Procedural Principles of Good Administration in Community Law

- Thesis submitted for the obtaining of the Masters degree (LL.M.) -

Academic year 1996/1997

European University Institute, Florence
Law Department

Hanns Peter Nehl
Alter Schulweg 2
D-22529 Hamburg
Germany
A. INTRODUCTION

In current debates turning on the fundamental values which the legal order of the European Community should be committed to respect and protect legal issues relating to administrative process and, in particular, the adequate degree of procedural protection to be accorded to individuals have increasingly come to the forefront. This paper seeks to contribute to the discussion by trying to demonstrate that and why the significance ascribed to the law governing Community administrative procedures has indeed gone through a deep metamorphosis during the last decade which arguably has not yet come to an end. In fact, in the face of the recent case-law of the Community courts, which will be analyzed, it seems not too daring to speak of an ongoing process of 'constitutionalization' with respect to procedural requirements. In the context of this broader development, an attempt will be made to reveal some of its exemplary features, namely, the dynamic expansion of a specified set of procedural standards of good administration. It will be argued that process standards, such as the right to access to information or the right to be heard, tend to be extensively interpreted in particular instances as well as to gradually gain universal applicability in the vast field of what has come to be named

'Community' or 'European administrative law'. However, the marked trend towards constitutionalizing process principles, which is primarily being supported by judicial intervention, is understandable only with a view to the extraordinarily heterogeneous nature of the Community administrative 'system' referred to; its 'structure' therefore calls for some further elucidation.

I. The quest for and expansion of basic procedural rules in a heterogene administrative 'system'

It is widely recognized that the well-functioning and the legitimacy of any modern 'democratic polity' is heavily dependent on the availability of workable organizational and process structures. Administrative process constitutes one of the essential avenues by virtue of which the common will of the polity is being expressed and implemented. More specifically, as regards the Community, it is a commonplace that the existence

---


'Community law' referred to in this paper, if nothing indicated to the contrary, is meant to comprise the rules of the Treaty establishing the European Community (EC Treaty), the secondary legislation derived therefrom and the judge-made law (in particular general principles of law) established in its context.


4 Luhmann, ibid., p. 201 ff.
of a performant organizational and procedural framework is an indispensable precondition for the effective implementation, application and enforcement of (substantive) Community law, thereby ensuring the harmonious attainment of Community policy goals both in all Member States and with respect to their citizens.5 Such a system furthermore must provide for a reasonable degree of participation and protection for individuals who are likely to be adversely affected by the outcome of administrative decision-making - a feature common to any modern legal order subjected to the 'rule of law'.6 Yet, it hardly needs mentioning that the European Community has never had at its disposal an overall and coherently regulated process framework capable of sufficiently securing both the uniform and effective implementation of its policies.7

---


6 Cf. for the Community, e.g., ECJ, Case 294/83, Parti Ecologiste 'Les Verts v. European Parliament', [1983] ECR 1339, par. 23: "community based on law"; see furthermore Article F par. 2 of the Treaty on the European Union emphasizing the Union's commitment to protecting fundamental rights. See generally on Community administrative process Schwarz, ibid., p. 1173 ff..

7 As to some of the existing shortcomings in the Community system see the analysis by Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques',
and the protection of individuals. On a large scale the execution of Community law is ensured by national authorities and thus primarily framed by the process law of the Member States (so-called indirect administration), which, in principle, enjoy procedural autonomy. Depending on how far Community law interferes with national procedural autonomy by setting common criteria for its implementation a complex interaction between supranational and national rules - the latter currently originating in 15 distinct legal orders - is established; this, moreover, may be coupled with a sectorially shifting degree of interplay between Community and national organs. Likewise, the existing decisional frameworks for so-called direct administration entrusted to the Community institutions are not designed according to a systematic pattern and are defective in several respects. Related legislative enactments of process law consist to a large extent of patchwork codification tailored to the specific requirements of sectorial policy implementation. They are little coordinated with one another, suffer from serious gaps - in particular as regards individual protection - and, at least partly, are not up to the new challenges to which a modern economic and technocratic bureaucracy is increasingly

---


8 Cf., e.g., Majone, 'The European Community: An "Independent Fourth Branch of Government"?' in Verfassungen für ein ziviles Europa, Brüggemeier (ed.), 1994, p. 23 (41 f.).

