

ESSAYS

NATIONAL ADMINISTRATIVE PROCEDURES IN A EUROPEAN PERSPECTIVE: PATHWAYS TO A SLOW CONVERGENCE

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Abstract

This paper looks at the evolution of principles and rules of administrative procedure in the European Union and their implications for national systems of administrative law. Section 1 treats the development of 'general principles of administrative procedure' by the Luxembourg Courts. Section 2 deals with problems of conflicts which may arise when procedural principles of administrative law gain the status of a fundamental human right, with special reference to the European Convention on Human Rights. Section 3 turns to the 'soft law' principles of good administration promulgated by the European Ombudsman in his Code of Good Administrative Behaviour. Section 4 looks briefly at the increasing volume of sector-specific regulation by the EU, which often directly imposes procedural requirements on national administrations. Section 5 covers horizontal EU requirements in respect of access to information and privacy. The authors foresee a gradual convergence of national procedural requirements, concluding that a gradual approach will prove more effective in the long run than codification at EU level or other attempts at formal procedural harmonisation.

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Introduction

This paper looks at the evolution of principles and rules of administrative procedure in the European Union from the viewpoint of their implications for national systems of administrative law. The term 'administrative procedure' is not without its complications. Generally, the term refers to the non-contentious procedures used by the administration: in other words, *all* those procedures followed by the administration before any issue of judicial review arises. It may however be used in an attenuated sense to cover values such as natural justice, consultation or transparency, which are seen to apply horizontally across administrative functions. The development of 'general principles of administrative procedure' in this sense by the Luxembourg Courts is briefly treated in Section 1. It is a familiar story, starting from the Treaty obligation to give reasons for all formal Community acts and expanding within competition proceedings to cover what are generally called the rights of the defence or, in Anglo-American terminology, due process rights.

To borrow the language of her well-known article,¹ this is Bignami's 'first generation' of participatory rights. Transparency, her 'second generation' right, is the subject of Section 5.

From the particular perspective of this paper, Bignami's 'third generation' of rights, which refer to the participation of 'stakeholders' and 'civil society' generally in rulemaking, is more problematic. The Constitutional Treaty and Treaty of Lisbon both make mention of citizen participation in 'the democratic life of the Union' and TFEU Article 11 not only requires the institutions to provide for opportunities for exchange of views and 'open, transparent and regular dialogue' but more specifically obliges the Commission 'to carry out broad consultations with parties concerned', something that more closely approaches an administrative law right. These provisions, which take up to Treaty level ideas introduced by the Commission in its *White Paper on European Governance* in 2001,² apply only to lawmaking at European Union level; the direct impact on national systems is therefore minimal. The same is true of the procedures set in place by the Commission to govern its relations with civil society, which for this reason receive only a brief mention in Section 6. Sector-specific regulation by the EU does, on the other hand, often provide for consultation and other participatory rights at national level. This issue is dealt with in Section 4.

Conflicts may occur when procedural principles expressed as general principles of EU law become applicable inside national legal orders or 'vertically'. This problem is exacerbated when general principles of administrative law, such as the rights of the defence or natural justice, are adopted in human rights texts as a fundamental human right, as is the case with Article 6(1) of the European Convention on Human Rights (ECHR). The potential for judicial conflict is magnified as similar procedural issues arise before different courts with differing perspectives. This is the subject of Section 2. Whether expressed in human rights texts or articulated judicially, these general principles of administrative

¹ F Bignami, *Three Generations of Participation Rights before the European Commission* 68 *Law and Contemporary Problems* 61(2004).

² European Commission, *White Paper on European Governance*, COM (2001) 428 final p.1. For the special links with regulatory reform, see European Commission, *Third strategic review of Better Regulation in the European Union*, COM (2009) 15 final.

procedure are, however, justiciable. Other important procedural standards are expressed in 'soft law'. Section 3 deals with the *Code of Good Administrative Behaviour* promulgated by the European Ombudsman (EO), which has been particularly important in promoting good administrative procedures, leading in time to the crystallisation of the right to good administration in Article 41 of the European Charter of Fundamental Rights (ECFR). Whether or not the term 'codification' can be applied to this soft law code of practice, it represents an important path towards 'approximation'.

The term 'administrative procedure' may also refer to a single administrative process, such as the regulation of competition or of public procurement or of 'risk regulation procedures' such as food safety or the regulation of noxious chemicals. In this case, the procedures apply vertically in the sense of being sector-specific and selective: consultation procedures and third-party rights in environmental decision-making will, for example, be very different from the rights of the defence applicable to competition proceedings and different again to the rights of asylum-seekers. Again, there may be conflicts with cross-cutting general principles of administrative procedure. The extent of this type of sector-specific codification at EU level and its role in harmonisation is considered in Section 4. Section 5 approaches codification from a horizontal but single-purpose perspective, through a consideration of EU legislation on access to information and data protection. The problems that surround the regulatory process and the implications for national legal orders are in both cases addressed.

In Section 6, the authors suggest a pragmatic approach tailored to developments in EU governance. The emphasis, it is argued, should be on pluralism and gradual convergence. A multi-track approach, combining soft law, sector-specific codification and, where appropriate single-purpose horizontal regulation, is advocated.

1. A judicial contribution

a. Reason and remedy

The starting-point for principles of administrative procedure in the EU is in the founding treaties, which provided in

TEC Article 190³ that all 'regulations, directives and decisions' must state the reasons on which they were based. This far-sighted provision has been adhered to strictly by the Luxembourg courts.⁴ The ECJ's judgments reiterated that the duty was no mere formality: it provided an essential opportunity not only for those affected to defend their rights but (more important in the jurisprudence) for the Court to exercise its supervisory functions. Significantly, the ECJ also acknowledged a wider public dimension for 'member states and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty'.⁵ This statement arguably presaged the democratic 'right to know' (Bignamì's 'second generation' right of transparency) that underlies so many administrative procedures. The Treaty requirement of reasoned decisions stands as an inspiration to member states such as the UK, where no general duty to give reasons features in the national administrative law system,⁶ but also as a warning that in every situation that involves elements of EU law where a preliminary reference from a national court under TFEU 267 (ex 234) is a possibility, reasons will be expected by the Luxembourg Courts (see the *OMPI* decisions below).

However, the nature and extent of the reasons required by a court in any given case leaves a wide margin of discretion to the reviewing court. At EU level, the balance fell to be struck by the ECJ, though latterly, for jurisdictional reasons, the CFI has taken up the running. The two Luxembourg courts took the view broadly that the statement of reasons must be 'appropriate' for the purposes of review: on the one hand, for someone adversely affected by an administrative decision or procedure to defend his

³ This later became TEC Art. 253 and is now replaced and marginally re-worded by TFEU Art. 296.

⁴ For the sake of consistency the term EU law is used throughout this paper to cover what was previously EC law. Where it is necessary to distinguish EC and EU institutions, the term 'Community' is used. The convenient term 'Community Courts' is shorthand for *all* courts that play a part in the administration of EU law, while 'Luxembourg Courts' refers to the Court of Justice (ECJ) and the Court of First Instance, now the General Court, for which the abbreviation CFI is used throughout.

⁵ This is the formulation of Case C-350/88 *Delacre v Commission* [1990] ECR I-395.

⁶ C Harlow and R Rawlings, *Law and Administration* (3rd edn., 2009) at 630-636.

rights; on the other, for the reviewing court properly to exercise its powers of review.⁷ This not only involved confirmation that due process had been observed but also that the decision-maker's reasons were well-founded: an evaluation of the quality of the *reasoning*, usually on the basis of a proportionality test. On other due process values the EC Treaties were silent. It therefore fell to the ECJ and Commission to set the agenda or, more correctly, their respective agendas.

The ECJ is often seen by commentators as the creator of European administrative procedure.⁸ Certainly it did see itself as mandated to formulate 'general principles of EU law', many of which were - typically of administrative law - procedural in character. Drawn at first primarily from the legal orders of different member states, these procedural values were imposed by the Court not only on the Commission as Community executive but also on national administrations when acting as agents of the Community or where issues of Community law were involved. 'First generation rights' received recognition in Article 41 of the Charter, which selects for special protection a number of specific rights with strong legal connotations: the right to be heard and access one's file and the obligation to give reasoned decisions.

As Craig reminds us, all legal systems have to determine the content of the right to be heard. Amongst the possibilities, he lists: the right to notice of the relevant decision; whether there is a right to an oral hearing or only a paper hearing; whether the hearing must precede the relevant decision or whether it can be given thereafter; whether there should be any right to discovery of documents or any right to cross-examination; whether the evidential rules applied in a normal trial should be modified or relaxed in their application to administrative decision-making; whether there can be any contact between the administration and one of the parties prior to the decision being made; whether causation should matter, in the sense that the reviewing court should consider if the hearing would have made a difference to

⁷ Joined Cases 142/94 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487; Case T-7/92 *Asia Motor France v Commission* [1993] ECR II-669 [33]; Case C-367/95P *Commission v Syntraval and Brink's France SARL* [1998] ECR I-1719. And see P Craig, *EU Administrative Law* (2006) at 381-384.

⁸ Notably J. Schwarze, *Developing Principles of European Administrative Law* (1993) 229.

the final outcome; whether there is a right to be represented by a lawyer; whether reasons should be given for the decision; and the meaning to be given to impartiality.⁹

Almost every one of these issues has arisen in the context of EU administrative law and most of the due process requirements are now incorporated as principles of EU law.

Preliminary reference under TEC Article 234 (ex 177, now TFEU 267) gave opportunities to the ECJ to pronounce on national administrative procedures. The keystone of the Court's jurisprudence in this respect was the celebrated *Heylens* case, involving an application by a Belgian football trainer for a licence to work in France. The decision was based on an unreasoned opinion from a national body. The ECJ ruled that Heylens was entitled both to 'a remedy of a judicial nature' in situations where the decision of a national authority refused the benefit of a fundamental Treaty right and to a *reasoned* decision rendered either at the time or in a subsequent communication made at their request.¹⁰ The decision had the effect of 'constitutionalising' the twin rights as general principles of Community law.

b. Competition law and beyond

That the due process principles developed by the ECJ possess a distinctly Anglo-American flavour is explained by the origins of EU procedural law in competition law. In competition, mergers, state aids and anti-dumping cases, the Commission looked very like a classical regulator¹¹ and had to play against powerful international corporations able to purchase the best corporate lawyers trained in the anti-trust procedures of American law and prepared to contest every available procedural point with a view to reversing or substantially delaying a final unfavourable decision from the regulator. The famous Regulation 17,¹² which activated the competition regime, granted draconian powers to the Commission rendering it, in the view of its many critics, judge and prosecutor in its own cause; it was, on the other hand, notably

⁹ Craig, cit. at 7 at 361-2.

