology of setting prices for telecommunication services. This decision was quashed by a Dutch court for being in conflict with Dutch law and in fact also EU hard law. As the recommendation was considered to be non-binding, the Dutch court found in favour of the application of the Dutch rules, forcing OPTA to follow this ruling. See LJN BR6195, CBb 31 August 2011, *T-Mobile e.a. vs OPTA*. On the basis of Article 19 of the Framework Directive, *op.cit.*, the Commission is empowered to turn the recommendation into a decision. See also the press release in connection to this case: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/130&format=HTML&aged=0&language=EN&quillanguage=en>

other policy directions than that taken by the agency, leading to contradictions.²²⁸ Because of the legitimacy issues this development raises, an adequate institutional and procedural response is called for.

Since the Treaty drafters chose not to regulate the OMC, the legal-institutional embedding of the OMC is equally weak. This leads to the situation that it is not very clear when the OMC may actually be resorted to under the Treaty provisions, especially in areas where the Treaties allow for or even oblige the adoption of legislation. In these cases of so-called obliging and enabling legal bases (see section 2.2.2), the enhanced role of the EP in the decision-making process as a result of the broader applicability of the ordinary legislative procedure may be affected. In this regard one must note that Article 292 TFEU is not framed such as to provide for protection of the Parliament's role in the decision-making process when the Council proceeds to the adoption of recommendations, but merely that of the Commission and of the national competences and sovereignty. This contrasts with the way in which the Treaty of Lisbon has provided for better **involvement of and control by the EP** in the case of delegation of powers to the Commission, also within the framework of the comitology process, especially where such delegation would affect the Parliament's decision-making rights under the ordinary legislative procedure. The failure of the Treaties to deal with soft administrative rule-making and with soft regulatory rule-making seems at odds with this strengthening of the democratic control on hard rule-making acts, especially when taking account of their possible effects. This applies even more strongly to the soft rule-making activity by agencies and networks, which are weak in terms of democratic and political accountability but where there is an increasing risk of rule-making powers leaking away by the backdoor. The **Framework Agreement on relations between the European Parliament and the European Commission** (2010) meets these shortcomings to the extent that it provides that in areas where the Parliament is usually involved in the legislative process, the Commission shall use soft law only where appropriate and on a duly justified basis after having given the Parliament the opportunity to express its views. When it adopts its proposal, the Commission is required to provide a detailed explanation to the Parliament on how its views have been taken into account.²²⁹ While such an obligation is not provided for in relation to the Council's use of soft law, it has been established that in practice the Council often follows the decision-making procedure prescribed in the underlying legal basis also when it comes to its adoption of recommendations.

A second problem area arises from the still rather **general and limited framing** of the newly introduced **good governance/good administration principles** in the Treaties that have been central to our research. Except for the already existing right of access to documents, these principles do not find further substantiation in general secondary law acts and only partly in the case law of the Union Courts. In combination with the weak legal-institutional foundations of soft rule-making, this has firstly led to the situation that the general procedural framing of soft rule-making has mainly come about in soft Commission acts, such as its consultation guidelines and impact assessment guidelines. Yet, these do not cover all of the Commission's soft administrative acts nor include those of other Union institutions and bodies. Importantly, the Inter-Institutional Agreement on Better Law-Making does not cover soft administrative rule-making by Union entities nor any OMC-type processes at all. Secondly, this has entailed that the procedural framing of soft rule-making

²²⁸ Shapiro 2011, *op. cit.*, p. 117.

²²⁹ OJ 2010, L304/52, point 42.

gets its shape in a highly *ad hoc* manner, depending on the rules that are being put into place in the context of specific areas, sectors, agencies or networks. In legal doctrine, this has led to the observation that ‘While certain overall administrative norms, such as giving reasons and the duty of good administration may apply, a style of administrative law seems to be emerging in which each agency is subject to procedures peculiar to itself and provided by the legislation creating it plus those developed by its own practices over time plus any emerging from judicial review.’²³⁰ The landscape of applicable procedural rules and practices thus resembles a patchwork blanket, where some agencies may have put into place far more sophisticated good governance/administration rules and practices than others. While more recently we can see a correlation between the scope of rule-making powers allocated to agencies and the level of proceduralisation (cf. the ESAs), the reasons behind the differences in approach in this regard are not always evident. How to ensure consistency is a general issue emerging in this context.

A related, third problem area concerns **the objectives and scope of the procedural guarantees provided for in respect of consultation and participation**. Article 11 TEU has introduced them as good governance principles, but their objectives are defined in a rather narrow way: they mainly serve the goals of coherence and transparency of Union action. On the basis of existing tertiary rules (the soft consultation guidelines) and the Court’s case law we can also conclude that these are still a far cry from any consultation and participation rights. This goes for the context of both soft administrative and regulatory rule-making: the Union institutions and agencies enjoy wide discretionary powers and clear guidelines and binding obligations as to who to consult, but the when and how are absent. The legal framework for participation therefore is in rather stark contrast with the high claims the OMC makes of being an inclusive, open, bottom-up process. So far these claims have not been corroborated either by institutional practice and empirical evidence about third-actor inclusion in the OMC process. While more empirical research needs to be done on this, it is suggested that the legal permissiveness of the OMC in this regard bears some relevance to the limited involvement of certain parties in OMC processes. If the OMC is to truly enhance legitimacy and accountability, then putting into place certain procedural guarantees should be considered, addressing issues such as the identification of relevant stakeholders and concerned parties, their representativeness and timely information. Ensuring adequate involvement of all relevant actors is also highly important from the point of view of ensuring the effectiveness of OMC processes, as realising policy coordination will in the end depend very much on their support.

Regarding administrative rule-making by agencies, it must be noted that the Treaty of Lisbon has sought to enhance the protection of individuals regarding actions on the part of agencies, institutes and bodies of the EU, even if not regulating them in a general way in the Treaties. It has thus recognized the necessity of ensuring the openness and access to documents of these entities as well as of judicial protection against their actions. Yet, neither Article 11 TEU nor other Treaty rules on participation and consultation include these entities. Given the fact that there is no electoral connection in the agencies’ general rule-making activity, the establishment of procedural rules under which such rule-making may come about and who is to be involved in this process appears imperative. While agencies’ statutes may (increasingly) provide for outside participation in their decision-making processes, there is a risk that this particularly involves those that have the technical and

²³⁰ Shapiro 2011, *op. cit.*, second edition, p. 112.

financial resources to do so and those having a particular interest.²³¹ There is no legal guarantee of balanced participation and influence on this process and some actors may be privileged. Agencies are therefore often considered to provide at the most for some form of technical accountability rather than any democratic accountability: the typical agency executive board is constructed in such a way as to provide for some Member State control through the appointment of experts. It is argued that to the extent that this renders the staff of agencies accountable, it is less likely to be to the Member States and the citizenry as a whole than to the epistemic community to which board members and the staff belong.²³² How to ensure inclusiveness, equal treatment and equal representation are therefore important issues emerging in this context.

