

## PARTE GENERALE

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**EU ADMINISTRATIVE LAW. THE *ACQUIS* (\*)**

SUMMARY: 1. Treaty provisions. — 2. EU Courts and principles of EU administrative law. — 2.1. Foundations. — 2.2. General principles developed by the EU courts. — 3. EU legislation. — 3.1. The financial regulation: central principles. — 3.2. Legislation relating to a certain type of administrative body: executive agencies. — 3.3. Legislation that establishes the more detailed rules relating to a particular treaty article: access to documents. — 3.4. Sector specific legislation that establishes procedural rules or a code for the relevant area: competition and state aids. — 4. EU charter of rights. — 5. Ombudsman.

## 1. TREATY PROVISIONS.

It should be made clear that the Treaty from the outset contained provisions that were directly relevant for the overall regime of administrative law. Thus what is now Article 19 TEU provides that the Court of Justice of the European Union shall ensure that in the interpretation and application of this Treaty the law is observed.

The more specific authority for the exercise of review is located in Article 263(1) TFEU, which stipulates that 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. The Lisbon Treaty modified Article 263 so as to make it explicit that judicial review would also be available against acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties. Judi-

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cial review for failure to act is found in Article 265 TFEU. The direct action via Article 263, paragraph 1, TFEU is complemented by Article 267 TFEU, which provides the basis for indirect scrutiny of, *inter alia*, the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union through the preliminary ruling procedure. The EEC Treaty from its inception also contained Treaty articles that deal with principles, both procedural and substantive, that are directly relevant for administrative law and judicial review.

Thus Article 296 TFEU establishes a duty to give reasons that applies to legal acts, whether in the form of regulations, decisions. It is noteworthy that Article 296 imposes a duty to give reasons not only for administrative decisions, but also for legislative norms, such as regulations or directives.

Article 15 TFEU contains a number of provisions that are directly relevant for a regime of EU Administrative law. Thus Article 15, paragraph 1, deals with transparency, and provides that “in order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible”.

This is complemented by Article 15, paragraph 2, which states that “the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act”.

Article 15, paragraph 3, concerns access to documents. It states that “any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph”. The detailed rules concerning access to documents, and the limits on such access on grounds of public or private interest, are to be determined by the European Parliament and the Council. It is clear moreover from Article 15, paragraph 3, that obligations concerning transparency and access to documents are incumbent on each EU institution, body, office or agency.

The EU Treaty not only provides for procedural principles that are relevant to EU Administrative law and judicial review, but also makes mention of substantive principles that constrain and delimit the behaviour of EU institutions and Member States when they act within the sphere of EU law. Thus, for example, Article 18 TFEU contains a general proscription of discrimination on the grounds of

nationality, and this is also to be found in the specific Treaty Articles dealing with free movement of workers, freedom of establishment, and the provision of services. Non-discrimination on the grounds of gender is dealt with by Article 157 TFEU. There are also provisions dealing with non-discrimination as between producers or consumers in the field of agriculture, Article 40, paragraph 2, TFEU, and specific provisions such as Article 110 TFEU prohibiting discriminatory taxation.

## 2. EU COURTS AND PRINCIPLES OF EU ADMINISTRATIVE LAW.

It has however been the EU courts that have made the major contribution to the development of EU administrative law principles. They have read principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality and procedural justice into the Treaty, and used them as the foundation for judicial review under Articles 263 or 267 TFEU.

### 2.1. *Foundations.*

It is axiomatic that all systems of administrative law will embody grounds or categories of review that provide the framework within which the courts exercise their powers. These may be developed by the courts. They may be laid down by statute or code. They may be formed from an admixture of the two.

In the case of the EU the Treaty forms the starting point for the elaboration of the grounds of review. Article 263, paragraph 2, TFEU stipulates that review shall be available for lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers.

The *travaux préparatoires* for the original Rome Treaty are not available. The influence of French juristic thought is nonetheless clearly imprinted on these grounds of review. The four heads of review, lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application and misuse of power, resonate with the French mode of administrative law thought.

Having recognized this progeny, it is however important to be mindful of the latitude accorded to the ECJ, and later the CFI, in

fashioning the principles of judicial review. This judicial discretion stemmed in part from the fact that while French influence might have dominated the choice of grounds for review, these grounds were then applied within a Community of six Member States. Principles of administrative law and modes of thought in Member States other than France naturally exercised an influence on the ECJ's emerging jurisprudence. It was unsurprising that German thought came to exert considerable authority in this respect.

The judicial discretion in developing the grounds of review also stemmed in part from the very fact that they are open-textured. This was especially so with respect to the second and third of the categories. Infringement of an essential procedural requirement could be read in a number of ways and gave ample latitude to the Community judiciary to develop it as they saw fit. This was *a fortiori* the case with respect to the third ground of review, infringement of the Treaty or any rule of law relating to its application.

The imperative to use Articles 263 and 267 TFEU to develop principles of EU administrative law was fuelled by the background precept of the rule of law, which is now recognized in Article 2 TEU. The legal systems of the Member States possess various precepts of administrative law concerning procedural and substantive review. The details vary as between legal systems, but there is not surprisingly significant overlap, and this is so irrespective of whether the same term or label is used. It is moreover common for the development of these precepts to be justified by recourse to the rule of law. The idea that administration should be procedurally and substantively accountable before the courts has been central to the rule of law. The EU judiciary therefore perceived its task as one of developing analogous principles within the EU legal order, so as to enhance the legitimacy of the EU and ensure that it too was governed by precepts of the rule of law. This was more especially so given the desire to assure the Member States, national courts, politicians and bureaucrats that the exercise of rapidly growing Community power over areas such as agriculture would be subject to proper legal scrutiny.

