

# Chapter 8

## Inquisitorial Procedures and General Principles of Law: The Duty of Care in the Case Law of the European Court of Justice

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### Introduction

The question of who is in charge of providing (and possibly proving) the relevant information for decision-making appears to be one of the key questions resulting in the classification of a procedure as “adversarial” or “inquisitorial.”<sup>2</sup> Within the scope of application of European Union (EU) law, administrative decision-making generally relies on the generation and sharing of information, by highly integrated administrative networks consisting of EU and Member State institutions and bodies plus private actors.<sup>3</sup> EU administrative law provides rules and principles governing “who” has to generate information, by “what means,” of “what quality,” from “which source,” and “how,” finally, such information is to be used for the implementation of EU policies. The applicable rules and principles

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<sup>2</sup> The notion of “inquisitorial” procedures is used here in the sense of a juxtaposition with the notion of “adversarial” to describe certain archetypical types of administrative procedures. It is not used in the context of describing certain criminal procedures in pre-enlightenment times.

<sup>3</sup> In EU administrative law, generally, the composition of a file is a joint, composite effort of Member State and EU administrations. Decision-making is then undertaken on the basis of that file by either an EU or a Member State body. An adversarial element comes into play in so far as that any decision affecting the rights of an individual is subject to judicial review in an independent Court. This right is guaranteed in Article 47 of the EU’s Charter of Fundamental Rights (CFR). The first paragraph of Article 47 CFR states that “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”<sup>3</sup> course, the formulation of this article is misleading, since it is the Court which will establish whether procedural or substantive rights of an individual have been violated. The claim of such violation opens the access to Court.

relate to all aspects of administrative activity, be it subordinate legislation and administrative rule-making, or single case decision-making (adjudication). They apply irrespective of whether a decision is to be based upon objective criteria, or whether the administration enjoys a certain level of discretion.<sup>4</sup>

Such rules and principles, as is usual in EU administrative law, have not been established by general legislation on administrative procedure. Instead, they have been established mainly with respect to individual policy areas. Nevertheless, certain standard structures and frameworks for handling information gathering and exchange have also emerged. Such general rules on information and its role in EU public administration arise from the protection of certain basic rights, from general principles of law and from certain important rules related specifically to the EU institutional structure. The key concepts of this general administrative law of the EU has largely been developed in the case law of the Court of Justice of the European Union (CJEU) and will be the main focus of this chapter. The approach of governing EU public law by the development and refinement of general principles of European Union (EU) law is a common approach of the CJEU. It is necessary to establish the legal backbone of a complex system of procedurally highly integrated administrations which implement EU policies jointly.

The purpose-driven generation of information prior to decision-making can involve the collecting or assembling of other pre-existing information. Within Europe's administrative network, as in national systems, decision-making by an authority (whether by an EU institution or a Member State) may rely not only on information gathered by that authority itself, but may also be generated by other public or private actors, for example, by an agency of (another) Member State, by (another) EU body, or by a private party. Correspondingly, such actors have both rights to request and obligations to maintain and to provide information.<sup>5</sup> In some cases, rules relating to the sourcing of information require an EU or Member State institution or body to generate and maintain all relevant information itself. This

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4 This chapter is limited in that it exclusively deals with the administrative law of the EU. It does not give a comparative overview over the EU and its Member States' legal systems. The EU legal order often differs significantly from the structures in the Member States, as the legal systems of the Member States differ considerably amongst each other. Thereby, it is often less relevant whether a legal system belongs to a certain family of law. Important for the distinction are, in my comparative experience, factors such as, *inter alia*, whether a system has a written constitution, a constitutional court, a written Administrative Procedure Act, a specific system of administrative courts, a written catalogue of fundamental rights and many other more.

