

EU Administrative Law and Tradition

*Paul Craig**

1 Introduction

This chapter examines tradition as it informs EU Administrative law. It should be noted at the outset that there is a duality in the meaning of tradition that should be revealed for the sake of analytical clarity. The concept can be used to capture the background influences, ‘traditions’, which have informed the subject. It can also be used to denote the tradition that is apparent in the subject as it currently exists, thereby capturing its essential features. This duality is inherent in phrases such as the common law tradition, or the civil law tradition, which when unpacked reveal something about both the historical/cultural influences that have shaped the respective approaches to law, and also something about their current central characteristics. This chapter explores both senses of the term tradition in relation to EU Administrative law, thereby casting light on the traditions that have shaped the subject since the inception of the EEC, and also reflecting on the tradition that informs the subject in its more developed form.

2 Source and Inspiration

The EEC at its inception did not by definition have its own traditions on which to build when shaping what became EU Administrative law. There is nonetheless now an extensive body of jurisprudence that is clearly recognizable as EU Administrative law, and it is therefore interesting to reflect on the forces that created this ‘tradition’ within the EU. It is fitting to

* Professor of English Law, St John’s College, Oxford.

begin the inquiry by reflecting on the sources of EU Administrative law and the more general forces that inspired the traditions that now underpin the subject.

The sources of EU administrative law have always been eclectic. They are to be found primarily in the Treaty, EU legislation, the case law of the EU courts and decisions made by the European Ombudsman. The administrative law of the Member States has moreover been influential in shaping the EU regime. Thus the Treaty contains Articles that deal with principles, both procedural and substantive, which are directly relevant for judicial review, as exemplified by: Article 296 TFEU, which establishes a duty to give reasons that applies to all legal acts, whether legislative, delegated or implementing; Article 15 TFEU, which provides for a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to certain principles and conditions; and Article 18 TFEU, which contains a general proscription of discrimination on the grounds of nationality, further fleshed out in specific Treaty Articles dealing with free movement of workers, freedom of establishment, and the provision of services, non-discrimination on the grounds of gender, non-discrimination as between producers or consumers in the field of agriculture, and discriminatory taxation.

EU legislation made pursuant to the Treaty may also deal with the principles of judicial review. This legislation may flesh out a principle contained in a Treaty article. This was the case in relation to the legislation adopted pursuant to Article 15 TFEU, dealing with access to information. EU legislation may also establish a code of administrative procedure for a particular area.

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

The initial inspiration for the regime of administrative law developed in the EU came from the French tradition. This was unsurprising, given the predominance of French thought in the framing of the original Treaties. This is especially marked in Article 263(2) TFEU, which stipulates that review shall be available for lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The influence of French juristic thought is clearly imprinted on these grounds of review.¹ The four heads of review, lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application and misuse of power, resonate with the French mode of administrative law thought.

While the French civil law tradition was therefore dominant in the framing of the key provision concerning judicial review in Article 263, the ECJ and GC used their inherent judicial discretion to shape the principles of judicial review that were to apply within the EU legal order. Principles of administrative law in Member States other than France naturally exercised influence on the ECJ's emerging jurisprudence. It was unsurprising that German thought came to exert considerable authority in this respect. The judicial discretion in developing the grounds of review was enhanced because the grounds listed in Article 263 were relatively open-textured. Infringement of an essential procedural requirement could be read in a number of ways and gave ample latitude to the EU judiciary to develop it as they saw fit, and so too was the third ground of review, infringement of the Treaty or any rule of law relating to its application.

The EU courts did not systematically trawl through the legal systems of each Member State to find principles that they had in common. The approach was, rather, to consider

¹ J Schwarze, *European Administrative Law* (Office for Official Publications of the European Communities/Sweet & Maxwell, revised edition, 2006) 40.

principles in the major national legal systems, to use those that were felt to be best developed and to fashion them to suit the EU's needs. Thus as Advocate General Lagrange stated, the ECJ does not seek arithmetical common denominators between the national approaches to a particular problem, but rather chooses from 'each of the Member States those solutions which, having regard to the objects of the Treaty, appear to be the best or, if one may use the expression, the most progressive'.² German law was most influential in this regard. It was German jurisprudence on, for example, proportionality and legitimate expectations that was of principal significance for the development of EU law in these areas.

Judicial discretion in shaping the principles of judicial review was also required because the heads of review as specified by Article 263(2) TFEU did not provide an answer to certain issues, which are addressed by all systems of administrative law. They did not on their face tell one about the standard for review in relation to matters of law, fact or discretion. Now to be sure the Treaty provides, as we have seen, in Article 19 TEU that it is for the ECJ to ensure that the law is observed in the interpretation and application of the Treaty. To be sure also, there will be certain instances, such as competence strictly conceived, where the courts will naturally incline to strict control and substitution of judgment as to the meaning of the contested Treaty article or provision of secondary legislation. This does not diminish the force of the point being made here, which is that many of the seminal issues concerning the test for review for errors of law, fact or discretion are not addressed by the Treaty, with the necessary consequence that they have been elaborated by the EU courts.