It should be made clear at the outset that this paper refrains from advocating a comprehensive codification of Community administrative decision-making. Indeed, this might constitute, at least at this stage of European integration, an unattainable object in the face of the intricate division of competence between the Community and its components on the one hand and the particular exigencies displayed by distinct domains of policy implementation on the other. Instead, an attempt will be made to identify certain basic process rules which, it is assumed, are coming to be recognized as a common standard of

---


11 For a recent discussion see Harlow, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot?', [1996] European Law Journal p. 3 (19 ff.); Chiti, 'Are there Universal Principles of Good Governance?', [1995] European Public Law p. 241 (247 f.) and the contributions in Schwarze and Starck (eds.), 'Vereinheitlichung des Verwaltungsverfahrensrechts in der EG', [1995] Europarecht, Beilheft 1. This, however, does not touch upon the necessity of partial codification, such as in State aid matters (Article 94 EC Treaty is still a dead letter) and the need to ensure a certain standard of coherence among the rules on sectorial decision-making; see, e.g., della Cananea, ibid., p. 74 ff.
reference in various fields of policy implementation. To this end, the analysis will focus on a specific part of Community administration in which the involvement of Community organs as executants is of central importance. This perspective not only covers the domains of direct administration in the narrow sense but also includes so-called cooperative or mixed administration, i.e. instances in which the major executive part is entrusted to the national authorities (hence strictly speaking indirect administration), yet, in which the Commission exerts a leading administrative function. This category of administrative process will be considered as a test-field for the potential of expansion inherent in a set of fundamental procedural rules, such as the right to access to information, the right to be heard, the principle of care and the duty to give reasons, which, it is submitted, are to be classified under the category of principles of good administration. Particular emphasis will be put on the

12 This kind of composite administration is particularly frequent in the framework of the CAP, see, e.g., the facts of Case C-97/91 Olifeco Borelli SpA v. Commission [1993] ECR I-6313, and in customs matters; cf., e.g., Articles 239 and 240 of the Customs Code (remission of customs duties).

13 It should be noted that Article 190 EC Treaty (laying down the duty to give reasons for administrative measures) provides the only express process rule of general applicability in the areas of direct administration.

14 The term of 'good administration' will be used in an equivalent sense to 'proper' or 'sound' administration, as it seems that, at least in the Community context, the shifting terminology does not imply a change in meaning. As will be discussed below (see under part B.), the Community courts do not follow a clearcut guideline in this respect. 'Good administration' can principally be held to reflect a wide range of (basic) soft and hard law rules governing administrative decision-making, both of purely procedural character and of a rather substantive nature. The latter category comprises, e.g., principles directing admini-
'principle of care' - i.e. the duty of the administration to impartially and carefully examine the information needed for its decision-making - which has been developing in recent years into a significant process standard with a strong protective reflex in favour of individual parties.

In this context, the term 'expansion' is meant to have two distinct but closely interrelated thrusts: First, it is suggested that the aforementioned process rules, for a variety of reasons, tend to be interpreted extensively in terms of both their legal rank and their scope of application within a given field of administrative decision-making. Second, 'expansion' stands for the capacity and likelihood of 'spill over' peculiar to these principles (and of equivalent process standards) into diverse areas of administrative rule-making. It will be seen that the more relevance a process rule gains in a given context the higher is the probability of its producing a 'spill over' effect. Both dynamisms therefore testify a tendency towards recognizing the universal character or the 'constitutional' significance of the rule in question.

Yet, both the extensive interpretation of principles of good administration in particular instances and their spreading in
the realm of European administrative law are inconceivable without the existence of a particularly powerful driving force which, unsurprisingly, is vested in the Community courts. Indeed, judicial activism plays a crucial part in steering this development and thus inevitably forms the focus of this paper. The above-described incoherent process framework which conceals varying levels and gaps of individual protection in administrative decision-making procedures appears to be a particularly well-suited area for judicial intervention. In such propitious context — combined with an often patent inertia on the part of the Community legislator — the courts, well aware of their protective task with regard to individuals, feel encouraged to impose judge-made procedural constraints on the administration. The technique designed to achieve this is well known from the earliest days in the ECJ's jurisprudence in the field of substantive administrative law as well as, at some later point, from its human rights doctrine; since then, judicial creativity has been continuously fostering an array of fundamental principles. The judicial establishment in the procedural realm of general principles of law or equivalent

