Article 41

Paul Craig[*]

The Right to Good Administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Text of Explanations on Article 41 — Right to good administration

Article 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined inter alia good administration as a general principle of law (see inter alia Court of Justice judgment of 31 March 1992 in Case C-255/90 P *Burban* [1992] ECR I-2253, and Court of First Instance judgments of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 New Europe Consulting and others [1999] ECR II-2403). The wording for that right in the first two paragraphs results from the case-law (Court of Justice judgment of 15 October 1987 in Case 222/86 *Heylens* [1987] ECR 4097, paragraph 15 of the grounds, judgment of 18 October 1989 in Case 374/87 *Orkem* [1989] ECR 3283, judgment of 21 November 1991 in Case C-269/90 *TU München* [1991] ECR I-5469, and Court of First Instance judgments of 6 December 1994 in Case T-450/93 *Lisrestal* [1994] ECR II-1177, 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589) and the wording regarding the obligation to give reasons comes from Article 296 of the Treaty on the Functioning

[*] Professor of English Law, St John's College and the University of Oxford.

of the European Union (cf. also the legal base in Article 298 of the Treaty on the Functioning of the European Union for the adoption of legislation in the interest of an open, efficient and independent European administration).

Paragraph 3 reproduces the right now guaranteed by Article 340 of the Treaty on the Functioning of the European Union. Paragraph 4 reproduces the right now guaranteed by Article 20(2)(d) and Article 25 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

The right to an effective remedy, which is an important aspect of this question, is guaranteed in Article 47 of this Charter.

Select Bibliography

Alonso de Leon, S, *Composite Administrative Procedures in the European Union* (Iustel, 2017)

Barbier de la Serre, E, 'Procedural Justice in the European Community Case Law Concerning the Rights of the Defence: Essentialist and Instrumental Trends' (2006) 12 EPL 225

Craig, P, *EU Administrative Law* (Oxford University Press, 3rd ed, 2018)

Craig, P, Hofmann, H, Schneider, J-P, and Ziller, J, (eds), *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press, 2017)

Heukels, T, and McDonnell, A, (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997)

Eckes, C, and Mendes, J, 'The Right to be Heard in Composite Administrative Procedures: Lost in between Protection?' (2011) 36 ELRev 651

Hofmann, H, Rowe, G, and Türk, A, *Administrative Law and Policy of the European Union* (Oxford University Press, 2012)

Kanska, K, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights' (2004) 10 ELJ 296

Lenaerts, K, and Vanhamme, J, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 CMLRev 531

Levitt, M, 'Access to the File: the Commission's Administrative Procedures in Cases under Articles 85 and 86' (1997) 34 CMLRev 1413

Mendes, J, *Participation in EU Rulemaking, A Rights-based Approach* (Oxford University Press, 2011)

Nehl, H, *Principles of Administrative Procedure in EC Law* (Hart, 1999)

Rabinovici, I, 'The Right to Be Heard in the Charter of Fundamental Rights of the European Union' (2012) 18 EPL 149

Schwarze, J, *European Administrative Law* (Sweet & Maxwell, revised ed, 2006)

Schilling, T, 'Language Rights in the European Union' (2008) 9 German LJ 1219

Tridimas, T, *The General Principles of EU Law* (Oxford University Press, 2nd ed, 2006)

A. Article 41 and the Scope of EU Law

It is made clear in the Explanations accompanying the Charter that Articles 41 is based in part on a general principle of EU law as elaborated by the EU courts and in part on specific Treaty articles. Article 41 is therefore congruent with the scope of these respective aspects of EU law.

The general principles of EU law bind the EU institutions, bodies, offices and agencies, and also Member State institutions when they act within the scope of EU law. There was debate as to whether the scope of application of the Charter is more limited because of Article 51(1), which provides that Member States are only bound by the Charter when they are implementing EU law. However, it is now clear that

Member States remain bound by the Charter when they act within the scope of EU law.[1]

However, Article 41 on its face is framed in terms of EU institutions, bodies, offices and agencies, and there is authority for this literal interpretation.[2] The position taken by the CJEU is, however, more nuanced. The Court recognizes that Article 41 refers only to EU institutions, bodies and agencies, and thus cannot in itself be relied on as against a Member State, but that the right to good administration constitutes a general principle of EU law, which includes, inter alia, the provision of reasons and the right to a hearing, and this binds the Member States when they act in the scope of EU law.[3]

B. Interrelationship of Article 41 with other Provisions of the Charter

The Charter provision that is most relevant to Article 41 is Article 47, which is concerned with the right to an effective remedy and to a fair trial. It provides,

---

[1] Case C–617/10 *Åklagaren v Åkerberg Fransson* EU:C:2013:105 ; Case C–390/12 *Pfleger* EU:C:2014:281, [35]–[36]; Cases C-217 and 350/15 *Criminal proceedings against Massimo Orsi and Luciano Baldetti* EU:C:2017:264, [16]-[20].

[2] Case C-482/10 *Teresa Cicala v Regione Siciliana*, EU:C:2011:868, [28]; Case C-419/14 *WebmindLicenses*, EU:C:2015:832, [83]; Case C-141/15 *Doux*, EU:C:2017:188, [60].

[3] Case C-277/11 *MM v Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, EU:C:2012:744, [81]-[94]; Case C-604/12 *H.N. v Minister for Justice, Equality and Law Reform*, EU:C:2014:302, [49]-[50]; Case C-166/13 *Mukurabega*, EU:C:2014:2336, [43]-[46]; Case C-249/13 *Boudjlida*, EU:C:2014:2431, [30]-[36]; Case C-141/12 *YS v Minister voor Immigratie, Integratie en Asiel*, EU:C:2014:2081, [68]-[69]; Case C-358/16 *UBS Europe*, EU:C:2018:715, [28]; Case C-230/18 *PI v Landespolizeidirektion Tirol*, EU:C:2019:383, [56]-[58]. This is also the view taken by the EU Ombudsman, https://www.ombudsman.europa.eu/en/publication/en/3510 , accessed 6 June 2020.

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The second paragraph of Article 47 is especially connected to Article 41. It is based on Article 6 ECHR and imposes an obligation to give a fair and public hearing within a reasonable time, which should be held before an independent and impartial tribunal established by law.[4]

Article 42 of the Charter is also inter-related with Article 41. Article 42 provides that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium. It is moreover important to note Article 48 of the Charter: everyone charged shall be presumed innocent until proved guilty according to law, and respect for the rights of the defence of anyone who has been charged shall be guaranteed.

C. Sources of Article 41 Rights

The principal source of the rights contained in Article 41 of the Charter is the case law of the EU courts. Articles 41(1) and (2) are, as the Explanations to the Charter make clear, based on the general principle of law concerning the right to be heard and the rights of the defence. Article 41(3) is based on Article 340 TFEU, and Article 41(4) is grounded on Articles 20(2)(d) and 25 TFEU. The principal source for the

[4] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

interpretation of these provisions is therefore the case law of the EU courts concerning the general principle of law and the relevant provisions of the TFEU respectively. The European Convention on Human Rights is relevant as a source in relation to some aspects of the right to be heard. Article 6 ECHR is of particular relevance in this respect.

D. Analysis

I. General Remarks

Two general remarks can be made concerning Article 41. First, the 'fit' between the constituent parts of Article 41 and the right to good administration is imperfect. Articles 41(1)-(2) can readily be regarded as part of the right to good administration, and so too can the obligation to make good damage in Article 41(3). The connection between good administration and language rights in Article 41(4) is more indirect. Secondly, the divide between Article 41 and Article 47 is questionable. Article 41(2)(a) deals with the right to be heard. Article 47 requires that the hearing should be conducted by a person who is impartial and independent. The elements dealt with by the respective Articles are, however, parts of the overall right to a fair hearing and it would have been preferable for them to have been included in the same provision of the Charter.

II. Scope of Application

i. Article 41(1)

Article 41(1) provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time[5] by the institutions, bodies, offices and agencies of the Union. It is a substantive provision in its own right, and is not exhausted by the three sub-parts of Article 41(2).[6] This is made clear by the wording of Article 41(2), which states that the rights 'include' those specifically listed in Article 41(2)(a)-(c). It is therefore open to a claimant to rely on Article 41(1) for aspects of the right to good administration that do not readily fall within the more specific parts of Article 41(2). The CJEU has held that the requirement of impartiality in Article 41(1) covers subjective impartiality, which precludes bias or personal prejudice, and objective impartiality, under which there must be sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned.[7]

An expansive interpretation of Article 41(1) would include many of the issues listed by the EU Ombudsman in the Code of Good Administrative Behaviour[8] as part

---

[5] See, eg, Case T-67/01 *JCB Service v Commission* [2004] ECR II-49.

[6] K Kanska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights' (2004) 10 ELJ 296; A Ward, 'Access to Justice', in S Peers and A Ward (eds), *The EU Charter of Fundamental Rights, Politics, Law and Policy* (Hart, 2004) Ch 5; M Lais, 'Das Recht auf eine gute Verwaltung unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs' ZEuS 2002, S 448-482; M Bullinger, 'Das Recht auf eine gute Verwaltung nach der Grundrechtscharta der EU', in Festschrift für W Brohm, München 2002, S 25-33.

[7] Case C-439/11 P *Ziegler v Commission*, EU:C:2013:513, [153]-[154]; Case C-521/15 *Spain v Commission*, EU:C:2017:982, [91]; Case T-180/15 *Icap v Commission*, EU:T:2017:795, [272].

[8] European Ombudsman, The European Code of Good Administrative Behaviour (2005), available at, https://www.ombudsman.europa.eu/en/publication/en/3510 , accessed 6 June 2020. See also, the CEDEFOP Decision on Good Administrative Behaviour [2011] OJ C285/3.

of the right to good administration, which include non-discrimination, proportionality, objectivity, impartiality and independence, legitimate expectations, the right to be heard, and the provision of reasons and fairness.

A narrower reading of Article 41(1) would give protection to rather more discrete rights, which are not specifically listed in Article 41(2), such as the obligation to give careful consideration to the claimant's case exemplifies. This might be regarded as part of the right to be heard, and hence come within Article 41(2)(a), but this is strained because the duty can be owed even though there is no formal hearing. It can nonetheless still be regarded as part of the duty to act fairly within Article 41(1).[9]

ii. Article 41(2)(a)

The scope of application of the right to be heard is broad in certain respects and narrow in others. It is broad insofar as the right benefits every person, which includes legal as well as natural persons, and it was moreover assumed in *MM* that the right to be heard in Article 41(2)(a) was applicable against Member State institutions when they act in the scope of EU law.[10] It is narrow insofar as it only applies to individual determinations. It does not include any right to be heard or participate in the making of norms that are general or legislative in nature.

There is, moreover, a difficult issue concerning the precise scope of the right to be heard in relation to individual determinations. The formulation in Article

[9] See, eg, Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313; Case T-211/02 *Tideland Signal Ltd v Commission* [2002] ECR II-3781, [37].

[10] Case 277/11 *MM* (n **Error! Bookmark not defined.**).