¹⁰ Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097 at [15].

¹¹ See G Majone, *The rise of the regulatory state in Europe* (1994) 17 W. Eur. Pol. 77.

¹² Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, OJ 21.02.1962, pp. 204/62.

short on procedural protections.¹³ Both Commission and Court came under pressure to introduce procedural rules along the lines of the American anti-trust procedures with which the corporate players were familiar.¹⁴

What followed epitomises the way in which administrative procedures typically emerge as a shared responsibility of executive and judiciary. Motivated both by the Courts' jurisprudence on reasons and also no doubt by a wish to secure a measure of cooperation from their formidable rivals, the Commission issued a further procedural text incorporating concessions appropriate to corporate enterprises, such as a right to legal representation at hearings.¹⁵ The ECJ eagerly took up the challenge in the *Transocean Marine Paint* case,¹⁶ where the *audi alteram partem* rule, according to which persons whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make representations, was classified as a general principle of EU law. This allowed the ECJ to build on and embroider the principle, which it began regularly to do, walking steadily down the path mapped out by Craig (above). Strictly, rights formulated by the Luxembourg Courts in direct actions against the Commission were not applicable in *national* competition regimes, although the ECJ could, as it did in *Heylens*, 'constitutionalise' the principles by applying them to national legal orders in any case where an Article 234 reference was made.

Competition law lies at the heart of the single market, while freedom to offer services is one of the four freedoms central to the Treaties, so it can be argued in both cases that the 'constitutionalisation' of procedures is a legitimate ancillary effect. It can nonetheless be taken too far and become too intrusive. The controversial *Watts* decision¹⁷ was one of a set of cases involving

¹³ K Lenaerts and L Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process* (1997) CML Rev 523.

¹⁴ Bignami, cit. at 1 at 64-67.

¹⁵ These were later fleshed out in Council Regulation 99/63 EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17, OJ 1963-4 p.47.

¹⁶ Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063. And see Case 85/76 *Hoffmann-LaRoche v Commission* [1979] ECR 461.

¹⁷ Case C-372/04 R(*Yvonne Watts*) v *Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325.

national medical services in which the ECJ can be rightly charged with penetrating an area of national competence too deeply. The case concerned the right of patients to claim back from the national authority the costs of obtaining medical care in another member state. In his Opinion, Advocate General Geelhoed argued that waiting lists, of which Mrs Watts was complaining, 'should be managed actively as dynamic and flexible instruments which take into account the needs of patients as their medical condition develops'. This meant that 'in the interest of transparency, decisions regarding the treatment to be provided and when that is likely to be should be taken on the basis of clear criteria restricting the discretionary power of the decision-making body'. The ECJ required the waiting list system to be based on 'objective, non-discriminatory criteria known in advance'. Individual decisions must be properly reasoned and there must in addition be: "a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings"¹⁸.

The objection to these instructions is that they are likely to have the undesirable effect of 'judicialising' what is essentially a clinical and administrative procedure. It may moreover be thought that detailed directions from the Court of Justice as to how hospitals in the British National Health Service should manage their waiting lists are in any event inappropriate.¹⁹

c. The challenge of new governance

The discussion has so far been in terms of a very traditional approach to administrative procedures conceived in the framework of a traditional 'two-tier model' of administration in which a sharp division is drawn between (small) areas of 'direct'

¹⁸ *Watts*, Opinion at [75] and [76]; judgment at [116].

¹⁹ C Newdick, *Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity* (2006) 43 CML Rev 1045. See also P Kiiver, *Legal Accountability to a Political Forum? The European Commission, the Dutch Parliament and the Early Warning System for the Principle of Subsidiarity*, Maastricht Faculty of Law Working Paper (2009-8) at 30-32 available on line on the SSRN network.

Commission administration and 'indirect' administration by national authorities. The addition of the 'Third Pillar' introduced a three-fold complication: first, the Pillar was built up not on the Community method but on longstanding habits of inter-governmental cooperation that were never abandoned; secondly, the Commission lost its position of primacy as the Council built up its own executive power;²⁰ finally the ECJ possessed only attenuated supervisory powers. There were hints here of challenge to the prevailing orthodoxy as the intermediate area of 'cooperative' or 'shared' administration, where the two tiers worked together, expanded.

In recent years, moreover, the two-tier classificatory system has been more directly challenged by the arrival of 'new governance' structures.²¹ Cooperative networks of public and private actors emerged, working as in the Lisbon initiative on social policy towards a common goal and further elaborating indirect techniques of decentred and co-regulation.²² New structures of 'decentralized administration' arrived. Even inside the central area of competition law, a policy now operates of downloading competition cases, a Commission responsibility, to national authorities. A European Competition Network composed of the Commission plus all the national regulators is in place, charged with a duty of close cooperation in the application of EU competition law.²³ The trend of agencification²⁴ both at European and national levels underwrites the broader development, with many sector-specific initiatives centred on an EU agency and/or network of agencies in collaboration.²⁵ The stated mission of

²⁰ D Curtin, *The Executive Power of the European Union* (2009) at 81-91.

²¹ R Rhodes, *What is New about Governance and Why does it Matter?* in J. Hayward and A. Menon (eds) *Governing Europe* (2003).

²² F. Caffagi (ed.), *Reframing self-regulation in European private law* (2006).

²³ I Maher and O Stefan, *Competition Law in Europe: The Challenge of a Network Constitution* in D Oliver, T. Prosser & R Rawlings (eds), *The Regulatory State: Constitutional Implications* (2009).

²⁴ D. Geradin, R. Munoz & N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm for European Governance* (2005); European Commission, *The European Agencies – The Way Forward*, COM (2008) 135.

²⁵ S. Cassese, *European Administrative Proceedings* 68 *Law and Contemporary Problems* 21, 22 (2004); D. Coen & M. Thatcher, *Reshaping European Regulatory Space: An Evolutionary Analysis* 31 *West Eur. Pol.* 806 (2008); E. Chiti, *The administrative implementation of European Union law: a taxonomy and its*

Europol, a powerful ex-'Third Pillar' agency answerable to the Council, is, for example, to 'assist and support the competent law enforcement authorities of the member states' and foster the 'establishment of joint investigation teams', in which Europol staff are encouraged to participate.²⁶ In other areas, such as environment and telecommunications, international networks of public and private actors operate inside EU regulatory space. The recent world-wide 'credit crunch' opens up similar vistas.

'Composite' decision-making processes, which allow national officials to function extra-territorially, not only require ex-ante regulation by composite administrative procedures but also ex-post expansions of accountability machinery to keep them in check.²⁷ The Luxembourg Courts have, however, attracted much academic criticism for their slow reaction to problems of the so-called 'gap'. Their approach is seen by Scott and Trubek as old-fashioned: "Though it has been rare for the courts to actively thwart new governance, they have, in some cases, simply ignored the new changes. In others they have distorted the real nature of the new approach in order to fit it into preconceived legal categories"²⁸.

In one sense this is just what the ECJ did in the 1991 *Munich University* case,²⁹ which dealt with import duties on scientific apparatus intended for educational or research. It was nonetheless a landmark case, where due process principles were applied in a coherent fashion to a multi-level or composite decision-making procedure. The relevant regulations specified that national customs officials, who took the final decision to levy duty, had to consult the Commission on the key question whether apparatus of equivalent scientific value was manufactured in the country of

implications in H. Hofmann & A. Turk (eds), *Legal challenges in EU Administrative Law* (2009).

²⁶ Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA).

²⁷ H. Hofmann & A. Türk, *The Development of Integrated Administration in the EU and its Consequences* 13 ELJ 253, 266-270 (2007). And see D. Curtin, *Delegation to EU non-majoritarian agencies and emerging practices of public accountability* in D. Geradin, R. Munoz & N. Petit (eds), *cit.* at 24.

²⁸ J. Scott & D. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union* 8 ELJ 1, 9 (2002).

²⁹ Case C 269/90 *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469.

importation, in which case import duty applied. The Commission effectively delegated this decision to a group of scientific advisers, making no provision for importers to make representations at any stage of the proceedings. In these circumstances the ECJ ruled that the person concerned must be able '*during the actual procedure before the Commission*, to put his own case and properly make his views known on the relevant circumstances'. The due process requirements must cover not only a right to make representations but also to 'comment on the documents taken into account by the Community institution', implying an important right to access documents forming part of the case file. The requisite statement of reasons from the Commission: must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction.

The *Munich University* decision does not *directly* impinge on national administration, in principle free to apply their own procedural requirements - insofar at least as these comply with the general principles of EU law. In practice, however, a composite decision-making procedure envisages cooperation between administrators. And it must at the end of the day be acceptable both to the ECJ and to national courts.

