

JUDICIAL REVIEW OF EUROPEAN ADMINISTRATIVE PROCEDURE

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I

INTRODUCTION

“Form is the sworn enemy of arbitrariness, the twin sister of liberty.”¹ In this spirit, the role of a well-regulated administrative process in securing liberty has been emphasized repeatedly. Like its Member States, the European Community (EC) has submitted itself to the principle of the rule of law, including the obligation to adhere to impartial and fair administrative procedure.

This Article examines the requirements set down in the case law of the Court of Justice and the Court of First Instance that serve to guarantee a fair and impartial administrative process. It also considers whether improvements should be made to the design of the administrative process and, if so, what kind. The survey is not exhaustive but concentrates on selected questions that are essential in practice. The Article’s scope is defined by exploring, in some depth, the two terms key to this discussion—“direct” and “indirect” implementation of administrative law.

A. Judicial Review

In *Les Verts v. Parliament*,² the European Court of Justice emphasized that the European Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid judicial review of their actions to determine whether those actions are in conformity with the Treaty Establishing the European Community (“Treaty”). The Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice and the Court of First Instance to review the legality of measures adopted by the EC’s institutions.³ At present, under Article 230(4) of the Treaty, individuals have access to the European Courts only if the act in question directly and individually concerns the complainant. For this reason, the system of legal remedies has often been criticized as being too

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1. R. VON IHERING, *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN DER ENTWICKLUNG* II, 471 (3d ed. 1874) (opus on the spirit of Roman law).

2. Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1357, para. 23. The Court already mentioned the principle of the rule of law in the earlier Case 101/78, *Granaria B. V. v. Hoofdprodukschap voor Akkerbouwprodukten*, 1979 E.C.R. 623, para. 5.

3. Case C-50/00, *Unión de Pequeños Agricultores v. Council*, 2002 E.C.R. I-6677, para. 38.

narrow, particularly regarding direct legal protection of individuals against general legal acts. The Court of Justice has recently pointed out, however, that broadening access to judicial review by allowing individuals to seek remedies against general legal acts—contrary to the wording of Article 230(4) of the Treaty—would go beyond its powers as a court. Instead, it is the responsibility of the Member States to alter their statutory provisions to create legal remedies for individuals.⁴ Notably, in the Treaty Establishing a Constitution for Europe, the European Convention has proposed that legal protection should be extended “against a regulatory act which is of direct concern to [the complainant] and does not entail implementing measures.”⁵ This seems to be an acceptable compromise between the necessities of adequate judicial protection of the individual and the prevailing view in the Member States that general legal acts should as a matter of principle not be subject to direct judicial challenges by individuals.

The central provision governing the principles of judicial review is Article 230 of the Treaty. Following the model of French administrative law, Article 230(2) states four grounds of action to annul an administrative action: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, and misuse of powers. That infringement of an essential procedural requirement is stated separately is remarkable since it is already covered by the general provision of Art. 230 (2) (infringement of the Treaty or of any rule of law relating to its application).⁶

Article 230 deals with the judicial control of administrative procedure in the narrow sense—specifically, infringement of an essential procedural requirement. It also includes certain aspects of substantive grounds for annulment, such as infringement of the Treaty or infringement of any rule of law relating to its application. The latter issues represent some of the most interesting and most recent developments in the case law of the European Courts.

B. European Administrative Procedure

There is no single European administrative procedure. But direct administrative implementation of Community law (that is, administration carried out by Community institutions) is distinct from indirect administrative implementation (that is, administration carried out by the Member States). The vast majority of Community law is still implemented by national authorities. Administrative procedure in indirect administration lacks uniformity because of the principle of administrative autonomy—that is, that national authorities follow national procedural rules.

It is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are

4. *Id.* at para. 39. For a further discussion of this case see J. SCHWARZE, DEUTSCHES VERWALTUNGSBLATT 1297 (2002).

5. TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, art. III-365, para. 4, 2004 O. J. (C 310) 1.

6. D. Booß, in DAS RECHT DER EUROPÄISCHEN UNION: KOMMENTAR, Art. 230 para. 94 (E. Grabitz & M. Hilf, eds.).

not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).⁷

Notwithstanding national autonomy, the need for equity and effectiveness has led to considerable Community influence on national administrative law and procedure. The preliminary rulings of the Court of Justice have been particularly influential.

This Article focuses primarily on the first area: the direct implementation of European law by European institutions. In this field a uniform set of principles, the “European Administrative Procedure,” can be identified, although the particulars depend on the concrete subject matter. The degree of codification especially differs from field to field. The most important areas of direct implementation are the competition policy (Articles 81 et seq.), including antitrust law and merger control; the law on the European civil service; the conditions for awarding Community subsidies; and the restrictions on state aid (Articles 87 et seq.).

II

SOURCES OF THE LAW ON ADMINISTRATIVE PROCEDURE

European administrative procedure law is built on two pillars: written law, in the form of primary and secondary law; and judge-made law created by the European Courts.

A. Written Law

Some principles of administrative procedure can be found in primary Treaty law. Article 253 contains the duty to give reasons. Regarding the control of state aid, Article 88 (2) provides the right to be heard. Finally, Article 287 imposes the duty to observe rules of professional secrecy and to respect the confidentiality of information given to European officials by companies as well as by natural persons.

Other administrative procedure principles are stated in rather detailed written sources of secondary law for competition policy,⁸ for the control of national subsidies,⁹ and for the regulation of the Community’s own civil service.¹⁰ In addition, rights of defense—originally, unwritten principles developed by the Court—are now at least partially protected in secondary legislation.¹¹

7. Case C-120/97, *Upjohn Ltd. v. The Licensing Auth. established by the Medicines Act 1968*, 1999 E.C.R. I-223, para. 32; Case C-228/98, *Charalampos Dounias v. Ypourgos Oikonomikon*, 2000 E.C.R. I-577, para. 58.

8. Rules for the administrative implementation of the antitrust provisions of Art. 81 and 82 EC can be found in Council Regulation 1/2003, 2003 O. J. (L 1) 1 (formerly Council Regulation 17/62, 1962 O. J. (P 13) 204) as well as in the Commission Regulation 773/2004, *Relating to the Conduct of Proceedings by the Commission*, 2004 O. J. (L 123) 18. Council Regulation 139/2004, 2004 O. J. (L 24) 1 (formerly Council Regulation 4064/89, 1989 O. J. (L 395) 1), regulates the control of concentrations between undertakings and is supplemented by the Commission Regulation 802/2004, 2004 O. J. (L 133) 1.

9. The detailed rules for the application of Art. 88 EC can be found in Council Regulation 659/99, 1999 O. J. (L 83) 1.

10. The staff regulations for officials and the conditions of employment of other servants of the European Communities are laid down in Council Regulation 259/68, 1968 O. J. (L 56) 1.

11. Regarding the right to be heard the former Commission Regulation 2842/98 on the hearing of parties in cartel matters has to be mentioned. Equally the new Council Regulation 1/2003 on the implementation of

Yet secondary law is generally limited to specific areas of Community competence and does not broadly cover all types of Community administrative action. Even in the face of codification, unwritten law continues to play an important role.

B. Unwritten Law and Judge-Made Law

Many unwritten principles shape European administrative law. On the one hand, the important role of unwritten sources is due to the specific nature of Community law. The Treaty establishing the European Community, almost like a *traité cadre*, only set leading goals and principles and left the gap-filling to secondary legislation and, if necessary, to the jurisdiction of the Court. On the other hand, judge-made law at the Community level is typical of administrative law, which at its origin was shaped primarily by judges—in particular, the French *Conseil d'Etat*. Not very long ago, codes of administrative procedure were first drafted and promulgated to serve as written sources of administrative law in the Member States. The administrative law of the Community shows similar features, although it rightly claims to be a new, independent legal order of its own.

