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What's New in European Administrative Law?
Quoi de Neuf en Droit Administratif européen ?

Sous la direction de
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Transcription of the Statements and Discussions of the
Round Table held at the EUI on 10 December 2004

*Transcription des exposés et discussions de la
Table ronde organisée à l'IUE le 10 Décembre 2004*

Sous la direction de Jacques Ziller, editor

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Introduction

Jacques Ziller

European Administrative Law is a fast growing field of principles, procedures and institutional settings, which is of primary relevance to the study of EU policies as well as institutional law¹, and is becoming more and more relevant to the study of administrative and constitutional law of all EU member states, as well as of members of the European Economic Area and Associate states. The round table which was organised at the EUI in December 2004, whose proceedings are being published in this Working Paper of the Law Department, followed a series of seminars on European Administrative law which I organised for researchers in the doctoral programme.

The topics which had been addressed in the ten seminar sessions were the following, and are recalled here only in order to show that the set of presentations and discussions published here are by no means exhaustive: les autonomies régionales et locales dans le droit administratif européen ; European Administrative Law in the EU Charter of Fundamental Rights and the Constitution for Europe ; Agences de régulation, agences d'exécution et agences de coordination dans le système administratif de l'Union européenne ; The principle of participation in European Administrative Law ; The role of Courts in European Administrative Law ; The language(s) of European Administrative Law ; Responsabilité & accountability in European Administrative Law ; Service public et services d'intérêt général en droit administratif européen ; The European Ombudsman's role in developing the right to good administration and access to documents.

La diversité des thèmes qui se développent dans le cadre du droit administratif européen est telle que le seul fil conducteur de la table ronde décembre 2004 a été de mettre ensemble trois générations d'universitaires en provenance de divers Etats membres de l'Union et dont les intérêts scientifiques, tout en se rejoignant, ne coïncident pas exactement. Certains s'intéressent plus au développement continu de la matière scientifique qu'est le droit administratif européen, d'autres portent leur attention avant tout sur le contenu du droit de l'action administrative nécessaire à la mise en œuvre des politiques de l'Union, ou encore aux évolutions du contrôle juridictionnel des administrations que ce soient les services de l'Union ou ceux de ses Etats membres, que ce contrôle soit opéré par la Cour de Luxembourg ou par les juridictions nationales. Le lecteur verra que les thèmes sont d'importance et resteront d'actualité, quel que soit le sort du Traité établissant une Constitution pour l'Europe et de la Charte des Droits fondamentaux de l'Union européenne.

This Working Paper is not a bundle of fully fledged papers; it is a collection of transcriptions of oral statements, quickly revised by their authors, sometimes worked out far

¹ See amongst many others Jacques Ziller, *L'autorité administrative dans l'Union européenne*, EUI Working papers Law n° 2004/14, with a more extensive bibliography.

more in detail as a preparation for a future paper. It has not been submitted to English language correction for non native speakers, and therefore any improper use of this language is to be blamed upon the Editor. Un certain nombre de synthèses ont également été réalisées par des chercheurs de l'IUE participant à la première année du programme doctoral. Elles reflètent on ne peut plus fidèlement les débats, mais montrent également le talent de ces jeunes chercheurs à identifier ce qui importe et mérite d'être retenu pour l'avenir.

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The Relationship between National Administrative Law and European Administrative Law in Administrative Procedures

Edoardo Chiti

1. My starting point as an introduction is that the administrative execution of Community laws and policies is nowadays essentially a matter of joint action by Community and national administrations as well as mixed administrations, that is to say administrations composed by representatives of the two orders of administrations. When I speak of joint action – or better: of joint exercise – of Community functions, I refer to any possible alternative to the traditional frameworks for driving the administrative execution of supranational laws and policies – i.e. to any possible alternative to the direct/indirect execution dichotomy. A more accurate description should recognize that there are several models of joint exercise of Community functions which can be and should be also typified and classified. However, I will leave aside this taxonomy and I shall consider as belonging to a basically unitary group all regulatory schemes based on the co-operation (rather than the separation) between the supranational administrations (Commission, but also agencies, independent authorities and so on) and the national administrations.

When they operate within a regulatory framework of joint administrative action, the national administrations are subject partly to national law and partly to supranational law. The problem is: to what extent are they subject to the former and to what extent are they subject to the second? And what is the final result of this interaction between the supranational law and national law? In particular, can we say that a process of vertical convergence – i.e. convergence from national administrative law to European administrative law – is taking place, or does a more complex dynamic develop?

2. In order to provide a brief answer to this question, I would propose to consider three elements which I will present in a somewhat assertive way.

(a) First of all, a regulatory scheme of joint exercise of a certain Community function implies the connection of proceedings involving the Commission or other supranational administrations with proceedings before national administrations. In other terms, it implies recognition of composite proceedings or mixed proceedings, which are characterized by the intervention both of national and supranational administrations as well as of mixed administrations. What is common to all hypotheses is that composite proceedings are at least partly regulated by European administrative law, which disciplines the action not only of the supranational administrations but also of the competent national and mixed administrations.

The scope and the "intensity" of the European regulation of the action of national and mixed administrations vary however considerably from sector to sector. Sometimes European law introduces a series of new procedural segments into procedures already existing in the Member States' administrative law, and these segments or phases may also be further

developed by national law. The Community intervention leaves thus a significant scope for the national procedural discipline. This is the case for instance of the Public Service sectors. In other cases, the Community intervention consists in the adoption *ex novo* of a fully accomplished procedural Community regulation, meant, on the one hand, to articulate the function among a plurality of distinct, structurally distinct administrative bodies, and on the other hand, to combine these public powers in a procedural context which is regulated exclusively within the Community order. This is the case for instance of the sectors which are co-ordinated by the European agencies.

In order to assess correctly the impact of the Community regulation on the action of the national administrations, one should also notice that the Community regulation is strictly connected to the legal experiences of the Member States. The European legislation implements the criteria which are developed by the Court of Justice as general principles of Community law, on the basis of the common traditions of the Member States, although this operation can obviously be highly creative.

This two-way-relationship between the administrative law of the Member States and the European administrative law is confirmed also by a number of sectorial provisions. For instance there is an interesting provision in the Regulation establishing the Community Office for Trademarks, according to which in the absence of procedural provisions in the regulation, the office shall take into account directly the principles of procedural law generally recognized in the Member States.

(b) Second: Community law may also use a different technique of intervention, in addition or as an alternative to the prescription of specific procedural roles for national administrations. Rather often the Community legislation establishes a mixed body at the European level, composed by representatives of the Commission and of the national administrations to which it imposes the respect of certain procedural rules. Thus, differently from the previous hypothesis, the administrative regulation is not directed in this case to national bodies, to national administrations, but to supranational administrations. When such a technique is envisaged in combination with that based on the at least partial conformation of the action of national administrations, this action is regulated in the same way as the action of the Community body; so that a sort of full coherence of the administrative system is achieved.

When it is used as an alternative to the Community conformation of national administrative action, we have an asymmetry in the procedural regulation; but this asymmetry between the national and the supranational regulation is hardly bearable, and determines a progressive adequation of the national procedural rules to supranational procedural rules.

(c) Third: composite proceedings have a double dimension. They have both a vertical and a horizontal dimension. Vertical because they connect the national with the supranational level. Horizontal in so far as they establish a relationship among the national legal orders themselves.

This second dimension – the horizontal dimension – is important because it implies a communication among the administrative law of the various Member States, and we can say, in general terms at least, that the effect of such communication can be described, using a medical metaphor, in terms of contagion among the national legal orders. But we should recognize that the specific content of this contagion can hardly be typified. In some cases, it may consist in a diffusion of the national procedural institutes which are particularly appropriate to the specific character of the function that has to be fulfilled. In other cases, it may consist in the horizontal spread of the Community procedural institutes. Again, in other cases it cannot be demonstrated at all the adaptation of the procedural discipline of the Member States to the exigencies of the full protection of the Community interests.

3. Let me briefly conclude this short introduction with three brief observations derived from this general picture that I tried to sketch.

First of all, the relationship between national and European procedural administrative law in the context of the schemes of joint exercise of Community functions is characterized by four elements: i) the partial Community confirmation of the modalities of action of national administrations; ii) the contagion which takes place between the modalities of action of the national administrations and that of their equivalents at the European level; iii) the room which is left for national procedural regulation; iv) the horizontal contagion, that is the contagion which takes place among the administrative laws of the various Member States.

Secondly, such a technique of Community intervention guarantees an effect of vertical convergence, from national administrative law to European administrative law. But such a vertical convergence is not independent from the administrative experiences of the Member States, on which the principles worked out by the Court of Justice and implemented by the sectorial legislation are based. Moreover, the vertical convergence does not determine a true harmonization of national procedural law. It rather determines a process of ‘homogenisation’ of the procedural standards, in so far as Community law relies upon the capacity of national administrative law to develop the Community institutes and rules.

Thirdly and finally, the technique that I have tried to outline presents a remarkable flexibility. Depending on the combination of the various elements, it allows a stronger or a more subtle influence on national administrative law. Such flexibility could prove to be very useful with reference to the enlargement process which inevitably will complicate considerably the functioning of the schemes of joint exercise of Community functions. But it could prove to be even more useful with reference to the opening of these schemes to the dimension of global administrative law, which is ever more frequent in the administrative experience of the EU.

The Obligation for National Administrative Bodies to Review their Final Administrative Decisions

Diana-Urania Galetta

My statement is about 'administrative self-remedies' as the concept is called in Italian law (*autotulea decisoria*), i.e. the obligation for national administrative bodies to review their final administrative decision in some circumstances. My short statement is linked to the rulings of the European Court of Justice (ECJ) in three important judgments, which all refer to cases of indirect administrative implementation of Community law.

First of all I will consider the ECJ judgment of 20 March 1997, *Land Rheinland-Pfalz v. Alcan Deutschland GmbH*, case C-24/95. In this case the Court decided that "Community law requires the competent authority to revoke" – 'retirer' in French I suppose, "rücknehmen" in German or "ritirare" in Italian – "a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering a recovery even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse". The reasoning of the Court is that "in principle the recovery of aid must take place in accordance with the relevant procedural provisions of national law. Those provisions have to be applied in such a way that the recovery required by Community law is not rendered practically impossible, in particular the interests of the Community must be taken fully into consideration in the application of a provision which requires the various interests involved to be weighed up before a defective administrative measure is withdrawn."

Thus the Court talks about the necessity of "weighing up" and the object of this "weighing up" is indicated by the Court itself where it refers in the judgment to several principles, in particular to the principle of protection of legitimate expectations and legal certainty on the one hand, and on the other hand to the "effet utile" of Community law. But there are in my opinion two more recent judgments of the Court, which better develop those principles that we have already found in the Alcan case.

First of all there is a very recent judgment of the Court of Justice of 7 January 2004, in case –201/02, *Delena Wells v. Secretary of State for Transport, Local Government and the Regions*. Here the High Court of Justice, Queen's Bench Division – which is to be considered as an administrative court – referred several questions to the ECJ for a preliminary ruling under Article 234 ECT. One of these questions is about the obligation for the national administrative bodies to review their final administrative decisions in case of a breach of Community law, in order to fulfil the principle of cooperation in good faith which is laid down in Article 10 ECT. In this judgment the Court decided that: "under Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of the Directive 85/337", whereas, "the detailed procedural rules

applicable in that context are a matter for the domestic legal order of each Member State". This should happen "under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness). In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended."

In this case again the Court of Justice refers to the necessity for the various involved interests to be weighed up, and I have tried to find out the different interests which are taken into consideration by the ECJ. The principles which are relevant to this sentence are in my opinion: on the one side, the principle of *effet utile*, the principle of effectiveness and, most important, the principle of cooperation in good faith laid down in Article 10 EC, which implicate an obligation to nullify the consequences of an infringement of Community law. On the opposite side we find the principle of legal certainty and the principle of legitimate expectations. These are the principles that need to be weighed up in the opinion of the ECJ.

Finally I want to consider the judgment of the ECJ of 13 January 2004, *Kühne and Heitz* case C-453/00, the so-called "poultry-meat decision". In this case the statement of the Court is in my opinion very clear and at the same time light shedding. The ECJ declares that "... the principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where

- under national law, it has the power to reopen that decision;
 - the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
 - that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234(3) EC;
- and
- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court".

As the ECJ itself emphasizes, this important judgment has to be read in the light of three different considerations. The first important consideration is that national law, to which this case is referred, already confers upon the administrative body a competence to reopen an administrative decision, which has become final. The second point is that the administrative decision in question has become final only as a result of a judgment of a national court, against whose decisions there was no judicial remedy. And that that judgment was based on an interpretation of Community law which, in the light of a subsequent judgment of the Court, was incorrect and was adopted without a question being referred to the Court for a preliminary ruling in accordance with the conditions provided for in Article 234 EC. The third and last consideration is that the person concerned complained to the administrative body immediately

after becoming aware of that judgment of the Court. Therefore, it is only in case of existence of all the three above mentioned circumstances that it can be identified an obligation for the administrative body concerned to review its decision, in accordance with the principle of cooperation arising from Article 10 ECT.

I would now like to try and summarize. For this I need to set up two important premises, which explain why these judgments of the ECJ are, in my opinion, so important. First premise: in case of indirect administrative implementation of Community law, (which means – as we all know – administration carried out by the Member States and not by the Community Institutions), the general principles resulting from the case-law of the ECJ do have a so-called spill-over effect. This means that they complement the national law and directly integrate its rules. This direct integration into national law leads to a modification of national rules as long as a “non integration” might imply an infringement of the general principle of equality (equality of treatment). Second premise: As a consequence, the general principles laid down in the case-law of the ECJ play a central role. We might think, for instance, of the principle of proportionality, which was an unknown principle in many legal systems – this is the case of the Italian system, where in the past we did not know this principle as formulated by German law and later Community law– and is now being progressively integrated into them.

Starting from these two premises, I would say that the principle of administrative self-remedy is now a general principle of Community law. This comes out from the ECJ statements I quoted. But it is a sort of ‘conditional principle’, which only applies as long as national law already allows the administrative bodies to reopen their illegal final decision and as long as the person concerned complains with the administrative body immediately after becoming aware of the illegitimacy of a decision. Under these two circumstances, administrative bodies do have an obligation to review their final administrative decision. But this does not mean that they have an obligation to revoke, or to annul, or to anyhow cancel that illegitimate decision: they only have the obligation to review their administrative decision if there is such a request coming from the person who has become aware of its illegitimacy.

As a conclusion I would like to consider a last point: another problem emerges from the *Kühne and Heitz* judgment, which is very important from the Italian point of view. It is the problem of revision of final administrative decisions as a possible breach of the so-called authority of res judicata, authority of final judgment. Italian commentators have pointed out that this questions the strength of a final judgment of a Court. I do not agree with such a point of view. In fact, based on the consolidated ruling of the Court of Justice in *Richardson*(case C-137/94) “... a ruling on the interpretation of Community law takes effect from the date on which the rule interpreted entered into force”. An exception can be made only in particular cases, as the one considered in *Defrenne* (case C-43/75). This means that the ruling of the ECJ on the interpretation of Community law has only an explanatory and not a constitutive effect.

