

## General Principles of EU law and EU administrative law

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Treaty provisions and Union legislation are only part of the story of how law can actually take effect in reality. A quite decisive factor is their implementation through administrative action. This chapter looks at the steps which take place after legislation has been passed: Who does what and by which means to make sure that value decisions made in a legislative act do not only remain 'law on the books'? Which rights exist in that context? How can they be protected? With other words, this chapter deals with sub-legislative setting of rules and making of decisions. It asks which principles and rules exist to ensure the legality and legitimacy of such action.

The questions addressed thereby are as varied as one can imagine: Will a medicine which one study finds to do more harm to a patient than good in combatting the relevant disease be taken off the market in the entire EU? How much minimum capital should a bank maintain in order to be allowed to offer services? May a product labelled as 'organic' contain traces of genetically modified organisms? What level of training should the pilot of a commercial airliner maintain to be allowed to fly over and land on an airport in the EU? Can the bank account held by a citizen of the Union be frozen by order of the United Nations Security Council? Can I ask the administration in my home country to grant me access to the information that has been collected about me in another Member State of the Union? Is the permission to build an offshore wind-energy-park legal when no previous study has been made to assess whether the flight patterns of migrating birds might thereby be disturbed? What can be done if the application for the protection for an EU-wide trademark protection for my newest invention has been turned down?

Finding solutions to these questions will regularly require having a basic understanding of what is referred to in this chapter as General Principles of EU law and of EU administrative law.

Administrative law is part of public law enabling and constraining administrative conduct, that is, activity designed to implement EU law. The essence of EU administrative law are therefore rules and principles governing the procedures for exercising administrative functions and the organisation of the institutions and bodies exercising these functions. One word of caution, though, is necessary: The EU's legal order is particularly dynamic. This is due to the evolving

nature of European integration and growing interdependencies between various levels of law and politics. The effect is that a combination of legal sources – international, European Union, and national – is being used in most policy areas adapting the needs of the policy area to the possibilities of a Union with limited conferral of powers, and often varying constellations of Member States taking part in specific policies.

In order to explain this area in a step-by-step approach, this chapter will give an overview over which actors there are and what they do (I). Then, it will move on to develop an understanding of the applicable law which is key to developing notions of accountability and the protection of rights in this field (II).

You are already familiar with some elements relevant in this chapter. You have, for example, read in chapter 5 (on decision-making and competences) about delegated and implementing acts under Article 290 and 291 TFEU, and that the EU possesses in principle only those powers explicitly conferred on it. In other contexts, you might have read about EU agencies (as regards some particular EU agencies, see chapters 25 and 26) and about possibilities of delegation of powers to agencies, about the separation of functions between the Member States and the EU – especially the principle of sincere cooperation between Member States and the Union.

## **I        Organizational Levels and the Distribution of Powers in Implementing EU Law**

In the EU's legal system, the exercise of the administrative function is undertaken by a diverse range of actors both on the EU-level as well as on the Member State level. These are institutions and bodies of the Union as well as those of its Member States. The following discussion concentrates on some central principles of law governing this distribution and holding the actors on various levels to account.

### ***A    Conferral of Powers on the Union***

Under the principle of conferral, not only is the Union barred from enacting legislation in cases where it is not authorised to do so by the Treaties. Also it is barred from passing implementing acts if not authorised. This results from the principle of conferral under Article 5(1) and (2) TEU

and is explicitly restated in Article 291(1) TFEU under which ‘Member States shall adopt all measures of national law necessary to implement legally binding Union acts.’

Only where the Union is authorised to act, can it do so. When administrative functions are undertaken on the EU level, their exercise is organisationally fragmented. It is spread across the Commission (to a certain degree also the Council) and increasingly European Union agencies. Comitology committees, made up of Member State experts, are designated to supervise and advise the Commission when undertaking implementing activity under Article 291 TFEU. These were already addressed and explained further in the context of the chapter on decision making procedures in this book.

Generally, where administrative powers are conferred to EU level bodies, they are authorised to adopt acts with general content – so called rule-making. Areas where Union bodies have been conferred also the powers to take single case decisions with binding force on individuals are increasingly frequent. Initially, it was only the Commission which was given external decision-making powers in the area of competition law including anti-trust under Articles 101 and 102 TFEU, merger control, and the control of state aid given by the Member States (see further chapters 17 and 18). More and more, EU agencies are also taking decisions addressing issues of EU wide concern such as the granting trademarks for the entire EU market, admitting chemical products as safe for use, and other such regulatory activity.

In most policy areas, however, even if legislation has been adopted by the EU and even if some common rules for the implementation of these rules have been adopted on the European Union level, final decisions vis-à-vis individuals implementing EU policies are taken by Member State bodies. Examples for this approach are customs decisions. Despite the fact that customs law and tariffs are entirely governed by EU law, because the customs union and the common commercial (ie external trade) policy are ‘exclusive competences’ of the EU (see chapter 5), it is national customs officials who take the final decisions and enforce them. This is sometimes referred to as indirect administration of EU law.

### ***B Implementation of EU law by the Member States***

In absence of EU law provisions to the contrary, Member States not only have the right to implement EU law through their administrative apparatus, they are actually obliged to do so (see further chapter 6).

Member States, under the principle of ‘sincere cooperation’ in Article 4(3) TEU, are obliged to ‘take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from acts of the institutions of the Union’.

They may do so by applying existing national legislation, but may also be obliged by EU law to pass specific national implementing legislation and to adopt associated administrative regulations in order to create the conditions necessary for implementation on the national level. Member States, under this model, enjoy only limited institutional or procedural autonomy to implement EU law.<sup>1</sup>

The limitations on the Member States’ autonomy therefore arise from the fact that, in the fields of Union policy, Member States’ substantive and procedural administrative law is to be applied within the framework of EU law. This framework consists of three basic concepts:

First, Member States have the right to set their own standards for substantive and procedural law only in the absence of any explicit requirements in Union law. Therefore, insofar as Union law itself makes provision as regards procedures, criteria, or organizational requirements, national administrations are obliged to act in conformity with these.<sup>2</sup>

Secondly, in the area of indirect administration, the legality of Member States rules and procedures will be measured by their compliance with general principles of EU law and the EU’s Charter of fundamental rights (see further chapter 9).

Thirdly, the application of national procedural rules in the implementation of Union law, must be exercised in strict compliance with the principles of *equivalence* and *effectiveness*.<sup>3</sup> Under the principle of equivalence, in absence of applicable EU law, Member States must grant at least equivalent protection for violation of EU law to that available against violation of national law.<sup>4</sup> Provisions used under national law may not be ‘less favourable than those governing similar

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<sup>1</sup> See originally formulated in Case 33/76 *Rewe-Zentralfinanz EG v Landwirtschafts-Kammer für das Saarland* [1976] ECR 1989, para. 5.

<sup>2</sup> National law might turn out to be inconsistent or even incompatible with EU provisions in the area. The EU’s conflicts rules applicable to such situations are the principle of primacy and the possibility of direct effect of EU law. These interpretative principles oblige the Member States bodies to set aside national law which is in conflict with EU law provisions; see e.g. case law since Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmenthal II)* [1978] ECR 629.

<sup>3</sup> See: Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025, para. 27. See also C-453/99 *Courage and Crehan* [2001] ECR I-6297, para. 25.

<sup>4</sup> C 205-15/82 *Deutsche Milchkontor* [1983] ECR 2633, para 17; C-453/99 *Courage* [2001] ECR I-6297 para 29

domestic actions (principle of equivalence)'.<sup>5</sup> A rule must therefore 'be applied without distinction,' whether the infringement arises from Union law or national law.<sup>6</sup>

Where there is no equivalent national law, or where its application does not lead to the result of enforcing or protecting a right under EU law, the principle of equivalence will override the principle of effectiveness. National courts are obliged to set aside

'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness' of Union law.<sup>7</sup>

Even in cases where there is no equivalent form of protection of rights under national law, Member States, under the principle of effectiveness may not make the exercise of rights conferred by Union law (even only temporarily) 'practically impossible or excessively difficult.'<sup>8</sup>

The obligations under the principles of equivalence and effectiveness apply not only to national Courts but also directly to national administrations.<sup>9</sup> These are explicitly obliged under EU law to set aside national laws which are in conflict with directly effective EU law.<sup>10</sup>

In many cases, implementation of EU law by Member States requires the national bodies to take decisions which have an effect not only on the territory of that state but in the entire EU. This phenomenon can be well illustrated by looking at EU customs law. Once a toy from China has been imported into the EU, for example, via a port in Italy, this toy can be sold throughout the Union without facing any further customs duties or controls, with other words, it can freely circulate in the Union. The Italian customs officials classifying the product as a toy and assessing the customs tariff due to be paid in that sense act as customs officials of the Union. They act on a mix of applicable law – they are agents of the Republic of Italy and subject to the rules and

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<sup>5</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para. 29.

<sup>6</sup> Case C-231/96 *Edis* [1998] ECR I-4951, para 36; Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237, para 21. Whether a situation under EU law is sufficiently similar to a situation regulated under national law is subject to detailed case-by-case analysis, the Court looking at the purpose and effect of a national measure in question – see Case C-326/96 *Levez* [1998] ECR I-7835, para 41.

<sup>7</sup> Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19, 20

<sup>8</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para. 29. This is a standard formula which can be found in many cases e.g. Case C-128/93 *Fischer* [1994] ECR I-4583, para. 37; Joined Cases C-231/06 to C-233/06 *Jonkman and Others* [2007] ECR I-5149, para. 28.

<sup>9</sup> Sacha Prechal, *Directives in EC Law*, 2<sup>nd</sup> edn. (OUP, 2005) 65-72.

<sup>10</sup> See: Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839; C-224/97 *Ciola* [1999] ECR I-2517; Case C-118/00 *Larsy v Inasti* [2001] ECR I-5063; Case C-453/00 *Kühne & Heitz* [2004] ECR I-837. These cases refer for the basis of that obligation the principle of sincere cooperation under Article 4(3) TEU (but the cases still refer to the old Article 10 EC). For a critique of this approach of the CJEU see e.g. Sacha Prechal, *Directives in EC Law*, 2<sup>nd</sup> edn. (OUP, 2005) 65-72

procedures of their own hierarchic system – yet in the exercise of their duties as customs officials and in classification of the goods, they act on the basis of EU law.

In order to mitigate this very common phenomenon of what might be referred to as a decision-making with trans-territorial effect (some authors say trans-national effect), in most policy areas there are some form of common structures for exchange of information and coordination of administrative action. These are sometimes referred to using the metaphor ‘networks’. The objective of such structures of information exchange which are established by EU legislation or international agreement between MS is to reduce potential problems arising from decentralised administration of a common legal space. Examples for such systems are the so called ‘Schengen Information System’<sup>11</sup>, basically a very large data base on wanted persons, persons to be denied entry to the Schengen zone, and stolen objects (see further chapters 25 and 26). Other such information networks exist, to name just a few examples, on food safety<sup>12</sup>, the environment<sup>13</sup>, external borders, fisheries<sup>14</sup>, maritime and ship safety<sup>15</sup>, customs, and value added tax<sup>16</sup>. These information exchanges are generally managed and maintained by EU agencies.