41(2)(a) accords a right to be heard where there is an individual measure that adversely affect a person. This formulation does not require that the contested measure should be initiated against the claimant, although some requirement of this kind is included in some other language versions of the Charter. It has been argued that the English language Charter formulation does not cohere with some case law, which required that the contested measure should be initiated against the claimant. The author however also acknowledged that the case law varied across different subject matter areas, and that the general trend was towards an emphasis on adverse impact, either by expanding the notion of initiated against, or by not requiring it in certain types of case.[11]

iii. Article 41(2)(b)

The principal issues concerning the scope of application of Article 41(2)(b) on access to the file concerns the subject matter areas to which the right applies. The right of access was initially developed in the context of competition law, and was then extended to customs, in the manner explicated below. There is however no reason for it to be confined to these areas. The case law never limited application of the right to these areas. To the contrary, the courts reasoned analogically and applied the right to the sphere of customs when the issue was argued in that type of case. The right of access was rationalised as being part of the rights of the defence, and this rationale is equally applicable to all subject matter areas where the rights of the defence are

[11] I Rabinovici, 'The Right to Be Heard in the Charter of Fundamental Rights of the European Union' (2012) 18 EPL 149

applicable. This conclusion is reinforced by the wording of Article 41(2)(b), which is framed in general terms and is not confined to specific subject matter areas.

iv. Article 41(2)(c)

This Article imposes a duty on the administration to give reasons for its decisions. The foundation for this provision is the Treaty article enshrining a duty to give reasons that has been present since the inception of the Rome Treaty. The Treaty obligation is, however, broader than Article 41(2)(c), since the former has never been limited to the administration. Thus Article 190 EEC imposed a duty to give reasons in relation to all regulations, directives and decisions made by the Council and Commission. Article 296 TFEU now imposes a duty to give reasons in relation to all legal acts. It provides that 'legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties'. The Treaty has therefore always imposed a duty to give reasons in relation to legislative acts as well as administrative acts.

It is unlikely that Article 41(2)(c) will be read more narrowly than Article 296 TFEU. The Explanations that accompany the Charter state expressly that the wording of Article 41(2)(c) comes from Article 296 TFEU. If the issue were to arise, the ECJ might interpret 'administration' within the Charter provision broadly so as to include all institutional acts with legal effect, drawing on the wording from the Explanations for support. It could alternatively choose to give priority to Article 296 TFEU, the rationale being that Treaty articles and the Charter have the same legal status, and that in the absence of fit between the two, the ECJ is therefore entitled to give preference to the provision that is broader and hence more protective of rights, which in this instance would be Article 296 TFEU.

It is possible that Article 41 might be interpreted more broadly than Article 296 TFEU, since the word 'administration' might be taken to include national administration, thereby requiring it to provide reasons when it acts in the scope of EU law, as would be the case when a national agency is part of a scheme of shared administration. An obligation to give reasons by national administration has in any event been imposed in particular cases, where it is regarded as necessary to safeguard other important principles of EU law.[12]

v. Article 41(3)

This Article of the Charter replicates Article 340 TFEU. The two Articles are in substance the same, save for the fact that the obligation to make good the damage in Article 340 is predicated on the assumption that the damage was the result of non-contractual liability, whereas this condition is not present in the Charter Article. It is, however, doubtful whether any difference was intended in this respect. The Explanations that accompany the Charter simply state that Article 41(3) 'reproduces' the right in Article 340 TFEU and there is nothing to indicate any difference between the two provisions. It follows, as affirmed by the Explanations, that Article 52(2) of the Charter, which provides that rights recognised by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties, is applicable to Article 41(3).

[12] See, eg, Case 222/86 *Unectef v Heylens* [1987] ECR 4097, [15].

The scope of application of Article 41(3) will follow that of Article 340 TFEU. In temporal terms, the basic limitation period for such actions is five years.[13] The term 'institutions' has been interpreted broadly to cover not only those listed in Article 13 TEU, but also other EU bodies established by the Treaty that are intended to contribute to attainment of Union objectives.[14] The EU courts have held that it would be contrary to principle if the EU when it acts through a body established pursuant to the Treaty could escape the consequences of Article 340(2). This coheres with earlier authority holding the EU liable for acts performed by bodies to which the EU has delegated governmental functions.[15] It should also be noted that EU legislation will often make specific provision for damages liability for agencies and the like.[16] Thus, the enabling regulations for agencies contain provisions identical to Article 340(2).

The action for damages under Article 340 TFEU is regarded as independent and autonomous. The fact that the contested provision has not been annulled will not

---

[13] Art 46 of the Statute of the Court of Justice, https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf , accessed on 6 June 2020. For discussion as to when the period begins, see, Case T-201/94 *Kusterman v Council and Commission* [2002] ECR II-415; Case T-261/94 *Schulte v Council and Commission* [2002] ECR II-441; Case C-282/05 P *Holcim (Deutschland) AG v Commission* [2007] ECR I-2941; Case C-51/05 P *Commission v Cantina sociale di Dolianova Soc coop arl* [2008] ECR I-5341.

[14] Case C-370/89 *SGEEM and Etroy v EIB* [1992] ECR I-6211; Case T-209/00 *Lamberts v Commission* [2002] ECR II-2203; Case 234/02 P *European Ombudsman v Frank Lamberts* [2004] ECR I-2803.

[15] Case 18/60 *Worms v High Authority* [1962] ECR 195.

[16] See, eg, Council Regulation (EC) 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes [2003] OJ L11/1, Art 21(1); Council Regulation 1210/90/EEC of 7 May 1990 on the establishment of the European Environment Agency [1990] OJ L120/1, Art 18.

normally bar a damages action.[17] This general rule is, however, subject to exceptions. Thus a damages action will be held inadmissible if it is aimed at securing withdrawal of a measure that has become definitive where the damages action would in effect nullify the legal effects of that measure. This would be the case where the applicant sought payment in a damages action of an amount precisely equal to a duty paid by it pursuant to a measure that had become definitive.[18] Subject to this caveat, a damages action can be pursued even if the relevant measure has not been annulled.

The normal remedy under Article 340 is damages for loss suffered. Article 340(2) is, however, framed in terms of 'non-contractual liability', which can cover restitution, notwithstanding the fact that the requirement to 'make good any damage caused' by its institutions, does not fit perfectly with restitution. The ECJ affirmed in

---

[17] Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975; Cases 9 and 11/71 *Compagnie d'Approvisionnement de Transport et de Crédit SA et Grands Moulins de Paris SA v Commission* [1972] ECR 391; Case T-178/98 *Fresh Marine Company SA v Commission* [2000] ECR II-3331, [45]-[49]; Case T-99/98 *Hameico Stuttgart GmbH v Council and Commission* [2003] ECR II-2195, [37]-[38]; Case 234/02 P *Lamberts* (n 14); Case T-47/02 *Danzer and Danzer v Council* [2006] ECR II-1779, [27]; Case T-193/04 *Hans-Martin Tillack v Commission* [2006] ECR II-3995, [97]-[98].

[18] Case 543/79 *Birke v Commission* [1981] ECR 2669, [28]; Cases C–199 and 200/94 *Pesqueria Vasco-Montanesa SA (Pevasa) and Compania Internacional de Pesca y Derivados SA (Inpesca) v Commission* [1995] ECR I–3709, [27]-[28]; Case T–93/95 *Laga v Commission* [1998] ECR II-195; Case C-310/97 P *Commission v AssiDomän Kraft Products AB* [1999] ECR I-5363, [59]; Case T-178/98 *Fresh Marine Company SA v Commission* [2000] ECR II-3331, [50]; Cases T-44, 119, 126/01 *Eduardo Vieira Sa, Vieira Argentina SA and Pescanova SA v Commission* [2003] ECR II-1209, [214]-[216]; Case T-47/02 *Danzer and Danzer v Council* [2006] ECR II-1779, [28]; P Mead, 'The Relationship between an Action for Damages and an Action for Annulment: The Return of *Plaumann*', in T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997) Ch 13.

Masdar that although unjust enrichment did not fit perfectly with the criteria for recovery in cases of non-contractual liability, it would be contrary to the principle of effective judicial protection if Articles 274 and 340(2) were construed to preclude such recovery.[19] The ECJ has applied restitutionary principles where there has been unjust enrichment by an individual against the EU, as exemplified by staff cases.[20] A restitutionary claim may also arise where payment is made to public bodies that have no right to the money,[21] such as where a Member State has imposed a levy that is illegal under EU law, or where an illegal charge has been levied by the EU.

vi. Article 41(4)

Article 41(4) is framed in terms of a right to write to one of the EU institutions in an official language and receive an answer in that language. The EU institutions are listed in Article 13 TEU. The analogous Treaty provision, Article 20(2)(d), is broader, including also among the addressees of any such communication, the European Ombudsman and advisory bodies of the Union. The Explanations accompanying the Charter state that Article 41(4) reproduces the right in Article 20(2)(d) TFEU and that as a consequence Article 52(2) of the Charter should be applicable, such that rights recognised by this Charter for which provision is made in the Treaties must be exercised under the conditions and within the limits defined by those Treaties.

---

[19] Case C-47/07 P *Masdar (UK) Ltd v Commission* [2008] ECR I-9761.

[20] Case 18/63 *Wollast v EEC* [1964] ECR 85, 98; Case 110/63 *Willame v Commission* [1965] ECR 649, 666; Case 36/72 *Meganck v Commission* [1973] ECR 527; Case 71/72 *Kuhl v Council* [1973] ECR 705.

[21] A Jones, *Restitution and European Community Law* (Mansfield Press, 2000); R Williams, *Unjust Enrichment and Public Law, A Comparative Study of England, France and the EU* (Hart, 2010).

On this view Article 41(4) would be read congruently with Article 20(2)(d) TFEU to include advisory bodies, as well as the institutions stricto sensu. This still leaves open the breadth of the term 'advisory bodies' within Article 20(2)(d). The most sensible construction would be to read it as a reference to bodies, offices and agencies of the EU. Not all such bodies are purely advisory, since some can make binding determinations in individual cases. It would however be absurd to construe Article 20(2)(d), and hence also Article 41 of the Charter, as applicable only to such bodies that were strictly advisory, and not to include those that could make some binding determinations.

III. Specific Provisions

III.A Specific Provisions: Article 41(1): The General Clause

The scope of application of Article 41(1) was considered above. The obligation to give careful consideration to the claimant's case provides a good example of a right that could be regarded as part of the duty to act fairly within Article 41(1).[22]

The ECJ developed early in its jurisprudence an obligation that care should be exercised in particular when discretionary determinations were made in relation to individual cases,[23] and this was applied in the context of competition[24] and state

---

[22] See, eg, Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313; Case T-211/02 *Tideland Signal Ltd v Commission* [2002] ECR II-3781, [37].

[23] Cases 16-18/59 *Geitling, Mausegatt and Prasident v High Authority* [1960] ECR 17, 20; Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV v High Authority* [1962] ECR 253.

[24] Case 56/65 *Societe La Technique Miniere (LTM) v Maschinenbau Ulm GmbH* [1966] ECR 235, 248; Cases 56 & 58/64 *Consten & Grundig v Commission* [1966] 299, 374.

aids.[25] The administration is under a duty carefully to examine the relevant factual and legal aspects of the individual case.[26] The principle is exemplified by the decision in *Technische Universitat Munchen*.[27] The Technical University of Munich sought to import an electron microscope from Japan. Its application for exemption from customs duties was rejected because apparatus of equivalent scientific value was manufactured in the EU, this decision having been reached after having consulted experts in the area. The ECJ held that where the Union institutions have a power of appraisal then respect for rights guaranteed by the EU legal order was especially important. This included the right of the person to make his views known, the right to have an adequately reasoned decision and the duty of the competent institution to examine carefully and impartially all relevant aspects of the individual case. It was only in this way that the courts could 'verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present'.[28] The ECJ annulled the decision, finding a breach of the duty of care by the Commission through its reliance on experts who did not possess the requisite technical knowledge in the relevant area.[29] The principle has been developed by the CFI, especially in relation to competition and state aids.

In the context of competition the principle of care operates both with respect to the decision whether to pursue an investigation and as to the conduct of the

---

[25] Case 120/73 *Gebruder Lorenz GmbH v Germany* [1973] ECR 1471, 1481.

[26] Case 16/90 *Nolle v Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163.

[27] Case C-269/90 *Hauptzollamt Munchen-Mitte v Technische Universitat Munchen* [1991] ECR I-5469.

[28] Case C-269/90 (n 27) [14].