3 Status and Hierarchy

² Case 14/61 *Hoogovens v High Authority* [1962] ECR 253, 283-284, Lagrange AG.

A central feature in divining the ‘tradition’ of EU Administrative Law is the status of the norms that comprise the subject, and more especially their place within the overall hierarchy of norms that constitute that legal system. There is in this sense a symbiotic link between creativity and tradition. This may seem paradoxical, but the paradox is apparent rather than real. Judicial creativity will play an essential role in shaping the place of administrative law principles within the relevant legal system, and the place thus assigned for such principles will be central in shaping the tradition of administrative law in that legal system.

It is clear that general principles of law as devised by the ECJ, which constitute the core of EU Administrative law function as interpretive guides in relation to primary Treaty articles and regulations, directives and decisions enacted pursuant thereto. The EU courts cannot invalidate primary Treaty articles, but the general principles of law are nonetheless used to interpret the Treaty articles. These principles can moreover be used to annul regulations, directives, decisions and other EU acts with legal effect. Violation of a general principle of EU law will thus serve as a ground for annulment. The principles can also be used against national measures that fall within the scope of EU law. Breach of a general principle may also form the basis for a damages action against the EU, or the Member States, subject to fulfilment of the conditions for this species of liability.

The general principles of law thus sit below the Treaties, but above all else. It is important to emphasize that this status attaches to all general principles of law, not merely to that part dealing with fundamental rights. Thus if a claimant can show that an EU legislative act is contrary to, for example, the principle of legitimate expectations or the precautionary principle and that it cannot be interpreted to be in conformity with such precepts, then it will be declared void. This conclusion will also follow if, for example, the claimant is able to show that an EU legislative act infringes proportionality, even if the case has nothing to do with fundamental rights.

The explanation for the status accorded to general principles in EU law cannot rest *per se* on the analogy with *principes généraux du droit* in France. At the inception of the EEC the *principes généraux du droit* were not fully developed in French law. More importantly the Conseil d'Etat could not invalidate primary legislation, and the Conseil Constitutionnel had not yet undergone its rebirth. The renaissance of the Conseil Constitutionnel in the 1970s facilitated challenge to primary legislation, but only *ex ante* and there was no possibility for challenge *ex post* prior to the recent constitutional reforms in France.³

Thus any idea that the status accorded to general principles in EU law was somehow pre-ordained by domestic analogy is flawed. The reality was, rather, that the status accorded to such principles was a choice made by the ECJ, which was facilitated by the wording of what is now Article 263 TFEU. Thus once the ECJ interpreted the magic phrase 'any rule of law relating to their application' as the grounding for general principles of law, it was an easy step to place them above legislative acts in the hierarchy of norms, since Article 263(1) TFEU was predicated on such acts being susceptible to judicial review.

This very wording of Article 263(1) in rendering EU legislative acts susceptible to judicial review should moreover be viewed in the historical context sketched above. At the inception of the EEC the legislative process was dominated by the Commission and Council. It was imperfectly democratic to say the least and hence the idea that judicial review in accord with general principles of law should sit 'above' norms made in this manner could be accepted with relative equanimity. The structural relationship between Articles 263(1) and (2) has however remained unchanged in the subsequent years, notwithstanding the significant development and democratization of the EU legislative process.

³ M Rogoff, 'Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond' (2011) 6 *Jus Politicum*. See also the articles in (2012) 7 *Jus Politicum* as to whether the Conseil Constitutionnel is the guardian of fundamental rights.

The status accorded to general principles of law gives the EU courts a very powerful tool to shape the emerging EU legal and political order, since they are the ultimate deciders as to whether EU legislation is consonant with the ever expanding list of general principles of EU law. The EU legislature may respond to invalidation of a legislative act for non-compliance with a general principle of law by re-drafting it to remove the legal infirmity. This does not alter the fact that the judicial view as to what is demanded by general principles of law will trump any such estimation made by the EU legislature, irrespective of whether the case is concerned with fundamental rights.

It might be argued that the status of general principles of law in the hierarchy of norms is legitimate because the wording of Article 263(1) is expressly predicated on legislative acts being reviewable in accord with the criteria in Article 263(2). It could be argued further that the framers of the Lisbon Treaty were fully mindful of review for compliance with general principles of law, which had existed for over forty years, and were content that the new Lisbon category of legislative act should be subject to this same regime. There is force in this view. There is nonetheless scant if any evidence from the deliberations that led to the Constitutional Treaty⁴ to suggest that thought was given to this issue. There was discussion of the hierarchy of norms, which led to the Lisbon distinctions between legislative, delegated and implementing acts. There is however no indication of considered reflection on the status of general principles of law within the hierarchy of norms in a regime where the passage of legislative acts has some real democratic legitimacy.⁵

It might alternatively be contended that the status of general principles of law is justified in normative terms, in the sense that the placing of general principles of law below

⁴ The Constitutional Treaty was never ratified, but much of the content was taken over into the Lisbon Treaty.