There are also broader **democratic legitimacy concerns** that have been identified more generally in relation to four characteristics of network-based governance,²³³ but that are also relevant to agency-based governance. Firstly, there is a weak presence of citizen representatives in networks. Secondly, there is a lack of visibility and uncoupling of democratic circuit, meaning that decisional procedures in policy networks are often informal and non-transparent. Thirdly, because of the multilevel aspect, decision-making cuts across different levels and actors, which means that networks dilute responsibility among a large number of actors. They are also detached from the official representative bodies, whose capacity to exert effective oversight over such decision-making procedures is doubtful.²³⁴ Fourthly, there is the prevalence of 'peer' forms of accountability, which is part of a more general trend whereby principles of informal control are becoming more important than formal accountability.²³⁵ They can prove to be more sensitive to social justice than majoritarian decision-making, but this is not always the case as not all stakeholders get a say.²³⁶ Furthermore, peer accountability can weaken public accountability, in particular if it concerns a rather closed circle.²³⁷

3.1.2. Problem areas of judicial review

The findings in the first part of this report also lead us to the following general conclusions regarding existing problem areas in relation to the judicial protection provided for in the case of soft regulatory and administrative rule-making and the enforcement of good governance/administration principles in this context.

A first problem area is related to the **soft nature of the acts** in question. While it is settled case law that an action for annulment under Article 263 TFEU can be brought before the ECJ against 'fake' soft law provisions, some uncertainty remains as to what extent the Court effectively requires demonstration of 'intent' of legal effects in this regard and if this is not required, whether all types of legal effects allow for admissibility of a claim. Would

²³¹ Cf. Shapiro 2011, *op. cit.*, p. 116.

²³² Shapiro 2011, *op. cit.*, p. 117.

²³³ Y. Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance' in *European Law Journal*, vol. 13, no. 4, (2007), pp. 469-486.

²³⁴ The concept of 'post-parliamentary' governance has been coined to describe this phenomenon. See S. S. Andersen and T. R. Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-Parliamentary Governance', in S.S. Andersen and K. J. Eliassen (eds), *The European Union: How Democratic Is It?* (Sage, 1996), pp. 226-251.

²³⁵ M. Saward, *Authorisation and Authenticity: Does Democracy Really Need Political Parties*, Paper Presented at the ECPR Joint Sessions, Workshop Democracy and Political Parties (Granada, 14-19 April 2005), p. 13.

²³⁶ Papadopoulos 2007, *op. cit.*, p. 481.

for instance legal effects produced by way of judicial interpretation suffice in this regard, as seems to be the case for the admissibility of validity questions under the preliminary rulings procedure of Article 267 TFEU? Clearly, Article 263 does not allow for judicial protection against soft law acts which entail only factual implications, even if such acts present a wrongful interpretation of EU law and may be misleading for those concerned and legal practitioners.²³⁸ Already for this reason, parties (including the EP) that feel sidestepped for instance in an OMC process for not having been properly involved or consulted, will not be able to challenge the soft outcome of that process in court. The lack of judicial protection due to the impossibility of challenging acts not intending or producing legal effects, can be somewhat mitigated by the possibility to bring an action for annulment against an individual decision the Union may have taken on the basis of such an act.²³⁹

A second problem area concerns the **limited locus standi** of natural and legal persons (including representative associations, NGOs) under Article 263 TFEU. It has been noted that the Treaty of Lisbon has taken an important step to loosen the strict requirement of 'individual concern' by now enabling claimants to start an action for annulment against 'regulatory acts' that are merely of direct concern to them. Yet, a recent ruling of the General Court has shown that while acts of general application are covered by that term, they have to be of a binding nature as well. In the current situation, the threshold for individuals to have the ECJ consider the lawfulness of soft law acts would appear lower within the framework of the preliminary rulings procedure than under the annulment procedure.

A third – possible - problem area relates to **the entities against which procedures can be started**. The Treaty of Lisbon has marked an enhancement of the level of judicial protection by stipulating in the judicial procedures provisions, including Articles 263 and 267 TFEU, that actions can also be brought against acts of Union bodies, offices and agencies. Yet, networks do not have the formal status of a Union body and lack legal personality under EU law. Presumably, they are therefore not covered by these provisions and hence no action for annulment can be started against such an entity. Yet, if the rule-making activity of a network can be considered attributable to the Commission and/or the national regulatory authority, one can start proceedings against the Commission and/or the national authority.

If a claimant has been able to overcome the above hurdles, a fourth problem area looms in the actual **enforceability of certain good administration principles**. While access to documents, under certain conditions, has evolved into a procedural right, this is certainly not the case so far for the principles of participation and consultation. As noted above, so far the Union Courts have been very reluctant to understand them in terms of procedural rights and to recognize a dialogue dimension to the giving reasons requirement. It is also far from clear what the actual meaning and scope is in this context of the principle of equal treatment as a principle of good administration. The question is whether the Court may still

²³⁷ Cf. also the 'revolving doors' problem, discussed in section 2.4.3.

²³⁸ H. Luijendijk and L. Senden, 'De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde', *Sociaal Economische Wetgeving (SEW)*, 59(7-8).

²³⁹ Luijendijk and Senden 2011, *op. cit.* Cf. also the ECJ in Case C-443/97 *Kingdom of Spain v Commission* [2000] ECR I-02415, Paragraph 33: 'The internal guidelines thus indicate the general lines along which, pursuant to Article 24 of the coordination regulation, the Commission envisages subsequently adopting individual decisions whose legality may be challenged before the Court by the Member State concerned in accordance with the procedure laid down by Article 173 of the Treaty.'

stick to this restrictive approach since the entry into force of the Treaty of Lisbon, given that the said principles have now been laid down in the Treaties (see further section 3.3.2).

3.1.3. A predominantly effectiveness-based approach in general EU law

Considering the above problem areas in conjunction, the conclusion can be drawn that a well-considered, well-balanced and consistent approach regarding the regulation of soft administrative and regulatory rule-making and the relevant checks and balances is still very much lacking. To the extent that one can discern common elements in the approach of this matter, it can be concluded that the overall legal framework – at the level of general primary, secondary and tertiary law - breathes a strong desire to **maintain the Commission's or Union's flexibility** to the fullest extent possible when it comes to its use of soft rule-making devices and processes. This becomes clear for example in the decision, at the time of drafting the Constitutional Treaty for Europe, not to regulate the OMC, not to institutionalize the phenomenon of agencies and networks in the Treaties and not to include the Commission's soft administrative rule-making devices in the new hierarchy of norms. We also observe this in the hesitation so far to proceed to adopt general secondary legislation on this matter, the limited scope of the IIA on Better Law-Making, the vagueness and non-binding nature of the consultation guidelines, the avoidance to create any consultation or participation rights and the ECJ's refusal to enhance the *locus standi* of individuals under Article 263 TFEU (and the underlying fear of increasing the Court's workload if it were to loosen these conditions). Clearly, the general legal framework is not so much geared towards enhancing the legal position or empowerment of the citizen in the Union's decision-making process – and with that of enhancing input or procedural legitimacy - but rather towards enhancing the effectiveness of EU action and thereby output or substantive legitimacy.