[29] Ibid [135]; Case T-241/00 *Azienda Agricola 'Le Canne' Srl v Commission* [2002] ECR II-1251, [53]-[54].

investigation if it is pursued.[30] The Commission has limited resources with which to pursue competition violations, thus it will choose which infringements are worthy of its attention. The Commission cannot therefore be compelled to conduct an investigation.[31] It is, however, obliged 'to examine carefully the factual and legal aspects of which it is notified by the complainant'[32] in order to decide whether they indicated behaviour likely to distort competition, and the ECJ verifies whether this had been done. Where the Commission decides to conduct an investigation it has to investigate with the degree of care that enables it to assess the factual and legal considerations submitted by the complainant.[33]

In the context of state aids, the principle of care has been similarly important, although the EU courts have differed as to what it required. The CFI's judgment in *Sytraval*[34] represented a high-point in the application of the principle. The applicant sought the annulment of a decision rejecting a complaint about a state aid. The CFI held that the Commission was under a duty to give a reasoned answer to each of the objections raised in the complaint.[35] It held further that the Commission came under an 'automatic obligation to examine the objections which the complainant would certainly have raised if it had been given the opportunity of taking cognizance of that

---

[30] Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

[31] Case T–24/90 *Automec Srl v Commission* [1992] ECR II–2223; Case T-432/05 *EMC Development AB v European Commission* [2010] ECR II-1629, [59]-[60]; Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* [2010] ECR II-5865, [157]-[160].

[32] Case T–24/90 *Automec* (n 31) [79].

[33] Case T–7/92 *Asia Motor France SA v Commission* [1993] ECR II–669, [36]; Case T-154/98 *Asia Motor France SA v Commission* [2000] ECR II-3453, [53]-[56].

[34] Case T-95/94 *Sytraval and Brink's France v Commission* [1995] ECR II-2651.

[35] Ibid [62].

information',[36] and that the Commission's duty to give reasons could require an exchange of views and arguments with the complainant.[37] The ECJ was far more circumspect when the *Sytraval* case was appealed.[38] It held that the Commission was not under an obligation to conduct an exchange of views with the complainant, nor was there an obligation to engage in an adversarial debate with the Commission. The ECJ nonetheless concluded that the Commission might be obliged to extend its investigation of a complaint beyond mere examination of the facts and law brought to its attention by the complainant.[39]

The precise boundaries of the principle of care or diligent and impartial administration remain uncertain.[40] The CFI and CJEU are nonetheless willing to apply the principle in areas other than state aids and competition, in order to enhance the accountability of the Union administration.[41]

III.B Specific Provisions Article 41(2)(a): The Right to be Heard

---

[36] Ibid [66].

[37] Ibid [78].

[38] Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719.

[39] Ibid [62].

[40] Compare, eg, Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313 and Case T-211/02 *Tideland Signal Ltd v Commission* [2002] ECR II-3781, [37], with Case C-141/02 P *Commission v T-Mobile Austria GmbH* [2005] ECR I-1283, [68]-[75]. See also, Case T-817/14 *Zoofachhandel Züpke GmbH v European Commission*, EU:T:2016:157.

[41] See, eg, Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305, [170]-[172]; Case T-413/03 *Shandong Reipu Biochemicals Co Ltd v Council* [2006] ECR II-2243; Case C-405/07 P *Netherlands v Commission* [2008] ECR I-8301, [55]-[57]; Case T-610/17 *ICL-IP Terneuzen, BV and ICL Europe Coöperatief UA v European Commission*, EU:T:2019:637, [61].

i. Applicability

The EU courts have protected the right to be heard in individual decisions, irrespective of whether this requirement was found in the relevant Treaty article, regulation, directive or decision.[42] This principle was established in the early case law.[43] The right to be heard contained in Article 41(2)(a) is applicable against Member State institutions as a general principle of law when they act in the scope of EU law.[44]

The precise circumstances in which there is a right to be heard was considered above.[45] Article 41(2)(a) is framed in terms of individual measures that adversely affect the claimant, with no specific requirement that the contested measure should be initiated against the claimant. Some cases predicated the right to be heard on the fact that there was adverse impact from a procedure initiated against the claimant. The case law has however evolved and varied across different subject matter areas, and the

---

[42] D Curtin, 'Constitutionalism in the European Community: The Right to Fair Procedures in Administrative Law', in J O'Reilly (ed), *Human Rights and Constitutional Law, essays in Honour of Brian Walsh* (Round Hall Press, 1992) 293; J Schwarze, 'Developing Principles of European Administrative Law' [1993] PL 229; G Nolte, 'General Principles of German and European Administrative Law – A Comparison in Historical Perspective' (1994) 57 MLR 191; J Schwarze, 'Towards a Common European Public Law' (1995) 1 EPL 227; K Lenaerts and J Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 CMLRev 531; H Nehl, *Principles of Administrative Procedure in EC Law* (Hart, 1999) 70-99; Rabinovici (n 11); P Craig, *EU Administrative Law* (Oxford University Press, 3rd ed, 2018) Chs 11-12.

[43] Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063, [15]; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [9].

[44] See (n **Error! Bookmark not defined.**).

[45] Section D(II)(ii).

general trend has been an emphasis on adverse impact, either by expanding the notion of initiated against, or by not requiring it in certain types of case.[46] The right to be heard was regarded as part of the fundamental rights jurisprudence in *Al-Jubail*.[47] The ECJ held that it must be observed not only where it might lead to penalties, but also where the investigative proceedings prior to the adoption of the anti-dumping duty might directly and adversely affect the undertakings. The provisions concerning hearings contained in the relevant regulation on dumping did not provide all the necessary procedural guarantees and therefore could be complemented by recourse to

---

[46] Case T-450/93 *Lisrestal v Commission* [1994] ECR II-1177; Case C-32/95 P *Commission v Lisrestal* [1996] ECR I-5373; Case T-50/96 *Primex Produkte Import-Export GmbH & Co KG v Commission* [1998] ECR II-3773, [59]; Case C-462/98 P *MedioCurso-Etabelecimento de Ensino Particular Ld v Commission* [2000] ECR I-7183, [36]; Case C-395/00 *Distillerie Fratelli Cipriani SpA v Ministero delle Finanze* [2002] ECR I-11877, [51]; Case T-102/00 *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap v Commission* [2003] ECR II-2433, [59]; Case C-349/07 *Sopropé - Organizações de Calçado Lda v Fazenda Pública* [2008] ECR I-10369, [37]; Case C-249/13 *Boudjlida v Préfet des Pyrénées-Atlantiques*, EU:C:2014:2431, [31]-[40]; Case C-566/14 *Jean-Charles Marchiani v European Parliament*, EU:C:2016:437, [51]; Rabinovici (n 11).

[47] Case C-49/88 *Al-Jubail Fertilizer v Council* [1991] ECR I-3187, [15]. See also, Cases T-33-34/98 *Petrotub and Republica SA v Council* [1999] ECR II-3837; Case C-458/98 P *Industrie des Poudres Spheriques v Council and Commission* [2000] ECR I-8147, [99]; Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware Co Ltd v Council* [2009] ECR I-9147, [83]; Case T-410/06 *Foshan City Nanhai Golden Step Industrial Co, Ltd v Council* [2010] ECR II-879, [109]-[111]; Case T-260/11 *Spain v European Commission*, EU:T:2014:555, [62]; Cases C-129-130/13 *Kamino International Logistics BV and Datema Hellmann Worldwide Logistics BV v Staatssecretaris van Financiën*, EU:C:2014:2041; Case T-346/14 *Yanukovych v Council of the European Union*, EU:T:2016:497, [67]; Case T-153/15 *Hamcho International v Council of the European Union*, EU:T:2016:630, [115].

the fundamental right itself.[48] The right to be heard can be raised by the Court of its own motion.[49]

The application of the right to be heard can be difficult where the administration of the particular scheme is divided or shared between the EU and the Member States,[50] as in the context of customs or the Structural Funds. It can be problematic locating the right to be heard at national or Union level or an admixture of the two.[51] This difficulty is exemplified by case law concerning the right to be heard in sanction cases.[52] The ECJ has however imposed a right to be heard in composite proceedings, even where it was not provided for at one stage of the proceedings.[53] This is exemplified by *Lisrestal*,[54] which concerned the European

---

[48] Case C-49/88 *Al-Jubail* (n 47) [16]; Case T-260/94 *Air Inter SA v Commission* [1997] ECR II-997, [60]; Case C-249/13 *Boudjlida* (n 46) [39]-[40]; Case C-560/14 *M v Minister for Justice and Equality Ireland and the Attorney General*, EU:C:2017:101, [25].

[49] Case C-291/89 *Interhotel v Commission* [1991] ECR I-2257, [14]; Case C-367/95 P *Sytraval* (n 38) [67].

[50] S Alonso de Leon, *Composite Administrative Procedures in the European Union* (Iustel, 2017), Ch 5; F Brito Bastos, 'Beyond Executive Federalism, The Judicial Crafting of the Law of Composite Administrative Decision-Making', Ph.D Thesis, EUI 2018, Ch 4; P Craig, H Hofmann, J-P Schneider and J Ziller (eds), *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press, 2017), Book III, Art 24.

[51] C Eckes and J Mendes, 'The Right to be Heard in Composite Administrative Procedures: Lost in between Protection?' (2011) 36 ELRev 651.

[52] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council and UK* [2006] ECR II-4665; Case T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3019; Case T-284/08 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-3487; Case T-85/09 *Yassin Abdullah Kadi v Commission* [2010] ECR II-5177.

[53] Case C-269/90 *Technische Universitat Munchen* (n 27) [25]; Case T-50/96 *Primex Produkte* (n 46).

Social Fund, the administration of which is shared. The Commission issued a decision to the Portuguese ministry requiring the re-payment of funding to Lisrestal on the grounds that it had mismanaged the funds. The regulation gave no opportunity for the firm to comment before the decision was made, although this was given to the national ministry. The CFI held that the right to be heard was applicable in all proceedings initiated against a person liable to culminate in a measure adversely affecting him. It was a fundamental principle of Community law that applied even in the absence of specific rules concerning the proceedings in question.[55] The ECJ, confirming the CFI's decision, stated that the right to be heard would apply because the measure would significantly affect the applicant's interests, in this instance the loss of funding.[56]

The approach of the EU courts is markedly different in relation to norms of a legislative nature, where the applicant seeks a right to participate, be consulted or intervene in the making of the provision. The EU courts have consistently resisted such claims.[57] They have denied consultation rights unless they are expressly provided by the relevant Treaty article, or by a regulation, directive or decision.

---

[54] Case T-450/93 *Lisrestal*, affirmed in Case C-32/95 P (n 46).

[55] Case T-450/93 *Lisrestal* (n 46) [42]; Cases C-48 and 60/90 *Netherlands v Commission* [1992] ECR I-565, [44]; Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885, [39]; Case T-50/96 *Primex Produkte* (n 46) [59].

[56] Case C-32/95 P (n 46) [33]; Case T-102/00 *Vlaams Fonds voor de Sociale Integratie* (n 46) [60]; Case T-260/94 *Air Inter* (n 48) [65]; Case T-50/96 *Primex Produkte* (n 46) [60]; Case T-290/97 *Mehibas Dordtselaan BV v Commission* ECR [2000] ECR II-15.

[57] Craig (n 42) Ch 11; J Mendes, *Participation in EU Rulemaking, A Rights-based Approach* (Oxford University Press, 2011) Chs 4-5.

