Abstract

General Principles of EU law establish criteria of legality of EU legal acts of legislative and administrative nature, and those of Member States when acting in the scope of EU law. This chapter addresses some of the most important principles, especially those concerning the procedure and substance of implementing EU law within its multi-level system. The principles discussed in this chapter include proportionality, the rule of law, good administration, information rights and the conditions necessary to ensure the right to an effective remedy.

Keywords

legislation

legal system

EU law

administrative action

applicable law

rights

accountability

transparency

agencies

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General Principles of EU law and EU administrative law

Herwig CH Hofmann

1 Introduction

The provisions of the Treaty and EU legislative acts defining the content of EU policies must be implemented in real life. This often requires some form of regulatory or administrative action by the European Union administration, consisting of the Union's institutions, bodies, offices, and

agencies (Article 298(1) TFEU), as well as those of the Member States when implementing EU law.[1] Such action will be needed to provide further specification of the content of legislative acts or such measures as the creation of specific agencies to ensure coordination between Member States. This chapter explores two key questions in this context: Who does what and by what means to make sure that Union policies specified in the Treaties and EU legislative acts are implemented? Which rights and obligations exist in that context, and how can they be protected?

General Principles of EU law play a crucial role in answering these two questions, as they serve as criteria for the legality of all forms of EU law, including those used for the implementation and enforcement of EU law. Next to the General Principles of EU law, the legality of implementing actions also depends on legislation governing questions such as the creation of EU bodies, offices, and agencies, as well as administrative organisation and procedures, for example, the creation of networks between EU and Member State bodies implementing EU policies. This body of law is often referred to as the European Union administrative law.[2] EU administrative law is a particularly dynamic field marked by the close interaction of legal sources arising from the international, EU, and national levels. Additionally, EU law and particularly its administrative law, must be flexible enough to accommodate the fact that many policy fields have varying constellations of participating Member States. For example, in the Economic and Monetary Union (EMU), only 20 of 27 EU Member States share the Euro as their common

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[1] The latter are under the obligation to transpose and implement EU law into under the principle of sincere cooperation. They "shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" (Article 4(3) TEU).

[2] HCH Hofmann, GC Rowe, and A Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011).

currency (rising to 21 from 2026). Or, consider the Schengen zone, which covers not all EU Member States but includes some non-EU Member States.

This chapter will first give an overview of the key institutions, offices, bodies and agencies of the EU and what they do in terms of implementation of EU law (section 2), before then moving 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 (section 3).

You are already familiar with some elements relevant for this chapter. You have, for example, read in the chapter on decision-making and competences about delegated and implementing acts under Articles 290 and 291 TFEU, as well as about the principle of conferral (Article 5 TEU), which limits the EU to the exercise of powers conferred upon it in the Treaties. In other contexts, you will have read about the separation of functions between the Member States and the EU—especially in the context of the principle of sincere cooperation (Article 4(3) TEU). You will have further read about EU agencies and the possibilities of delegating powers to agencies. These elements are brought together in this chapter to demonstrate how institutional, substantive, and procedural law, resulting from the rules and principles of EU law, shape the legal reality.

2 Organizational levels and the distribution of powers in implementing EU law

In the EU's legal system, the exercise of administrative functions is undertaken by a diverse range of actors, both at the EU level and within the Member States. 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.

2.1 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, it is also barred from passing implementing acts if not authorised. This results from the principle of conferral under Article 5(1) and (2) TEU. The result of the distribution of implementing powers in EU law is explicitly restated in Article 291(1) TFEU, according to which 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts', a provision which is as much a restatement of powers remaining within the hands of Member States as a restatement of obligations of Member States under the principle of sincere cooperation in Article 4(3) TEU.

Where the Union is authorised to undertake the implementation of EU policies, administrative functions are carried out by the Commission (and, to a certain extent, also the Council) and, increasingly, by EU agencies. Comitology committees, comprising Member State experts, are designated to supervise and advise the Commission when undertaking implementing activities under Article 291 TFEU. These issues were already addressed and further explained in the context of Chapter 5 on decision-making procedures.

Administrative powers conferred on the EU primarily consist of the authority to adopt acts with general content, such as non-legislative administrative rule-making in the form of directives, regulations, or decisions (Article 289 TFEU), as well as the issuance of guidance or the creation of standards. However, in an increasing number of areas of EU law, Union bodies have also been conferred with the power to take single-case decisions with binding force directly

on individuals. Probably the best-known area where that is the case is the Commission's power to impose fines in the area of competition law (see further XXX). Increasingly, EU agencies are also being empowered to take individual decisions addressing issues of EU-wide concern, such as the granting of trademarks for the entire EU market (by the EUIPO, the European Intellectual Property Office), admitting chemical products as safe for use (by ECHA, the European Chemicals Agency), and other such regulatory activity. Where EU agencies have decision-making powers, they generally also have a board of appeal or a complaint board to address complaints regarding decisions.[3]

In most policy areas, however, even if the EU has adopted legislation and some common rules for implementing these rules have been established at the EU level, final decisions regarding the implementation of these rules are made by Member State bodies. An example of this approach to indirect administration is the EU's customs policy, where national customs officials adopt decisions with a binding effect throughout the entire EU based on highly detailed EU legislation.

2.2 **Implementation of EU law by the Member States**

In the absence of EU law provisions conferring powers to implement EU law on EU institutions and bodies, Member States not only have the right to implement EU law through their administrative apparatus, but they are also obliged to do so.

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[3] Case C-46/21 P *ACER v Aquind*, EU:C:2023:182, paras. 57, 67. In *Aquind*, the Court of Justice stated that boards must ensure a comprehensive review of agencies' decisions, as otherwise the guarantees of effective judicial protection in the EU legal system would be compromised.

Under the principle of 'sincere cooperation' in Article 4(3) TEU, Member States are obliged to

take any appropriate measure, general or particular, to ensure fulfilment 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 enact specific national implementing legislation and adopt associated administrative regulations to create the necessary conditions for implementation at the national level. Member States, under this model, enjoy only limited institutional or procedural autonomy to implement and enforce EU law.[4]

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 organisational requirements, national administrations are obliged to act in conformity with these.[5]

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[4] See: Case 33/76 *Rewe,* EU:C:1976:188, para. 5.

[5] 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

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*.[6]

2.2.1 'Equivalence' and 'effectiveness'

Under the principle of equivalence, in the 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.[7] Provisions used under national law may not be 'less favourable than those governing similar domestic actions (principle of equivalence)'.[8] A rule must therefore 'be applied without distinction', whether the infringement arises from Union law or national law.[9]

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national law which is in conflict with EU law provisions; see eg case law since Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ('*Simmenthal II*') EU:C:1978:49 and the discussion in chapter XXX.

[6] See Case C-261/95 *Palmisani v INPS* EU:C:1997:351, para 27. See also Case C-453/99 *Courage and Crehan* EU:C:2001:465, para 25.

[7] Joined Cases C-205–215/82 *Deutsche Milchkontor* EU:C:1983:233, para 17; *Courage* (n 7) para 29.

[8] *Courage* (n 7) para 29.

[9] Case C-231/96 *Edis* EU:C:1998:401, para 36; Joined Cases 66/79, 127/79, and 128/79 *Salumi* EU:C:1980:101, para 21. Whether a situation under EU law is sufficiently similar to a situation regulated

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].[10]

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'.[11]

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* EU:C:1998:557, para 41.

[10] Case C-213/89 *Factortame* EU:C:1990:257, paras 19 and 20.

[11] *Courage* (n 7) para 29. This is a standard formula which was initially developed in C-312/93 *Peterbroeck* EU:C:1995:437, para 14, Joined cases C-430 and C-431/93 *Van Schijndel* EU:C:1995:441, para 19. This formula can be found in many cases and contexts, eg C-249/11, *Bykanov* EU:C:2012:608, para 75.

The obligations under the principles of equivalence and effectiveness apply not only to national courts but also directly to national administrations.[12] The latter are explicitly obliged under EU law to set aside national laws which conflict with directly effective EU law.[13]

2.2.2 Composite procedures and decision-making with 'trans-territorial' effect

In many cases, the implementation of EU law by Member States requires the national bodies to take decisions in cooperation with offices and bodies from other Member States or with input from EU agencies.