⁵ This point could indeed be made pre-Lisbon, and post-Maastricht, given that the co-decision procedure, the precursor to the ordinary legislative procedure, had democratic legitimacy in the areas to which it applied.

the Treaties, but above other EU norms, is correct in normative terms. This argument must however be sustained, not merely stated as if self-evidently correct. Such an argument could be constructed, but would be contestable. The normative premise might be positivist in orientation, drawing on the wording of Article 263 as the source-based legitimation for judicial articulation of general principles of law. The normative premise might alternatively be a non-positivist theory of law, in which it was accepted as legitimate for courts to create general principles of law that bind the legislature, irrespective of the precise wording of Article 263 in this regard. The normative premise might alternatively be a non-positivist theory of law, in which it was accepted as legitimate for courts to create general principles of law that bind the legislature, irrespective of the precise wording of Article 263 in this regard.

Whether one prefers the positivist or non-positivist rationale for the status of general principles of law within the EU legal system the fact that such principles are below the Treaties, but above all other legal norms, gives them a peremptory force that is central to the emerging tradition of EU Administrative law. It places the courts in a very powerful position. While they cannot invalidate the Treaty articles they can use the general principles as strong interpretive devices in deciding on the meaning that a particular Treaty article should bear, and once the Treaty article is construed in this manner then that constitutes its meaning, subject to any later Treaty amendment to the contrary. The courts' power in relation to legislative, delegated and implementing acts is even greater, since the principles can be used not only as interpretive devices, but also as the rationale for annulment, with the consequence that the EU will have to re-enact such measures in a form that complies with the precepts of administrative law as laid down by the courts.

4 Principle and Purpose

The traditions that inform national systems of administrative law will necessarily vary depending, *inter alia*, on culture, politics and history. There is nonetheless some commonality between different legal systems. It is common for the development of particular precepts of judicial review to be justified by recourse to the rule of law, which is a concept with diverse meanings, both formal and substantive.⁶ The idea that administration should be procedurally and substantively accountable before the courts has been central to the rule of law.

The rule of law tradition had especial force in the emerging Community legal order. This was because even though there might be room for argument as to the detailed principles of judicial review that should follow from the rule of law, it could hardly be denied that some such principles should exist, given the desire to assure the Member States and national courts that the rapidly growing Community power would be subject to proper legal scrutiny. The primary Treaty provisions were incomplete in this respect, but provided fertile ground for development of a richer set of administrative law principles grounded on the rule of law.

Article 263(2) TFEU specified, *inter alia*, that review should be available for breach of the Treaty or any rule of law relating to its application. We do not know what the latter part of this phrase was intended to connote. The intent might have been to do nothing more than ensure that Commission decision-making should have to comply not only with the primary Treaty articles, but also regulations, directives and decisions passed pursuant thereto. The intent might alternatively have been to capture not only compliance with secondary legislation, but also with other ‘rules of law relating to the application’ of the Treaty that might be developed by the courts. This ambiguity provided the ECJ with a window through which to justify the imposition of administrative law principles as grounds of review.

Article 19 TFEU was equally important in this respect. It charged the ECJ with the duty of ensuring that in the interpretation and application of the Treaty the law should be

⁶ P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] PL 467.

observed. This might have been interpreted in a limited manner to connote the idea that, for example, Commission decisions should be made within the limits laid down by the primary Treaty articles and secondary legislation. The word ‘law’ was however open to a broader interpretation that could legitimate the ECJ fashioning a ‘system of legal principles in accordance with which the legality of Community and Member State action must be determined’.⁷

The latitude afforded by Articles 19 TEU and 263(2) TFEU laid the foundation for the ECJ to read general principles into EU law. A rich body of jurisprudence developed on process rights, fundamental rights, equal treatment and non-discrimination, proportionality, and legal certainty and legitimate expectations. The EU courts’ jurisprudence on general principles informed by the background precept of the rule of law was well-developed by the time of the Treaty of Amsterdam. The amendment of the TEU to provide express recognition that the EU was founded, *inter alia*, on the rule of law was nonetheless supportive of the judicial strategy. Article 2 TEU now provides that,

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The rule of law tradition naturally fed into and informed development of EU Administrative law. It was not however the only background tradition that shaped the subject at EU level. The ECJ has also had recourse to the idea of institutional balance.⁸ The idea of

⁷ T Tridimas, *The General Principles of EU Law* (Oxford University Press, 2nd ed, 2006) 11. See also, M Luisa Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International, 1999) 106-122.