15 See the early precedent concerning the principle of revocation of administrative acts Joined Cases 7/56 and 3-7/57, Algera v. Common Assembly [1957] ECR 39; for the establishment of a range of other — in particular substantive — principles of good administration, such as proportionality and legal certainty, see the comprehensive account in Schwarze, ibid. As regards human rights matters see the volte-face of the ECJ in Case 29/69, Stauder v. City of Ulm, [1969] ECR 419 as opposed to Case 1/58, Stork v. High Authority, [1959] ECR 17 in which it had rejected to review Community legislation (under the Treaty on the European Steel and Coal Community) for violations of basic rights. For a general survey on the human rights jurisprudence of the ECJ cf., Cassese, Clapham and Weiler (eds.), 'European Union: The Human Rights Challenge', 1991; Craig and de Burca, 'EC Law: Text, Cases, and Materials', 1995, p. 283 ff.
unwritten rules with higher rank in the hierarchy of norms may thus be considered as witnessing a further move in the constitutionalization of the Community legal order.\textsuperscript{16}

This development of expansion shall be exemplified by an analysis of the innovative jurisprudence of the Community courts with respect to (essential) procedural requirements\textsuperscript{17} in four main areas, namely, \textit{competition}, \textit{anti-dumping}, \textit{customs} and \textit{State aid} policy implementation - supplemented, where appropriate, by short insights into other fields of Community administration.

It is submitted that the strength of convergence of procedural standards of good administration appears to be particularly well discernable in these fields. This may be partly explained by the assumption that the Community courts feel less reluctant to proceed to judicial harmonization of administrative principles in the frame of exclusive Community process competence than in the province of national procedural autonomy.

Indeed, indirect administration opens far less leeway for activism as the Community courts are confronted with manifold national legal traditions and strong opponents such as the national courts on whose cooperation\textsuperscript{18} the furtherance of


\textsuperscript{17} Cf. Article 173 par. 2 EC Treaty.

\textsuperscript{18} For a recent socio-political account of the cooperative relationship between the ECJ and the national courts as the focal driving force in legal integration on the basis of the so-called \textit{consociational model} see Chalmers, 'Judicial Preferences and the Community Legal Order', [1997] \textit{Modern Law Review} p. 164.
Community policy goals is heavily dependent. The dynamism of expansion of process principles on the level of direct administration of Community policies, such as those referred to above, will be described as horizontal convergence.

Moreover, an attempt will be made to address the much more problematic vertical relationship between Community and national administration; accordingly, the harmonizing effect of fundamental procedural standards in this context will be typified as vertical convergence. It will be shown that, in particular, instances of mixed or cooperative administration in which the administrative process is 'shared' between Community organs and national authorities trigger the marked


20 For the general trend towards approximation between European and national administrative law see the recent comparative analysis in Schwarze (ed.), 'Administrative Law under European Influence (On the convergences of the administrative laws of the EU Member States)', 1996, and in Marcou (ed.), 'Les mutations du droit de l'administration en Europe', 1995. Concerning the mutual influences between the European and the German administrative system see now the huge work by V. Danwitz, 'Verwaltungsrechtliches System und Europäische Integration', 1996.
need to observe basic procedural rules along the same standards. This development - first signs of which are detectable in the case-law - is to be viewed in parallel to the increasingly felt tendency towards incorporation or federalization, meaning that the practices of the Member States, when acting as Community agents, are being gradually subjected to scrutiny according to a common standard of human rights protection as well as to substantive and procedural principles of good administration.

---

21 ECJ, Case 222/86, UNECTEF v. Heylens, [1987] ECR 4097 constitutes a landmark in this respect. Even though mixed or indirect execution of Community law was not at issue (but compliance with Article 48 EC Treaty) the case evidences the capacity of expansion of Community principles of good administration - here the giving reasons requirement - into the area of national administrative process.


23 In the context of recovery of unlawfully granted State aids, which is to be secured by the national authorities, the ECJ has interpreted the (Community) principle of protection of legitimate expectations fairly restrictively so that it trumps the (higher) protective standards existing in the Member States; cf. recently ECJ, judgment of 20.3.1997, Case C-24/95, Land Rheinland-Pfalz v. Alcan Deutschland GmbH, not yet reported; see also Case C-5/89, Commission v. Germany (Re State Aid to BUG-Alutechnik) [1990] ECR 1-3437 and Triantafyllou, 'Zur "Europäisierung" des Vertrauensschutzes (insbesondere § 48 VwVfG) am Beispiel der Rückforderung staatlicher Beihilfen', [1992] Neue Zeitschrift für Verwaltungsrecht p. 436. For a general survey on legitimate expectations in EC law see Schwarze, ibid., p. 867 ff., Sharpston, 'Legitimate Expectations and Economic Reality', [1990] European Law Review p. 103; Borchardt, 'Der Grundsatz des Vertrauensschutzes im Europäischen Gemeinschaftsrecht', 1988.
However, the structural disparity and incompleteness of written process rules in Community administrative law referred to above cannot furnish a full account of the reasons for judicial activism in fostering this dynamic process of expansion. This holds all the more true for the first type of 'expansion', namely, the extensive interpretation of process rules in particular instances of Community administration. Several other factors are to be taken into consideration in order to explain the activist stance adopted by the Community courts.