**CASE STUDY: **

An example of these commonplace 'composite procedures' is found in EU data protection law, which contains both horizontal cooperation procedures (between national authorities) and vertical and diagonal cooperation procedures (between national authorities in EU bodies). Horizontal cooperation, for example, occurs when a person files a complaint for a data privacy violation in the EU Member State where they reside. The 'lead' in handling the complaint will

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[12] S Prechal, *Directives in EC Law* (2nd edn, Oxford: Oxford University Press, 2005) 65–72.

[13] See Case 103/88 *Fratelli Costanzo v Comune di Milano* EU:C:1989:256; Case 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* EU:C:2004:17. These cases, for the basis of that obligation, refer to the principle of sincere cooperation under Art 4(3) TEU (but the cases still refer to the old Art 10 EC). For a critique of this approach by the Court of Justice, see eg Prechal (n 12) 65–72.

usually be taken by the data protection authority in the Member State where the company that committed the alleged violation is located (Article 55(1) GDPR - Regulation 2016/679 – provides for the implementation of a so called 'one-stop shop' mechanism based on a sharing of competences between the data protection authorities). These authorities cooperate in handling the complaint and the investigation. The GDPR also contains vertical and diagonal forms of cooperation when data protection authorities involved in handling a case disagree on the outcome. In that case, under Articles 60, 63, and 65 of the GDPR, the lead supervisory authority must obtain a binding decision from the European Data Protection Board (EDPB), a body established under EU law. The relevant national data protection authorities will then implement that binding EDPB decision.[14]

**** END OF CASE STUDY ****

Composite procedures come with their own set of questions regarding the General Principles of EU law, as they are also addressed in Article 41 of the Charter on Good Administration. These include how to ensure the rights of a fair hearing. There arise questions which authority needs to hear a party, and how the result of such a hearing can be taken into account based on which file? How to address access to documents and how the final decision-maker establishing a binding act has had full access to all relevant facts and findings. Overall, composite procedures raise problems with respect to judicial review, in that it is not always clear which court, within which Member State or the CJEU, is responsible for hearing a case. Such problems are reflected in cases such as *Berlioz*[15],

[14] See for an example of that situation T-183/23 *Ballmann v EDPB* EU:T:2025:735.

[15] Case C-682/15, *Berlioz Investment Fund SA*, EU:C:2017:373.

Luxembourg v B[16], and *WhatsApp Ireland*[17], which highlight several issues of judicial review and accountability within multi-jurisdictional composite procedures.[18]

Throughout EU administrative law, however, a phenomenon exists which we might refer to as the trans-territorial effect of administrative action. Some acts have an effect not only on the territory of that State but in the entire EU. This phenomenon is well illustrated by looking at EU customs law. For example, once a product from, for example, Brazil has cleared customs, for example, via a port of Rotterdam in the Netherlands, that product can be sold throughout the Union without facing any further customs controls or duties; in other words, it can freely circulate in the Union. The Dutch customs officials will *de facto* act as customs officials of the entire Union when classifying the product according to the EU law's system of customs classifications and assessing the customs tariff due to be paid at the port of Rotterdam. The Dutch customs officials in this example, act on a mix of applicable law—they are agents of the Kingdom of the Netherlands (subject e.g. to the Dutch civil service employment rules) yet in the exercise of their duties as customs officials – in our example the act of classifying the goods which is a decision which has an effect within the entire EU, they act based on EU law.

To mitigate potential problems with the widespread phenomenon of what might be referred to as decision-making with trans-territorial effect (some authors say transnational effect), in most policy areas, there is some form of common structure for the exchange of information and

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[16] Joined cases C-245/19 and C-246/19, *Etat Luxembourgeois v B and Others*, EU:C:2020:795.

[17] Case C-97/23 P, *WhatsApp Ireland Ltd v European Data Protection Board,* case still pending.

[18] See H.C.H. Hofmann, 'Multi-Jurisdictional Composite Procedures - the Backbone to the EU's Single Regulatory Space', 2019 *University of Luxembourg Law Working Paper No. 003-2019 26*, 24; M. Eliantonio, 'Composite Procedures, the Violation of Fundamental Rights, and the Availability of Sufficient Remedies in the Multi-level EU Judicial Architecture', in M. Fink (ed), *Redressing Fundamental Rights Violations by the EU* (Cambridge University Press, 2024), 345–365.

coordination of administrative action. These are sometimes referred to using the metaphor of administrative 'networks'. The objective of networked administration, establishing, for example, structures of information-exchange is to reduce potential problems arising from decentralized administration. Information exchange systems are generally established by EU legislation and linked to an EU agency. An example of such a system is the so-called 'Schengen Information System'.[19] (see further chapters XXX). It is actually difficult to identify a policy area within EU

[19] The information exchange is based on a set of updated Regulations from 2018 and 2019 including regulations covering the use of SIS for entry bans and the exchange of information on third-country nationals who have been refused entry (See: Regulation (EU) 2018/1860 of the EP and of the Council on the use of the Schengen Information System (SIS) for the return of illegally staying third-country nationals, OJ [2018] L 312/1*;* Regulation (EU) 2018/1861 of the EP and of the Council on the establishment, operation and use of the SIS in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ [2018] L 312/14). Other regulation focuses on the exchange of information for police and judicial cooperation within the Schengen Area (e.g. Regulation (EU) 2018/1862 of the EP and of the Council on the establishment, operation and use of the SIS in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ [2018] L 312/56*).* Several other regulations establish a framework for interoperability between large-scale IT systems, including SIS, enhancing information exchange and cooperation between different EU agencies and Member States (e.g. Regulation (EU) 2019/817 of the EP and of the Council on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 and Council

Decisions 2004/512/EC and 2008/633/JHA, OJ [2019] L 135/27; Regulation (EU) 2019/818 of the EP and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration, OJ [2019] L 135/85.

law where no information network exists. To name just a few examples, agencies have been created to deal with food safety,[20] the environment,[21] fisheries,[22] maritime and ship safety.[23]

2.3 **Delegation of powers within the Union**

[20] Regulation (EC) No 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 [2002] L31/1) amended by Regulation (EU) 2019/1381 on the transparency and sustainability of the EU risk assessment in the food chain and amending Regulations (OJ [2019] L 231/1) Commission Regulation (EU) No 16/2001 of 10 January 2011 laying down implementing measures for the rapid alert system for food and feed (OJ [2011] L6/7) and Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain (OJ [2019] L231/1).

[21] Regulation (EC) No 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 [2009] L126/13).

[22] Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulation (EEC) No 2847/93, (EC) No 1936/2001, and (EC) No 601/2004, and repealing Regulation (EC) No 1093/94 and (EC) No 1447/1999 (OJ [2008] L286/1).

[23] Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (OJ [2002] L208/1).

As discussed in chapter XXX, delegation of powers from legislators to the executive 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. Delegation is not only a practical necessity but also a general phenomenon in the implementation of EU policies.

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 should be exercised in the EU by those entrusted with them by the Treaties, but the Treaty provisions on delegation of powers, set out in Articles 290 and 291 TFEU, do allow for delegation to the Commission (see further chapter 5).[24] In this system, no reference is made to EU agencies and other EU bodies as possible recipients of delegations—despite the express acknowledgement in the provisions on judicial review of acts (Article 263, paragraphs 1 and 5, TFEU) of EU agencies as potential decision-makers (see further chapter 10).[25] In the same vein, the 2011 Comitology Regulation

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[24] 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, paras 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'.

[25] 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 (transparency and access to documents), Art 16 (data protection), Art 228 (competence of the European Ombudsman), Art 265 (action for failure to act), Art 267 (reference for preliminary ruling), and Art 287 (jurisdiction of the European Court of Auditors). Also the EU's Charter of

sets out only the general rules on the conferment upon the Commission of the power to adopt measures implementing EU acts, pursuant to Article 291 TFEU.[26] It 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.[27]

Agencies with decision-making powers are, however, an important part of the EU's administration. Some such agencies have a legal basis directly in the Treaties,[28] most are created by legislative act. EU agencies have been entrusted with pursuing different tasks,[29] ranging from

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Fundamental Rights under Art 47 explicitly gives the right to an effective remedy, including against agencies. Agencies are further explicitly mentioned in Arts 41, 42, and 43 Charter.

[26] Regulation (EU) No 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 (OJ [2011] 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'.

[27] Instead it might actually be read to exclude the possibilities of delegating decision-making powers to independent EU agencies since it allows explicitly only for delegating to the Commission of implementing powers either under what it defines as the 'advisory' or the 'examination' procedure. Regulation 182/2011 (OJ [2011] L55/13).

[28] eg the European Police Office, Europol, Art 88 TFEU; the agency in charge of cooperation of judicial cooperation, Eurojust, Art 85 TFEU. On these bodies, see further chapter 24.