⁸ P Craig, ‘Democracy and Rulemaking within the EC: An Empirical and Normative Assessment’ (1997) 3 ELJ 105; K Lenaerts and A Verhoeven, ‘Institutional Balance as a Guarantee for Democracy in EU Governance’, in C Joerges and R Dehousse (eds), *Good Governance in Europe’s Integrated Market* (Oxford University Press,

institutional balance has a rich history. It was an important part of republican discourse in the fifteenth and sixteenth centuries,⁹ shaping the desired structure of government in the Italian republics, exerting later influence in England and the United States.¹⁰ Institutional balance was a central tenet in the republican conception of government. This was based on the twin precepts that the form of political ordering should encapsulate a balance between different interests, which represented different sections within civil society, and that democratic deliberation should be designed to achieve the public interest rather than narrow sectional desires. Considerable emphasis was placed on institutional balance within EU political debates, more especially during Treaty revisions when the major institutional players made explicit reference to it in making recommendations for the desired distribution of power between them.¹¹

Legal recourse to the concept of institutional balance that is of direct relevance to EU Administrative law is evident in the saga concerning the European Parliament's standing to seek judicial review. Prior to the passage of the TEU it was not accorded any formal privileged status in Article 173 EC as it then was. In the '*Comitology*' case¹² the ECJ rejected

2002) Ch 2; S Smismans, 'Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven', in Joerges and Dehousse, Ch 3; J-P Jaque, 'The Principle of Institutional Balance' (2004) 41 CMLRev 383; P Craig, 'Institutions, Power and Institutional Balance', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, end ed, 2011) Ch 3.

⁹ JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975) and *Virtue, Commerce and History* (Cambridge University Press, 1985).

¹⁰ C Sunstein, 'Interest Groups in American Public Law' 38 Stan L Rev 29 (1985) and 'Beyond the Republican Revival' 97 Yale LJ 1539 (1988); F Michelman, 'Foreword: Traces of Self-Government' 100 Harv L Rev 4 (1986); P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford University Press, 1990) Ch 10.

¹¹ Craig (n 8) 107-109.

¹² Case 302/87 *European Parliament v Council* [1988] ECR 5615.

the EP's argument that it should have the same unlimited standing as other privileged applicants, because Article 173 did not afford it a privileged status and because the ECJ felt that there were other remedies through which the EP's prerogatives in the legislative process could be protected. The issue was considered again in the '*Chernobyl* case'¹³ where the ECJ admitted that these legal remedies might be ineffective and that it was therefore uncertain whether a measure adopted by the Council or the Commission in disregard of the Parliament's prerogatives would be reviewed. The ECJ concluded that it must 'be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve.'¹⁴ The absence of any Treaty provision giving the EP the right to bring an action for annulment was conceptualised as a procedural gap, which could not prevail over 'the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities'.¹⁵ The ECJ therefore concluded that the EP could bring an annulment action to safeguard its prerogatives, which included participation in the drafting of legislative measures, in particular participation in the co-operation procedure laid down in the Treaty. Formal Treaty amendment followed swiftly after the ECJ's ruling. Article 173 EC was re-drafted in the Maastricht Treaty to reflect the legal position reached by the ECJ. It was further amended by the Treaty of Nice and the EP was added to the list of privileged applicants.

¹³ Case C-70/88 *European Parliament v Council* [1990] ECR I-2041.

¹⁴ *Ibid* [21]-[23].

¹⁵ *Ibid* [26].

Legal recourse to the concept of institutional balance in shaping EU Administrative law is apparent once again in the *Meroni* decision.¹⁶ The applicant challenged a decision of the High Authority on the ground that there had been an improper delegation of power to certain agencies concerning scrap metal. The ECJ held that a delegating authority cannot confer power upon another body different from that which it possessed: if the High Authority had exercised the relevant powers itself it would have been subject to a duty to give reasons, a duty to publish an annual report on its activities, a duty to publish data that would have been useful to governments or other concerned parties, and it would have been subject to judicial review. The agency to which power had been delegated was not subject to any of these constraints. The ECJ's concluded that the delegation would undermine the 'balance of powers which is characteristic of the institutional structure of the Community.'¹⁷

5 Individual Protection and Administrative Efficacy

The tradition of administrative law that emerged in the EU was in certain respects Janus faced in a manner not often noticed.

There was, on the one hand, the classic vision of EU Administrative law as designed to protect the individual against the administration, as manifest most noticeably in the creation and development of general principles of law. This dimension was also evident in the creative use made of the principle of effectiveness, which was used to shape many areas of EU law, including administrative law. This is apparent, for example, by use made of the principle to lay the foundation for Member States' damages liability in *Francovich*¹⁸ where the ECJ held that the full effectiveness of EU rules would be impaired and the protection of

¹⁶ Case 9/56 *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1957-58] ECR 133.

¹⁷ *Ibid* 152.

¹⁸ Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

the rights which they granted would be weakened if individuals were unable to obtain compensation when their rights were infringed by a breach of EU law for which a Member State was responsible. This was especially so where the full effectiveness of EU rules was subject to prior action by the State, with the consequence that individuals could not, in the absence of such action, enforce the rights granted to them by EU before the national courts. It followed that the principle of state liability for harm caused to individuals by breaches of EU law for which the State was responsible was inherent in the Treaty.