The European Court has come a long way since the famous *Algera* case¹² in developing general principles of administrative law¹³ and procedure, especially those principles regarding rights of defense.

The European Courts rely on a number of sources for jurisprudence on administrative procedure. First, they resort to the common administrative provisions of the Member States. Second, the Charter of Fundamental Rights of the European Union, proclaimed at Nice on December 7, 2000,¹⁴ gives some direction on administrative principles. For example, Article 41 of the Charter provides for the right to good administration: every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time. This includes the right of every person to be heard before the Community takes any individual measure that would adversely affect him or her; the right of access to files, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and the duty of the administration to give reasons for its decisions. Although the Charter of Fundamental Rights is still a non-binding document, it can, like the European Convention of Human Rights (ECHR),¹⁵ indicate general principles common to the different legal traditions of the Member States. In fact, the Court of First Instance has already referred to the right to good administration in a case before it.

Since the present action is directed against a measure rejecting a complaint, it must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed

Articles 81 and 82 EC, that came into force in May 2004, deals in its Article 27 with the right to be heard, the right to have access to the Commission's files and the protection of business secrets. Article 28 of this regulation demands professional secrecy from the Commission's and Member States officials.

12. Cases 7/56, 3/57 to 7/57, *Dineke Algera et al. v. Common Assembly*, E.C.R. 39 (1957).

13. See JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW*, 59 (1992); 1 *EUROPÄISCHES VERWALTUNGSRECHT* 57; 1 *DROIT ADMINISTRATIF EUROPÉEN* 69.

14. 2000 O. J. (C 364) 1.

15. For the relevance of the ECHR for EC law see, e.g., Case T-112/98, *Mannesmannröhren-Werke AG v. Comm'n*, 2001 E.C.R. II-729, para. 59.

in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 . . . confirms that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.¹⁶

III REVIEWABLE ACTS

The stage at which administrative decisionmaking is open to judicial review deserves a closer look. Only an act that produces discernible legal effects—that appears to produce a change in someone’s rights and obligations—can be subject to judicial review. Non-binding recommendations or opinions are excluded from review. In three different types of borderline cases—preparatory acts, intermediate decisions, and the administrative decision to initiate litigation—the legal effects of administrative acts are not immediately apparent.

A. Preparatory Acts

The Court will not review merely preparatory acts, such as the Commission’s decision to initiate competition proceedings or the statement of objections in a cartel case. In *IBM v. Commission*,¹⁷ the Court refused to review the initiation of a proceeding and the statement of objections because these decisions did not produce direct legal consequences. The Court noted

[a] Statement of objections does not compel the undertakings concerned to alter or reconsider its marketing practices. . . . Whilst a statement of objections may have the effect of showing the undertaking in question is incurring a real risk of being fined by the Commission, that is merely a consequence of fact, and not a legal consequence.¹⁸

The Court further argued that the review of such a decision would

make it necessary for the Court to arrive at a decision on questions on which the Commission has not yet had an opportunity to state its position and would as a result anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial.¹⁹

Such a decision would therefore be incompatible with the division of powers that exists between the Commission and the Court.²⁰

B. Intermediate Decisions

In a proceeding consisting of several stages, the Commission may make intermediate decisions on matters separate from the final determination, which represents a definitive position and thus produces legal consequences. One example of such an intermediate decision is a request for information during a cartel procedure.

16. Case T-54/99, *max.mobil Telekommunikation Service GmbH v. Comm’n*, 2002 E.C.R. II-313, para. 48.

17. Case 60/81, *Int’l Bus. Mach. Corp. v. Comm’n*, 1981 E.C.R. 2639.

18. *Id.* at para. 19.

19. *Id.* at para. 20.

20. *Id.*

The right to have this decision reviewed by the Court of Justice is set down in Article 18(3) of Regulation 1/2003²¹ on anti-competitive agreements among firms.

Another example of a reviewable intermediate decision is any decision concerning the transmission of a company's documents to a third party. In *AKZO v. Commission*,²² the Court considered the Commission's decision to transmit certain documents to third parties as definitive in nature and independent from any final decision. According to the ECJ, the opportunity to bring an action against the final decision would not provide the company with an adequate degree of protection since it would not prevent the irreversible consequences that would result from the potentially illegal decision.

In sum, whenever a decision carries the risk of irreversibly infringing a party's rights of defense, a separate action for annulment is possible.

C. Commencement of Legal Proceedings

The issue of legal effects and reviewability also arises with respect to an administration's decision to commence litigation. In *Philip Morris and Others*,²³ recently decided by the Court of First Instance, several American cigarette manufacturers challenged the Commission's decision to sue certain companies in United States district court for their alleged involvement in a cigarette smuggling ring. According to the Commission, the cigarettes were smuggled into and distributed within the European Community. The Community was seeking compensation for the loss resulting from the smuggling, consisting mainly of lost customs duties and value added tax (VAT)—which would have been paid on legal imports—as well as injunctions prohibiting the alleged activities in the future.²⁴

The tobacco companies were unable to obtain review in the Court of First Instance. The Court dismissed the actions because the challenged act had, in its view, no legal effects:

The commencement of legal proceedings is not without legal effects, but those effects concern principally the procedure before the court seized of the case. The commencement of proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment but does not per se determine definitively the obligations of the parties to the case. That determination can result only from the judgment of the court. The decision to commence legal proceedings does not, therefore, in itself alter the legal position in question. . . . When it decides to commence proceedings, the Commission does not intend (itself) to change the legal position in question, but merely opens a procedure whose purpose is to achieve a change in that position through a judgment.

This reasoning holds true not only for actions brought by an institution before the Court of Justice, but also for proceedings it may commence before national courts. In both cases, it is not the institution that brings the case before the Community or national court, but only that court which, by the decision it is called upon to give, can alter the legal position underlying the case and determine definitively the rights and obligations of the parties.²⁵

21. Formerly Article 11 (5) of Regulation 17/62.

22. Case 53/85, *AKZO Chemie et al. v. Comm'n.*, 1986 E.C.R. 1965, para. 20.

23. Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International et al. v. Comm'n* 2003 E.C.R. II-1.

24. *Id.* at para. 3.

25. *Id.* paras. 79 & 80.

Given the consequences for the defendants of any legal action, the Court should have taken a different position. By dismissing this action, the Court lost the opportunity to decide whether the Commission's initiating the lawsuit complied with EC law. In view of the extraordinary character of a lawsuit in third-country courts, and the possible impact on the European Union's foreign policies, the question of the legality of the prosecutorial decision deserved judicial review. Because the U.S. courts will not decide the issue of the Commission's power, the Commission will never know whether it was legally entitled to push the tobacco industry into the role of defendant.

IV

PROCEDURAL REQUIREMENTS

Different legal acts have different procedural requirements. The procedural requirements of an administrative action include adherence to certain provisions on form, consultation of an advisory body, adequate reasoning, and publication or notification of an act.²⁶ Foremost among the procedural requirements subject to judicial review in the European Courts are the so-called rights of defense. In the majority of legal proceedings challenging administrative acts, the complainant claims that his rights of defense were violated by the administration.