The *Atlanta* case is the leading authority.[58] The applicant sought compensation for damage caused by a Community regulation concerning the bananas market. It argued that the CFI had erred in finding that the right to be heard in an administrative procedure affecting a specific person could not be transposed to the process leading to a regulation, more especially because it was irrelevant to the individual concerned whether his legal situation was affected as a result of an administrative or a legislative procedure. The applicant sought to rely on *Al-Jubail* to show that the absence of a Treaty provision requiring consultation in relation to a legislative procedure did not allow a hearing to be dispensed with.[59]

The ECJ rejected the argument. It held that the case law according a right to be heard related only to acts of direct and individual concern to the applicant. It could not be extended to the procedure culminating in legislation involving a choice of economic policy and applying to the generality of traders concerned. The only obligations of consultation incumbent on the Union legislature were those laid down by the Treaty article in question.[60] This approach has been reaffirmed by later authority.[61] The ECJ has, moreover, used the wording of Article 41 of the Charter, which specifies a right to be heard before an individual measure adversely affecting

---

[58] Case C-104/97 P *Atlanta AG v Commission* [1999] ECR I-6983.

[59] Ibid [31]-[32].

[60] Ibid [35]-[39].

[61] Case C-258/02 P *Bactria Industriehygiene-Service Verwaltungs GMbH v Commission* [2003] ECR I-15105, [43]; Case C-263/02 P *Commission v Jégo-Quéré & Cie SA* [2004] ECR I-3425, [47]; Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305, [487]; Case T-296/12 *The Health Food Manufacturers' Association and Others v European Commission*, EU:T:2015:375, [98].

the applicant is taken, to reinforce its conclusion that hearing rights do not cover measures of general application.[62]

ii. Content

There is no general, detailed procedural code, and the content of hearing rights is determined by a mixture of case law, combined with sector-specific legislation. The ECJ has insisted that notice should be given of the nature of the case and that the individual should have a right to respond to it.[63] There is a right of access to the file, and a duty to give reasons, both of which are considered below. The right to be heard will not necessarily require an oral hearing.[64] The ECJ will normally leave it to the Commission to make the initial determination as to whether the hearing should be oral, or whether the opportunity to make written observations should suffice. The EU courts may decide that the right to be heard requires an oral hearing in a particular case, and this might also be stipulated by sector-specific legislation. There is no right to engage in cross-examination,[65] but it may be granted directly by sector-specific

---

[62] Case C-221/09 *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd and Avukat Generali*, EU:C:2011:153, [49].

[63] Cases C-48 and 66/90 *Netherlands and Koninklijke PTT Nederland NV and PTT Post v Commission* [1992] ECR 565; Cases C-402 and C-415/05 P *Kadi* (n 47) [348]; Cases C-399 and 403/06 *Hassan and Ayadi v Council and Commission* [2009] ECR I-11393, [83]-[86]; Case C-135/92 *Fiskano AB v Commission* [1994] ECR I-2885.

[64] J Schwarze, *European Administrative Law* (Sweet & Maxwell, revised ed, 2006) 1363-1364.

[65] Cases T-122-124/07 *Siemens AG Österreich and others v Commission*, EU:T:2011:70, [233]-[234]; Case T-191/06 *FMC Foret v Commission*, EU:T:2011:277, [139]; Case T-439/07 *Coats Holdings Ltd v Commission*, EU:T:2012:320, [174].

legislation, or the EU courts may infer a right to cross-examine from the provisions applicable in a particular area.[66]

iii. Separation of Functions

There are certain circumstances where the Commission acts as both prosecutor and judge, which can be inconsistent with Article 6(1) ECHR. The ECJ has in the past rejected such arguments on the basis that the Commission is not a tribunal and hence not bound by Article 6(1),[67] (although it was bound to observe the procedural safeguards of EU law, such as the right to a fair hearing). The ECJ's reasoning concerning Article 6(1) was problematic, because Article 6(1) stipulates that where civil rights and obligations etc are in issue they must be decided by a tribunal that is independent. The ECJ's conclusion could, however, be rationalized using the Strasbourg case law to the effect that determinations of civil rights and obligations by administrative authorities that are not independent can be accepted, provided that there is adequate appeal or judicial review to a tribunal or court that does conform to Article 6(1). The CFI has in effect adopted this reasoning,[68] as has Advocate General Sharpston.[69] The Union administration and legislature have responded to the concerns voiced claimants. Since 1982 the Commission has appointed a hearing officer to preside over the hearing and to ensure that the rights of the defence are properly

[66] Case 141/84 *Henri de Compte v European Parliament* [1985] ECR 1951.

[67] Cases 209-215, 218/78 *Van Landewyck SARL v Commission* [1980] ECR 3125, [79]-[81]; Cases 100–103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825.

[68] Case T-348/94 *Enso Espanola SA v Commission* [1998] ECR II-1875, [60]-[65]; Case T-351/03 *Schneider Electric SA v Commission* [2007] ECR II-2237, [181]-[183].

[69] Case C-272/09 *KME Germany v Commission*, EU:C:2011:810, [67]-[70].

protected, and legislation now requires hearings to be conducted by an independent hearing officer.[70]

III.C Specific Provisions Article 41(2)(b): Access to the File

Access to the file may be relevant before the decision is made by the administration, or after it has been made when an applicant seeks to challenge the decision by judicial review. Access facilitates understanding of the evidentiary basis on which the decision is to be made or has been made, and of the reasoning underlying it, thereby placing the individual in a better position to put counter-arguments when exercising the right to be heard, or challenging the decision by way of judicial review. Access to the file and access to documents as protected by Article 15(3) TFEU and Article 42 of the Charter can function as alternate routes to the same goal.[71]

EU law accords access to the file as part of the rights of the defence. The initial jurisprudence was developed in relation to competition law, but has been extended to other areas. The application of the principle is not especially difficult where the decision affects only one party, or a small number of parties. It can, however, be problematic when the administrative decision affects a multiplicity of parties, even more so where the litigation is complex and generates a large amount of documentation, as exemplified by some cases on horizontal cartels. The EU courts have placed limitations on access in such instances, but such limits have only been necessary because of the breadth of the initial principle concerning access to the file.

---

[70] Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18, Art 14.

[71] Case C-139/07 P *Commission v Technische Glaswerke Ilmenau GmbH* [2010] ECR I-5885, [59].

The early jurisprudence on access arose in competition proceedings.[72] The ECJ initially held in *VBVB*[73] that there was no legal obligation to disclose the complete file, only those documents on which the Commission had based its decision. The Commission chose not to stick to the legal letter of this judgment, and permitted access, except where, for example, information covered by professional secrecy was involved. The CFI in *Hercules*[74] gave legal force to this administrative practice. The Commission is obliged to make available all documents obtained in the investigation, save where they involve business secrets of other undertakings, confidential information, or internal Commission documents.[75] This was regarded as part of a wider principle of equality of arms, allowing addressees of a decision to examine the file so that they could effectively put their views on the evidentiary basis of the Commission decision.[76] It was not for the Commission alone to decide which

---

[72] J Schwarze, *European Administrative Law* (Sweet & Maxwell, revised ed, 2006) 1341-1357; M Levitt, 'Access to the File: the Commission's Administrative Procedures in Cases under Articles 85 and 86' (1997) 34 CMLRev 1413; C-D Ehlermann and B Drijber, 'Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality' [1996] ECLRev 375; H Nehl, *Principles of Administrative Procedure in EC Law* (Hart, 1999) Ch 5.

[73] Cases 43, 63/82 *VBVB and VBBB v Commission* [1985] ECR 19, [25].

[74] Case T–7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II–1711, [53]-[54]; Case T–65/89 *BPB Industries plc and British Gypsum Ltd v Commission* [1993] ECR II–389.

[75] Commission Notice on internal rules of procedure for access to the file [1997] OJ 1997 C23/3, now overtaken by Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 EC, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation 139/2004 [2005] OJ 325/7.

[76] Cases T-30-32/91 *Solvay SA v Commission* [1995] ECR II-1775; Case T-36-37/91 *ICI v Commission* [1995] ECR II-1847, [93]; Case C-51/92 P *Hercules Chemicals NV v Commission* [1999] ECR I-4235; Case T-175/95 *BASF Lacke & Farben AG v Commission* [1999] ECR II-1581; Cases C-238, 244-245,

documents were useful to the undertakings, which should have the opportunity to examine them to determine their probative value for the applicants' defence. The EU courts could, however, decide not to annul for failure to grant access unless this adversely affected the right to a hearing. A right to access to the file is now included in the regulations governing competition.[77]

The EU courts have applied the reasoning on access to the file from competition cases to other areas. Thus in *Eyckeler*, the CFI reasoned by analogy from the competition cases and held that access to the file was equally important in challenging customs' decisions. It stated that if the right to be heard was to be exercised effectively there must be access to non-confidential documentation relied on by the Commission when it made the contested decision.[78] It was not open to the Commission to exclude documents that it did not consider relevant, since these might well be of interest to the applicant. The CFI concluded that it would be a serious breach of the rights of the defence if the Commission could unilaterally exclude from the administrative procedure documents that might be detrimental to it.[79]

The ease with which the CFI reasoned by analogy from competition to customs signifies the generalization of access to the file as an aspect of the right to be

---

247, 250, 252 and 254/99 P *Limburgse Vinyl Maatschappij v Commission* [2002] ECR I-8375; Case T-5/02 *Tetra Laval BV v Commission* [2002] ECR II-4381, [89]-[91].

[77] Reg 773/2004 (n 70) Arts 15-16.

[78] Case T-42/96 *Eyckeler & Malt AG v Commission* [1998] ECR II-401, [79]-[80].

[79] Ibid [81]. See also, Case T-50/96 *Primex Produkte* (n 46) [57]-[70]; Cases T-186, 187, 190, 192, 210, 211, 216-218, 279-280, 293/97 and 147/99 *Kaufring AG v Commission* [2001] ECR II-1337, [185]; Case T-205/99 *Hyper Srl v Commission* [2002] ECR II-3141; Case T-53/02 *Ricosmos BV v Commission* [2005] ECR II-3173, [71]-[74].

heard,[80] irrespective of the subject-matter area in question, and this is in accord with the formulation in the Charter of Fundamental Rights.

The precise boundaries of access to the file were tested in complex litigation in *Aalborg Portland*.[81] The case concerned a long-running Commission investigation into agreements and concerted practices engaged in by a number of European cement producers. The documentation supporting the alleged practices was very large. The Commission therefore did not append to the statement of objections the documents supporting its conclusions. It prepared a box of documents that was made available for each addressee relating to the statement of objections addressed to that firm. The Commission refused access to the chapters of the statement of objections which they had not received, and refused to grant access to all documents in the investigation file. The ECJ reiterated the right of access to the file, which meant that 'the Commission must give the undertaking concerned the opportunity to examine all the documents in

[80] Cases C-584, 593, 595/10 P *Commission v Kadi*, EU:C:2013:518, [98]-[99]; Case C-200/13 P *Council of the European Union v Bank Saderat Iran*, EU:C:2016:284, [75]; Case C-176/13 P *Council of the European Union v Bank Mellat*, EU:C:2016:96, [82].

[81] Cases C-204-205, 211, 213, 217, 219/00 P *Aalborg Portland v Commission* [2004] ECR I-123. See also, Case T-161/05 *Hoechst GmbH v Commission* [2009] ECR II-3555; Case T-58/01 *Solvay SA v Commission* [2009] ECR II-4781; Case T-66/01 *ICI v Commission* [2010] ECR II-2631; Case C-407/08 P *Knauf Gips KG v European Commission* [2010] ECR I-6375; Case T-186/06 *Solvay SA v Commission*, EU:T:2011:276; Case T-112/07 *Hitachi v Commission*, EU:T:2011:3871; Case T-151/07 *Kone v Commission*, EU:T:2011:365; Case T-197/06 *FMC Corp v European Commission*, EU:T:2011:282; Case C-110/10 P *Solvay SA v Commission*, EU:C:2011:687, [47]-[52]; Case T-128/14 *Daimler AG v Commission*, EU:T:2018:643.

the investigation which may be relevant for its defence',[82] including incriminating and exculpatory evidence.