There was, on the other hand, the way in which judicial review actions served as a vehicle to enhance administrative effectiveness. Actions would be brought before the courts in which claimants would challenge for example a Commission decision made in the context of shared administration, direct administration, Comitology or agencies. The individual would often lose such actions, and the ECJ would take the opportunity afforded by having the case brought before it to give a ruling, often teleological in nature, which served to render the overall schema of the legislation more effective, by interpreting the enabling legislation so as to close loopholes or prevent unwarranted avoidance techniques that undermined the overall objective of the regulatory schema. Judicial review thus became an important vehicle through which the EU courts filled gaps, and interpreted the enabling legislation in the light of its overall objective in order thereby to enhance administrative effectiveness in that particular area. This does not of course mean that such decisions should always be accepted with equanimity. Administrative efficacy is no automatic trump that can justify any legal decision given in its name. Nor should we veer in the opposite direction and view such decisions as illegitimate or unwarranted. It is part of the judicial function to effectuate an administrative regime by interpreting the empowering regulations or directives to attain the overall purpose.

6 Geographical Reach and Administrative Diversity

The discussion thus far has explored both the traditions that have shaped EU Administrative law, and the tradition that informs the subject in its more developed form. The understanding of the latter would however be incomplete without reference to the novel challenges that have had a profound impact on shaping what is now the EU Administrative law tradition. Two such challenges are especially important in this respect, geographical and administrative diversity. Thus the EU courts and legislature have had to craft principles of judicial review that can be applied across an EU of twenty seven Member States, and they have also had to craft such principles to cope with a plurality of administrative forms, including direct administration, shared administration, Comitology, agencies, networks, and the open method of coordination. This has been a daunting task, to which the EU courts and legislature have both contributed.

Space precludes detailed examination, but the nature of the task and the respective contributions of EU courts and legislature can be exemplified by reflecting a little further on shared administration, which has been central to the pattern of Community administration since the inception of the EEC. It was the administrative mode used for issues such as customs, with Community legislation being applied by national customs authorities.¹⁹ It was also the administrative technique used for the Common Agricultural Policy,²⁰ which was the early paradigm for shared administration, and the birthplace of Comitology. The Commission and the Member States had distinct administrative tasks, which were nonetheless inter-dependent, and were set down in legislation and where both had to discharge their respective

¹⁹ Council Regulation (EEC) 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L302/1; Commission Regulation (EEC) 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) 2913/92 establishing the Community Customs Code [1993] OJ L253/1.

²⁰ W Grant, *The Common Agricultural Policy* (MacMillan, 1997); R Fennell, *The Common Agricultural Policy: Continuity and Change* (Clarendon Press, 1997); J McMahon, *Law of the Common Agricultural Policy* (Longman, 2000); M Cardwell, *The European Model of Agriculture* (Oxford University Press, 2004).

tasks for the Community policy to be implemented successfully.²¹ Thus the administration of the CAP was ‘shared’, since the various forms of price support payments were administered jointly by the Commission and the Member States.²² This was done initially through the European Agricultural Guidance and Guarantee Fund (EAGGF). The main enabling provision was Regulation 729/70.²³ The Member States designated the bodies within their countries that would make the payments covered by the Guarantee section,²⁴ and the Commission would make the funds available to the Member States for disbursement by those bodies.²⁵ The Member States were under an obligation to take the necessary measures to satisfy themselves that the transactions financed by the Fund were carried out correctly; to prevent and deal with irregularities; and to recover sums lost as a result of irregularities or negligence.²⁶ The Member States and the Commission had the power to carry out inspections to ensure the probity of the transactions financed by the Fund.²⁷ In addition to the provisions of Regulation 729/70 the protection of the Community Budget was to be secured through the system of clearance of accounts.

The rationale for this form of administration was not difficult to discern. The price support regime required multiple complex payments to farmers throughout the Community. It could not conceivably be undertaken by the Commission itself. The Commission therefore

²¹ Committee of Independent Experts, Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud (10 September 1999), Vol. I, [3.2.2].

²² *Ibid* [3.6.3].

²³ Council Regulation 729/70/EEC on the financing of the Common Agricultural Policy [1970] OJ 1970 L94/13.

²⁴ *Ibid* Art 4(1).

²⁵ *Ibid* Art 4(2).

²⁶ Reg. 729/70 (n 23) Art 8(1).

²⁷ *Ibid* Art 9.

operated by and through national bureaucracies, which often established a specialist national agency to discharge the duties. The very fact that the Member States' duties were formally enshrined in Community regulations served to sharpen the duality of the responsibility for implementation of the policy.

The CAP is also of more general significance in relation to the pattern of Community administration because it gave birth to Comitology.²⁸ It rapidly became clear that the administration of the CAP would require the deployment of detailed rules in ever-changing market circumstances. Recourse to primary legislation on all such occasions was impracticable. It was equally apparent that the Member States were wary of according the Commission a blank cheque over the making of implementing rules, especially given that power once delegated without encumbrance would generate legally binding rules without further possibility of Council oversight. The newly emergent committee system was also conceived as a way of dealing with disagreements between the Member States themselves. The net result was the birth of the management committee procedure, embodied in the early agricultural regulations.²⁹ Involvement in the making of the implementing rules facilitated interaction between national administrators who would be responsible for the application of the rules at national level. The committee methodology spread rapidly to other areas, and became a standard feature attached to the delegation of power to the Commission.³⁰

²⁸ C Bertram, 'Decision-Making in the EEC: The Management Committee Procedure' (1967-68) 5 CMLRev 246; P Schindler, 'The Problems of Decision-Making by Way of the Management Committee Procedure in the EEC' (1971) 8 CMLRev 184; C Bergstrom, *Comitology, Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005) Ch 2.