A. Rights of Defense

The rights of defense include the right to be heard (including the right of access to the Commission's files), the duty to give reasons, the reasonable duration of the proceedings, the confidentiality of attorney-client correspondence, and the privilege against self-incrimination.²⁷

1. Right to Be Heard

The most important principle of administrative procedure is probably the right to be heard, which is closely related to the concept of fair and just proceedings.²⁸ The Court of Justice has acknowledged "the general principle that when any administrative body adopts a measure which is liable gravely to prejudice the interests of an individual it is bound to put him in a position to express his point of view."²⁹

26. See H. G. SCHERMERS/D. F. WAELEBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN UNION*, § 758 et seq. (6th ed. 2001)

27. See Case 374/87, *Orkem SA v. Comm'n*, 1989 E.C.R. 3283, para. 35: "Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove."

28. Already in 1963 the ECJ had pointed out that,

[a]ccording to a generally accepted principle of administrative law in force in the Member States . . . , the administrations . . . must allow their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them. This rule, which meets the requirements of sound justice and good administration, must be followed by Community institutions.

Case 32/62, *Maurice Alvis v. Council*, 1963 E.C.R. 109, 123. See generally *M. Waline, Le principe "Audi alteram partem"*, in *LE CONSEIL D'ETAT DU GRAND-DUCHE DE LUXEMBOURG: LIVRE JUBILAIRE 495* (1957).

29. Case 121/76, *Moli v. Comm'n*, 1977 E.C.R. 1971, 1979.

The leading case concerning the right to be heard is *Transocean Marine Paint Association v. Commission*.³⁰ In *Transocean*, the Commission subjected the extension of an exemption from the prohibition of cartels under Article 85 (3) of the EEC Treaty, now Article 81 (3) of the Treaty, to a new set of conditions. The paint manufacturers who were parties to the exempted manufacture and marketing agreement were required to supply the Commission with information about any links between members of the Association and any other company in the paint sector or any Association members' financial participation in such outside companies. The members of the Association appealed to the Court of Justice, claiming the Commission had violated certain provisions of an antitrust regulation³¹ by imposing the above-mentioned new conditions upon the Association without a hearing on its views. Advocate General Warner used the opportunity, which came shortly after the United Kingdom had joined the EEC in 1973, to introduce certain principles of English law into European Community law. He explained that in English law the right to be heard is a so-called "rule of natural law," which requires that a party be heard even if there is no written obligation.³² Warner demonstrated in his opinion that the concept of *audi alteram partem*³³ is a general principle recognized in the legal orders of all Member States and that it should, therefore, also govern administrative proceedings in the European Community.³⁴ The Court accepted the opinion and held that the relevant regulation applied:

The general rule is that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission. This is especially so in the case of conditions which, as in this case, impose considerable obligations having far-reaching effects.³⁵

The right to be heard inescapably also includes the right of access to the Commission's files. For an individual or undertaking to express its views effectively, it must also be able to respond to the documents used by the administration in support of the allegation of misconduct.³⁶

30. Case 17/74, *Transocean Marine Paint Ass'n v. Comm'n*, 1974 E.C.R. 1063.

31. Commission Regulation 99/63/EEC, 1963 O.J. (P 127) 2268 on the hearings provided for in Article 19 (1) and (2) of Council Regulation 17/62.

32. Case 17/74, *Transocean Marine Paint Ass'n v. Comm'n*, 1974 E.C.R. 1083, 1090.

33. Advocate General Warner's argument proves among other things the importance of Roman law ideas and Latin expressions within the multilingual juristic community of the ECJ. From a doctrinal point of view, their meaning is not totally precise but nonetheless can serve as a platform for a basic level of common understanding. Another example of reference to a Latin formula (*patere legem quam fecisti*) is to be found in the opinion of Warner, Case 81/72, *Comm'n v. Council*, 1973 E.C.R. 587, 594 et seq.

34. Case 17/74, *Transocean Marine Paint Ass'n v. Comm'n*, 1974 E.C.R. 1083, 1090 et seq.

35. *Id.* at 1081, para. 15.

36. See, e.g., Case 322/81, *N.V. Nederlandsche Banden-Industrie Michelin v. Comm'n*, 1983 E.C.R. 3461, para. 7.

2. Duty to Give Reasons

The obligation to give reasons serves the aim of effective legal protection by enabling courts to carefully review administrative decisions. The European Courts have consistently held

[t]hat the statement of grounds required by Article 190 of the EEC Treaty (now Article 253 EC) 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 the Court to exercise its supervisory jurisdiction.³⁷

The extent of this duty depends on the circumstances of each individual case. When assessing whether the administration's statement of reasons meets the requirements, the Court must consider factors such as the content of the measure, the nature of the reasons given, and the interest of the parties in obtaining explanations.³⁸ According to the European Court of Justice, the administration's reasoning does not have to address all the relevant facts and points of law, since judging whether the statement of reasons meets the requirements involves not only the administration's wording but also the context and all the legal rules governing the matter in question.³⁹

3. Principle of a Reasonable Duration of the Proceedings

A general principle of Community law is that the administration must adopt decisions within a reasonable time.⁴⁰ According to the European Courts, it is impossible to determine a precise, maximum limit in the abstract. The reasonableness of a period must instead be appraised in the light of the specific circumstances of each case, taking into account context, complexity, the importance of the case to the parties involved, and the conduct of both the person concerned and the authorities.⁴¹

4. Confidentiality of Attorney-Client Correspondence

The principle of privileged attorney-client correspondence was adopted by the Court in *AM & S Europe Limited v. Commission*.⁴² This principle, familiar to lawyers

37. Case 350/88, *Société Francaise des Biscuits Delacre SA et al. v. Comm'n*, 1990 E.C.R. I-395, para. 15. As an example of the latest jurisprudence see Case C-113/00, *Spain v. Comm'n*, 2002 E.C.R. I-7601, para. 47; Cases T-141/99, T-142/99, T-150/99 and T-151/99, *Vela Srl and Tecnagrind SL v. Comm'n*, 2002 E.C.R. II-4547, para. 168; Case T-199/99, *Sgaravatti Mediterranea Srl v. Comm'n*, 2002 E.C.R. II-2289, para. 100.

38. Case C-113/00, *Spain v. Comm'n*, 2002 E.C.R. I-7601, para. 47 et seq; Cases T-141/99, T-142/99, T-150/99 and T-151/99, *Vela Srl and Tecnagrind SL v. Comm'n*, 2002 E.C.R. II-4547, para. 169; Case T-199/99, *Sgaravatti Mediterranea Srl v. Comm'n*, 2002 E.C.R. II-2289, para. 100.

39. Case C-17/99, *France v. Comm'n*, 2001 E.C.R. I-2481, para. 36; Case C-310/99 *Italy v. Comm'n*, 2002 E.C.R. I-2289, para. 48; Case T-15/99, *Brugg Rohrsysteme GmbH v. Comm'n*, 2002 E.C.R. I-2289, para. 203; Cases T-141/99, T-142/99, T-150/99, T-151/99, *Vela Srl and Tecnagrind SL v. Comm'n*, 2002 E.C.R. II-4547, para. 170.

40. Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV (LVM) et al. v. Comm'n*, 2002 E.C.R. I-8375, para. 164 et seq.; Cases T-213/95 and T-18/96 *Certificatie Kraanverhuurbedrijf (SCK) et al. v. Comm'n*, 1997 II-1739, para. 56. For the reasonable duration of judicial proceedings, see Case C-185/95 P, *Baustahlgewebe GmbH v. Comm'n*, 1998 E.C.R. I-8417, para. 26 et seq.

41. Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV (LVM) et al. v. Comm'n*, 2002 E.C.R. I-8375, para. 187, 192; Cases T-213/95 and T-18/96, *Certificatie Kraanverhuurbedrijf (SCK) et al. v. Comm'n*, 1997 II-1739, para. 57.

42. Case 155/79, *AM and S Europe Ltd. v. Comm'n*, 1982 E.C.R. 1575.

in common law states,⁴³ is not developed to the same extent in continental European legal orders—a circumstance that created a notable challenge for the Court. In *AM & S Europe Limited*, the Court had to decide on the scope of the Commission's investigative powers in antitrust proceedings. During an investigation in 1979 into an alleged cartel on zinc producers, AM & S Europe Ltd. refused to produce certain documents, including correspondence and records of legal consultations with independent and in-house lawyers. AM & S claimed that these documents were protected by the attorney-client privilege.⁴⁴ In contrast, the Commission took the view that its investigative powers in antitrust procedures included an unlimited right to check any document and file and to make a determination as to significance. In its view, this right extended to correspondence and records of legal consultations with independent and in-house lawyers. Although the Court of Justice acknowledged that the standard of protection differs among the Member States, it concluded that European Community law contains a general principle of privileged correspondence between lawyers and clients, at least for correspondence with independent, as opposed to in-house, lawyers:

Apart from these differences, however, there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.⁴⁵

In the AM & S judgment, the Court recognized the individual right of confidentiality of correspondence between lawyer and client, and defined its exact shape through a synthesis of common law concepts and continental law ideas.

B. Relevance of Procedural Guarantees

1. Importance of Procedural Guarantees for Discretionary Decisions

The Courts normally grant European administrative authorities broad discretionary powers. Since they do not want to substitute the administrative judgment with their own, they only check that the procedural rules have been observed, that the facts have been accurately stated, and that there has been no manifest error of assessment or a misuse of power.

Because discretionary decisions are not fully reviewable, the Courts attach great importance to compliance with the formal rules of procedure. This point was particularly emphasized in *Technische Universität München v. Commission*.⁴⁶ The Court reviewed a decision of the Commission regarding the customs duty imposed on an electron microscope imported from Japan. As it had in previous cases, the Court of

43. For the law of the United Kingdom as far as legal confidence of lawyers' correspondence is concerned, see House of Lords, Select Committee on the European Communities Competition Practice (H.M.S.O., London: February 1982) p. XII passim.

44. For the history of this case, see H. W. KREIS, *in* ANTITRUST AND TRADE POLICIES OF THE EUROPEAN ECONOMIC COMMUNITIES 157 (B.E. Hawk ed., 1983).

45. Case 155/79, *AM and S Europe Ltd. v. Comm'n*, 1982 E.C.R. 1575, para. 21.

46. Case C-269/90, *Technische Universität v. Hauptzollamt München-Mitte*, 1991 E.C.R. I-5469, para. 13 et seq.

Justice noted that if an administrative procedure requires complex technical evaluations, the Commission must have a power of discretion.⁴⁷ But in *Technische Universität München*, the Court further ruled that only if the required procedural steps had been observed could it find that the Commission had properly used its discretionary powers. According to the Court, the procedural guarantees in this sense included rules on investigation, the right to be heard, and the duty to give reasons for the administrative action. The Court explained:

It must be stated first of all that, since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks. However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.⁴⁸

The importance of this case lies in its strict enforcement of procedural requirements in the administrative decisionmaking process.⁴⁹ Discretion can be exercised properly only if the decisionmaking process is correct. Professor Rodríguez Iglesias, former President of the European Court of Justice, has emphasized that this judgment reflects a more general tendency to extend judicial protection of individual rights.⁵⁰ The European Courts have since confirmed these principles.⁵¹

The reason for strict observance of the rules for administrative procedure is obvious, particularly in the field of highly complicated administrative decisions. Judges leave evaluation of the substance largely to the administration, which is thought to have special expertise on technical matters.⁵² To counterbalance administrative discretion, the Courts ensure the strict observance of procedural safeguards for the benefit of individuals, associations, or institutions affected by the administrative decision. Today, allowing the administration discretionary powers

47. Discretionary powers are delegated to the Commission by Directive 83/348 EEC under which scientific apparatuses benefit from customs duty exemptions when they are of “educational, cultural or scientific value.”

48. Case C-269/90, *Technische Universität v. Hauptzollamt München-Mitte*, 1991 E.C.R. I-5469, para. 13 et seq.

49. J. SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 143 (1992).

50. G. C. RODRÍGUEZ IGLESIAS, *EUROPARECHT* (1992).

51. *See, e.g.*, Case C-294/90, *British Aerospace et al. v. Comm’n*, 1992 E.C.R. I-493. The Court linked the lawfulness of a decision, in this instance the recovery of a subsidy, to guarantees of administrative procedure. The case *British Aerospace* underlines the Court’s interest in procedural control. The Court once again declared a decision of the Commission unlawful on procedural grounds, this time because certain procedural requirements stipulated in the Treaty—in Art. 87 and Art. 88 (2) EC—had not been met. The discretionary powers exercised by the Community were derived directly from Treaty provisions, i.e. Art. 87 (1) EC. The procedural guarantees can be found in Art. 88 (2) EC, requiring a period of time to be granted to the subsidy-receiving parties to enable them to state their views.

52. Case 188/85, *Fediol v. Comm’n*, 1988 E.C.R. 4193, para. 40; J. SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 1443 (1992); I. van Bael, *Discretionary Powers of the Commission and Their Legal Control in Trade and Antitrust Matters*, in *DISCRETIONARY POWERS OF THE MEMBER STATES IN THE FIELD OF ECONOMIC POLICIES AND THEIR LIMITS UNDER THE EEC TREATY* 165, 173 (J. Schwarze ed., 1988).

appears permissible only if discretion is exercised in strict observance of procedural guarantees.

2. The Importance of Procedural Guarantees for the Protection of Fundamental Rights

Procedural guarantees are also important for the protection of fundamental rights and freedoms.⁵³ In *Stanley Adams v. Commission*, the Court developed its analysis on procedural and fundamental rights.⁵⁴ The case tested the Commission's duty to protect the confidentiality of information given by companies and natural persons. Stanley Adams had informed the Commission of certain anti-competitive practices of his former employer, Hoffmann-La Roche. This information led the Commission to impose a fine on the Swiss company for the abuse of its dominant position in the market for bulk vitamins.⁵⁵ In the course of the antitrust proceeding, the Commission disclosed documents that made it possible for Hoffmann-La Roche to identify Adams as the source of the information. This led to his arrest, detention, and conviction in Switzerland. Adams brought an action under Article 230 and Article 288 of the Treaty⁵⁶ against the Commission for damages. He blamed the Commission for having disclosed confidential information and for not having warned him of the risk of his returning to Switzerland. The Court held that Article 214 EEC Treaty (now Article 287 of the Treaty), which lays down the obligation of the members and civil servants of Community institutions "not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about companies, their business relations or their cost components," contains a general principle that applies not only to confidential information gathered from companies, but also to information supplied by natural persons.⁵⁷ The Court found that the Commission was bound by a duty of confidentiality toward Mr. Adams. It left open the question whether the Commission's handing over of the documents to Hoffmann-La Roche was sufficient to create liability for Mr. Adams' misfortunes. The Court concluded, however, that the Commission had had a duty to take every possible step to warn Adams of the measures that Hoffmann-La Roche was likely to take against him once they learned he was an informant.⁵⁸ The Commission had failed to warn Mr. Adams, and it was found liable for the harm to Mr. Adams' personal freedom and property interests.