### ***C Delegation of powers within the Union***

As discussed in chapter 3, delegation of powers from legislators to executive (in practice, administrative) bodies constitutes an inevitable aspect of modern legal systems. Reasons include the technical complexity of many areas of regulation, the limited effectiveness of hierarchical command structures, and the highly pluralistic societies which require knowledge and balancing of very diverse interests. At first glance, the principle of attributed powers under Articles 5(2) and 13(2) TEU provides a presumption against delegation. Under these provisions, powers

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<sup>11</sup> Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 205, 7.8.2007, p. 63); Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 381, 28.12.2006, p. 4)

<sup>12</sup> Regulation (EC) n° 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1); Commission Regulation (EU) n° 16/2001 of 10 January 2011 laying down implementing measures for the rapid alert system for food and feed (OJ L 6, 11.1.2011, p. 7).

<sup>13</sup> Regulation (EC) n° 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network (OJ L 126, 21.5.2009, p.13);

<sup>14</sup> Council Regulation (EC) n° 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulation (EEC) n° 2847/93, (EC) n° 1936/2001 and (EC) n° 601/2004 and repealing Regulation (EC) n° 1093/94 and (EC) n° 1447/1999 (OJ L286, 29.10.2008, p.1),

<sup>15</sup> Regulation (EC) n° 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (OJ L208, 5.8.2002, p.1)

<sup>16</sup> See more generally on administrative cooperation in the field of taxation: Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/779/EC (OJ L64, 11.3.2011, p.1).

should be exercised in the European Union by those entrusted with them by the Treaties. However, delegation is not only a practical necessity but also a general phenomenon in implementation of EU policies.

The Treaty provisions on delegation of powers, set out in Articles 290 and 291 TFEU, favour delegation to the Commission (see further chapter 5).<sup>17</sup> In this system, no reference is made to agencies as possible recipients of delegations – despite the express acknowledgement in the provisions on judicial review of acts (Article 263 paras 1 and 5 TFEU) of EU agencies as potential decision-makers (see further chapter 10).<sup>18</sup> In the same vein, the 2011 comitology regulation (ie the general rules on the conferment upon the Commission of the power to adopt measures implementing EU acts, pursuant to Article 291 TFEU)<sup>19</sup> makes no mention of agencies and does not clarify the relation of decision-making with the help of comitology committees as opposed to agency decision-making.<sup>20</sup> Instead, it establishes for this delegation to the Commission two decision-making procedures only – the advisory and the examination procedures. Yet, some agencies have a legal basis directly in the Treaties.<sup>21</sup> Most, however, are created by legislative act despite lacking explicit empowerment in EU primary constitutional Treaty law to do so. Despite this, in the EU, agencies have been entrusted with pursuing different tasks,<sup>22</sup> ranging from the provision of information, the provision of services as a basis

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<sup>17</sup> Art. 290 TFEU allows conferring upon the Commission the power to adopt quasi-legislative ‘delegated’ acts under the oversight of the European Parliament and the Council. Under Art. 291, para 2 and 3, TFEU, implementing powers shall be conferred on the Commission – exceptionally on the Council – “where uniform conditions for implementing legally binding Union acts are needed.”

<sup>18</sup> Besides Art. 263 TFEU, several other provisions in the TFEU directly take into consideration the importance and role played by agencies in the EU legal system. Among these, the most important are: Art. 15 TFEU (transparency and access to documents), Art. 16 TFEU (data protection), Art. 228 TFEU (competence of the European Ombudsman), Art. 265 TFEU (action for failure to act), Art. 267 TFEU (reference for preliminary ruling), Art. 287 TFEU (jurisdiction of the European Court of Auditors). Also the EU’s Charter of Fundamental Rights under Art. 47 explicitly gives the right to an effective remedy, including against agencies. Agencies are further explicitly mentioned in Art. 41, 42 and 43 of the CFR.

<sup>19</sup> Regulation 182/2011 of 16 February 2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, [2011] OJ L55/13, is the legislative act that under Art. 291, para. 3, TFEU lays down “mechanisms for control by Member States of the Commission’s exercise of implementing powers”.

<sup>20</sup> Instead it might actually be read to exclude the possibilities of delegating decision-making powers to independent EU agencies since it allows for explicitly only for either the advisory or the examination procedure. Regulation 182/2011, [2011] OJ L55/13.

<sup>21</sup> E.g. the European Police Office, EUROPOL, Art. 88 TFEU; the agency in charge of cooperation of judicial cooperation, EUROJUST, Art. 85 TFEU.

<sup>22</sup> The basis for this classification can be found in Ellen Vos, ‘Reforming the European Commission: What Role to Play for EU Agencies’, *CMLRev.* 37 (2000) 1113-34 at 1120-1. For a different classification of agencies, see Edoardo Chiti, ‘The Emergence of a Community Administration: the Case of European Agencies’, *CMLRev.* 37 (2000) 309-43 at 315-17.

for the adoption of implementing acts, and even the exercise of specific implementing powers.<sup>23</sup> Even though some agencies support the Commission only by collecting information or processing applications, other agencies have been delegated powers to adopt individually binding decision-making, such as the Community Plant Variety Office (CPVO), the European Chemicals Agency (ECHA) and, in non-scientific fields, the Office for the Harmonisation of Internal Market (OHIM). In all these cases, agencies exert a limited discretion, well qualified by the provisions of the relevant regulations.

How then does an EU agency receive a mandate to exercise its powers, by whom, why, and within which limits? Delegation of powers in the EU is generally discussed in the context of the *Meroni* case from the very early days of European integration.<sup>24</sup> There the Court examined the question as to whether and to what extent the Commission (which was then called the ‘High Authority’) could delegate powers under Article 53 of the Treaty establishing the European Coal and Steel Community (ECSC) for the operation of the supply of ferrous scrap to two bodies it had set up on the basis of Belgian private law.<sup>25</sup> In *Meroni*, the Court explicitly allowed sub-delegation of Commission powers to private parties, despite the lack of an explicit authorisation in the ECSC Treaty. It however set some conditions for such sub-delegation: First, the Commission was authorised only to sub-delegate powers which it had previously been granted. Thereby, the Court reconfirmed the principle of conferral and prohibited actions *ultra vires*.<sup>26</sup> Second, the Commission had to control the exercise of the sub-delegated powers.<sup>27</sup> Third, the Commission was barred from delegating powers to private parties which would allow them to adopt acts with quasi-legislative content because doing so would upset the ‘institutional balance’ of powers conferred on institutions in the ECSC Treaty.<sup>28</sup>

This reference to ‘institutional balance’ – a principle akin to the separation of powers - is the reason for applying the standards set by *Meroni* also today in the context of the EU.<sup>29</sup> Today,

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<sup>23</sup> Two examples of many: Art. 42(5) of the Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (codified version), OJ 2009 L 78/1; Art. 62 of the Council Regulation (EC) 2100/94 of 22 July 1994 on Community plant variety rights, OJ 1994 L 227/1, as amended.

<sup>24</sup> Cases 9, 10/56 *Meroni v ECSC High Authority* [1957/58] ECR English Special Edition 133.

<sup>25</sup> These were the ‘Joint Bureau of Ferrous Scrap Consumers’ and the ‘Imported Ferrous Scrap Equalization Fund’.

<sup>26</sup> *Meroni v High Authority* (9 and 10/56) [1957/58] ECR English Special Edition 133 para 150.

<sup>27</sup> *Meroni v High Authority* (9 and 10/56) [1957/58] ECR English Special Edition 133 para 152.

<sup>28</sup> *Meroni v High Authority* (9 and 10/56) [1957/58] ECR English Special Edition 133 para 152.

<sup>29</sup> See e.g.: C-345/00 P *FNAB and Others v Council* [2001] ECR I-3811, para 41 (on the relevance of the concept of institutional balance); C-301/02 P *Tralli v European Central Bank* [2005] ECR I-4071, paras 41-44; C-164/98 P *DIR Films international and others v Commission* [2000] ECR I-447 paras 52-55. On the limits to delegate by legislative act the right to amend an annex to



therefore, it is established that under EU law delegation of clearly defined powers, the exercise of which is subject to its supervision, is possible. Most EU agencies, which are established by EU legislative acts, have as legal basis Treaty provisions permitting the adoption of ‘measures’ for the harmonisation or approximation of national law such as, most importantly, Article 114 TFEU, and subsidiarily, Article 352 TFEU. Also, policy-specific powers exist allowing for the creation of structural ‘measures’ (i.e. agencies).<sup>30</sup>

## II Criteria for Legality

In the day to day application of EU law, one of the most central questions which needs to be asked and answered concerns the legality of an act or action of an institution body or agency acting within a policy covered by EU law. In order to answer such question, it is necessary to have a set of criteria in mind which can be used as mental guidance for analysing a case. Not all of the principles listed below will give rise to rights of individuals or will be applicable in every case. But keeping them in mind as a checklist will be extremely helpful for structuring answers to a real life problem.

General, overarching criteria for legality of acts of the EU exist mostly in the form of General Principles of law.<sup>31</sup> These General Principles of EU law,<sup>32</sup> have a constitutional status in that they bind Union institutions in the exercise of their legislative and administrative competences. Their function is to provide a guide to the interpretation of Union law, including the Treaties, to constitute grounds of the review of Union law, whether directly based on the Treaties themselves or subordinate acts, and to establish a basis for the non-contractual liability of the Union

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such legislation by means of implementing acts (under the pre-Lisbon system) C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, para 90.

<sup>30</sup> See e.g. in the area of research Articles 182 paragraph 5 and 187 TFEU; in the environmental field Article 192 TFEU (the legal basis for the European Environmental Agency, [2009] OJ L 126/13); in the air and maritime transport field Article 100 paragraph 2 TFEU; regarding border checks, asylum, and immigration in the context of the so called “Area of Freedom, Security and Justice” Articles 74 and 77(2)d) TFEU (The latter is the legal basis for the creation of the EU’s external borders agency, FRONTEX, OJ 2004 L 349/1. See further chapters 5 and 26).

<sup>31</sup> The European Parliament has now called on the Commission to present a legislative proposal for a general act on administrative procedures to be followed by EU institutions and bodies when implementing EU law. So far, however, there is no standard EU ‘administrative procedure act’ or similar code or legal framework horizontally applicable throughout the policy areas touched by European Union integration. The same is true at national level, as regards the national implementation of EU law: see chapter 6.

<sup>32</sup> General principles of law often include principles requiring standards of procedural justice in administrative procedures, such as the notions of proportionality, rights of defence and others.

(Articles 268 and 340 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs TFEU). In addition, such principles also have to be observed by the Member States when they implement Union law<sup>33</sup> and where they derogate from it,<sup>34</sup> that is, in all cases which ‘fall within the scope of Community law’.<sup>35</sup>

In the following, I will first discuss proportionality (A), then various additional sub-elements of the Rule of Law including transparency, legality, the protection of legitimate expectations (B). The discussion then turns to principles of good administration including the right to a fair hearing, to a reasoned act and further rights of defence (C). This is followed by a discussion of the right to an effective judicial remedy (D) and information rights (E).