[29] The basis for this classification can be found in E Vos, 'Reforming the European Commission: What Role to Play for EU Agencies' (2000) 37 *Common Market Law Review* 1113 at 1120–1121. For a different classification of agencies, see E Chiti, 'The Emergence of a Community Administration: The Case of European Agencies' (2000) 37 *Common Market Law Review* 309 at 315–317.

the provision of information and the provision of services as a basis for the adoption of implementing acts, and even the exercise of specific implementing powers.[30] Therefore, some agencies support the Commission and the Member States by collecting information or processing applications, other EU agencies have been delegated powers allowing them to adopt individually binding decisions.[31] In these cases, agencies exert discretion, sometimes qualified by the Courts as 'broad discretion',[32] but always qualified by the provisions of the relevant regulations.[33]

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

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[30] Two examples of many: Art 42(5) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (OJ [2009] L78/1) as amended by Regulation (EU) 2015/2424 of the EP and the Council of 16 December 2015 (OJ 2015 L 241/21); Art 62 of Council Regulation (EC) No 2100/94 of 22 July 1994 on Community plant variety rights (OJ [1994] L227/1), as amended.

[31] Eg the Community Plant Variety Office—CPVO, the European Chemicals Agency—ECHA, and, in non-scientific fields, the European Union Intellectual Property Office—EUIPO.

[32] See eg with regard to the Community Plant Variety Office, C-38/09 P *Schräder v CPVO* EU:C:2010:196, para 77; C-534/10 P *Brookfield New Zealand v CPVO* EU:C:2012:813, para 50. For other policy areas see eg C-281/10 P *PepsiCo* EU:C:2011:679, para 67; Joined cases C-101, 102/11 P *Neuman and Galdeano*, EU:C:2012:641, para 41.

[33] This was, eg a situation of confirmation upon appeal of Case T-187/06 *Schräder v Community Plant Variety Office* in Case C-38/09 P *Schräder v CPVO* EU:C:2010:196.

Meroni case from the very early days of European integration.[34] In *Meroni*, the Court explicitly allowed sub-delegation of Commission powers to private parties, despite the lack of explicit authorization in the ECSC Treaty. It, however, set some conditions for such sub-delegation: first, the Commission could only sub-delegate powers which it had previously been granted. Thereby, the Court reconfirmed the principle of conferral and prohibited actions *ultra vires*.[35] Secondly, the Commission had to oversee and control the exercise of the sub-delegated powers.[36] Thirdly, the Commission was barred from delegating powers to adopt acts with quasi-legislative content since doing so would upset the 'institutional balance' established by the European Coal and Steel Community Treaty (ECSC).[37] This reference to 'institutional balance'—a principle akin to the separation of powers—is the reason for also applying the standards set by *Meroni* today in the context of the EU.[38] Under today's EU law, the delegation of clearly defined powers, if subject

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[34] Joined Cases 9/56 and 10/56 *Meroni v ECSC High Authority* EU:C:1958:7. There the Court examined the question 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—the 'Joint Bureau of Ferrous Scrap Consumers' and the 'Imported Ferrous Scrap Equalization Fund'.

[35] *Meroni* (n 30) para 150.

[36] Ibid, para 152.

[37] Ibid.

[38] See eg Case C-345/00 P *FNAB v Council* [2001] ECR I-3811, para 41 (on the relevance of the concept of institutional balance); On the limits to delegate by legislative act the right to amend an annex to such legislation by means of implementing acts (under the pre-Lisbon system), see Joined Cases C-154/04

to supervision, is possible.[39] Today, most legislative acts of the Union establishing EU agencies are based on Treaty provisions that permit the adoption of 'measures' for the harmonisation or approximation of national law, such as, most importantly, Article 114 TFEU (the general legal base for the adoption of internal market measures). Also, specific policy-specific Treaty provisions exist allowing for the creation of structural 'measures' such as agencies.[40] In the past, many agencies were also established as 'measures' under the reserve clause of Article 352 TFEU.[41]

3 Criteria for legality

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and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, para 90; On the limits arising from institutional balance on delegation to agencies see: C-270/12 *UK v Parliament and Council (ESMA, Short Selling)* EU:C:2014:18.

[39] Case C-270/12 *UK v EP and Council (ESMA—Short Selling*), EU:C:2014:18.

[40] See eg in the area of research, Arts 182, fifth para, and 187 TFEU; in the environmental field Art 192 TFEU (the legal basis for the European Environmental Agency (OJ [2009] L126/13)); in the air and maritime transport field Art 100, second para TFEU; regarding border checks, asylum, and immigration in the context of the 'Area of Freedom, Security and Justice', Arts 74 and 77(2)d TFEU (the latter is the legal basis for the creation of the EU's external borders agency, Frontex (now Regulation 2019/1896, OJ [2019] L 295/1); see further chapters XXX).

[41] Which gives residual power for the EU to act to attain one of its objectives, if the Treaties have not set out the necessary powers.

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. Criteria for the legality of acts of the EU exist primarily in the form of General Principles of EU law.[42] These General Principles of EU law[43] 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 for 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 (Articles 268 and 340, second and third paragraphs, TFEU). In addition, such principles must also be

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[42] The European Parliament has repeatedly called on the Commission to present a legislative proposal for a regulation on EU administrative procedures (eg European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP)) to remedy the lack of an EU 'administrative procedure act'. For a model, see: P Craig, HCH Hofmann, J-P Schneider, and J Ziller (eds) *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford: Oxford University Press, 2017), also published in French, German, Italian, Polish, Romanian, and Spanish language versions.

[43] General Principles of law often include principles requiring standards of procedural justice in administrative procedures, eg the notions of proportionality, right of defence, and others.

observed by the Member States when they implement Union law,[44] where they derogate from it,[45] and in all other cases within the 'scope' of Union law.[46]

The following discussion addresses to greater detail the principle of proportionality (section 3.1), the rule of law—and various of its sub-elements including transparency, legality, and the protection of legitimate expectations (section 3.2)—principles of good administration—including the right to a fair hearing, reasoning, and rights of defence (section 3.3)— information rights (section 3.4) and, finally, the right to an effective judicial remedy (section 3.5).

3.1 **Proportionality**

Under Article 5(4) TEU, 'the content and form of Union action, shall not exceed what is necessary to achieve the objectives of this Treaty'. The CJEU's concept of the general principle of proportionality is both older than the formulation in Article 5(4) TEU and much richer. Directly or indirectly, proportionality can be understood as 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:

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[44] See Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:32.

[45] Case C-260/89 *ERT v DEP* EU:C:1991:254.

[46] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105; Case C-263/97 *First City Trading* EU:C:1998:444.

- 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);[47]
- acts of EU institutions and bodies when limiting Member State powers by adopting EU acts (e.g. an EU legislative directive on the maximum working time of workers per week);[48]
- indirectly, in case of acts of Member State bodies transposing or implementing EU law (e.g. the Dutch veterinary authorities confiscate pet sheep in order to comply with an EU regulation on the limitation of the outbreak of viral veterinary diseases);[49]
- 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 licence to a private TV station).[50]

The Court of Justice has developed the review of compliance with the principle of proportionality as a three-step test:

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[47] Joined Cases C-189, 202, 205–208, and 213/02 P *Dansk Rørindustri v Commission* EU:C:2005:408. On EU competition law, see further chapter XXX.

[48] Case C-84/94 *UK v Council* (‘*Working Time Directive*’) EU:C:1996:43. On this legislation, see further chapter XXX .

[49] Case C-189/01 *Jippes* EU:C:2001:420.

[50] Case C-260/89 *ERT v DEP* [n 48].

- 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'.[51]
- Secondly, 'when there is a choice between several appropriate measures, recourse must be had to the least onerous'.[52] The notion of 'least onerous' must be understood as the least restricting of the rights in question.
- Thirdly, 'the disadvantages caused must not be disproportionate to the aims pursued',[53] that is, there must be an overall reasonable ratio between means and outcome.

Case study 8.1: Broadcasting of sports events in news programmes

The use of the proportionality test is best explained using a practical example such as the *Sky Österreich* case.[54] This case concerned the legality of a provision of an EU directive requiring companies which had acquired exclusive broadcasting licences for sports events also to allow limited reporting of those events 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 Charter of Fundamental Rights, the Court found that this right needed to be balanced with the

[51] See eg Case C-343/09 *Afton Chemical* [2010] ECR I-7027, para 45, and Joined Cases C-581/10 and C-629/10 *Nelson*, EU:C:2012:657, para 71.