II. Judicial procedural review as the catalyst for constitutionalizing process principles

An event of major importance in the above described development was the establishment of the Court of First Instance (CFI) in 1988. Over the years the CFI has been charged with the task of dealing with the bulk of administrative litigation against Community institutions in order to release the European Court of Justice (ECJ) from its ever growing workload in time-consuming factually highly complex matters, such as competition cases. It soon became clear that the CFI, as compared to the

---

24 See Article 168a EC Treaty and Council Decision 88/591 (OJ 1988 L 319/1), respectively amended by Council Decisions 93/350 (OJ 1993 L 144/21) and, ultimately, 94/149 (OJ 1994 L 66/29) whereby the competence to deal with individual claims in all areas of direct Community policy implementation (including anti-dumping measures) has been successively transferred to the CFI.

ECJ, would shift to a more active and thorough fact finding and evaluation. Accordingly, it would show enhanced responsiveness to the factual and legal arguments and evidence put forward by the parties to the litigation as well as a more intrusive stance in scrutinizing whether the challenged administrative acts were well founded. This change in judicial policy, it will be shown, was not without effect on the standard of procedural review of administrative acts henceforth adopted by the Community courts. Against this backdrop certain process standards, such as the principle of care and the giving reasons duty, were likely to develop into appropriate instruments for scrupulously reviewing administrative measures.

The years following the coming into operation of the CFI were characterized by a steadily increasing flow of adjudication in the field of Community administrative law and, inter

---

26 See, e.g., the survey on the CFI's jurisprudence by Van der Woude, ibid., p. 460 ff.

27 It is arguable that the opportunity for appeal to the ECJ under Article 51 of the Court's Statute entails a gradual modification of either the CFI's and the ECJ's stance towards judicial review. The CFI will be induced to follow the precedents set by the ECJ in view of the possibility of seeing its decision quashed; conversely, the latter will be inevitably influenced by the accurate approach of the former in scrutinizing the lawfulness of administrative measures.

28 The workload of the CFI and the ECJ in administrative matters is constantly increasing, cf. the figures set out in European Court of Justice, Report on proceedings 1992-1994, Luxemburg 1995. It should be noted that the ECJ is still, albeit indirectly, involved in administrative adjudication related to direct administration not only by way of appeal but also by means of preliminary references pursuant to Article 177 EC Treaty. This is the result of the doctrine of direct effect which empowers the Member State courts to adjudicate on the basis of directly effective provisions (e.g. Articles 85 and 93 par 3. EC Treaty). Furthermore, many administrative measures taken by the Community institutions
estingly, reliance by litigants on alleged breaches of procedural rules has become an issue of central importance.\(^2\)
The marked general trend, in particular among large and powerful undertakings, to use litigation as a strategy for pursuing economic self- and group interests can be asserted as one essential factor accounting for this development.\(^3\) However, explaining the raise in adjudication on procedural grounds merely by the enhanced propensity of undertakings and corporate interests to go before the courts would be unconvincing. Rather it is suggested that the strengthening of litigation strategies and a gradually changing attitude displayed by the Community courts with regard to reviewing process standards constitute parallel and mutually reinforcing parameters. To elucidation, the reason why procedural issues have come to be transformed

need complementary action by national authorities (e.g. recovery of State aids, levying of ant-dumping duties), the latter being subject to judicial review before the national courts.


into a promising and widely used battle-ground for litigants lies both with the enhanced pressure for the improvement of judicial protection\(^\text{31}\) and with the responsivness of the courts to yield this pressure. As will be discussed, a series of judgments handed down by the ECJ in 1991 constitute an important landmark - perhaps even a turning point - in this development.\(^\text{32}\) It furthermore appears that the CFI, in the aftermath of this jurisprudence, has performed an additional marked shift towards a stronger emphasis on the observance of process rules.