## **A Proportionality**

Art. 5 (4) TEU states that ‘[u]nder the principle of proportionality, the content and form of Union action, shall not exceed what is necessary to achieve the objectives of this Treaty.’ The real content and relevance of the principle of proportionality, however, arises only from the interpretation given to it under the case law of the CJEU. Long before the principle of proportionality was recognised in what is now Article 5(4) TEU, the CJEU had developed proportionality as general principle of EU law. It now might be regarded as, directly or indirectly, the most widely used general principle of EU law. One of the reasons for this is that proportionality is a very versatile principle serving to review the legality of:

- Acts of EU institutions and bodies when limiting or regulating the exercise of rights of individuals (e.g. the Commission adopts a decision fining a company for violation of EU antitrust law under Article 101 TFEU).<sup>36</sup>
- Acts of EU institutions and bodies when limiting Member State powers by adopting EU acts (e.g. an EU directive of legislative nature on the maximum working time of workers per week).<sup>37</sup>

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<sup>33</sup> See Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609.

<sup>34</sup> Case C-260/89 *ERT v DEP* [1991] ECR I-2925.

<sup>35</sup> Case C-260/89 *ERT v DEP* [1991] ECR I-2925, para. 42. See also Case C-263/97 *First City Trading* [1998] ECR I-5537.

<sup>36</sup> Joined Cases C-189, 202, 205-208, & 213/02P *Dansk Rørindustri and others v Commission* [2005] ECR I-5425.

<sup>37</sup> Case C-84/94, *UK v Council (working time directive)*, [1996] ECR I-5755.

- Indirectly, in case of acts of Member State bodies when implementing EU law (e.g. The Dutch veterinary authorities confiscate Ms Jippes's pet sheep in order to comply with an EU regulation on the limitation of the outbreak of viral veterinary diseases).<sup>38</sup>
- Acts of Member States when limiting or regulating in the context of rights or freedoms guaranteed by EU law (e.g. Greek authorities decide not to grant a broadcasting license to a private TV station).<sup>39</sup>

The CJEU has developed the review of compliance with the principle of proportionality as a three-step test.

- Under the first level 'the principle of proportionality requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question.'<sup>40</sup>
- Second, 'when there is a choice between several appropriate measures recourse must be had to the least onerous'.<sup>41</sup> The notion of 'least onerous' therefore requires a clear definition of the rights in question.
- Third, 'the disadvantages caused must not be disproportionate to the aims pursued',<sup>42</sup> i.e. it there must be an overall reasonable ratio between means and outcome.

The use of the proportionality test is best explained using a practical example such as the *Sky Österreich* case.<sup>43</sup> This case concerned the legality of a provision of a Union directive requiring companies which had acquired the exclusive broadcasting licenses for sports events to allow limited reporting of these events also by other, competing, channels. In review of the compliance of this requirement with the 'freedom to conduct a business', a right under Article 16 of the EU's Charter of Fundamental Rights (CFR), the Court finds that this right needs to be balanced with the right to the freedom to receive information under Article 11(2) CFR. With regard to the first step of the proportionality test, the Court finds that 'safeguarding of the freedoms protected

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<sup>38</sup> Case C-189/01 *Jippes and Others* [2001] ECR I-5689.

<sup>39</sup> Case C-260/89 *ERT v DEP* [1991] ECR I-2925.

<sup>40</sup> See e.g. Case C-343/09 *Afton Chemical* [2010] ECR I-7027, para 45, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR I-nyr, para 71.

<sup>41</sup> See e.g. Case C-343/09 *Afton Chemical* [2010] ECR I-7027, para 45, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR I-nyr, para 71.

<sup>42</sup> See e.g. Case C-343/09 *Afton Chemical* [2010] ECR I-7027, para 45, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR I-nyr, para 71.

<sup>43</sup> Case C-283/11 *Sky Österreich* [2013] ECR I-nyr (Grand Chamber).

under Article 11 of the Charter undoubtedly constitutes a legitimate aim in the general interest'.<sup>44</sup> The directive is also 'appropriate for the purpose of ensuring that the objective pursued is achieved' in that it allows any broadcaster 'to be able to make short news reports and thus to inform the general public of events of high interest.'<sup>45</sup> In its analysis of the second leg of the proportionality test, the Court first explores which measures would have been conceivable which are capable of reaching the legitimate legislative goal but are at the same time less restrictive for the rights of the plaintiff. It considers, for example, the possibility of granting the rights holder the right to partially recover the costs of acquisition of the exclusive sports broadcasting rights. The Court, however, finds that this less restrictive option would not achieve the objective pursued by the directive. It would effectively further restrict the access of the general public to the information.<sup>46</sup> The Court then turns to the third step of the proportionality test regarding the overall disproportionality of the directive. The Court finds that the EU legislature had struck a fair 'balance between' the rights of the parties involved by limiting the broadcasting rights of the short news reports only to specific types of general news programmes and by requiring to cite the source of the information.<sup>47</sup> Thereby, the disadvantages resulting for the rights holder 'are not disproportionate in the light of the aims' which the directive pursues and 'are such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case.'<sup>48</sup>

As noted, the principle of proportionality is applied in many different contexts. Within these different contexts, the degree of judicial review varies. In some cases, the CJEU (as described in Chapter 5 of this book on Decision-Making and Competence) will apply only marginal review and thereby only check for manifest error of assessment in the different steps of application of the proportionality test.<sup>49</sup> This is especially the case where the institutions enjoy wide legislative discretion. The reason for the judicial self-restraint in these cases is that the Court is reluctant to replace the assessment of the legislature with its own assessment of the politically desirable outcome. Such restraint is therefore a question of respect for the separation of powers as

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<sup>44</sup> Case C-283/11 Sky Österreich [2013] ECR I-nyr (Grand Chamber), para 52.

<sup>45</sup> Case C-283/11 Sky Österreich [2013] ECR I-nyr (Grand Chamber), para 53.

<sup>46</sup> Case C-283/11 Sky Österreich [2013] ECR I-nyr (Grand Chamber), paras 55-57.

<sup>47</sup> Case C-283/11 Sky Österreich [2013] ECR I-nyr (Grand Chamber), paras 58-63.

<sup>48</sup> Case C-283/11 Sky Österreich [2013] ECR I-nyr (Grand Chamber), paras 66, 67.

<sup>49</sup> C-84/94, *working time directive*, [1996] ECR I-5755 at 5811: 'As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social political choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiating by manifest error of misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.' That means that although the Court reviews the different elements of discretion, it only reviews manifest errors in each of the steps.

expressed in Article 13(2) TEU. Increasingly, therefore, in the context of review of legislative acts of the Union, the CJEU does not review of the substance of an act but instead checks whether the institutions can prove that they themselves reviewed the proportionality of a measure before adopting it.<sup>50</sup>

In areas, other than the review of EU legislation, the CJEU tends to exercise less judicial self-restraint and will conduct a more full review of the proportionality of an act. Such cases include:

- Cases where the institutions have no or only limited discretion. This is often the case in matters of administrative acts implementing legislation.<sup>51</sup>
- Acts of Member States which limit EU fundamental rights or fundamental freedoms.<sup>52</sup>
- Acts of the institutions restricts the scope of applicability of a fundamental right or balances various rights and principles against each other.<sup>53</sup> This is now an explicit obligation under Article 52(1) CFR which reads: ‘Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest (...)’. An example for this is the above discussed *Sky Österreich* case (see further chapter 9).

## ***B Rule of Law – Transparency, Legality, Legal Certainty, Legitimate Expectations***

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<sup>50</sup> One way for the legislature to do just that is to prove that it has undertaken an impact assessment study weighing the effects of various policy alternatives and analysing the cost-benefit relation between a measure and its disadvantages to other rights and principles. E.g.: Case C-58/08 *Vodafone and Others* [2010] ECR I-nyr paras 51 et seq.; C-176/09 *Luxembourg v EP and Council* [2011] ECR I-nyr, paras 56 et seq.

<sup>51</sup> T-170/06 *Alrosa v Commission* [2007] ECR II-2601, paras. 108-110; C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paras. 38-40

<sup>52</sup> See e.g.: Case C-200/02 *Catherine Chen v Secretary of State* [2004] ECR I-9925 of 19 October 2004, para 32; Case C-413/99, *Baumbast* [2002] ECR I-7091 of 17.9.2002, para 90, 91; Case C-41/02, *Commission v Netherlands* (Vitamins drops) [2004] ECR I-11375 of 2.12.2004, para 46: ‘However, in exercising their discretion relating to the protection of public health, the Member States must comply with the principle of proportionality. The means which they choose must therefore be confined to what is actually necessary to ensure the safeguarding of public health; they must be proportional to the objective thus pursued, which could not have been attained by measures which are less restrictive of intra-Community trade.’

<sup>53</sup> E.g. Case C-283/11 *Sky Österreich* [2013] ECR I-nyr (Grand Chamber), paras 47-66 and pre-entry into force of the Charter of Fundamental Rights: C-295/94 *Hüpeden* [1996] ECR I-3375; C-296/94 *Pietsch* [1996] ECR I-3409).

The rule of law is, like the principle of democracy (see Chapter 3 ) a foundational constitutional principle from which other principles and rules emanate. In the following, therefore, this chapter will not present a comprehensive account of the rule of law's sub-elements but focus on the relevant criteria for the review of the legality of acts for implementing EU policies.

The European Union is established, as famously pronounced by the Court in *Les Verts*, as a 'Community based on the rule of law'.<sup>54</sup> Although there is a lively academic debate about what that actually means in practice, most people would agree that the rule of law is an 'umbrella principle' with some core content and a numerous (sub-)principles, many of which can in themselves be regarded as having a certain independent existence.<sup>55</sup> In this understanding, the rule of law contains both elements which arise primarily as criteria for the legality of legislative acts and others which relate more directly to the exercise of administrative functions. The following is a selection of some of the main sub-elements of the rule of law within the EU's legal system.

## 1 LEGALITY

One requirement of the rule of law is that actions of public bodies of the EU take place *under* and *within* the law. That means that, first, a legal basis is required (the principle of conferral under Article 5(2) TEU) which can be traced to primary law. 'Public authorities must have a legal basis and be justified on the grounds laid down by law'.<sup>56</sup> Second, the institutions and bodies must act within the limits of the powers so conferred on them by complying with the limits and not acting *ultra vires* as well as the procedures provided in the legal basis. With other words, the hierarchy of legal norms must be recognized and respected in that no act may violate higher-level Union law,<sup>57</sup> including fundamental rights and other general principles in EU law.<sup>58</sup>

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<sup>54</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para. 23.

<sup>55</sup> For many, see: Koen Lenaerts, 'The Rule of Law and The Coherence of the Judicial System of the European Union', *CMLRev.* 44 (2007) 1625-59.

<sup>56</sup> Case 46/87 *Hoechst v Commission* [1989] ECR 2859, summary point 3.

<sup>57</sup> Case 1/54 *France v High Authority* [1954] ECR 7, 23; Case 38/70 *Deutsche Tradax GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECR 145, para. 10.