[52] See eg *Afton Chemical* (n 54) para 45, and *Nelson* (n 54) para 71.

[53] See eg *Afton Chemical* (n 54) para 45, and *Nelson* (n 54) para 71.

[54] Case C-283/11 *Sky Österreich*, EU:C:2013:28</IBT>.

right to the freedom to receive information under Article 11(2) Charter. With regard to the first step of the proportionality test, the Court found that 'safeguarding of the freedoms protected under Article 11 of the Charter undoubtedly constitutes a legitimate aim in the general interest'.[55] The directive was also considered 'appropriate for the purpose of ensuring that the objective pursued is achieved' in that it allowed any broadcaster 'to be able to make short news reports and thus to inform the general public of events of high interest'.[56] In its analysis of the second leg of the proportionality test, the Court first explored which measures would have been conceivable which were capable of reaching the legitimate legislative goal but were at the same time less restrictive for the rights of the plaintiff. It considered, for example, the possibility of granting the rights holder the right partially to recover the costs of acquisition of the exclusive sports broadcasting rights. The Court, however, found 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.[57] The Court then turned to the third step of the proportionality test regarding the overall disproportionality of the directive. The Court found 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 them to cite the source of the information.[58] Thereby, the disadvantages resulting for the rights holder were 'not disproportionate in the light of the aims' which the

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[55] Ibid, para 52.

[56] Ibid, para 53.

[57] Ibid, paras 55–57.

[58] Ibid, paras 58–63.

directive pursues and were 'such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case'.[59]

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 Court (as described in chapter XXX) will apply only marginal review and thereby only check for manifest errors of assessment in the different steps of application of the proportionality test.[60] 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 legislature's assessment with its own assessment of the politically desirable outcome, thereby respecting the separation of powers

[59] Ibid, paras 66 and 67.

[60] *Working Time Directive* (n 51) para 58:

> 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 *vitiated by manifest error of misuse of powers*, or whether the institution concerned has *manifestly exceeded the limits* of its discretion (emphasis added).

That means that although the Court reviews the different elements of discretion, it only reviews manifest errors in each of the steps.

(Article 13(2) TEU). Increasingly, therefore, in the context of reviewing Union legislative acts, the Court does not examine the substance of an act but instead checks whether the institutions can demonstrate that they themselves assessed the proportionality of a measure before adopting it.[61]

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

- those where the institutions have no or only limited discretion—as is often the case in matters of administrative acts implementing legislation,[62]
- acts of Member States which limit EU fundamental rights or fundamental freedoms,[63]

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[61] 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. See eg Case C-58/08 *Vodafone* EU:C:2010:321, paras 51 *et seq*; Case C-176/09 *Luxembourg v European Parliament and Council* EU:C:2011:290, paras 56 *et seq*; Case C-128/17 *Republic of Poland v EP and Council*, EU:C:2019:194, paras 31–45, 100, 127, 136–139.

[62] Case T-170/06 *Alrosa v Commission* EU:T:2007:220, paras 108–110; Case C-12/03 P *Commission v Tetra Laval* EU:C:2005:87, paras 38–40.

[63] See for one of many examples: Case C-41/02 *Commission v Netherlands* (‘*Vitamins drops*’) EU:C:2004:762, 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

- acts of the institutions which restrict the scope of applicability of a fundamental right or balance various rights and principles against each other.[64] This is an explicit obligation under Article 52(1) Charter, 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 of this is the previously discussed *Sky Österreich* case in case study 8.1.

3.2 Rule of law: transparency, legality, legal certainty, legitimate expectations

The EU is established, as famously pronounced by the Court in *Les Verts*, as a 'Community based on the rule of law'.[65] Although there is a lively academic debate about what that actually means in practice for the EU legal system, most people would agree that the rule of law is an 'umbrella principle' with some core content and numerous (sub-)principles, many of which can in themselves be regarded as having a certain independent existence.[66] 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

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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.'

[64] eg *Sky Österreich* (n 67) paras 47–66.

[65] Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23.

[66] For many, see K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625.

following is a selection of some of the main sub-elements of the rule of law within the EU's legal system.

3.2.1 **Legality**

One requirement of the rule of law is that actions of public bodies of the EU take place *under* and *within* the law. This 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.'[67] Secondly, the institutions and bodies must act within the limits of the powers so conferred on them. They may not, therefore, act ultra vires and have to comply with the procedural rules spelt out in their specific legal basis. In other words, no act may violate higher-level Union law,[68] including fundamental rights and other General Principles in EU law.[69]

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.[70] In particular, the institution or body must take into account all relevant factors for decision-

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[67] Joined Cases 46/87 and 227/88 *Hoechst v Commission* EU:C:1989:337, summary point 3.

[68] 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.

[69] See eg Case 240/83 *Procureur de la République v ADBHU* EU:C:1985:59.

[70] Case 18/57 *Nold KG v ECSC High Authority* EU:C:1959:6.

making[71] but is barred from acting on improper motives leading to misuse of its powers. As in any exercise of public powers, therefore, they must act in good faith and avoid any improper purpose.[72]

3.2.2 **Legal and institutional transparency**

Legal and institutional transparency is essential for the exercise of the rule of law and can be regarded as a precondition 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 level of openness in the 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 are transparent (paragraph (3), third

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[71] This criteria is summarized in the case law of the CJEU as the 'duty of care'—an essential procedural requirement allowing for review of compliance with the rule of law. There is a host of case law specifying the duties of decision makers under the duty of care, the seminal cases of which include: Case 6/54 *Netherlands v High Authority* EU:C:1955:5; C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* EU:C:1991:438; C-367/95 P *Commission v Sytraval and Brinks France* EU:C:1998:154, paras 60 and 62.

[72] Art 263, second para, TFEU, dealing with actions for annulment before the Court of Justice, 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).

sub-paragraph), for example, by publication of 'documents relating to the legislative procedures'.[73] Additionally, the legislature, as per 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 Charter. Details are laid down by Regulation 1049/2001 on public access to documents.[74]

Case study 8.2: Tennis racquets on-board planes?

Airport authorities at Vienna airport refused Mr Heinrich the right to board a plane because they found an item which was prohibited as cabin luggage—here, a tennis racquet. Mr Heinrich, outraged about missing his flight, brought a case before the competent Austrian administrative court asking for a declaration that it was illegal for the authorities to refuse to allow him to board his plane with a racquet in his luggage.[75]

The Austrian court noted that the authorities were acting on the basis of an EU regulation (622/2003) but that it was impossible for individuals to comply with that regulation since the annex to the regulation listing prohibited articles was not made public. This constituted, in the view of the Austrian court, a severe impairment of the most elementary principles of the rule of

[73] Case C-345/06 *Heinrich* EU:C:2009:140, paras 41–47 and 64–66.

[74] Regulation (EC) No 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] L145/43). Replacement by a revised measure is currently being discussed among the institutions. See further chapter 3.

[75] See C-345/06 *Gottfried Heinrich* EU:C:2009:140, paras 42–44 and 59–63.

law. Such regulations should therefore be declared by the Court of Justice as legally non-existent and hence non-binding.

The CJEU, in a preliminary ruling, adopted a more differentiated position. It held that the annex to Regulation 622/2003 adapting the list of articles prohibited on-board an aircraft, which was not published in the Official Journal, had no binding force insofar 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 Official Journal. The Court held that

> an act adopted by a Community institution cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves acquainted with it by its proper publication in the *Official Journal of the European Union*. In particular, the principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to clearly understand their rights and obligations and take the necessary steps accordingly.

As a consequence, the Court declared that all the relevant implementing acts of the EU Regulation could not be enforced against individuals. Until proper publication, tennis racquets and other items listed in secret could be taken on board. The Vienna authorities' refusal to let Mr Heinrich board the plane with the racquet was therefore illegal.

In terms of administrative law, the often mixed enforcement of policies involving various Member States and EU bodies (e.g., in the field of data protection under the General Data Protection Regulation) may exacerbate transparency problems arising from a certain lack of clarity regarding who is responsible for decision-making. The transparency of a system is directly linked to the possibility of holding actors accountable and therefore interacts with certain other important precepts, such as legal and institutional responsibility.[76]

3.2.3 **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 and are criteria for the legality of acts adopted on the basis of or in the scope of EU law.