5 The topic of the law of information has been so far not been treated with great attention in legal writing on EU administrative law. A notable exception to this is the work by J. Sommer, *Verwaltungskooperation am Beispiel administrativer Informationsverfahren im Europäischen Umweltrecht* (Berlin: Springer, 2003) and the summary thereof in J. Sommer, "Informationskooperation am Beispiel des Europäischen Umweltrechts" in Eberhard Schmidt-Assmann and Bettina Schöndorf-Haubold, eds., *Der Europäische Verwaltungsverbund* (Tübingen: Mohr Siebeck, 2005) 57.

is so, for example, in competition law, where the EU Commission is the central enforcement authority together with Member States agencies. In other policy areas, the principle that individuals must supply pertinent information is common, for example, where they request authorizations to market a product, to register an intellectual property right, or a chemical compound. Finally, some policy areas' mix of inquisitive and adjudicatory roles in which, at different steps in a procedure (often under the influence of varying rules on the burden of proof), information is either directly collected by administrative actors or submitted by individuals, for example, in the area of state aid enforcement. Various instruments to obtain information exist but each requires for their application a legal basis in specific legislation regarding a policy area.

These instruments include investigations, controls, inspections, information injunctions and auditing procedures. Investigative powers are given to the "enquiring" administration such as the Commission or other EU authorities as well as Member States, including the right of one Member State to undertake an investigation in another EU Member State.<sup>6</sup> Inspections are specifically intensive forms of control serving the purpose of administrative information gathering. Through inspections, fact-finding takes place either physically, on the premises of the person or organization being inspected, or through the control of books and accounts or other documentation provided to the administrative bodies.<sup>7</sup> Information injunctions are decisions which can be issued on the basis of a specific legal basis to "specify what information is required and prescribe an appropriate period within which it is to be supplied."<sup>8</sup> Auditing is an important part of investigations into either private activity or that of other administrations. For example, in relations between the EU administration and the Member States, auditing plays an important role, for example in tracing Member States' distribution of EU moneys.

Information sourcing is a further part of often complex administrative procedures such as requests for authorizations, planning procedures or complaints procedures. In that respect, mostly private parties will request an administrative decision, or networks of administrative actors will enter into joint planning procedures. The

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6 This is an exceptional arrangement; for example, in the area of supervision of banking and financial institutions, see Art 43(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) Text with EEA relevance, OJ 2006 L 177/1 (which replaced Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, OJ 2000 L 126/1).


7 For more detail consult especially Giacinto della Cananea's contribution in this volume.

8 An example is offered by Article 10(3) of the procedural regulation on state aids: Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty (hereinafter Regulation 659/1999), OJ 1999 L 83/1.

result is the requirement of providing the responsible administrative actors with relevant information such as to enable it to make an informed decision.

Despite the fact that the provisions governing inspections are spread across legislative acts relating to diverse single policy areas, limitations on the powers of inspection emerge from several general legal principles.<sup>9</sup> First, all administrative activity, whether undertaken by an EU body or a Member State authority acting within the sphere of European law, must be proportionate.<sup>10</sup> When undertaking inspections, especially *vis-à-vis* individuals, fundamental rights must be observed and protected.<sup>11</sup> Further discussion of these points is undertaken by the contribution of Giacinto della Cananea in this volume.

### The “Duty of Care” as General Principle of EU Administrative Law

 Amongst the most central general principles of law is, as is argued in this contribution, the principle of the duty of care arising from the administrative obligation to fully and impartially assess all the relevant factors leading to a decision prior to decision-making. Judicial review of administrative decision-making will review compliance of the administration of rules and principles of European administrative law relating to the use of information. This includes, for example, the issue of the level of information which must be established and quality demands which must be met by the information collected prior to decision-making. Courts establish and police these standards as to which information needs to be collected, and how – especially according to what standards – in order to serve as the basis of administrative decision-making under European administrative law. Judicial review regarding this point can thus become very strict, including full review of law and facts and, in certain cases having the effect of the reviewing Court replacing the administrative decision entirely. Although on its face based on procedural elements of decision-making, essentially it focuses on the questions directly related to its substance.

The level of information which needs to be brought together in order to allow an authority to take a decision within European administrative law is generally either explicitly or implicitly laid down in specific legal acts. Thus it will differ

9 See Jean-Bernard Auby, “Les pouvoirs d’inspection de l’Union européenne” (2006) 42 *RTDE* 131 at 136; Antje David, *Inspektionen im Europäischen Verwaltungsrecht* (Berlin: Duncker & Humblot, 2003) 277; Alberto Gil Ibañez, *The Administrative Supervision and Enforcement of EC Law* (Oxford: Hart, 1999) 71.