The above alleged endeavour to seek improved procedural protection of individual parties is particularly pronounced in relation to the exercise of \textit{administrative discretion}, thus adding force to the expansion of basic process rules. Indeed, the traditional fairly restrictive stance adopted by the Community courts with respect to (substantive) control of discretionary powers provides a supplementary, perhaps even

\(^{31}\) The partisan claim for enhanced procedural protection in competition proceedings sampled by the European Association of Lawyers is but one example to this development, see \textit{Association Européene des Avocats} (ed.), 'Rights of Defence and Rights of the European Commission in EC Competition Law', 1994. Likewise, increased pressure emanates from national (mostly German) courts in Article 177-proceedings which constantly urge the ECJ to strengthen its allegedly too relaxed standard of judicial review, in particular, with respect to human rights issues, see, e.g., the claims for full review of technocratic discretionary power asserted by the Bundesfinanzhof in Case C-269/90, \textit{Hauptzollamt München-Mitte v. Technische Universität München}, [1991] ECR I-5469 (5473 f.) and recently by German administrative courts in the frame of the 'banana-litigation', see Everling, ibid., p. 430 ff. with further references.

central, explanation for both the growing significance of process rules and the boost of procedural review. It will be shown that procedural standards, in particular, the principle of care and the duty to give reasons, have gained an enormous relevance in discretionary rule-making inasmuch as they are held to operate in a 'compensatory function' or as a counterbalance for (allegedly) reduced individual protection. Such a protective endeavour, furthermore, quite automatically induces the courts to increase their powers of review with regard to administrative decision-making. This is not only felt in view of the increasingly generous approach of the courts with respect to granting applicants standing on procedural grounds but also, and more importantly, with regard to the intensity of review on the substance of administrative measures. Hence, procedural review is likely to undergo a significant change which, eventually, may culminate in a disguised intrusion into the hitherto well-protected province of administrative discretion. Thus, it is not surprising that recent judgments of the CFI reveal a tendency to quashing discretionary decisions, which display doubts as to their substantive correctness, on procedural rather than on substantive grounds.

---


Seen from this perspective, the growth of successful adjudication on procedural grounds is not likely to be attributable to an ever increasing negligence on the part of the Community administration in rule-making processes but is rather the result of a dynamic interaction between litigants and the courts. Encouraged by the above-mentioned shift in the jurisprudence private parties (and potential plaintiffs) tend to act more aggressively in the 'pre-litigation phase'. They strategically seek to maximize their participation in order to either influence the outcome of the decision-making to their advantage or, at the very least, to prepare the ground for subsequent litigation by triggering reviewable process failures.

It is the task of the Community courts to ensure that a reasonable balance between the progressive development of procedural constraints on the one hand and administrative leeway needed for efficient policy-implementation on the other is maintained. The following analysis will attempt to show that the courts not always comply with this task and tend to shift the balance in favour of (excessive) procedural protection as well as the enhancement of their own powers of review. Thus, it will be argued that the above-described twofold development of expansion of fundamental process rules produces considerable repercussions on the concept of both administrative decision-making and of judicial (procedural) review hitherto commonly accepted in Community administrative law.

The course of the analysis will be sub-divided as follows: After a short inquiry into the meaning of procedural 'good administration', i.e. the basic rationales underlying process rules, as well as the related 'principle of good administration' (B.) the development of the case-law regarding a range of process principles of good administration will be examined. Four closely inter-twined process standards, namely, the right to access to information, the right to be heard (C.) and the principle of care in conjunction with the obligation to state the reasons for an administrative measure (D.) will be addressed. The following considerations do not purport to furnish a comprehensive examination of the case-law; they are rather eclectic and meant to provide the framework for exhibiting the above-referred twofold process of expansion. However, more emphasis will be laid on the analysis of the recent evolution of expansion with regard to the principle of care. This appears to be all the more justified as no systematic assessment of this process standard, as far as can be seen, has ever been undertaken in Community law.
B. Procedural 'good administration' in Community administrative law