More in general, it would seem that administration in the EU has also focused very much on **balancing national and supranational interests**. This balancing act is perhaps even the dominant perspective on EU administrative law, of which the principles of conferral and subsidiarity are prime examples. But also the use of soft law mechanisms and instruments must often be explained from this perspective. The application of the OMC in 'sovereignty sensitive' areas such as economic and fiscal governance and employment illustrates this. One of the reasons for establishing agencies in the first place has been to keep the size of the Commission manageable, which ultimately also relates to the Member States' wishes to protect national competences. The realization has dawned that this perspective may no longer exclusively serve as an adequate input legitimacy basis. In terms of ensuring transparency, openness and accountability EU administrative law on the one hand faces similar challenges as Member States' administration (e.g. in getting a grip on agencies and soft law instruments), and on the other hand the challenges at EU level are greater, because of this dominant EU/national perspective (a good example is the comitology procedure which has proved a great challenge for transparency, participation etc.).

While it may therefore be considered that the decision not to regulate and condition the use of soft rule-making may have been an appropriate one ten years ago when the predecessor of the Lisbon Treaty was drafted, this is no longer the case today. The above problem areas and considerations already make a strong case in favour of strengthening the institutional, procedural and judicial framework of soft EU rule-making processes and instruments. Interestingly, recent developments regarding specific EU law provisions and institutional

practices indicate the **need for a different approach**. We now turn to these practices as well as to the consideration of approaches contained in some national legal systems, with a view to the identification of possible avenues and best practices for enhancing the Union's input/procedural legitimacy with regard to soft rule-making.

3.2. The plea for enhanced proceduralisation

3.2.1. Specific EU law insights

Most importantly, recent developments in specific areas of EU law and institutional practices demonstrate **an incremental proceduralisation process of soft rule-making**, even if still embryonic and haphazard. This has been seen at the level of soft regulatory rule-making as regards the area of fiscal and economic governance. This area both demonstrates a crisis of effectiveness (regarding its compliance and enforcement) and of democratic legitimacy (on the public level as regards the decreasing level of trust in and acceptance of the EU; on the political level there is the discussion on national sovereignty leaking away). So, both the output/substantive legitimacy and input/procedural legitimacy is clearly at stake here. The measures taken very recently seek to improve both at the same time, by hardening the rules and obligations imposed and by a further democratization and proceduralisation of the rule-making process. One can therefore observe enhanced involvement of the EP in the decision-making process (drawing up of the six-pack); the EP's enhanced involvement in surveillance through the creation of an economic dialogue between the Commission, Council and EP and of a right to hear the president of the (European) Council and the Commission and the President of the Eurogroup; an enhanced obligation of information imposed on the Member States; an enhanced procedure for the detection of macro-economic imbalances through the publication of an annual report and the publication of the results of investigations of the Commission on the situation in problematic Member States; and the adoption of a fiscal treaty allowing for ratification through national parliaments. These changes indicate a realization of the need to particularly enhance the openness, transparency and democratic accountability of the economic governance process. While this process has thus become more inclusive in terms of input of institutional actors and Member States, this is not (yet) the case for other important actors and in terms of popular involvement.

The gradually increasing interest for proceduralisation is most visible at the level of soft administrative rule-making. The analysis of the Commission practice as well as of a number of agencies and networks has provided us with insights regarding the proceduralisation that is provided regarding the exercise of their powers at the level of direct administration, both through individual decision-making and general soft rule-making. The latter also has important implications for indirect administration, i.e. the implementation of EU rules by national authorities.

Where agencies are involved in the direct administration of EU law by **single-case decision-making**, such as the granting of licences or EU-wide marketing authorizations, it has been noted that the founding acts of these agencies specify rather elaborate hearing, appeal and other procedures, that they provide easy access to judicial review and that they

tend to provide more open channels of access to non-governmental parties than is the case for most other agencies.²⁴⁰

Concerning networks and the agencies involved in direct administration by exercising **general rule-making powers**, the following procedural guarantees have been identified, which may however vary from one body to another, both as regards their applicability and the rigor with which they apply:

- periodical publications, e.g. annual reports on the functioning or work programmes of the agency in question;
- internal rules of procedure;
- application of the Regulation on Access to Documents, active publication of decisions;
- general obligation for agencies that are entrusted with the task of gathering and analysing data and statistics to make such information available e.g. through databases;
- exchange of information between EU agencies and national authorities;
- various mechanisms for participation and consultation of stakeholders (e.g. set-up of Stakeholder Group, development of consultation policy, comply-or-complain approach);
- participation by non-governmental parties;²⁴¹
- publication of results of consultation (e.g. advice of experts);
- duty to give reasons.

Over time, and especially compared to older agencies, it has been found that establishing regulations of agencies provide for more procedural guarantees and also means of administrative and judicial review. The newer agencies also seem to pursue higher ambitions in the sense of seeking to make a contribution to both output and input legitimacy. If the input aspect is focused on, provisions regarding inclusiveness of the consultation process are particularly relevant, the type of consultation (via the Internet, public hearings, establishing boards of stakeholders etc.), clarity on the representativeness that is required, is input sought to include representation of all interests at stake or rather the unlocking of expertise and which the actions the institutions or bodies are required to take on the basis of the input delivered (e.g. reports, summaries, duty to give reasons in case of diverging decisions etc.). With a view to enhancing the overall procedural legitimacy and coherence of the Union system, what needs serious consideration now is what should be the basic core of procedural guarantees provided for in relation to agencies and also the Commission and other entities that engage in soft administrative rule-making. The recent establishment and development of the ESAs may provide inspiration for this, as they already indicate the realization that the more rule-making powers are granted to agencies, the more stringent procedural requirements need to be put into place. Their statutes therefore include rather elaborate provisions on consultation, added to by institutional practice. The rules and experiences in those areas may very well serve as an example for the EU institutions, including the ECJ, to further develop the consultation/participation principles in relation to soft rule-making processes.

In addition, there are two specific procedural devices on the level of participation and consultation that are worth considering with a view to a redesign of the Union's procedural

²⁴⁰ Shapiro 2011, *op.cit.*, p. 115.

²⁴¹ Shapiro 2011, *op.cit.*, has noted that the procedure provided for in the Aviation Safety Agency is the only one similar to US 'notice-and-comment' rule-making method.

system. The first one concerns the **comply-or-complain approach** developed within the framework of the European Aviation Safety Agency, which may be regarded as a possible best practice. Such approaches can also be found in the legal systems of the Member States (see section 3.2.3). According to Shapiro this procedure is also akin to the US notice and comment procedure, which the US Administrative Procedure Act 1946 contains for agencies' rule-making. Such a type of procedure was also proposed in the European Council's 1993 Inter-Institutional Declaration on Democracy, Transparency and Subsidiarity: a notification procedure according to which the Commission should publish a brief summary of the draft measure in the Official Journal and stipulating a deadline for interested parties to submit their comments.²⁴²

The second device concerns the **comitology procedure**. It appears to be an emerging practice to control Commission soft administrative rule-making by declaring a comitology procedure applicable in the underlying secondary law act. Such an approach has also been identified in the framework of networks (ECN). So far, the applicability of such procedures seems to be decided on in a highly ad hoc way. It deserves further consideration when soft administrative rule-making by the Commission should be subjected to comitology and if so, to what type of procedure. It should also be considered whether such national control is in fact sufficient. That is to say, the comply-or-complain approach or the notice-and-comment procedure have a broader scope, as they also allow interested parties to respond to the proposed rule-making.²⁴³ As comitology is designed in Article 291 TFEU and in the Comitology Regulation as a control mechanism for the Member States vis-à-vis the Commission, it cannot be applied as such to agencies' rule-making, also because these are supposed to function independently from the Commission.