The primary Treaty provisions provided fertile ground for the development of a richer set of administrative law principles grounded on the rule of law. Thus, as noted above, Article 263, paragraph 2, TFEU specified, *inter alia*, that review should be available for breach of the Treaty or any rule of law relating to its application. The absence of the *travaux préparatoires* means that we do not know

what the latter part of this phrase was intended to connote. The intent might have been to do nothing more than ensure that Commission decision-making should have to comply not only with the primary Treaty articles, but also regulations, directives etc passed pursuant thereto. If this had been the intent it could however have been expressed far more simply and clearly. The intent might alternatively have been to capture not only compliance with secondary legislation, but also with other “rules of law relating to the application” of the Treaty that might be developed by the courts. In any event, the very ambiguity in the phrase provided the ECJ with a window through which to justify the imposition of administrative law principles as grounds of review.

Article 19 TEU (ex 220 EC) was equally important in this respect. It charged the ECJ with the duty of ensuring that in the interpretation and application of the Treaty the law should be observed. This might have been interpreted in a limited manner to connote the idea that, for example, Commission decisions should be made within the limits laid down by the primary Treaty articles and secondary legislation. The word ‘law’ within this Article was however open to a broader interpretation that would serve to legitimate the ECJ fashioning a system of legal principles in accordance with which the legality of Community and Member State action must be determined.

The judicial task of elaborating principles of judicial review was further facilitated by more specific Treaty articles, which made reference to, for example, non-discrimination. It was then open to the ECJ to read these particular Treaty references as indicative of a more general principle of equal treatment and non-discrimination that could be said to underpin the entire Community legal order.

The latitude afforded by Articles 19 TEU and 263, paragraph 2, TFEU, combined with the reference to concepts such as non-discrimination and proportionality in specific Treaty articles, laid the foundation for the ECJ to read general principles into EU law. A rich body of jurisprudence developed on process rights, fundamental rights, equal treatment and non-discrimination, proportionality, and legal certainty and legitimate expectations.

In developing these concepts the ECJ and later the CFI drew upon administrative law doctrine from the Member States. They did not systematically trawl through the legal systems of each of the Member States in order to find principles that they had in common, which could then be transferred to the Community context. The

approach was, rather, to consider principles found in the major legal systems of the Member States, to use those that were felt to be best developed and to fashion them to suit the Community's own needs. Thus as Advocate General Lagrange stated in an early case, the ECJ did not seek arithmetical common denominators between the national approaches to a particular problem, but rather chose from "each of the Member States those solutions which, having regard to the objects of the Treaty, appear to be the best or, if one may use the expression, the most progressive" (1). German law was perhaps the most influential in this regard. It was German jurisprudence on, for example, proportionality and legitimate expectations that was of principal significance for the development of Community law in these areas.

The EU courts use these principles in a number of different ways. They functioned as interpretative guides in relation to primary Treaty articles and regulations, directives and decisions enacted pursuant thereto. The general principles also operated as grounds of review. The EU courts cannot invalidate primary Treaty articles. They can, however, annul regulations, directives, decisions and other EU acts with legal effect. Violation of a general principle of EU law served as a ground for annulment. The principles can also be used against national measures that fall within the scope of EU law, although the range of measures caught in this manner is not free from doubt. Breach of a general principle may also form the basis for a damages action against the EU. The same should be true with respect to a breach of such a principle by the Member States, subject to fulfilment of the other conditions for this species of liability.

It should also be recognized that the EU courts not only developed the general principles of EU administrative law in the manner described above, but also determined the intensity with which they would be applied. The heads of review as specified by Article 263, paragraph 2, TFEU do not provide any answer to certain key issues that are addressed by all systems of administrative law. They do not on their face tell one anything about the test or standard for review in relation to matters of law, fact or discretion. Now to be sure the Treaty provides in Article 220 EC, as we have seen, that it is for the ECJ to ensure that the law is observed in the interpretation and

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(1) Case 14/61 *Hoogovens v High Authority* [1962] ECR 253, 283-4, Lagrange AG.

application of the Treaty. To be sure also, there will be certain instances, such as competence strictly conceived, where the courts will naturally incline to strict control and substitution of judgment as to the meaning of the contested Treaty article or provision of secondary legislation. This does not diminish the force of the point being made here, which is that many of the seminal issues concerning the test for review for errors of law, fact or discretion are not addressed by the Treaty, with the necessary consequence that they have been elaborated by the EU courts. It has therefore been the EU courts that have determined, for example, the intensity of proportionality review in different types of case, and the degree of scrutiny of errors of fact.