Physionomie du contentieux administratif européen

Jean Bernard Auby

Je suis venu avec beaucoup de questions, et très peu de réponses, et qui vous paraîtront assez générales. Je dois ajouter, mais vous le percevrez très rapidement, qu'elles sont des questions d'administrativiste, qui n'est pas tout à fait indifférent à ce qu'est le droit communautaire, mais d'administrativiste, tout de même. Le problème que je me pose est le suivant.

Si nous admettons qu'il existe un droit administratif européen, ce droit administratif européen doit comporter un contentieux administratif européen. Si j'avais demain à écrire un livre sur ce contentieux administratif européen, quel(s) problème(s) est-ce que je me poserais, quel plan est-ce que j'envisagerai ? C'est sur cette perspective très générale que je voudrais vous livrer quelques idées, qui sont surtout des questions.

Je précise d'abord ce que je conçois comme droit administratif européen, parce que la notion n'est pas toujours comprise exactement de la même manière. Dans mon esprit, c'est l'ensemble composé de la partie du droit communautaire que l'on peut considérer comme du droit administratif, parce qu'ayant trait à la mise en œuvre, à l'exécution. C'est la manière dont les droits administratifs nationaux assurent la mise en œuvre du droit communautaire. C'est encore la façon dont le droit européen, le droit communautaire et de l'UE, influence les droits administratifs, et peut-être encore aussi la manière dont les droits administratifs nationaux s'influencent mutuellement au travers du droit communautaire. J'ai cette vision un peu composite de cet objet, on peut en avoir de plus restreinte.

Cet ensemble a nécessairement un volet contentieux. Comment pourrait-on envisager de l'étudier, de le décrire ? Je vais poser cinq questions :

1. quel est l'objet, quel est le domaine de ce contentieux administratif ?
2. quels sont ses organes ?
3. quels sont ses principes essentiels ?
4. quelles sont ses techniques juridiques principales
5. quelles sont ses caractéristiques fonctionnelles essentielles ; quelles fins, quelles fonctions sert-il ?

Vous voyez qu'il s'agit de questions très générales.

1. Sur la première, l'objet, le domaine il y a deux hypothèses me semble-t-il. Une restreinte, et une plus large. Je n'ai pas de choix arrêté entre ces deux.

La première est une perspective purement formelle. Elle va consister à dire que le contentieux administratif européen est le contentieux des actes d'exécution, de mise en œuvre des normes communautaires, législation comme réglementation. Que ces actes soient communautaires ou qu'ils soient des actes administratifs nationaux, et que ce contentieux se

déroule devant les juridictions communautaires ou devant les juridictions nationales. C'est la perspective la plus stricte, probablement la plus cohérente.

Y a-t-il une définition plus large, qui consisterait, peut-être, à dire, le contentieux administratif européen, c'est le règlement de tous les litiges qui sont résolus par application des règles, des principes du droit administratif européen ? Ce serait un peu plus large notamment parce que, cela conduirait à inclure des hypothèses, disons, de « *spill-over* » dans le droit administratif, dans lesquelles les principes du droit administratif européen débordent sur des questions qui ne concernent pas des actes de mise en œuvre du droit communautaire stricto sensu.

Je vous livre ma question ; je n'ai pas de réponse. Je sens bien que le premier terrain est un peu plus sûr que le second. Mais le second me plaît pour d'autres raisons.

2. La deuxième question, est de savoir quels sont les organes du contentieux administratif européen.

Je me concentre sur les juridictions, car l'on pourrait compliquer les débats en disant que le contentieux administratifs européen est peut-être quelque fois tranché par des mécanismes non juridictionnels (ombudsman, médiateur, de toute sortes). Si je me concentre sur les juridictions, sur le système juridictionnel du contentieux administratif européen, que vais-je pouvoir observer ? Mon idée très simpliste est celle-ci: il s'agit d'un système dans lequel la répartition des rôles, à priori, est assez claire, entre juridiction communautaire et juridiction administrative nationale. Assez claire, à priori, en fonction du monopole que les juridictions communautaires ont de l'interprétation et de l'appréciation de la légalité des actes communautaires. Plus délicate est la question de savoir comment cet ensemble est organisé et régulé, parce qu'il est par essence composite. Bien entendu il n'est pas hiérarchisé, comme l'est un appareil juridictionnel interne, et il y a en son sein des marges de jeu, des marges de manœuvre pour les juridictions administratives nationales. Sur ce point j'ajouterai juste une observation.

A mon sens, ces marges de manœuvre sont moins grandes aujourd'hui depuis au moins l'arrêt *Köbler*. Jusqu'à l'arrêt *Köbler*, de manière générale, les juridiction nationales, et là je parle des juridictions administratives, étaient en somme, vis-à-vis du droit communautaire, plus libres que les législateurs. Le législateur peut ignorer le droit communautaire, mais le lendemain, la loi qu'il prend peut être écartée au profit du droit communautaire. Alors que les juridictions nationales et notamment les juridictions suprêmes ont la possibilité d'user de marges d'interprétation, d'adaptation entre les principes nationaux et les principes communautaires, dont elles usent fréquemment, en France mais ailleurs aussi. L'arrêt *Köbler* me paraît verrouiller un peu plus le système en créant le risque d'une responsabilité. Et donc, donne au système, non pas un caractère hiérarchique, mais une plus grande verticalité.

3. Si je me pose à présent la question de savoir quels sont les principes essentiels de ce contentieux administratif européen ?

A priori, on doit dire : ils sont une combinaison des principes que le droit communautaire applique en matière administrative et des principes du contentieux administratif interne. Que peut-on ajouter à cela ? Le droit communautaire émet, formule des principes fondamentaux concernant le contentieux. C'est vrai de la Charte des droits fondamentaux, c'est vrai du projet de Constitution. Au fond, au point de départ qui est quelque chose tournant autour de l'effectivité du droit communautaire s'ajoutent maintenant des principes qui touchent à la garantie des droits des personnes : droit au juge, droit au recours effectif, etc...

Donc, le droit communautaire dans mon ensemble contentieux administratif européen est plus riche aujourd'hui que par le passé, pèse plus lourd en termes de principes. Comment ces principes vont-ils s'articuler avec ceux du contentieux administratif national ? La question essentielle est de savoir s'ils peuvent parfois rentrer en contradiction. Que le contentieux administratif national puisse enrichir, ajouter, aller plus loin que les principes communautaires, cela ne pose pas de problème. Et on pourra dire, par exemple, que sur la proportionnalité, le contentieux allemand va plus loin que le contentieux communautaire stricto sensu. Cela n'est pas compliqué. Peut-on imaginer des hypothèses de contradiction ? Nous en avons un peu approché une, avec la question du retrait des actes. On en trouverait une autre, par exemple, qui existe assez largement dans notre droit, et j'imagine dans certains autres droits administratifs, avec l'impossibilité des voies de recours contre les collectivités publiques au-delà de certains délais. Là on pourrait avoir une contradiction très nette.

4. Peut-on répondre à la quatrième question ? Quelles sont les techniques principales du contentieux administratif européen ?

L'observation dont on doit nécessairement partir ici, c'est que ces techniques, rien dans la construction communautaire ou ailleurs n'impose qu'elles soient homogènes. Elles sont typiquement le domaine de l'autonomie institutionnelle et procédurale. Chaque droit administratif peut mettre ses techniques de contentieux au service de la mise en œuvre du droit communautaire comme il l'entend. Cependant, le droit communautaire a parfois quelque chose à dire sur les techniques nationales, ne les laisse pas libres de se déployer comme elle le veulent. Les exigences d'effectivité pèsent sur le développement de certaines techniques procédurales : l'affaire *Factortame* en Grande Bretagne ou dans le système français, la mise en œuvre de la directive marchés publics, induisant la création d'un référé précontractuel, complètement contraire aux traditions existantes). A quoi s'ajoute le fait que quand le droit communautaire exerce un effet sur l'étendue, l'intensité du contrôle du juge, ce n'est pas pour la faire reculer, c'est en général pour la faire avancer : la proportionnalité en Grande Bretagne, et en France toutes sortes d'exemples de passage au contrôle normal, comme nous disons, à un contrôle très étendu dans un certain nombre de registres du contentieux administratif.

Donc, diversité admise des techniques, mais à l'intérieur de certaines limites et moyennant une certaine influence du droit communautaire.

5. Mon cinquième point, ce sont les caractéristiques fonctionnelles essentielles du contentieux administratif européen. A quoi sert-il ? Peut-on répondre à cette question ? Il me semble que l'on peut dire deux choses, qui sont en partie liées.

La première c'est que, au départ, sa préoccupation principale, voire exclusive, c'est d'assurer l'efficacité de la sanction de la norme communautaire. Aujourd'hui, indiscutablement, il devient davantage un instrument de garantie des citoyens, de garantie des entreprises vis-à-vis des actes qui concourent à la mise en œuvre des normes communautaires. Et c'est même sensible dans la Constitution et la Charte des droits fondamentaux.

La deuxième remarque, en partie liée à la précédente, c'est que si le contentieux administratif européen est un contentieux traditionnellement objectif (contrôle de norme à norme), il devient davantage un contentieux subjectif, visant à résoudre des problèmes, des litiges particuliers par des solutions adaptées. C'est un phénomène que l'on constate dans un certain nombre de droits administratifs nationaux. Eduardo García de Enterría a étudié le phénomène dans quelques droits : espagnol, français ... Cela passe par le développement des procédures d'urgence, d'injonction, le développement de la responsabilité, enfin un certain nombre de mécanismes qui au lieu de répondre seulement à la question de la légalité, donne une solution adaptée à un problème particulier. Et j'ai le sentiment que cette évolution existe au sein du droit communautaire, et qu'elle nous intéresse dans sa partie concernant le contrôle des actes administratifs. Peut-être au fond, mais là je parle sous votre tutelle, la création prévue de chambres spécialisées au sein des juridictions communautaires a un certain rapport avec cette évolution.

Européanisation et transformation de la justice administrative en Europe

Karl-Peter Sommermann

Mon sujet est l'eupéanisation de la justice administrative en Europe, et je peux suivre, sur certains points, l'exposé du Professeur Jean-Bernard Auby. Tout d'abord, je ferai une observation quant à la situation de fait, dans une perspective comparée. Ensuite, j'essaierai d'expliquer ces faits en recherchant les causes de leur développement. Enfin, j'évoquerai les nouveaux défis de la juridiction administrative.

1 – Quelle est tout d'abord la situation de la justice administrative en Europe ?

On peut observer un grand dynamisme dans le développement de la justice administrative dans plusieurs pays, dynamisme véritablement étonnant si on considère les dix dernières années. Indiquons seulement quelques réformes importantes des années passées :

- en Espagne (1998) nouvelle codification et grande réforme par la « *Ley 29/1998 de 13 de julio, reguladora de la jurisdicción contencioso-administrativa* » qui ouvre le recours contentieux et la protection d'urgence pour toutes configurations de litiges ;
- en France (1995 et 2000) : réforme concernant la suspension des actes administratifs et l'exécution de jugements par la « *Loi no 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative* » ; renforcement de la protection d'urgence par la « *Loi no 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives* » ;
- en Italie (2000) : réforme de la protection contre l'inactivité de l'administration et mesures d'urgence par la « *Legge 21 luglio 2000, n. 205, disposizioni in materia di giustizia amministrativa* » ;
- au Portugal (2002) : une nouvelle codification et grande réforme par la « *Lei n° 13/2002 de 19 de Fevereiro (Estatuto dos Tribunais administrativos e Fiscais)* » et la « *Lei n° 15/2002 de 22 de Fevereiro (Código de Processo nos Tribunais Administrativos)* », les deux lois ayant déjà été modifiées par la « *Lei no 4-A/2003 de 19 de Fevereiro* » ;

On pourrait également mentionner les réformes aux Pays Bas (1992), en Finlande (1996 et 2003), en Grèce (1999), en Pologne (1995 et 2002) et en Tchéquie (2002).

Quelle est la caractéristique de ces réformes ?

On trouve des éléments clairement communs à ces réformes. Le but général est de renforcer la position du particulier vis-à-vis de l'administration. Cela se produit notamment dans deux domaines : premièrement, dans l'amélioration des recours tendant à l'obtention d'une prestation, particulièrement les recours contre l'inactivité de l'administration et

deuxièmement dans le renforcement de la protection provisoire par la diversification et l'intensification des procédures d'urgence. Tous les pays que j'ai mentionnés se réfèrent à l'un ou l'autre des aspects et généralement aux deux.

Je pense que dans plusieurs pays, on peut parler d'une modernisation « de rattrapage », une « *nachholende Modernisierung* » comme on dit en allemand. Ce jugement part de l'observation qu'il y a une asymétrie entre le développement du droit du contentieux d'une part et le droit administratif d'autre part. En effet, la transformation du droit administratif, son orientation croissante vers un service public moderne et vers une administration coopérative avec de nouvelles formes d'action et un rôle nouveau tenu par l'administré/client/citoyen, n'a pas toujours été accompagnée par des réformes correspondantes du droit du contentieux qui est longtemps resté, dans de nombreux pays conforme au schéma d'un contrôle basé sur l'archétype du recours en annulation. Les Espagnols parlaient dans ce sens, avant la réforme de 1998, du « *carácter revisor* » du contentieux.

Il est évident qu'un contrôle juridictionnel moderne et une pleine protection des particuliers exigent une diversification des instruments juridictionnels. Pour cela, toutes les réformes mentionnées tendent à élargir et à rendre plus effective la protection juridictionnelle. Dans la plupart des pays le point de départ est le droit constitutionnel à un recours effectif ou une revalorisation des clauses constitutionnelles qui peuvent être interprétées dans ce sens (par exemple l'article 16 de la Déclaration des droits de l'homme et du citoyen en France). Je voudrais souligner, comme l'a très justement dit Jean-Bernard Auby, qu'on trouve aujourd'hui même dans les systèmes qui étaient traditionnellement purement « objectifs », des éléments nettement subjectifs. Cela ne veut pas dire qu'on ait changé de paradigme mais il y a maintenant dans presque tous les systèmes ces deux objectifs qui sont présents dans la justice administrative : la garantie objective de la légalité de l'ordre juridique et la protection subjective des droits des particuliers.

2 – Quelles sont les causes de ce développement ?