<sup>58</sup> See, e.g., Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531.

A further consequence of the rule of law is the requirement of the correct exercise of discretionary power, where such discretionary powers are conferred on the institution or body.<sup>59</sup> Especially, the institution and body must take into account all relevant factors for decision making but is barred from acting on improper motives leading to misuse of their powers. As in any exercise of public powers, therefore, they must act in good faith and avoid an improper purpose.<sup>60</sup>

## 2 LEGAL AND INSTITUTIONAL TRANSPARENCY

Legal and institutional transparency is essential for the exercise of the rule of law and can be regarded as a pre-condition for establishing an accountable legal and political system.

Transparency, however, has multiple meanings and facts. In a narrow interpretation, it might be seen as referring to a minimal openness of process, access to documents and publication of official measures. With respect to transparency in the sense of access to documents and freedom of information, a key treaty provision is Article 15 TFEU which *inter alia* expressly requires that the proceedings of all bodies be transparent (paragraph (3) 3<sup>rd</sup> sub-paragraph), *inter alia* by publication of ‘documents relating to the legislative procedures’.<sup>61</sup> Also, the legislature under Article 297 TFEU has the duty to publish all legislative measures and decisions. Access to documents is also restated in terms of an individual right in Article 42 CFR. Details are laid down by Regulation 1049/2001 on public access to documents.<sup>62</sup>

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### Case Study: Tennis racquets on board of planes?

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<sup>59</sup> Case 18/57 *Nold KG v ECSC High Authority* [1959] ECR 89.

<sup>60</sup> Article 263, 2<sup>nd</sup> paragraph TFEU, dealing with actions for annulment before the CJEU, makes the application of these principles explicit in providing that actions against all EU institutions in respect of measures having legal effects may be based on the grounds of ‘lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers’ (see further chapter 10).

<sup>61</sup> Case C-345/06 *Heinrich* [2009] ECR I-1659, paras. 41-47 and 64-66.

<sup>62</sup> Regulation (EC) 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43. Replacement by a revised measure is currently being discussed among the institutions. See further chapter 4

Airport authorities on the airport of Vienna refused Mr Heinrich the right to board a plane because they found a tennis racquet in his cabin luggage. According to their information, tennis racquets were amongst the items prohibited to carry on planes. Mr Heinrich, outraged about missing his flight, sought declaratory judgement before the competent Austrian administrative Court about the illegality of the authorities' refusal to let him board his plane.

The Austrian court notes that the authorities were acting on the basis of an EU Regulation (No 622/2003) but, that it is impossible for individuals to comply with that regulation, since the annex to that regulation listing prohibited items on planes has not been published in the *Official Journal of the European Union (OJ)*. Keeping secret the rules of conduct with which individuals are required to comply constitutes, in view of the Austrian Court, a severe impairment of the most elementary principles of the rule of law. Such regulations should be declared by the CJEU legally non-existent and hence non-binding.

The CJEU, in a preliminary ruling, adopted a slightly more differentiated position. It held that the annex to Regulation No 622/2003 adapting the list of articles prohibited on board an aircraft, which was not published in the OJ, has no binding force in so far as it seeks to impose obligations on individuals and therefore cannot be enforced against individuals. Article 297 (2) TFEU states clearly that EU law cannot take effect in law unless it has been published in the OJ. In particular, the principle of legal certainty requires that Union rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.

(See: Case C-345/06 *Gottfried Heinrich* [2009] ECR I-1659 paras 42-44, 59-63)

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In a broader sense, transparency is a structural principle for a legal system – something which might be lacking in the EU due to a certain lack of visibility as regards the allocation of final responsibility for decisions made. This can be a consequence of the complex multi-level structures of decision making seeking to include various interests. The complexity of the legal system is also a result of the evolution of EU law through successive layers of Treaty amendments and of developments in institutional practice, and varying speed of integration through national 'opt-ins' and 'opt-outs'. Transparency of a system is directly linked to the possibility of holding actors to account and therefore interacts with certain other important precepts such as legal and institutional responsibility.<sup>63</sup>

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<sup>63</sup> See Case T-188/97 *Rothmans International BV v Commission* [1999] ECR II-2463.



### 3 LEGAL CERTAINTY AND THE PROTECTION OF LEGITIMATE EXPECTATIONS

The principle of legal certainty and the principle of the protection of legitimate expectations are both sub-concepts of the rule of law. They are consequently protected under EU law and are criteria for legality of acts adopted on the base of or in the scope of EU law.

#### (a) *Legal certainty*

Legal certainty is acknowledged as a general principle of EU law.<sup>64</sup> According to the CJEU the principle requires essentially two things:

- ‘legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable’.<sup>65</sup>
- ‘Those subject to the law must know what the law is so as to plan their action accordingly’.<sup>66</sup>

Practically speaking, this has a series of consequences, for example:

- EU institutions are barred from applying rules to individuals which are inconsistent or contradictory.<sup>67</sup>
- The prohibition of double jeopardy, also known as the principle of *ne bis in idem* in criminal law and embodied in Article 50 CFR in comparable terms.
- The requirement that administrative proceedings be conducted within a reasonable period of time.<sup>68</sup>

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<sup>64</sup> Case C 55/91 *Italien v Commission* [1993] ECR I-4813, para. 66; Joined Cases T-55/93 and T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos v Commission* [1996] ECR II-247, paras. 76, 116, 119; Case 43/75 *Defrenne v SABENA* [1976] ECR 455, paras. 69ff.; Case C-143/93 *Gebroeders van Es Douane Agenten vs Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431, para. 27; Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others v Germany* [1983] ECR 2633.

<sup>65</sup> Case C-199/03 *Ireland v Commission* [2005] ECR I-8027, para. 69. See also Case C-29/08 *SKF* [2009] ECR #####nyr###, para. 77.

<sup>66</sup> Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> edn. (OUP, 2006) 242.

<sup>67</sup> Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, para. 125; Case C-143/93 *Gebroeders van Es Douane Agenten vs Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431, para. 27; there the Commission was held to be ‘under an obligation to amend those regulations’ which were detrimental to the principle of legal certainty which requires that an individual will be able ‘to ascertain unequivocally what his rights and obligations are and take steps accordingly’.

- The requirement of legal certainty with respect to legal charges, limitation periods.<sup>69</sup>
- The prohibition, in principle, of retroactive effect of EU law.

The latter is, from a practical point of view, probably the most important consequence of the principle of legal certainty. This arises not only from Article 297(1) TFEU laying down that Union acts come into force only after publication which implies that retroactive entry into force is in principle excluded.<sup>70</sup> Retroactive effect of Union law is exceptionally possible if such effect explicitly follows from Union law<sup>71</sup> and if the public interest in retroactive effect overrides the private interest in the maintenance of the existing legal situation.<sup>72</sup> This indicates that balancing of interests in maintenance of different principles, e.g. that of the public in upholding the law and that of private parties in legal certainty, is necessary.<sup>73</sup> This requirement for balancing of public interest in upholding the law and the private interest in maintaining a previously acquired legal position can be well illustrated when looking at questions of revocation of acts and recovery of monies. These are instances of application of the principle of legal certainty which relate to acts of individual application.

The case law with regard to revocation of acts of Union institutions, distinguishes *lawful* acts from those which have a legal defect (*unlawful* acts). It is important to recall that even unlawful acts, if not challenged and annulled (for example following an action for annulment before the Courts under Article 263 TFEU), are valid and have effect. This is one of the consequences of the principle of legal certainty.

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<sup>68</sup> Case T-347/03 *Branco v Commission* [2005] ECR II-2555, para. 114; Case T-125/01 *José Martí Peix v Commission* [2003] ECR II-865, para. 111; Joined Cases T-44/01, T-119/01, and T-126/01 *Vieira and others v Commission* [2003] ECR II-1209, para. 167.

<sup>69</sup> Case T-240/02 *Koninklijke Coöperatie Cosun v Commission* [2004] ECR II-4237, paras. 38, 44-45, 58, 61-62; Case 41/69 *Chemiefarma v Commission* [1970] ECR 661, para. 16; Case T-144/02 *Eagle and ors v Commission* [2007] ECR II-2721, paras. 64-65.

<sup>70</sup> Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and another v Council and Commission* [2004] ECR II-521, para. 90; Case 98/78 *Racke v Hauptzollamt Mainz* [1979] ECR 69, para. 20. This fundamental approach is also recognised within the legal systems of the Member States (see with comparison Case 63/83 *Regina Kırk* [1984] ECR 2689, para. 22) and established with regard to criminal sanctions in Article 49(1) CFR and Article 7 ECHR.

<sup>71</sup> See Case T-357/02 *Freistaat Sachsen v Commission* [2007] ECR II-1261, para. 98, where the Court stated that ‘provisions of Community law have no retroactive effect unless, exceptionally, it clearly follows from their terms or general scheme that such was the intention of the legislature, that the purpose to be achieved so demands and that the legitimate expectations of those concerned are duly respected’.

<sup>72</sup> For the public interests recognised by the Court, see Takis Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> edn. (OUP, 2006) 256-7.

<sup>73</sup> Cases 42 and 49/59 *S.N.U.P.A.T. v High Authority* [1961] ECR 103 (English Special Edition, 53).

*Lawful* acts, in particular those creating rights for individuals or Member States, may in principle not be revoked since, generally, the interest of the individual in the continuous application of the act prevails over the public interest of revocation.<sup>74</sup>

On the other hand, the retroactive revocation of *unlawful* acts is

‘permissible provided that the withdrawal occurs within a reasonable time and provided that the institution from which it emanates has had sufficient regard to how far the applicant might have been led to rely on the lawfulness of the measure’.<sup>75</sup>

Similar concerns govern the question of recovery of monies. This is important for example in the area of subsidies which in EU law are called ‘State aid’. National aid granted to companies is in principle subject to authorisation by the Commission. The question arose in *Alcan*<sup>76</sup> as to whether such a recipient was individually affected by a determination of the Commission that the aid, which was already advanced to the company by the national government, was unlawful. Could the principle of legal certainty be invoked by *Alcan* to avoid the sanction of repayment of the aid which was now declared unlawful?<sup>77</sup>

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### Case study: Tobacco farmers

Mr Crispoltoni is a tobacco farmer from Lerchi, in the region of Umbria in Italy. He belongs to a producers’ association which processes leaf tobacco produced by its members and pays to its farmers an advance for the amount of leaf tobacco agreed to be delivered by each farmer. The price is established by the association on the basis of a Council regulation on agriculture markets for that year. During the season of 1988 - after the farmers had planted the tobacco in April, but before the harvest –

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<sup>74</sup> See Joined Cases 7/56 and 3-7/57 *Algera and Others v Common Assembly* [1957-1958] ECR 39. See also Case 159/82 *Verli-Wallace v Commission* [1983] ECR 2711, para. 8; Case T-123/89 *Chomel v Commission* [1990] ECR II-131, para. 34; Case T-197/99 *Gooch v Commission* [2000] ECR II-1247, para. 52; Case T-251/00 *Lagardère and Canal+ v Commission* [2002] ECR II-4825, para. 139.