## 2.2. *General principles developed by the EU courts.*

A brief overview can be provided here of the main principles of administrative legality developed by the EU courts as general principles of law. The EU courts have been activist in protecting *process rights* in relation to individualized decisions. They imposed a right to be heard as a general rule of EU law, irrespective of whether this requirement was found in the relevant Treaty article, regulation, directive or decision. The general trend of the case law has been to require a hearing even where no sanction is imposed, provided that there is some adverse impact, or some significant affect on the applicant's interests (2), and the Community courts have applied and adapted this criterion to the many instances where administration is shared between the Community and the Member States. The right to be heard has been held to be part of the fundamental rights jurisprudence (3). It cannot be excluded or restricted by any legislative provision, and the principle must be protected both where there is no

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(2) Case T-450/93 *Lisrestal v Commission* [1994] ECR II-1177; Case C-32/95 *P Commission v. Lisrestal* [1996] ECR I-5373; Case T-50/96, *Primex Produkte Import-Export GmbH & Co. KG v Commission* [1998] ECR II-3773, [59]; Case C-462/98 *P MedioCurso-Etabelecimiento de Ensino Particular Ld v Commission* [2000] ECR I-7183, [36]; Case C-395/00 *Distillerie Fratelli Cipriani SpA v Ministero delle Finanze* [2002] ECR I-11877, [51]; Case T-102/00 *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap v. Commission* [2003] ECR II-2433, [59].

(3) Case C-49/88 *Al-Jubail Fertilizer v Council* [1991] ECR I-3187, [15]; Cases T-33-34/98 *Petrotub and Republica SA v Council* [1999] ECR II-3837; Case C-458/98 *P Industrie des Poudres Spheriques v Council and Commission* [2000] ECR I-8147, [99].



specific Community legislation and also where legislation exists, but does not take sufficient account of the principle (4).

Observance of the right to be heard can be raised by the Court of its own motion (5). The right to be heard before an individual measure is taken that would affect a person adversely is included within the Charter of Fundamental Rights (6).

The EU courts have developed the core principles concerning review of *law, fact and discretion*, issues that are central to any regime of administrative law. The EU courts substitute judgment on issues of law. The test for review of fact and discretion is different.

Manifest error, misuse of power or a clear excess of the bounds of discretion are the general grounds of review for fact and discretion, although the more precise meaning accorded to these terms may vary significantly depending on the subject matter being reviewed. Thus while the phrase manifest error originally connoted very low intensity judicial review it has been used more recently as the foundation for more intensive judicial review in areas such as such as risk regulation and competition.

It was the ECJ that recognized *fundamental rights* as a general principle of Community law, which could be used to test the legality of Community and Member State action. The original Treaties contained no express provisions concerning the protection of human rights, but it quickly became apparent that Community action could affect social and political, as well as economic, issues. It was the ECJ that developed what amounted to an unwritten charter of rights. The ECJ's early approach was unreceptive to rights-based claims (7). In *Stauder* there were nonetheless indications that fundamental rights would be protected in the Community order by the ECJ (8). It was however *Internationale Handelsgesellschaft* which secured fundamental rights within the Community legal order (9).

(4) Case T-260/94 *Air Inter SA v Commission* [1997] ECR II-997, [60].

(5) Case C-291/89, *Interhotel v Commission* [1991] ECR I-2257, [14]; Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, [67].

(6) Charter of Fundamental Rights of the European Union, OJ 2000 C364/1, Art. 41, paragraph 2.

(7) Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37, 38, and 40/59 *Geitling v High Authority* [1960] ECR 423; Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215.

(8) Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, [7].

(9) Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.



The applicant, a German import-export company, argued that a Community Regulation, which required forfeiture of a deposit if goods were not exported within a specified time, was contrary to principles of German constitutional law. The ECJ's response was a mixture of stick and carrot. It forcefully denied that the validity of a Community measure could be judged against principles of national constitutional law. It then held that respect for fundamental rights formed an integral part of the general principles of Community law protected by the ECJ. The ECJ would therefore decide whether the deposit system infringed these fundamental rights. In subsequent case law the ECJ emphasized that it would draw inspiration from the constitutional traditions of the Member States, from international human rights Treaties (10), and especially from the European Convention on Human Rights (ECHR) (11).

The early case law was concerned with the compatibility of Community norms with fundamental rights. The ECJ also later confirmed that these rights could be binding on the Member States when they acted within the sphere of Community law. This covered situations where Member States were applying provisions of Community Law which were based on protection for human rights (12). It applied to the many important areas where a Member State acted as agent for the Community in the application of EC law within its own country, as exemplified by *Wachauf* (13). The ECJ held further in *ERT* that Member States which sought to derogate from EC law on free movement, by relying on public policy, public health and the like, would be subject to the requirements of fundamental rights when deciding whether the derogation was lawful (14).

(10) Case 149/77 *Defrenne v Sabena* [1978] ECR 1365.

(11) Case 4/73 *Nold v Commission* [1974] ECR 491; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case C-235/99 *The Queen v Secretary of State for the Home Department, ex p Kondova* [2001] ECR I-6427; Case C-25/02 *Rinke v Arztekkammer Hamburg* [2003] ECR I-8349; Cases C-465/00, 138 and 139/01 *Rechnungshof v Österreichischer Rundfunk and others* [2003] ECR I-4989.

(12) Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

(13) Case 5/88 *Wachauf v Germany* [1989] ECR 2609; Cases C-74/95 and 129/95 *Criminal Proceedings against X* [1996] ECR I-6609.

(14) Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, [43]; Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-368, [24]; Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, [40]-[41];

The EU courts developed an extensive jurisprudence on *equality* across a broad range of areas that fell within the sphere of EU law. Thus equality and non-discrimination on grounds of nationality was central to the case law on the four freedoms. It was equally important at a more general level in the interpretation of what is now Article 18 EU, which played a central role in the development of the case law on citizenship in the last two decades.