Le droit européen a nettement contribué à faire apparaître la nécessité d'améliorer et d'augmenter les instruments du contentieux afin de garantir une protection effective des citoyens par les tribunaux.

a. Il faut mentionner tout d'abord la Convention Européenne des droits de l'Homme, interprétée par la Cour européenne des droits de l'homme comme un « instrument vivant », c'est-à-dire d'une manière dynamique. À part les garanties bien connues de l'article 6, c'est l'article 13 qui a pris de l'importance pour la garantie d'un recours effectif devant les tribunaux nationaux. Depuis l'arrêt *Kudla* (arrêt du 26 octobre 2000) cet article est même interprété comme obligeant les Etats-membres à établir en droit interne un recours qui rend effectif le droit à un procès dans un délai raisonnable (article 6 § 1 de la Convention). On observe ici un dédoublement fonctionnel des garanties procédurales, ce qui constitue un pas important pour renforcer la garantie d'un recours juridictionnel effectif.

b. Le droit à un recours effectif est depuis quelques années également très présent dans la jurisprudence de la Cour de justice. Cette jurisprudence peut puiser, d'une part, dans les garanties procédurales de la Convention Européenne des droits de l'Homme et, d'autre part, dans les sources nationales où la plupart des Constitutions contiennent aussi un droit à un recours effectif, cela d'une manière explicite d'abord dans la Constitution italienne de 1947 (article 24) et la Loi fondamentale de Bonn de 1949 (article 19 § 4), plus tard par exemple dans la Constitution portugaise de 1976 (article 20) et dans la Constitution espagnole de 1978 (article 24). On peut observer, et ce sera ma thèse, que la jurisprudence de la Cour de justice concernant l'efficacité du droit communautaire aujourd'hui ne se réfère plus seulement à l'efficacité objective du droit communautaire comme c'était clairement le cas dans les premières décennies de son existence, mais que la Cour de justice a introduit également l'efficacité en faveur des droits individuels des citoyens de l'Union Européenne. Les arrêts qui déterminent les principes de la protection d'urgence révèlent notamment cette tendance à une subjectivisation. Le traité constitutionnel va renforcer ce développement car il contient un droit à un recours effectif (article II-107).

c. Une autre raison à cette évolution est le renforcement du rôle des tribunaux nationaux. J'ai déjà mentionné le cas *Kudla*. La Cour européenne des Droits de l'Homme, avec environ 20 000 décisions en 2004 (incluant les décisions sur la recevabilité ou l'irrecevabilité des requêtes) et la Cour de justice, celle-ci étant aussi affectée par une augmentation des cas en cours, ne veulent plus être, disons, l'instrument de réparation pour les défauts nationaux. On commence maintenant à imposer aux législateurs nationaux de renforcer la protection, le contrôle juridictionnel. C'est une tendance très claire qui fait pression sur les législateurs pour qu'ils élargissent les champs de contrôle et les instruments accessibles aux citoyens.

3 – Quels sont les défis actuels pour la justice administrative aux échelons national et supranational ?

Malgré la modernisation de la justice administrative effectuée dans la plupart des Etats-membres de l'Union Européenne, il reste encore un travail considérable aux législateurs nationaux et supranational. Il faut faire face à un ensemble de défis que je ne peux qu'esquisser très brièvement.

a. Tout d'abord, je pense qu'une grande tâche pour l'avenir est la coordination des différents échelons. Jean-Bernard Auby a déjà montré cette interrelation entre les deux sphères et il me semble qu'il y a encore une certaine expérimentation dans la détermination de la sphère relevant du champ de la Cour de justice et celle relevant des juridictions nationales. Il faut améliorer la coordination fonctionnelle dans le système juridictionnel à plusieurs niveaux ou bien – exprimé dans la terminologie actuelle de la modernisation des systèmes politiques – développer un modèle cohérent de « *judicial multi-level-governance* » qui inclut aussi les relations entre les Cours européennes de Luxembourg et de Strasbourg.

b. Le deuxième défi constitue toujours l'adaptation des systèmes juridictionnels aux nouvelles structures du droit administratif. J'ai parlé tout à l'heure d'une modernisation que j'ai qualifié de « rattrapage » car je ne voulais pas laisser croire qu'on ait déjà acquis une modernisation décisive tournée vers le futur ; nous avons encore devant nous de grands programmes de réformes pour adapter les systèmes nationaux au développement dynamique du droit administratif.

J'en donne trois exemples :

- i. Tout d'abord on observe depuis les années 1980 le développement d'une administration coopérative ; la coopération a pris une place importante dans l'action de l'administration publique et, par conséquent, dans l'aménagement des procédures administratives. Néanmoins, au niveau du contentieux, ce principe n'est pas encore très présent. Actuellement il y a des expérimentations qui tendent à y introduire aussi des éléments de médiation. Je ne parle pas d'instruments traditionnels de médiation ou de compromis, mais d'une véritable médiation au sein du système juridictionnel et en même temps hors de la procédure contentieuse. En Allemagne, il y a quelques tribunaux qui pratiquent de nouvelles formes d'un règlement non contentieux avec un certain succès.
- ii. Deuxième exemple intimement lié à la coopération administrative, c'est l'accroissement des partenariats public/privé (*public private partnerships*) dans tous les ordres juridiques nationaux ; le monde anglo-saxon était précurseur et puis les autres pays ont suivi. En Allemagne il y a actuellement une discussion sur la nécessité d'introduire dans le Code de procédure administrative des règles spéciales pour de telles relations ; en France, les contrats de partenariat furent l'objet d'une ordonnance du 17 juin 2004 (ordonnance no 2004-559). Tandis que les systèmes monistes, c'est-à-dire notamment les pays de « *common law* » n'ont pas de problèmes spéciaux avec le classement des litiges auxquels peuvent donner lieu de tels partenariats, les systèmes juridictionnels dualistes, prédominants sur le continent, qui sont basés, en principe, sur la distinction entre litiges de droit privé et litiges de droit public, doivent souvent trouver de nouvelles solutions pour intégrer ces relations juridiques mixtes dans le contentieux et pour réunir l'expertise de la juridiction civile et celle de la juridiction administrative dans un tel cas.
- iii. Le troisième exemple se réfère au rôle des tribunaux nationaux et supranationaux dans le futur face à l'importance croissante d'organes collégiaux d'experts dans le processus décisionnaire de l'administration publique. Ces organes préparent ou bien prennent eux-mêmes des décisions souvent de grande envergure après des délibérations complexes et difficiles à reproduire dans la procédure contentieuse. On peut aussi mentionner dans ce contexte les autorités indépendantes spécialisées dans une matière, exerçant leurs fonctions généralement au sein d'organes collégiaux. Ce phénomène n'a pas été totalement étranger à la tradition européenne, mais a pris beaucoup d'importance sous l'influence du modèle des *independent regulatory agencies* des Etats-Unis. Si on peut donc observer un renforcement de l'expertise organisée au sein de l'administration publique, on peut constater, en même temps, qu'il manque un contrepoids des tribunaux

administratifs, ce qui ne peut être obtenu que partiellement par un contrôle approfondi des règles procédurales et de leur application dans le cas concret. Cette asymétrie soulève des problèmes sérieux quant à la possibilité de maintenir un contrôle juridictionnel effectif. Comment les tribunaux peuvent-ils exercer un véritable contrôle de fond des décisions administratives préformées par des experts dans un processus complexe ? Est-ce que la complexité du processus décisionnaire entraîne nécessairement un contrôle réduit des tribunaux ? Comment pourrait-on garantir la densité de contrôle habituelle ? Ou bien faut-il redéfinir la sphère du pouvoir juridictionnel ? Est-ce qu'il y a une nouvelle différenciation fonctionnelle, c'est-à-dire y a-t-il des organes indépendants d'experts qui, d'une certaine manière, sont des équivalents fonctionnels pour un contrôle juridictionnel perdu ? Est-ce qu'il y aurait, peut-être, deux voies pour contrôler efficacement les décisions administratives ?

c. Ce ne sont que quelques réflexions initiales. Elles devaient montrer qu'il y a des défis notables pour la pratique législative ainsi que pour la science juridique. C'est un grand avantage que les juristes européens coopèrent de plus en plus ; notre Table ronde en est une preuve. Ainsi peuvent être développées des solutions basées sur la richesse des expériences d'une multitude de cultures juridiques.

Process Rights in Adjudication and Rulemaking: Legal and Political Perspectives

Paul Craig

In any legal system, when we're dealing with administrative law two things stand out. One, of course, concerns the normative choices made when developing administrative law doctrine. The other common feature in any system of administrative law is that there is an interaction between developments of administrative law concerning doctrine by the Courts, on the one hand, and the political bodies or the government, on the other.

I want to exemplify both of those themes: the normative choices faced by Courts, on the one hand, when developing administrative law doctrine and the interactions between the development of that doctrine and political developments, by looking at process rights in the EU and process rights in adjudication and in relation to rule making.

Just to situate this dialogue: process rights are extremely important, because they constitute one method whereby the individual can gain access to the particular legal system in question. In any system of administrative law, you have access points or gateways (the methods by which the legal system determines who can get into the system) and any administrative law regime will normally have two crucial access points: there will be procedural rules determining who is entitled to be heard, or intervene before the initial decision is made, or who is entitled to be consulted before a legislative act – that's one type of gateway –, and there will be rules of standing to determine who should be able to complain to the Court that the decision maker has overstepped its powers.

I am going to focus on the first of the issues. I'll quickly go into the normative choices faced by the Courts in the EU in developing process rights. It's quite clear, when you look at the jurisprudence of the ECJ in this respect, that they have articulated a very clear, although contestable and contentious, normative choice in relation to process rights in this respect.

In relation to individual determinations – and in that respect, access – the Courts have been activist and have articulated very clearly and positively the right to be heard. This goes back to the jurisprudence in the *Transocean Marine Paint*² case and developed through that jurisprudence in the *Hoffmann-La Roche*³ case. And, of course, the right to be heard was regarded as a part of the fundamental rights jurisprudence and extended to antidumping proceedings in cases like *Al-Jubail*⁴. But the Court has been more activist even than that. Thus

² Case 17-74, *Transocean Marine Paint Association v Commission of the European Communities* [1974] ECR 1063.

³ Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461.

⁴ Case C-49/88, *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v Council of the European Communities* [1991] ECR I-31887.

in cases such as *Air Inter*⁵, the Court of First Instance made it clear that fundamental principles regarding rights to be heard could not be excluded or restricted by any legislative provision and that, therefore, the respect for the principle must be ensured both where there was no specific legislation, and where legislation did exist but didn't take sufficient account of the principle. It is also significant in this respect that the observance of the right to be heard can be raised by the Court of its own motion, and it does not have to be raised by the litigants before the Court.

The activism – and I mean that in a positive sense – by the Courts in relation to the right to be heard is also extended to making sure that the right to be heard can be adequately protected in the context of shared administration, that is where the administration of a particular regime in question is shared between the Community and the national administrations. Thus the ECJ concluded in the *Technische Universität München*⁶ case, that the right to be heard in relation to customs administrative procedure requires that the person concerned should be able, during that procedure, to put before the Commission its own case and make its own views known. The right to be heard was again emphasised and applied, in cases by the Court of Justice, in cases such as *Lisrestal*⁷, and the more recent *Primex Produkte*⁸ case.

So, in relation to the right to be heard, in relation to initial determinations, or of an individualised nature, the Court has been extremely activist. The stance is markedly different when it comes to a right to be consulted or participate in the making of norms of legislative nature. Here the Court has been equally clear, but equally clear in the other direction.

Just to take a step back here. It is important to put this in its broader context because there has been a considerable literature on legitimacy of decision making in the EU, and, particularly, on the legitimacy of decision-making that takes the form of delegated rulemaking in Comitology. One of the consistent themes repeated in the literature is that one way in which the legitimacy of these decisions could be enhanced would be to foster participation, consultation in the rule-making process. The message from the Court is clear, which is that the Community courts will not provide help in this respect. The leading case is still the *Atlanta*⁹ case that dates back to the late 1990's and the applicant in that case sought rely on the *Al-Jubail* to show that the absence of Treaty provisions requiring consultation in relation to the enactment of legislation didn't mean that consultation could be dispensed with. They were therefore trying to extend the *Al-Jubail* principle to rule making. But the ECJ rejected the argument and held that the right to be heard only related to acts which were of direct and individual concern to the applicant, couldn't be extended to the procedure culminating in legislation. The obligations to consult only applied when it was laid down by the Community

⁵ Case T-260/94, *Air Inter SA v Commission of the European Communities* [1997] ECR II-997.

⁶ Case C-269/90, *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR.

⁷ Case T-450/93, *Lisrestal - Organização Gestão de Restaurantes Colectivos Lda and others v Commission of the European Communities* [1994] ECR II-1177.

⁸, Case T-50/96 *Primex Produkte Import-Export GmbH & Co. KG, Gebr. Kruse GmbH, Interporc Im- und Export GmbH v Commission of the European Communities* [1998]

⁹ Case C-104/97 P, *Atlanta AG and others v Commission of the European Communities and Council of the European Union* [1999] ECR I-6983.

legislator or where it was contained in a Treaty article. That approach has been reaffirmed and reinforced in later cases, such as *Bactria*¹⁰, *Jégo-Quééré*¹¹. The Community Courts not only rejected the idea that they should infer a right to be consulted in the context of rulemaking, they have also made it clear that they are unwilling to draw any legal consequences, positively for the individual, from the fact of participation in the making of a legislative measure. They made that clear in *Asocarne*¹² case, where the ECJ held that the fact that the bodies that act in the defence of a collective interest had taken part in the preparation of directive in circumstances where the relevant Treaty article accorded no right to participate, nor did it give that person any preference of treatment with regard to challenging the measure. The *Asocarne* judgment in that respect was again reaffirmed in *Jégo-Quééré*, and in *Greenpeace*¹³, and in *Merck*¹⁴.

So, the jurisprudence of the ECJ and the CFI embodies a clear normative choice. And that clear normative choice can be summarised in the following way: the right to be heard in relation to individual determinations is fundamental; it is not dependent on a foundation in a Treaty article, regulation or directive; Community norms will be subject to that right; and the Courts can raise the right to be heard on their own motion. The Court's stance in relation to participation or consultation in the making of norms of a legislative nature is markedly different. In this context, such rights will only exist when there is a foundation in a treaty article, regulation, directive, or decision, the Court will not readily find that those norms give rise to such rights and moreover the fact of participation in their making will not increase the applicants' chance of being accorded standing when seeking judicial review.

It would go beyond this short presentation to engage in a normative analysis of whether the stance of the ECJ is really defensible or not. What I would say briefly in this respect is that one could defend the courts' normative choice, the premise being that there is a real distinction between provisions that impact on the person in a form of an individual act determination and those that impact on the individual through a legislative type norm. We should however also recognise that the distinction is contestable. It can be entirely fortuitous whether a person is affected through an individualised determination or through a rule. The individualised determination may, in any event, have a precedential impact for a category of cases that impact on a broader range of people. Moreover, the background principles served to justify procedural rights in individual adjudications are equally applicable in the context of rule making. The twin rationales are instrumental and non instrumental. The former justifies process rights because it is more likely that the correct outcome will be reachable on the substance of the case. The non-instrumental justification sees process as being part of what it means to treat the person as a

¹⁰ Case T-339/00, *Bactria Industriehygiene-Service Verwaltungs GmbH v Commission of the European Communities* [2002]

¹¹ Case T-177/01, *Jégo-Quééré & Cie SA v Commission of the European Communities* [2002]

¹² Case C-10/95 P, *Asociacion Espanola de Empresas de la Carne (Asocarne) v Council* [1995] ECR I-4149, para. 39.