Failure to provide access to the file will lead to annulment of the decision. The failure to provide such access when the Commission makes its determination is not remedied by the mere fact that access is possible at the stage of judicial review. The GC considered issues of law and its hearing could not therefore replace a full investigation of the kind that would be undertaken in the initial administrative procedure. Moreover, belated disclosure of documents in the file could not return the claimant to the situation it would have been in if it had been able to rely on those documents in presenting its written and oral observations to the Commission.[83]

The ECJ has slightly modified the burden on the claimant in this type of case. In *Aalborg Portland* it held that it was for the applicant to show that the result would have been different if incriminating evidence not communicated to the applicant had been relied on by the Commission in reaching its decision,[84] although where the document not communicated was exculpatory it was only necessary to show that its non-disclosure was able to influence disadvantageously the Commission decision.[85] In the later *Solvay* case it expressed the test in the following manner: where access to the file, and particularly to exculpatory documents, is granted at the stage of the judicial proceedings, the undertaking concerned has to show, not that if it had had access to

[82] Cases C-204-205/00 P *Aalborg Portland* (n 81) [68].

[83] Ibid [103]; Case C-110/10 P *Solvay* (n 81) [51].

[84] Cases C-204-205/00 P *Aalborg Portland* (n 81) Ibid [73].

[85] Ibid [74]-[75].

the non-disclosed documents the Commission decision would have been different in content, but only that those documents could have been useful for its defence.[86]

The general principle of access to the file is subject to a number of limitations. There is no access to business secrets and confidential information, but the Commission cannot make a general reference to confidentiality to justify a total refusal to disclose documents in its file, nor can it give blank pages on the ground that they contained business secrets without providing a more comprehensible non-confidential version, or a summary of the documents.[87] There is no general principle that the parties must receive copies of all documents taken into account in the case of other persons.[88] There is no right for access to documentation that is irrelevant and bears no relation to the allegations of fact or law in the statement of objections.[89] The right of access to the file cannot be used to circumvent the state aid rules concerning challenges to such decisions raised by third parties.[90]

It was for the GC to make these determinations in the light of a provisional examination of certain evidence to see whether the documents 'could have had a significance which ought not to have been disregarded'.[91] The GC in performing this task used an 'objective link' criterion: there has to be some objective link between the

[86] Case C-110/10 P *Solvay* (n 81) [52].

[87] Case T-410/03 *Hoechst GmbH v Commission* [2008] ECR II-881, [152]-[153].

[88] Cases C-204-205/00 P *Aalborg Portland* (n 81) [70].

[89] Ibid [126].

[90] Case T-165/15 *Ryanair v Commission,* EU:T:2018:953, [62]-[69]; Case C-56/18 P *Commission v Gmina Miasto Gdynia*, EU:C:2020:192, [89]-[90].

[91] Cases C-204-205/00 P *Aalborg Portland* (n 81) [76], [77], [101].

document not disclosed and the finding against the relevant undertaking. The ECJ upheld this test.[92]

The application of the access principle to complex litigation of this kind is undoubtedly problematic. There are, as the applicants claimed in argument,[93] difficulties in the GC applying the objective link criterion, since it will not have the same knowledge and understanding of the situation as the Commission. The ECJ's approach is nonetheless explicable. It is reluctant to allow what may well be years of Commission investigation into a complex cartel to be overturned through annulment whenever the undertaking can point to something in the mass of documents that it did not have access to.

III.D Specific Provisions Article 41(2)(c): Duty to Give Reasons

The following analysis is predicated on the assumption, considered above, that Article 41(2)(c) will be interpreted in accord with the ECJ's case law on Article 296 TFEU.

There are a number of policy rationales for the duty to provide reasons. From the perspective of affected parties, it makes the decision-making process more transparent, so that they can know why a measure has been adopted. From the perspective of the decision-maker, an obligation to give reasons will help to ensure that the rationale for the action has been thought through, since having to explain oneself, and defend the rationality of one's choice, is always a salutary exercise. From the perspective of the ECJ, the existence of reasons facilitates judicial review, by, for example, enabling the Court to determine whether a decision was disproportionate.

---

[92] Ibid [129].

[93] Ibid [115].

These policy arguments are reflected in the oft-repeated judicial statements that reasons inform the addressee of the decision of the factual and legal grounds on which it is based, thereby enabling the person to decide whether to seek judicial review and facilitate the exercise of that review by the EU courts. Thus, as the ECJ stated early in its jurisprudence,[94]

> In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties defending their rights, to the court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty.

The most common general formulation of the scope of the duty to give reasons is to be found in the *Sytraval* case.[95]

---

[94] Case 24/62 *Germany v Commission* [1963] ECR 63, 69; Case T-7/92 *Asia Motor France SA v Commission* [1993] ECR II–669, [30]; Case T-387/94 *Asia Motor France SA v Commission* [1996] ECR II-961, [103]; Case 187/99 *Agrana Zucker und Stark AG v Commission* [2001] ECR II-1587, [83]; Case T-241/00 *Azienda Agricola 'Le Canne' Srl v Commission* [2002] ECR II-1251, [54]; Case T-206/99 *Metropole Television SA v Commission* [2001] ECR II-10, [44].

[95] Case C-367/95 P *Sytraval* (n 38) [63]; Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 809, [19]; Case C-316/97 P *European Parliament v Gaspari* [1998] ECR I-7597, [26]; Case C-301/96 *Germany v Commission* [2003] ECR I-9919, [87]; Case C-76/00 P *Petrotub* (n 46) [81]; Case C-89/08 P *Commission v Ireland* [2009] ECR I-11245, [77]; Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECR I-9555, [131]; Case T-24/05 *Alliance One International, Inc v Commission* [2010] ECR II-5329, [149]; Case C-403/10 P *Mediaset SpA v Commission*, EU:C:2011:533, [113]; Case T-300/10 *Internationaler Hilfsfonds eV v Commission*, EU:T:2012:247, [181]; Case T-111/08 *MasterCard, Inc. v Commission*, EU:T:2012:260, [309]; Case T-463/14 *Österreichische Post AG v European Commission*, EU:T:2016:243, [20]; Case T-796/14 *Philip Morris Ltd v European Commission*, EU:T:2016:483, [29].

> [I]t is settled case that the statement of reasons required by Article 190[96] of the Treaty must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its powers of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

The obligation to give reasons will normally require specification of the Treaty article on which the measure was based; the factual background to the measure; and the purposes behind it. This is exemplified by the *Tariff Preferences* case,[97] where the ECJ annulled a Council measure in part because the legal basis of the measure had not been specified. In *Germany v Commission*[98] the Court held that it was sufficient to set out in a concise, clear, and relevant manner the principal issues of law and fact upon which the action was based, such that the reasoning which led the Commission to its decision could be understood. Where a decision established a new principle, or applied it in a novel fashion, there would have to be sufficient reasons in the decision itself,[99] but on some occasions the Court will sanction the incorporation of reasons from another instrument.[100]

Article 296 TFEU applies to all legal acts, legislative, delegated and implementing. The degree of specificity as regards reasons will depend on the nature

---

[96] Now Art 296 TFEU.

[97] Case 45/86 *Commission v Council* [1987] ECR 1493.

[98] Case 24/62 (n 94).

[99] Case 73/74 *Papiers Peints de Belgique v Commission* [1975] ECR 1491.

[100] Case 16/65 *Schwarze* [1965] ECR 877.

of the contested measure. In *Beus*,[101] the ECJ recognized that the requirement to state the reasons on which a measure was based would depend on its nature. In the case of a regulation it might suffice for the preamble to indicate the rationale for its adoption, and the objectives it was intended to achieve. It was not necessary for the regulation to set out the factual basis of the measure, which was often complex, nor was it necessary for the relevant measure to provide a complete evaluation of those facts. Where a measure was of a general legislative nature it was necessary for the EU authority to show the reasoning which led to its adoption, but it was not necessary for it to go into every point of fact and law. Where the essential objective of the measure had been clearly disclosed there was no need for a specific statement of the reasons for each of the technical choices that had been made.[102]

The Court may demand greater particularity where the measure challenged is of an individual, rather than legislative nature. Thus in *Germany v Commission*[103] Germany produced an alcoholic drink called Brenwein, which was made from wine much of which was imported from outside the EU. The establishment of the common external tariff resulted in significant cost increases, and therefore the German Government asked the Commission for permission to import 450,000 hectolitres of this wine at the old, lower rate of duty. The Commission acceded to this request in principle, but only for 100,000 hectolitres. The Commission justified this decision on

---

[101] Case 5/67 *Beus* [1968] ECR 83, 95; Case C–205/94 *Binder GmbH v Hauptzollamt Stuttgart-West* [1996] ECR I–2871.

[102] Case C–122/94 *Commission v Council* [1996] ECR I–881, [29]; Case C–84/94 *United Kingdom v Council* [1996] ECR I–5755, [74], [79].

[103] Case 24/62 *Commission v Germany* (n 94); Case T–5/93 *Tremblay v Commission* [1995] ECR II–185.

the grounds that there was ample wine production in the EU, and that the grant of the requested quota would lead to serious disturbances on the relevant product market. The ECJ found the Commission's reasoning to be insufficiently specific concerning the size of any EU surplus, and that it was unclear why there would be serious disturbances in the market.

The context in which individual decisions are taken will be important in determining the extent of the duty to give reasons. Thus the EU courts have held that in stating the reasons for its decisions the Commission is not obliged to adopt a position on all the arguments relied on by the parties. It is sufficient if it sets out the facts and legal considerations having decisive importance for the decision. [104]

III.E Specific Provisions Article 41(3): Damages Actions against the EU

i. Discretionary Acts

The EU courts have developed different tests for liability depending upon whether the decision-maker has discretion or not. The *Schöppenstedt* case [105] established the general test for recovery in those cases where the decision-maker has some meaningful discretion.

> In the present case the non-contractual liability of the Community presupposes at the very least the unlawful nature of the act alleged to be the cause of the damage. Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred. For that reason the Court, in the present case, must first consider whether such a violation has occurred.

---

[104] See cases (n 94).

[105] Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* (n 17) [11].

This test will most commonly apply in relation to EU legislation where there is some significant discretion, as exemplified by regulations and directives made under the Common Agricultural Policy. The test is also applicable where the contested provision is not legislative in form, but where the primary decision-maker nonetheless possessed some real discretion.

This is apparent from *Bergaderm*.[106] The applicant sought damages for losses suffered by the passage of a Directive, which prohibited the use of certain substances in cosmetics. It claimed that the Directive should be regarded as an administrative act, since it only concerned the applicant and therefore it should suffice to show illegality *per se*, rather than having to prove a sufficiently serious breach. The ECJ rejected the argument, stating that 'the general or individual nature of a measure taken by an institution is not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question'.[107]

The same point is evident in *Antillean Rice*.[108] The applicants challenged aspects of the basic Council Decision which governed the relationship between the overseas countries and territories (OCTs) and the EC. They also challenged a

---

[106] Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission* [2000] ECR I-5291.

[107] Ibid [46]. See also, Case C-472/00 P *Commission v Fresh Marine A/S* [2003] ECR I-7541, [27]; Case C-312/00 P *Commission v Camar Srl and Tico Srl* [2002] ECR I-11355, [55]; Case C-440/07 P *Commission v Schneider Electric SA* [2009] ECR I-6413, [160]-161]; Case T-16/04 *Arcelor SA v European Parliament and Council* [2010] ECR–II 211, [141]-[143]; Case C-346/17 P *Christoph Klein v European Commission*, EU:C:2018:679; Case T-292/15 *VKS v European Commission*, EU:T:2018:103, [62]-[64].

[108] Case C-390/95 P *Antillean Rice Mills NV v Commission* [1999] ECR I-769, [56]-[62]; Case C-312/00 P *Camar* (n 107) [55]-[56].