The EU courts recognized *legal certainty and legitimate expectations* as general principles of EU administrative law. Protection of legitimate expectations extends to any individual who is in a situation from which it is clear that, in giving precise and specific assurances (15), the EU institutions caused that person to entertain justified hopes (16). There are no strict rules as to the form of the representation. It can arise from letters (17), faxes, reports (18), communications (19), administrative practice (20), codes of conduct (21) and the like (22). A legitimate expectation cannot however arise from the unilateral action of the person seeking to plead the expectation (23). The crucial issue for the applicant is however to show that the representation, in whatever form it was issued, was sufficiently precise and specific to give rise to a legitimate expectation that it would be adhered to.

*Proportionality* is another important general principle of EU administrative law recognized by the EU courts. The concept of proportionality was most fully developed within German law. It appeared initially to challenge policing measures where they were excessive or unnecessary in relation to the objective being pursued.

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Cases C-482 and 493/01 *Orfanopoulos v Land Baden-Wurtemberg* [2004] ECR I-5257, [97]-[98].

(15) Case T-72/99 *Meyer v Commission* [2000] ECR II-2521; Case T-290/97 *Mehibas Dordtselaan BV v Commission* [2000] ECR II-15.

(16) Case T-489/93 *Unifruit Hellas EPE v Commission* [1994] ECR II- 1201; Case T-534/93, *Grynberg and Hall v Commission* [1994] ECR II-595; Case T-456/93 *Consorzio Gruppo di Azioni Locale Murgia Messapica v Commission* [1994] ECR II-361.

(17) Case 144/82 *Detti v ECJ* [1983] ECR 2439.

(18) Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products v Commission* [1987] ECR 1155.

(19) Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, [53]-[55].

(20) Case T-310/00 *MCI, Inc v Commission* [2004] ECR II-3253, [112].

(21) Case C-313/90 *CIRFS v Commission* [1993] ECR I-1125.

(22) Cases 424-425/85 *Frico v VIV* [1987] ECR 2755, [32]-[33].

(23) Case T-107/02 *GE Betz, Inc, formerly BetzDearborn Inc v OHIM* [2004] ECR II-1845, [87].

In its modern German formulation the consensus is that proportionality involves three factors. The courts will consider whether the measure was suitable for the attainment of the desired objective. They will examine whether the disputed measure was necessary, in the sense that the agency had no other option which was less restrictive of the individual's freedom. The final stage of the inquiry is whether the measure was disproportionate to the restrictions thereby involved.

Proportionality is well established as a general principle of EU law. There was early reference to proportionality in the case law concerning the ECSC (24). The principle was however developed more fully after the decision in *Internationale Handelsgesellschaft* (25), where proportionality was used to challenge the system of deposits for import and export licences. While the action failed on the facts the judgment nonetheless established proportionality as a ground of review. The EU courts will in general inquire whether the measure was suitable or appropriate to achieve the desired end. They will also examine whether it was necessary to achieve that objective, or whether this could have been attained by a less onerous method. There has been greater uncertainty as to whether the third element, often referred to as proportionality *stricto sensu*, is also part of the EU test.

The legal reality is that although the EU courts do not always make reference to this aspect of the proportionality inquiry, they will generally do so when the applicant presents arguments directed specifically to it. It is clear that the intensity with which the proportionality inquiry is applied will vary depending on the nature of the subject matter that is being reviewed. A version of the proportionality principle is also enshrined in Article 5 TEU as part of subsidiarity.

A more recent addition to the list of general principles of law that is of especial relevance to EU administrative law is the *precautionary principle*, which has been developed primarily by the CFI. The ECJ made reference to the precautionary principle when inter-

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(24) Case 8/55 *Fédération Charbonnière Belgique v High Authority* [1954-6] ECR 292, 299; Case 19/61 *Mannesmann AG v High Authority* [1962] ECR 357, at 370-371.

(25) Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

preting Community legislation in the environmental field (26), and was willing to use the principle as an interpretative tool when construing a Community directive that had an impact on the environment (27). It referred to the principle once again in the *BSE* case (28), where it held that “where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become apparent” (29). That approach was, said the ECJ, ‘borne out’ by Article 174, paragraph 1, EC, requiring Community policy on the environment to pursue the objective, *inter alia*, of public health, and by Article 174, paragraph 2, EC, which incorporated the precautionary principle into environmental decision-making (30). This reasoning was repeated in the *NFU* case (31), where the National Farmers’ Union challenged the legality of Community measures to combat mad cow disease. In neither case did the ECJ mention the precautionary principle explicitly, but it was clearly implicit in the legitimation of protective measures when there was scientific uncertainty. It was nonetheless the CFI that took the leading role in rendering explicit what had been implicit in the ECJ’s jurisprudence and to elevate the precautionary principle to the status of a new general principle of EU law.

*Pfizer* (32) and *Artegoda*n (33) are the seminal judgments in this respect.

The EU courts have in addition been at the forefront of the development of the *remedial principles* that apply when relief is sought via judicial review direct or indirect, under Articles 263 and 267 TFEU respectively. They also fashioned the principles of Member State liability, including damages liability pursuant to the *Franco*vich case.

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(26) Cases 175 and 178/98 *Criminal Proceedings against Paolo Lirussi and Francesca Bizzaro* [1999] ECR I-6881, [51]-[52].

(27) Case C-6/99 *Association Greenpeace France v Ministère de l’Agriculture and de la Pêche* [2000] ECR I-1651, [44].

(28) Case C-180/96 *UK v Commission* [1998] ECR I-2265.