¹³ Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* [1998] ECR I-1651.

¹⁴ Case T-60/96, *Merck & Co Inc, NV Organon and Glaxo Wellcome plc v Commission* [1997] ECR II-849, para. 73.

human being with the corollary that it is right to demand a hearing before taking action that can adversely affect the individual. Both, the non instrumental and instrumental justifications for process rights in adjudication can and do apply in relation to participation in rule-making. It is clear however that advancement in participation rights isn't going to come through the Community Courts in relation to rule-making, not unless they radically change their stance and there's no indication that they will do so.

Let me spend two minutes on the political side. Community Courts are not developing participation rights, but it would be wrong to suggest that nothing is happening. The important thing which is happening is mainly in the political sphere. What's interesting is that the Commission has developed what is known as IPM in the jargon of the trade, Interactive Policy Making. And it's actually very interesting: it is specifically designed to foster a consultation or participation in the making of norms of legislative nature. The Commission puts online the draft proposals and the idea is that you are allowed to comment in a form, on-line, electronically. The Commission responds, takes this into account, in the formulation of the rule. So, in the electronic, digital, internet age, this is a way to foster participation in the making of rules. And, on the whole, this seems an interesting idea. I've done some work following up of the effect of the consultations in particular areas. While it is a good idea and to be encouraged, the limitations of IPM should also be noted.

Two limitations, is all that I wish to point out by way of conclusion. Firstly in terms of the range of coverage: it is clear that IPM technique is only used in relation to a small fraction of rule-making. In other words, the type of rules to which the IPM technique is used is confined to important policy initiatives. The problem is that this doesn't help the person in the Atlanta type of case: such a person will be affected not by the overall general rule, but the more detailed specification of that rule in delegated rule-making and IPM doesn't touch delegated rule-making at all. And nor do the other Commission initiatives to enhance consultation rights touch comitology rule-making at all. So, yes, IPM is a good idea, but quantitatively the range of coverage is limited.

The second point to make about the political initiative is that like all political initiatives designed to foster participation it's a good idea, but it means that the individual has no recourse, legally, if things go wrong. There is nothing akin to the notice and comment procedure in the United States under the Administrative Procedure Act of 1946. There's no legal recourse in those circumstances. It is quite clear, from the jurisprudence of the ECJ and the CFI, that the existence of the IPM scheme, and the fact that you would participate in the IPM scheme, will make no difference in legal terms. The final point is to question whether the statements in the Constitutional Treaty in part I, fostering participatory democracy, would make any difference, legally or politically, in this respect. My own view is that, in strict legal terms, it will not cause the Court to change its stance.

The Constitutional Bases of European Administrative Law

Susana de la Sierra

1.- Introduction. The concept of European Administrative Law

The study of the constitutional bases of European Administrative Law requires, first of all, dealing with the very concept of European Administrative Law. Even if this is not the place to go through all the existing theories, it is worth mentioning a piece of work by Prof. Fausto de Quadros in Portuguese language, where he canvasses the various meanings of this expression.¹⁵ Without entering in all these meanings, I would like to try and state what the concept of European Administrative Law I am applying for the purposes of this paper, a concept which very much coincides with Prof. Auby's previous intervention. European Administrative Law is the final step of a process, where various legal orders interact and produce principles or norms of general application in the territories where those legal orders apply. I would not conceive it as the process itself, but, I insist, as the final step of a process of interaction. It is thus the ensemble of those norms and principles, which exist due to the spontaneous interaction and, in some cases, due to the willingness of the corresponding actors (political powers, judges, legislators...). The pieces that contribute to this phenomenon are, as it is well known, the legal orders of the Member States, which interact with the Community legal order, but also some legal systems that affect in some way or another to this corpus. I refer here, specifically, to the law of the Council of Europe and the law of the WTO.

2.- The need to identify the constitutional bases of European Administrative Law

In the first place I want to address the question of why we want or why we need a definition of the constitutional bases of European Administrative Law. In order to do this I had a look at different national legal orders where this debate has taken place. The question of the constitutional bases of administrative law has not raised many problems in countries such Spain, where it is taken for granted that this constitutional bases exist and have, indeed, been developed in the case-law of the Spanish Constitutional Court. In the two countries I am going to refer to in the following lines – France and the United Kingdom –, there has been a deep debate on the constitutional bases of administrative law, asking whether or not there is a need for those constitutional bases to exist. Further, it has been inquired on the very meaning of the concept of constitutional bases.

European Community Law, which is one of the pillars of European Administrative Law, is not an abstract construction, detached from reality and lacking any parental relationship. On the contrary, we well know that some national legal orders contributed to its

¹⁵ F. DE QUADROS, *A nova dimensao do directo administrativo. O Directo Administrativo portugues na perspectiva comunitaria*, Almedina, Coimbra, 1999.

creation and development in the very beginning of the existence of this law.¹⁶ I do not mean with this that European (Administrative) Law should not follow an original and own path, but I would only like to highlight the importance of models or patterns in the development of any institution, here including of course legal institutions. Thorough comparative analysis served Montesquieu to propose a model of government¹⁷, comparative analysis was used by Tocqueville in order to promote the establishment of a democratic political system based on the American experience¹⁸. Comparison has always been a tool in order to promote reforms or in order to criticize them.

That being said, I would like to reproduce here two sentences of George Vedel, a French public lawyer who actively participated in the elaboration of the Treaties: “L’administration et le droit administratif ne peuvent, ni d’un point de vue pédagogique, ni d’un point de vue théorique, se définir de façon autonome. C’est en partant de la Constitution que leur définition peut être donnée”. These two sentences put forward clearly the starting point of Vedel’s construction and conception of administrative law.¹⁹ Indeed, Dean Vedel developed in France the theory of the constitutional bases of administrative law, in order to constrain administrative action and to define its powers and limits.²⁰

This theory has not always been unanimously accepted. The most famous critic was raised by Eisenmann in one paper that was afterwards contested by Vedel himself.²¹ Vedel identified two elements that should justify the need to explain administrative law from the point of view of the Constitution. First, constitutional tradition in France from 1789 to 1958 had placed Statutes (*la loi*) at the centre of the legal and political system, that meaning that the executive power (*pouvoir exécutif*) was subject to the mandates of the supreme instrument, i.e. Statutes produced by Parliament. Second, the Constitution of 1958 introduced new provisions in the legal system that had to be taken into consideration, which modified in fact the very traditional concept and contents of administrative law.

¹⁶ On the influence of French law, see, for instance, J.A. CARRILLO SALCEDO, *La recepción del recurso contencioso-administrativo francés en la Comunidad Europea del Carbón y del Acero*, Instituto García Oviedo, Universidad de Sevilla, Seville, 1958.

¹⁷ *L’esprit des lois*.

¹⁸ *De la démocratie en Amérique*.

¹⁹ See now in G. VEDEL/ P. DELVOLVÉ, *Droit administratif*, I, PUF, Paris, 12th ed., 1992, at 25.

²⁰ This theory was first developed in *Etudes et documents du Conseil d’Etat*, n° 8, pp. 21ff.

²¹ See Ch. EISENMANN, *La théorie des bases constitutionnelles du droit administratif français*, RDP, 1972, pp. 1345ff. Vedel responded to the critics in the foreword to the 7th edition of his *Droit administratif*. The whole discussion is synthesised in G. VEDEL, *Les bases constitutionnelles du droit administrative* : P. AMSELEK, “La pensée de Charles Eisenmann”, pp. 133ff. Also in E. BREEN, *Le Doyen Vedel et Charles Eisenmann : une controverse sur les fondements du droit administratif*, RFDA, 18 (2002), pp. 232ff. Some other interesting references are the following : G. BIGOT, *Les bases constitutionnelles du droit administratif avant 1875 (Définir le droit administratif/1)*, RFDA, 2003, pp. 218ff. ; idem, *La dictature administrative au XIX siècle : théorie historique du droit administratif (Définir le droit administratif/2)*, RFDA 2003, pp. 435ff. A. LANZA, *L’expression constitutionnelle de l’administration française*, Paris, 1984; A. S. OULD BOUBOUTT, *L’apport du Conseil constitutionnel au droit administrative*, Paris, 1987 ; G. TIMSIT, *La nature et le rôle de la fonction administrative en droit administratif français*, Paris, 1963 ; P. SABOURIN, *Recherches sur la notion d’autorité administrative en droit administratif français*, Paris, 1966 ; B. STIRN, *Les sources constitutionnelles du droit administratif*, Paris, 1989 ; G. GUGLIELMI, *La notion d’administration publique dans la théorie juridique française (de la Révolution à l’arrêt Cadot, 1789-1889)*, 1991.

Indeed, as Vedel argued, the classical understanding of administrative law depended on two elements. On the one hand, administrative law has been traditionally defined (in France) by criteria that differentiate it from private law. Vedel refers to the power of constraint,²² while others prefer to mention the function of administrative action and allude here to the concept of public service or of public order²³. There are some, finally, who are bringing the theory of administrative action back to the entities that perform that action. This requires defining who these entities are, who – in short – public administrations are. Those entities are subjected to a specific set of norms, which are their own and which apply as long as those bodies act.²⁴

Thus, the classical understanding of administrative law depends on a definition that differs according to the various theories that have been developed in this regard. Another element that should be taken into consideration is the principle of separation of powers. According to the French conception of the separation of powers, public administrations should not be controlled by ordinary judges, because this would imply an interfering in administrative action by the judiciary. This is the reason why a specific system of judicial review was created, where it is the public administration itself who, by means of an organ especially devoted to this type of control, exercises the supervision of administrative entities or bodies when they act. It is well known that the evolution of this system has virtually consolidated administrative judges as real judges in the constitutional sense.²⁵

The United Kingdom could also be taken as an example of how administrative law has been traditionally conceived and how recent debates have pinpointed the fact that an adaptation of administrative law (more specifically, judicial review) to the Constitution should be achieved.²⁶ Gordon Anthony states that “[t]he academic and judicial debate that has

²² “*Le “pouvoir exécutif” a ainsi pour essence d’exercer dans l’Etat la contrainte organisée*”. G. VEDEL, *Droit administratif*, cited, at 27.

²³ See here P. BERNARD, *La notion d’ordre public en droit administrative*, Paris, 1962 ; G. FARJAT, *L’ordre public économique*, LGDJ, 1963. Vedel considers that the idea of “public interest” could well be considered a conciliation between public order and public service, taking into consideration the fact that both elements coincide in many occasions.

²⁴ This theory has been developed, for instance, in Spain. See E. GARCÍA DE ENTERRÍA, *Verso un concetto di Diritto Amministrativo come Diritto statutario*, Rivista Trimestrale di Diritto Pubblico, año X, 1960, pp. 317ff.; idem, *El concepto de personalidad jurídica en el Derecho Público*, RAP 129, pp. 195ff. See also S. MARTÍN-RETORTILLO, *Presupuestos constitucionales de la función administrativa en el Derecho positivo español*, RAP, 26, pp. 11ss.; L. MORELL OCAÑA, *El criterium de la Administración Pública y el Derecho Administrativo contemporáneo*, REDA 29; L. ORTEGA, *La concepción subjetiva del Derecho Administrativo tras la Constitución Española de 1978*, Bomarzo, Albacete, 1989; S. DEL SAZ, *Desarrollo y crisis del Derecho Administrativo. Su reserva constitucional*, en C. CHINCHILLA/B. LOZANO/S. DEL SAZ, “Nuevas perspectivas del Derecho Administrativo. Tres estudios”, Civitas, Madrid, 1992.

In the UK, this debate could be linked to the interpretation of the Human Rights Act and, more specifically, to section 6 of the Act, which makes it “*unlawful for a public authority to act in a way which is incompatible with a Convention right*”. The concept of public authority served for the purposes of scrutiny and has thus been interpreted by scholars and judges.

²⁵ See, for instance, G. WOLFF, *Les magistrats*, RDP, 1991, pp. 1641ff.

²⁶ See the following references: T.R.S. ALLAN, *The Rule of Law as the Foundation of Judicial Review*, in C. FORSYTH (ed.), “Judicial Review and the Constitution”, Hart Publishing, Oxford, 2000, pp. 413ff.; G. ANTHONY/ J. MORISON, *The Role of Judges in the Formation of Public Law: Activism or Autolimitation?* (1998) 10 ERPL 977; E. BARENDT, *Constitutional Law and the Criminal Injuries Compensation Scheme* (1995) PL 357; P. CRAIG, *Competing Models of Judicial Review* (1999) PL 428; idem, *Ultra Vires and the Foundations of Judicial Review* (1998) 57 CLJ 63; idem, *Constitutions, Property and Regulation* (1991) PL 538; M. ELLIOT,

accompanied the evolution of the domestic order has focused on the relevance to judicial review of the institutional assumptions associated with the *ultra vires* doctrine. The *ultra vires* doctrine is, in its traditional form, premised upon an understanding of judicial review as a mechanism for controlling exercises of statutory power. It is, moreover, a doctrine that is born of rigid adherence to orthodox notions of the separation of powers and of the courts as implementers of the sovereign Parliament's intentions".²⁷ The similarities with the French formula are apparent.

In the British system the starting conceptual point is Parliamentary sovereignty, whose statutes are executed by public bodies. Traditionally this has implied that judges had limited powers to control legislative and administrative action, in order not to interfere in the functions of other powers.²⁸ This problem was not present, as is self-evident, in common law cases, due to the fact that they affect private persons and not the activity of any public power. Nevertheless, some have argued that the integration of common law criteria into judicial review is necessary.²⁹

The key element has traditionally been the execution of statutes by public bodies, as well as the exercise of the so-called "royal prerogative". Only later was the concept of "public function" of interest, due to the transferring of public power to the private sector by the conservative government.³⁰

The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law (1999) 58 CLJ 129; C. FORSYTH, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review* (1996) 55 CLJ 122; G. GANZ, *Criminal Injuries Compensation: The Constitutional Issue* (1996) 59 MLR 95; J. LAWS, *Law and Democracy* (1995) PL 72; A.P. LE SUEUR, *The Judicial Review Debate: From Partnership to Friction* (1996) 31 Government and Opposition 221; R. RAWLINGS, *Courts and interests*, in I. LOVELAND (ed.), "A Special Relationship? American Influences on Public Law in the UK", Clarendon Press, Oxford, 1995, p. 99; H. WOOLF, *Droit Public – English Style* (1995) PL 57.

²⁷ G. ANTHONY, *UK Public Law & European Law*, Hart Publishing, Oxford, 2002, at 24.

²⁸ A specific problem, linked to judicial review of administrative action is the royal prerogative, which has been described as "a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent on any statutory authorisation but nevertheless have consequences on the private rights or legitimate expectations of other persons" (*Council of Civil Service Unions v. Minister for the Civil Service* (1985) AC 374, 409-10 (Lord Diplock)), *apud* G. ANTHONY, cited, at 30. About the historical approach of judges towards the revision of the royal prerogative see P. CRAIG, *Prerogative, Precedent and Power*, in C. FORSYTH/ I. HARE (eds), "The Golden Metwand and Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC", Clarendon Press, Oxford, 1998, pp. 65ff.