2. Due process as a human right

In the last two decades, as human rights have gradually expanded as a source of law in national legal orders, an individual right of petition to the Strasbourg Court of Human Rights and similar transnational jurisdictions has been widely recognised and human rights litigation has escalated. Increasingly self-confident, the Strasbourg Court has extended its jurisdiction slowly but surely into the realm of administrative procedure. Two Articles are especially relevant: ECHR Article 6(1) and (2), which provide for a judicial hearing in the determination of a person's 'civil rights and obligations', and Article 13, which stipulates that states must provide an 'effective remedy' for violations. Both have been used by the Strasbourg Court to promote an arguably excessive judicialisation of the administrative process. Thus Article 13

allows the Court to assert that only legally enforceable, 'judicial' remedies are 'effective' for Convention purposes, as it notably did in the early Dutch *Bentham* case,³⁰ where a licence application was held to fall within the ambit of a 'civil right'. Consequently, the standard means of appeal through the administrative division of the administrative litigation section of the Council of State did not amount to an 'effective remedy' because its recommendations did not bind the Crown in whose name the decision was taken. There was a further indication of the direction in which the ECtHR was moving when it commented unfavourably on the fact that 'the text of [the section's] advice remained secret, being communicated neither to the appellant nor to the licence-holder nor to the issuing authority.'

a. Administrative justice in issue

This was, however, only the start of a set of ECtHR cases attacking systems of administrative justice, an attitude that, not unnaturally, has provoked conflict with national courts on several occasions. Whereas initially a French interpretation of the term 'civil rights' was adopted, according to which 'civil' and 'administrative' justice were distinguished,³¹ the parameters of Article 6(1) expanded rapidly until many administrative processes, from welfare rights to taxation and immigration, came within its ambit. Planning procedures common to many European countries were attacked on the grounds that they were insufficiently independent and autonomous. A satisfactory compromise was reached in *Bryan*,³² where the ECtHR ruled that, although the British planning inspectorate was insufficiently independent to satisfy ECHR Article 6(1), its quasi-judicial procedures did afford many of the requisite safeguards; it was thus sufficiently autonomous to establish facts and any deficiencies could be cured by the availability of a right of review in the ordinary courts. In a later planning case, the House of Lords roundly rejected the idea implicit in the Strasbourg jurisprudence

³⁰ *Bentham v Netherlands*, (1985) 8 EHRR 1.

³¹ *Ferrazzini v Italy* (2002) 34 EHRR 45; *Maaouia v France* (2001) 33 EHRR 1037.

³² *Bryan v United Kingdom* (1996) 21 EHRR 342. See also *Zumbotel v Austria* (1993) 17 EHRR 116.

of a single judicialised template for all administrative decision-making.³³

*Tsfayo v United Kingdom*³⁴ marks a dangerous step in judicialisation of the administrative process with implications for all administrative systems. Miss Tsfayo was an immigrant in receipt of welfare benefits whose English was poor. She failed to claim her entitlements in time, maintaining that she had never received the relevant correspondence. Her story failed to convince the local authority review board, composed of elected members of the local authority and her subsequent application for judicial review on the grounds of irrationality also failed. The Strasbourg Court made heavy weather of her appeal, ruling first, that the case fell within the ambit of Article 6(1); secondly, that the review board was structurally biased, being 'directly connected to one of the parties in the dispute'. This involves classifying the review board's decision as adjudicative in character rather than as a step in an administrative review process.

Tsfayo is also one of a number of cases to raise queries about the efficacy of English judicial review procedure, here on the ground that it provides no adequate judicial review of fact-finding. Quite naturally, it provoked a reaction from national judges. *Tomlinson*³⁵ involved appeal arrangements in cases where homeless persons apply for public housing. The new UK Supreme Court traversed the confusing and contradictory Strasbourg jurisprudence scrupulously before deciding that Article 6(1) was not engaged³⁶ or, if it was, that the absence of a full fact-finding jurisdiction in the reviewing court did not deprive the system of 'what it needs to satisfy the requirements of article 6(1)'. The Court was clearly concerned that 'no clearly defined stopping point' could be discerned in the ECtHR's jurisprudence, which risked 'over-judicialisation of dispute procedures in the administration of social and welfare benefits'. *Tsfayo* penetrates deeply into the administrative process, opening the way to wholly disproportionate, expensive and time-consuming litigation on fine points of institutional design – truly a human right for lawyers!

³³ *R(Alconbury Developments) v Environment Secretary* [2001] 2 All ER 929 at [91].

³⁴ *Tsfayo v United Kingdom* [2009] 48 EHRR 18.

³⁵ *Tomlinson v Birmingham City Council* [2010] UKSC 8.

³⁶ *Salesi v Italy* (1993) 26 EHRR 187; *Mennitto v Italy* (2000) 34 EHRR 1122.

The long-term effect must necessarily be the diversion of scarce welfare funds from needy claimants into bureaucratic structures, arguably an unfair prioritisation of the few over the many.

b. Sources of conflict

Very similar disagreements over administrative procedure mark the relationship between national courts and the ECJ. Disputes over the proper conduct of tax proceedings, for example, underlie the celebrated 'solange' jurisprudence in which the German Constitutional Court first challenged the Luxembourg claim to be the ultimate arbiter.³⁷ Similar problems entangle the Strasbourg and Luxembourg Courts, both of which claim jurisdiction in situations where national measures implement EU legislation or apparently fail to embody requirements of EU law. The two courts have already crossed swords in a notorious set of competition cases where the ECJ has been accused of excessive leniency towards the Commission or, to relate this point to the previous debate, where the ECJ has treated competition procedures as primarily regulatory and administrative, while the Strasbourg court has classified them as requiring the protections accorded in criminal proceedings.³⁸

In a very different context, the potential for clashes within the triadic human rights structure is illustrated in the *Bosphorus Airways* affair. This centred on the detention of an aircraft belonging to a company based in Yugoslavia but leased to Bosphorus, an 'innocent' external economic operator acting in good faith. In response to a UN anti-terrorism resolution on asset-freezing, the plane was detained in Ireland, and Bosphorus first applied unsuccessfully for relief in the Irish courts. It then turned to the ECJ, which ruled on the substantive issue that to impound was not incompatible with EU fundamental rights when weighed against the international 'public interest' objectives of ending the state of war and the 'massive violations of human rights and of

³⁷ Case 11/70 *Internationale Handelsgesellschaft mbh*, [1970] ECR 1125 and BVerfGE 37, 271 (1974) and [1974] 2 CMLR 541.

³⁸ Compare e.g., Case 374/87 *Orkem v Commission* [1989] ECR 3283 with *Funke v France* [1993] ECHR 7. In *Saunders v United Kingdom* (1996) 23 EHRR 313, the ECtHR took a similar view of the investigation of commercial fraud by inspectors appointed by the Department of Trade and Industry.

humanitarian international law in the region'.³⁹ A later application to Strasbourg failed on the grounds of the so-called 'primacy rule': that Ireland was merely implementing its international obligations. In respect of the proceedings in the ECJ, the ECtHR applied a version of the 'solange' test, to the effect that EU law, at least in this instance, provided a level of protection equivalent to that provided under the Convention.⁴⁰

This severely criticised ruling,⁴¹ which does not strictly concern administrative procedures, is the backdrop to a highly significant set of cases involving the procedures for freezing the assets of those suspected of involvement in terrorism, where due process rights were fully engaged. In *Kadi*,⁴² a challenge to inclusion on the EU list of suspects, it was argued that listing by the UN (a process notable for its lack of due process and absence of transparency) made listing at EU level mandatory. Overruling the CFI, the ECJ confirmed in a key *arrêt de principe* that:

fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.⁴³

³⁹ Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and communication* [1996] ECR I-03953.

⁴⁰ "*Bosphorus Airways*" v Ireland App no 45036/98 (judgment of 30 June 2005).

⁴¹ S. D. Scott, *A Tale of Two Courts: Luxembourg, Strasbourg, and the Growing European Human Rights Acquis* 43 CML Rev 629 (2006); A. Dawes & B. Kunoy, *Plate tectonics in Luxembourg: The ménage à trois between EC law, international law and the European Convention on Human Rights following the UN sanctions cases* 46 CML Rev 73 (2009); C. Costello *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe* 6 HRLR 87 (2006).

⁴² Case C-402/05 *Kadi v Council and Commission* [2008] ECR I-6351 allowing an appeal from Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649 at [284]-[285]. See G. della Cananea, *Global Security and Procedural Due Process of Law between the United Nations and the European Union* 15 Col. J of Eur. Law 512 (2009).

⁴³ Case C-402/05 at [284]-[285].

It followed that respect for human rights was a condition of the lawfulness of EU acts and that measures incompatible with respect for human rights were not acceptable within the EU. This in turn meant that the Luxembourg courts had competence to review the Council decision.

It fell to the CFI to flesh out the implications of this reasoning for administrative procedures, which it did in a set of cases involving sanctions against the Organisation des Mojahadines (OMPI), originally founded to overthrow the regime of the late Shah of Persia but suspected on little concrete evidence of similar intentions in respect of the present Iranian regime. OMPI had been listed at every level - by the UN, the UK and the EU Council - but at no stage had there been an opportunity for adequate representations. The CFI explicitly invoked the concept of multi-level decision-making to rule that listing was 'a multi-level procedure, taking place at Community and national level' in the course of which due process must be observed. The individuated, adjudicated phase of the procedure took place at national level and required that the party be informed of evidence and afforded an opportunity to make representations, subject to possible restrictions 'legally justified in national law, particularly on grounds of public policy, public security or the maintenance of international order'. A second hearing before the Council, which acted in a legislative capacity, would not normally be necessary, provided that the first decision had been adopted by a 'competent national authority' in a member state.⁴⁴

In a second *OMPI* case,⁴⁵ the CFI underlined its own responsibility for examining the record to establish whether the evidence relied on is 'factually accurate, reliable and consistent' and 'capable of substantiating the conclusions drawn from it'. It went on, however, to express great respect for the English decisions⁴⁶ as 'the the first decision of a competent judicial

⁴⁴ Case T-228/02 *Organisation des Modjahedines des peuples d'Iran v Council* [2006] ECR II-4665 [93], [94 and [117] [123] noted Sponenti (2009) 46 CML Rev 1239.

⁴⁵ Case T-256/07 *Organisation des Modjahedines des peuples d'Iran v Council* [2008] ECR II-3019 [85]. A further OMPI listing had to be annulled by the Court of First Instance in *Case T-284/08 Organisation des Mojahedines des peuples d'Iran v Council* [2008] ECR II-334 (appeal pending)

⁴⁶ *Secretary of State for the Home Department v Lord Alton of Liverpool & Ors* [2008] EWCA Civ 443. There was no further appeal and delisting was confirmed by

authority ruling on lawfulness under national law'. The CFI annulled the Council listing on the ground that the statement of reasons 'does not make it possible to grasp how far the Council actually took into account the POAC's decision, as it was required to do'.⁴⁷ For national legal orders, this reasoning is double-edged. On one interpretation, it could point to greater intrusion in national procedures by the Luxembourg Courts, more especially the CFI; on the other hand, it could point to a more permissive, pluralist regime of cooperation amongst the EU courts, as advocated by the authors in an earlier article on accountability networks.⁴⁸

The extension of human rights into due process procedures sets in place different and possibly conflicting obligations to four distinct legal orders and at least three sets of courts: the international legal order, which claims primacy over all other legal systems; the EU legal order and the ECJ, author of the doctrine of primacy of EU law; the ECHR and the powerful ECtHR, accessible to individuals; and national law, to which individuals must normally turn first. Each of the courts has its own different perspective on due process rights and administrative procedures.