(29) *Ibid* [99].

(30) *Ibid* [100].

(31) Case C-157/96 *The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex p National Farmers’ Union* [1998] ECR I-2211, [62]-[64].

(32) Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305.

(33) Cases T-74, 76, 83-85, 132, 137 and 141/00 *Artegoda*n GmbH v Commission [2002] ECR II-4945.

### 3. EU LEGISLATION.

A third source of principles relevant to the *acquis* for EU administrative law is to be found in EU legislation, which will of course be subject to interpretation by the EU courts. It would be impossible within the context of this paper to list or analyze all such legislation. It is nonetheless possible to differentiate the different kinds of EU legislation that impact on EU administrative law.

#### 3.1. *The financial regulation: central principles.*

The new Financial Regulation 2002 was enacted as part of the reforms introduced after the resignation of the Santer Commission. It establishes general principles concerning different forms of EU administration.

Article 53 provides that the Commission shall implement the budget either on a centralized basis, or by shared or decentralized management, or by joint management with international organizations. Centralized management covers those instances where the Commission implements the budget directly through its departments, or indirectly (34).

The principles concerning indirect centralized implementation are set out in Article 54. The Commission is not allowed to entrust its executive powers to third parties where they involve a large measure of discretion implying political choices. The implementing tasks delegated must be clearly defined and fully supervised (35). Within these limits the Commission can entrust tasks to the new breed of executive agencies, or EU bodies that can receive grants (36). It can also, within the limits of Article 54, paragraph 1, entrust tasks to national public-sector bodies, or bodies governed by private law with a public service mission guaranteed by the State (37). These national bodies can only be entrusted with budget implementation if the basic

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(34) Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002, On the Financial Regulation Applicable to the General Budget of the European Communities, OJ 2002 OJ L248/1 Art 53(2); Council Regulation (EC, Euratom) 1995/2006 of 13 December 2006 amending Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2006 L390/1.

(35) Ibid Art 54, paragraph 1.

(36) Ibid Arts 54, paragraph 2, lett. a) and b).

(37) Ibid Art 54, paragraph 2, lett. c).

act concerning the programme provides for the possibility of delegation, and lays down the criteria for the selection of such bodies. It is also a condition that the delegation to national bodies is a response to the requirements of sound financial management, and is non-discriminatory.

The delegation of executive tasks to these bodies must be transparent, and the procurement procedure must be non-discriminatory and prevent any conflict of interest.

There must be an effective internal control system for management operations, proper accounting arrangements, and an external audit (38). Before the Commission entrusts implementation to any of the preceding bodies it must ensure that there are proper control and accounting systems in place and proper procedures for the award of contracts and grants (39).

The Commission is not allowed to entrust implementation of funds from the budget in particular payment and recovery, to external private-sector bodies, other than those which have a public service mission guaranteed by the State (40). The Commission is however empowered to entrust such private-sector entities with tasks involving technical expertise, and administrative, preparatory or ancillary tasks involving neither the exercise of public authority, nor the use of discretionary judgment (41).

The new Financial Regulation therefore provides a framework for those activities directly managed by the Commission. Such programmes can be directly managed within the Commission; management tasks can be undertaken by executive agencies; implementation can be entrusted to an EU body or agency; some tasks can be delegated to networks of national agencies; and certain activities can be contracted-out.

The new Financial Regulation also contains many other important provisions concerning, for example, the respective duties of the authorizing officer and the accounting officer, which are separated (42).

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(38) Ibid Art 56, paragraph 1.

(39) Commission Regulation (EC, Euratom) 2342/2002 of 23 December 2002, Laying Down Detailed Rules for the Implementation of Council Regulation 1605/2002, OJ 2002 L357/1, Art. 35.

(40) Reg. 1605/2002 (n 34) Art 57, paragraph 1.

(41) Ibid Art 57, paragraph 2.

(42) Ibid Art 58.

The 2006 amendments to the 2002 Financial Regulation made further provision for those many instances in which administration is shared with the Member States, the most prominent examples being the CAP and the Structural Funds, at least in relation to those instances of shared administration that involve expenditure of EU funds. The desire to ensure financial regularity underlies the 2006 reforms. Thus Article 53, lett. b), provides that without prejudice to complementary provisions included in relevant sector-specific regulations, and in order to ensure in shared management that the funds are used in accordance with the applicable rules and principles, the “Member States shall take all the legislative, regulatory and administrative or other measures necessary for protecting the Communities’ financial interests”. The Member States must in particular: satisfy themselves that actions financed from the budget are actually carried out and to ensure that they are implemented correctly; prevent and deal with irregularities and fraud; recover funds wrongly paid or incorrectly used or funds lost as a result of irregularities or errors; ensure, by means of relevant sector-specific regulations adequate annual ex post publication of beneficiaries of funds deriving from the budget. The Member States must conduct checks and put in place an effective and efficient internal control system, and bring legal proceedings as necessary and appropriate.

### 3.2. *Legislation relating to a certain type of administrative body: executive agencies.*

EU legislation may also deal in detail with the rules relating to a certain type of administrative body. This is exemplified by the framework Regulation dealing with executive agencies (43). The overall objective was to foster flexible, accountable and efficient management of tasks assigned to the Commission. Policy decisions remain with the Commission, implementation is assigned to the agency (44).

The Regulation deals with a range of issues that are central to this type of administrative body, including the criteria for establish-

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(43) Council Regulation (EC) 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.