²⁹ ANTHONY shares this opinion and considers that it is the way that best allows the entrance of European, not strictly national, law in the British legal order.

³⁰ See G. ANTHONY, quoted, at 35. He refers to this topic in relation to the discussion of the public-private divide in British law. See further J.W.F. ALLISON, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law*, Oxford University Press, Oxford, 2nd ed., 2000; P. CRAIG, *Public Law and Control over Private Power*, in M. TAGGART (ed.), "The Province of Administrative Law", Hart Publishing, Oxford, 1997, pp. 196ff; S. FREDMAN/ G.S. MORRIS, *The Costs of Exclusivity: Public and Private Re-examined?* (1994) PL 69; D. OLIVER, *Common Values and the Public-Private Divide*, Butterworths, London, 1999. On the basis for identifying which action is to be subjected to judicial review see C. FORSYTH, *The Scope of Judicial Review: "Public Duty" not "Source of Power"* (1987) PL 356. See further DE SMITH/ WOOLF/ JOWELL, *Principles of Judicial Review*, Sweet & Maxwell, London, 6th ed., 1999.

It is, finally, important to note that constitutional reforms foreseen by the New Labour Government have led some authors argue that it may imply a redefinition of public law from the constitutional point of view.³¹

3.- The bases of European Administrative Law

The previous considerations on the concept of European Administrative Law and on the need of identifying the constitutional bases of Administrative Law in any legal order allow us now develop the central point of this paper: what the concrete constitutional bases of European Administrative Law are. These should be defined by norms and principles with constitutional value, i.e. the Treaties of the Union and the European Community, as well as case-law of the Court of Justice, but also the constitutional traditions of the Member States, and other legal instruments.³²

A.- The contents of the constitutional bases of European Administrative Law

Various administrative questions require a constitutional answer. What is the model of public administration that derives from European Constitutional Law? What can be considered a public administration and what are its components? What are the powers of this public administration? What is the role of fundamental rights vis-à-vis administrative action? What is the relationship between the public administration and the citizen that derives from European Constitutional Law? What kind of control can be exercised against administrative action? What are the remedies existing against administrative action? What are the powers and the limits for judges to control that action?

Due to time constraints, I cannot develop all this points with a minimum of seriousness.³³ This is why I opted for focussing my analysing on a very specific point which is more of a proscriptive nature than of an existing one. I considered it interesting to check what model of European Administrative Law the Treaty Establishing a Constitution for Europe foresees. It is true that it is only one piece of the puzzle, but it is necessary to critically study this model, in order to identify its principles, its possibilities of development and its possible excesses. The compatibility and adequateness of this legal instrument with other constitutional principles and norms should afterwards be verified.

B.- The constitutional bases of European Administrative Law and the Treaty Establishing a Constitution for Europe

³¹ See G. ANTHONY, cited, at 45.

³² We should remind here the vital role that plays the European Convention on Human Rights in the Treaty Establishing a Constitution for Europe, since various articles refer to it.

³³ I have developed some of these issues elsewhere. See S. DE LA SIERRA, *Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right to Effective Court Protection. A Comparative Approach*, ELJ 10 (2004), pp. 42ff. In this piece of work I tried to analyse one of the elements of the constitutional bases of European Administrative Law (the right to effective judicial protection) and apply it to the system of interim measures or interlocutory injunctions in Europe. See also S. DE LA SIERRA, *Tutela Cautelar Contencioso-Administrativa y Derecho Europeo. Un Estudio Normativo y Jurisprudencial*, Aranzadi/Thomson, Pamplona, 2004 (specially pp. 115ff.).

To start with, an important article should be taken into consideration: article I-19, related to the institutional framework of the Union. This article provides general guidelines for all institutions, be it of legislative, of administrative or of judicial nature. This framework is the one that defines the powers and the limits of those institutions. First, the Union's institutions shall promote the Union's values. The concrete way in which these values are to be promoted is not further developed in the article. Second, the institutions shall aim to advance the Union's objectives, something which is also as vague as the former statement and does not allow much place for imagination in order to assert the legal meaning of it. Third, the institutions shall serve the interests of the Union, of the citizens and of the Member States. It is interesting to note that the Union's citizens acquire here a specific value, since they are considered actors of the European process at the same level as the Union itself or the Member States. Finally, and this is, I think, the most important feature, the Union's institutions shall aim to ensure consistency, effectiveness and continuity of its policies and actions. These are, to my belief, the real core principles of the action of public powers, since they define the way in which those powers are to be exercised.

The Constitution itself recalls the differentiation existing in Member States between legislative and implementing (or executing) functions.³⁴ This is apparent in article I-33, where legislative and implementing acts are foreseen.³⁵ It is interesting to note that "regulations" are now regulations in the original sense, i.e. norms that implement other norms, which have been adopted by those institutions having constitutional or legislative power. A specific feature is to be highlighted. As it happens with legislative acts, regulations can be adopted both as binding in its entity or binding, as to the result to be achieved, thus leaving Member States a wide margin of discretion in order to decide how is the norm going to be implemented. The control of that discretion may generate problems in relation with the protection citizens may obtain. "Decisions" are also non-legislative acts and have regulatory nature, since they are binding in its entity. They could be compared to independent regulations existing in some Member States (such as in France and, to a certain extent, in Spain), which means that they do not implement a previously existing norm, but they are adopted in order to solve a specific legal problem.

The Treaty Establishing a Constitution for Europe establishes some principles that are applicable for administrative action. It is obvious that in most cases these principles are addressed to the Union institutions, but in others they are directly applicable in Member State's action. Finally, they can constitute an embryo of a common corpus of European Administrative Law, as they penetrate in more and more spheres of action.

a.- General principles governing administrative action in Europe

³⁴ The language of the Constitution takes into consideration the existence of acts (and, thus, institutions that produce them) of different nature, using classical national concepts. It refers, for instance, to "administrative measures" (see article III-160) and it also differentiates administrative from regulatory action or regulation (see art. III-209).

³⁵ However, there are certain principles which apply to all institutions as regards the law they produce. Art. I-38 imposes limits on the choice of the specific legal instrument that is used in those cases where the Constitution does not indicate the instrument which is required. Moreover, it establishes the obligation to give reasons.

Various principles can be deduced from the Treaty Establishing a Constitution for Europe as constituting general principles of administrative action in Europe.³⁶ Among all of them I would like to refer in the first place to the principle of cooperation.

Cooperation is a general mandate that has existed since the very beginning of the Communities, and that has been derived from what is now art. 10 of the EC Treaty. This article has been reproduced in the European Constitution, renumbered as article I-5, and reads as follows: “Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure that could jeopardise the attainment of the Union’s objectives”. Member States are the executors of EU law, they fulfil therefore administrative action both in the normative as in the applicative ways. What degree of freedom do Member States have in order to interpret EU law and execute it? What degree of freedom do judges have in order to analyse the validity of the law that has been executed by Member States? What degree of freedom do judges have in order to verify the respect of all constitutional provisions? These are all well-known questions that the European Court of Justice has been long dealing with.

Later, art. III-285 establishes: “1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. 2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. European laws shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States. 3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the constitution providing for administrative cooperation among the Member States and between them and the Union”. This is one of the concretions of the principle of cooperation. It would be interesting to check what the control of the application of this principle could be, what happens if a Member State fails to accomplish it, and what requirements could be deduced vis-à-vis the Union from this art. III-285. Cooperation appears again in article I-37.1: “Member States shall adopt all measures of national law necessary to implement legally binding Union acts”.

Cooperation is also linked to other principles, such as solidarity and fair sharing of responsibility, as the European Constitution establishes in art. III-268: “The policies of the Union set out in this Section [Policies on border checks, asylum and immigration] and their implementation shall be governed by the principle of solidarity and fair sharing of

³⁶ There exist many references to principles in Community law, which is the starting point of the European Constitution. See, for instance, L. PAREJO ALFONSO, *Los principios generales del Derecho Administrativo Comunitario*, in L. PAREJO ALFONSO and others, “Manual de Derecho Administrativo Comunitario”, CEURA, Madrid, 2000, pp. 39ff.

responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Section shall contain appropriate measures to give effect to this principle”.

European Administrative is thus a cooperative law.³⁷ This derives from the coexistence of the Union and the Member States as entities which have to achieve some objectives and which have to contribute by their action to a common outcome. Moreover, it is interesting to note that administrative cooperation is precisely one of the areas where the Union “shall have competence to carry out supporting, coordinating or complementary action”.³⁸ Cooperation formulae are to be fostered, and cooperation can affect not only to the direct execution of norms, but also to its elaboration. (Art. I-23: the Council of Ministers has coordinating functions). Another example could be found in art. III-141, which states that European framework laws shall cover “the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons”.

Simplification of public administration and administrative activity could be linked to the cooperation mandate. Simplification of administration is foreseen, for instance, in article I-163 b), related to rules on competition. Thus, the Council can adopt regulations (following the procedural rules established in article III-163), “to lay down detailed rules for the application of Article III-161 (3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other”.

Further, simplification can also be one of the possibilities opened by the Constitution, where it previews the possibility of modifying the provisions on administrative action in Member States. Article III-172 recognises this power where it reads that “European laws or framework laws shall establish measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”. And article III-173 widens the powers recognised in article III-172: “Without prejudice to Article III-172, a European framework law of the Council shall establish measures for the approximation of such laws, regulations or administrative procedures of the Member States as directly affect the establishment or functioning of the internal market (...)”.

Finally, two important principles are to be mentioned. In the first place, efficiency has always been one of the key concepts in the Community legal order. It has also defined administrative law in various Member States, in the sense that it implied that administrative acts (for different reasons) have been granted special, outstanding effects, different from the effects of private acts. The Treaty Establishing a Constitution for Europe recognises efficiency,

³⁷ Some authors have argued in this sense. See, for instance, S. CASSESE, *Diritto amministrativo comunitario e diritti amministrativi nazionali*, in M.P. CHITI/ G. GRECO, “Trattato di Diritto Amministrativo Europeo”, Giuffrè, Milan, 1997, pp. 3ff.; E. SCHMIDT-ASSMANN, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, Springer, Berlin, 1998.

³⁸ See article I-17 of the European Constitution.

which for our purposes is easily identified with the special effects administrative acts are usually granted.³⁹

In the second place, a system of public liability exists. The Treaty Establishing a Constitution for Europe basically maintains the system that existed so far. Nevertheless, it includes specific provisions for concrete cases. For instance, a clause of discharge should be mentioned. Thus, article III-183 indicates that “1. [t]he Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project”.

Other principles applicable to European public administrations and to its activity are transparency, access to documents and data protection. They are recognised in articles I-50 and I-51 of the Treaty Establishing a Constitution for Europe and are recalled in various articles afterwards. As some authors have argued, this could be a sign of the influence of Swedish Administrative Law in European Law.⁴⁰ The question would be if this implies or not a profound modification of the constitutional bases of European Administrative Law.

b.- Principles governing specific fields of administrative action

There exist common constitutional grounds for general Administrative Law and specific provisions which affect to concrete fields of law. For instance, the Economic Constitution has provoked the development of a set of norms that apply in economic relationships.⁴¹ If we want to believe that the Union is something more than an economic reality, we should discuss whether or not those provisions are applicable in other realms, such as culture or education.

It is also important to note the fact that the Constitution – and European law in general – echoes the evolution of administrative law existing in Member States, where a basic core of administrative law remains, and where specific fields of this law are presided or regulated by specific norms (even procedural and judicial norms). Specificities of the military administration, as well as in the area of freedom, security and justice, should be delimited and

³⁹ More specifically, art. III-401 refers to pecuniary obligations imposed to persons other than Member States, indicating that those obligations shall be enforceable.

⁴⁰ See J. ZILLER, *Procedimento amministrativo en Francia: fra semplificazione e partecipazione*, in M.A. SANDULLI (ed.), “Il procedimento amministrativo in Europa. Atti del Convegno di Milano”, Giuffrè, Milan, 2000, pp. 79ff. Of the same author, more generally on the European Constitution, see *La nuova Costituzione europea*, Il Mulino, Bologna, 2nd ed. 2004 – *La nouvelle Constitution européenne*, La Découverte, Paris, 2ème éd. 2005.

⁴¹ See on this issue, for all, J. BAQUERO, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Hart [Spanish version: *Entre competencia y libre circulación. El Derecho Constitucional Económico de la Comunidad Europea*, Civitas, Madrid, 2002].

differentiated from the general principles of Administrative Law, since they usually increase public powers and reduce, accordingly, citizen's rights.

In this latter sense, that of the reduction of citizen's rights, article III-134, states that European laws may be adopted in order to abolish administrative procedures and practices in matters of labour market which could form an obstacle to liberalisation of the movement of workers.⁴² Administrative procedures in many cases guarantee that the file is being correctly studied, that the persons affected are duly informed of the different steps. The fact that administrative procedures may be abolished indicates the existence of some dangers in relation with the rights I mentioned. Although the Constitution for Europe initially respects administrative procedure and practices⁴³, it has deemed that in certain cases – those that affect the most important policies of the Union – the procedures and practices I mentioned could be abolished. As long as the sphere of action of the Union is ever wider, we can consider that the Union's intervention in administrative law will increase as time passes.

To finish with, the environment and worries about the environment are present in various articles of the Constitution (e.g. art. III-172). The question is whether or not environmental law may contribute to the creation of a differing model of administrative law?

c.- The concept of European Public Administration

What/which/who is the European Administration? A clue can be found in art. III-181, where it refers to a set of bodies and institutions which could correspond to the concept of European Administration: Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States.⁴⁴

The concept of European Administration is recalled in the very text of the Constitution for Europe. In this sense, art. III-398 states that “1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration”. As relates the presence of the Union in the Member States, art. III-426 indicates that “[i]n each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation”.

⁴² “[A]bolish those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers”. A similar provision (but related to self-employed workers) is art. III-138.2, c).

⁴³ The problem here is apparent: how are these practices identified?

⁴⁴ The sphere of this article is overdraft facilities and any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of the institutions mentioned in the text.

As relates administrative organisation, art. III-389 indicates that a decision is necessary in order to determine the composition of the Economic and Social Committee. Are decisions the instrument used for organisational matters?

The European Commission is, needless to say, the executive institution of the Union. The principles of its action are condensed in article I-26 of the Constitution, which reads as follows: “1. The Commission shall promote the general interest⁴⁵ of the Union and take appropriate initiatives to that end. It shall ensure the application of the Constitution, and measures adopted by the institutions pursuant to the Constitution. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union’s external representation. It shall initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements”.

Finally, in liaison with the concept of European Public Administration is the notion of public service. The concept of public service, as it is understood in some Member States, is respected by the Constitution for Europe. For instance, article III-133.4, on freedom of movement of workers, states that it shall not apply to employment in the public service. A similar provision exists also, but with a different wording, in relation to freedom of establishment. Thus, art. III-139 establishes that the subsection to which it is related “shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority”. Further, art. III-238 addresses directly the question in the area of transport, as it indicates that “[a]ids shall be compatible with the Constitution if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service”. To what extent the concept of public service may be used to construct a European model of Administrative Law is a question to which scholars have already devoted much work and which could generate even more studies in the future.⁴⁶

d.- Control over administrative action

As I indicated in the introduction, one of the pillars of the constitutional bases of Administrative Law is related to the type and the intensity of the control of administrative action by judges or by other organs.