Commission Decision, which introduced safeguard measures for rice originating in the Dutch Antilles, for breach of the Council Decision. The applicants argued that the CFI was wrong to have required proof of a sufficiently serious breach, since the contested measures were decisions. The ECJ rejected the claim. It held that the Commission enjoyed a wide discretion in the field of economic policy, which meant that liability was dependent on showing a sufficiently serious breach of a superior rule of law for the protection of the individual. The fact that the contested measure took the form of a Decision was not decisive, since the test for damages liability depended on the nature of the measure in question and not its form.

It was clear prior to the Lisbon Treaty that whether an act was subject to the *Schöppenstedt* test would be dependent on the substance of the measure, and not the legal form in which it was expressed.[109] This meant that it was always open to an applicant in what is now an Article 340(2) action to claim that the measure, although called a regulation, was in reality an administrative decision.[110] The converse was also true: it was possible for a measure to be a decision for some purposes, but to be a legislative act for the purposes of Article 340(2).[111] It is however clear after the Lisbon Treaty that the definition of a legislative act is matter of form: any act that is passed in accord with a legislative procedure is a legislative acts for the purposes of

[109] Case C-390/95 P *Antillean Rice* (n 108) [60]; A Arnull, 'Liability for Legislative Acts under Article 215(2) EC', in Heukels and McDonnell (n 18) 131–136.

[110] Case C–119/88 *Aerpo and Others v Commission* [1990] ECR I–2189; Case T–472/93 *Campo Ebro and Others v Commission* [1995] ECR II–421.

[111] Cases T–481/93 and 484/93 *Vereniging van Exporteurs in Levende Varkens v Commission (Live Pigs)* [1995] ECR II–2941; Case C-390/95 P *Antillean Rice* (n 108) [62].

the Lisbon Treaty, and acts not enacted in accord with such a procedure do not qualify as legislative acts, irrespective of their substance.[112]

The applicant must show that the damage resulted from breach of a superior rule of law for the protection of the individual. Superior is sometimes equated with 'important', and sometimes with a more formalistic conception of one rule being hierarchically superior to another. It is apparent from the case law that three differing types of norm can, in principle, qualify in this respect.[113]

First, many Treaty provisions fall within this category. A commonly cited ground in cases under Article 340(2) is the ban on discrimination contained in Article 40(2) TFEU, in the context of the Common Agricultural Policy (CAP). A second ground is that a regulation is in breach of a hierarchically superior regulation.[114] A third ground which has been held capable of sustaining the claim in damages is where the EU legislation is held to infringe certain general principles of law such as proportionality, legal certainty, or legitimate expectations.[115] The principle of sound administration does not, in itself, confer rights upon individuals, except where it

---

[112] Art 289 TFEU.

[113] Rules of the World Trade Organization (WTO) cannot generally be relied on in this context, Case C-149/96 *Portugal v Council* [1999] ECR I-8395; Case T-18/99 *Cordis Obst und Gemuse Grosshandel GmbH v Commission* [2001] ECR II-913; Case C-377/02 *Leon Van Parys NV v BIRB* [2005] ECR I-1465; Case T-383/00 *Beamglow Ltd v European Parliament, Council and Commission* [2005] ECR II-5459; Cases C-120-121/06 P *FIAMM v Council and Commission* [2008] ECR I-6513, [111]-[112].

[114] Case 74/74 *Comptoir National Technique Agricole (CNTA) SA v Commission* [1975] ECR 533.

[115] The duty to give reasons does not appear to qualify as a superior rule of law for these purposes: Case 106/81 *Julius Kind KG v EEC* [1982] ECR 2885; Case C–119/88 *Aerpo* (n 110) [19]; Cases T–466, 469, 473, 474, 477/93 *O'Dwyer v Council* [1996] ECR II-207, [72]; Cases T-64 and 65/01 *Afrikanische Frucht-Compagnie GmbH v Council and Commission* [2004] ECR II-521, [128].

constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of Fundamental Rights.[116]

The individual must prove not only that there has been breach of a superior rule of law for the protection of the individual, but also that the breach was flagrant. This has been the most important control device used by the courts. Its meaning has altered over time. The older case law revealed two senses of the term flagrant violation/serious breach. In some cases this condition was used to deny recovery where the loss was not deemed to be sufficiently serious, as exemplified by *Bayerische HNL*.[117] In other cases the ECJ interpreted the requirement of flagrant violation to refer to the seriousness of the breach, as exemplified by *Amylum*,[118] where recovery was denied because the institutional error did not verge on the arbitrary.[119] The conditions in *Bayerische HNL* and *Amylum* were cumulative. An applicant had to show both that the *effects* of the breach were serious, in terms of the quantum of loss suffered, and also that the *manner* of the breach was arbitrary. These hurdles were not easy to surmount, particularly the second.

---

[116] Case T-193/04 *Tillack* (n 17) [116]-[117]; Case T-138/14 *Randa Chart v European External Action Service*, EU:T:2015:981, [113]-114].

[117] Cases 83, 94/76, 4, 15, 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v Council and Commission* [1978] ECR 1209.

[118] Cases 116 and 124/77 *Amylum NV and Tunnel Refineries Ltd v Council and Commission* [1979] ECR 3497.

[119] Ibid [19].

There have been significant shifts in the ECJ's later jurisprudence. The major change came in *Bergaderm*.[120] When considering state liability in damages the ECJ in *Brasserie du Pêcheur/Factortame*[121] held that the test should not be different from that used to determine the EU's liability under Article 340(2). This cross-fertilization between the test for the EU's damages liability and that of the Member States was carried further in *Bergaderm*, where the ECJ completed the circle by explicitly drawing on the factors mentioned in *Brasserie du Pecheur/Factortame* to determine the meaning of flagrant violation for the purposes of liability under Article 340(2). In *Bergaderm* the ECJ held that the rules for liability under Article 340(2) take account, as do those in relation to state liability in damages, of 'the complexity of situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question'.[122] It affirmed that the test for damages liability was in general the same irrespective of whether the Union or the Member State inflicted the loss: the rule of law infringed must be intended to confer rights on individuals; there must be a sufficiently serious breach; and there had to be a direct causal link between the breach and the damage.[123]

This means that under Article 340(2) the seriousness of the breach will be dependent upon factors articulated in the case law on state liability such as the relative clarity of the rule which has been breached; the measure of discretion left to the relevant authorities; whether the error of law was excusable or not; and whether the

---

[120] Case C-352/98 *Laboratoires Pharmaceutiques Bergaderm* (n 106).

[121] Cases C–46 and 48/93 *Brasserie du Pêcheur SA v Germany*; *R. v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I–1029.

[122] Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm* (n 106) [40].

[123] Ibid [41]-[42].

breach was intentional or voluntary. Where the Member State or the EU institution has only considerably reduced, or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach. The decisive issue for the purposes of damages liability is not the individual or general nature of the act adopted, but the discretion available to the institution when it was adopted. This approach has been followed in later cases.[124]

Thus, for example, in *Arcelor*[125] the claimant sought damages for loss caused by a Directive concerned with greenhouse gas emissions. The CFI reiterated the test from *Bergaderm* and held that it was for the claimant to show the serious breach. This required it to show a manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the Union legislature when exercising its environmental powers. It emphasized the breadth of the discretionary power in this area, stating that it required the Union legislature to evaluate 'ecological, scientific, technical and economic changes of a complex and uncertain nature' and to balance 'the various objectives, principles and interests set out in Article 174 EC'.[126]

---

[124] Case C-472/00 P *Fresh Marine A/S* (n 7); Case C-312/00 P *Camar* (n 107); Case C-198/03 P *Commission v CEVA Santé Animale SA and Pfizer Enterprises Sàrl* [2005] ECR I-6357; Case C-282/05 P *Holcim (Deutschland) AG v Commission* [2007] ECR I-2941; Case T-304/01 *Julia Abad Pérez v Council of the European Union and Commission* [2006] ECR II-4857; Case T-364/03 *Medici Grimm KG v Council* [2006] ECR II-79; Cases T-3/00 and 337/04 *Athanasios Pitsiorlas v Council and ECB* [2007] ECR II-4779; Case T-94/98 *Alfonsius Alferink v Commission* [2008] ECR II-1125; Case T-212/03 *My Travel Group plc v Commission* [2008] ECR II-1967; Case T-79/13 *Accorinti v European Central Bank*, EU:T:2015:756, [64]-[67]; Cases C-8-10/15 *Ledra Advertising Ltd v European Commission and European Central Bank*, EU:C:2016:701, [63]-[64].

[125] Case T-16/04 *Arcelor* (n 107).

[126] Ibid [143].

The rationale for the test for liability set out above is that the EU institutions often have to make difficult discretionary choices. A test for liability based on illegality *per se* would render the decision-makers susceptible to a potentially wide liability, and would run the risk that the Court might 'second-guess' the decisions made by the Council and Commission as to how the variables concerning the discretion should be balanced in any particular instance. Such a strict test for damages liability might also deter the courts from finding illegality. The crucial issue is then how the phrase 'flagrant violation' or 'serious breach' should be interpreted. The interpretation in the early case law required something akin to arbitrary action and this was too restrictive. The more liberal approach in *Brasserie du Pêcheur/Factortame*, which was adopted in *Bergaderm*, is therefore to be welcomed.

ii. Non-Discretionary Acts

The test for liability for non-discretionary acts was subtly altered in the jurisprudence. The traditional approach, prior to *Bergaderm*, was that where the contested measure did not entail any meaningful discretionary choice then it would normally suffice to show illegality, causation, and damage.[127] Discretionary measures, by way of contrast, would be subject to the further requirement of showing a sufficiently serious breach.

---

[127] Cases 44–51/77 *Union Malt v Commission* [1978] ECR 57; Cases T–481 and 484/93 *Live Pigs* (n 111); Case 26/81 *Oleifici Mediterranei v EEC* [1982] ECR 3057, [16]; Case C–146/91 *KYDEP v Council and Commission* [1994] ECR I–4199; Cases C–258 and 259/90 *Pesquerias de Bermeo SA and Naviera Laida SA v Commission* [1992] ECR I–2901; Case T-336/94 *Efisol v Commission* [1996] ECR II-1343, [30]; Case T-178/98 *Fresh Marine* (n 17) [54]; Cases T-79/96, 260/97, 117/98 *Camar Srl and Tico Srl v Commission* [2000] ECR II-2193, [204]-[205]; Case T-333/03 *Masdar (UK) Ltd v Commission* [2006] ECR II-4377, [59]-[62].

The more recent jurisprudence continues to distinguish between discretionary and non-discretionary acts, but does so within the unitary framework of the sufficiently serious breach test. The modern formulation, set out in *Bergaderm* and applied in subsequent cases, is as follows. It is necessary for the applicant to prove that the rule of law infringed was intended to confer rights on individuals; there must be a sufficiently serious breach; and a causal link between the breach and the resultant harm. Where however the EU institution has considerably reduced or no discretion, the mere infringement of EU law 'may' be sufficient to establish the existence of the sufficiently serious breach.[128] The ECJ therefore continues to distinguish between the test for liability for discretionary and non-discretionary acts, but within the framework of the sufficiently serious breach test. Where there is no or considerably reduced discretion, the mere breach of Community law 'may' suffice to establish the existence of the sufficiently serious breach. The general or individual nature of the measure is, as seen from *Bergaderm*[129] and *Antillean Rice*,[130] not a decisive criterion when identifying the limits of discretion possessed by an institution. This is correct in

---

[128] Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm* (n 106) [42]-[44]; Case C-472/00 P, *Fresh Marine A/S* (n 7) [26]-[27]; Case C-312/00 P *Camar* (n 107) [54]-[55]; Cases T-198/95, 171/96, 230/97, 174/98, and 225/98 *Comafrica SpA and Dole Fresh Fruit Europa Ltd & Co v Commission* [2001] ECR II-1975, [134]-[136]; Case T-283/02 *EnBW Kernkraft GmbH v Commission* [2005] ECR II-913, [87]; Case T-139/01 *Comafrica SpA and Dole Fresh Fruit Europe & Co Ltd v Commission* [2005] ECR II-409, [142]; Case T-94/98 *Alfonsius Alferink* (n 124); Case T-16/04 *Arcelor* (n 107) [141]; Case C-440/07 P *Schneider* (n 107) [160]; Case T-341/07 *Jose Maria Sison v Council*, EU:T:2011:687, [33]-[41]; Case C-221/10 P *Artegodan GmbH v Commission and Germany*, EU:C:2012:216, [80]; Case C-346/17 P *Christoph Klein* (n 107).