(44) Ibid recitals 5-6.



ment of such bodies, their duration, staffing, and legal status. There are important provisions specifying the agency's tasks. The Commission can entrust the executive agency with any tasks required to implement a Community programme, with the exception of "tasks requiring discretionary powers in translating political choices into action" (45). The intent is clear. Policy choices remain for the Commission, implementation is for the agency.

3.3. *Legislation that establishes the more detailed rules relating to a particular treaty article: access to documents.*

EU legislation that is relevant to administrative law may be designed to fill out the details of a principle that is contained in a particular Treaty article.

Thus, for example, the legislation required by what was Article 255 EC was adopted in the form of a Regulation in 2001 (46), following a number of earlier more specific decisions.

Regulation 1049/2001 improved the position governing access to documents in several respects, by for example abolishing the authorship rule, softening the nature of some of the exceptions and requiring a register of documents to be kept. The new legislation was implemented by the three EU institutions into their own rules of procedure (47), and has been applied to EU agencies. The right of access to documents is moreover now enshrined in Article 42 of the Charter of Fundamental Rights of the European Union (48).

3.4. *Sector specific legislation that establishes procedural rules or a code for the relevant area: competition and state aids.*

EU legislation that is relevant for the purposes of EU Administrative law may also take the form of what are in effect sector specific

(45) Ibid Art 6, paragraph 1.

(46) Regulation (EC) 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.

(47) Council Decision 2002/682/EC, Euratom of 22 July 2002, Adopting the Council's Rules of Procedure, OJ 2002 L230/7; Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001, Amending its Rules of Procedure, OJ 2001 L345/94.

(48) OJ 2000 C364/19.

rules or codes of procedure that govern the relevant area. Such rules apply in a number of areas, notably competition and state aids.

The following discussion also reveals the interplay between formal EU legislation laying down the relevant rules, and soft law in the form of Commission Notices and Guidelines that provide further information about the interpretation and application of such rules.

Competition can be taken by way of example. The new regime was put in place through a Regulation in 2003 (49). The classic elements of individual process rights are included in the new regulatory regime. There is a right to a hearing for the undertakings concerned by the proceedings before the Commission takes a decision and the Commission must base its decision only on objections on which the parties have been able to comment (50). The statement of objections must be notified to each of the parties and the Commission must set a time limit within which the parties may inform it in writing of their views. It is then open to the parties in their written submissions to set out all facts known to them which are relevant to their defence and to submit relevant documentation (51).

The Commission must give parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing if they so request in their written submissions (52). Complainants must be closely associated with the proceedings. If the Commission or National Competition Authorities (NCAs) consider it necessary, they may also hear other natural and legal persons. Applications to be heard by such persons shall be granted where they show sufficient interest (53). The Commission may, where appropriate, invite such persons to develop their arguments at the oral hearing of the parties to whom the statement of objections has been addressed, and the Commission may moreover invite any other person to express its views in writing and attend the oral hearing and may invite them to express their views at the oral hearing.

The rights of defence of the parties concerned must be fully respected in the proceedings.

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(49) Council Regulation 1/2003/EC of 16 December 2002, On the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

(50) Ibid Art 27, paragraph 1.

(51) Ibid Art 10, paragraph 3.

(52) Ibid Art 12.

(53) Ibid Art 27, paragraph 3.

They are entitled to access to the file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file does not extend to confidential information and internal documents of the Commission or NCAs. These provisions accord with the jurisprudence of the Community courts. The Commission decision must contain reasons for the conclusion reached (54).

The discussion thus far has been primarily concerned with the process rights of those undertakings alleged to have infringed the competition rules, although we have seen that other parties may also take part to varying degrees in the decision-making process. The procedural rights of the complainant have been addressed more fully through a Regulation and a Commission Notice. The Commission has made it clear that a complainant has a number of options (55): an action can be pursued in the national courts; a formal complaint can be lodged with the Commission; or the person may simply provide market information indicating competition infringements that can be logged on a Commission website. There are various process rights for persons with a legitimate interest (56) who seek to lodge a formal complaint with the Commission pursuant to Article 7, paragraph 2, of Regulation 1/2003.

The Commission Notice supports existing orthodoxy that the Commission does not have an obligation to take up all such complaints, given the limited nature of its resources and the relative importance of a complaint for the Community interest (57). The Commission however fully acknowledges the obligation derived from the jurisprudence that it must consider carefully the factual and legal issues brought to its attention by the complainant (58).

The Commission will therefore carefully examine the complaint and may collect further information and have an informal exchange of views with the complainant. If it decides not to pursue the complaint it will give reasons to the complainant and allow comment

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(54) Cases T-374, 375, 384 and 388/94 *European Night Services v. Commission* [1998] ECR II-3141.

(55) Commission Notice, On the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ 2004 C101/65, [3]-[4].

(56) Ibid [33]-[40].

(57) Ibid [41]-[45].

(58) Ibid [42], [53].

thereon (59). Where the Commission decides to take the matter forward the complainant is provided with a copy of the non-confidential version of the statement of objections. The complainant is allowed to comment in writing and may be afforded the opportunity to express views at the oral hearing. The Commission has however emphasized pre-existing orthodoxy that proceedings of the Commission in competition cases are not adversarial as between the complainant and the companies under investigation, and hence “the procedural rights of the complainants are less far-reaching than the right to a fair hearing of the companies which are the subject of an infringement procedure” (60).