Since implementation of what until now has been Community law is carried out by Member States, article I-29 of the European Constitution establishes that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. Nothing equivalent is said about the European institutions, and nothing is further developed about the contents of the effective legal protection the Constitution guarantees.

Effective legal protection is an expression that the ECJ has used in several occasions and that the Constitution for Europe also employs. Nevertheless, the contents of this expression

⁴⁵ What happens then with the general mandate of article I-19, i.e., to serve the Commission’s interests, those of its citizens and those of the Member States?

⁴⁶ Note also that article II-96 of the Constitution refers to access to services of general economic interest as a fundamental right.

are far from clear. One is tended to have the intuition that the meaning of it in Community law is very much linked to the objective protection of the integrity of EC law as a legal order. When the Court has felt the necessity to incorporate the means that would enforce the application of Community law, it has in some cases made appeal to the abovementioned expression. This may have been the unconscious position of the Constitution for Europe, which in some provisions has incorporated this view. For instance, article III-415, related to combating fraud, states in number 4 that “European laws or framework laws shall lay down the necessary measures in the fields of the prevention of and fight against fraud affecting the Union’s financial interests with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies (...)”.

When the Constitution has wanted to refer to the recognition of rights to the citizen on the basis of effective judicial protection, it has preferred to use another expression: access to justice or effective access to justice.⁴⁷ This is the case, for instance, of art. III-257.4, referred to the area of freedom, security and justice: “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”. And article III-269, applicable in judicial cooperation and civil matters, states that measures shall be established aiming, among other objectives, at ensuring effective access to justice.

Finally, article II-107 of the Constitution recognises the right to an effective remedy and to a fair trial.

Apart from more classical ways of controlling the European Public Administration (like is the judicial control by the European Court of Justice)⁴⁸, the concept of maladministration is to be recalled here. It should be reminded that art. II-101 incorporates the “right to good administration” and, therefore, mechanisms to make this right be respected are to be foreseen

There are two protectors against maladministration. First, the European Ombudsman controls maladministration, so that it may establish standards of administrative action and of its control by other organs or institutions (art. I-49). Second, the European Parliament “may [in the course of its duties] at the request of a quarter of its component Members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Constitution on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings”.

e.- Fundamental rights. The relationship between the public administration and the citizen

⁴⁷ Both expressions, effective judicial protection and access to justice, are not real equivalents. On this, I refer to previous work present in my article, cited above, *Provisional Court Protection...*, at 25.

⁴⁸ Here art. III-375 of the Constitution is to be recalled: “I. *Save where jurisdiction is conferred on the Court of Justice of the European Union by the Constitution, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States*”.

Protection of fundamental rights is also part of European Administrative Law. The importance of this topic obliges me to leave its treatment for a later moment. Nevertheless, I would like only to pinpoint the value of the European Convention on Human Rights, which has always played a role in Community law, but which now appears expressly in various provisions of the Constitution for Europe. The most important one is article I-9, where it is stated that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. But article II-112.3 needs also to be taken into consideration, as it indicates that protection to fundamental rights accorded by the Union legal order should be the same as the one granted in the system of the European Convention on Human Rights.

Constitutional traditions of the Member States are also a key element in the construction of a European Administrative Law which respects the citizen's rights.⁴⁹ A specific system of remedies, which respond to the mandates of time in today's societies, is to be set. This would be a sign that the Union really cares for the citizen's rights.

Harmony among those elements is to be consolidated, not forgetting the Charter of Fundamental Rights of the Union, where the principles of administrative action and of its control are to be set in a framework.

⁴⁹ Art. I-9, 3: "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*".

Extension et élévation du champ du droit administratif européen

Loïc Azoulay

Je voudrais, dans cet exposé, présenter à grands traits deux tendances qui apparaissent de manière latente dans le champ du droit administratif européen. C'est du point de vue du contentieux communautaire et, en particulier, de celui de la Cour de justice des Communautés européennes que je voudrais les exposer. Il s'agit de mettre en relation quelques arrêts récents de la jurisprudence de la Cour et les évolutions pressenties du droit administratif européen. Un point de vue aussi limité ne peut avoir que des bases théoriques incertaines. Voici comment l'on peut désigner, de manière très schématique, ces deux tendances: il y a, d'une part, une extension de l'aire du droit de l'Union européenne et, par conséquent, une extension du champ du droit administratif européen; on observe, d'autre part, un mouvement d'élévation des sources et même de l'ordre administratif européen. Ces deux mouvements emportent des conséquences pratiques importantes.

§ 1. – Extension du champ du droit administratif européen

Tendance marquante, elle se manifeste notamment à travers le contentieux communautaire. Le droit communautaire et le droit administratif européen ont longtemps été réduits aux matières économiques, douanières ou agricoles. A présent, le droit de l'Union et la jurisprudence de la Cour de justice s'étendent peu à peu à l'ensemble des branches de l'action administrative. Ce droit finit par intéresser aussi bien les services publics, y compris l'éducation, la santé, la protection sociale, la communication, l'audiovisuel, que les questions d'ordre public, c'est-à-dire les pouvoirs de police. Ainsi, par exemple, le développement de l'« espace de liberté, de sécurité et de justice » inclut la question de l'immigration et, particulièrement, celle de l'accès, des conditions de vie et de travail des étrangers non-communautaires sur le territoire de l'Union.

Donc, pour parler de manière un peu brutale, ce n'est plus simplement l'administration des choses, des biens, qui se trouve sous l'emprise du droit communautaire. C'est aussi l'administration des personnes et l'état des personnes. A mon avis, il en résulte qu'on ne peut plus se contenter d'une approche classique, atavique, du droit communautaire privilégiant les libertés économiques, à laquelle se rattache une série de méthodologies traditionnelles (interdiction/justification, test de proportionnalité...).

A présent, l'action administrative d'origine communautaire rencontre les droits sociaux mais aussi des libertés individuelles, des libertés « civiques » et plus seulement des libertés économiques. Ce mouvement d'extension a deux conséquences visibles sur l'espace administratif européen en construction: d'une part, une décentralisation accrue (a), et d'autre part, un besoin de conciliation augmenté (b).

a) Une décentralisation accrue

En s'étendant, les actions administratives qui se développent dans le cadre communautaire se décentralisent. Cette décentralisation est encadrée. On peut dire qu'il s'agit d'une décentralisation intégrée: Edoardo Chiti parle d'« intégration décentralisée »⁵⁰. Cette expression et le modèle qu'il présente emportent tout à fait la conviction. Je vais essayer de l'illustrer un peu schématiquement, à ma manière.

L'extension des compétences et des domaines d'action de la Communauté n'entraîne pas une centralisation accrue au profit des institutions et organes de la Communauté. Il me semble, au contraire, que cela ne fait qu'accroître les deux caractères essentiels du droit communautaire et du droit administratif européen: d'une part sa complexité, d'autre part son incomplétude. Complexité de ce droit au sens où les actes administratifs d'origine européenne ne vivent que par des opérations complexes. Ils ne sont pas le produit d'affirmations d'une volonté simple et consensuelle. Ils supposent l'apport de droits multiples (communautaire et nationaux) et le concours de nombreuses autorités disposant de légitimités différentes. D'autre part, ce droit est incomplet en ce qu'il n'atteint son objet et ne produit ses effets qu'en passant par des opérations qui sont étrangères à son ordre, en utilisant notamment des médiations, des dispositifs et des procédures nationaux.

La complexité et l'incomplétude s'accroissent, et on en connaît les raisons, elles sont classiques (manque de ressources de la Communauté, esprit de subsidiarité...). Mais le résultat en est moins connu : c'est qu'il existe un fort besoin de cohérence dans cet espace en construction. Or, ce besoin n'est pas entièrement satisfait par les techniques classiques.

Voici mon hypothèse: c'est que, pour l'essentiel, l'espace du droit administratif européen ne se construit pas de la même manière que le droit communautaire classique. Il ne se structure pas exactement comme le droit communautaire « institutionnel ». En effet, le droit administratif européen ne repose pas essentiellement sur une règle hiérarchique (la primauté du droit communautaire) et une technique de délégation (les autorités administratives comme agents d'exécution autonomes mais subordonnés aux autorités politiques européennes). Autrement dit, on s'éloigne du modèle classique d'une hiérarchie normative doublée d'une hiérarchie organique avec une séparation étanche entre les autorités politiques communautaires et les autorités administratives nationales – c'est le schéma typique du fédéralisme d'exécution. A mon avis, un tel modèle ne suffit pas à résoudre les cas concrets qui se présentent par exemple devant la Cour de justice des Communautés européennes. Ce n'est pas un modèle adéquat, opératoire pour résoudre les problèmes juridiques qui se posent en droit administratif européen. Au lieu de cela, ce qui domine, ce sont des techniques « procédurales », des techniques « communicationnelles », des techniques « conflictuelles », plus inspirées du droit international privé que du droit administratif classique. Le droit administratif européen repose sur des procédés de « renvoi normatif »: le droit national, comme on l'a rappelé tout à l'heure, n'est pas du tout exclu du droit administratif européen. D'autre part, il fait appel à des procédés

⁵⁰ European Law Journal, numéro de juillet 2004.

de coopération et à des procédés de reconnaissance, d'intervention et d'assistance mutuelle entre les autorités. Cela est particulièrement vrai dans les « nouveaux » domaines du droit communautaire (environnement, santé, asile), mais cela devient tout aussi vrai dans les domaines classiques de la construction européenne (concurrence). En ce sens, les nouvelles méthodes employées sont indépendantes de la nature des compétences exercées.

Une affaire récente, « *EU-Wood-Trading* », peut être citée à titre d'illustration (Affaire C-277/02, en matière de transfert des déchets dans la Communauté). Ce cas fait appel à des procédures transversales entre les autorités d'expédition et les autorités nationales de destination des déchets aux fins de valorisation. Dans cette affaire, les conclusions ont été prononcées le 23 septembre 2004, l'arrêt a été rendu le 16 décembre 2004. Par cet arrêt, la Cour légitime un système ambivalent de compétition/coopération entre les autorités compétentes d'expédition et de destination. En outre, elle prend soin de situer ce système dans un cadre d'intégration défini par des exigences minimales – c'est la protection de l'environnement ici – et par des exigences maximales – c'est le principe de proportionnalité qui impose que l'on n'aille pas au-delà de ce qui est nécessaire pour atteindre le but visé. Ce qui est en cause ici, ce n'est pas seulement la protection de l'environnement mais le principe de libre circulation. Il y a donc un cadre d'intégration défini par le droit communautaire et à l'intérieur de ce cadre-là, il y a à la fois coopération et compétition entre les autorités compétentes.

En pareil cas, le droit administratif européen ne se caractérise pas par une fonction d'application mais plutôt par une relation, c'est-à-dire un exercice conjoint de l'autorité découlant des traités, dans le cadre d'un espace où comparaissent les différentes autorités compétentes (un espace administratif européen). Cet espace n'est pas exempt de contraintes; mais celles-ci ne sont pas de nature hiérarchique: ce sont essentiellement des contraintes de justification, d'évaluation et de reconnaissance mutuelle.

Notons que ce phénomène de remise en cause des hiérarchies établies affecte non seulement la production et la vie des actes administratifs d'origine européenne mais également leur disparition. Il arrive ainsi que soient maintenus en vie des actes d'application en dépit de l'invalidité du règlement sur lequel ils sont fondés (modulation dans le temps des effets des arrêts d'annulation, pratiquée par le Cour de justice et importée à présent par le Conseil d'Etat français) ou en dépit de leur contrariété avec des normes nationales de rang supérieur (immunité contentieuse des actes d'exécution du droit communautaire dans certains ordres internes comme en France). Ces techniques répondent aussi à un souci de cohérence normative et institutionnelle.

Cette construction, décrite ici très abstraitement, génère deux sortes de risques opposés: le premier est un risque de fragmentation, de dispersion excessive de l'autorité; le second est un risque de re-centralisation, de re-création de liens hiérarchiques au profit des autorités de contrôle, Commission européenne et Cour de justice.

D'où la nécessité d'encadrer cet espace. C'est le rôle de la Commission qui établit des liens entre les différentes autorités compétentes. Mais, là encore, il s'agit d'un encadrement spécial, différent de celui du droit institutionnel classique. Il y a également un besoin d'encadrement par la Cour de justice qui a la charge de veiller à la juste répartition des compétences entre ces différentes autorités. En 2003, il y a eu une tendance de la Cour de justice à entrer dans les mécanismes administratifs: elle s'est intéressée, même si ce n'est pas la première fois, à la comitologie, aux organes subsidiaires tels que l'O.H.M.I, à l'administration bancaire (Cf. les arrêts sur la Banque centrale européenne et sur la Banque européenne d'investissement). Il y a là une tentative d'encadrement de répartition des compétences au sein de cet espace, un souci de garantir l'autonomie des autorités et le respect des principes fondamentaux.

b) Un fort besoin de conciliation

De cette extension du domaine d'action des compétences de la Communauté, de l'emprise du droit de l'Union, résulte un besoin accru de conciliation administrative entre les règles, entre des normes contradictoires. Ce qui est en cause ici n'est plus la cohérence institutionnelle évoquée ci-dessus, mais la cohérence matérielle (« *consistency* », comme le disait Susana de la Sierra) entre les régimes différents et contradictoires du droit de l'Union européenne au niveau administratif. Là encore, ces problèmes de cohérence matérielle ne se résolvent pas par les techniques classiques de la synthèse des intérêts, bien connues en droit administratif français et bien connue aussi par le juge communautaire dans sa jurisprudence économique. Dans cette jurisprudence classique, la Cour utilise la technique de l'harmonie préétablie des intérêts toujours au profit des libertés économiques. Or, d'autres procédés de résolution des conflits sont à l'œuvre ici.

Deux formes typiques de conflit sont à considérer. En premier lieu, des conflits verticaux lorsque s'appliquent parallèlement le droit de l'Union et le droit national (Cf. en matière de concurrence avec le nouveau règlement ou en matière de fiscalité notamment). On observe alors que des dispositifs nationaux consolidés (tels le système d'imposition des sociétés ou le système de concours pour l'entrée dans la fonction publique) sont soumis aux exigences du droit de l'Union. Pareilles exigences ne consistent pas à écarter les droits et aux pratiques nationaux, mais il s'agit d'encadrer et d'aménager ceux-ci de manière à ce qu'ils prennent en considération non seulement les situations nationales mais les situations transnationales.