The Stanley Adams case illustrates an additional point: two or more procedural rights might sometimes come into conflict. Hoffmann-La Roche's right to be heard includes the right to obtain information about the factual data upon which the Commission's decision was based. Yet Hoffman-La Roche's rights must be

53. Art. 41 of the Charter of Fundamental Rights provides for the right to good administration; *see also supra* nn. 12–16 and accompanying text.

54. Case 145/83, *Stanley Adams v. Comm'n*, 1985 E.C.R. 3539; *see also* Case 53/85, *AKZO Chemie et al v. Comm'n*, 1986 E.C.R. 1965.

55. *See* Decision 76/642/EEC, 1976 O. J. (L 223) 27. This decision of the Commission was confirmed in all essential respects by the Court's judgment of February 13, 1979, Case 85/76 *Hoffmann-LaRoche v. Comm'n* 1979 E.C.R. 461.

56. Formerly Article 178 and Article 215 (2) EEC.

57. Case 145/83, *Stanley Adams v. Comm'n*, 1985 E.C.R. 3539, para. 34.

58. *Id.* at para. 42.

reconciled with the interest in efficient anti-trust procedure and the interests of those who provide the Commission with information in secrecy.⁵⁹

In *UNECTEF v. Heylens*,⁶⁰ another landmark case in fundamental rights, the issue was whether the principle of the free movement of workers (Article 39 EC) rendered unlawful a national provision on access to the football trainer profession. The provision allowed individuals without a national diploma or the equivalent to be denied access to the profession without explanation and without recourse to challenge the administrative decision refusing recognition. The Court of Justice found this national law incompatible with the free movement of workers—a fundamental right under Community law. The principle of effective legal protection of such rights was described by the Court as a “general principle of Community law [that] underlies the constitutional traditions common to the Member States and [that] has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”⁶¹

Moreover, the Court had this to say about the relationship between judicial review and the administration’s duty to give reasons:

Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reason on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.⁶²

The protection of fundamental, constitutional rights is thus inextricably linked to correct administrative procedure.

C. Legal Consequences of Procedural Defects

Under Article 230 of the Treaty, only the “infringement of an essential procedural requirement” is grounds for annulment. However, procedural requirements can hardly be classified as essential or unessential: what is meant, instead, is the essential or unessential infringement of the same provision.⁶³ Whether an infringement is

59. J. Schwarze, *The Administrative Law of the Community and the Protection of Human Rights*, 1996 COMMON MKT. L. 401.

60. Case 222/86, *UNECTEF v. Heylens*, 1987 E.C.R. 4097.

61. *Id.* at para. 14.

62. *Id.* at para. 15; *see also* Case 222/84, *Johnston v. Chief Constable*, 1986 E.C.R. 1651, para. 13. In this case, the ECJ imposed a similar requirement of judicial review of an administrative determination that a female officer could not serve in the Royal Ulster Constabulary.

63. C. Gaitanides in *VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT* Art. 230, para. 122 (H. Von der Groeben & J. Schwarze eds., 6th ed. 2004); W. Cremer, in *KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG*, Art. 230, para. 71 (C. Callies & M. Ruffert eds., 2d ed., 2002); P. CRAIG & G. DE BÚRCA, *EU LAW* 533 (3d ed., 2002); Case 30/78 *Distillers Co Ltd v. Comm’n* [1980] E.C.R. 2229, para 26; *see also* Opinion of Advocate General J.-P. Warner, *id.* at 2290. For a more recent opinion, *see* Opinion of Advocate General D. Ruiz-Jarabon Colomer, Case C-204/00 *Aalborg Portland A/S v. Comm’n* 2004 E.C.R. II, paras. 29-30 (not yet published).

essential or unessential depends on the impact that failure to respect the requirements has on the ultimate administrative outcome⁶⁴ or on individual rights.⁶⁵

The standard of proof for showing an essential infringement is fairly low. In a recent staff case, the Court of First Instance pointed out that the right to be heard is infringed if “it cannot be reasonably precluded that that irregularity could have had a particular impact on the content of that act.”⁶⁶ In the Court’s view, the failure to engage in a preliminary consultation would be shown to have no impact on the result only if the administration had no discretion when adopting the final act.⁶⁷ Since European authorities are normally granted discretionary powers, the infringement of the right to a hearing would, according to this court, virtually always lead to an annulment. A similar approach is found in *Schneider Electric v. Commission*.⁶⁸ The Court of First Instance annulled the Commission’s decision, stating that, had a proper hearing taken place, the companies would have been able to propose alternative remedies to the competition problems. The Commission might then have reconsidered its position or provided further evidence in support of its decision.⁶⁹

In recent years, the standard for showing an essential infringement of the right of access to the authorities’ files has been lowered even further. It is not necessary for the reviewing court to show that the administrative decision would have been different, but only that the documents to which access had been denied could have been used in preparing the defense.⁷⁰ However, if the Commission’s decision was based on documents other than those to which access had been denied, the European Courts have refused to annul the decision.⁷¹ As for the duty to give reasons, the Courts are fairly strict. They regularly annul decisions whenever this duty is breached, without any further discussion of whether the infringement is essential.⁷²

64. Case C-301/87, *France v. Comm’n*, 1990 E.C.R. I-307, para. 31; H. Krück, *supra* note 63, at Art. 173 para. 79; W. Cremer, *supra* note 63, at Art. 230 para. 73; J. Schwarze, *in* EU-Kommentar, Art. 230 para. 61 (J. Schwarze, ed.)

65. D. Booß, *supra* note 6, at Art. 230, para. 103; M. Burgi, *in* HANDBUCH DES RECHTSSCHUTZES IN DER EUROPÄISCHEN UNION § 7 para. 98 (H.-W. Rengeling, A. Middeke, & M. Gellermann eds., 2d ed., 2003).

66. Case T-237/00, *Patrick Reynolds v. European Parliament*, 2002 E.C.R. II-163, para. 112.

67. *Id.* at para. 113.

68. Case T-310/01, *Schneider Electric v. Comm’n*, 2002 E.C.R. II-4071.

69. *Id.* at para. 456.

70. Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV et al. v. Comm’n*, 2002 E.C.R. I-8375, para. 318; Case C-51/92 P, *Hercules Chemicals NV v. Comm’n*, 1999 E.C.R. I-4235, para. 81; Case T-5/02, *Tetra Laval v. Comm’n*, 2002 E.C.R. II-4381, para. 89.

71. Case 234/84, *Belgium v. Comm’n*, 1986 E.C.R. 2263, para. 30; Case T-205/99 *Hyper Srl v. Comm’n*, 2002 E.C.R. II-3141, para. 60.

72. Case T-323/99, *Industrie Navali Meccaniche Affini SpA (INMA) et al. v. Comm’n*, 2002 E.C.R. II-545, para. 106 et seq.; Case T-206/99, *Métropole télévision SA v. Comm’n*, 2001 E.C.R. II-1057, para. 53 et seq.; Cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale et al. v. Comm’n*, 2003 E.C.R. II-435, para. 420; Case T-251/00, *LAGARDÈRE SCA et al. v. Comm’n*, 2002 E.C.R. II-4825, para. 159 et seq.; Case T-388/00, *Institut für Lernsysteme GmbH v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, 2002 E.C.R. II-4301, para. 58.