10 For example, Case 68/88 *Commission of the European Communities v Greece* [1989] ECR 2965. See with details Paul Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006) at 703 [Paul Craig]; Antje David, *Inspektionen im Europäischen Verwaltungsrecht* (Berlin: Duncker & Humblot, 2003) at 216–23 and 269.

11 Case 136/79 *National Panasonic v Commission of the European Communities* [1980] ECR at paras 17–22.

according to the policy field in question. As a general principle of EU administrative law, however, prior to an administrative decision, all relevant information must be assembled and assessed as to its potential influence on the final determination of the matter. This is the content of the general principle of the “duty of care,” or sometimes also referred to as the “duty of diligent and impartial examination” by administrative actors. In EU case law, the duty of care is closely linked with the right to a fair hearing (the *audi alteram partem* rule)<sup>12</sup> and is now regarded as one of the general principles protected under the umbrella notion of “good administration.”<sup>13</sup>

The duty of care was first explicitly mentioned in the case law of the CJEU (before entry into force of the Treaty of Lisbon, it was known as the ECJ) by van Gerven AG.<sup>14</sup> It has since been applied in reviewing the exercise of Commission discretion, especially in the context of economic regulation,<sup>15</sup> but also in cases of risk regulation.<sup>16</sup> The duty of care, or of diligent and impartial examination, is thus an important element of judicial review of inquisitorial-type administrative procedures. In particular, it sets the standard for the amount and detail of information to be established prior to taking a decision, and the way in which this information is then processed. The CJEU defined the duty of care to mean that the Commission was obliged to scrutinize the “information contained in the documents in the case ... with all the due care required.”<sup>17</sup> It developed this obligation with respect to

12 H-P Nehl, *Principles of Administrative Procedure in EC Law* (Oxford: Hart, 1999) at 103–5.

13 Also protected by Art. 41(1) CFR (Charter of Fundamental Rights of the European Union).

14 Opinion of Advocate General van Gerven in Case C-16/90 *Nölle v Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163.

15 See, in particular, Cases T-211/02 *Tieland Signal Ltd v Commission* [2002] ECR II-3781 at para 37; Case T-54/99 *max.mobil v Commission* [2002] ECR II-313 at paras 48–51; Case C-449/98 *P IECC v Commission* [2001] ECR I-3875 at para 45; Case T-24/90 *Automec v Commission* [1992] ECR II-2223, para 79; Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407 at para 53; Joined cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487 at para 20. See also, with further detail, Paul Craig, *supra* note 10, at 374–5.


16 See, for example, Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305, paras 170–2. The notions of risk and risk regulation have been element of several specific studies. See, for instance, with further references, J Neyer, “Risikoregulierung im Binnenmarkt: Zur Problemlösungsfähigkeit der europäischen politischen Verwaltung” in Christian Jörges and Joseph Falke, eds., *Das Ausschusswesen der Europäischen Union* (Baden-Baden: Nomos, 2000) 257; S Perez, “L’administration communautaire et la gestion du risque” (2001) 24 *Annuaire Européen d’Administration Publique* 323; E Fischer, “Risk and Challenges for Administrative Law” (2003) 15 *ERPL/REDP* 707.

17 The Court found this lacking in *Nölle I*, an anti-dumping case, and one of the first cases to explicitly refer to the duty of care. See Case C-16/90 *Nölle v Hauptzollamt Bremen-Freihafen* (*Nölle I*) [1991] ECR I-5163 at para 29.

anti-dumping matters in the *Nölle* cases,<sup>18</sup> and with respect to customs duties in *TU München*. In the latter, the Court found that the Commission was under the obligation to examine carefully and impartially all relevant facts and aspects of the particular case.<sup>19</sup> That case is important as the Court specifically based the annulment of the Commission decision *inter alia* on the violation of the duty of care by the Commission. The fault of the Commission was that, in its assessments of the facts, it had relied on “experts” who lacked the technical expertise needed for assessing the merits of the individual case.<sup>20</sup>

The principle of the duty of care applies to all steps of an administrative procedure. This has been established, for example, by the case law on multi-step competition procedures in which an initial investigation may be followed by a second phase in-depth investigation.<sup>21</sup> The duty of care is, therefore, applicable in the decision of the administrative body as to whether to follow up triggering information such as a complaint, whether to pursue an preliminary investigation in initial phase and finally, where a second in-depth phase is conducted, to what extent and depth the investigation needs to be taken in the path toward a final decision.<sup>22</sup> The application of the duty of care in competition law (antitrust) cases has for example led to the limiting of the Commission’s discretion to react to an individual complaint about anti-competitive behaviors of a competitor. The

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18 *Nölle I* was followed a few years later by Case T-167/94 *Nölle v Council and Commission* (*Nölle II*) [1995] ECR II-2589 at para 129 in which the GC (the former ) established the duty of care as a “rule protecting individuals.”