Legal certainty

According to the CJEU the principle of legal certainty is a general principle of EU law[77] essentially requiring that:

- 'Legal rules be clear and precise, and aim to ensure that situations and legal relationships governed by Community law remain foreseeable'.[78]

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[76] See Case T-188/97 *Rothmans International BV v Commission* EU:T:1999:156.

[77] Case 43/75 *Defrenne v SABENA* EU:C:1976:56, paras 69 *et seq*; Joined Cases 205–215/82 *Deutsche Milchkontor v Germany* EU:C:1983:233.

[78] Case C-199/03 *Ireland v Commission* ECLI:EU:C:2005:548, para 69.

- 'Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly'.[79]

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

- EU institutions are barred from applying rules to individuals which are inconsistent or contradictory;[80]
- double jeopardy (also known as the principle of *ne bis in idem* in criminal law and embodied in Article 50 Charter in comparable terms) is prohibited;
- administrative proceedings must be conducted within a reasonable period of time;[81]
- there is a requirement of legal certainty with respect to legal charges and limitation periods;[82]
- retroactive effect of EU law is, in principle, prohibited.

The latter is, from a practical point of view, probably the most important consequence of the principle of legal certainty. Article 297(1) TFEU lays down that Union acts come into force only

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[79] See eg Case C-158/06 *ROM-projecten* EU:C:2007:370, para 25 with further references. This leg of legal certainty is thus directly related to the principle of transparency discussed above.

[80] Case T-115/94 *Opel Austria v Council* EU:T:1997:3, para 125; C-143/93 *Gebroeders van Es Douane Agenten* EU:C:1996:45, 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'.

[81] E.g. Case T-347/03 *Branco v Commission* EU:T:2005:265, para 114.

[82] Case 41/69 *Chemiefarma v Commission* EU:C:1970:71, para 16.

after publication, which implies that retroactive entry into force is in principle excluded.[83] Retroactive effect of Union law is exceptionally possible if such effect explicitly follows from Union law[84] and if the public interest in retroactive effect overrides the private interest in the maintenance of the existing legal situation.[85] This indicates that balancing of interests in maintenance of different principles, for example that of the public in upholding the law and that of private parties in legal certainty, is necessary.[86] This requirement for balancing of the 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.

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[83] Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie v Council and Commission* EU:T:2004:37, para 90; Case 98/78 *Racke v Hauptzollamt Mainz* EU:C:1979:14, para 20. This fundamental approach is also recognized within the legal systems of the Member States (see by comparison Case 63/83 *Regina Kirk* EU:C:1984:255, para 22) and established with regard to criminal sanctions in Art 49(1) Charter and Art 7 ECHR.

[84] See Case T-357/02 *Freistaat Sachsen v Commission* EU:T:2011:376, 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'.

[85] For the public interests recognized by the Court, see T Tridimas, *The General Principles of EU Law* (2nd edn, Oxford: Oxford University Press, 2006) 256–257.

[86] Joined Cases 42/59 and 49/59 *SNUPAT v High Authority* EU:C:1961:5.

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 (e.g. 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.[87]

Lawful acts, in particular those creating rights for individuals or Member States, may not in principle be revoked since, generally, the interest of the individual in the continuous application of the act prevails over the public interest of revocation.[88]

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.[89]

[87] See also chapter XXX.

[88] See Joined Cases 7/56 and 3–7/57 *Algera v Common Assembly* EU:C:1957:7. See also Case T-251/00 *Lagardère and Canal+ v Commission* EU:T:2002:278, para 139.

[89] *Lagardère and Canal+* (n 91) para 140. Going back to Case 14/81 *Alpha Steel v Commission* ECLI:EU:C:1982:76.

Similar concerns govern the question of recovery of monies. This is important, for example, in the area of subsidies (so-called 'State aid').[90]

Legitimate expectations

The principle of the protection of legitimate expectations is a general legal principle of Union law, which has been recognized since the very early case law of the Court particularly where an administrative decision is cancelled or revoked.[91] It is closely linked to that of legal certainty.[92] Three key elements must be satisfied:

- The existence of justifiable reliance[93] (this can arise from a valid legislative act,[94] but can also arise from any act of a Union official conferring individual rights or benefits, for

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[90] Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland* EU:C:1997:163, paras 36 and 37. National aid granted to companies is in principle subject to authorization by the Commission. Could the principle of legal certainty be invoked by *Alcan* to avoid the sanction of repayment of the aid which was declared unlawful after payment? The Court, balancing the principles of legal certainty, on the one hand, preferred to give preference to the principle of effectiveness of EU law and requested repayment.

[91] See Case 111/63 *Lemmerz-Werke* EU:C:1965:76, where the concept of protection of legitimate expectations was first explicitly enunciated. See also *Algera* (n 91) 118; *SNUPAT* (n 89) 103, 111, and 172 *et seq*; Case 14/61 *Hoogovens v ECSC High Authority* EU:C:1962:28.

[92] Cases 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 a 'corollary of the principle of legal certainty'.

[93] Case T-176/01 *Ferriere Nord Spa v Commission* [2004] ECR II-3931.

[94] 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.

example, by giving precise assurances, which can give rise to protected 'legitimate expectations'[95]).

- An affected interest[96] (expectations of 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,[97] for example due to incorrect facts which the potential beneficiary had given.[98] 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[99]).
- Priority for the protection of expectations over the interest of the Union.

3.3 Good administration

Principles of good administration have been subject to a particularly dynamic development. Good administration is best understood as an 'umbrella' concept containing numerous more specific rights, rules, and principles, the practically most relevant of which we will discuss in the following.

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[95] Case T-283/02 *EnBW* EU:T:2005:101, para 89.

[96] Case 74/74 *CNTA v Commission* EU:C:1976:84, para 44.

[97] *EnBW* (n 98) para 113. See also Case T-13/99 *Pfizer Animal Health v Council* EU:T:2002:209, para 501.

[98] Case 228/84 *Pauvert v Court of Auditors* EU:C:1985:271, para 14.

[99] See Joined Cases 303/81 and 312/81 *Klöckner v Commission* EU:C:1983:129, para 34.

3.3.1 General observations on good administration

Good administration and its sub-principles are protected as General Principles of EU law,[100] granting individuals rights also vis-à-vis Member States when implementing and enforcing EU law.[101] Good administration is also recognized as a fundamental right binding EU institutions, bodies, offices, and agencies under Article 41 Charter.

Article 41 Charter 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:

   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.

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[100] See eg C-337/15 P *European Ombudsman v Claire Stehlen*, EU:C:2017:256, para 34; C-556/14 P *Holcim (Romania) SA v European Commission*, EU:C:2016:207, para 80; C-534/10 P *Brookfield New Zealand and Elaris V CPVO*, EU:C:2012:813, para 51.

[101] Article 6(3) TEU. See, for example, C-166/13 *Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis*, EU:C:2014:2336, paras 44–48.

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.

Principles of good administration are essential procedural requirements, and their violation may lead to an annulment of an act.[102] And possibly the right to damages.[103]

It is noteworthy that the material, institutional, and personal scope of the right to good administration as recognised in Article 41 Charter is more limited than that of the right to good administration as protected as General Principle of EU law (Article 6(3) TEU). Whether good administration will be invoked to exist under Article 41 Charter, as opposed to the same right as a General Principle of law, therefore may change the outcome of a case. This can be illustrated by the following comparison:

- The wording of Article 41 Charter indicates that
  - the material scope of protection of good administration is predominantly intended to cover 'single case decision-making' according to the formulations in Article 41 Charter which cover an 'individual measure', access of a person to 'his or her'

[102] Case T-211/ 02 *Tideland Signal v Commission* EU:T:2002:232[2002] ECR II-3781, *Tideland Signal* (n 98) para 37.

[103] Case C-337/15 P *European Ombudsman v Claire Staelen*, EU:C:2017:256, para 41 ; Case T-62/98 *Volkswagen* EU:T:2000:180, para 607.

(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, first paragraph, TFEU;[104]

  - the institutional scope of the right to good administration under Article 41(1) Charter is limited to 'institutions, bodies, offices and agencies of the Union';[105]

- the right to good administration as a 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,[106] as well as for non-legislative acts which, as the Court held, must be

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[104] J Ziller, 'Is a Law of Administrative Procedure for the Union Institutions Necessary?' (2011) 3 *Rivista italiana di diritto pubblico comunitario* 699 at 718, however, notes that 'nothing impedes applying art. 41 of the Charter on the right to good administration also to rule making, including to consultation procedures by the Commission'. However, the Court of Justice in Case C-221/09 *AJD Tuna Ltd* EU:C:2011:153, para 49, has consistently held that Art 41 Charter does not cover the process of enacting measures of general application and the General Court agrees eg in Case T-135/05 *Crampoli v Commission* EU:T:2006:366, paras 149 and 150, in which it held that the Council when establishing acts of abstract general nature was not subject to the obligations equivalent to what is now protected in Art 41 Charter, and that their violation could therefore not lead to the annulment of an act.