Although recent case law justifies a measure of optimism, it does not suggest that the problems of multi-level adjudication are near to resolution. We may indeed be witnessing a tendency for national courts to make 'unilateral declarations of independence' in constitutional matters including due process rights, which can only complicate an already over-complex system.⁴⁹ In respect of Luxembourg and Strasbourg, however, the Treaty of Lisbon may

Resolution of the House of Commons: see HC Deb, vol 478, cols 98-118 (23 June 2008).

⁴⁷ Case T-256/07 above n. 45 at [179]. POAC is the Proscribed Organisation Appeals Commission, a specialised security tribunal whose procedures have been questioned: see *Home Secretary v AF* [2009] UKHL 28; *A and others v United Kingdom* [2009] ECHR 301.

⁴⁸ C. Harlow & R. Rawlings, *Promoting Accountability in Multi-Level Governance: A Network Approach* in D. Curtin & A. Wille (eds), *Meaning and Practice of Accountability in the EU Multi-Level Context*, CONNEX Report Series Nr. 07 (2008).

⁴⁹ Consider the conflicting Czech, Polish, German and Cypriot 'European Arrest Warrant' cases discussed by D. Sarmiento, *EU: The European Arrest Warrant and the Quest for Constitutional Coherence* in Int. J. of Con. Law 1 (2008). For similar UK developments, see *R v Horncastle* [2009] UKSC 14.

affect the power balance by providing for the EU to accede to the Convention.⁵⁰ This may prove important, as the text of the EU's own ECFR, which is 'recognised' by the new TEU, differs substantially from that of the Convention. Where there is overlap, ECFR Article 51(3) provides that the 'meaning and scope' of the rights shall be the same as those laid down in the Convention, a provision presumably intended to give the last word to Strasbourg. Some member states still have opt-outs and the ECFR applies in any event only to acts of the EU institutions with due regard for subsidiarity (TEU Article 6). There is scope here for considerable overlap and confusion.⁵¹

3. Principles of good administration

Although courts occasionally experiment with novel and original principles of administrative procedure, as the Luxembourg Courts have tentatively done with a 'principle of care or diligence',⁵² in general they stick rather closely to individuated, adjudicative rights. It is to ombudsmen that we look for principles of good administration and it is indeed the EO who has developed the principles of care on which the good administrator is to act, in a *Code of Good Administrative Behaviour*.⁵³ To their credit, the first two European Ombudsmen⁵⁴ have shown quite as much interest in the dissemination of good administrative practice as in the investigation of instances of maladministration. Their ideal was recently outlined in a speech to the Europe Direct network, where

⁴⁷ See TEU Art. 6(2) and Protocol 5 relating to accession.

⁵¹ On the dangers, see G. Gaja, *New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?* in P. Alston, J. Heenan & M. Bustelo (eds), *The EU and Human Rights* (1999); F. van den Berghe, *The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?* 16 ELJ 112 (2010).

⁵² See Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] II-0313 [47]-[63] and the Opinion of Advocate General Maduro in Case C-141/02P *Commission v T-Mobile Austria GmbH* [2005] ECR I-1283 [16]-[21]. And see Craig, cit. at 7 at 373-381; H-P Nehl, *Principles of Administrative Procedure in ECLaw* (1998) Ch.8.

⁵³ European Ombudsman, *The European Code of Good Administrative Behaviour*, approved by Resolution of the European Parliament 6 Sep. 2001, available on the EO's web site.

⁵⁴ The founding EO was Jacob Söderman, previously Finnish Ombudsman, the second is Nicoforos Diamandorous, previously Greek Ombudsman.

the EO described 'good administration' as 'a citizen-centred administration, an open and accountable administration and an administration focused on results'. The good public servant acts impartially, fairly and within a reasonable time, avoiding unnecessary red tape and keeping administrative costs for citizens and enterprises to a minimum. The Code also sets out a principle of consistency, according to which an official should follow the institution's policies. It reminds the public servant to be at all times courteous, helpful and, when found to be wrong, to apologise. So too, procedural obligations, such as duties to provide information, keep adequate records, answer letters promptly and take decisions in a timely fashion, find a place in the Code. These principles then feed back into ombudsman investigations. For example, in a complaint alleging misuse of the tendering procedures, the EO criticised a statement made by the European Parliament on the ground that it 'did not seem to be consonant with the principles of good administration concerning the exercise of discretionary powers.'⁵⁵ In a later case, the EO found maladministration on the ground that the Commission had failed to ensure that all its services knew of a policy change. Making specific reference to the *Code of Good Administrative Behaviour*, the EO found that the Commission had not complied with the principles of good administration, which required the institutions to act consistently.⁵⁶

Again, the Code deals with 'objectivity', which resembles the Courts' embryonic duty of care in obliging officials when taking decisions to 'take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration'. From Article 19 of the Code, this idea has travelled upwards to become the umbrella principle of Article 41(1) of the ECFR, which puts in first place the objectivity tenet that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union' and goes on to include *within* this right the 'first generation' due process rights mentioned in Section 1. As translated into hard law

⁵⁵ Complaint No 1315/2005/BB.

⁵⁶ Complaint No 1339/2008/MF

by Art.41, the EO's consumer-oriented approach is applicable in every area of EU administration.

The remit of the EO is European administration and his recommendations are not binding. They nonetheless possess considerable force. In his Annual Reports, the EO now publishes 'star cases', in which the administration is shown in especially favourable light. These feed into national administrations through the European Network of Ombudsmen, set up by the EO with domestic ombudsmen to foster good relations and good administration throughout the EU. This Network works co-operatively to promote high quality administration and provide effective remedies where needed. Extensive programmes of training and meetings to exchange ideas on good practice are already in place and the EO has declared his ambition to 'work concertedly and systematically with his national, regional and local colleagues to ensure that citizens' rights are fully respected throughout the Union'.⁵⁷ Parallel investigations are one way forward. In the medium term, these developments are likely to promote considerable convergence in administrative procedures.

4. Sector-specific codification

There is a marked divergence between the majority of member states, which operate with a rather detailed Administrative Procedure Act or sometimes more than one in the case of federal states, and the common law countries, which do not. Administrative Procedure Acts are usually subsidiary to legislation which specifies detailed *vertical* procedures for a particular administrative process, such as asylum decision-making or environmental regulation, considered in this Section and *horizontal* procedures such as the data protection and freedom of information legislation considered in the next Section, which also takes precedence over the general legislation.

As early as 1993, Schwarze, who like many other lawyers had been inclined to award primacy to the ECJ in the creation of Community administrative procedures,⁵⁸ was noting the

⁵⁷ European Ombudsman, Annual Report (2005) at 6.

⁵⁸ J. Schwarze, *European Administrative Law*, (1992); J. Schwarze, *Sources of European Administrative Law* in S. Martin (ed.), *The Construction of Europe, Essays*

increasing role and influence of legislation: procedural law had its roots 'in the codification of law relating to particular fields of administration, such as the common agricultural market, competition policy or anti-dumping matters'. Observing that these 'codifications' introduced 'a special procedure into the European administration or into the administration of the Member States',⁵⁹ Schwarze commented specially on the imminent arrival of a new public procurement directive.

a. Evolution

Public procurement is an archetypal example of European procedural codification directed to the member states. It is based on the idea of the 'pathway(s) model'⁶⁰ to frame the tendering process. Four main pathways are prescribed: an *open procedure*, allowing all interested firms to tender; a *restricted procedure*, where tenders are invited from a list of firms drawn up by the authority; *negotiated procedure*, with contractual terms negotiated with chosen contractors, the use of which has however been strictly confined precisely because of its informality; and *competitive dialogue procedure*, where discussions are had with suppliers about suitable solutions, on which chosen bidders are invited to tender. Three key directives are currently in force, covering in considerable detail the procedures to be followed by member states' public administrations in contracts of public works, public service, public utility and defence and security.⁶¹ A fourth, the so-called Remedies Directive,⁶² which requires legal remedies to be in place

in Honour of Emile Noel (1994); J. Schwarze *Towards a Common European Public Law* 1 EPLR 227 (1995).

⁵⁹ J. Schwarze, *Developing Principles of European Administrative Law* (1993) 229, 231, 234 (emphasis ours).

⁶⁰ See for an account, C. Harlow & R. Rawlings, *Law and Administration* cit. at 6, Ch. 8.

⁶¹ Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2009/81/EC on defence and security procurement.

⁶² Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

at national level to deal with breaches of the procurement procedures, bites very directly on national legal systems, as Germany found when told by the ECJ that administrative measures were an inadequate method of implementation.⁶³

This regulatory regime has undergone several cycles of reform more or less directive in character, with latterly some 'streamlining' of the rules and much emphasis on professional training and use of information technologies in the tendering process. Along the way there has been some distinguished jurisprudence from the ECJ, largely on substantive issues,⁶⁴ but the regime has in general adopted the pathway of EU procedural law from soft to hard law, while at the same time paradoxically following the pathway of public administration towards soft governance - though admittedly always with the option of legal enforcement in the background.⁶⁵ It is worth noting too that Commission infringement procedure, the ultimate sanction for breach of these highly-valued administrative procedures, has regularly been employed in respect of breaches of the public procurement directives, a further incursion into national systems.⁶⁶

A very similar process is currently under way in the area of asylum. Asylum policy was first transferred to the 'First Pillar' at Amsterdam (TEC Title IV). The Common European Asylum System (CEAS) was part of the 'progressive establishment' of an EU area of freedom, security and justice and a vital element in EU migration law and policy. The Lisbon Treaty now provides that the EU 'shall' develop 'a common policy' on asylum matters, to be enacted by the European Parliament and Council (TFEU Article 78). In this way, a process that started with Conventions and inter-

⁶³ Case C-433/93 *Commission v Germany* [1995] ECR I-2303. And see Case C-81/98 *Alcatel* [1999] ECR I-7671 (interim measures).

⁶⁴ E.g., Case C-225/98 *Commission v. France* [2000] ECR I-7455; Case C-513/99 *Concordia Bus Finland v Helsinki* [2002] ECR I-7213; C. Bovis, *Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making* 43 CML Rev 461 (2006).