19 Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469 at para 14. In that case, the technical university of Munich sought to benefit from an exemption from import duties in the EU customs code for imports of scientific instruments for which there was no equivalent produced in the EU. The university claimed that a microscope imported from Japan fell under this rule. The German customs officials and, upon review, the European Commission held that a microscope produced by a Dutch company was an equivalent to the imported Japanese product. Upon judicial review, the CJEU (then the ECJ) established that the Commission was obliged to base its decision on sufficiently qualified experts or else risking to violate the duty of care obliging the administration to fully and impartially investigate the case prior to taking a decision.

20 See Francis Jacobs AG in Case C-296/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469 at paras 21, 30.

21 See, for example, Case T-7/92 *Asia Motor France and others v Commission* [1993] ECR II-669 at para 34: an antitrust case in which an initial *prima facie* investigation will require a subsequent full-scale investigation, should the Commission as administrative authority wish to prohibit certain activity for its anti-competitive effects or issue a fine for violation of EU competition law.

22 In German administrative law, the term “maturity” (*Entscheidungsreife*) is used indicating that an administrative decision may only be taken if the case file has sufficiently advanced in information gathering.



Commission is under an obligation “to examine carefully the factual and legal aspects of which it is notified by the complainant.”<sup>23</sup>

The outcome of this examination must be communicated to the complainant in a reasoned decision, which is subject to judicial review.<sup>24</sup> In *Sytraval*, involving a complaint to the Commission from a competitor against an allegedly illegal state aid, the Court highlighted the importance of this understanding of the obligation.<sup>25</sup> The applicant had challenged the Commission’s decision rejecting the complaint. The General Court (GC, prior to the entry into force of the Treaty of Lisbon known as the Court of First Instance, CFI) favored an expansive reading of the obligations upon the Commission arising from the duty of care. In deciding in state aid proceedings whether to embark upon a second phase, in which the complainant would be procedurally entitled to present its arguments, the Commission had the “automatic obligation to examine the objections which the complainant would certainly have raised if it had been given the opportunity of taking cognizance of that information.”<sup>26</sup> On appeal, the CJ (Court of Justice, formerly known as ECJ, now the highest-level Court within the CJEU) rejected this far-reaching view, but found that the Commission could be required “to conduct a diligent and impartial examination of the complaint, which may make it necessary for it to examine matters not expressly raised by the complainant.”<sup>27</sup>

Where the Commission has entered into a formal investigation, the duty of care obliges the administration, in refining the matter to enable a final decision to be made, to conduct its investigation with “the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal.”<sup>28</sup> The GC has in the past repeatedly sought to establish the duty of care as a general principle of law applicable in all policy fields within, where given, the framework of procedural rules laid out in secondary law. This raises the link between the duty of care and the general principle of good or sound administration. This approach was pursued in *max.mobil*,<sup>29</sup> a leading case in which an Austrian telecom company requested the annulment of those parts of a Commission decision rejecting *max.mobil*’s complaint against the abuse of a dominant position by a competitor, then under Article 82 EC (now Article 102 TFEU). The Court found that “it must be emphasized at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a

23 Case T-24/90 *Automec v Commission* [1992] ECR II-2223 at para 79.

24 Case T-77/95 *Ufex and others v Commission* [2000] ECR II-2167 at para 42.

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

26 *Ibid* at para 66.

27 Case C-367/95 P *Commission v Sytraval and Brinks France* [1998] ECR I-1719 at paras 60, 62, linking this duty to the principle of sound or good administration.