[129] Case C-352/98 P (n 106) [46]; Case T-178/98 *Fresh Marine* (n 17) [57].

[130] Case C-390/95 P *Antillean Rice* (n 108) [56]-[62].

principle. Many administrative measures involve discretionary choices that are just as difficult as those made in the context of legislative action, and the line between the two may be difficult to draw.[131]

If the EU courts decide that there is no meaningful discretion, and therefore that the mere infringement of EU law may suffice to establish a sufficiently serious breach, there may still be issues concerning the meaning of illegality. The mere proof of an error will not, however, always ensure success in a damages action. The Court may construe illegality narrowly, or define it so as to preclude liability unless there has been some culpable error, or something equivalent thereto.[132] Thus in *Fresh Marine*,[133] the applicant sought damages because the Commission had erroneously decided that the company was in breach of an undertaking it had given in relation to the dumping of salmon. The CFI held that a mere infringement of EU law could suffice for liability, because the alleged error did not involve complex discretionary choices by the Commission. However, it then defined the relevant error leading to illegality to be lack of ordinary care and diligence by the Commission, and took account of the applicant's contributory negligence.[134]

iii. Causation and Damage

---

[131] Case T–390/94 *Aloys Schröder v Commission* [1997] ECR II–501; Cases T–458 and 523/93 *ENU v Commission* [1995] ECR II–2459; Case C-390/95 P *Antillean Rice* (n 108); Case T-178/98 *Fresh Marine* (n 17) [57]; Case T-79/96 *Camar Srl* (n 127) [206]; Case C-64/98 *Petrides Co Inc v Commission* [1999] ECR I-5187, [26]-[28].

[132] Cases 19, 20, 25, 30/69 *Denise Richez-Parise v Commission* [1970] ECR 325.

[133] Case T-178/98 (n 17) [61].

[134] Ibid [57]-[61], [82]; Cases T-198/95, 171/96, 230/97, 174/98, and 225/98 *Comafrica* (n 128) [144], [149]; Case T-341/07 *Jose Maria Sison* (n 128) [40].

An applicant must show causation and damage in any action, irrespective of whether the contested measure is discretionary or non-discretionary in nature. Claims for damages have often fallen at this hurdle.[135] There is a causal link for the purposes of Article 340 where there is a certain, direct causal nexus between the fault committed by the institution concerned and the injury pleaded, the burden of proof of which rests on the applicants.[136] It can be difficult to prove that EU action caused the loss.[137] Thus in *Scan Office Design* the applicant failed in its damages claim, because although it had established some serious faults by the Commission in procurement procedure, it could not show that it should have been awarded the contract.[138] The applicant must show not only that the Union action caused the loss,[139] but also that the chain of causation has not been broken by either the Member State or the applicant. If the loss

---

[135] A Toth, 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability', in Heukels and McDonnell (n 18) 192.

[136] Case T-304/01 *Julia Abad Pérez* (n 124); Cases T-252, 271-272/07 *Sungro SA v Council and Commission* [2010] ECR II-55, [47].

[137] Cases 64, 113/76, 167, 239/78, 27, 28, 45/79 *Dumortier Frères SA v Council* [1979] ECR 3091; Case C-419/08 P *Trubowest Handel GmbH and Viktor Makarov v Council and Commission* [2010] ECR I-2259.

[138] Case T-40/01 *Scan Office Design SA v Commission* [2002] ECR II-5043; Cases T-3/00 and 337/04, *Athanasios Pitsiorlas* (n 124); Case T-42/06 *Bruno Gollnisch v European Parliament* [2010] ECR II-1135, [110].

[139] Case C-363-4/88 *Finsider v Commission* [1992] ECR I-359, [25]; Case T-57/00 *Banan-Kompaniet AB and Skandinaviska Bananimporten AB v Council and Commission* [2003] ECR II-607, [40]; Case T-333/01 *Karl Meyer v Commission* [2003] ECR II-117, [32]; Case T-673/15 *Guardian Europe Sàrl v European Union*, EU:T:2017:377, [75]-[76]; Case T-479/14 *Kendrion NV v European Union, represented by the Court of Justice of the European Union*, EU:T:2017:48, [64]-[66].

arises from an independent or autonomous act by the Member State, the EU is no longer liable.[140] If, however, this conduct has been made possible by an illegal failure of the Commission to exercise its supervisory powers, then this failure will be considered to be the cause of the damage.[141] Similarly, the EU will be liable where it committed the wrong, and hence any damage caused by implementation of the invalid EU act by national authorities that had no discretion will be attributable to the Union.[142] It is not entirely clear what type of conduct by the applicant will break the chain of causation. Negligence, or contributory negligence, will suffice either to defeat the claim or to reduce the damages.[143] If the individual ought to have foreseen the possibility of certain events which might cause loss, then the possibility of claiming damages will be diminished or lost.[144] Particular problems of causation can arise where the illegality consists of omissions by an EU institution.[145]

The claimant will also have to show that the damage is of kind that is recoverable under EU law. The general objective is to place the victim in the situation

---

[140] Case 132/77 *Société pour l'Exportation des Sucres SA v Commission* [1978] ECR 1061, 1072–1073; Case T-261/94 *Schulte v Commission* [2002] ECR II-441, [57].

[141] Cases 9 and 12/60 *Vloeberghs v High Authority* [1961] ECR 197, 240; Case 4/69 *Alfons Lütticke GmbH v Commission* [1971] ECR 325, 336–338.

[142] Case T-210/00 *Etablissments Biret et Cie SA v Council* [2002] ECR II-47, [36]-[37].

[143] Case 145/83 *Adams v Commission* [1985] ECR 3539, 3592; Case T-178/98 *Fresh Marine* (n 17).

[144] Case 59/83 *SA Biovilac NV v EEC* [1984] ECR 4057; Case T–514/93 *Cobrecaf v Commission* [1995] ECR II–621, at 643; Case T–572/93 *Odigitria v Council and Commission* [1995] ECR II–2025, 2051–2052; Case T-184/95 *Dorsch Consult* [1998] ECR II-667.

[145] Case T-304/01 *Julia Abad Pérez* (n 124); Case T-138/03 *ÉR* (n 13).

that would have pertained if the wrong had not been committed.[146] Losses will only be recoverable if they are certain and specific, proven and quantifiable.[147] It is however possible to maintain an action 'for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed'.[148] The idea that the damage suffered must be specific, in the sense that it affects the applicant's interests in a special and individual way, is found in various guises in ECJ decisions. Thus, in *Bayerische HNL* the Court emphasized that the effects of the regulation did not exceed the bounds of economic risk inherent in the activity in question.[149] The applicant will have the onus of proving that the damage occurred. The damage must also be quantifiable and come within the types of damage that are recoverable.[150] The ECJ will grant damages for losses actually sustained and will exceptionally award for non-material damage.[151] It is willing in principle also to give damages for lost profits,

---

[146] Case C-308/87 *Grifoni v EAEC* [1994] ECR I-341, [40]; Cases C-104/89 and 37/90 *Mulder and others v Council and Commission* [2000] ECR I-203, [51], [63]; Case T-260/97 *Camar Srl v Council* [2005] ECR II-2741, [97].

[147] Toth (n 135) 180–191; Case T-139/01 *Comafrica* (n 128) [163]-[168]; Case T-99/98 *Hameico Stuttgart* (n 17) [67]; Case C-243/05 P *Agraz, SA and Others v Commission* [2006] ECR I-10833; Cases T-3/00 and 337/04 *Athanasios Pitsiorlas* (n 124); Case T-452/05 *Belgian Sewing Thread (BST) NV v European Commission* [2010] ECR II-1373, [163]-[168].

[148] Cases 56–60/74 *Kampffmeyer v Commission and Council* [1976] ECR 711, 741; Case T-79/96 *Camar Srl* (n 127) [207]; Case T-260/97 *Camar Srl* (n 146) [91]; Case T-279/03 *Galileo International Technology LLC v Commission* [2006] ECR II-1291, [123].

[149] Cases 83, 94/76, 4, 15, 40/77 *Bayerische HNL* (n 117).

[150] Case 238/78 *Ireks-Arkady v Council and Commission* [1979] ECR 2955, 2998–2999.

[151] Case T-84/98 *C v Council* [2000] ECR IA-113, [98]-[103]; Case T-307/01 *Jean-Paul François v Commission* [2004] ECR II-1669, [107]-[111]; Case T-48/01 *François Vainker and Brenda Vainker v European Parliament* [2004] ECR IA-51, [180].

but is reluctant to do so.[152] There are, however, exceptional cases where it will award lost profits, subject to a duty to mitigate loss.[153]

Damages will normally be the relief claimed under Article 340. The CFI however held in *Galileo*[154] that the combined effect of Articles 268 and 340 TFEU is that the EU Courts have the power to impose on the Union any form of reparation that accords with the general principles of non-contractual liability common to the laws of the Member States, including, if it accords with those principles, compensation in kind, if necessary in the form of an injunction to do or not to do something.

iv. EU Servants

Article 340(2) specifically allows for loss to be claimed where it has been caused either by the Union institutions or by the acts of its servants 'in the performance of their duties'. The ECJ has construed this provision narrowly. Thus in *Sayag*[155] an engineer employed by Euratom was instructed to take Leduc, a representative of a private firm, on a visit to certain installations. He drove him there in his own car, having obtained a travel order enabling him to claim expenses for the trip from the Community. An accident occurred and Leduc claimed damages in the Belgian courts against Sayag. It was argued that Sayag was driving the car in the performance of his

---

[152] Cases 5, 7, 13–24/66 *Kampffmeyer v Commission* [1967] ECR 245, 266–267; Case T-160/03 *AFCon Management Consultants v Commission* [2005] ECR II-981, [112]-[114]; Case 74/74 *CNTA* (n 114) 550.

[153] Cases C–104/89 and 37/90 *Mulder v Council and Commission* [1992] ECR I–3061.

[154] Case T-279/03 *Galileo* (n 148) [63].

[155] Case 9/69 *Sayag v Leduc* [1969] ECR 329; Case T-124/04 *Jamal Ouariachi v Commission* [2005] ECR II-4653, [18].

duties, and that therefore the action should have been brought against the Community. The ECJ held that the Community was only liable for those acts of its servants which, by virtue of an internal and direct relationship, were the necessary extension of the tasks entrusted to the institutions. A servant's use of his private car for transport during the course of his duties could only satisfy this condition in exceptional circumstances, notwithstanding that Sayag had obtained a travel order for the journey. The range of acts done by its servants for which the Community will accept responsibility is therefore more limited than in most Member States. No justification for the limited nature of this liability is provided by the ECJ.

If the Community is not liable then an action can in principle be brought against the servant in his or her personal capacity in a national court and governed by national law. However, Article 343 TFEU provides that the Union shall enjoy in the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down by the 1965 Protocol on the Privileges and Immunities of the European Union as amended.[156] Article 12(a) of the Protocol provides that servants have immunity from suit in national courts in relation to 'acts performed in their official capacity'.[157] One would expect that where the EU is liable under Article 340(2), because the servant is acting in the performance of her duties, then it would follow that the servant would not be personally liable, since he or she would be deemed to be acting in an official capacity. The interrelationship between these two provisions is more problematic, and the ECJ has held that the servant's

[156] [1967] OJ L152/14.