3.2.2. Comparative law insights

The EU administration is facing similar phenomena as national administrations. Obviously, the EU administration is unique for sharing administrative responsibilities between national and European levels. Nevertheless, EU administrative law may benefit from experiences gained at the national level to adopt best practices from the Member States or to avoid pitfalls that they have encountered. Obviously, the scope of this report does not allow for an elaborate, let alone comprehensive, overview of all the Member States and their practices in this regard. Instead, we pursue a much more modest goal, geared to exploring some practices that have developed in the Netherlands, France, Germany and the UK to deal with issues that are at the core of this report: soft administrative rule-making, including by agencies. We will limit ourselves to some indicative and non-exhaustive observations regarding the approaches taken in these Member States, while noting the usefulness of further comparative research in this respect. So far, such research appears limited and rather outdated.

With regard to soft administrative rule-making

The legal basis for adopting soft law may be explicit or implicit. An implicit legal basis to adopt soft law may result from an administrative, single-case decision-making power. None

²⁴² Inter-institutional declaration on democracy, transparency, and subsidiarity. Bulletin of the European Communities, No. 10/93. pp. 118-120.

²⁴³ Cf. the idea put forward in legal doctrine to combine comitology and notice-and-comment: F.E. Bignami, 'The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology', *Harvard International Law Journal*, Vol. 40, Number 2, Spring 1999, pp. 451-515.

of the Member States studied have adopted a full and integral legislative framework for soft law instruments. Nevertheless, in the **Netherlands** an elaborate legal framework is in place with regard to a specific type of soft law: *beleidsregels* (policy rules, which are a type of administrative guidelines). The **General Administrative Law Act** (GALA) defines them as: 'a general rule, not being a generally binding regulation, established by decision, concerning the balancing of interests, establishment of facts or interpretation of legislation in the exercise of a power of an administrative authority'. As such, the Commission's interpretative and decisional acts bear resemblance to these policy rules.

In **Germany**, the instrument of *Verwaltungsvorschriften* has a **constitutional basis**, although in practice this term serves as an umbrella term for instruments with labels such *technische Anleitungen*, *Richtlinien*. The power to adopt *Verwaltungsvorschriften* is considered inherent to the exercise of executive power.²⁴⁴ In German doctrine, a distinction has been made between *norminterpretierende Verwaltungsvorschriften* (provisions that interpret *unbestimmte Rechtsbegriffe* - vague or open legal norms) and *ermessenslenkender Verwaltungsvorschriften*. The latter category concerns soft law that is adopted by administrative authorities on how they will apply discretionary powers that have been conferred on them. So, here we can also see a similarity with the Commission's interpretative and decisional acts.

In **France**, first and foremost it has been the Council of State that has developed the concept of soft law as a legal phenomenon. It has developed a **catalogue of soft law instruments**, consisting of preparatory acts,²⁴⁵ confirmative decisions, directives²⁴⁶ and circulars. The category of circulars is further broken down in interpretative, non-imperative and imperative circulars. What is interesting with regard to the French legal system is the shift that French courts have made from a formal to a more functional or substantive approach. Previously, normative value was precluded to acts on the basis of their formal category. Now the courts take into consideration the more practical consequences and effects, although this approach is still limited in scope.

Such clarity is largely absent in the **United Kingdom**, where the use of soft law is subject to various levels of confusion. This may be explained from the UK Parliament's practice to not pursue a particular policy in choosing forms of delegation, neither in terms of typology (notions such as regulations, rules, bylaws, orders, directions, guidance, code of practice etc. may be used) nor in terms of legal effects. This is decided on an **ad hoc basis** by the UK Parliament.

With such differences in legal foundations, it may come as no surprise that there are also **many differences** with regard to the **procedural framework** that applies to them. The abovementioned policy rules in the Netherlands are subject to a rather elaborate set of norms resulting from the application of the General Administrative Law Act (GALA). This includes the principles of legal certainty, equality and proportionality as well as due diligence, motivation and a prohibition of *détournement de pouvoir*. Policy rules must also be published, which is a common characteristic in the UK, Germany and France as well,

²⁴⁴ C. F. Müller, *Handbuch des Deutschen Staatsrecht*, Heidelberg 2007, p. 343.

²⁴⁵ CE, Ass., 15 April 1996, Syndicat CGT des hospitaliers de Bédarieux N° 120273 (<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007937111&fastReqId=678391357&fastPos=1>).

²⁴⁶ CE Sect., 11 December 1970, Crédit Foncier de France c. Demoiselle Gaupillat et Dame Ader N° 78880 (<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007641501&fastReqId=381565606&fastPos=1>).

although usually not in the form of a general obligation. In Germany, a special website is hosted by the federal government on which all *Verwaltungsvorschriften* are published and updated.²⁴⁷ In the UK, soft law (circulars) cannot be issued when it concerns controversial issues and it cannot require the performance of unlawful acts.²⁴⁸ Notwithstanding the fact that a ministry is not obliged to publish instructions to its staff on purely internal matters, rules which directly affect the individual should be published.²⁴⁹

Another complex issue with regard to soft law regards its **legal effects**. German *Verwaltungsvorschriften* may have different legal effects depending on the type of *Verwaltungsvorschrift*. *Verwaltungsvorschriften* on how administrative authorities apply discretionary powers are only binding on the administrative authority in question. Legal effects of *Verwaltungsvorschriften* that make legal norms more concrete may even bind individuals (unless a court decides afterwards that the interpretation was not legal). With regard to the Dutch policy rules, external legal effects are accepted on the basis of the principles of legal certainty and legitimate expectations. The legality principle however excludes the creation of obligations on individuals. In the UK it is statutory law rather than legal principles that define the legal effects of soft law instruments.

A last point here regards the **reviewability** of soft law instruments. In France, only acts in the category of 'Acte administratif' are subject to a judicial challenge (*recours pour excès de pouvoir*). One of the criteria for such an act is that it must be normative. This normative nature is defined as the addition, maintaining or disappearing of provisions. Given the abovementioned more functional approach in recent years, soft law instruments more easily qualify as such. Direct review of policy rules in the Netherlands has been explicitly excluded (Article 8:2 GALA), but indirect review may be possible if an individual challenges a decision based on policy rules, or if the administrative authority has deliberately deviated from the applicable policy rules. In Germany, the possibility for review is contested.²⁵⁰

With regard to agencies

The relevant issue to consider here with regard to agencies is the extent to which they may exercise general rule-making powers and to what extent there is the intention to establish uniformity in regulating their status and powers.

In the **Netherlands**, the Guidelines for Legislation²⁵¹ provide that the responsible minister of the Crown may only delegate regulatory powers to Independent Administrative Bodies (IABs) that concern organizational or technical subjects.²⁵² These powers are not subject to ministerial approval. The relevant Minister may, however, also delegate other regulatory powers in extraordinary cases, as long as the Minister has the competence to approve the regulations of the IABs. It has not been specified what is meant by 'organizational or technical subjects', or special cases for that matter. Interestingly, in the Netherlands in 2006 a **framework law** on IABs was adopted.²⁵³ This law aims at regulating the

²⁴⁷ www.verwaltungsvorschriften.de.