⁶⁵ S. Arrowsmith, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?* 35 Publ. Contr. L. J. 337 (2006).

⁶⁶ E.g., Joined Cases C-20/01 and 28/01 *Commission v Germany* [2003] ECR I-3609; Case C-480/06 *Commission v Germany* (judgment of 9 June 2009) noted K. Pedersen & E. Olsson, *Commission v Germany - A New Approach on In-house Providing?* 1 Publ. Procur. R. 33 (2010).

governmental cooperation has moved from the mongrel status of Common Positions into the mainstream methods of EU policy-making.

It needs to be emphasised that the legislative package of which the Asylum Procedures Directive (APD) forms part was the product of hard bargaining and much compromise. The measures have been developed against a backdrop, first, of the overarching international legal obligations of individual member states, more especially under the Geneva Convention,⁶⁷ and secondly, of considerable political and administrative controversy at the domestic level.⁶⁸ The first phase of the programme, outlined in TEC Article 63, is notable for the number of times the word 'minimum' appears, so that it is hardly surprising to find that the outcome is officially seen as allowing member states 'a wide margin of discretion'.⁶⁹ Even so the Irish, Danish and UK governments negotiated opt-outs, while the European Parliament successfully challenged the decision-making procedure in the ECJ.⁷⁰ There was no reference to minimum standards of harmonisation in the Lisbon Treaty, which points the way to closer convergence. But although the Commission has made a start with a proposal for a revised APD,⁷¹ it is hard to accept either that the currently stalled proposal is a truly harmonised codification or that, at least in the short term, a true harmonisation is a real possibility. Indeed, the current Stockholm Programme signals a renewed emphasis on soft governance⁷²: closer practical

⁶⁷ 1951 Geneva Convention relating to the Status of Refugees.

⁶⁸ See G. Goodwin Gill, *The Individual Refugee, 1951 Convention and the Treaty of Amsterdam* in E. Guild & C. Harlow (eds), *Implementing Amsterdam*, (2000). Asylum is also specifically protected by Articles 17 and 18 of the ECFR.

⁶⁹ See C. Costello, *The Asylum Procedures Directive in Legal Context* in A. Baldaccini, E. Guild & H. Toner (eds), *Whose Freedom, Security and Justice?* (2007).

⁷⁰ Case C133/06 *European Parliament v Council* [2008] ECR I-3189 noted Craig (2009) 46 *CML Rev* 193.

⁷¹ Commission Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2009) 554/4; and Annex to the Proposal. But see now Commission Communication, *Action Plan implementing the Stockholm Programme* (Brussels, COM(2010) 171 at 6-7.

⁷² The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Council Doc. 17024/09 (December 2009). See also

cooperation between member states in the form of technical assistance, training, and exchanges of information and experts. The new European Asylum Support Office (EASO) is tasked to promote this.⁷³

It is doubtful that this approach will meet the demands of the United Nations Refugee Agency in a recent report based on a survey of eighteen key provisions of the APD in twelve member states. This showed that the APD had not achieved the harmonization either of legal standards or of practice across the EU sought by the UN. This was partly due to the wide scope of many provisions, which explicitly permitted divergent practice and exceptions and derogations but, significantly, it was also due to 'differing interpretations of many articles (including mandatory provisions), and different approaches to their application'. The APD, an instrument intended to be at the heart of CEAS, had not yet brought about consistent approaches and did not always ensure fair and accurate outcomes. Much further work and further legislative reform would be needed at both national and EU level to ensure that the necessary safeguards were in place.⁷⁴

b. Enhancement

Reflecting and reinforcing the idea of 'public participation' as a key ingredient of effective and legitimate decision-making, EU environmental law increasingly stands for an enhanced conception of administrative procedures, and one which consciously ranges beyond a classical, individualised model (rights of the defence).⁷⁵ Specific requirements for consultation directed to the member states⁷⁶ are today almost a *sine qua non* of

Commission Communication on Strengthened Practical Cooperation, COM (2006) 67 final). .

⁷³ For the policy development, see *Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office*, COM(2009) 66.

⁷⁴ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (March, 2010) at 13, 91-2.

⁷⁵ J. Holder & M. Lee, *Environmental Protection, Law and Policy* (2nd edn, 2008); J. Scott, *Environmental Protection: European Law and Governance* (2009).

⁷⁶ For the disparities with the European level, see D. Obradovic, *EC rules on public participation in Environmental Decision making operating at the European and National levels* 32 EL Rev 839 (2007).

the legislation (water⁷⁷, waste⁷⁸ and greenhouse gas emissions⁷⁹, preparation of plans and programmes,⁸⁰ etc). The long-standing and (in view of alignment with the Aarhus Convention⁸¹) heightened demands of environmental impact assessment (EIA) for development projects provide a template⁸² for what is a marked proceduralisation⁸³ of regulation. Again denoting minimum requirements, the amended Directive (EIAD) imposes a general obligation on member states to conduct assessments of those schemes which are assumed or considered after screening 'likely to have significant effects on the environment'. This requires that 'the public concerned shall be given early and effective opportunities to participate' in the decision-making procedures and 'shall, for that purpose, be entitled to express comments and opinions when all options are open', in other words, prior to the decision on the request for development consent. This is subject to 'reasonable time-frames' and determination of the 'detailed arrangements' by member states. The results must be taken into consideration and the reasons for granting or refusing a development consent made available to the public. These requirements are flanked by special rights of access to environmental information and of access to justice (review of 'the substantive or procedural legality' of decisions).

77 Art. 14 of Directive 2000/60/EC establishing a framework for Community action in the field of water policy.

78 Art. 31 of Directive 2008/98/EC on waste,.

79 Art. 8 of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community.

80 Art.6 of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

81 *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998) discussed by M. Lee & C. Abbot, *The usual suspects? Public participation under the Aarhus Convention* 66 *Modern L. R.* 80 (2003).

82 Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive); amending Directive 97/11/EC; and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 85/337/EEC and 96/61/EC (Directive concerning integrated pollution prevention and control).

83 J. Steele, *Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach* 21 *Oxf. J of Legal St.* 415 (2001).

Super-imposing this framework on domestic procedures constitutes a natural litigation 'hot-spot'. Whether at the suit of developers or other interested parties, national courts must grapple with the full range of problems of implementation, and in particular of 'fit' with pre-existing structures and understandings. This is well-illustrated in the UK, where some judges have trumpeted the EIAD as requiring an 'inclusive and democratic process'⁸⁴, one which 'seeks to redress to some extent the imbalance in resources'⁸⁵, while others have displayed more cautious attitudes.⁸⁶ The ECJ has vigorously asserted the broad scope and purpose of the Directive in a string of cases.⁸⁷ For example, a repeated emphasis on cumulative effects targets the classic administrative device of 'salami-slicing' (splitting projects into sub-projects so as to avoid requirements).⁸⁸ Again, the Court has recently buttressed public participation by establishing a reasons-providing requirement for negative screening decisions.⁸⁹ On the other hand, in the first case on administrative procedural autonomy in the form of 'detailed arrangements', the Court has proved understandably protective of member states. In *Commission v Ireland*,⁹⁰ the issue was the charging of administrative fees for making submissions during the EIA process. Whereas the Commission pointed up the potential 'chilling effect', the Advocate General observed tartly that EIA does not mean an unrestricted right for everybody to be consulted. Proceeding on the basis that the Community legislature wished member states to have 'wide discretion' in determining

⁸⁴ *Berkeley v Secretary of State for the Environment* [2000] UKHL 36. Common law and European law challenges frequently appear in the same case: see *R(Edwards) v Environment Agency* [2008] UKHL 22.

⁸⁵ *R v Hammersmith and Fulham LBC, ex p Burkett* [2002] UKHL 23.

⁸⁶ As in *Jones v Mansfield District Council* [2003] EWCA Civ 1408. And see generally, R. Gordon, *EC Law in Judicial Review* (2006), Ch. 14.

⁸⁷ Beginning with Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

⁸⁸ See e.g. Case C-207 *Abraham v Région wallonne* (judgment of 28 Feb. 2008) and Case C-75/08 *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* (judgment of 25 July 2008).

⁸⁹ Case C-75/08 *R(Mellor) v Secretary of State for Communities and Local Government* (judgment of 30 April 2009).

⁹⁰ Case C-216/05 *Commission v Ireland* (2006) ECR I-10787 noted by Ryall (2007) 19 J. of Environmental Law 247.

practicalities, the Court held that the administration was in principle free to make a charge, provided that this was not so excessive as to constitute an obstacle to exercising the rights to participation. The case is thus authority for a substantial element of subsidiarity: pluralism in the design of more plural procedures.

Periodic assessment by the Commission of application and effectiveness is a standard feature of the regulatory framework. The latest report in 2009 confirms that, although EIA is now effectively entrenched at national level, the challenge of ensuring consistent implementation is a continuous one.⁹¹ The common thread is indeed the scope for and scale of diversity in administrative practice and procedure. 'EIAs carried out in the various MS vary considerably (from fewer than 100 to 5000), even when comparing MS of a similar size'. National officials 'often exceed their margin of discretion': for example by only taking account some of the selection criteria. Again, despite increasing public participation, there still is 'no standard practice across the EU'; timeframes, for example, 'vary considerably'.⁹² Nor is it surprising to learn of 'major differences in the quality of EIA documentation, not only between different MS but also within MS themselves.' As well as non-compliance underwritten by the pressures for development, so-called 'gold-plating' is in evidence. 'In several cases, MS have introduced obligations which go beyond the Directive's minimum requirements'. The report rightly stresses the knock-on effects in terms of soft governance. 'Many MS have also developed their own guidance on good practice and on specific project categories and issues. These national experiences can be shared across the EU.' A suggested simplification exercise increasing the degree of harmonisation would certainly be challenging.

⁹¹ Report from the Commission on the application and effectiveness of the EIA Directive, COM(2009) 378. See for further details, DG Environment, *Study concerning the report on the application and effectiveness of the EIA Directive* (June, 2009).