[105] Still more limited are the formulations regarding damages and language rights (Art 41(3) and (4) Charter) which speak of 'institutions' and 'servants in the performance of their duties' respectively.

[106] Opinion of AG Trstenjak in Case C-204/07 P *CAS SpA v Commission* EU:C:2008:175, para 146; Joined Cases T-186/97, T-187/97, T-190–192/97, 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 AG v Commission* EU:T:2001:133, para 257.

'adopted by the Commission pursuant to the principle of sound administration and the duty of care';[107]

– to Member State action in the scope of EU law;

– under certain conditions to third parties if they have a qualified involvement in an administrative procedure.[108]

3.3.2 **Sub-principles of good administration**

Article 41(2) Charter lists an indicative set of principles useful for the definition of the general concept of good administration invoked in Article 41(1) Charter.

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

The duty of care's (sometimes also referred to the duty of diligence) central feature is the obligation of any decision-maker to establish impartially and carefully all relevant factual and legal elements of a case, and to take these into account in decision-making.[109] A decision must be

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[107] Case C-248/99 P *Monsanto* EU:C:2002:1, paras 91–93.

[108] A good example of the analysis of this effect is Case T-260/94 *Air Inter SA v Commission* EU:T:1994:265, with discussion by HP Nehl, *Principles of Administrative Procedure in EC Law* (Oxford: Hart Publishing, 1999) 91–94.

[109] See in that respect, AG Van Gerven in Case C-16/90 *Eugen Nölle v Hauptzollamt Bremen-Freihafen* EU:C:1991:233.

taken ‘carefully and impartially’,[110] in full recognition of the facts so assembled.[111] The duty of care binds EU institutions and bodies as well as Member States’ authorities acting in the scope of EU law.[112]

The fairness dimension of the right to good administration also requires the absence of arbitrary action and unjustified preferential treatment, including the absence of a conflict of interest. At least for this reason, an interested party is entitled to know the identity of persons conducting investigations and making decisions.[113]

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, not only can overly hasty administration result in bad administration, but it is also widely accepted that ‘slow administration is bad administration’[114] and might violate the principle of legal certainty.

Hearing and access to one’s file

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[110] Case C-269/90 *TU München v Hauptzollamt München Mitte* EU:C:1991:438, para 14.

[111] Case 6/54 *Netherlands v High Authority*, EU:C:1955:5, English language version page 112; C-12/03 P *Commission v Tetra Laval* EU:C:2005:87 para 39.

[112] See eg Cases C-166/13 *Mukarubega v Seine-Saint-Denis*, EU:C:2014:2336, paras 47–49; and C-362/14 *Schrems v Data Protection Commissioner*, EU:C:2015:650, para 63.

[113] Case T-305/94 *Limburgse Vinyl Maatschappij v Commission* EU:T:1999:80, paras 317 *et seq*.

[114] AG Jacobs in Case C-270/99 P *Z v Parliament* EU:C:2001:180, para 40, with reference to Art 41 Charter and claiming that this was ‘a generally recognised principle’.

Article 41(2)(a) and (b) Charter 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 access to one's file including:

- the right to full information which may affect a person's position in an administrative procedure, especially where sanctions may be involved;[115]
- the right to be informed of
  - the administration's response to complaints or representations;[116]
  - the outcome of procedures and of decisions made;[117]
  - all matters necessary for their defence,[118] including rights of appeal.

The right to a fair hearing as a general principle of EU law 'cannot be excluded'[119] and must be observed 'in all proceedings initiated against a person which are liable to culminate in a measure

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[115] E.g. Case 270/82 *Estel v Commission* EU:C:1984:84, paras 13 *et seq*; Case C-54/95 *Germany v Commission* EU:C:1999:11, para 118.

[116] Case 179/82 *Lucchini Siderurgica v Commission* ECLI:EU:C:1983:280, para 27.

[117] Case 120/73 *Lorenz v Germany* EU:C:1973:152, para 5; Case 121/73 *Markmann v Germany* EU:C:1973:153, para 5; see also R Bauer, *Das Recht auf eine gute Verwaltung im Europäischen Gemeinschaftsrecht* (Frankfurt am Main: Peter Lang, 2002) 64.

[118] Case 41/69 *Chemiefarma v Commission* EU:C:1970:71, para 27.

[119] Case T-260/94 *Air Inter v Commission* EU:T:1994:265, para 60; Case C-135/92 *Fiskano v Commission* EU:C:1994:267, para 39.

adversely affecting that person'.[120] As a general principle of law, it thus supplements legislation, which does not explicitly provide for its exercise[121] requiring 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',[122]
- must be given right of access to documents and the file (which can be limited in the case of confidential information of third parties).

In procedures using large databases and an automated access and processing to information, it will be necessary to reconsider the notion of the 'file' mentioned in Article 41 Charter and the under the General Principle of law. Here, the traditional idea of a file will not contain all the information processed in decision-making and possibly not all of the facts leading to the decision

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[120] Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* EU:T:2005:331.

[121] Case 234/84 *Belgium v Commission* EU:C:1986:302, para 27; Case 259/85 *France v Commission* EU:C:1987:478, para 12.

[122] See eg Cases 100–103/80 *Musique Diffusion française v Commission* EU:C:1983:158, para 10; In Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission ('Kadi I')* EU:C:2008:461, 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 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.

with the help of an automated system. In view of the purpose of the right to a hearing and access to the file to serve as defence right, access rights under the principle of good administration will therefore need to be interpreted as giving access to the relevant information processed by the automated system in preparation of decision making.

It is less clear 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 289 TFEU), a delegated act (Article 290 TFEU), or an implementing act with effect beyond a single case (Article 291 TFEU). Article 11(1) and (3) TEU requires Union institutions to hear views and opinions on Union measures and to enter into consultation procedures. This reinforces the view of the Court in *Denmark v Commission*,[123] which had found that a right to a hearing is not excluded simply because the basic act is of general application. It is so far not clear from the evolving case law, whether the hearing in these cases is a subjective right of individuals or just a factor for review of the act.

Reasoning of decisions

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

[123] Case C-3/00 *Denmark v Commission* EU:C:2003:167.

basis of the act, the general situation which led to its adoption, and the general objectives which it intended to achieve:[124]

the 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.[125]

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

Where decision making has been fully or partially automated, the purpose of reasoning should in also be interpreted to require not only that there by transparency about the fact that an automated system has been used, but also to require that a detailed listing of the information taken into account in decision-making be provided in order to show that the duty of care has been complied with in the process of an automated processing of data.

Damages

The right to good administration in Article 41(3) Charter contains an explicit reference to the right to receive compensation for damage under Article 340 TFEU. Article 41 Charter therefore cannot limit the obligation to pay damages for violations of the principles listed in the provisions

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[124] Case 5/67 *Beus GmbH v Hauptzollamt München* EU:C:1968:13; see also Case T-13/99 *Pfizer Animal Health v Council* EU:T:2002:209, para 501; Case C-342/03 *Spain v Council* EU:C:2005:151, para 55.

[125] *TU München* (n 115) paras 14 and 26.

on good administration only. The right to damages is discussed in greater detail in chapter 10 on judicial review.

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 is a parallel provision to the right under Article 24(4) TFEU with Article 342 TFEU giving the Council the authority to establish the language regime for the institutions.[126] The right of free choice of the language is applicable to communication with 'institutions' of the EU only. Agencies and other bodies may thus be subject to specific and possibly more limited language regimes, provided for by law.[127]

3.4 Information-related rights: freedom of information and data protection

The right of access to documents is a precondition 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. It is thus of utmost importance in a system under the rule of law. The right of access to documents is explicitly protected as a

[126] This was done by one of the first legal acts issued by the Council, Regulation 1/58 determining the languages used by the European Economic Community (OJ English Special Edition [1952–8] 59).