²⁴⁸ *Royal College of Nursing v. DHSS* [1981] AC 800; *Gillick v. West Norfolk Health Authority* [1986] AC 112.

²⁴⁹ Bradley, A. W. & Ewing, K. D., *Constitutional and Administrative Law* (13th ed.), 2003, Harlow: Longman, p. 664.

²⁵⁰ C. F. Müller 2007, *op. cit.*, p. 348.

²⁵¹ Aanwijzing voor de regelgeving' (Guidelines for legislation), last amendment: Stcrt.2011, 6602. A consolidated version is available at http://wetten.overheid.nl/BWBR0005730/Hoofdstuk4/geldigheidsdatum_05-03-2012, Paragraph 4.5.

²⁵² Guideline 124c of the abovementioned Guidelines for Legislation.

²⁵³ Kaderwet zelfstandige bestuursorganen (Framework Law on independent administrative bodies), 02-11-2006, Stb.

monitoring of the IABs by the Minister in a more uniform way. The law contains obligations for IABs to provide the Minister with information if so requested,²⁵⁴ the power for the Minister to establish policy rules with which the IAB has to comply when exercising its tasks,²⁵⁵ the Minister's power to quash decisions of an IAB²⁵⁶ and to take the necessary measures should the Minister consider that an IAB neglects its tasks.²⁵⁷ These rules do not apply, however, to all IABs. First, the definition given by the framework law only covers a quarter of all IABs.²⁵⁸ Second, the framework law opens the possibility to deviate from its substantive rules if properly motivated: the so-called **comply-or-explain approach**.²⁵⁹ A third interesting development in this regard has been the adoption of a **Code on good governance for organizations that exercise public tasks** (the *Code goed bestuur uitvoeringsorganisaties*).²⁶⁰ This Code was an initiative of a group of IABs and was published in 2003. It is not obligatory for IABs to commit themselves to this Code. It contains rules on financial accountability, independence and relation to the public. With regard to the latter point, the Code recommends inter alia the establishment of internal complaint procedures and the organization of periodical polls among the users of the services provided by the IAB. Other IABs have adopted their own codes of conduct, such as the OPTA (Independent Post and Telecommunication Authority).

In the **UK**, a Code has also been adopted to ensure greater uniformity and accountability of agencies, or Non-Departmental Public Bodies (NDPBs) as they are called.²⁶¹ The '**Corporate Governance in Central Government Departments: Code of Good Practice**'²⁶² contains provisions on parliamentary accountability, the role of the relevant internal Board, its composition, its effectiveness and risk management. The Code applies a 'comply-or-explain' approach which means that NDPBs can only deviate from it when it is properly motivated. With regard to consultation and transparency, the NDPBs should identify their key stakeholders and establish clear and effective channels of communication with them. It should furthermore engage and consult with the public on issues of real public interest or concern. This might be via new media. The body should consider holding open board meetings or an annual open meeting. The public body should furthermore establish effective correspondence handling and complaint procedures. Complaints should be taken seriously and where necessary be referred to the Parliamentary Ombudsman.²⁶³ The regulatory powers of NDPBs vary greatly. An example of an NDPB vested with regulatory power is the General Teaching Council for Wales. As the regulatory body for teaching, it sets out and maintains the standards for the behaviour and professional competence of teachers.²⁶⁴

²⁵⁴ Framework law IAB, *op.cit.*, Article 20.

²⁵⁵ Framework law IAB, *op.cit.*, Article 21.

²⁵⁶ Framework law IAB, *op.cit.*, Article 22.

²⁵⁷ Framework law IAB, *op.cit.*, Article 23.

²⁵⁸ S. Thiel, 'Kaderwet Zelfstandige Bestuursorganen; uniformiteit of verscheidenheid?', p. 2. <http://repub.eur.nl/res/pub/850/>.

²⁵⁹ S. Thiel, 'ZBO's en de grenzen van ministeriële verantwoordelijkheid', in R. Andeweg and J. Thomassen (eds.), *Democratie doorgelicht; het functioneren van de Nederlandse democratie*, Leiden: Leiden University Press, 2011, p. 466.

²⁶⁰ http://www.nhg.nl/fileadmin/user_upload/Documenten/PDF/organisatie/code_goed_bestuur.pdf.

²⁶¹ Bradley, A. W. & Ewing, K. D., *Constitutional and Administrative Law* (14th ed.), 2007, London: Longman, pp. 300-301.

²⁶² Available at http://www.hm-treasury.gov.uk/d/corporate_governance_good_practice_july2011.pdf.

²⁶³ Cabinet Office, 'Guidance on Reviews of non departmental public bodies', June 2011, p. 31-32. Available at http://www.civilservice.gov.uk/wp-content/uploads/2011/09/triennial-reviews-guidance-2011_tcm6-38900.pdf.

²⁶⁴ The General Teaching Council for England (GTCE) was established by the Teaching and Higher Education Act 1998, Articles 1 and 5. The GTCE was abolished by the Education Act 2011 and substituted by the General Teaching Council of Wales: Education Act 2011, Article 7.

In **France**, calls have been made to rationalize the framework for *Autorités Administratives Indépendantes* (AAIs), but this has not led to any concrete results yet.²⁶⁵ Key problem that was identified concerned the lack of supervision and procedural guarantees with regard to the power to sanction that some AAIs have. No soft law code, comparable to those in the Netherlands and the UK, exists. Instead, the **statutes establishing AAIs are decisive**. An interesting practice with regard to consultation may be found with regard to the French *Autorité de Régulation des Télécommunications* (ART; the Telecommunications authority). This authority is obliged to hold **public consultations** on important decisions that it intends to take.²⁶⁶ This authority is also under the obligation to publish all of its advice and decisions and is editor of an information letter containing information on topical issues and thematic issues in which it has to present its points of view as well as that of relevant stakeholders.²⁶⁷ Another issue with regard to AAIs concerns their use of soft law. The AMF (*Autorité des Marchés Financiers*) for instance possesses the power to adopt hard law provisions but considers it opportune to adopt soft law instruments instead. This leads to formal boundaries and competences being overstepped.²⁶⁸

Accountability and judicial review may be considered to be the main issues regarding agencies in the Member States. In the Netherlands, the Minister's competences with regard to IABs (and also the form and extent of control) depends on the establishing statutory laws and is therefore different for each IAB. This makes it very difficult for the Dutch Parliament to supervise the exercise of power regarding the acts they have adopted.²⁶⁹ In the UK, ministerial accountability is guaranteed by a range of provisions and obligations to inform and consult the Minister concerned and to require his consent for specific important decisions.²⁷⁰ In addition to this, an annual report should be provided to the Parliament.