⁹² Nor from a grassroots perspective should the many practical obstacles be overlooked: C. Nadal, *Pursuing Substantive Environmental Justice: The Aarhus Convention as a "Pillar" of Empowerment* 10 *Env. L. Rev.* 28 (2008).

c. Contemporary trends

The EU is today at the forefront of burgeoning disciplines of 'risk regulation': a major forcing ground for new administrative procedures in the multi-level system. We find a multiplicity of directives prescribing in very considerable detail the steps to be followed when, for example, granting Community authorisation for additives in foodstuffs or protecting against dangerous pharmaceuticals.⁹³ Bound up today with the meta-policy of 'better regulation',⁹⁴ strict requirements are imposed on the Commission and its scientific advisory and regulatory committees for the gathering and handling of scientific evidence. This has given rise to a raft of cases in which the Luxembourg Courts have had to grapple with new forms of procedural complaint such as errors of risk assessment or management and misapplication of the precautionary principle, a novel standard of proof required in scientific matters.⁹⁵ The Courts have ruled, for example, on the degree of risk necessary before preventive measures can be taken and, in consequence, on the proper approach to the evaluation of scientific evidence.⁹⁶ Typically such directives impose reporting procedures and other obligations on member states, which greatly restrict their domestic freedom of action.

In *Greenpeace France*,⁹⁷ for example, the issue was the effect of Directive 90/220, designed to approximate the laws, regulations and *administrative provisions* of the member states in respect of

⁹³ S. Krapohl, *Risk Regulation in the Single Market* (2008); and for a comparative perspective E. Fisher, *Risk Regulation and Administrative Constitutionalism* (2010).

⁹⁴ Which places a particular premium on impact assessment: see C. Radaelli & A. Meuwese, *Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU* 33 *West Eur. Pol.* 1 (2010); and, for a legal perspective, A. Alemanno, *The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?* 15 *ELJ* 382 (2009).

⁹⁵ See *Communication from the Commission on the precautionary principle* COM (2000) 1.

⁹⁶ These procedures have sparked a mountain of litigation of which the most important cases are probably: Case C-331/88 *R v MAFF ex p Federation de la Santé animale (FEDESA)* [1990] ECR I-4023; Case T-13/99 *Pfizer* [2002] ECR II-3305; Case T-70/99 *Alpharma v Council* [2002] ECR II-3475; Case C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* [2003] ECR I-8105.

⁹⁷ Case C-6/99 *Association Greenpeace France v Ministère de l'Agriculture et Pêche* [2000] ECR I-1651.

genetically modified organisms (GMOs).⁹⁸ In accordance with French law, the Minister issued a decree permitting the sale of genetically modified maize. This was attacked by Greenpeace on the twin grounds that it had been adopted following an irregular procedure and that it infringed the precautionary principle. A preliminary reference established that the French authorities possessed no discretion in the matter: 'whilst another wording might have made it more explicit that the Member States' powers were circumscribed', the provisions indicated 'clearly and unequivocally' that the Member State concerned was obliged to 'issue its consent in writing'. The Directive specifically established 'harmonised procedures and criteria for the case-by-case evaluation of the potential risks arising from the deliberate release of GMOs into the environment'. The only procedure left to the French authorities was to report any doubts to the Commission. In the *ABNA* case,⁹⁹ which involved animal foodstuffs, an ancillary point arose as to whether national administrations could avail themselves of administrative powers to suspend the operation of a community directive *pendent lite*. The response of the ECJ, invoking due process principles, was that only a national court could make such an order.

If the EU risk frameworks are to function effectively, national agencies must establish flexible and responsive procedures for dealing with urgent matters. Domestic courts may in turn have to determine how far to press in regulating the regulator. For example, Friends of the Earth recently challenged the British Food Standards Agency over its handling of a known risk of contamination in imported foodstuff.¹⁰⁰ The pressure group complained that although earlier threats of judicial review had prodded the independent regulator to greater efforts, the warnings it gave were insufficient in the light of EU requirements. The court took the innovative approach of 'stopping the clock' at various points, better to test the evolving regulatory response, before giving the agency the benefit of a margin of discretion.

⁹⁸ Now replaced by Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms.

⁹⁹ Joined Cases C-453/03 *R(ABNA and Others) v Health Secretary*, C-11/04 *Fratelli Martini v Ministero delle Politiche Agricole e Forestali*, C-194/04 *Nevedí v Produktschap Diervoeder* [2005] ECR I-10423.

¹⁰⁰ *R (Friends of the Earth) v Food Standards Authority* [2007] EWHC 558.

Strongly associated with the area of risk regulation, the role of agencification in driving new administrative procedures deserves special emphasis. Let us recall that, developing in successive waves, there are now over 30 'EU agencies': bodies which, though not amounting to 'regulatory agencies' as that term is commonly understood in the Anglo-American tradition, nevertheless exercise an important range of individualised decision-making, advisory and collaborative functions. These Euro-agencies network with their national counterparts. The British Food Standards Agency, for example, set up like the European Food Standards Agency in the wake of the BSE crisis has a website replete with contributions to, and opinions emanating from, the scientific advisory work of EFSA.

Yet, if only because of the sheer scale of the organisational development, first place in the European 'rule of networks' belongs to competition proceedings. Enforcement is now a shared responsibility of the Commission and national agencies and provision for the exchange of confidential information and re-allocation of cases with a cross-border dimension represents a defining feature of the European Competition Network. In other words, a *collaborative* decision-making procedure has emerged in competition cases, with domestic administrative law agencies becoming increasingly integrated in the EU administration. 'Soft law' developments promoting consistency follow on naturally: detailed Commission guidelines, a pan-European system of liaison officers and a plethora of working groups for establishing best practice. Commentators have remarked both on the danger of undue interference with national legal orders¹⁰¹ and on the intense challenges posed in terms of the good governance values of transparency and accountability.¹⁰²

Much further exploration is needed of sector-specific procedural legislation, which could be described as the spearhead of EU regulatory policy. This short survey suggests, however, that sector-specific legislation has the potential to be the most coercive form of EU regulation and the most likely to penetrate deeply into

¹⁰¹ S. Kingston A "New Division of Responsibilities" in the proposed regulation to modernise the rules implementing Arts 81 and 82 EC? A warning call Eur. Comp. L. Rev. 340 (2001).

¹⁰² Maher and Stefan, cit. at 23.

national administrative procedures. By way of comparison we turn in the next section to horizontal regulation selecting, in the absence of a general EU Administrative Procedures Act, examples of legislation in the field of access to and retention of information.

5. Horizontality: access to documents and data protection

a. Access to documents

The genesis of freedom of information legislation in the EU is Council Declaration 17 annexed to the TEU at Maastricht, which declares unequivocally that transparency of the decision-making process is necessary to 'strengthen the democratic nature of the institutions and the public's confidence in the administration'. TEC Article 255, inserted at Amsterdam, placed the initiative squarely on the political institutions, a provision construed by the ECJ as barring judicial activism.¹⁰³ The response of the institutions was, however, sluggish and did not meet the deadline imposed by TEC Article 255(2) - a first indication of disagreements that would follow. In the absence of any legislative initiative, Codes of Conduct were promulgated by the institutions providing for access to documents in their possession,¹⁰⁴ a practical approach stiffened by the first EO, Jacob Söderman, whose first 'Own Initiative Investigation' was designed to ensure that all EU institutions and bodies had an access code in place.¹⁰⁵ When finally the Codes were superseded by a Council Regulation on public access to documents¹⁰⁶ based largely on the text of the Codes, the uneasy settlement between the widely differing attitudes of the institutions and member states was reflected in its ungenerous text to the annoyance of the EO. Both Söderman and Nikiforos Diamandoros, the second EO, have taken a significant

¹⁰³ Case C-68/94 *Netherlands v Council* [1996] ECR I-2169. But see now Case T-211/00 *Kuijer v Council* [2002] ECR II-1301.

¹⁰⁴ Council Decision 93/731/EC, OJ 1993 L 340, p. 41 and Code of Conduct, p.43; Commission Decision 94/90 EC on public access to Commission documents, OJ 1994 L 46, p. 58; and European Parliament access rules [1997] OJ L263/27.

¹⁰⁵ European Ombudsman, *Special Report and Decision by the European Ombudsman following the Own-Initiative Inquiry into Public Access to Documents held by Community Institutions and Bodies* (December 1997).

¹⁰⁶ Regulation EC 1049/2001 regarding public access to European Parliament, Council and Commission Documents (hereafter Regulation 1049).

interest in transparency and have fought hard for freedom of information.¹⁰⁷

Regulation 1049 reiterates the grandiose sentiments of Declaration 17, underscoring the objective of enabling citizens to participate more closely in decision-making; to lend greater legitimacy to EU administration; to 'guarantee' effectiveness and accountability; and to strengthen respect for democracy and human rights. It is, however, hardly a model of open government. The list of exceptions is considerable, ranging from usual exceptions for security, defence and international relations (Art. 4(1)) to wide exceptions in respect of confidentiality, commercial secrecy and third-party or member state documents (Art. 4(4) and 4(5)). Many of the exceptions are mandatory, leaving the institutions with little or no discretion; others are mandatory subject only to complex public interest tests: legal advice, for example, can be disclosed if there is 'an overriding public interest in disclosure' (Art. 4(2)), while documents drawn up by an institution for internal use (Art. 4(3)) must not be disclosed if disclosure would 'seriously undermine' the decision-making process unless 'there is an overriding public interest in disclosure'.¹⁰⁸ Although the CFI in particular has gone some way to lessen the effect of these restrictive exceptions by ruling that they must be strictly interpreted, the judicial record is decidedly uneven.¹⁰⁹

Unlike the sector-specific legislation considered in the previous section, Regulation 1049 applies only to EU institutions and, with few exceptions, has no direct impact on member states. National freedom of information legislation is very variable: the UK stands at one end of the openness/secretcy scale with a Freedom of Information Act 2000 that came into force only in 2005 and is generally regarded as 'one of the world's more restrictive

¹⁰⁷ J. Söderman, *The Role and Impact of the European Ombudsman in Access to Documentation and the Transparency of Decision-Making* in V. Deckmyn & I. Thomson (eds), *Openness and Transparency in the European Union* (1998).

¹⁰⁸ See on the interpretation of this test in the context of Art. 4(2), Case T-84/03, *Maurizio Turco v Council* [2004] ECR II-4061 and note the intervention by and joinder of Sweden in the appeal: Joined Cases C-39/05, C-52/05 *Sweden and Turco v Council* [2008] ECR I-4723.