<sup>75</sup> Case T-251/00 *Lagardère and Canal+ v Commission* [2002] ECR II-4825, para. 140. See also Case 14/81 *Alpha Steel v Commission* [1982] ECR 749; Case 15/85 *Consorzio Cooperativo d’Abruzzo v Commission* [1987] ECR 1005; Case C-24/89 *Cargill v Commission* [1991] ECR I-2987; Case C-365/89 *Cargill v Produktschap voor Margarine, Vetten en Oliën* [1991] ECR I-3045; Case C-90/95 P *De Compte v Parliament* [1997] ECR I-1999; Case T-197/99 *Gooch v Commission* [2000] ECR II-1247, para. 53. See Case 15/60 *Simon v Court of Justice* [1961] ECR 239; Case 54/77 *Herpels v Commission* [1978] ECR 585.

<sup>76</sup> Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland* [1993] ECR I-1591.

<sup>77</sup> The Court, in balancing the principles of legal certainty, on one hand, against legality and effectiveness of EU law, on the other hand, requested repayment because otherwise Union law prohibiting State aid would be ‘deprived of effectiveness.’ See: Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland* [1993] ECR I-1591, paras. 36-37.

the maximum quantity of tobacco which profited from the guaranteed minimum price was reduced by the Commission in an implementing regulation. The association therefore requested its farmers including Mr Crispoltoni to repay part of the advance they had received.

Mr. Crispoltoni turns to the local Court against the demand by the association. The local Court in turn requests a preliminary reference from the CJEU expressing doubts as to the validity of the regulations on the ground that they could be contrary to the principles of the protection of legitimate expectations, the non-retroactivity of legal rules and legal certainty.

The CJEU finds that the planting season of the tobacco plants in April involves the greatest expense to the farmers. Since the Commission regulation was published only after the tobacco farmers had made their decisions on how much to plant that year, the regulation for all practical purposes 'had retroactive effect'. The Court finds that

'although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. That case-law also applies where the retroactivity is not expressly laid down by the measure itself but is the result of its content.'<sup>78</sup>

The 'legitimate expectations of the operators concerned were not respected, in so far as the measures adopted, although foreseeable, were introduced at a time when they could no longer be taken into account' by the farmers since they were not 'notified in good time of any measures having effects on their investments.'<sup>79</sup>

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#### (b) *Legitimate expectations*

The principle of the protection of legitimate expectations is a general legal principle of Union law, which has been recognised since the very early case law of the CJEU.<sup>80</sup> It is closely linked to

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<sup>78</sup> C-368/89 *Crispoltoni I* [1991] ECR I-3695, para. 17

<sup>79</sup> C-368/89 *Crispoltoni I* [1991] ECR I-3695, para. 20

<sup>80</sup> See Case 111/63 *Lemmerz-Werke* [1962] ECR 883 (English Special Edition, 239), where the concept of protection of legitimate expectations was first explicitly enunciated. See also Cases 7/56 and 3-7/57 *Algeria* [1957] ECR 87, 118; Cases 42 and 49/59 *S.N.U.P.A.T. v High Authority* [1961] ECR 103, 111, 172 f.; Case 14/61 *Hoogovens v ECSC High Authority* [1962] ECR 511, 511, 548 (English Special Edition, 53).

that of legal certainty in that it gives individuals a right to rely on the validity of acts of Union institutions.<sup>81</sup> The issue of legitimate expectations arises particularly often, where an administrative decision is cancelled or revoked. The entitlement to protection on the basis of legitimate expectations requires that three key elements be satisfied:

- The existence of justifiable reliance<sup>82</sup> (this can arise from a valid legislative act but can also arise from any act of Union officials conferring individual rights or benefits, for example by giving precise assurances, can give rise to protected legitimate expectations<sup>83</sup>).
- An affected interest;<sup>84</sup> (Expectations into the continuous existence of a future legal situation are not protected under Union law, if the beneficiary knew that the situation or assurance was illegal<sup>85</sup> for example due to incorrect facts which the potential beneficiary had given.<sup>86</sup> Also, legitimate expectations cannot arise if the alleged assurance was made contrary to Union law for example in the form of a promise not to apply or enforce the law.<sup>87</sup>)
- Priority for the protection of expectations over the interest of the Union.

For example, the Court held in the milk quota cases that where a milk producer ‘has been encouraged by a Community measure to suspend marketing (...) he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions’.<sup>88</sup>

### **C Good Administration**

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<sup>81</sup> Case C-177/99 and C-181/99 *Ampafrance und Sanofi* [2000] ECR I-7013, para. 67, where the Court regarded the principle of legitimate expectations as ‘corollary of the principle of legal certainty’.

<sup>82</sup> Case T-176/01 *Ferriere Nord Spa v Commission* [2004] ECR II-3931.

<sup>83</sup> Case T-283/02 *EnBW v Commission* [2005] ECR II-913, para. 89.

<sup>84</sup> Case 74/74 *CNTA v Commission* [1975] ECR 533, para. 44.

<sup>85</sup> Case T-283/02 *EnBW v Commission* [2005] ECR II-913, para. 113. See also Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, para. 501.

<sup>86</sup> Case 228/84 *Pauvert v Court of Auditors* [1985] ECR 1973, para. 14.

<sup>87</sup> See Joined Cases 303 and 312/81 *Klückner v Commission* [1983] ECR 1507, para. 34; Case 188/82 *Thyssen v Commission* [1983] ECR 3721, para. 11; Case 162/84 *Vlachou v Court of Auditors* [1986] ECR 459, para. 6.

<sup>88</sup> See Case 120/86 *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321; Case 170/86 *Van Deetzen v Hauptzollamt Hamburg-Jonas* [1988] ECR 2355.

The notion of good administration in the legal system of the EU is still evolving. It is perhaps best understood as an ‘umbrella’ concept containing rights, rules, and principles guiding administrative procedures.

## 1 GENERAL OBSERVATIONS ON GOOD ADMINISTRATION

The CJEU has referred to notions of ‘good’,<sup>89</sup> ‘sound’,<sup>90</sup> or ‘proper’<sup>91</sup> administration since the very early case law.<sup>92</sup> Good administration,<sup>93</sup> has now also been described as a ‘principle’,<sup>94</sup> as well as a ‘general principle’ of EU law.<sup>95</sup> It is thereby a right recognised as a general principle of EU law (Article 6(3) TEU). With the entry into force of the Charter of Fundamental Rights (CFR) under the Treaty of Lisbon, good administration is also recognised as a binding fundamental right under Articles 41 CFR, pursuant to Article 6(1) TEU, which gives the Charter the ‘same legal value’ as the Treaties (see chapter 9).

Article 41 CFR reads:

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:

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<sup>89</sup> Case 32/62 *Alvis* [1963] ECR 49, para 1A; Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

<sup>90</sup> The first mention of the principle of *sound administration* has been made in relation to the requirement to process an application within a *reasonable time* in the Joined Cases 1-57 and 14-57 *Société des usines à tubes de la Sarre* [1957] ERT 105, para 113.

<sup>91</sup> Case C-255/90 P *Burban* [1992] ECR I-2253, paras 7 and 12; Case T-167/94 *Nölle v Council and Commission* [1995] ECR II-2589, para 53.

<sup>92</sup> Joined Cases 7/56, 3/57 to 7/57 *Algera* [1957] ECR 0039; Case 64/82 *Tradax v Commission* [1984] ECR 1359.

<sup>93</sup> In several cases, the infringements protected under the notion of good administration were either not sufficient enough or did not bear on the outcome of decision-making and thus did not lead to the annulment of the decision of the Commission: Case T- 62/98 *Volkswagen v Commission* [2000] ECR II-2707, paras 279-283; C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, paras 163-165; Case T-308/94 *Cascades SA v Commission* [1998] ECR II-925, para 61; Case C-476/08 P *Evropaïki Dynamiki v Commission* [2009] ECR I-207, paras 33-35.

<sup>94</sup> Case C-83/91 *Tetra Pak International v Commission* [1994] ECR II-755, paras 24-31.

<sup>95</sup> Joined Cases 33/79 and 75/79 *Kubner v Commission* [1980] ECR 1677, para 25 (here, the Court explains that good administration is, by contrast to the more specific rights of defence, ‘only’ a general principle of law); Case T-54/99 *max.mobil* [2002] ECR II-313, para 48. See also Case T-198/01 R *Technische Glaswerke Ilmenau GmbH v Commission* [2002] ECR II-2153, para 85 and Case T-211/02 *Tideland Signal v Commission* [2002] ECR II-3781, para 37.

- 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.

Failure to comply with the principles of good administration may, in cases of sufficient seriousness of the breach, result in a manifest error of assessment and thus lead to an annulment of a decision due to its illegality<sup>96</sup> with the possible consequence of rights to damages for violation of procedural principles.<sup>97</sup>

By comparison to the protection of the principle of good administration in case law of the CJEU on the protection of good administration as a principle, the formulation of Article 41 CFR is significantly more limited in its material, institutional, and personal scope. Therefore, it makes a difference, whether good administration will be evoked to exist under Article 41 CFR as opposed to granting the same right as a general principle of law under Article 6(3) TEU established in the case law of the EU Courts, has the potential to change the outcome of a case. This is why:

- The wording of Article 41 CFR indicates that
  - the material scope of protection of good administration is intended to cover ‘single case decision-making’. This arises specifically from the formulations in Article 41 CFR taking about an ‘individual measure’, access of a person to ‘his or her’ (specific) file, and the obligation to give reasons for administrative decisions – as opposed to the broader obligation of stating reasons in all ‘legal acts’ of the Union in Article 296 paragraph 1 TFEU.<sup>98</sup>

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<sup>96</sup> Case T-211/02 *Tideland Signal v Commission* [2002] ECR II-3781, para. 37.

<sup>97</sup> Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, para. 607.

<sup>98</sup> J. Ziller, ‘Is a law of administrative procedure for the Union institutions necessary?’ 3-4 *Rivista italiana di diritto pubblico comunitario* (2011), 699-725, at p. 718 however notes that ‘nothing impedes applying art. 41 of the Charter on the right to

- the institutional scope of the right to good administration under Article 41(1) CFR is limited to ‘institutions, bodies, offices and agencies of the Union’.<sup>99</sup>
- The right to good administration as General Principle of EU law (Article 6(3) TEU), on the other hand is also applicable
  - to general acts for example for the review of international (association) agreements,<sup>100</sup> as well as for non-legislative acts which, as the Court held, must be ‘adopted by the Commission pursuant to the principle of sound administration and the duty of care’.<sup>101</sup>
  - to Member State action in the scope of EU law in line with *ERT* and *Lisrestal* case law.<sup>102</sup>
  - Under certain conditions to third parties if they have a qualified involvement in an administrative procedure.<sup>103</sup>

## 2 SUB-PRINCIPLES OF GOOD ADMINISTRATION

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good administration also to rule making, including to consultation procedures by the Commission’. For an opposite approach, see the CJ in Case C-221/09 *AJD Tuna Ltd* [2011] ECR nyr of 17 March 2011, para 49, where the Court stated that Article 41 CFR does not cover the process of enacting measures of general application and the GC in a recent line of civil service cases e.g. Case T-135/05 *Crampoli v Commission* [2006] ECR II-A-2-1527, paras 149 and 150; Joint Cases T-98/92 and T-99/92 *Di Marzio and Lebedef v Commission* [1994] ECR II-541, para 58; Case T-65/92 *Arauxo-Dumay v Commission* [1993] ECR II-597, para 37; Case T-46/90 *Deviliez and Others v European Parliament* [1993] ECR II-699, para 37 in which it held that the Council when establishing acts of abstract general nature was not subject to the obligations under [equivalent to?] Article 41 CFR [there was no Charter in 1993...] and that their violation could therefore not lead to the annulment of an act.