Lessons to be learnt

This brief sketch has served to show that many of the issues identified in this report for the EU level manifest themselves at the national level as well. Given the diversity of national approaches and experiences, it must be observed that **no clear-cut answers** exist with regard to the issue as to how to deal with soft rule-making, including by agencies. But some elements of national law may provide useful sources of inspiration. The **legal 'embedding'** of policy rules in the Dutch legal system provides for more **legal certainty** without removing all flexibility for the administrative authorities concerned. Both the administration and individual citizens benefit from this, especially as it has clarified the legal effects and the possibilities for judicial review. The distinction in Germany between the two types of *Verwaltungsvorschriften* equally increases legal certainty by distinguishing the legal effects these types may give rise to. The quest for achieving a uniform legal-procedural framework to be applied to agencies has been difficult at national levels. However, the approaches pursued in the Netherlands and the UK – to adopt a code of conduct or good practice – could be an effective method. Also, the possibility included in

²⁶⁵ See a report by the French Parliament concerning AAIs 'Office Parlementaire d'évaluation de la législation rapport sur les autorités administratives indépendantes, available at <http://www.assemblee-nationale.fr/12/rap-off/i3166-tl.asp>.

²⁶⁶ <http://www.arcep.fr/index.php?id=13>.

²⁶⁷ *Ibid.*

²⁶⁸ Aurélie Ballot-Léna, 'Les Actes non décisaires de l'AMF. Quand le 'droit mou' s'endurcit', 2004. Available at <http://www.glose.org/CEDCACE1.pdf>.

²⁶⁹ J.L.W. Broeksteeg, 'Ministeriële verantwoordelijkheid van zelfstandige bestuursorganen', in J.L.W. Broeksteeg, J.T.J. van den Berg and L.F.M. Verwey, *Ministeriële verantwoordelijkheid opnieuw gewogen*, Alphen aan de Rijn: Kluwer, 2006, p. 89.

²⁷⁰ Cabinet Office, 'Guidance on Reviews of non departmental public bodies', June 2011, p. 21-22. Available at http://www.civilservice.gov.uk/wp-content/uploads/2011/09/triennial-reviews-guidance-2011_tcm6-38900.pdf.

such a code to give reasons in case of deviation (comply-or-explain principle) is interesting, as it balances the desire for more uniformity with the need for flexibility.

3.3. Possibilities of enhanced ex-ante and ex-post review

Finally, some consideration should be given to the possibilities for enhanced review and their place in or vis-à-vis the process of proceduralization of soft rule-making. On the ex ante level we will consider the potential of impact assessment for an enhanced review of soft rule-making processes, on the ex post level we will dedicate some further thoughts to the review possibilities at the level of the ECJ and the EO.

3.3.1. Impact assessment

Dehousse has argued that rather than applying a dogmatic approach to what has to be regulated by way of legislative instruments, it is more important to focus on strengthening transparency, participatory rights, the pluralist character (and therefore the quality) of scientific/academic deliberations, and fair behaviour by public authorities.²⁷¹ While we are not in favour of such a dogmatic approach either, we would argue that it is not so much an either-or question. An enhanced level of proceduralization and more balanced decisions regarding the choice of instrument should go hand in hand to a certain extent. For not only a higher level of proceduralization can enhance the Union's legitimacy, but also a **more deliberate use of regulatory instruments** by the responsible authorities. Impact assessment provides a potentially useful tool for this, in combination with consultation of stakeholders and other interested parties, but its current use at EU-level needs optimization.

As observed in section 2.3.2 the Commission takes an integrated approach to IA, assessing not only the environmental, economic and social impacts of its proposals, but also their subsidiarity and proportionality. In particular the latter two principles require that within the IA-process a range of legislative and non-legislative options is considered. While the claim is made that this consideration forms an essential part of the assessments carried out, this is only to a rather limited extent corroborated by the Commission's practice so far. The Impact Assessment Board has also held that there is **room for improvement** in this regard.²⁷² It thus appears that in the Commission's IA-process the emphasis lies very much on issues of substance and effectiveness/efficiency – especially cost-benefit analysis – and less so on instrumental issues. The consultations the Commission conducts within the framework of its IA-process should be effective on both these aspects. Also in this regard, however, there is a need for improvement. The EP has noted this as well, stating in recent resolutions that the consultation of stakeholder groups should be enhanced and that the complexity, asymmetry of the methods and forms of the Commission's consultation process and its feedback should be improved.²⁷³ The ex ante review of the Commission's proposals within the framework of the IA-process thus bears relevance not only on the 'smart

²⁷¹ R. Dehousse, *Misfits: EU Law and the Transformation of European Governance*, *Jean Monnet Working Papers* 2/02 (2002).

²⁷² See A. Meuwese and L.A.J. Senden, 'European Impact Assessment and the Choice of Alternative Regulatory Instruments', in: J. Verschuuren (ed.), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation*, Martinus Nijhoff Publishers, Leiden/Boston, 2009, pp. 137-174.

²⁷³ European Parliament resolution of 8 June 2011 on guaranteeing independent impact assessments, P7_TA-PROV(2011)0259; European Parliament resolution of 14 September 2011 on better legislation, subsidiarity and proportionality and smart regulation, P7_TA(2011)0381.

regulation' level with regard to the control of the 'first generation' institutional principles, in particular proportionality, but also in fact with regard to that of shaping 'second generation' good governance/administration principles, in particular that of consultation.

As the Commission's consultation process on the basis of its consultation guidelines has been tied to the impact assessment process, another relevant aspect to consider here concerns the **initiatives** that are **subject to IA**. As observed, this not only includes legislative, delegated and implementing acts but also non-legislative initiatives, to the extent that they 'define future policies and set out commitments for future legislative action.' On the face, this excludes many soft rule-making acts, in particular the Commission's interpretative and decisional acts given that these are foremost geared towards the implementation of existing rules and policies. Yet, it has also been observed that the Commission has apparently developed a **pragmatic approach** in this regard, by sometimes initiating IA-processes on such acts as well. Importantly, in cases in which rule- and policy making comes about without a Commission proposal (which may be the case e.g. with Council recommendations within the framework of OMC-processes), no impact assessment will be carried out, even if it would define future policies. While there is inter-institutional cooperation on impact assessment, a common approach of the legislative institutions to impact assessment is still lacking and the Council so far has made little use of IA. It thus appears that soft rule-making initiated by other Union institutions and bodies, including agencies, will escape ex ante review within an IA-process.

Impact assessment could make an enhanced contribution to both better regulation and better administration, if good governance/administration principles such as consultation would be more adequately shaped and if its scope would be extended to – hard and soft - actions of other institutions and bodies that define future Union policies or set out commitments for future legislative action.

3.3.2. The role of the European Court of Justice

Where the European Parliament plays an important role in the decision-making process, such as in the framework of the adoption of legislative acts according to the ordinary legislative procedure, the *locus standi* of individuals against such acts has remained restraint. Where the **democratic legitimacy of Union acts** is more limited, the Treaty of Lisbon has loosened the *locus standi* requirements; appeal is possible against regulatory acts, to be understood as binding acts of general application in the General Court's view, which are of direct concern to natural or legal persons. This amendment illustrates that there is a **correlation** between the level of input/procedural legitimacy that is provided for and the level of judicial protection that needs to be ensured. What implication should there be of this statement with a view to the judicial review of soft rule-making acts by the ECJ?