¹⁰⁹ J. Helioskosi & P. Leino, *Darkness at the Break of Noon: The Case Law on Regulation No 1049/2001 on Access to Documents* 43 CML Rev 735 (2006).

pieces of information legislation';¹¹⁰ Sweden stands at the other, with a tradition of open government dating to 1766, which receives specific protection in the Swedish Treaty of Accession. The potential for negative impact on national provisions is demonstrated by the *Swedish Journalists* case,¹¹¹ where the Swedish journalists' union, believing that joining the EU had damaged the openness of Swedish government, applied under Swedish law for documents in the possession of the EU Justice Council, obtaining around 80%; an application to the Council under EU law resulted in the release of just 20%. Only a partial remedy was forthcoming. The CFI annulled the Council's decision on the narrow procedural ground that inadequate reasons for refusal had been given. This case was decided under the Codes of Conduct; paragraph 15 of the Preamble to Regulation 1049 now warns member states of their duty of loyal cooperation to 'take care not to hamper' the proper application of the Regulation and to 'respect the security rules of the institutions'. Article 5 is more coercive. It requires a member state to 'consult' with an institution before releasing one of its documents 'in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation'.

The two articles most likely to impinge on member states are, however, Article 4(3), which requires the Commission, faced with an application to access documents originating with 'third parties' to consult them before granting or refusing access; and Article 4(5), which allows a member state to 'request' an institution not to disclose one of its documents without its prior agreement. The meaning of these provisions, thought until recently to amount to a right of veto, was tested in the *IFAW* case,¹¹² where a non-governmental organisation active in the field of animal welfare and nature conservation asked to access a Commission Opinion on the declassification of a German conservation site for development purposes. The Commission refused access, giving as its reason Germany's refusal when consulted under Article 4(5). According to the CFI, a request made by a member state under Article 4(5) constituted an instruction to the institution not to

¹¹⁰ Constitution Unit, *Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000* (London, 2006).

¹¹¹ Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289.

¹¹² Case T-168/02 *Internationaler Tierschutz-Fonds v Environment Secretary* [2004] ECR II-4135.

disclose the document in question; otherwise the Article would risk becoming a dead letter. The importance of this ruling for national provisions explains why Sweden had the support of Finland, Denmark, and the Netherlands in its appeal.¹¹³ The ECJ ruled that 'joint decision-making' was involved and that both levels must give reasons for non-disclosure; at EU level, the last word lay with the Commission, which must carry out its own assessment; there might be circumstances in which documents were released by the Community when not available at national level but the fact that national law forbade disclosure would be a pertinent factor in the Commission's decision-making. Purportedly to implement this judgment, the Commission has proposed an amendment designed to safeguard the autonomy of national legislation. This would leave the Commission to assess the adequacy of any objections based on EU law, while maintaining the right of a member state to base a refusal on specific provisions in its own national legislation.¹¹⁴ Reform of Regulation 1049 is, however, currently deadlocked by inter-institutional dispute and disagreement between member states.¹¹⁵

b. Data protection

In contrast to the indirect impact of Regulation 1049, EU data protection legislation encroaches directly on national space. The stated objective of the Directive on Data Protection (DPD)¹¹⁶ is to coordinate and approximate national law so as to 'ensure that the cross-border flow of personal data is regulated in a consistent manner that is in keeping with the objective of the internal market', while at the same time leaving a 'margin of manoeuvre' to the member states. Extended on several occasions in sectoral legislation, it was extended to electronic telecommunications in 2006, when the Preamble to the new Directive explicitly referred to

¹¹³ Case 64/05 *Sweden v Commission* [2007] ECR I-11389.

¹¹⁴ *Commission Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents* COM(2008) 229 final, proposed Art. 5(2).

¹¹⁵ The matter was struck from the agenda of the 2009 Swedish Presidency.

¹¹⁶ Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

the need for harmonisation due to 'legal and technical differences between national provisions concerning the retention of data for the purpose of prevention, investigation, detection and prosecution of criminal offences'. The national provisions varied considerably.¹¹⁷

The DPD thus requires national administrative systems to be set in place for the collection of personal data. It affects substantive content - data must be 'adequate, relevant and not excessive' in relation to the purposes for which it is collected and/or processed and processing of some types of sensitive (such as ethnic or religious) data is prohibited without the express consent of the subject (Art. 8) - but also extends to procedure. Data must be: (a) processed lawfully and fairly; (b) collected only for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; (c) kept up to date or otherwise disposed of. Retention must be based either on individual consent or 'some other legitimate basis laid down by law'. There are ancillary rights of access and to have misinformation rectified. The importance of data protection to individuals is emphasised by its inclusion both in Article 21 of the EO's *Code of Good Administrative Behaviour* and in ECFR Article 8 and the clear intention of the policy-makers is harmonisation or approximation of national laws on data protection. Yet significantly the Council has drawn back from extending the DPD to data collected for 'Third Pillar' purposes of security and criminal investigation.¹¹⁸ The sector is overdue for a revamp under the provisions of the Lisbon Treaty. Observers have, however, expressed serious concern at inadequate implementation of what already exists and the European Data Protection Supervisor (EDPS) has argued that full implementation of existing provisions should precede reforms. He has asked for better Commission measures of supervision, including resort to infringement

¹¹⁷ Recitals 5 and 6 of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC OJ L105.

¹¹⁸ Directive 2006/24/EC covers criminal proceedings in the area of telecommunications for which reason it was unsuccessfully challenged by Ireland: see Case C-301/06 *Ireland v Council and European Parliament* [2009] ECR I-593.

procedures, Commission guidance and 'the promotion of non-binding instruments', such as best practice and self-regulation.¹¹⁹ Perhaps in recognition of this reproof, infringement proceedings have been started against the UK on the ground that UK rules governing the confidentiality of electronic communications breach EU law.¹²⁰

Problems may be caused when different types of procedural provision conflict. In the *Bavarian Lager* case,¹²¹ BL made several requests under Regulation 1049 for access to documentation concerning a meeting convened by the Commission with member state representatives in the course of projected infringement proceedings. The papers included the names of those attending. The Commission rejected BL's confirmatory application on the ground that the relevant Regulation¹²² prohibited disclosure, bringing the two Regulations into apparent conflict. This case involved two horizontal provisions operative at EU level and two rights classified as fundamental by the Advocate General, who with great ingenuity managed to reconcile them. But similar points quite commonly arise in national systems where a general, horizontal Administrative Procedures Act clashes with vertical sector-specific legislation, and could also arise where national procedural legislation seems to be out of accord with EU legislation. This situation should perhaps be governed by the principle of procedural autonomy applied by the ECJ to judicial procedures, whereby national rules prevail subject to the proviso that effective legal remedies for violations of EC law must be available in the

¹¹⁹ EDPS Press Release 07/8 (25 July 2007).

¹²⁰ Commission Press Release, IP/09/1626 (29/10/2009). These proceedings involve Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

¹²¹ Case T-194/04 *Bavarian Lager v Commission* [2007] ECR II-4523; Case C-28/08P *Commission v Bavarian Lager* with the Opinion of AG Sharpston (pending).

¹²² Regulation 45/2001/EC on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

national legal order and must not discriminate against non-nationals.¹²³

6. Looking ahead: a multi-track approach

This paper confirms Franchini's view of the EU law of administrative procedures as 'spotty': 'the norms do not go so far at present as to create a general law or a "tight web"¹²⁴. The web of principle is a loose one, woven of disparate threads. The general principles have been laid down by the Luxembourg Courts as and when litigation provided an opening, sometimes created by those Courts in the interests of the Community, sometimes drawn from national constitutions and installed at EU level at the insistence of national courts. Due process principles have been bought in from human rights texts, often in response to the jurisprudence of the ECtHR. Inter-court competition, currently on the increase, is liable to increase the 'spottiness' of EU procedural law still further. Reform by judicial process is necessarily piecemeal and cannot easily be avoided when access to the court is a fundamental right. Moreover, human rights values are never static, as witnessed by the volume of litigation built up around human rights texts, the constitutional status of which means that they are hard to change.

Amongst other sources of important procedural principle are the EO's *Code of Good Administrative Behaviour* and the Commission's *White Paper on European Governance*, where openness and participation sit together with accountability, effectiveness and coherence. The Commission has taken steps to flesh out its general principles in procedural format: for example, guidelines now govern Commission rules of conduct towards civil society organisations, a register of potential consultees is maintained and made publicly available on-line and, more important, a principle of public on-line consultation has been established.¹²⁵ Serious gaps remain, however. There are, for

¹²³ See Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Land Wirtschaftskammer für das Saarland* [1976] ECR 1989 and for analysis, Craig, cit. at 7 at 791-803.

¹²⁴ C. Franchini, *European principles governing national administrative proceedings* 68 *Law & Contemp. Probs.* 183, 187 (2004).

¹²⁵ Notably Commission Communication, *General principles and minimum standards for consulting non-institutional interested parties* COM(2002) 277;

example, no 'notice-and-comment' rights in EU rule-making procedures other than on a sector-specific basis,¹²⁶ an omission which, for administrative lawyers raised in systems where administrative procedures are codified, must seem anathema.¹²⁷

As already indicated, much of the day-to-day substance of administrative procedure is contained in detailed, sector-specific regulation: we have instanced the areas of competition law and public procurement, asylum law, environment and risk-regulation. But 'spottiness' has grounded an argument for codification at EU level based on the values of consistency and openness. In this way, the argument might run, codification could be a step in the direction indicated by the *White Paper*, of bringing the EU closer to its peoples.¹²⁸ The fact that a majority of member states already possess an Administrative Procedures Act and their public servants are accustomed to function within its framework is likely to add to the already considerable pressure for similar legislation at EU level. Although a European APA would not be directly applicable within national public administration, its effect would be felt in every area of activity governed by EU law. But how comprehensive such a text might be is controversial: Meuwese, Schuurmans and Voermans, for example, suggest compromising on specially defective areas, notably the rights of participation mentioned above. The outcome would be a compromise closely based on the American APA.¹²⁹

Commission Communication, *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. In Case 3617/2006/JF, the EO demanded that the Commission abide by its promises.