28 Case T-206/99 *Métropole Télévision v Commission* [2001] ECR II-2707 at para 59.

29 Case T-54/99 *max.mobil v Commission* [2002] ECR II-313.

State governed by the rule of law and are common to the constitutional traditions of the Member States.”<sup>30</sup>

The CJ has, however, been cautious in following the GC’s lead in taking an expansive view of the duty of care. Instead it has traditionally focused more on the procedural obligations in each individual policy area. Although not contesting the link between the duty of care and the general principle of good or sound administration, in the appeal to *max.mobil* the Court linked it with particular obligations burdening the Commission in handling competition complaints under Article 82 EC (now Article 102 TFEU).<sup>31</sup> This more restricted view of the scope of the duty of care has not, however, prevented the Court from invoking the duty as a general specification of the criteria of investigatory diligence also in its case law in other policy areas and questions, especially risk regulation, as discussed in the following section concerning scientific evidence.

The duty to investigate fully and impartially all aspects of a case prior to taking a decision can also encompass the analysis of its potential impact on other collateral aspects.<sup>32</sup> Sharpston AG, in a matter concerning a Spanish support scheme for cotton producers, referred to the obligation of the institutions to explore the element of a decision fully, prior to taking a decision, as the obligation to undertake an “impact study.”<sup>33</sup> This obligation is linked to the principle of proportionality insofar as it imposes “an obligation on Community institutions at least to satisfy themselves that the proposed measures are *prima facie* adequate to attain the legitimate aims pursued.”<sup>34</sup> These questions are linked to the control over the exercise discretion in judicial review. In that case, the CJ did not, however, explicitly refer to these significant issues raised by the Advocate General, nor to the conclusions which she drew. In two more recent cases, however this has been changed. The CJ now has established case law reviewing the legality of a measure under the principle of proportionality by establishing whether there is proof of the respect of the duty of care. The proof is supplied in both cases by means of an in-depth analysis of the

30 *Ibid* at para 48, with reference to Art 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364/1) confirming that “[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.”

31 See especially the CJ’s appeal decision in the *max.mobil* case, in which it overturned the GC: Case C-141/02 P, *Commission v max-mobil* [2005] ECR I-1283 at paras 68–75.

32 See, for example, the situation in Case C-310/04 *Spain v Council* [2006] ECR I-7285 at paras 123, 130: “[a] proper study of the effects of that reform on the profitability of cotton production requires an examination of the consequences the reform is liable to produce for ginning undertaking situated in the production regions.”

33 This formulation of the Council’s obligation should not be confused with the formal impact assessment procedure addressed below in this chapter.

34 Opinion of Sharpston AG in Case C-310/04 *Spain v Council* [2006] ECR I-7285 at para 80. The violation of the duty to care by the institutions was so severe that they were criticized as appearing arbitrary: “In the absence of any impact study, certain choices made by the Commission and the Council appear arbitrary” (para 94).



European Commission's impact assessment report drafted prior to the entry into force of the of a measure.<sup>35</sup> In both cases, however, the measures overturned by the CJ were of legislative nature. It remains to be seen whether this line of arguing will also be developed with respect to the review of single-case measures in view of the duty of care. So far, the review of single case decisions has taken place in the context of the control of the duty of diligent and impartial examination of all aspects of the case. This is closely linked to the obligation to give reasons. Only a sufficiently reasoned decision will indicate compliance with the duty of care and the standards of investigation.<sup>36</sup> Especially in highly fact-based and context-determined competition law cases, the GC has limited the obligation of providing reasons for the final decision from the perspective of the satisfaction of the duty of care or diligence. In stating the reasons for decisions, the Commission is not obliged to adopt a position on all the arguments put forward by the parties, but may concentrate its presentation of facts and legal considerations to those having decisive importance for the decision.<sup>37</sup>

In a range of situations it will not be sufficient for administrative decision-makers to rely on pre-existing knowledge within the authority or on information provided by the parties. Instead, they must have recourse to scientific expertise.<sup>38</sup> The latter differs from general administrative information in that its generation complies with specific standards inherent in scientific method. It is based on gathering observable, empirical, measurable evidence, subject to specific principles of reasoning or analysis. That means, very obviously, that the information assembled has to be non-partisan, and the generators of the information have to answer to the standards of their scientific community. By referring to scientific expertise, an external and independently reviewable standard of information as

<sup>35</sup> Case C-176/09 *Luxembourg v EP and Council* [2011] ECR I-nyr of 12 May 2011 at para. 65; Case C-58/08 *Vodafone and Others* [2010] ECR I-nyr of 8 June 2010 at para. 55.