[127] See eg Case T-120/99 *Kik v OHIM* EU:T:2001:189, para 64.

fundamental individual right under Article 42 Charter and Article 15(3) TFEU.[128] Regulation 1049/2001 specifies conditions of access under Article 15 TFEU but when limiting this right must be interpreted in light of the principle of proportionality under Article 52(1) Charter.[129] Policy specific legislation on access to documents exists in the field of environmental law[130] and, in the field of food safety law obliging the EU food safety authority to pro-actively publish documents.[131]

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[128] Art 15(3) TFEU, lays down that 'Any 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.' Historically speaking, the right of access to documents, as a constitutional right, goes back to the Swedish and Finnish traditions.

[129] Regulation (EC) No 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] L145/43).

[130] See Regulation (EC) No 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] L264/13).

[131] Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain (OJ [2019] L231/1).

Freedom of information rights must be balanced with other individual rights, most notably the right to the protection of personal data and privacy of individuals.[132] Case law of the CJEU has upheld access rights regarding documents arising from legislative procedures.[133] However exceptions to the constitutionally guaranteed right of access to documents listed in Article 4(2) of Regulation 1049/2001 have been interpreted by the Court of Justice quite extensively, finding that important parts of the administrative activities of the Commission should 'enjoy a general presumption of confidentiality' and thus the exercise of the constitutionally guaranteed access-

[132] See esp Case C-28/08 P *Commission v Bavarian Lager* EU:C:2010:378 and Joined Cases C-92/09 and C-93/09 *Schecke* EU:C:2009:284, 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.

[133] See eg Case C-39/05 P and 52/05 P *Sweden and Turco v Council* EU:C:2008:374 (Grand Chamber) paras 35–41.

rights requires proof that the individual interest of access would override any public interest in secrecy.[134]

Union law governing information contains not only rules on access to information but also on the protection of personal information data. Under Article 8 Charter, protection of personal information 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 recognized in Article 8 of the European Convention on Human Rights (ECHR). 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.[135]

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[134] Case C-612/13 P *Client Earth*, EU:C:2015:486. See especially paragraph 77 of the judgment with many further references. As a result, de facto, an overriding interest in access must be argued without prior knowledge of the content of the documents to which access is sought.

[135] See eg Art 16 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ [2004] L123/18); Art 28 of Council Regulation (EC) No 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] L1/1); Art 8 of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ [1999] L136/1); Art 8(1) of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ [1996] L292/2) of Regulation 1/2003 on antitrust enforcement. Art 28 of Regulation 1/2003 protects professional secrecy insofar as it provides

3.5 The right to an effective judicial remedy and additional rights of defence

The CJEU has held that 'the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law'[136] Persons affected by measures of the Union or the Member States acting under Union law must therefore be able to challenge actions affecting their interests.[137] This is protected in Union law by the right to an effective remedy and additional rights of defence.

3.5.1 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 a remedy to ensure its enforcement. Accordingly, the 'right to obtain an effective remedy in a competent court' is protected as a fundamental right as a General Principle of EU law,[138] and under Article 47 Charter. This right is also protected in Articles 6 and 13 ECHR.

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that this information may only be used for purposes for which it was gathered by the Commission and within the competition network and that such information shall not be disclosed.

[136] C-72/15 *Rosneft*, EU:C:2017:236, paras 73–78; C-562/13 *Abdida*, EU:C:2014:2453, para 45; C-362/14 *Schrems I*, EU:C:2015:650, para 95.

[137] HCH Hofmann, GC Rowe, and A Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011) 204.

[138] Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, para 9; Case 222/84 *Johnston* EU:C:1986:206, para 19.

Article 47, first paragraph, Charter, expanding the language of the Convention, grants a 'right to an effective remedy before a tribunal', where any right and freedom recognized 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, second paragraph, Charter clarifying that a tribunal be 'independent and impartial',[139] that hearings be 'fair and public', and that everyone 'ha[s] 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'.[140] Any act which fails to provide 'for any possibility for an individual to pursue legal remedies' in order to protect her or his rights can be found to violate 'the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter'.[141] The right to an effective judicial remedy under EU law is also linked with the principle of effectiveness (flowing from Article 4(3) TEU as discussed previously). Under the *Factortame* formula, the right to an effective remedy offers protection against 'any provision of a

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[139] Case C-506/04 *Wilson* EU:C:2006:587, paras 60–62.

[140] *Kudla v Poland* (Appl No 30210/96) ECHR 2000-XI (Grand Chamber) para 157. Art 13 ECHR is, however, more limited than the right to effective judicial review under EU law. Art 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.

[141] Case C-362/14 *Schrems v Data Protection Commissioner*, EU:C:2015:650, para 95.

national legal system and any legislative, administrative or judicial practice which might impair the effectiveness' of Union law.[142] That means that Member States

- may 'not render virtually *impossible or excessively difficult* the exercise of rights'[143] conferred by EU law,
- are obliged to 'guarantee real and effective judicial protection',[144]
- are barred from applying any rule or applying any procedure which 'might prevent, even temporarily, Community rules from having full force and effect'.[145]

For a practical illustration of this, we 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,

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[142] Case C-213/89 *Factortame* EU:C:1990:257, paras 19 and 20.

[143] See eg Case C-128/93 *Fisscher* EU:C:1994:353, para 37; Case C-261/95 *Palmisani* EU:C:1997:351, para 27; *Courage* (n 7) para 29; Joined Cases C-231–233/06 *Jonkman* EU:C:2007:373, para 28 (emphasis added).

[144] Case 14/83 *Van Colson* EU:C:1984:153, para 23.

[145] *Factortame* (n 152) paras 19 and 20.

- 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.[146]

Additionally, remedies must be granted by courts or tribunals which enjoy independence. The conditions for what counts as an independent court in the sense of Art 19 TEU and thus 47 CFR have been developed by the CJEU in a series of cases.[147] The second sub-paragraph of Art 19(1) TEU requires Member States to 'provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law'. Therefore, Member States must ensure that the 'courts or tribunals' within the meaning of EU law 'meet the requirements of effective judicial protection'.[148] This is the case if a court or tribunal can exercise its judicial functions, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from another source.[149] A 'court or tribunal', capable of

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[146] Correctly, the European Court of Human Rights has pointed out that with respect to Art 13 ECHR (in *MSS v Belgium and Greece* (Appl No 30696/09) [2011] ECHR 108 (Grand Chamber) paras 289 and 290) 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 Art 13, the aggregate of remedies provided for under domestic law may do so.

[147] Cases C-64/16 *Associação Sindical dos Juízes Portugueses (ASJP)*, EU:C:2018:117 paras 33–37; C-222/13 *TDC*, EU:C:2014:2265, para 32.

[148] Case C-284/16 *Achmea*, EU:C:2018:158, para 34.

[149] Case C-64/16 *ASJP*, EU:C:2018:117, paras 44–45.

granting effective judicial protection,[150] must be permanently established by law, its jurisdiction must be compulsory (excluding commercial arbitration), and it must apply procedural rules predefined by law providing for an adjudicatory (*inter partes*) procedure.[151] Courts must be independent and capable of acting with objectivity as a third party to a decision maker.[152]

Independence under EU law, in limitation of Member State procedural autonomy, is further measured by rules establishing 'the composition of the body, the appointment, length of service and grounds for abstention, rejection and dismissal of its members'.[153] Any national disciplinary regime, including the procedures for removal from office concerning judges, must guarantee that it cannot be used as 'a system of political control of the content of judicial decisions', including guarantees against removal from office.[154] Impartiality also requires fairness in a procedure in the sense of a level playing field for the parties to the proceedings and the absence of a judge of any interest in the outcome of the proceedings. The requirement of independence of courts is

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[150] Cases C-506/04 *Wilson v Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587 (Grand Chambre), para 48 with further references; C-64/16 *ASJP*, EU:C:2018:117, paras 38, 40; C-503/15 *Margarit Panicello*, EU:C:2017:126, para 27.

[151] Case 14/86 *Pretore di Salò* v *Persons Unknown* EU:C:1987:275, para 7 ; Case C-17/00 *De Coster* EU:C:2001:651, para 17.

[152] Cases C-506/04, *Wilson*, EU:C:2006:587, para 51; C-503/15 *Margarit Panicello*, EU:C:2017:126, para 37.

[153] This the CJEU refers to as factors protecting courts form external influences. See Case C-103/97 *Köllensperger and Atzwanger* EU:C:1999:52, para 21; Case C-407/98 *Abrahamsson and Anderson* EU:C:2000:367, para 36.

[154] Joined Cases C-9/97 and C-118/97 *Jokela and Pitkäranta* EU:C:1998:497, para 20.

according to the CJEU 'of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected'[155] within a system under the rule of law, according to the EU's own 'constitutional structure'.[156]

3.5.2 **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 Charter. 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'.[157] The Court of Justice 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.[158]

[155] Case C-216/18 PPU *LM* EU:C:2018:586, para 48.