²⁹ See, eg, Council Regulation 19/62/EEC of 4 April 1962 on the progressive establishment of a common organisation of the market in cereals [1962] OJ 30/933, Arts 25-26.

³⁰ See, eg, Council Regulation 802/68/EEC of 27 June 1968 on the common definition of the concept of the origin of goods [1968] OJ L148/1, Arts 12-14.

Shared administration was once again the administrative mode used in the context of the Structural Funds.³¹ The Single European Act, SEA, was the major catalyst for development in this area. Reform of Structural Fund policy was a consequence of the drive to complete the internal market, since such reform was seen as necessary to ensure the acceptability of the market-based initiatives contained in the SEA. There were fears that the wealthier economies would benefit from the completion of the single market, with the consequence that the gap between them and the less advantaged economies would widen. Reform of the Structural Funds was seen as one way of alleviating these concerns. The Treaty was therefore amended through the inclusion of new articles under the Title of Economic and Social Cohesion,³² through which the Community aimed to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions. The attainment of these aims was to be supported through the Structural Funds.³³ The detailed operation of this regime was set out by Regulation 2052/88,³⁴ which identified

³¹ G Marks, 'Structural Policy in the European Community', in A Sbragia (ed), *Euro Politics: Institutions and Policymaking in the 'New' European Community* (Brookings Institution, 1992); J Scott, *Development Dilemmas in the European Community: Rethinking Regional Development Policy* (Open University Press, 1995); L Hooghe (ed), *Cohesion Policy and European Integration* (Oxford University Press, 1996); I Bache, *The Politics of European Union Regional Policy: Multi-Level Governance or Flexible Gatekeeping?* (Sheffield Academic Press, 1998); T Christiansen, 'Territorial Politics in the EU' (1999) 6 *JEPP* 349; J Scott, 'Regional Policy: An Evolutionary Perspective', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) Ch 17; A Evans, *The EU Structural Funds* (Oxford University Press, 1999).

³² Art 130a EEC, now Art 174 TFEU.

³³ The European Agricultural Guidance and Guarantee Fund, Guidance Section, EAGGF; the European Social Fund, ESF; and the European Regional Development Fund, ERDF.

³⁴ Council Regulation (EEC) 2052/88 of 24 June 1988 on the tasks of the structural funds and their effectiveness and on co-ordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments [1988] OJ L185/9.

the principal objectives and tasks of the Funds. The regime of shared administration in the 1988 regulations entailed formal shared responsibility between Member States and Commission in relation to both input and output.

In relation to input, it was the Member States who submitted their regional development plans to the Commission, which reviewed the plans for conformity with the Regulation. It then established in agreement with the Member State the Community Support Framework (CSF) for Community structural fund operations, which specified the priorities adopted for Community assistance, the form of the assistance, its duration, and the financing plan. There was then more detailed elaboration of the operational programmes given the green light by the CSF. Shared administration at the input stage was designed to enable Member State preferences as to the projects that would be funded to be taken into account, provided they were consonant with the objectives in the 1988 regulations.

In relation to output, it was the Member States who were accorded initial responsibility for ensuring that Community funds for particular projects were properly expended, subject to constraints in Community regulations as to how this should be done, in order to minimize the possibility of fraud and mismanagement. The Commission was also empowered to recover funds that were improperly expended. The application of shared administration to the output stage reflected the fact that the Commission did not possess the resources to monitor in detail all projects that received Community funding, hence the allocation of responsibility to the Member States, while preserving the Commission's right to take legal action to recover funds improperly expended.

The preceding discussion has touched on two examples of shared administration as it operates in relation to agriculture and the Structural Funds, and the rationale for use of this

administrative regime. There are moreover different forms of shared administration, as della Cananea has noted.³⁵

Thus in top-down proceedings the initial decision is made by the EU authorities, normally in the form of a legislative act, which is often complemented by more detailed provisions, which in the post-Lisbon world may take the form of delegated or implementing acts. It is then for the relevant national authority to apply these rules at national level. This mode of shared administration has characterized much of the Common Agricultural Policy, in relation to the disbursement of financial benefits and in relation to the levying of penalties for those who acted in contravention of production constraints and the like. A national intervention agency, or some similar body, applies the EU precepts at national level.

By way of contrast, in bottom-up proceedings the initial decision in the administrative sequence is made at the national level, with the final decision resting with the Commission. This has been the case with some subsidies granted under the CAP, whereby it is for the national authority to make the initial recommendation as to the grant of the subsidy, with the final decision resting with the Commission.³⁶ The bottom-up approach also captures important aspects of the Structural Funds. EU legislation identified the objectives of the funds,³⁷ one of which was the promotion of under-developed regions. The Member State would then submit to the Commission its regional development plans and priorities, and the operational programmes it wished to pursue in those areas. The Commission reviewed the proposed plans and programmes for conformity with the Regulation. It then established in agreement with the Member State, the Community Support Framework for structural fund

³⁵ G della Cananea, 'The European Union's Mixed Administrative Proceedings' (2004) 68 LCP 197, 199-203.