<sup>36</sup> Joined Cases T-371 and 394/94 *British Airways and others and British Midlands Airways v Commission* [1998] ECR II-2405 at para 95.

<sup>37</sup> See, for the development of the case law in cases other than Sytraval and Métropole, Cases T-7/92 *Asia Motor France and others v Commission* [1993] ECR II-669 at paras 31, 34; Case T-459/93 *Siemens v Commission* [1995] ECR II-1675 at para 31; Case T-387/94 *Asia Motor France and others v Commission* [1996] ECR II-961 at para 104; Case T-5/97 *Industrie des Poudres Sphériques v Commission* [2000] ECR II-3755 at para 199; Case T-187/99 *Agrana Zucker und Stärke v Commission* [2001] ECR II-1587 at para 84; Case T-206/99 *Métropole Télévision v Commission* [2001] ECR II-2707 at para 44; Case T-228 and 233/99 *Westdeutsche Landesbank Girozentrale v Commission* [2003] ECR II-435 at para 280. See Paul Craig, *supra* note 10, at 376 with further explanation.

<sup>38</sup> For a background to the discussion see the contributions in Christian Joerges, Karl-Heinz Ladeur and Ellen Vos, eds., *Integrating Scientific Expertise into Regulatory Decision-Making* (Baden-Baden: Nomos, 1997) [Joerges, Ladeur and Vos].

basis for administrative decision-making is necessarily implied.<sup>39</sup> Decisions relying upon scientific advice are “founded on the principles of excellence, transparency and independence” which the Court has held to be “an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures and preclude any arbitrary measures.”<sup>40</sup> Generally, the reference to scientific expertise introduces the requirement for specifically structured, rational deliberation in administrative and regulatory decision-making. Even absent an obligation in secondary law to employ scientific expertise, it may still be necessary due to the principle of the administrative duty of care.<sup>41</sup> This holds true especially in matters where EU law requires a “high level” of protection to “be ensured in the definition and implementation in all Union policies and activities.”<sup>42</sup> According to the CJ, the requirement of such a level of protection “implies that the Community institutions must ensure that their decisions are taken in the light of the best scientific information available and that they are based on the most recent results of international research.”<sup>43</sup> EU authorities, when required to ensure that the best

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39 The resulting judicial review of scientific expertise itself is then limited. It is restricted to a review of reasoning and its review takes place in the context of composite procedures in a multiple-step procedure. See, for example, Joined cases T-74/00, T-76/00, T-83–85/00, T-132/00, T-137/00 and T-141/00 *Artogodan and Others v Commission* [2002] ECR II-4945 at paras 199, 200; Case T-27/98 *Nardone v Commission* [1999] ECR II-1293 at paras 30 and 88.

40 Case T-70/99 *Alpharma v Council* [2002] ECR II-3495 at para 183.

41 Reference to independent scientific expertise may, in certain cases, be protected in the framework of fundamental rights, especially the right to a fair hearing. This is illustrated by the case of *Steffensen* where the CJ gave a preliminary ruling to a question concerning the interpretation of an EU directive on quality controls of foodstuffs. That directive allowed Member States’ authorities to take samples of foodstuffs for quality control whilst also obliging Member States to “ensure that those subject to inspection may apply for a second opinion.” Depriving a party of the possibility to obtain a second opinion in the form of an independent scientific evaluation of the quality of the product, the Court held, was a violation of EU fundamental rights, notably the right to a fair hearing as protected in Art 6(1) ECHR if the evidence collected in the control of the foodstuffs will later be used as evidence in court against an alleged offender of food quality standards. See Case C-276/01 *Steffensen* [2003] ECR I-3735 at paras 73, 80.

42 Such a level is required under the Treaty in areas of regulation subject to the so-called “cross-section” clauses, that is, in matters concerning health (Article 114(3) and Article 168 TFEU), safety and consumer protection (Articles 12 and 114(3) TFEU) as well as environmental protection (Articles 11 and 114(3) TFEU). See Joined cases T-74/00, T-76/00, T-83–85/00, T-132/00, T-137/00 and T-141/00 *Artogodan and Others v Commission* [2002] ECR II-4945 at para 198; Case T-199/96 *Bergaderm and Jean-Jacques Goupil v Commission* [1998] ECR II-2805 at paras 64, 65; Case C-212/91 *Angelopharm v Freie und Hansestadt Hamburg* [1994] ECR I-171 at paras 31, 32 and 38.