<sup>99</sup> Still more limited are the formulations regarding damages and language rights (Article 41(3), (4) CFR) which speak of ‘institutions’ and ‘servants in the performance of their duties’ respectively.

<sup>100</sup> Opinion of AG Trstenjak in Case C-204/07 P *C.A.S. SpA v Commission* [2008] ECR I-6135, para 146; Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97, T-217/97, T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring e.a. v Commission* [2001] ECR II-1337, para 257.

<sup>101</sup> C-248/99 P *Monsanto* [2002] ECR I-1, paras 91-93.

<sup>102</sup> In the latter case, the Court of Justice held that the applicants’ right to be heard and their right to getting an adequate statement of reasons had been infringed as a consequence of the interlocutor Member State’s failure in keeping them informed about the Commission’s decision to reduce the economic assistance that the latter had initially granted them - Case T-450/93 *Lisrestal v Commission* [1994] ECR II-1177; Joined Cases T-186/97 *Kaufring v Commission* [2001] ECR 1337, paras 150-153.

<sup>103</sup> A good example for the analysis of this effect is case T-260/94 *Air Inter SA v Commission* [1997] ECR II-997 with discussion by Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* (Oxford: Hart, 1999) 91-4.



In certain areas, Article 41 CFR merely defines minimum standards which thus need to be understood also in the light of the case law of the Courts on the general principle of good administration.

(a) *The right to have his or her affairs handled impartially, fairly and within a reasonable time – the duty of care*

The central feature of the duty of care as such is the obligation of the administration impartially and carefully to establish and review the relevant factual and legal elements of a case, prior to making decisions or taking other steps.<sup>104</sup> In the context of the right to fair and impartial treatment, the duty of care requires a thorough establishment of facts prior to decisions and other measures. The decision must be taken ‘carefully and impartially’,<sup>105</sup> requiring the absence both of arbitrary action and of unjustified preferential treatment including personal interest. Most obviously this requires that there be no conflict of interest. At least for this reason, an interested party is entitled, as the General Court has held, to know the identity of persons conducting investigations and making decisions.<sup>106</sup>

The notion of fairness in the wider sense is also relevant for the right to the treatment of an issue ‘within a reasonable time’. After all, ‘slow administration is bad administration’<sup>107</sup> and might be in violation of the concept of legal certainty. This concept is reflected in Article 265 TFEU (Article 232 EC), giving a remedy for undue delays in decision-making.

(b) *Hearing and Access to One’s File*

Article 41(2)(a) and (b) CFR address the right to a fair hearing (*audi alteram partem* or *audiatur altera pars*) ‘before any individual measure’ which could affect a person ‘adversely’ is taken. Preparation of a hearing requires and access to one’s file.

Matters related to a fair hearing are:

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<sup>104</sup> See to that respect, Van Gerven AG in Case C-16/90 *Eugen Nölle v Hauptzollamt Bremen –Freihafen* [1991] ECR I-5163.

<sup>105</sup> Case C-269/90 *TU München v Hauptzollamt München Mitte* [1991] ECR I-5469, para. 14.

<sup>106</sup> Case T-146/89 *Williams v Court of Auditors* [1991] ECR II-1293, para. 40; Case T-305/94 *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, paras. 317ff.

<sup>107</sup> AG Jacobs in C-270/99 P *Z v Parliament* [2001] ECR I-9197, para. 40 with reference to Art. 41 of the Charter and claiming that this was ‘a generally recognised principle.’

- The right to full information which may affect a person’s position in an administrative procedure, especially where sanctions may be involved.<sup>108</sup>
- The right to be informed of
  - the administration’s response to complaints or representations.<sup>109</sup>
  - the outcome of procedures and of decisions made,<sup>110</sup>
  - all matters necessary for their defence,<sup>111</sup> including rights of appeal.

The right to a fair hearing as general principle of EU law must be observed ‘in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person’.<sup>112</sup> It is protected to the highest degree by the CJEU having stated that it ‘cannot be excluded or restricted by any legislative provision’.<sup>113</sup> As a general principle of law, it thus supplements legislation which do not explicitly provide for its exercise.<sup>114</sup>

The right of a fair hearing requires that the party concerned:

- must receive an exact and complete statement of the claims or objections raised.
- must also be given the opportunity to make its views known ‘on the truth and relevance of the facts and circumstances alleged and on the documents used...’<sup>115</sup>

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<sup>108</sup> Case 270/82 *Estel v Commission* [1984] ECR 1195, paras. 13ff.; Case 64/82 *Tradax v Commission* [1984] ECR 1359, paras. 21f.; Case C-34/89 *Italy v Commission* [1990] ECR I-3603, paras. 14f.; Case T-100/92 *La Pietra v Commission* [1994], ECR (civil service) I-A-83, II-275, paras. 43ff.; Case C-54/95 *Germany v Commission* [1999] ECR I-35, para. 118.

<sup>109</sup> Case 179/82 *Lucchini Siderurgica v Commission* [1983] ECR 3083, para. 27; Cases 96-102 and 104-106 and 110/82 *NV LAZ International Belgium v Commission* [1983] ECR 3369, paras. 12ff.

<sup>110</sup> Case 120/73 *Lorenz v Germany* [1973] ECR 1471, para. 5; Case 121/73 *Markmann v Germany* [1973] ECR 1495, para. 5; Case 122/73 *Nordsee v Germany* [1973] ECR 1511, para. 5; Case 141/73 *Lobrey v Germany* [1973] ECR 1527, para. 5; see also Ralf Bauer, *Das Recht auf eine gute Verwaltung im Europäischen Gemeinschaftsrecht* (Frankfurt/Main: Peter Lang, 2002) 64.

<sup>111</sup> Case 41/69 *Chemiefarma v Commission* [1970] ECR 661, para. 27.

<sup>112</sup> Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, para. 325.

<sup>113</sup> Case T-260/94 *Air Inter v. Commission* [1997] ECR II-997, para. 60; case C-135/92 *Fiskano v. Commission* [1994] ECR I-2885, para. 39.

<sup>114</sup> Case 234/84 *Belgium v Commission* [1986] ECR 2263, para. 27; Case 259/85 *France v Commission* [1987] ECR 4393, para. 12.

<sup>115</sup> See, e.g., Case 100/80 to 103/80 *Musique Diffusion française v Commission* [1983] ECR 1835, para. 10; Case 121/76 *Moli v Commission* [1977] ECR 1971, para. 19; Case 322/81 *Michelin v Commission* [1983] ECR 3461, para. 7; Case C-328/05 *SGL Carbon v Commission* [2007] ECR I-3921, para. 71. In Joined Cases C-402/05 P and Case C-415/05 P *Kadi v Council and Commission* [2008] ECR I-6351, paras. 338-352, the Court held that overriding considerations of safety or the conduct of international relations might justify that certain matters may not be communicated to the persons concerned, but do not

- must be given right of access to documents and the file which can be limited in case of confidential information of third parties.

It is less clear under when a right to a hearing might exist in situations where the proceedings lead to the adoption of an act of general application - such as a legislative act (Article 298 TFEU), a delegated act (Article 290 TFEU) or an implementing act with effect beyond a single case (Article 291 TFEU). Articles 11(1) and (3) TEU require Union institutions to hear views and opinions on Union measures and especially enter into consultation procedures. This reinforces the view of the CJEU in *Denmark v Commission*<sup>116</sup> which had found that a right to a hearing is not excluded simply because the basic act is of general application. It is not clear, however, whether hearing in these cases is a subjective right of individuals or just a factor for review of the act.

### (c) Reasoning of Decisions

The obligation to give reasons for decisions which is restated also in Article 41(2)c CFR, in other words to provide grounds for the action taken, finds expression in the more general obligation under the EU Article 296(2) TFEU to support all legal acts in the EU with reasons.<sup>117</sup> The extent of the obligation to state reasons under Article 296 TFEU comprises an indication of

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allow for evidence used against them to justify restrictive measures or for them not to be afforded the right to be informed of such evidence within a reasonable period after those measures were taken.

<sup>116</sup> Case C-3/00 *Denmark v Commission* [2003] ECR I-2643.

<sup>117</sup> In the laws of the Member States it can be observed that the duty to give reasons is limited to administrative acts of individual application. In France, the *loi* of 11 July 1979 provides that in certain cases, which were extended by the *loi* of 17 January 1986, the administration has to give reasons for individual decisions; see André de Laubadère, Jean-Claude Venezia and Gaudemet Yves, *Traité de Droit Administratif*, Book 1, 14<sup>th</sup> edn. (Paris: L.G.D.J., 1996) para. 944; this statutory duty does, therefore, not apply to acts of general application, for which only in exceptional circumstances a reasoning has to be provided (*ibid.*). See also Jürgen Schwarze, *European Administrative Law* (London: Sweet & Maxwell, 1992) 1386. Similarly, in Germany, § 39 of the Federal Law on Administrative Procedure (*BVwVfG*) only applies to administrative acts of individual application; see Ferdinand O. Kopp and Ulrich Ramsauer, *Verwaltungsverfahrensgesetz*, 7<sup>th</sup> edn. (München: Beck, 2000) § 39. Acts of general application adopted by the executive on the basis of a delegation must state their legal basis in accordance with Art. 80(1), 3<sup>rd</sup> sent. of the Basic Law. This amounts, however, only to a limited form of reasoning; see Jürgen Schwarze, *European Administrative Law* (London: Sweet & Maxwell, 1992) 1387. In English law, a duty to give reasons is recognised as a requirement of natural justice for administrative acts only in exceptional circumstances irrespective whether the act is of individual or general application; see Paul Craig, *Administrative Law*, 4<sup>th</sup> edn. (London: Sweet & Maxwell, 1999) 377.

the legal basis of the act, the general situation which led to its adoption and the general objectives which it intended to achieve:<sup>118</sup>

‘[T]he statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction.’<sup>119</sup>

A lack of reasoning of an act is ground for its annulment.

#### (d) *Damages*

The right to good administration in Article 41(3) CFR contains an explicit reference to the right to receive compensation for damage under Article 340 TFEU. Article 41 CFR therefore can not limit the obligation to pay damages to violations of the principles listed in the provisions on good administration only. The right to damages is discussed to greater detail in Chapter 10 of this book on judicial review.