¹²⁶ E.g., in lawmaking through the social partners: see S. Fredman, *Social Law in the European Union: The Impact of the Lawmaking Process*, in P. Craig & C. Harlow (eds), *Lawmaking in the European Union* (1998). And see Case T-135/96 *UEAPME v Council* [1998] ECR II-2335 discussed in C. Harlow, *Civil society organisations and participatory administration: a challenge to EU administrative law?* in S. Smismans, *Civil Society and Legitimate European Governance* (2006).

¹²⁷ Craig, cit. at 7, ch.10; F. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology* 40 *Harv Int'l LJ* 451 (1999).

¹²⁸ For a recent call in this direction, see E. Nieto-Garrido & I. Delgado, *European Administrative Law in the Constitutional Treaty* (2007).

¹²⁹ A. Meuwese, Y. Schuurmans & W. Voermans, *Towards a European Administrative Procedure Act* 2 *Rev. of Eur. Adm. L.* 3 (2009).

Codification of administrative procedures on a trans-European basis would be a more difficult undertaking. There is a sharp variance in attitudes to codification between civilian and common law countries. Work on codification of European civil law started twenty years ago. It has not so far had any very positive outcome despite the fact that a majority of member states have civil codes. What has emerged from the project, however, are very helpful compendia of common principle, closely resembling the non-binding *Restatements* published by the American Bar Association.¹³⁰ Again, work on codification of criminal procedures was first undertaken by the Storme Commission, which in 1994 had to report failure: the basic distinction in European legal systems between adversarial and inquisitorial procedures was 'so deeply enshrined in the respective legal cultures as to make harmonisation practically unfeasible'.¹³¹ Work on approximation is under way but it now follows the less ambitious pathway of focusing on specific problem areas such as arrest, victims' rights or the double jeopardy rule.

Similarly, it is dangerous simply to assume that common principles of administrative procedure exist and are accepted in every national administration. As part of a 'better governance' initiative in 2004, the Swedish Government commissioned a study from the Swedish Agency for Public Management (Statskontoret), which administered a questionnaire to twenty-five member states on the subject.¹³² Selecting twelve principles seen as core to good administration, ranging from legal principles, such as the due process and proportionality principles and duty to give reasons, to principles valued by administrators and ombudsmen, such as obligations to document administrative procedures, keep registers and be 'service-minded', the study set out to discover if the principles were recognised in national public services. The authors concluded that up to ten of these principles were widely

¹³⁰ See Resolution of the EP, OJ 1989 NC 158/4006. And see A. Hartkamp & A. Hesselink (eds), *Towards a European Civil Code* (3rd edn, 2004); C. von Bar et al. (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (2009).

¹³¹ M. Storme, *General Introductory Report*, in M. Storme (ed), *Rapprochement du Droit Judiciaire de l'Union Européenne* (1994) at 63.

¹³² Statskontoret, *Principles of Good Administration in the Member States of the European Union* (2005) (available on line).

recognised throughout the EU and found expression in national codes of practice or legislation. But even when a common core of good administration principles was discernible, the weight attached to any given principle varied as the national legislative texts varied stylistically. Uniformity was largely illusory: 'Even though a rule looks the same across a number of countries, it doesn't mean that it is applied the same way. It will be interpreted in different ways and thus mean different things in different countries'.¹³³ The 'tidiness' of codification may also be illusory. The hard law of codification is regularly undercut by the soft law of administrative practice, as the UNHCR report into the operation of the Asylum Procedures Directive amply demonstrates.

Whether the theoretical arguments for harmonisation justify attempts to overcome the difficulties is questionable. The argument for harmonisation is essentially political, bound up with the dream of a federal or quasi-federal 'state' with a common political and administrative culture, whose institutions seek legitimacy.¹³⁴ A market version of the 'level playing field' argument is based on the convenience of multi-national corporations and their need to trade efficiently in several jurisdictions.¹³⁵ As we have seen, this has had powerful driving force in the construction of due process principles for competition law. A softer consumer version of the 'level playing field' argument exemplified in *Heylens* fastens on unfairness to users of public services, who are faced with different procedural regimes in different member states. This argument is at its strongest in respect of a limited number of due process rights, when human rights entitlements can be invoked.

The Community emerged as an economic regulator, a form of delegated administrative governance for which a claim of legitimacy based on economic efficiency could be made.¹³⁶ This

¹³³ Ibid at 71.

¹³⁴ S. Cassese, *Global Standards for National Administrative Procedure* 68 *Law & Contemp. Probs.* 109 (2005).

¹³⁵ See H. Schermers, *The Role of the European Court of Justice in the Free Movement of Goods* in T. Sandalow & E. Stein (eds), *Courts and Free Markets* (1982).

¹³⁶ See A. Menon & S. Weatherill, *Legitimacy, Accountability and Delegation in the European Union* in A. Arnall & D. Wincott (eds), *Accountability and Legitimacy in the European Union* (2002); G. Majone *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (2005).

was the context in which the 'first generation' of due process rights evolved. Equally, the Community was able to develop a very large volume of executive legislation, largely agreed by bureaucrats functioning in committees and vertically applicable inside the territory of the member states. We are, however, living through an era of rapid economic change and experimental globalisation, in which politics increasingly takes place in international conventions and meetings of the G7 and G20. The EU too is undergoing rapid geographical, political and administrative change. The classical nineteenth-century model of 'bounded government' based on conceptions of sovereignty and power-sharing between executive and legislature is sharing space with more fluid forms of executive governance: governance through expert networks or, increasingly, expert agencies.¹³⁷ Outside the confining boundaries of the nation-state, in the framework of EU regulatory governance, this trend is particularly marked. As suggested earlier, the emergence of network governance at EU level and the move to composite decision-making has been matched by techniques of 'soft governance', based less on law than on cooperation between member states, agencies and EU bodies in the form of technical assistance, training, and exchanges of information and experts. These new governance structures and techniques bring together national and supranational actors in a multiplicity of horizontal and infra-national collaborations and partnerships. Public administration is also changing very rapidly under the influence of information technology. This serves as a strong catalyst for organisational change, facilitating networking and collaboration. It has the potential dramatically to transform public sector organisations and processes and impact on traditional Weberian bureaucratic organisations.¹³⁸ The beneficent side of information technology is its potential for transparency and citizen involvement. Less benign is the potential for surveillance. In their different ways, the Commission and Council have both turned information technology to their advantage.

¹³⁷ M. Shapiro, *Administrative Law Unbounded*, 8 Ind. J. Global Legal Stud. 369 (2001); D. Oliver, T. Prosser & R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (2010).

¹³⁸ Pan Suk Kim, *Introduction: challenges and opportunities for democracy, administration and law* 71 Int'l Rev. Adm. Sciences 101-2 (2005); J. Morison, *Online government and e-constitutionalism* (2003) PL 14.

This is a fluid and complex set of issues, of which administrative procedures is only one dimension. Our own approach to the problems is pragmatic, as our approach to the problems of public law and administration has always been; we 'do not demand consistency with some overarching theory of the administrative state'.¹³⁹ We would therefore advocate a multi-track approach to administrative procedures, which fits the contemporary trajectory of European governance. We would want to underline the important place of soft law in promoting values and general principles. The European Ombudsman's *Code of Good Administrative Behaviour* is in this respect an important precedent. The Code is capable of replication at national level through the Network of European Ombudsmen, already working together in a teaching and training network to assure local implementation.

This situation is, however, not without its dangers. It is, indeed, the very way in which the EU has built up some of its most contestable administrative practices in the 'Third Pillar'. In the dark and windowless areas of asylum procedures and anti-terrorism measures, for example, this has led to the creation of data banks lacking in adequate supervision. In certain areas therefore, we recognise the need for a strong injection of single-purpose horizontal regulation along the lines of the access to information Regulation. We have heard repeated calls, as yet unsuccessful, for something similar in the area of data protection. Significantly too, a thoughtful and wide-ranging paper from the European Data Protection Supervisor has just been published arguing for a new basic principle of 'privacy by design' to be built into *all* EU measures, private and public.¹⁴⁰ We also support the further development of sector-specific legislation on a case-by-case basis. Spotty this may be but it is, after all, the central idea of functional integration.

The Luxembourg Courts will doubtless continue to make an important contribution in procedural matters. They could conceivably move further in the direction of a coercive model of harmonisation, though such a step would require change in the

¹³⁹ S. Shapiro, *Pragmatic Administrative Law in Issues in Legal Scholarship, The Reformation of American Administrative Law* (2005) cited in Harlow and Rawlings, at 6.

¹⁴⁰ *Opinion of the European Data Protection Supervisor on Promoting Trust in the Information Society by Fostering Data Protection and Privacy* (18 March 2010).

present, somewhat confused but generally pluralist approach to national procedural regimes at a time when national courts are showing signs of assertiveness. This would be out of place. The 'interlocutors' of the ECJ have greater legitimacy and are now more powerful and more self-confident. National parliaments are demanding greater respect for subsidiarity, evidenced by the role allocated to them in the Lisbon Treaty.

The arguments in favour of pluralism and diversity are powerful, more especially in the context of an enlarged and enlarging Union. National procedures grow out of national cultures. There is, for example, no absolute advantage of adversarial over inquisitorial procedure; one is not inevitably more independent or inherently less arbitrary than the other; each can operate fairly. Again, some societies have strong cultures of 'non-law', a preference which may be reflected in their procedures. To rule out ombudsmen as a remedy because their recommendations are not technically binding alters the very concept of justice in a society.¹⁴¹ Furthermore, as Abraham once argued, cultural uniformity precludes experiment and creates a real danger of stultification.¹⁴²

Gradual approximation and convergence of administrative procedures is in any case likely to be achieved through administrators working in 'new governance' relationships with a little assistance from time to time from legislators and courts. This approach has the advantage of being both 'bottom up' and based on national experience. It is surely a source of strength that diverse national practices reflected in national codes are there to be drawn on. At one and the same time these reflect particular historical experience and cultural traditions while becoming increasingly open to European and external/comparative influences.

¹⁴¹ C. Harlow, *Voices of Difference in a Plural Community*, 50 Am. J. Comp. L. 339 (2002).

¹⁴² R. Abraham, *Les principes généraux de la protection juridictionnelle administrative en Europe: L'influence des jurisprudences européennes*, 9 Eur. Publ. L. Rev. 577 (1997).