En second lieu, il faut tenir des conflits horizontaux entre les différents régimes, entre les différentes branches du droit de l'Union européenne. Citons à cet égard l'arrêt *Altmark* du 24 juillet 2003 (C-280/00) rendu dans le cadre du financement des services publics. Cet arrêt tend à concilier les exigences de service public et l'exigence de la concurrence et de l'interdiction des aides d'Etat: c'est dès lors à la Commission de maintenir cet équilibre, selon des méthodologies à inventer. Ce besoin de conciliation apparaît aussi, par voie de conséquence, au niveau de l'administration nationale: tel est le sens de l'arrêt *Milk Marque &*

National Farmers' Union du 9 septembre 2003 (C-137/00), qui concerne la compétence d'une autorité nationale de concurrence dans le cadre de l'organisation commune du marché du lait. Selon la Cour de justice, il appartient à l'autorité nationale de concurrence de tenir compte à la fois des exigences de la politique agricole commune et des exigences de la politique de concurrence. La Cour déclare ainsi: « Il faut que l'autorité nationale parvienne à une conciliation entre les éventuelles contradictions entre les objectifs différents poursuivis par l'Union européenne ».

C'est donc une nouvelle charge pour l'administration nationale qui ne se résout par des techniques classiques (privilège des libertés économiques) mais par des nouvelles règles de conflit, à savoir des règles d'équilibre entre ces différents régimes. C'est une nouvelle charge que la Cour de justice fait peser sur les administrations nationales ainsi que sur l'administration communautaire. Le problème de cette jurisprudence est qu'elle oblige dès lors ces administrations et le juge à opérer des évaluations complexes.

§ 2. – Elévation de l'ordre administratif européen

Par élévation, j'entends la reconnaissance de la capacité administrative européenne dans le champ du droit de l'Union. Il est remarquable que cette capacité administrative ait été reconnue dans le traité établissant une Constitution pour l'Europe (art. III-285). Jacques Ziller a étudié cette question dans une contribution sur « L'autorité administrative dans l'Union européenne » qui fait partie d'un ouvrage collectif sur « L'autorité de l'Union européenne »⁵¹. Simultanément, il y a une reconnaissance des obligations qui pèsent sur l'administration communautaire et nationale. En ses deux sens, il s'agit d'un processus de « constitutionnalisation de l'administration » (Paul Craig).

Cette constitutionnalisation consiste en une élévation normative par l'inscription de la capacité administrative dans le cadre constitutionnel mais également, et surtout, en une élévation axiologique: les principes de droit administratif ont la valeur de « principes fondamentaux » et non de simples règles constitutionnelles.

« Elévation » peut aussi signifier l'inverse, à savoir l'« administrationalisation » de la Constitution: on trouve en effet dans la Constitution des compétences dites de « coordination » ou d'« appoint ». Or, cela n'est rien d'autre que l'importation de méthodes administratives dans le cadre des compétences de l'Union. Ces méthodes administratives sont ainsi élevées au rang de procédé général d'élaboration du droit.

Cette reconnaissance de la capacité administrative de l'Union a deux séries de conséquences contradictoires.

⁵¹ Laurence Burgorgue Larsen et Loïc Azoulay (dir.), *L'autorité de l'Union européenne*, à paraître, Bruxelles : Bruylant, 2005.

a) Une reconstruction

Cette reconnaissance sert à la reconstruction de la relation entre les individus et l'administration dans le champ du droit administratif européen.

Cette reconstruction signifie d'abord une identification de l'autorité administrative et de ses capacités, ainsi que l'a présenté Susana de la Sierra tout à l'heure. On ne se contente plus du schéma selon lequel l'administration est une conséquence fonctionnelle de la construction européenne. Le régime administratif est identifié en tant que tel. Ce régime n'est pas un régime de service et de puissance, comme l'est l'administration étatique. C'est un régime de régulation, de coordination et d'habilitation (voir, à cet égard, les arrêts *Roquette Frères* et *CIF*, qui précisent les contraintes pesant sur les autorités nationales soumises à l'application des règles de concurrence).

D'un autre côté, il s'agit aussi de l'identification des assujettis à l'administration européenne, qui sont reconstruits comme citoyens. Ainsi, dans la Constitution européenne, l'article relatif au principe de bonne administration est rangé parmi les droits relatifs à la citoyenneté. On le voit encore dans la jurisprudence de la Cour de justice: le contribuable, dans un arrêt récent, est qualifié de citoyen (*Pusa*, 29 avril 2004). L'administré est élevé au rang de citoyen. Cela veut dire essentiellement qu'il dispose de droits subjectifs fondamentaux. Il y a bien en effet une « subjectivation » du champ du droit administratif européen (voir les débats précédents). Il en résulte la construction d'un lien plus direct entre le citoyen et l'autorité administrative. L'administration communautaire est non plus seulement une nécessité fonctionnelle mais une relation qu'on peut qualifier de « civique »: un lien direct est établi entre une communauté de citoyens et un groupe d'autorités compétentes. Ce lien ne passe pas essentiellement par la contrainte.

Je voudrais citer à cet égard l'affaire *max.mobil*, qui a fait l'objet d'un arrêt du Tribunal de première instance puis d'un pourvoi devant la Cour de justice. Cette affaire reflète bien les ambiguïtés qui résultent de la création d'un lien particulier entre le citoyen et l'administration européenne. Ce lien crée évidemment des droits mais aussi des attentes d'accès à la justice européenne ainsi que des attentes de droit de la part des citoyens européens. Dans cette affaire, le Tribunal de première instance essaie précisément de répondre à ces attentes. Par un raisonnement inédit en droit communautaire, il associe immédiatement à une obligation pesant sur l'administration communautaire une voie d'accès au juge. Par là, il subjectivise la justice européenne. Au contraire, la Cour va « ré-objectiver » le litige, fermer la voie d'accès au juge et, ainsi, déplacer la charge de la délibération sur la procédure pré-contentieuse.

b) Des risques d'exclusion

Il faut bien prendre garde au fait que cette reconstruction emporte le risque d'engendrer un processus d'exclusion. Le processus de constitutionnalisation est plus paradoxal et ambigu qu'on ne le croit généralement.

Cette reconstruction du lien entre le citoyen et l'administration européenne risque d'exclure deux catégories de personnes.

D'abord les tiers qui ne sont pas des citoyens, c'est-à-dire essentiellement les étrangers non-communautaires. Certes, l'article relatif au principe de bonne administration s'adresse à « toute personne ». Mais cela signifie-t-il que l'on va traiter de la même manière les citoyens européens et les personnes qui ne sont pas des citoyens européens ? Cela n'est pas certain. Certaines forces s'y opposent. Il y a en tout cas un risque de ne pas appliquer de la même façon les règles à ces deux catégories de personnes.

Un autre risque d'exclusion concerne les citoyens qui n'ont pas de ressources, c'est-à-dire ceux qui ne disposent pas des moyens matériels et cognitifs pour accéder aux institutions. On se reportera notamment à cet égard à l'arrêt *Kik/OHMI*, qui fonde le régime linguistique de l'organe communautaire sur les ressources économiques (et nécessairement sélectives) des opérateurs ayant accès à cet organe.

The Concept of Administrative Self-Remedy under EC Law: Case Law and Related Questions

Synthesis of the Round-Table Discussion by Kathrin Maria Scherr

On December 10, 2004 an interesting, thought-provoking and thematically rich colloquium of experts was held at the European University Institute, Florence, Italy under the organization and direction of Prof. Jacques Ziller, Professor of Comparative Public Law at the European University Institute. The round table consisted of distinguished scholars and high-level experts⁵² in the field of European administrative law as well as a number of doctoral researchers from the European University Institute. The thematic focus and title of this bilingual conference, which was conducted entirely in English and French, evolved around the general question of “What’s new in European Administrative Law?/Quoi de neuf en Droit Administratif Européen?”. Under this premise the colloquium centred around three overall topics of discussion: First, questions of administrative procedure in European law, secondly, the issue of judicial control in administrative law and last but not least novelties in the development of a “European administrative area” with special reference to questions related to the European Constitution and various aspects of enlargement.

All the aforementioned issues gave rise to a rich and stimulating round-table discussion and thus allow for specific key points to be analysed and presented in a short synthesis, which is to be published alongside the introductory presentations of each individual speaker at the conference. Even though the conference followed a well-structured agenda, the various sessions and presentations cannot be clearly thematically divided from each other and in fact, the debates subsequent to each presentation frequently overlapped in substance and content. Therefore, instead of reproducing the exact chronological sequence of the topics addressed in the course of the conference, a number of core themes can be identified as key points of the round-table discussion. The following paragraphs will focus first and foremost on an important and widely-discussed point on the agenda of the colloquium, namely the broad range of questions related to administrative procedure in European law. The topic was introduced by two short presentations, starting with Prof. Eduardo Chiti, who provided a broad overview of the regulatory framework of joint administrative functions, and followed by Prof. Diana-Urania Galetta, who discussed the case-law related to the concept of “administrative self-remedy” in European Community Law. The subsequent paragraphs will elaborate in more detail on the

⁵² The list of participants (in alphabetical order): Prof. Jean-Bernard Auby (Université de Paris II), Prof. Loïc Azoulay (Université de Rouen et Cour de Justice des Communautés Européennes), Prof. Eduardo Chiti (Università di Lecce), Prof. Paul Craig (University of Oxford), Prof. Diana-Urania Galetta (Università degli Studi di Milano), Prof. Susana De La Sierra (Universidad de Castilla-La Mancha), Prof. Karl-Peter Sommermann (Hochschule für Verwaltungswissenschaften, Speyer), Moderator: Prof. Jacques Ziller (Institut Universitaire Européen).

specific aspects discussed as a reaction to Prof. Galetta's presentation on the issue of administrative self-remedy:

The Notion of "Administrative Self-Remedy": Comparative Questions of Terminology and Translation

Already the title of Prof. Galetta's presentation on "administrative self-remedy" stimulated an interesting debate among the participants on the correct translation of the expression "*autotutela amministrativa*", which is commonly used in Italian administrative law. The English translation used by Prof. Galetta – "administrative self-remedy" – is in fact not an expression used by the Court of Justice itself. Moreover, Prof. Craig pointed out that the particular label of "self-remedy", or the English term of "self-regulation" for the description of an administrative law principle might carry a slightly confusing connotation, as from the more general public law perspective the term "self-regulation" has a whole different meaning. In fact, the more general connotation it has in common law systems is that a particular sector or industry would be allowed to regulate itself rather than being subject to external governmental regulation. This possible overlap in meaning has to be carefully taken into account when referring to the Italian administrative law principle of "*autotutela amministrativa*" as "administrative self-remedy" in English.

Thereupon Prof. Ziller added on a comparative note that the problem of finding a correct translation for "*procedimento di autotutela amministrativa*" not only exists in common law, but that even the French language provides for no exact equivalent corresponding to the aforementioned Italian legal expression. The lack of a suitable translation in French was also confirmed by Prof. Auby. On the same aspect, Prof. Ziller subsequently made reference to Spanish law, where in fact the Italian legal principle of "*autotutela amministrativa*" corresponds to an analogous legal concept, which is however different from the literal translation of "*autotutela*". Likewise, Prof. Susana de la Sierra confirmed that in Spanish administrative law the expression "*autotutela*" existed as such, but she added that it was used in a slightly different context. Prof. de la Sierra underlined the negative connotation attributed to the concept of "*autotutela*" in Spanish administrative law due to the fact that it awards extraordinary powers to an administrative authority equivalent to the judge's powers, so that the administrative body can in fact declare rights, execute them and in some cases even review its own decisions – a meaning which the expression "*autotutela ejecutiva*" also has commonly in Italian administrative law, as confirmed by Prof. Galetta. Thus, in certain cases the citizen is obliged to go to the administration before going to the judge in order to claim his rights. Instead, the concept evolving around the notion of "administrative self-remedy" is closer related to the different kinds of annulment of administrative acts that exist under Spanish law and the differentiation between the legal concepts of "*anulación*" and "*nulidad*". Moreover, in Spanish law there are specific grounds which serve as a basis in order to declare an administrative act void and, as Prof. de la Sierra stated, among these kinds of grounds can be Community law. Thus, she underlined once more that there was a considerable difference in Spanish law between the literal translation of the term "*autotutela*" and the actual concept corresponding to this principle under Spanish administrative law.

The Concept of Administrative Self-Remedy under European Community Law

As Prof. Galetta had already clarified in her presentation, the term “administrative self-remedy” refers to the obligation for the national administrative bodies to review their final administrative decisions in some circumstances. With reference to three specific judgments, namely *Land Rheinland-Pfalz v. Alcan Deutschland GmbH*⁵³, *Delena Wells v. Secretary of State for Transport, Local Government and the Regions*⁵⁴ and the recent decision in *Kühne & Heitz*⁵⁵, Prof. Galetta eloquently outlined the basic framework developed by the ECJ for the concept of administrative self-remedy, which is based on the following premises:

In case of indirect administrative implementation of Community law, which refers to administration carried out by the Member States and not the Community Institutions, the general principles set up by the ECJ complement the respective national law by means of the so-called spill-over effect. As a result the general principles established by the ECJ in its rulings have a central role and a significant impact on national rules. Prof. Galetta argued that the principle of administrative self-remedy is in fact a general principle of Community law anchored in the principle of cooperation in Article 10 EC. However, according to the decision *Kühne & Heitz*, this principle only applies under the following circumstances, namely where the individual concerned complained to the administrative body immediately after becoming aware of the illegitimacy of a decision and where under national law the administrative body has the power to reopen the decision. Under the aforementioned conditions and on the basis of Article 10 EC, the administrative bodies have an obligation to review a final administrative decision.

With respect to the conditions developed in the aforementioned jurisprudence of the Court, Prof. Craig distinguished between two particular case scenarios: The first situation, as represented in case C-453/00, is a typical reflection of the *Simmenthal*⁵⁶ ruling of the ECJ, in that an administrative decision in the instant case is subject to review by the national court and the question is then referred from the national court to the ECJ. The jurisprudence developed in *Simmenthal* established for the purposes of Community law that the obligation on national bodies to implement Community law as declared by the ECJ was an obligation which applied all the way down to the administrative bodies. Thus, Prof. Craig underlined once more that if a ruling by an administrative authority in a particular country is inconsistent with the ruling given by the ECJ in a case arising from that administrative ruling, then the trumping effect of EU law over national law applies against all institutions, that contains the national legislative, the national executive, the national courts and ex hypothesis the national administrations as well. All the aforementioned bodies including the latter would have a strict obligation to make their ruling comply with the ruling of the ECJ. Moreover, Prof. Craig strongly emphasized the point that if there was any mechanism in national administrative law, which prevented the

⁵³ C-24/95 [March 20, 1997] ECR I-01591.

⁵⁴ C-201/02 [January 7, 2004] ECR 2004-00000 (not yet published in ECR).

⁵⁵ *Kühne & Heitz NV v. Produktschap voor Pluim vee en Eieren*, C-453/00 [January 13, 2004] ECR 2004-00000 (not yet published in ECR).