³⁶ Ibid 201.

³⁷ Reg 2052/88 (n 34).

operations. The CSF specified the priorities adopted for assistance, the forms of the assistance, its duration, and the financing plan.

Hybrid shared administration entails an admixture of the previous two, in the sense that the administrative scheme has dimensions that are both top-down and bottom-up. Thus there were two tracks for gaining approval for new medicines. The centralized procedure was obligatory for biotechnical medicinal products, but optional for others. It was administered by the European Agency for the Evaluation of Medicinal Products,³⁸ aided by specialist committees, and made recommendations to the Commission, which then made the formal decision, albeit normally rubber-stamping the Agency's recommendation.³⁹ The decentralized procedure placed the authorization decision in the hands of national regulatory authorities, which when receiving an application informed authorities in other Member States, and the latter could object on certain specified grounds. The assumption underlying the decentralized procedure was nonetheless one of mutual recognition.⁴⁰

The regime of shared administration has posed challenges to which the EU courts and legislature have responded. Thus the EU courts have sought to ensure that the principles of judicial review, in the conceptual form of general principles of law, apply to Member States when they act within the scope of EU law. This can be exemplified by the case law on the right to be heard. The ECJ concluded in *Technische Universität München* that the right to be heard in an administrative procedure in the customs context required that the person concerned should be able during the procedure before the Commission to put his case and

³⁸ <http://www.emea.europa.eu/>

³⁹ Council Regulation (EEC) No 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products [1993] OJ L214/1.

⁴⁰ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311/67, Art 28.

make his views known.⁴¹ A similar approach was taken in *Lisrestal*⁴² in the context of the European Social Fund. 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 as an aspect of the right of defence was applicable in all proceedings initiated against a person liable to culminate in a measure adversely him. It was a fundamental principle of Community law that applied even in the absence of specific rules concerning the proceedings in question.⁴³ 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.⁴⁴ The CFI in *Air Inter* stated that it must be determined whether the right to be heard had been observed either directly through the applicant's dealings with the Commission, or indirectly through the national authorities, or through a combination of the two.⁴⁵

The EU legislature has also responded to the challenge of shared administration by enactment of procedural rules applicable to administrative proceedings at national level, in order thereby to secure the fairness and effectiveness of the overall administrative regime. This is exemplified by the regime applicable to telecommunications, another area where

⁴¹ Case C-269/90 *Hauptzollamt Munchen-Mitte v Technische Universitat Munchen* [1991] ECR I-5469, [25].

⁴² Case T-450/93 *Lisrestal v Commission* [1994] ECR II-1177; Case C-32/95 P *Commission v Lisrestal* [1996] ECR I-5373.

⁴³ 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 Import-Export GmbH & Co KG v Commission* [1998] ECR II-3773,[59].

⁴⁴ Case C-32/95 P (n 42) [33].

⁴⁵ Case T-260/94 *Air Inter SA v Commission* [1997] ECR II-997.

shared administration prevails. The Framework Directive⁴⁶ provides detailed rules of administrative procedure applicable to national regulatory agencies administering the EU regulations on telecommunications. Thus Member States must guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing electronic communications networks, equipment or services.⁴⁷ Member States must ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner, and that they have adequate financial and human resources to carry out the task assigned to them.⁴⁸ The national regulatory authorities must have separate annual budgets.⁴⁹ There are in addition provisions designed to prevent decisions of national regulatory authorities being overturned by other bodies, and to protect the members of these national authorities from outside interference, or dismissal where there are no adequate reasons for this course of action.⁵⁰

The rules on institutional autonomy are complemented by equally detailed provisions concerning process rights for those affected by the regulatory regime. Member States must ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved.⁵¹ The Member States have a duty to collect

⁴⁶ Directive of the European Parliament and of the Council 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), O.J. 2002, L108/33, as amended by Directive 2009/140 [2009] OJ L337/37.

⁴⁷ Ibid Art 3(2).

⁴⁸ Ibid Art 3(3).

⁴⁹ Ibid Art 3a.

⁵⁰ Ibid Art 3a.

⁵¹ Ibid Art 4(1).

information on the subject matter and number of appeals, the duration of the appeal proceedings and the number of decisions to grant interim measures.⁵² The process rights are not limited to circumstances where there is adjudication involving an appeal by a particular undertaking. These rights extend to consultation in the making of norms of a more generalized nature. Thus, subject to limited exceptions, where national regulatory authorities intend to take measures in accordance with the Framework Directive or specific Directives which have a significant impact on the market they must give interested parties the opportunity to comment on the draft measure within a reasonable period. The national regulatory authorities must publish their national consultation procedures and establish a single information point through which all current consultations can be accessed. The results of the consultation must be made publicly available, subject to exceptions for confidentiality.⁵³

The Directive on Integrated Pollution Prevention and Control⁵⁴ provides another example. It stipulates that the public should be given access to information concerning a permit application in order to be able to comment thereon before a decision is reached.⁵⁵ It is moreover incumbent on Member States to ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law or other independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive, provided that they have a sufficient interest, or

⁵² Ibid Art 4(3).