V

RECENT DEVELOPMENTS IN THE SCOPE OF REVIEW
OF COMMISSION COMPETITION DETERMINATIONS

Two significant recent developments in the case law of the European Court of Justice have been not procedural mistakes themselves, but judicial review of the use of administrative discretion and the standards that should be observed in imposing administrative sanctions.⁷³

A. Recent Developments in Judicial Review of Administrative Discretion: Merger Control Decisions

In 2002, in *Airtours*,⁷⁴ *Schneider Electric*,⁷⁵ and *Tetra Laval*,⁷⁶ the Court of First Instance for the first time annulled Commission determinations in the area of merger control. The Court's thorough and detailed analysis of all the facts and legal arguments used in the Commission's decisions, despite the complexity of the issue, was especially remarkable because, usually, an issue's high complexity results in significant administrative discretion (a large *marge d'appréciation*) and reduced judicial review.

Tetra Laval and *Schneider* were also notable as the first merger control cases to be decided under the Court of First Instance's new expedited procedure.⁷⁷ Thanks to these "fast-track" procedural provisions, in both cases a final judicial decision was available around one year after the Commission's decision to deny merger approval.

In *Airtours*, the Court of First Instance blamed the Commission for not having satisfactorily proven that the merger would lead to a collective dominant position on the British foreign package holiday market:

In the light of all of the foregoing, the Court concludes that the Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market.⁷⁸

Likewise, in *Schneider Electric*, the Court of First Instance concluded that the Commission had failed to prove that the merger created or strengthened a dominant position resulting in the significant impediment of effective competition in a substantial part of common market.⁷⁹ The Court found grave errors, omissions, and

73. Both developments concern the ground of review of illegality ("Infringement of the Treaty or of any rule of law relating to its application," Art. 230 (2) EC). Under this head of review, administrative bodies have to observe primary and secondary law as well as general principles of law such as the fundamental rights, equality, the principle of proportionality, and legal certainty.

74. Case T-342/99, *Airtours v. Comm'n*, 2002 E.C.R. II-2585.

75. Case T-310/01, *Schneider Electric v. Comm'n*, 2002 E.C.R. II-4071.

76. Case T-80/02, *Tetra Laval v. Comm'n*, 2002 E.C.R. II-4381.

77. Art. 76a of the Rules of Procedure of the Court of First Instance came into force on February 1, 2001; see 2000 O. J. (L 322) 4.

78. Case T-342/99, *Airtours v. Comm'n*, 2002 E.C.R. II-2585, para. 294.

79. This is the legal standard under Article 2 (3) Council Regulation 4064/89, 1989 O.J. (L 392) 1.

inconsistencies in the Commission's analysis.⁸⁰ These shortcomings were "such as to deprive of probative value the economic assessment of the impact of the concentration which forms the basis for the contested declaration of incompatibility."⁸¹

In *Tetra Laval*, the Court of First Instance similarly annulled the Commission's decision because it had not proven that the modified merger would give rise to significant anti-competitive conglomerate effects.

In particular, [the decision] does not establish to the requisite legal standard that any dominant position would be created on one of the various relevant PET packaging equipment markets and that Tetra's current position on the aseptic carton markets would be strengthened. It must therefore be concluded that the Commission committed a manifest error of assessment in prohibiting the modified merger on the basis of the evidence relied on in the contested decision relating to the foreseen conglomerate effect.⁸²

Although the European Courts have traditionally granted broad discretionary powers to the administration, especially when complex economic analysis is involved,⁸³ today, the Court of First Instance is willing to review the Commission's reasoning in great detail.⁸⁴

This change of legal practice in the merger control area—which the economic adviser of Airtours went so far as to call a "watershed in E.U. merger policy" and a "wake-up call" for the Commission⁸⁵—in combination with the application of the new, expedited "fast-track" procedure, represents an important improvement of judicial review.

The Court of First Instance obviously felt it necessary to counterbalance the substantial power the Commission exercises in economic matters, especially given that the global competitiveness of European industry is at stake. The case law tracks a general trend in modern administrative law. As comparative analyses of national administrative law show, it is extremely difficult to define in abstract terms the parameters within which administrations should be allowed to evaluate economic facts and consequences without any judicial interference.⁸⁶ This issue is now surfacing at the Community level. The division of powers between the Courts and the administration has not been clearly identified. The Courts instead use a flexible

80. Case T-310/01, *Schneider Electric v. Comm'n*, 2002 E.C.R. II-4071, para. 404.

81. *Id.* at para. 411.

82. Case T-80/02, *Tetra Laval v. Comm'n*, 2002 E.C.R. II-4381, para. 336.

83. For example, the Court noted in one case,

In this respect, however, the basic provisions of the Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

Cases C-68/94 and C-30/95, *France et al. v. Comm'n*, 1998 E.C.R. II-1375, para. 223.

84. C. D. Ehlermann and S. B. Völcker, *Editorial*, *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* (2003).

85. A. Overd, *in* *EUROPEAN COMPETITION LAW REVIEW* 375, 377 (2002).

86. For the flexible scope of judicial review in French administrative law, see G. VEDEL AND P. DELVOLVÉ, 2 *DROIT ADMINISTRATIF* 318 (12th ed., 1992). For German and French administrative law see J. SCHWARZE, *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* 241, 249 (2000). For British administrative law see H. WOOLF AND J. JOWELL, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* paras 6-004 (5th ed., 1995). For American administrative law see J. L. MASHAW, R. A. MERRILL, AND P. M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 748 (4th ed., 2000).

judicial review strategy that depends on the necessities of the particular case to limit or allow economic administrative power.

B. Future Directions in Judicial Review of Administrative Sanctions

Finally, what is the role for criminal law standards and principles in administrative decisionmaking? Should the more protective standards and principles of criminal law be applied when administrative measures have a significant impact on individual rights, such as in the case of sanctions?

Sanctions are a major policy instrument in the European Community. They are primarily fines, such as those used in antitrust law⁸⁷ and merger control.⁸⁸ Other kinds of sanctions, especially common in the agricultural sector,⁸⁹ are the recovery of wrongfully paid benefits, sometimes combined with an additional fee, the temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme, or the forfeiture of a security or deposit.

Sanctions can serve various purposes: restitution, prevention, and retribution. Restitution gives reparations for the damages caused. Prevention focuses on the deterrent effect of sanctions. Finally, retribution seeks revenge for the committed tort. While the recovery of benefits merely serves restitutionary purposes, instruments like fines and additional fees serve preventive and retributive functions as well.

Since both prevention and retribution are typical of criminal penalties,⁹⁰ the question is whether criminal law and criminal procedure standards, such as *nulla poena sine culpa* and *nullum crimen sine lege*, apply to such sanctions. The *nulla poena sine culpa* principle states that no one may be penalized without guilt. *Nullum crimen sine lege* means that the elements of an offence and its legal consequences must have been clearly defined by law before the deed in question was committed. Both maxims are accepted in most of the Member States' legal systems. Both can also be found in the European Convention on Human Rights—the principle of fault in Article 6 (2), and the *nullum crimen sine lege* principle in Article 7. The *nullum crimen sine lege* principle is recognized as well in Article 49 (1) of the Charter of Fundamental Rights of the European Union.

Notwithstanding the preventive and retributive character of sanctions, the European Courts regularly classify them as administrative instruments and thus deny the applicability of criminal law principles.⁹¹ According to the European Court of

87. Article 23 of Council Regulation 1/2003, 2003 O. J. (L 1) 1 (formerly Article 15 of Council Regulation 17/62, 1962 O. J. (P 13) 204).