[156] Case C-284/16 *Achmea*, EU:C:2018:158, para 33 and 36 with further references.

[157] Case 222/84 *Johnston v Chief Constabulary* EU:C:1986:206. See also Case C-32/95 P *Commission v Lisrestal* EU:C:1996:402, para 30.

[158] *Hoechst* (n 70) summary point 1.

Some of the rights 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) Charter and were discussed previously. Generally speaking, rights of defence further include

- rights of legal professional privilege,[159] concerning the right to confidentiality of communications with an external lawyer;[160]
- a right against self-incrimination[161]—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'.[162]

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[159] See Case 155/79 *AM&S* EU:C:1982:157, paras 23–26; Case T-30/89 *Hilti v Commission* EU:T:1991:70, para 18; Joined Cases T-125/03 and T-253/03 confirmed by Case C-550/07 P *Akzo* EU:C:2010:512.

[160] *Hilti* (n 169).

[161] See *Hoechst* (n 70); Case 374/87 *Orkem v Commission* ECLI:EU:C:1989:387. 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* ECLI:EU:C:2007:53, para 34.

[162] Case C-407/04 P *Dalmine v Commission* ECLI:EU:C:2007:53, para 35. The Court made it clear in Case C-60/92 *Otto v Postbank* ECLI:EU:C:1993:876, paras 15–17, that this limitation does not apply to civil proceedings in national courts.

Case study 8.4: 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 authorized to establish lists of persons and entities accused by UN Security Council members of being in some way or another associated with terrorist organizations 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. As a result, Mr Yusuf and Mr Kadi, two Swedish citizens, woke up one morning to find that they could no longer withdraw money from their bank accounts. They brought cases before the General Court against the EU legal acts listing them among the persons and entities whose assets should be frozen.[163] Upon appeal against the General Court's judgment the Court of Justice held in *Kadi I* that sanctions against Mr Yusuf had to be withdrawn. 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 Court of Justice in the *Kadi I* and *Kadi II* cases, dismissed the notion of

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[163] Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* EU:T:2005:331; Case T-315/01 *Kadi v Council and Commission* EU:T:2005:332.

Union acts as capable of having some form of 'immunity' from judicial review.[164] It then went on also to address the issues of rights of defence and the right to an effective judicial review.

The General Court in *Yusuf* had already 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'.[165] 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'.[166] 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.[167] However, according to the General Court, 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 *jus cogens* arising from public international law.

On appeal in *Kadi I*, the Court of Justice set aside the General Court'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

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[164] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission ('Kadi I')* ECLI:EU:C:2008:46,1esp paras 325–327.

[165] *Kadi I* (n 174) paras 325–327.

[166] Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* ECLI:EU:T:2005:331, para 325.

[167] Ibid, para 327.

Security Council resolution without following a procedure allowing for compliance with fundamental rights.[168] Therefore, it annulled the regulation freezing Mr Kadi's 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.[169]

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'. 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

[168] *Kadi I* (n 174) followed the AG. It upheld the Community standards of fundamental rights protection in paras 281 *et seq*.

[169] *Kadi I* (n 174) esp paras 326 and 327.

thereafter'.[170] 'Since Mr Kadi had not been in a position effectively 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.'[171]

The *Kadi II* case, decided by the Court of Justice in 2013,[172] 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 Quadi) 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 Mr Kadi's assets 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 General Court alleging, inter alia, breach of the right of the defence and of the right to effective judicial protection. The Court, 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 light of the fundamental rights guaranteed by the EU. This meant that

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[170] *Kadi I* (n 174) esp 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*, EU:C:2013:518 (Kadi II), para 24.

[171] *Kadi I* (n 174) paras 345–349 in the summary given in *Kadi II* (n 180), para 25.

[172] *Commission and UK v Kadi* (n 180).

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.[173]

The Court 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.

(a) No access to the evidence against him

Mr Kadi was refused access by the Commission to the evidence against him despite his express request, while no balance was struck between his interests and the need to protect the confidentiality of the information in question.

(b) Vague and insufficient allegations

[173] *Kadi II* (n 180) paras 39–41.

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].[174]

The General Court 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 Court.[175]

On appeal, the Court of Justice in its *Kadi II* judgment confirmed the General Court's interpretation of the violation of the right of defence and of an effective judicial review.[176] The right of defence arises from both the General Principles of EU law affirmed, inter alia, by Articles 42(2) and 47 Charter. However, limitations on the exercise of the right are possible, as set out in Article 52(1) Charter. This requires that limitations respect the essence of the right in question and are proportionate. It also requires analysis of the specific circumstances of the

[174] Case T-85/09 *Kadi v Commission* [2010] ECR II-5177 (General Court) paras 171–180 as cited by *Kadi II* (n 180) para 43.

[175] *Kadi II* (n 180), para 44.

[176] *Kadi II* (n 180), paras 97–134.

particular case, including the nature of the act at issue, the context of its adoption, and the legal rules governing the matter in question.[177]

One of the obligations which arises in the context of the right to good administration and is also related to the right of defence is the obligation of the Union administration regarding the 'duty of care'. In the words of the Court of Justice, 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'.[178]

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'.[179] The reason for this is that effective judicial review requires verification of the allegations and a review of whether 'those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated'.[180] In the absence of sufficient reasoning of the act, the Courts will base their review 'solely on the material which has been disclosed to them' and if 'that material

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[177] Ibid, para 102.

[178] Ibid, para 114 with references to Case C-269/90 *Technische Universität München* EU:C:1991:438, para 14; Case C-525/04 P *Spain v Lenzing* EU:C:2007:698, para 58.

[179] *Kadi II* (n 180) para 116; Joined Cases C-539/10 P and C-550/10 P *Al-Aqsa v Council and Netherlands v Al-Aqsa* EU:C:2012:711, paras 140 and 142.

[180] *Kadi II* (n 180), para 119.

is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason'.[181] The reason behind this is that 'the essence of effective judicial protection must be that it should enable the person concerned to obtain …annulment' of the contested measure.[182]

The Court of Justice therefore concluded 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 observations presented by that person and any exculpatory evidence that may be produced by him.[183]

The *Kadi* and *Al Barakaat* cases, as well as the *Ahmed Ali Yusuf* case, have become central reference points for several central issues of EU law. They address not only the relation between EU law and public international law obligations of the Member States in general, but they also

[181] Ibid, para 123.

[182] Ibid, para 134.

[183] Ibid, para 135.

clarify that it is inconceivable that any exercise of public authority by the EU could fail to comply with fundamental rights and EU General Principles protecting both substantive and procedural rights of individuals. Procedural rights, especially regarding the rights of defence and of good administration including the right to a fair hearing, the right to access to one's file, and many other rule of law-related principles, were enforced by the Court of Justice in a highly publicized case.

4 Conclusion

In summary, with entry into force of the Charter of Fundamental Rights of the European Union under the Treaty of Lisbon (Article 6(1) TEU) many of the rights and principles which were initially established under the case law of the Court of Justice 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 Charter. Importantly, however, this has not led to the discarding of the pre-Treaty of Lisbon 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 'Europeanization' and new influences, such as the drive towards more transparency of the legal system which took on board some of the more 'Nordic' legal traditions of the EU. A general administrative procedure act for the EU might clarify to a much greater degree than Article 41 Charter was capable of doing, 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, compliance with principles under the rule of law, and good administration in general.

Further reading

There is much literature on General Principles of EU law, less so on EU administrative law. As always, it is important to study EU law by taking into account contributions from the different language groups which often discuss EU law from varying experiences and with a focus sometimes different from that chosen by authors of another.

J-B AUBY AND J DUTHEIL DE LA ROCHÈRE (eds), *Traité de Droit Administratif Européen* (2nd edn, Brussels: Bruylant, 2014)

M CHITI (ed), *Diritto amministrativo europeo* (Milan: Guiffrè Editore, 2013)

P CRAIG, *EU Administrative Law* (3rd edn, Oxford: Oxford University Press, 2016)

HCH HOFMANN, GC ROWE, AND AH TÜRK, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011)

JE SORIANO GARCÍA (ed), *Procedimiento Administrativo Europeo* (Navarra: Thomson Reuters, 2012)

JP TERHECHTE (ed), *Verwaltungsrecht der Europäischen Union* (2nd edn, Baden-Baden: Nomos, 2021)

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