43 Case T-326/99 *Fern Olivieri v Commission* [2003] ECR II-6053 at para 68; Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305 at para 158; T-70/99 *Alpharma v Council* [2002] ECR II-3495 at para 171. This approach is in compliance with Art 114

scientific information forms the basis of a decision, are under the duty to check, wherever possible, “that all the information relating to the scientific evaluation of the product in question, whether it be favorable or unfavorable to the product, has indeed been made available to it.” The fact that the applicable procedural rules do not provide how this is to be done “cannot prevent the Commission from obtaining information from a third party where such a course of action is indispensable in order to safeguard public health.”<sup>44</sup>

Despite the benefits of requiring a more politically neutral, objectively rational approach to administrative decision-making through the requirement of referring to scientific evidence, there is a risk attached to the approach. Namely, that administrations may cloak essentially political decisions in scientific language and thereby disguise the real issues addressed, in order to be able to claim rational objectivity for the decision taken.<sup>45</sup> In this regard, the role of the courts in reviewing administrative decision-making must be to distinguish between, on the one hand, the requirement of gathering information as complete as possible and, on the other hand, the exercise of the discretion itself on the basis of the information collection. In this way the courts can acknowledge that uncertainty is inherent in scientific information, either due to incomplete data or differing opinions within the scientific community, and thus submit the decision-making to the measured review of discretion.<sup>46</sup> Addressing the needs of risk regulation in the face of scientific uncertainties has, however, led to the development of additional tools or precepts, most importantly the precautionary principle.

The necessity in some cases of basing a decision on the findings emerging from scientific expertise shows that there will often be a need for the administration, before making a determination, to engage in detailed information gathering concerning the nature and potential impact of a decision. Such information is, however, not always available either because it is simply lacking or because the science is inconclusive. In these cases the European courts, have accepted that “where there is uncertainty as to the existence or extent of risks to the health of consumers, the institutions may take protective measures without having to wait until the reality and the seriousness of those risks become fully apparent.”<sup>47</sup>

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TFEU (Art 95(3) EC), which obliges the Commission in the case of legislative proposals in these matters, to take into “account in particular any new development based on scientific facts.”

44 Case T-326/99 *Fern Olivieri v Commission* [2003] ECR II-6053 at para 73.

45 M Shapiro, “The Frontiers of Science Doctrine: American Experiences with the Judicial Control of Science-Based Decision-Making” in Joerges, Ladeur and Vos, *supra* note 38, at 325–42.

46 This approach has been increasingly followed in the area of merger control, where the economic/scientific market analysis has been subject to closer control, see HCH Hofmann, “Good Governance in EU Merger Control: Due Process and Checks and Balances under Review” (2003) 24 ECLR 114.

47 Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305 at para 139; Case C-157/96 *National Farmers’ Union and Others (BSE I-case)* [1998] ECR I-2211 at

This approach is generally referred to as the precautionary principle, which may be invoked in order to justify of a preventive measures in risk management.<sup>48</sup> The adoption of such measures requires, in principle, a scientifically based risk assessment identifying the “potentially dangerous effects deriving from a phenomenon, product or process.”<sup>49</sup> The courts have confirmed that the existence or extent of risks cannot be based “on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified.”<sup>50</sup> Prior to the application of the precautionary principle a risk assessment needed, therefore, to consider “the degree of probability of a certain product or procedure having adverse effects on human health and the seriousness of any such adverse effects.”<sup>51</sup> Generally, risk assessment needs to be “as complete as possible”<sup>52</sup> and must be undertaken on “on the basis of the most reliable scientific evidence available and the most recent results of international research.”<sup>53</sup> Where, as often, such completeness and reliability does not obtain in fact, the precautionary principle provides some alternative. As a general principle of law, it is now being used by Member States and EU institutions in all fields of risk regulation and is the basis of many legislative approaches.<sup>54</sup> The precautionary principle thus establishes criteria for the amount of scientific information necessary to allow for preliminary measures taken in lieu of full information necessary for a final decision. From this perspective, the application of the precautionary principle is as much a question of

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para 63; Case C-180/96 *United Kingdom v Commission* (BSE II-case) [1998] ECR I-2265 at para 99; Case T-199/96 *Bergaderm SA and Jean-Jacques Goupil v Commission* [1998] ECR II-2805 at para 66.