⁵³ Ibid Art 6.

⁵⁴ Council Directive 96/61/EC of 24 September concerning integrated pollution prevention and control, O.J. 1996, L257/26; Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version) [2008] OJ L24/8.

⁵⁵ Dir 2008/1 (n 54) Art 15.

maintain that there has been impairment of a right, where the administrative procedural law of a Member State requires this as a precondition for bringing an action.⁵⁶ A corollary of this obligation concerning access to justice is that Member States must ensure that practical information is made available to the public on access to the administrative and judicial review procedures.⁵⁷

This Directive was amended and strengthened by a more general Directive concerned with public participation and the environment.⁵⁸ In addition to this amendment the Directive makes provision for public participation in a number of areas. Member States have an obligation to ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of plans or programmes in a wide variety of areas concerned with the environment, including water, hazardous waste, packaging and packaging waste, and air quality.⁵⁹ The Member State must ensure that the public is informed about proposals, their right to participate and the body to whom comments should be sent.⁶⁰ The Directive emphasizes that the public must have this opportunity to comment while all options are open and before decisions on the plans are made; that the resultant decision should take account of the comments received; and that reasons should be given for the decision

⁵⁶ Ibid Art 16.

⁵⁷ Ibid Art 16(5).

⁵⁸ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17, Art 4. See also, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance [2011] OJ L26/1.

⁵⁹ Dir 2003/35 (n 58) Art 2(2).

⁶⁰ Ibid Art 2(2)(a).

reached.⁶¹ It is for the Member State to identify the public entitled to participate for these purposes and the detailed arrangements for the participation.

7 Conclusion

Legal subjects evolve over time and this is no less true of EU Administrative law than other subjects. The evolution may bring changes to the underlying foundation of the subject, thereby leading one to describe the ‘tradition’ that currently informs the subject in somewhat different terms than hitherto.

This may well occur as a result of initiatives for a general law to regulate administrative procedure, an issue which has been debated for some time in the academic literature.⁶² The arguments in favour of such a law are that:⁶³ it can enhance the clarity of, and facilitate access, to the law; increase the coherence of principles and procedures; set up default procedures to fill gaps in existing law; and establish the functions of administrative procedure. A general law could therefore function as a boilerplate, which could be supplemented by more sector-specific norms that address the needs of particular subject matter areas.

⁶¹ Ibid Arts. 2(2)(b)-(d).

⁶² European Ombudsman, *The European Code of Good Administrative Behaviour* (2005), available at <http://www.ombudsman.europa.eu/resources/code.faces>; C Harlow, ‘Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot’ (1996) 2 ELJ 3; M Shapiro, ‘Codification of Administrative Law: The US and the Union’ (1996) 2 ELJ 26; J Ziller, ‘Is a Law of Administrative Procedure for the Union Institutions Necessary? Introductory Remarks and Prospects’, European Parliament, DG for Internal Policies, 2010; Oriol Mir-Puigpelat, ‘Arguments in Favour of a General Codification of the Procedure Applicable to EU Administration’, European Parliament, DG for Internal Policies, 2011, <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN> ; <http://www.reneual.eu/>.

⁶³ Ziller (n 62); Mir-Puigpelat (n 62).

The detailed contours and content of such a law remain to be determined. Thus, the Committee on Legal Affairs of the European Parliament passed a resolution arguing in favour of the development of such a law, which would apply to all EU institutions, agencies, offices and bodies in relation to direct administration and individual administrative decisions,⁶⁴ and this has been affirmed by resolution of the European Parliament.⁶⁵ The proposed EU law would establish default principles of administrative procedure where no sector-specific rule existed, but such sectoral rules should not provide less protection than the general procedural law. The current proposal is for a set of principles such as legality, proportionality, non-discrimination, legitimate expectations and the like to be set out a relatively high level of generality, with more detailed specification of the process rights that should be applicable in terms of hearings, access to the file, reason giving, rights of the defence and the like.

There is, moreover, a research network on EU Administrative Law, ReNEUAL,⁶⁶ which is currently engaged in research designed to produce best practice guidelines and restatements on EU procedural law, which may lead to a more formal law. The research covers procedures relating to rule-making, contracts and information management as well as individualized decisions. The outcome of such deliberations remains to be seen, but if such a law were to be produced, more especially in the more extensive form proposed by ReNEUAL, it would perforce reshape what constitutes the EU Administrative law tradition.

⁶⁴ Committee on Legal Affairs, Draft Report with Recommendations to the Commission on a Law on Administrative Procedure of the European Union, 2012/2024, 21 June 2012, Rapporteur Luigi Berlinguer.

⁶⁵ European Parliament Resolution of 15 January 2013 with recommendations to the Commission for a Law on Administrative Procedure, 2012/2024 INI, P7-TAPROV(2013)0004.

⁶⁶ <http://www.reneual.eu/> .