#### (e) *Language Rights*

The entitlement to ‘write’ to the institutions of the Union in one of the languages of the treaties and to receive an answer in the same language’ simply repeats the existing right under Article 24(4) TFEU. Please note, though, that Article 342 TFEU gives the Council the authority to establish the language regime for the institutions.<sup>120</sup> The right of free choice of the language is

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<sup>118</sup> Case 5/67 *Beus GmbH v Hauptzollamt München* [1968] ECR 83, 95 (English Special Edition 83); See also Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, para. 510; Case T-70/99 *Alpharma v Council* [2002] ECR II-3495, para. 394; Case C-304/01 *Spain v Commission* [2004] ECR I-7655, para. 51; Case C-184/02 *Spain and Finland v European Parliament and Council* [2004] ECR I-7789, para. 79; Case C-342/03 *Spain v Council* [2005] ECR 1975, para. 55.

<sup>119</sup> Case C-269/90 *TU München v Hauptzollamt München Mitte* [1991] ECR I-5469, paras. 14, 26.

<sup>120</sup> This was done by one of the first legal acts issued by the Council, the Regulation 1/58 determining the languages used by the European Economic Community, OJ English Special Edition 1952-1958, 59.

applicable to communication with ‘institutions’ of the EU. Agencies and other bodies may thus be subject to specific language regimes.<sup>121</sup>

### ***D Information-related Rights – Freedom of Information and Data Protection***

Any person, not only parties not subject to an individual measure, enjoys the general right of access to documents under Articles 42 CFR and 15(3) TFEU.<sup>122</sup> Transparency of information can be regarded a pre-condition for both a fair and accountable administration and a functioning, participatory democracy in which citizens are able to engage in an informed debate and to exert influence on public decision-making. However, freedom of information, or more narrowly, the right of access to documents, has not always been regarded as a fundamental right or even a matter of priority in EU law. In line with the administrative traditions of many European countries, public non-accessibility and secrecy were generally the norm in regard to information held by European authorities.<sup>123</sup> This approach changed gradually in the light of the increasing recognition of the individual’s right to information and as a shift in focus in the context of the ‘Nordic’ enlargement of 1995 which gave the Swedish and Finnish traditions in this area a strong influence in the EU.<sup>124</sup> The right of access to documents is now protected both as a general principle of Union law and through provisions of primary law. The right of access to documents has, over the years, also been an element of several generations of regulation in secondary law.<sup>125</sup> Currently, Regulation 1049/2001 issued on the basis of what is now Article 15 TFEU is the general legislation on access to documents.<sup>126</sup> Further reaching rights are established in the field

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<sup>121</sup> See e.g. Case T-120/99 *Kik v OHIM* [2001] ECR II-2235, para. 64.

<sup>122</sup> Article 15(3) TFEU, lays down that ‘[a]ny citizen of the Union and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.’

<sup>123</sup> See e.g. case C-170/89 *BEUC v. Commission* [1991] ECR I-5709 in which the consumer protection NGO BEUC was denied access to non-confidential elements of Commission files in an anti-dumping case.

<sup>124</sup> See e.g. Section 12 of the Finish constitution of 1999 expressly links freedom of expression and the right of access to information: ‘Everyone has the freedom of expression. ... Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.’ See the unofficial translation of the Finish constitution of 1999 on the finlex website ([www.finlex.fi](http://www.finlex.fi)).

<sup>125</sup> Initially, the institutions had adopted internal guidelines. Original decisions of the institutions (Council Decision 93/731, OJ 1993 L 340/43; Commission Decision 94/90, OJ 1994 L46/58; EP Decision 97/632, OJ 1997 L 263/27) were based on right to self organisation.

<sup>126</sup> Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

of environmental law which profits from a more open approach though the specific implementation of the Aarhus Convention.<sup>127</sup> Limitations to the right of freedom of information result not least in data protection rights of individuals.<sup>128</sup>

Union law governing information contains not only rules on access to information but also on the protection of personal information data. Under Article 8 CFR, protection of personal constitutes an individual right against the potential misuse of information both by governments and non-governmental actors. Limitations on privacy rights to the extent ‘necessary in a democratic society’ are, for example, explicitly recognised in Article 8 of the European Convention on Human Rights. Legal persons are protected with respect to their professional or business secrets. This is recognized, for example, in Article 339 TFEU and in secondary legislation.<sup>129</sup>

### ***E The Right to an Effective Judicial Remedy and Additional Rights of Defence***

The rule of law would be practically meaningless if persons affected by measures of the Union or the Member States acting under Union law were not able to object to or challenge actions affecting their interests.<sup>130</sup>

## **1 RIGHT TO AN EFFECTIVE REMEDY**

The existence of a right is linked to the existence of a remedy under the principle known as *ubi ius ibi remedium*, which in Union terms might read: where there is a right under Union law, there is

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<sup>127</sup> Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264/13.

<sup>128</sup> See especially: C 28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055 and Joined Cases C-92 and 93/09 *Schebecke* [2010] ECR I-11063, para 85: ‘It is necessary to bear in mind that the institutions are obliged to balance, before disclosing information relating to a natural person, the EU’s interest in guaranteeing the transparency of its actions and the infringement of the rights recognised by Articles 7 and 8 of the Charter. No automatic priority can be conferred on the objective of transparency over the right to protection of personal data, even if important economic interests are at stake.’

<sup>129</sup> See for example: Article 28 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

<sup>130</sup> H.C.H. Hofmann, G.C. Rowe, A. Türk, *Administrative Law and Policy of the European Union*, OUP (Oxford 2011), 204.

a remedy to ensure its enforcement. Accordingly, the ‘right to obtain an effective remedy in a competent court’ is protected as a fundamental general principle of EU law,<sup>131</sup> and is also enshrined in Article 47 CFR and Articles 6 and 13 ECHR.

Article 47, 1<sup>st</sup> paragraph CFR, largely following the language of the Convention, grants a ‘right to an effective remedy before a tribunal’, where rights and freedoms under Union law are violated. Since judicial protection of rights under EU law must be in first line offered by courts and tribunals of the Member States, certain provisions refer to the notion of courts such as Article 47 2<sup>nd</sup> paragraph CFR clarifying that a tribunal be ‘independent and impartial’,<sup>132</sup> that hearings be ‘fair and public’, and that everyone ‘have the possibility of being advised, defended and represented’.

A remedy under EU law, by analogy with Article 13 ECHR, ‘must be “effective” both in law and in practice.’<sup>133</sup> The right to an effective judicial remedy under EU law is therefore also linked with the principle of effectiveness (flowing from Article 4(3) TEU as discussed above). Under the *Factortame*-formula, the right to an effective remedy offers protection against ‘any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness’ of Union law.<sup>134</sup> That means that Member States:

- may ‘not render virtually *impossible or excessively difficult* the exercise of rights’<sup>135</sup> conferred by EU law.
- are obliged to ‘guarantee real and effective judicial protection’.<sup>136</sup>
- are barred from applying any rule or applying any procedure which ‘might prevent, even temporarily, Community rules from having full force and effect’.<sup>137</sup>

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<sup>131</sup> Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para. 9; Case 222/84 *Johnston* [1986] ECR 1651, para 19.

<sup>132</sup> Case C-506/04 *Wilson* [2006] ECR I-8613, paras 60-62.

<sup>133</sup> Application no 30210/96 *Kudla v Poland* [GC] §157, ECHR 2000-XI. Article 13 ECHR is, however, more limited than the right to an effective judicial review under EU law. Article 13 ECHR protects only rights arising from the Convention – therefore only fundamental rights and freedoms. The General Principle of EU law, by contrast, protects all rights arising from EU law in both a vertical and a horizontal level. For further explanation see below in this commentary [??].

<sup>134</sup> Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19, 20

<sup>135</sup> See e.g. Case C-128/93 *Fisscher* [1994] ECR I-4583, para. 37; Case C-261/95 *Palmisani* [1997] ECR I-4025, para 27; C-453/99 *Courage* [2001] ECR I-6297 para 29; Case C-78/98 *Preston and Others* [2000] ECR I-3201, para. 39; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, para. 57; Case C-30/02 *Recheio-Cash & Carry* [2004] ECR I-6051, paras. 17, 18; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, para. 95; Joined Cases C-231/06 to C-233/06 *Jonkman and Others* [2007] ECR I-5149, para. 28 (emphasis added).

<sup>136</sup> Case 14/83 *Van Colson* [1984] ECR 1891, para 23.

<sup>137</sup> Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19, 20.

For a practical illustration of this, turn to *Factortame*. The right to an effective judicial remedy resulted there in the obligation of the English High Court to offer interim relief measures to protect the plaintiff's interests under EU law, even though such measures were not available to that Court under English law at the time.

Compliance with the right to an effective remedy, therefore, depends both on

- The *procedural* aspect whether the Member State offers procedural rules granting fair possibilities of bringing a case and that admissibility criteria allow actual access to a court.
- And the more *substantive* issue whether success on the grounds of the claim of violation of a right under EU law would lead to a remedy which is capable of addressing the violation of the right.<sup>138</sup>

## 2 ADDITIONAL RIGHTS OF DEFENCE

A guarantee of the respect for 'the rights of the defence of anyone who has been charged' is provided in Article 48 CFR. But more broadly, under EU law the rights of defence must be ensured not only in procedures before a Court, but also in administrative procedures conducted by EU institutions and bodies or by Member State bodies implementing EU law. They are enforced even 'where there is no specific legislation and also where legislation exists which does not itself take account of that principle'.<sup>139</sup> The CJEU held that,

'Respect for the rights of the defence constitutes a fundamental principle and must therefore be ensured not only in administrative procedures which may lead to the imposition of penalties but also during preliminary inquiry procedures such as investigations.'<sup>140</sup>

Some of the rights of the defence in administrative proceedings, such as the right to be heard and the right to access to one's file, have been enshrined in Article 41(2) of the CFR and are discussed above. Generally speaking, rights of defence include:

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<sup>138</sup> Correctly, the ECtHR has pointed out that with respect to Article 13 ECHR (in Application no. 30696/09 *M.S.S. v. Belgium and Greece*, §§ 289,290 [GC] ECHR 2011) that 'the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant.' Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.

<sup>139</sup> Case 222/84 *Johnston v Chief Constabulary* [1986] ECR 1651. See also Case C-32/95 P *Commission v Lisrestal and Others* [1996] ECR I-5373, para. 30.

<sup>140</sup> Case 46/87 *Hoechst v Commission* [1989] ECR 2859, summary point 1.



- A limited right of legal professional privilege,<sup>141</sup> concerning the right to confidentiality of communications with an external lawyer.<sup>142</sup>
- a limited right against self-incrimination.<sup>143</sup> This, for example, prohibits the Commission, in a request for information in competition proceedings, to require the undertaking ‘to provide it with answers which might involve an admission on its part of the existence of an infringement’.<sup>144</sup>

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### Case Study: Terrorism and Rights

Following the September 2001 terrorist attacks on targets in the US, the United Nations introduced what it called ‘smart sanctions’. The UN Security Council was authorised to establish lists of persons and entities which were accused by UN Security Council members of being in some way or another associated with terrorist organisations such as Al-Qaeda. UN member states were then required to freeze personal funds and economic resources including access to bank accounts and other assets of these listed persons and entities.