[157] See now, Protocol (No 7) On the Privileges and Immunities of the European Union, Art 11.

personal immunity and the scope of the EU's liability for the acts of the servant are separate issues.[158]

iv. Lawful Acts

The preceding discussion has been concerned with liability in damages for unlawful acts. Individuals may also suffer loss flowing from lawful EU acts.[159] The problem of loss being caused by lawful governmental action is not peculiar to the Union. Thus, French law recognizes a principle of *égalité devant les charges publiques*, and German law the concept of *Sonderöpfer*, allowing loss caused by lawful governmental action to be recovered, albeit in limited circumstances.[160] There can be difficulties in deciding when to grant such compensation, since legislation will often explicitly or implicitly aim to benefit one section of the population at the expense of another.

Claims for lawfully caused loss have been advanced frequently and most have been rejected.[161] The leading case is *Dorsch Consult*,[162] which arose out of the Gulf

---

[158] Case 5/68 *Sayag v Leduc* [1968] ECR 395, 402.

[159] H Bronkhorst, 'The Valid Legislative Act as a Cause of Liability of the Communities', in Heukels and McDonnell (n 18) Ch 8.

[160] Ibid 155–159.

[161] Cases 9 and 11/71 *Compagnie d'Approvisionnement de Transport et de Crédit SA and Grands Moulins de Paris SA v Commission* [1972] ECR 391, [45]; Cases 54–60/76 *Compagnie Industrielle et Agricole du Comté de Loheac v Council and Commission* [1977] ECR 645, [19]; Case 59/83 *SA Biovilac NV v EEC* [1984] ECR 4057, 4080–4081; Case 265/85 *Van den Bergh & Jurgens BV and Van Dijk Food Products (Lopik) BV v EEC* [1987] ECR 1155; Case 81/86 *De Boer Buizen v Council and Commission* [1987] ECR 3677.

[162] Case T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v Council* [1998] ECR II-667, upheld on appeal, Case C-237/98 P *Dorsch Consult Ingenieurgesellschaft mbH v Council* [2000] ECR I-4549.

war. The EC, acting pursuant to a UN Security Council resolution, passed a regulation banning trade with Iraq. The Iraqi government retaliated with a law that froze assets of companies doing business in Iraq, where those companies were based in countries that imposed the embargo. The applicant was such a company. It argued that it should be compensated for its loss, even if the EC had acted lawfully. The CFI emphasized that if liability for lawful acts were recognized by EC law, it was necessary for the applicant to prove damage and causation. Such liability could only be incurred if the damage affected a particular circle of economic operators in a disproportionate manner in comparison with others (unusual damage) and exceeded the economic risks inherent in operating in the sector concerned (special damage), where the legislative measure that gave rise to the alleged damage was not justified by a general economic interest. The CFI concluded that the applicant had not met these criteria.

The CFI's judgment was framed conditionally: if such liability were to exist then the conditions listed would have to be satisfied. This was stressed on appeal to the ECJ.[163] It has been emphasized again in *FIAMM*,[164] where the ECJ was even more wary about admitting the existence of any such principle of liability in EU law. It reiterated that no such principle yet existed in EU law and that if it did it would be subject to the stringent conditions set out above. The ECJ noted that there was no

---

See also, Case T-99/98 *Hameico Stuttgart* (n 17) [60]; Case T-170/00 *Forde-Reederie GmbH v Council and Commission* [2002] ECR II-515, [56]; Cases T-64-65/01 *Afrikanische Frucht-Compagnie GmbH and Internationale Fructimport Gesellschaft Weichert & Co v Council and Commission* [2004] ECR II-521, [150]-[156]; Case T-383/00 *Beamglow* (n 113) [173]-[174]; Cases C-120-121/06 P *FIAMM* (n 113).

[163] Case C–237/98 P *Dorsch Consult* (n 162) [19].

[164] Cases C-120-121/06 P *FIAMM* (n 113) [164]-[176].

consensus in the laws of the Member States as to whether liability for lawful acts of a legislative nature existed.[165]

v. Joint Liability

The preceding analysis was based on the assumption that the EU committed the unlawful act. There can, however, be cases where the EU and the Member States share liability.[166] Joint liability can arise where the EU wrongfully authorizes national action that is in breach of EU law, such as in *Kampffmeyer*,[167] where the Commission wrongfully confirmed a decision taken by the German government that suspended zero-rated import licences for maize, in circumstances where firms had acted in reliance on the zero-rating and had concluded contracts to buy maize on that assumption. The decision was annulled[168] and the applicants sought compensation from the Commission under what is now Article 340. The ECJ held that the Commission acted unlawfully so as to give rise to damages liability, but that the extent of the EU's liability should be determined after the conclusion of actions in the German courts brought by the firms affected. This has been criticized on the ground that there was no reason to require the applicants to proceed initially in the German courts, and that the ECJ's rationale was based implicitly on the assumption that the

---

[165] Ibid [175].

[166] A Durand, 'Restitution or Damages: National Court or European Court?' (1975–6) 1 ELRev 431; T Hartley, 'Concurrent Liability in EEC Law: A Critical Review of the Cases' (1977) 2 ELRev 249; W Wils, 'Concurrent Liability of the Community and a Member State' (1992) 17 ELRev 191; P Oliver, 'Joint Liability of the Community and the Member States', in Heukels and McDonnell (n 18) Ch 16.

[167] Cases 5, 7, 13–24/66 *Kampffmeyer v Commission* [1967] ECR 245.

[168] Cases 106 and 107/63 *Toepfer v Commission* [1965] ECR 405.

German authorities were primarily liable, with the EU bearing only a residual liability.[169] We should however distinguish the claim for the return of the levies paid from the more general tort action. Primary liability for the former should rest with Germany, given that it imposed the levy and received the funds. There is however no reason in relation to the latter why the EU's liability should be seen as secondary to that of the Member State. The CFI has nonetheless reaffirmed *Kampffmeyer*.[170]

Issues concerning joint liability can also arise where the Member State applies unlawful Union legislation. This can occur, for example, in the context of the CAP, where EU regulations will often be applied by national intervention boards. The general rule is that it is the national intervention boards, and not the Commission, which are responsible for the application of the CAP, and that an action must normally be commenced in the national courts.[171] The ECJ has also held that an action must be commenced in the national courts where a trader is seeking payment of a sum to which he believes himself to be entitled under EU law, although this decision was heavily influenced by the wording of the relevant EU regulations.[172] There are, however, situations in which it is possible to proceed against the EU directly,[173] the most important being where there would be no remedy available in the national courts,[174] and where the EU has committed a tortious wrong to the applicant.[175]

---

[169] Oliver (n 166).

[170] Case T-138/03 *ÉR v Council and Commission* [2006] ECR II-4923.

[171] Case 96/71 *R and V Haegeman Sprl v Commission* [1972] ECR 1005.

[172] Case 99/74 *Société des Grands Moulins des Antilles v Commission* [1975] ECR 1531.

[173] Case 175/84 *Krohn & Co. Import-Export GmbH & Co. KG v Commission* [1986] ECR 753.

[174] Case 281/82 *Société à responsabilité limitée Unifrex v Commission and Council* [1984] ECR 1969; Case 20/88 *Roquette Freres v Commission* [1989] ECR 1553; Case T–167/94 *Nolle v Council and Commission* [1995] ECR II-2589; Case T-18/99 *Cordis* (n 113) [28].

III.F Specific Provisions Article 41(4): Language Rights

Article 41(4) provides that every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language. This is based on Article 20(2)(d) TFEU, which was hitherto Article 21(3) EC.

The EU has 24 official and working languages: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish. The first Community Regulation determining official languages was passed in 1958,[176] which specified Dutch, French, German and Italian as the official and working languages of the EU. The number has increased since then, but there are fewer official languages than Member States, since some share common languages.

There are two formal consequences of inclusion in the list of official languages: documents can be sent to EU institutions and a reply received in any of these languages; and EU legal acts are published in the official and working languages, as is the Official Journal. Constraints of budget and time mean, however, that relatively few working documents are translated into all languages. The European Commission employs English, French and German in general as procedural languages,

---

[175] Case 126/76 *Dietz v Commission* [1977] ECR 2431; Case T-18/99 *Cordis* (n 113) [26]. The principle in *Dietz* may not apply if the national authorities were partially to blame for the loss caused to the applicant as in Cases 5, 7, 13–24/66 *Kampffmeyer* (n 167).

[176] Regulation No 1/1958 determining the languages to be used by the European Economic Community [1958] OJ L17/385, as amended.

whereas the European Parliament provides translation into different languages according to the needs of its Members.[177]

It has been argued that language rights, including the right to use a minority language, should be regarded as general principles of EU law.[178] There are, however, considerable difficulties with this view,[179] and it should in any event be acknowledged that the EU, by recognizing 24 official languages, goes considerably further in this respect than other international organizations.[180]

IV Limitations and Derogations

The limitations and derogations that can be made to the specific rights enshrined in Article 41 have been considered in the course of the preceding analysis. It should also be noted that Article 52(2) of the Charter, which provides that rights recognized by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties, is applicable to Article 41(3) and 41(4).[181]

V Remedies

---

[177] http://ec.europa.eu/languages/languages-of-europe/eu-languages_en.htm , accessed 21 September 2012.

[178] I Urrutia and I Lasagabaster, 'Language Rights as a General Principle of Community Law' (2007) 8 German LJ 479.

[179] T Schilling, 'Language Rights in the European Union' (2008) 9 German LJ 1219.

[180] Ibid.

[181] Explanations relating to the Charter (n 4).

The remedies for breach of Article 41 will be the same as those applicable for breach of a general principle of law, or for violation of the Treaty obligations that are relevant to Article 41.

Thus if there is a breach of a general principle of law concerning the right to be heard by an EU institution the normal remedy will be annulment pursuant to Article 263 TFEU if there is a direct action, or a finding of invalidity pursuant to Article 267 TFEU if there is an indirect action. If the breach of the general principle of law has been committed by the Member State then the ECJ will rule accordingly under Article 267 TFEU, with the consequence that the Member State will be under an obligation to remedy the breach through, for example, the provision of a hearing that complies with the right to be heard. If the breach of the general principle of the right to be heard flows from national legislation that falls within the scope of EU law, the Member State will be under an obligation to remedy the breach by amending the legislation.

The EU courts may, however, take account of the effect of the breach before deciding whether to annul the contested decision. Thus, for example, infringement of the reasonable time principle does not, as a general rule, lead per se to annulment of a decision taken at the culmination of the administrative procedure. The court will consider whether the elapsing of an excessive period is likely to affect the content of the decision adopted at the end of the administrative procedure.[182]

The normal remedy in the event of an action under Article 340 TFEU will be the award of damages to the claimant. If there is a breach of Article 41(4) of the Charter through failure to reply to an inquiry in the same language as the inquiry was

[182] See, eg, Case F-33/08 *V v Commission*, EU:F:2009:141.

made in, the remedy would in formal terms be annulment of the initial answer, which would carry with it an obligation to respond in the correct terms as demanded by Article 41(4).

E. Evaluation

Articles 41(1)-(2)(a)-(b) of the Charter are based on a general principle of law as developed by the EU courts, and Article 41(c) and Articles 41(3)-(4) are modelled on existing Treaty provisions. There is, therefore, a very considerable volume of existing jurisprudence to guide the interpretation of Article 41. The ECJ has been bold in developing general principles of law, including that relating to hearings, access to the file and the like. It is also natural, as with any large volume of case law, for there to be decisions that are contestable, and this has been exemplified in the preceding discussion. The most interesting issue going forward will be the interpretation accorded by the CJEU to the chapeau provision in Article 41(1).