48 See, for the more recent case law citing the precautionary principle in EU law, <AQ3> Case C-423/08 *EnviroTec v Etat Belge* [2009] ECR I-nyr (of 15 October 2009) at para 75; <AQ4> T-334/07 *Denka v Commission* [2009] ECR II-nyr (of 19 November 2009) at para 95.

49 European Commission, “Communication: On the precautionary principle,” 2 February 2002, COM/2000/1 final.

50 Case C-236/01 *Monsanto Agricoltura Italy and others* [2003] ECR I-8105 at para 106; Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305 at para 143; Case T-70/99 *Alpharma v Council* [2002] ECR II-3495 at paras 152–61.

51 Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305 at para 148; Case T-70/99 *Alpharma v Council* [2002] ECR II-3495 at paras 152–61.

52 Case C-236/01 *Monsanto Agricoltura Italy and others* [2003] ECR I-8105 at para 107.

53 *Ibid* at para 113.

54 See, for example, the so-called REACH legislation on the control of chemical substances: Regulation 1907/2006 (EC) of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency and amending Directive 1999/45/EC, OJ [2006] L 396/1. See, for the first case law on the precautionary principle in the context of REACH, <AQ5> C-558/07 *SPCM and Others v REACH* [2009] ECR I-nyr (of 7 July 2009).

the amount and use of discretion by an administration as a question relating to the management of information.<sup>55</sup>

The lack of information sufficient to decide a case may result from insufficient cooperation by the parties involved, especially where they are obliged to cooperate under secondary law. In that case, certain provisions in secondary legislation allow the EU institutions to act on the information available, even where not complete. Such provisions are essentially intended as sanctions for non-compliance with obligations for provision of information and are used as such.<sup>56</sup> Such rules, as an exception to the general duty of care and of diligent and impartial assessment of all relevant facts, are to be interpreted narrowly.<sup>57</sup>

## Conclusion

This chapter offered a view of the distinction between inquisitorial and adversarial systems being chiefly a question of who gathers information to which extent and in which quality prior to decision-making. This information-centered view may not be a common perspective, neither amongst people classified as common lawyers nor amongst various people finding themselves labeled as members of the civil law families. The information-perspective on administrative procedure law, however, appears to be a parameter capable of explaining many aspects and specificities of a system of public law including the system of judicial review of administrative decision-making.

<sup>55</sup> On the distinction between scientific advice, on the one hand, and that discretionary assessment of the competent authority, on the other, see, for example, the judgment in Case C-405/92 *Mondiet v Armement Islais* [1993] ECR I-6133 at para 31, and the Opinion of Gulmann AG in that case at para 28.

<sup>56</sup> See, for example, Art 18(1) of Council Regulation (EC) 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56/1 (as last amended by Regulation 2117/2005, OJ 2005 L 340/17): “In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of facts available.” See also Art 12 of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, OJ 1999 L 83/1: “If the Member State fails to comply with a suspension injunction or a recovery injunction, the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice of the European Communities direct and apply for a declaration that the failure to comply constitutes an infringement of the Treaty.”

<sup>57</sup> The issue will often be combined in litigation with the question of the burden of proof of a party. This question will be addressed below in this chapter.

<AQ6>

From this perspective, in this chapter, I have attempted to outline how in EU administrative law, the principle of the “duty to care” has become a central element of this administrative law of information. To a certain degree the European focus on such principled approaches goes a certain distance in explaining the specificities of a system allowing for a basically inquisitorial procedure linked with a system of judicial review, which is informed by a tradition of administrative courts with strong powers to control and overrule administrative decision-making. The availability of detailed judicial review generally introduces a strong adversarial component into the principally inquisitorial system. The adversarial element of a process of judicial review of administrative decision-making which reviews the procedural as well as the substantive element of an administrative decision allows distinguishing unproblematic situations, in which inquisitorial decision-making is sufficient to allow for a fast and structured decision-making process, from the more controversial cases, in which a case will be brought before an independent judge deciding in the adversarial mode.