The EU, not a member of the UN but acting within its competencies, implemented these decisions of the UN Security Council by various legal acts. Mr Yusuf and Mr Kadi, Swedish citizens, wake up one morning to find that they can no longer withdraw money from their bank accounts. They bring cases against the EU legal acts listing them amongst the persons and entities whose assets should be frozen before the General Court.<sup>145</sup> The Kadi case was on appeal decided by the CJEU. Sanctions against Mr Yusuf were withdrawn after several years, apparently, because he was struck from the list due to an error in transcription of his name from Arabic to other languages.

Some of the central legal questions arising in these cases, were, aside from the jurisdiction of EU courts and the degree of review of EU legal acts implementing UN Security Council decisions, whether the rights of defence and the right to an effective judicial review were violated by the EU legal acts. The CJEU in the Kadi I and Kadi II cases, dismissed the notion of

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<sup>141</sup> See Case 155/79 *AM&S* [1982] ECR 1575, paras. 23-26; Case T-30/89 *Hilti v Commission* [1990] ECR II-163, para. 18; Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akeros Chemicals* [2007] ECR II-3523, paras. 117, 123. UPDATE AKZO APPEAL!!!!!!!!!!!!!!!!!!!!

<sup>142</sup> Case T-30/89 *Hilti v Commission* [1990] ECR II-163.

<sup>143</sup> See Case 227/88 *Hoechst AG v Commission* [1989] ECR 2859; Case 374/87 *Orkem v Commission* [1989] ECR 3283. See also Case 27/88 *Solvay v Commission* [1989] ECR 3355; Case T-34/93 *Société Générale v Commission* [1995] ECR II-545, paras. 72-74; Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, para. 34

<sup>144</sup> Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, para. 35. The Court has made it clear in Case C-60/92 *Otto v Postbank* [1993] ECR I-5683, paras. 15-17, that this limitation does not apply to civil proceedings in national courts.

<sup>145</sup> T-306/01 *Abmed Ali Yusuf* [2005] ECR II-3533; Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

Union acts capable of having some form of ‘immunity’ from judicial review,<sup>146</sup> It then went on to address also the issues of rights of defence and the right to an effective judicial review.

Already the General Court in Yusuf had recalled that the right to a fair hearing required an individual to be able to ‘learn about the accusations held against them, to be able to understand the evidence gathered against them and to be able to defend themselves against such accusations.’<sup>147</sup> The right to a fair hearing must be observed ‘in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person’.<sup>148</sup> Although ‘the right to be heard cannot be extended to the context of a Community legislative process culminating in the enactment of legislation’ applying generally’ the right exists even if a legislative act also targets individuals.<sup>149</sup> However, according to the GC, this standard under EU law was not applicable to the case. Rather, the impugned EU legal act implementing a UN Security Council decision was only to be reviewed against compliance with standards of *ius cogens* arising from public international law.

Upon appeal in Kadi I the CJEU set aside the GC’s decision and held that ‘the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected’ when the EU simply implemented the UN Security Council resolution without following a procedure allowing for compliance with fundamental rights. <sup>150</sup> Therefore it annulled the regulation freezing his assets. The Court held, ‘that the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions, and that the General Court’s reasoning was consequently vitiated by an error of law.’<sup>151</sup> The ‘effectiveness of judicial review means that the competent European Union authority is bound to communicate the grounds for the contested listing decision to the person concerned and to provide that person with the opportunity to be heard in that regard.’<sup>152</sup> The Court stated that, as regards a decision that a person’s name should be listed for the first time, for reasons connected with the effectiveness of the restrictive measures at issue and with the objective of the regulation concerned, it was necessary that that disclosure and that hearing should occur not prior to the adoption of that decision but when that decision was adopted or as swiftly as possible thereafter.’<sup>153</sup> ‘Since Mr Kadi had not been in a position effectively

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<sup>146</sup> Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council and Commission (Kadi I)* [2008] ECR I-6351, especially paras 325-327.

<sup>147</sup> Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council and Commission (Kadi I)* [2008] ECR I-6351, paras 325-327.

<sup>148</sup> T-306/01 *Ahmed Ali Yusuf* [2005] ECR II-3533, para 325.

<sup>149</sup> T-306/01 *Ahmed Ali Yusuf* [2005] ECR II-3533, para 327.

<sup>150</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* of 3 Sept. 2008 followed the AG. It upheld the Community standards of FR protection in paras 281 *et seq.*

<sup>151</sup> Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council and Commission (Kadi I)* [2008] ECR I-6351, especially paras 326,327.

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<sup>153</sup> Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council and Commission (Kadi I)* [2008] ECR I-6351, especially paras 336-342 in the summary given by Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 24.

to make known his point of view in that regard, with the consequence that the rights of defence and the right to effective judicial review had been infringed.’<sup>154</sup>

The Kadi II case, decided by the CJEU in 2013,<sup>155</sup> arose from the UN Security Council’s Sanctions Committee’s attempts to remedy the situation by transferring a summary narrative of reasons for the listing of Mr Kadi (referred to as Mr Qadi) to him and publishing it on the UN website. Mr Kadi sent his statements to the Commission, requested the production of the evidence in support of the claims and assertions made in the UN’s summary of reasons, and asked that he be allowed to submit comments on that evidence. Irrespective of these demands, the Commission adopted a new regulation continuing the freezing of the assets of Mr Kadi without further commenting on the statements made by Mr Kadi in response to the allegations of the UN. Again, Mr Kadi brought an action for annulment against this act before the GC alleging inter alia breach of the rights of the defence and of the right to effective judicial protection. The GC, in view of Kadi I, had found that it was to ensure ‘in principle the full review’ of the lawfulness of the contested regulation in the light of the fundamental rights guaranteed by the EU. This meant that ‘the Courts of the European Union must review the assessment made by the institution concerned of the facts and circumstances relied on in support of the restrictive measures at issue and determine whether the information and evidence on which that assessment is based is accurate, reliable and consistent.’<sup>156</sup> The GC found that there was a breach of Mr Kadi’s rights of defence because ‘those rights had been respected only in a purely formal and superficial sense, since the Commission considered itself strictly bound by the findings of the Sanctions Committee and at no time envisaged calling them into question in the light of Mr Kadi’s comments or making any real effort to refute the exculpatory evidence adduced by Mr Kadi’; ‘Mr Kadi was refused access by the Commission to the evidence against him despite his express request, whilst no balance was struck between his interests and the need to protect the confidentiality of the information in question,’ and ‘the few pieces of information and the vague allegations in the summary of reasons relating to the listing of Mr Kadi’, ‘for example, that Mr Kadi was a shareholder in a Bosnian bank in which planning sessions for an attack on a United States facility in Saudi Arabia ‘may have’ taken place, were clearly insufficient to enable Mr Kadi to mount an effective’ defence against allegations.<sup>157</sup> The GC also found ‘that the principle of effective judicial protection had been infringed’ on the grounds that neither was Mr Kadi afforded proper access to the information and evidence used against him,’ nor had he been able to ‘defend his rights with regard to that information and evidence in satisfactory conditions.’ Further, no evidence of that kind or any indication of the evidence relied on against Mr Kadi had been disclosed to the GC.<sup>158</sup>

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<sup>154</sup> Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council and Commission (Kadi I)* [2008] ECR I-6351, paras 345-349 in the summary given by Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 25.

<sup>155</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr.

<sup>156</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, paras 39-41.

<sup>157</sup> GC KADI II paras 171-180 as cited by Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 43.

<sup>158</sup> GC KADI II paras 181-184 as cited by Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 44.

Upon appeal the CJ in its *Kadi II* judgment confirmed the GC's interpretation of violation of the rights of defence and of an effective judicial review.<sup>159</sup> Rights of defence arise from both the general principles of EU law affirmed inter alia by Articles 42(2) and 47 CFR. However, limitations to the exercise of the rights are possible and conditions are stated in Article 52(1) CFR. This requires that limitations respects the essence of the right in question and are proportionate. It also requires analysis of the specific circumstances of the particular case, including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question.<sup>160</sup>

One of the obligations which arise in the context of the right to good administration and are also related to the rights of defence is the obligation of the Union administration with the 'duty of care'. In the words of the CJEU, when 'comments are made by the individual concerned on the summary of reasons, the competent European Union authority is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any exculpatory evidence provided with those comments.'<sup>161</sup>

The duty to state reasons for a decision arising from Article 296 TFEU and the right to an effective judicial review 'entails in all circumstances', 'that that statement of reasons identifies the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures.'<sup>162</sup> The reason for this is that effective judicial review requires a verification of the allegations and to review whether 'those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated'.<sup>163</sup> In absence of sufficient reasoning of the act, Courts will base their review 'solely on the material which has been disclosed to them' and if 'that material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason'.<sup>164</sup> The reason is that 'the essence of effective judicial protection must be that it should enable the person concerned to obtain ... annulment' of the contested measure.<sup>165</sup>

The CJ therefore concludes that it 'follows from the criteria analysed above that, for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person concerned the summary of reasons provided by the Sanctions Committee which is the basis for listing or maintaining the listing of that person's name in Annex I to Regulation No 881/2002, (ii) enable him effectively to make known his observations on that subject and (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the

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<sup>159</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, paras 97-134.

<sup>160</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 102.

<sup>161</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 114 with references to Case C-269/90 *Technische Universität München* [1991] ECR I-5469, para 14; Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, para 58.

<sup>162</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 116 with references to *Al-Aqsa v Council* and *Netherlands v Al-Aqsa*, paragraphs 140 and 142, and *Council v Bamba*, paragraphs 49 to 53 – full citations!

<sup>163</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 119.

<sup>164</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 123.

<sup>165</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 134.

observations presented by that person and any exculpatory evidence that may be produced by him.<sup>166</sup>

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In summary, with entry into force of the Charter of Fundamental Rights of the European Union (CFR) under the Treaty of Lisbon (Article 6(1) TEU) many of the rights and principles which initially were established under the case law of the CJEU only, are now also restated in positive law. This adds to the prominence of principles which might initially not have been known to the wider public such as the right to good administration in Article 41 CFR. Importantly, however, this has not led to the discard of the 'old' approach of case-law-led developments of rights as general principles. To the contrary, under Article 6(3) TEU, rights are also protected as general principles of EU law. There is no hierarchy between the different sources of Article 6(1) TEU versus Article 6(3) TEU. This contributes to the dynamism of the EU legal system which continues to be capable of adapting to new challenges arising from policy areas increasingly becoming subject to 'Europeanisation' and new influences, such as for example the drive towards more transparency of the legal system which took on board some of the more 'Nordic' legal traditions of the EU. One of the topics which was not addressed in this chapter but which is arising as a big challenge to EU administrative law is the possibility and, arguably, the need for a general administrative procedure act for the EU. This might clarify to a much greater degree than Article 41 CFR was capable, the rights of individuals and obligations of administrations implementing EU law. Especially in the context of a highly integrated system of implementation of EU law in which Member State and EU institutions and bodies are involved, such clarification of applicable procedural provisions would add much to the transparency of the system, the compliance with principles under the rule of law and good administration in general.

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<sup>166</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and UK v Kadi* [2013] ECR I-nyr, para 135.