88. Article 14 of Council Regulation 139/2004, 2004 O. J. (L 24) 1 (formerly Article 14 of Council Regulation 4064/89, 1989 O. J. (L 395) 1).

89. The Court has repeatedly recognized the Community's power to impose penalties necessary for the effective application of the rules in the sphere of the common agricultural policy based on Art. 34 (2) and Art. 37 (3) EC. See Case C-240/90, Germany v. Comm'n, 1992 E.C.R. I-5383, para. 11.

90. See H.-H. JESCHECK AND T. WEIGEND, LEHRBUCH DES STRAFRECHTS 3, 68 (4th ed., 1988).

91. Case 137/85, Maizena GmbH et al. v. Bundesanstalt für Landwirtschaftliche Marktordnung (BALM), 1987 E.C.R. 4587, para. 13; Case C-240/90, Germany v. Comm'n, 1992 E.C.R. I-5383, para. 25; Case C-210/00, Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas, 2002 E.C.R. I-6453, para. 43. An exception to this approach are the ECJ judgments concerning the Commission's Polypropylene Decision. The Court stated that the criminal law principle of the presumption of innocence applies to the procedures that may result in the imposition of fines or periodic penalty payments. Case C-

Justice, sanctions are necessary for good administration and the effective implementation of Community law.⁹²

This approach is illustrated by the Court of Justice's decision in *Käserei Champignon*.⁹³ At issue was a regulation that allows sanctions to be imposed without any showing of fault. A cheese dairy had applied for and received an export refund for a cheese spread manufactured by a third party. An inspection revealed that the goods contained vegetable fat and therefore ought to have been classified under a different Common Agricultural Policy (CAP) Goods List Number than the one given in the refund application. The German Customs and Excise Office demanded the restitution of the subsidy as well as the payment of a penalty.⁹⁴ There was no showing of subjective fault, and the only exception to the penalty under the regulation was in cases involving *force majeure*. The Court of Justice found the provision in question to be valid. Contrary to the view of the plaintiff, the Court held that the sanction could not be said to be of a criminal nature; hence the principle of *nulla poena sine culpa* did not apply.⁹⁵

At least some sanctions should be treated as criminal rather than administrative for a number of reasons. First, the deterrent and retributive impact of certain sanctions is such that they should be reviewed under the strict standards of criminal law. Under Article 23 of Regulation 1/2003 (formerly Article 15 of Regulation 17/62), breaches of the competition rules laid down in Articles 81 and 82 of the Treaty can be penalized with fines up to ten percent of the firm's turnover in the preceding business year.⁹⁶ Regulation 1/2003 expressly says these fines are not sanctions "of a criminal law nature."⁹⁷ While the fines were relatively low during the initial phase of the European Community, they have continuously increased since the *Pioneer* decision.⁹⁸ In *Pioneer*, the Court of Justice explicitly granted the Commission the right to raise the level of the fines for reasons of deterrence.⁹⁹ In 1998, the Commission made a substantive change to the practice of imposing fines by introducing its "Guidelines on

199/92 P, Hüls AG v. Comm'n, 1999 E.C.R. I-4287, para. 150; Case C-235/92, Montecatini SpA v. Comm'n, 1999 E.C.R. I-4539, para. 176. In these judgments the Court referred to the following judgments of the European Court of Human Rights: *Öztürk*, 73 Eur. Ct. H.R. (ser. A); *Lutz*, 123 Eur. Ct. H.R. (ser. A).

92. Case 11/70, Internationale Handelsgesellschaft, 1970 E.C.R. 1125, para. 18; Case C-240/90, Germany v. Comm'n, 1992 E.C.R. I-5383, para. 25; Case C-210/00, *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas*, 2002 E.C.R. I-6453, paras. 33, 38.

93. Case C-210/00, *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas*, 2002 E.C.R. I-6453.

94. Based on point (a) of the first subparagraph of Article 11 (1) of Regulation 3665/87 (now Article 51 of Regulation 800/99).

95. Case C-210/00, *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas*, 2002 E.C.R. I-6453, para. 38 et seq. According to the opinion of the Court the attacked provision only intends to combat the numerous irregularities which are committed in the context of agricultural aid and simply forms an integral part of the export refund system to which the applicant deliberately subjects himself.

96. The scope of possible fines for infringements of Art. 81 and Art. 82 EC remained mostly unchanged by the reform of Regulation 17/62. Article 23 of the new Council Regulation 1/2003, 2003 O. J. (L 1) 1 contains in large part the same provisions as Article 15 of Regulation 17/62. See also A. Weitbrecht, in *EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 69 (2003).

97. See Article 23 (5) of Regulation 1/2003.

98. Case 80/256, *Pioneer v. EC* of December 14, 1979, 1980 O. J. (L 60) 21.

99. Cases 100-103/80, *Musique Diffusion française et al. v. Comm'n* ("Pioneer"), 1983 E.C.R. 1825, para. 109.

the method of setting fines,”¹⁰⁰ which changed the calculation basis of the fines.¹⁰¹ This led to a remarkable increase in the size of fines. In 2001, the penalties in total amounted to 1.8 billion Euros.

Regulation 1/2003 sets down a broad general framework for fines as well as rough criteria for the calculation of the fine, namely the gravity and the duration of the antitrust infringement. Nonetheless, the continuously increasing level of the fines raises the question whether the explicit legal qualification of competition fines as not being “of a criminal law nature” is still valid. It is questionable whether a simple change in administrative practice expressed in a Commission guideline is a legitimate basis for such significant monetary penalties. Specific provisions for the assessment of punishment should be adopted in the law instead of left to administrative guidelines.¹⁰² If not as a consequence of the *nullum crimen sine lege* principle, at the very least this clarification should be introduced as the expression of sound legal policy.

Second, the European Court of Human Rights has made clear in its jurisprudence that the applicability of the provisions of the European Convention on Human Rights concerning criminal law (Articles 6 and 7) does not depend on the formal classification of sanctions under national law. According to the European Court of Human Rights, what is relevant is the legislator’s intention in creating the particular sanction. If the sanction pursues both preventive and retributive objectives, it must be regarded as criminal in nature.¹⁰³ Although the European Convention on Human Rights and its guarantees do not apply directly in Community law, it serves as a source of inspiration for the rights and guarantees in Community law.¹⁰⁴ This is yet another reason why the purely formal qualification of a sanction as administrative rather than criminal—as in Regulation 1/2003 and the ECJ judgment in *Käserei Champignon*¹⁰⁵—does not suffice to avoid the strict formality of the criminal law.

100. Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation 17 and Article 65 (5) of the ECSC Treaty, 1998 O. J. (C 9) 3.

101. Until then, the usual practice was to calculate the fine based on the turnover from the products involved in the infringement. In 1998, the Commission switched from this “turnover-proportional” fining to the imposition of a lump-sum on the basis of the worldwide total turnover of the enterprise concerned.

102. The Commission based the change in its administrative practice of setting fines on the discretion granted by Art. 15 (2) Regulation No. 17/62. The CFI has not objected to this view. See Case T-15/99, *Brugg Rohrsysteme*, 2002 E.C.R. II-1613, para. 124. For a critical view see H.-J. Hellmann, in *WIRTSCHAFT UND WETTBEWERB* 944, 947 (2002); C. Korthals and A. Bangard, in *BETRIEBSBERATER* 1013, 1016 (1998); A. Möhlenkamp, *Die europäische Bußgeldpraxis aus Unternehmenssicht*, in *INSTRUMENTE ZUR DURCHSETZUNG DES EUROPÄISCHEN WETTBEWERBSRECHTS* 121, 129 (J. Schwarze ed.).