The new regulatory regime also exemplifies the significance of procedural rights and powers accorded to the administration. The rationale underlying these rights and powers is instrumental, enabling the substantive goals of EU competition policy to be attained.

It is axiomatic that the Commission must know of the existence of a competition infringement in order to take appropriate action. The Commission is empowered to request information from undertakings, competent authorities of Member States and governments, (61) and there are penalties for non-compliance (62).

The Commission has power to inspect. The officials authorized by the Commission to conduct an inspection are empowered to enter any premises of the concerned undertakings. This includes the homes of directors, managers and other staff members, in so far as it is suspected that business records are being kept there. The officials can examine company books and business records, and take copies of, or extracts from, the documents. They can seal any premises or business records during the inspection. They can moreover ask any staff member questions relating to the subject matter and purpose of the inspection (63). Inspections can be either voluntary or mandatory. Voluntary inspections require the Commission officials to produce a written authorization, which specifies the subject matter and purpose of the investigation, and also the possible penalties (64). Mandatory inspections are based on a decision ordering the investi-

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(59) Ibid [56].

(60) Ibid [59].

(61) Reg 1/2003 (n 49) Art 18.

(62) Ibid Arts. 18, paragraph 3, 23.

(63) Ibid Arts. 18, paragraph 3, 23.

(64) Ibid Art 20, paragraph 3.

gation. The decision must state the subject matter and purpose of the investigation, the susceptibility to penalties, and the right to have the decision reviewed by the ECJ (65). The authorities of the Member State must afford the necessary assistance to the Commission in the event that the firm in question proves intractable. This can include police assistance (66).

There are moreover significant procedural powers and obligations that flow from the fact that Regulation 1/2003 introduced a system of parallel competence by empowering NCAs and national courts to apply Articles 81 and 82 EC in their entirety (67). This is exemplified by the power granted to the Commission and NCAs to provide one another with any matter of fact or law, including confidential information, which can then be used in evidence (68), and the provisions facilitating assistance in investigations by NCAs in different Member States, coupled with the power given to the Commission to use a particular NCA in effect as its agent for the carrying out of inspections (69).

#### 4. EU CHARTER OF RIGHTS.

The role played by the ECJ in developing fundamental rights as part of the controls on EU and national administration was considered above. In thinking about the overall nature of the *acquis* that comprises EU Administrative law the EU Charter of Fundamental Rights is worthy of separate mention for the reasons that will be apparent below.

Prior to the Charter the protection of rights was fragmented and piecemeal, thereby making it more difficult for the citizenry to understand the legal status quo (70). Moreover, the very fact that the scope of Community power had increased considerably made the

(65) Ibid Art 20, paragraph 4.

(66) Ibid Art 20, paragraph 6.

(67) Commission Notice, On the Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, OJ 2004 C101/54; Commission Notice, On Co-operation within the Network of Competition Authorities, OJ 2004 C101/43.

(68) Reg 1/2003 (n 49) Art 12.

(69) Ibid Art. 22.

(70) A. VITORINO, *The Charter of Fundamental Rights as a Foundation for the Area of Freedom, Justice and Security* (Centre for European Legal Studies, Exeter Paper in European Law, No. 4, 2001) 12-14.

promulgation of some form of Community bill of rights more pressing. It is a basic tenet of liberal democratic regimes that a *quid pro quo* for governmental power is the existence of rightsbased constraints on the exercise of that power. This fundamental idea is just as applicable to the EU as to traditional nation states. Thus even if the ECJ had not been ‘pressed’ into recognizing fundamental rights by the threat of revolt from the German and Italian courts, it would, in all likelihood, have realized the necessity for such limits on governmental power of its own accord, more especially because it was at that time developing administrative law controls on Community action.

The immediate catalyst for the Charter of Fundamental Rights came from the European Council. In June 1999 the Cologne European Council (71) decided that there should be a Charter of Fundamental Rights to consolidate the fundamental rights applicable at Union Level and to make their overriding importance more visible to EU citizens. The Charter was to contain fundamental rights and freedoms, as well as the basic procedural rights guaranteed by the ECHR. It was to embrace the rights derived from the constitutional traditions common to the Member States that had been recognized as general principles of Community law. It was also made clear that the Charter should include economic and social rights, institutional consequences of enlargement that led to the Nice Treaty.

The draft Charter was submitted by the Chairman of the Convention, Roman Herzog, to President Chirac, who held the Presidency of the European Council, on 5 October 2000 (72). It was considered at an informal meeting of the European Council at Biarritz on 14 October 2000 (73). The Charter was accepted, and this was reinforced at the Nice European Council.

The Charter was drafted so as to be capable of being legally binding. The precise legal status of the Charter was however left undecided in the Nice Treaty.

The status of the Charter is now dealt with in Article 6, paragraph 1, TEU. The Charter itself is not incorporated in the Lisbon Treaty, but it is accorded the same legal value as the Treaties.

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(71) 3-4 June 1999.

(72) Charte 4960/00, Convent 55, 26 October 2000.

(73) Charte 4955/00, Convent 51, 17 October 2000.

The Lisbon Treaty is premised on the version of the Charter as amended by the IGC in 2004 (74), and this version has been reissued in the Official Journal (75).

The fact that the Charter is rendered binding by the Lisbon Treaty may well alter the profile of judicial review within the EU, and pose new challenges for the Union courts. They have hitherto fashioned the fundamental rights jurisprudence and been required to adjudicate on complex and contentious issues. The role of rights-based claims within judicial review may nonetheless expand considerably forcing the Union courts to adjudicate on an increasing number of complex claims relating to both Union and national action.