⁵⁶ *Amministrazione delle Finanze dello Stato v. Simmenthal SpA.*, C-106/77 [February 16, 1978] ECR 1978-00629.

national administration from changing its ruling, this itself would be contrary to EU law according to the *Factortame*⁵⁷ principle. In the second hypothesis Prof. Craig went even further in his argument in the sense that he raised the question to which extent a decision taken by a national administration would have to be re-examined or reviewed as a consequence of a separate judgment by the ECJ on exactly that point in the same or even in a different legal system, when this ruling by the Court clearly showed that the national administration in the initial case had got it wrong. In fact, Prof. Craig as well as Prof. Galetta agreed on the point that in the second case described above the administrative authority would have an obligation to review its initial decision.

With reference to Prof. Galetta's statement and to the general discussion thereafter, Prof. Eduardo Chiti identified the main rationale of the case *Kühne & Heitz* in terms of the concept of supremacy of Community law. Thereby, he highlighted three main implications of this extension of supremacy to public administrations at the general level: A first observation consisted of the impression that the Court was not only extending supremacy or the effects of supremacy to public administrations, but that it was also extending the concept of direct effect in a parallel jurisprudence. As a result the ECJ is essentially extending the two founding doctrines of Community law from the courts to the public administration. Moreover, Prof. Chiti argued that courts and national administrations were not treated in the same way by the Court of Justice. In his opinion the ECJ is designing two doctrines and interpreting the notion of supremacy of Community law in two slightly different ways. In fact, he argued that the Court of Justice was more cautious in his attempt to extend all the implications of supremacy to national public administrations, because the ECJ feared that this would bring about a sort of resistance or even a practice of disobedience from national administrations, which was less likely to happen from the side of national courts. As a final point Prof. Chiti argued that if the Court of Justice was in fact extending direct effect and supremacy to national administrations, then a development which was likely to happen was the extension of the jurisdiction under Art. 234 EC in order to include to a certain degree also public administrations. The aforementioned development could then be based on the fact that the national administrations are becoming part of a dialogue which is no longer a dialogue purely between courts, but also between the ECJ and national administrations.

Serious concerns were raised by Prof. Auby with respect to the recent developments in the jurisprudence of the European Court of Justice over the emerging contradiction between two growing tendencies: The mechanism of administrative self-remedy and the possibility to re-examine final administrative decisions on the one hand, and on the other hand the attempt by various national systems such as the French system to reduce the delay within which an administrative act can be legally revoked. According to Prof. Auby these two developments are not compatible and will eventually give rise to a conflict between national laws and the Community legal order.

⁵⁷ At the time a principle in UK law, which excluded the possibility of interim relief against the Crown, was found to be in breach of European law. See *R.v.Secretary of State for Transport, ex parte Factortame Ltd. and others*, C-46/93 and C-48/93 [March 5, 1996] ECR I-01029.

State Liability for Judicial Breaches of European Community Law: From Köbler⁵⁸ to Kühne & Heitz⁵⁹

A further aspect, which was touched upon following Prof. Chiti's and Prof. Galetta's presentation, was the issue concerning possible parallels between the groundbreaking ruling of the ECJ in *Köbler* and the Court's recent judgment in *Kühne & Heitz*. With reference to this point and in accordance with Prof. Chiti's remarks, Prof. Azoulay argued that even though both cases expressed the tendency of the ECJ to extend the two general principles of Community law – the principle of effectiveness and the principle of *effet utile* – to public administrations, there is in fact a fundamental difference between the two cases. In the *Köbler* case we are faced with the concept of responsibility and the mechanisms that lie behind it, which are directly linked to the issue of supremacy of Community law. In the judgment *Kühne & Heitz*, however, we are not explicitly concerned with the external concept of liability, but are in fact dealing with an internal mechanism of revision, which is closer linked to the principle of cooperation between administrative bodies enshrined in Article 10 EC. The aforementioned difference between these two cases has to be taken into consideration in order to analyse correctly all the implications of the abovementioned case law. With this in mind, Prof. Azoulay referred to the recent judgment by the ECJ in *Conorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato*⁶⁰ where the ECJ in fact explicitly referred to the principle of supremacy of EC law. However, the reasoning of the Court in the case *Kühne & Heitz* is based on a rather different foundation.

The problematic aspects surrounding the *Köbler* case were, inter alia, addressed by Prof. Jean-Bernard Auby in his presentation "*La physionomie du contentieux européen*". With reference to the recent developments of judicial mechanisms in European administrative law, Prof. Auby underlined the point that although a priori the division of competences between the national and the Community courts seems to be clear, the detailed questions of judicial organization are rather delicate, even more so because the Community structure lacks the classical hierarchical framework that exists within national judicial systems. However, Prof. Auby argued that with the judgment of the European Court of Justice in *Köbler v. Republic of Austria*⁶¹ this structural problem seems to be partly resolved. Before the ruling of the ECJ in *Köbler v. Republic of Austria*, according to Prof. Auby, the national judiciary had more leeway than the legislator with respect to the application and interpretation of Community law. On the basis of the newly-established principles in *Köbler*, however, the margin of appreciation for the judiciary has been significantly reduced due to the possibility of liability claims resulting from a judicial breach or misinterpretation of Community law. Thus, as Prof. Auby stated, on the basis of the *Köbler* case the overall judicial structure of the Community achieved not an entirely hierarchical character, but developed at least a certain degree of "verticalisation". This trend towards "*une tentative de verticalisation*" of the judicial structure was confirmed in a similar manner by Prof. Azoulay.

⁵⁸ C-224/01 [September 30, 2003] ECR I-10239.

⁵⁹ C-453/00 [January 13, 2004] ECR 2004-00000 (not yet published in ECR).

⁶⁰ C-198/01 [September 9, 2003] ECR I-08055.

⁶¹ C-224/01 [September 30, 2003] ECR I-10239.

However, one might observe the implications of the *Köbler* case also from a different angle. There is no doubt that the aforementioned judgment introduces a risk of liability claims against judicial decisions of courts ruling at last instance and therefore narrows the general margin of interpretation of Community law for the judiciary. Yet, in terms of a possible “verticalisation” of the overall judicial structure within the EC, the question remains to be asked whether the *Köbler* case has not in fact just achieved the opposite, namely a disturbance of the national judicial hierarchy? The latter hypothesis is based on the argument that as a consequence of the *Köbler* case subordinate national courts will be confronted with the problem of deciding over liability claims for loss or damage caused to an individual as a result of an alleged breach of Community law by a judgment of a national supreme court. Not only does the aforementioned judgment apparently cause serious structural and procedural entanglements, but it also seems to elide the principle of *res judicata*, the principle of legal certainty and the independence of the judiciary. Likewise, one might argue that this decision opens up a possibility to hold national supreme courts liable for a violation of Article 234 EC arguing that the respective court refused to refer the case for a preliminary ruling to the ECJ. Is the decisive point to invoke liability *à la Köbler* that the judgment by the national supreme court is contrary to EC law, or is the manifest violation of the duty to request a preliminary ruling in itself sufficient?

In brief, the *Köbler* judgment seems to open up a “Pandora’s box” with respect to the question of liability claims for erroneous judicial decisions within the Community legal order. Even though after *Köbler* the scope of interpretation of Community law might have been limited for the national judiciary, the decision nevertheless failed to introduce a hierarchical structure or a vertical organization among national and Community courts.

Conclusion

The lively debate among the participants and the numerous arguments raised in the course of the round-table discussion would in fact allow for a more elaborate analysis of all the aforementioned issues. However, as indicated in the introductory paragraphs, the objective of this synthesis is to limit the focus to the analysis of specific core points raised by the participants during the conference. *Quoi de neuf en Droit Administratif Européen?* – The colloquium at the European University Institute on December 10, 2004 surely provided a sufficient answer with respect to the concept of administrative self-remedy and further related issues arising within an emerging “European administrative area”.

Summary of the discussion regarding participation rights – Synthesis of the Round-Table Discussion

Joana Mendes

On the issue of participation, the discussion that followed the presentations was substantial and rich. Three main issues deserve to be mentioned: the changes in the model of administration, that stand on the background of the evolution undergone by the European administrative law in what regards rights of participation; the role of the Courts and the role of administrations in the emergence of consultation rights; and, finally, the importance of participation in order to enhance legitimacy, which was mentioned in a more briefly way.

1) The changes in the model of administration that impact on participation rights

The first aspect was essentially raised by Karl-Peter Sommermann, who made reference to those changes, underlining the parallels between Loïc Azoulay's presentation and the one of Paul Craig. Both Azoulay and Craig referred to the cooperative aspects of European administrative law, in two different ways: on the one hand, the Interactive Policy Making technique shows the cooperation between the Commission and civil society; on the other hand, there is a growing cooperation between the European institutions and the organs of national administrations. He considers that both are symptoms of a fundamental change: while initially, the performance of activities on a supranational level required the imposition of the higher ranking of the Community law on the Member States (and on the individuals subject to it), we find ourselves, nowadays, "within one polity in which we can all cooperate". Focusing on the cooperation developed between citizens and the Commission, Sommermann showed his doubts on whether this aspect of cooperation is helpful or not, even though he considers that the openness of rulemaking process to civil society is, as a principle, a very positive approach.

There are two, possibly three, main issues regarding participation that lay behind the fears expressed by Sommermann. Firstly, how are the external contributions given to a given process actually taken into account (he referred to the process of the European Convention to illustrate this point: it was open to civil society but the outcomes of this participatory process were rather disappointing, since the various contributions were not effectively considered). Secondly, what is meant by civil society – who shall have access to which processes (Sommermann mentioned the fact that the current provision on the Constitutional Treaty regarding participatory democracy expressly mentions groups, which means, in his opinion, that it is not the individual who is addressed but the organised interest groups and expertise groups). Both these issues lead us back to the question of procedure, criteria and guarantees. This last point raised – the fact that the Constitution refers not to individuals but to organised groups – can also hide the fear of corporatism. The change that can emerge from the symptoms that lie beneath the presentations of Loïc Azoulay and Paul Craig is the build up of a model of administrative cooperation, leaving out an undesirable effect of corporatism. To this respect, at the moment, it seems to him more effective the interrelation between the institutions (in this

point, he is seconded by Loïc Azoulay, who shares Sommermann's doubts on participatory democracy). He gave the example of the European agencies that are flourishing under the auspices of the Commission's White Paper on European Governance, stressing that they are built on cooperation, given the fact that their bodies entail representatives of the Member States and the Commission. Agencies are one of the symptoms of the changes in the European administrative model, if not – we might add – at the centre of that phenomenon.

2) The role of the Courts and the role of the administrations in the emergence of consultation rights

The issue of the role that Courts may or shall have in the development of rights of participation in rule making processes (or, in other words, consultation in normative processes that lead to the adoption of acts of a general scope) was mainly addressed by Paul Craig and Loïc Azoulay. While Craig considers that the Courts, to this respect, have been restrictive in their position (mainly due to pragmatic reasons, but also for fear of being regarded too activist in that respect), Azoulay underlined the fact that, in his opinion, stress should be put not on why the Court has been restrictive in the issue of rights of consultation, but on why it was so daring regarding the establishment of defence rights and procedural rights in procedures concerning individuals, which is directly related to the will of framing the Commission's discretionary power, by way of creating procedural guarantees. Further, he stressed that the distinction between procedural rights (rights of defence) and the rights of consultation is clearly made in the national systems: it resorts to the classical distinction between democracy ("participation", he stated, "is the democracy at the administrative level") and the right of defence, which, in a brief reference, one can say that equals the rule of law. He stressed that at the theoretical and ideological level the distinction is quite clear and added that, although it is possible to question it, he does not envisage that the Court will question this distinction on the basis of the Constitutional Treaty (therefore, he agrees with the statement Paul Craig made in the last part of his presentation).

This discussion clearly touches the issue of the role Courts shall play in this respect and also the further developments to expect from the inclusion in the Constitutional Treaty of a provision on participatory democracy. This provision might be labelled as being more of a political than of a strictly legal nature, therefore falling out of the range of the jurisdictional activity – and it is this assumption that seems to lie beneath Azoulay's intervention – but still one can question whether the role the judge can play in the shaping of an administrative model that embodies participation should be restrained to strengthening of the right of defence before individual measures. In this respect, Paul Craig, on the light of the existent position of the Court, reaffirmed his conviction that the general provision exhorting participation included on the Treaty will not cause the Court to change its present jurisprudence and define the right to be consulted, although he hopes that he would be proved wrong in this belief and that the said provision would be regarded as enough to cause this shift.

Linked to this there is another issue that was mentioned in the discussion: the role that administrations themselves have had so far regarding the creation of mechanisms of consultation, mainly processes of notice and comment. In this respect, Edoardo Chiti said that

both the European and the national administrations, working in networks in new areas of European administrative action, have developed themselves a framework for participation based in three steps: 1) duty to communicate the beginning of the administrative procedure; 2) duty to publish documents concerning the measure that is likely to be adopted; 3) duty to give reasons, explaining why and how a single comments have been taken into account. He believes that the reason why such duties have been created on the initiative of the administrations themselves lies on the need to stabilise the relations between multiple regulators and multiple regulates.

Paul Craig and Edoardo Chiti clearly disagreed on the significance that is to be given to the existent processes – processes that, according to the latter, are imposed by community legislation. Paul Craig stressed the fact that such mechanisms do not exist in many relevant areas of European rulemaking; he exemplified his point stating that “there is no systematised consultation in the form of notice and comment, or other, in relation to comitology” and that the mechanisms referred by Edoardo Chiti do not apply to $\frac{3}{4}$ of the European regulative activity.

3) The importance of participation in order to enhance legitimacy

One of the questions that were raised during the discussion was to what extent can actually participation enhance legitimacy, particularly having in consideration that, in some administrative areas, independence and impartiality are important values to preserve and that these can be endangered by participation.

On this issue, Paul Craig sustained his belief that participation does always enhance legitimacy, although he recognises that this is a controversial issue which was not possible to address in the discussion, in the little time available. On what regards impartiality, as a requirement with particular importance in certain areas of administrative action, “the issue” he stated, “is not to say that there should not be participation in those areas, but that there has to be a particular carefulness on the weight given to participation”, particularly when the views of the interested parties that have participated are being purported by representatives of groups who have an agenda to fulfil. That is not, in his view, a reason to reject participation: it is rather a reason to treat results of participation with due care. On this he was seconded by Chiti, who added that the legal principle in question would then be the principle of proportionality, meant not as a judicial test on the administrative function but on the administrative practice.

Conclusion

As a concluding remark on the issue of rights of participation, as it was addressed by the participants in the workshop, we could mention the observation made by Jean-Bernard Auby: the parallel evolution undergone by the European administrative law and the national administrative laws, from the stress put on hierarchy preoccupations (“*faire respecter l’ordre*”) to an approach more centred on democratic concerns (a rights based approach) is still an incomplete evolution in both levels.

In fact, whatever the stance that might be sustained concerning the role that rights of participation can actually play in the “democratization” of Administration (1), concerning the

jurisdictional attitude when reinforcing (or not) rights of consultation in the procedures that lead to the adoption of administrative regulations or the assessment of mechanisms created by administrations themselves (2), concerning, finally, the need to balance impartiality with participation (3), whatever those stances might be, the observation of Jean-Bernard Auby seems to meet the opinion of the participants in this workshop in what regards the current development of rights of participation in European administrative law.