103. European Court of Human Rights, Case 8544/79, *Öztürk v. Germany*, 1984 Series A No. 73, para. 53, in: *Europäische Grundrechte-Zeitschrift* 1985, p. 62 (67); Cases No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel et al. v. The Netherlands*, 1977 Series A No. 22, para. 34 et seq., in *EUROPÄISCHE GRUNDRICHTE-ZEITSCHRIFT* 221, 232 (1976); Case No. 9912/82 *Lutz v. Germany*, 1987 Series A No. 123, para. 54, in *EUROPÄISCHE GRUNDRICHTE-ZEITSCHRIFT* 399, 401 (1987); see also I. APPEL, *VERFASSUNG UND STRAFE—ZU DEN VERFASSUNGSRECHTLICHEN GRENZEN STAATLICHEN STRAFENS* 286 (1998); A. HEITZER, *PUNITIVE SANKTIONEN IM EUROPÄISCHEN GEMEINSCHAFTSRECHT* 17 (1997).

104. G. C. Rodríguez Iglesias, in *EUROPÄISCHE GRUNDRICHTE-ZEITSCHRIFT* 20 (2002). For the special significance of the ECHR for EC-law see also Case C-7/98 *Krombach v. Bamberski*, 2000 E.C.R. I-1935, para. 25 et seq.; Case 299/95, *Kremzow v. Austria*, 1997 E.C.R. I-2629, para. 14; Case T-15/99, *Brugg Rohrsysteme v. Comm’n*, 2002 E.C.R. II-1613, para. 106.

105. Case C-210/00, *Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas*, 2002 E.C.R. I-6453.

The German Constitutional Court (*Bundesverfassungsgericht*) takes a position similar to that of the European Court of Human Rights concerning the law of misdemeanors (*Ordnungswidrigkeitenrecht*). Misdemeanors, although different from crimes, are considered penal in the broader sense because they represent the retributive avengement of unlawful behavior through reprobation by the state.¹⁰⁶ According to the well-established case law of the German Constitutional Court, the fundamental constitutional guarantees of criminal law also apply to fines under the law of misdemeanors because of the similarities between the two branches of law.¹⁰⁷

In sum, it seems inappropriate to deny guarantees usually granted in criminal procedures only on the grounds that the measure is of administrative nature. The formal qualification as an administrative measure is not sufficient grounds for a denial of criminal procedure guarantees. The specific purpose and the concrete impact of the particular sanctions should also be examined. The standards and scope of judicial review of sanctions should vary according to their character. When the purpose of the administrative provision is retribution and deterrence, the European Courts should adhere to the standards of criminal law and not permit balancing between individual rights and efficiency or other administrative policy interests. This would be in line with the opinions of various Advocates General who have also opposed considering sanctions mere administrative measures and who have referred to them as criminal in nature.¹⁰⁸ It might be that sanctions lead to the reform of administrative procedure and improved legal guarantees. In French administrative law, which is in many ways the root of European administrative law, disciplinary measures against civil servants led to the development, in the *Conseil d'Etat*, of rights of defense, especially the right to be heard in administrative proceedings.¹⁰⁹ The application of criminal law guarantees like *nulla poena sine culpa* and *nullum crimen sine lege* would be a further step in improving the European administrative procedure of sanctions.

106. H.-H. JESCHECK AND T. WEIGEND, *LEHRBUCH DES STRAFRECHTS* 58 (4th ed., 1988); I. Appel, *Verfassung und Strafe—zu den verfassungsrechtlichen Grenzen staatlichen Strafens* 239.

107. For the long line of cases of the German Constitutional Court, see BVerfGE 26, 86, 203; BVerfGE 32, 373, 383; BVerfGE 38, 348, 371; BVerfGE 42, 261, 263; BVerfGE 71, 108, 114; J. Bohnert, in *KARLSRUHER KOMMENTAR ZUM GESETZ ÜBER ORDNUNGSWIDRIGKEITEN*, (K. Boujong ed. 2d ed., 2000), Einl. OWiG paras. 112; K. Rogall, in *KARLSRUHER KOMMENTAR ZUM GESETZ ÜBER ORDNUNGSWIDRIGKEITEN* (K. Boujong ed., 2d. ed. 2000) § 3 OwiG para. 5; I. Appel, *Verfassung und Strafe—zu den verfassungsrechtlichen Grenzen staatlichen Strafens*, 239, 505, 507. Appel speaks of a criminal-law-type situation, the dangers of which have to be met by the specific criminal law procedural guarantees.

108. Cases T-1/89 to T-4/89 and T-6/89 to T-15/89, *Rhône-Poulenc SA et al. v. Comm'n*, 1991 E.C.R. II-867 (884); Case C-185/95 P, *Baustahlgewebe GmbH v. Comm'n*, 1998 E.C.R. I-8417, para. 31.

109. See, e.g., Decision of the Conseil d'Etat of June 20, 1913, *Téry* Rec. 736, in M. LONG, P. WEIL, G. BRAIBANT ET AL., *LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE* 156 (11th ed., 1996); *Observations*, id. at 157, 158; see also A. DE LAUBADÈRE, J.-C. VENEZIA, AND Y. GAUDEMET, *II DROIT ADMINISTRATIF* 166 (10th ed., 1995); G. VEDEL AND P. DELVOLVÉ, *I DROIT ADMINISTRATIF* 284 (12th ed. 1992). For its relevance within Community law, see especially LORD MACKENZIE STUART, *THE EUROPEAN COMMUNITIES AND THE RULE OF LAW* 32 (1977); C. D. Ehlermann and D. Oldekop, *Due Process in Administrative Procedure*, in FIDE, *DUE PROCESS IN THE ADMINISTRATIVE PROCEDURE*, RAPPORTS DU 8ÈME CONGRÈS, 11.1-11.20, 22-24 Juin 1978.

VI CONCLUSION

Judicial review procedural requirements in European administrative proceedings is of crucial and ever-increasing importance. Three aspects deserve particular attention.

First, as a general tendency, the greater administrative powers are thought to be, the more strict will be judicial review of administrative procedure. The rigorous control of administrative procedure is particularly intended to counter-balance the far-reaching discretionary powers of the executive. One might even say that discretionary powers can be conferred upon an administration body in conformity with the rule of law only if, at the same time, a procedural counterweight is created.

Second, the analysis has demonstrated that judicial review of administrative procedure is integral to the protection of fundamental rights. Procedural guarantees in the administrative process, together with the ability to go to court to vindicate those guarantees, constitute fundamental rights and call for unconditional enforcement.¹¹⁰

Finally, regarding the future development of judicial review, the standards for imposing sanctions—such as in the agricultural sector or in competition law—demand special attention. For sanctions that are penal in character, the strict, clear, and formal principles of criminal and criminal procedure law—*nullum crimen sine lege* and *nulla poena sine culpa*—should apply.

In conclusion, the European Courts should continue to counteract the increasing powers of the administration with intensified judicial review of procedural requirements.

110. Administrative law may even be described as materialised constitutional law, as the former President of Germany's highest administrative court (*Bundesverwaltungsgericht*) has done it with regard to German law. F. Werner, *Verwaltungsrecht als konkretisiertes Verfassungsrecht*, DEUTSCHE VERWALTUNGSBLÄTTER 527 (1959).