Firstly, we argue that this amendment should not only include the possibility for individuals to start an action for annulment against delegated and implementing acts (as provided for in Arts. 290 and 291 TFEU), but also against **any regulatory act** that appears soft from the outside but generates a certain legal effect, be it adopted by the Commission, the Council, an agency or similar type of body. This is all the more important where administrative, implementing powers are increasingly conferred upon agencies and take the form of soft rule-making because of the Meroni constraints. As the democratic control on this rule-making is very weak, it is all the more important to ensure adequate judicial control. In this regard, we also plead for a **loose interpretation** regarding the

requirement of 'legal effect' contained in Art. 263 TFEU; here the Courts should follow the same approach under both Articles 263 and 267 TFEU, not requiring the demonstration of an 'intent' of legal effect. As Scott has argued, there is a strong argument for enabling judicial review of post-legislative guidance documents, because "guidance of this kind is intended to interpret a binding legal obligation and to shape the manner in which this binding legal obligation is interpreted, enforced and applied."²⁷⁴

A second important issue concerns the **grounds of judicial review**. The judicial framework should not only open up more to enable review of soft rule-making instruments, but also regarding the good governance/administration principles that are becoming part and parcel of both the Union's Better Regulation strategy and EU administration, such as consultation processes and impact assessments.²⁷⁵ In the light of this, also the question as to how to ensure their compliance and enforcement has become a very pressing one. Or, developments at the legislative, administrative and policymaking levels should be adequately mirrored and addressed on the judicial level. These developments should lead the Union Courts to "insist on a **minimum level of formality** in the elaboration of post-legislative guidance".²⁷⁶ This implies amongst others that the Union Courts control whether such soft rule-making acts have not been adopted in contravention of transparency rules and that consultation and participation requirements have been lived up to. The Courts could thus interpret these as essential procedural requirements whose infringement might lead to annulment of the act in question.²⁷⁷ The fact that in Article 11 of Title II of the TEU they are captured under the heading of 'democratic principles' should not stop the Courts in establishing certain **consultation or participation rights**, be it by recognizing a dialogue-dimension to the giving reasons requirement, as part of the right to good administration or otherwise. As observed earlier, it will only be a question of time before the Union Courts will be confronted with such questions pursuant to the new provision. The right to access to documents provides an example of the way in which the ECJ may contribute to developing 'soft' principles into hard legally binding rights (see also section 3.3.3).

Scott has even argued that when power is conferred upon the Commission to adopt implementing acts, the parties that have been given a right to control the Commission's exercise of implementing powers, such as in comitology procedures, should be viewed as enjoying a similar right in the Commission's soft administrative rule-making process. The same should go for the European Parliament, where it has for instance the right to veto the adoption of an implementing act. The Courts could thus guard against the danger that recourse to soft administrative rule-making is motivated by a **desire to circumvent the more formal procedures** contained in the Treaties for the adoption of implementing acts. By engaging in such a procedural review of guidance, it is considered that the accountability of those responsible for engaging in soft administrative rule-making can be enhanced.²⁷⁸ Clearly, such a suggestion presupposes a far-reaching, general proceduralisation of soft administrative rule-making, starting from the premise that the **same procedural rules** apply as for the adoption of the underlying secondary law acts. From specific EU law provisions and institutional practice we have learnt that the legislator may indeed sometimes declare comitology procedures applicable to the adoption of soft

²⁷⁴ Scott 2011, *op.cit.*, p. 350.

²⁷⁵ Cf. A. Alemanno, The Better Regulation Initiative at the Judicial Gate. A Trojan Horse within the Commission's Walls or the Way Forward?, *ELJ*, vol. 15, issue 3, May 2009, pp. 382-400.

²⁷⁶ Scott, 2011, *op.cit.*, p. 351.

²⁷⁷ Cf. Alemanno 2009, *op.cit.*, pp.382-400.

²⁷⁸ *Ibid.*, pp. 352-353.

administrative acts as well. However, as yet, this does not seem to have become a general practice.

The central issue emerging from the above is to what extent proceduralisation is a matter that can be left to the Courts to develop further – necessarily in an ad hoc way, depending on the questions that are put to them - and how **pro-active** the legislator should be in developing a general legal framework for this, possibly in the form of a European administrative procedures act. The advantage of the latter would clearly be that the legislator can regulate this in a well-balanced, systematic and consistent way and thereby also ensure quite a high level of legal certainty. If such a legislative course of action proves politically unfeasible, an alternative legal strategy for the European Parliament could be to secure enhanced judicial review of soft rule-making processes by other Union institutions and bodies. As a privileged litigant under Art. 263 TFEU, it can do so for instance by initiating annulment procedures before the ECJ in cases where consultation and participation processes have not been properly conducted.

3.3.3. The role of the European Ombudsman

At the level of administrative review, it is important to note that as far as rule-making by agencies is concerned many founding regulations also provide for an **internal review procedure**. This may prevent the need for going to court, while the possibility is still left open to appeal the decision of an internal appeal board before the Union Courts. As seen, another possibility is to file a complaint before the European Ombudsman.

The EO has had a considerable impact on the development of good governance/administration principles. The opportunities for the EO to successfully influence other institutions and bodies seem to depend in particular on the **intensity of the complaints** it receives from the public, even though it can also carry out own initiative investigations. EU institutions have proved to be willing to make amendments for example by making their website accessible in all EU languages, changing practices and forms, repealing certain acts etc. In terms of substance, the EO has also expanded its scope of review gradually. The transparency principle is already a telling example of the central role not only the case law of the Courts but also the decisions and investigations of the EO can make in developing legally binding and enforceable good administration rights, in case of access to documents. The legislator has only followed at a later stage.

An example of the EO's capacity to condition the exercise of discretionary powers of the Commission in an area in which the ECJ has considered these powers to be extremely wide concerns the **infringement procedure**. Both in terms of initiating infringement procedures as well as in terms of deciding on the next steps in the various stages of the procedure, the Commission enjoys wide discretion. The Commission heavily relies on complaints from citizens in finding Member States' infringements of EU law.²⁷⁹ The aim of the procedure is, however, not so much to protect individuals, but rather to ensure the adequate implementation of EU law. This has led the Commission to address the individual's interest in the procedure in a rather poor manner, without pursuing an active policy with regard to the individuals that had come to lodge complaints. Even the decision whether or not to start an infringement procedure was not communicated to the individuals concerned. Given

its wide scope of discretion, the ECJ had little possibility to improve the situation. Following recurring complaints, the EO decided to investigate the matter.²⁸⁰ He recommended the Commission to provide the individual with the preliminary decision on the complaint and to give reasons, should the Commission decide not to initiate the procedure. The Commission subsequently adopted these recommendations in the form of a communication.²⁸¹ The EO urging EU institutions to further regulate the exercise of their discretionary powers has thus led to an improvement of procedural guarantees. Obviously, the success factors were the numerous complaints of individuals, combined with the dependence of the Commission on individuals.

The EO could consider the launch of an **own initiative investigation** on the basis of complaints it receives that are related to the use of soft rule-making powers by Union institutions and other bodies, e.g. regarding consultation practices.