In the EU there has been a “common law style” development of fundamental rights by the Community courts since the 1970s. The number of such cases has nonetheless remained limited. Claimants, Advocates-General, the CFI and more recently the ECJ relied on the Charter for interpretative guidance even prior to the Lisbon Treaty.

The fact that the Charter is now rendered legally binding by the Lisbon Treaty will in all likelihood increase the profile of rights-based claims within judicial review actions.

Claimants will be able to point to a clear set of rights, which are legally binding on EU institutions and Member States when they act within the sphere of EU law. The Union courts will then be faced by a change in the profile of judicial review actions, with an increasing number of such claims having a strong rights-based component.

There are moreover three further reasons to think that the overall number of cases will increase, and that many will entail rights-based arguments in reliance on the Charter.

First, this is because of modification of the standing rules for direct actions, whereby the Lisbon Treaty, following in this respect the Constitutional Treaty, has loosened the grip of individual concern that has been such a block to actions hitherto, although the significance of this change remains uncertain.

Secondly, it is because of the very breadth of the Charter. The list of rights in the ECHR is considerably narrower than that included in the Charter, and that is so notwithstanding the fact that

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(74) Ibid 25, n 21.

(75) Charter of Fundamental Rights of the European Union, [2007] OJ C303/1; Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/17. The Charter has been reissued with the Lisbon Treaty, [2010] OJ C83/2.



some of the Charter provisions are deemed to be principles rather than rights. The very breadth of the Charter provisions will therefore fuel claims testing their meaning, scope and interpretation.

Thirdly, the number of rights-based claims involving complex issues is likely to increase because of the 'de-pillarization' of the Third Pillar. The Area of Freedom, Security and Justice is brought within the general framework of EU law, including judicial control. Many AFSJ measures involve conflicts with classic civil and political rights. The Community courts, prior to the Lisbon Treaty, did their best to maintain control over measures enacted under the Third Pillar, but even this teleological interpretation of their jurisdictional capacities left gaps in judicial protection. The fact that the AFSJ is, subject to transitional provisions, brought within the general framework of the EU legal and political order, including the applicability of the Charter, is therefore likely to generate rights-based claims before the Union courts and require them to grapple with complex issues concerning the interplay between civil and political rights and the needs of a political order seeking to impose controls over matters ranging from asylum to terrorism.

## 5. OMBUDSMAN.

The Ombudsman has also made an important contribution to the *acquis* of EU Administrative law.

The European Ombudsman is primarily reactive in the sense that he responds to complaints he has received, but he can also be proactive and initiate inquiries of his own volition in certain circumstances.

The Ombudsman's perception of maladministration is governed by a dual logic. There is the concept of legality, which emerges as the principal definitional component of maladministration. Contrary to objections that have been sporadically raised by the Commission, the Ombudsman has consistently held that the wrongful interpretation or application of Community norms constitutes an instance of maladministration. The Community norms whose infringement will lead to a finding of maladministration consist of the Treaties, legally binding provisions of Community legislation and the whole corpus of the judgements of the ECJ and the CFI. Particularly important for the Ombudsman's work are the general administrative law principles, both procedural and substantive, that have been established

and elaborated by the Community judiciary. These include: provision of accurate information, diligent and impartial examination of grievances, respect of the right to be heard, duty to give adequate and coherent reasons for decisions, protection of legitimate expectations, equality of treatment and transparency.

The concept of maladministration is not however exhausted by the concept of legality. It also includes rules and principles that for the purposes of the Ombudsman's investigations are considered to restrain the Community administrative behaviour even though they lack legally binding force. Thus the European Ombudsman has used his previous decisions, the Code of Good Administrative Behaviour and the Charter of Fundamental Rights before it became binding as criteria against which to assess the bureaucratic activity of Community institutions and bodies.

The European Ombudsman has also been a strong advocate of a general code of good administration and has argued that his existing code, which elaborates on the meaning of the right to good administration in Article 41 of the Charter, should be transformed into formal law (76). There has hitherto been doubt as to whether there was competence to make a general code, more especially because competence to adopt sector-specific codes has tended to be based on the Treaty Article governing the relevant substantive area. It is arguable that a code could have been based on Article 308 EC, now Article 352 TFEU, although the Commission President had doubts in this respect (77).

Article 298 TFEU could now provide the foundation for such an initiative. It states that in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. Article 298, paragraph 2 then empowers the European Parliament and Council to make regulations in accordance with the ordinary legislative procedure to achieve this aim.

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(76) European Ombudsman, *The European Code of Good Administrative Behaviour* (2005), available at [http://www.euro-ombudsman.eu.int/code/pdf/en/code2000\\_en.pdf](http://www.euro-ombudsman.eu.int/code/pdf/en/code2000_en.pdf); Speech by the European Ombudsman, P. Nikiforos Diamandouros, on the Occasion of the Formal Dinner with the EU Institutions, Bodies and Agencies to Mark the 10th Anniversary of the European Ombudsman Institution, available at <http://www.euroombudsman.eu.int/10anniversary/en/2005-11-17b.htm>.

(77) Speech by the President of the European Commission, M. BARROSO, on the Occasion of the Formal Dinner to Mark the 10th Anniversary of the European Ombudsman, available at <http://www.euroombudsman.eu.int/10anniversary/fr/2005-11-17a.htm>.