The EO could also take the lead in considering the **extension of the scope of the Code of Good Administrative Behaviour** to general rule-making actions of the Unions institutions and other bodies. The Council of Europe Code of Good Administration provides inspiration for this.²⁸² This Code makes clear first of all that it understands by administrative decisions, "regulatory or non-regulatory decisions taken by public authorities when exercising the prerogatives of public power" and that "regulatory decisions consist of generally applicable rules." It next requires that administrative decisions are:

- phrased in a simple, clear and understandable manner;
- published - through personal notification or generally - in order to allow those concerned by these decisions to have an exact and comprehensive knowledge of them;
- not to take no effect retroactively with regard to a date prior to their adoption or publication, except in legally justified circumstances;
- judicially reviewable, i.e. private persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests;
- in principle subject to appeal (on the merits on on its legality), prior to a judicial review. In certain cases this should be compulsory.

²⁷⁹ P. Bonner, 'The European Ombudsman. A Novel Source of Soft Law In the European Union', 25 *European Law Review* (2000), p. 39-57, at p. 47.

²⁸⁰ Inquiry 303/97/PD, started 15 April 1997.

²⁸¹ COM (2002) 141 fin., OJ 2002 C 244/03.

²⁸² Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. Accessible on: <https://wcd.coe.int/ViewDoc.jsp?id=1155877&Site=CM>

4. FINAL CONCLUSIONS AND RECOMMENDATIONS

Building on the conclusions and suggestions already contained in section 3, we present here some final thoughts and recommendations.

This report has revealed the increasing relevance of soft rule-making in the EU, both at the level of developing new laws and policies in the EU and at the level of EU administration. At the level of direct administration, soft rule-making acts of the EU, originating not only from the Commission but increasingly so also from networks and agencies, are at the basis of their single-case decision-making. At the level of indirect administration, these acts provide guidance for many different national actors that are involved in the application and enforcement of EU law. This also affects the behaviour of stakeholders and other interested parties. **Any effort to develop a European administrative procedures act – in whatever legal form - should take this institutional and legal reality into account.**

Importantly, the developments charted in this report also call for a more integrated approach towards the regulation of soft EU rule-making processes and instruments. When it comes to ensuring good governance/administration in the context of soft rule-making, such as openness, transparency, participation and consultation, specific EU law provisions and institutional practice have appeared to run ahead of the checks and balances laid down in the Union's general legal framework, as regards both the Treaties and secondary law. This testifies of a need to have both clearer and more far-reaching rules put into place. **The general institutional-procedural-judicial framework is thus lagging behind the daily Union reality.** Moreover, in the absence of a uniform legal framework this daily reality is highly fragmented in terms of achieving good governance principles. Or, a different balancing of output/substantive legitimacy vis-à-vis input/procedural legitimacy interests than the one contained in the current general legal framework may indeed be required.

The analysis has also shown that many of the good governance principles discussed are relevant both at the legislative level and administrative level. Clearly, the consultation and participation principles as formulated in the Treaties do not only concern the legislator but also the administration. The consultation and impact assessment guidelines and practices underscore this, both as regards hard and soft rule-making processes. Even more so, where soft administrative rule-making comes in, regulation and administration are definitely intertwined. This intertwinedness in conjunction with the problem areas that have surfaced, lead us to the recommendation to **couple the Union's 'Better/Smart Regulation Strategy' with a 'Better Administration Strategy'**. Where good governance principles at the Treaty level are cast in rather vague terms (e.g. consultation and participation) or have remained unsubstantiated (e.g. effectiveness and coherence), the legislator can be said to bear a particular responsibility in putting flesh on their bones. One can find support for this view in the distinction that the Charter of Fundamental Rights makes between rights and principles in its Article 52, as this provision starts from the idea that provisions of the Charter which contain principles may require further implementation by legislative and executive acts by institutions, bodies, offices and agencies of the Union.

The Treaty of Lisbon has brought some amendments to the Treaties that provide good starting points for **the legal framing of a 'Better Administration Strategy'**. Firstly, it

has put more pressure on the Union institutions to work together towards realizing the Union goals, including those of enhancing (democratic) legitimacy and the rule of law, by explicitly confirming the inter-institutional dimension of the principle and duty of sincere cooperation (Articles 4(3) and 13(2) TEU). This duty can be operationalised through the conclusion of binding inter-institutional agreements, for which Article 295 TFEU provides a legal basis. Thereby, this provision enables the adoption of an Inter-institutional agreement on Better Administration or the adaptation of the existing Inter-institutional agreement on Better Lawmaking,²⁸³ so as to include certain aspects regarding soft rule-making by Union institutions and agencies. Secondly, the Treaty of Lisbon has even introduced a legal basis for adopting a more far-reaching instrument, namely a regulation to ensure an 'open, efficient and independent European administration' in support of the carrying out of the missions of the Union's institutions, bodies, offices and agencies (Article 298 TFEU). The second paragraph can even be read as imposing an obligation to that effect ("shall establish provisions"). While amendment of the Treaties in the short term is not to be expected, the best way to move forward for now would be to flesh out and agree upon at least some of the procedural modalities of the use of soft rule-making by either one of these devices. From the point of view of ensuring as much legal certainty as possible for citizens and also judicial protection, obviously the choice for the regulation would be the one to be preferred. In case these legally binding options appear not feasible, a broadening of the existing Code of Good Administrative Behaviour might be envisaged.

Substance-wise, it would seem perfectly possible to set up a flexible enough legal framework for the use of soft rule-making, including norms on transparency policies, consultation requirements and modalities, external and internal accountability, etc. In our view, **important elements** to be considered in the shaping of a Better Administration Strategy in one of the aforementioned legal devices should at least include:

- A typology of soft administrative rule-making acts and clarification of their legal status;
- A reorientation of the Meroni doctrine on delegation of – hard and soft - rule-making powers to agencies, so as to better align the legal framework and institutional practice and to provide for more legal certainty in this regard;
- The role of impact assessment in shaping soft administrative rule-making processes;
- Codification of already broadly applied practices, such as regarding publication of soft rule-making acts and regarding access to documents;
- The role of comitology as a controlling device for both Member States and the European Parliament;
- The establishment of clear rules on the applicable consultation modalities, taking into account the core values of equal treatment, balanced representation and inclusiveness. In this context the introduction of 'notice and comment' or 'comply or complain' procedures should be further investigated;
- The establishment of clear rules on feedback and the duty to give reasons;
- A specification of administrative and judicial review possibilities.

²⁸³ The EP has also made such a proposition in its resolution of 4 September 2007 on institutional and legal implications of the use of soft law instruments (2007/2028INI), P6_TA(2007)0366.

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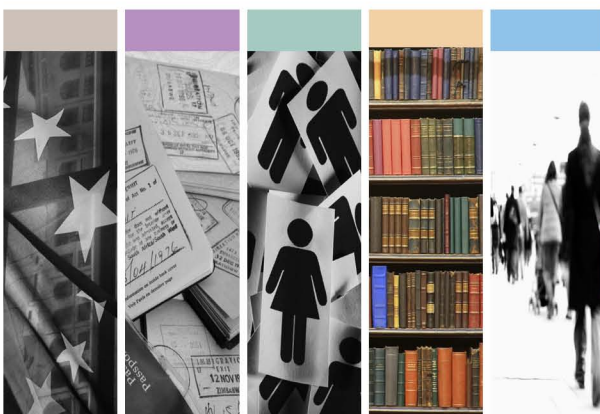
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