I. Introduction

Before addressing in more detail the dynamic of expansion displayed by a set of procedural principles it is appropriate to highlight their interrelation with the term of 'good administration'. It has been argued in the introductory part of this paper that legal process standards, such as the right to be heard or the principle of care, belong to the category of principles of good administration. At first sight, there seems to be no reason why this general statement should prove problematic or worth discussing in a separate section. However, even though the linkage between process rules and 'good administration' is often made it is fairly doubtful whether the latter can be said to reflect a settled legal concept in Community law. It is submitted that the notion 'good administration' in the broad sense is nothing but an aid to describing the corpus of the continuously evolving - legally enforceable and unenforceable - procedural and substantive requirements which a modern administration has to comply with. Nonetheless, as regards specifically procedural law the term 'good administration' can be said to embody some basic features generally underlying procedural constraints on administrative decision-making (II.).
The analysis of procedural 'good administration' provides the starting point for the discussion of an entirely unresolved problem in Community administrative law, namely, the question as to whether any particular significance is to be ascribed to 'the principle of good administration' as such.\(^3\) This principle increasingly makes its appearance in litigation before the Community courts\(^3\) and, according to the case-law addressed below, seems to be procedural in nature. Moreover, legal doctrine tends to simply refer to it without defining its scope and legal effect.\(^3\) It will be argued that, in the light of the inconsistent case-law as well as in comparative perspective, no clearcut answer to the question can be reached. Despite the 'constitutional' language used by the courts 'the principle' derived from the notion of 'good administration' cannot convincingly be held to fulfill the function of a specific fundamental process standard. Rather it is to be conceived as a general term comprising a range of rules establishing a certain standard of proper administrative practice (III.).

\(^3\) It will also be referred to this 'principle' under the heading of 'sound' or 'proper' administration.

\(^3\) Cf., e.g., recently CFI, judgment of 22.1.1997, Case T-115/94, Opel Austria GmbH v. Council, not yet reported, par. 43.

II. The significance of 'good administration' with regard to procedural rules

1) 'Good administration' as an indeterminate notion

Generally speaking, 'good administration', as it seems, is a deliberately chosen indeterminate (legal) notion meant to comprise a set of procedural and substantive - not necessarily legally enforceable - guidelines or norms for administrative decision-making. It is often used to denote a standard of practice serving the attainment of 'administrative justice' and the improvement of the relationship between State authorities and the citizens. These aspirations furthermore are ranged among the values commonly recognized by any modern democratic system of governance committed to the 'rule of law'. Surely,

---


41 Cf. the title chosen by JUSTICE in its 1988 report on proposals for administrative reform - including the setting up of a range of Principles of Good Administration - in the United Kingdom, 'Administrative Justice. Some Necessary Reforms', Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the United Kingdom, 1988. See furthermore Bradley, 'Administrative Justice: A Developing Human Right?', [1995] European Public Law p. 347 who pleads for a 'human right to administrative justice' construed on three pillars, namely, the right (or access) to judicial review, the requirement of an open, fair and impartial procedure and full factual and substantive judicial control of the correctness of an administrative measure in instances of major importance to the individual (p. 351-353).


43 In this vein Schwarze, 'European Administrative Law', 1992, p. 1173 (esp. at p. 1174) under the Chapter entitled 'Principles of Administrative Procedure under the Rule of Law'. See also Bradley, ibid., p. 355.
this very abstract and somewhat tautological description which seeks to illustrate a highly vague expression by means of no less obscure notions does not shed much light on what 'good administration' might imply in actual instances. This holds all the more true in the context of the Community in which, as opposed to the national realm, these parameters neither are rooted in legal traditions nor sufficiently concretized and elaborated by legal doctrine and jurisprudence in order to provide a reliable and useful yardstick for further discussion. The above made description gives no response as to what particular type of rule ought to be subsumed under 'good administration' nor does it enlighten what purpose, scope of application and legal force (if any), such rules shall possess. In actual fact, a comprehensive and reliable doctrinal categorization of the implications to be associated with 'good administration' in Community law seems hardly possible. On a more general level, this is due to the dynamic and evolutive character of the Community legal order as a whole; more specifically, it is the no less dynamically evolving structure of a Community administrative 'system' which renders any ad hoc description of particular features of sound executive practice eminently difficult.

However, it would seem that the task of conceptualizing basic features of procedural principles in Community administrative law is not as hazardous as this is the case for substantive principles of good administration. Indeed, certain fundamental characteristics and functions of process rules which may be equated with 'good administration' appear to stem from a common
heritage of the European public law systems. It is therefore quite safe to assume that the Community courts, when dealing with the problem of procedural justice or procedural 'good administration', also - at least implicitly - operate on the basis of a pre-existing rationale of procedural law. It will be seen that in modern administrative systems procedural rules in general are governed by two potentially conflicting rationales. The following considerations will deal with 'pure' process law and not address complicated issues connected to standards of good administration which are both procedural and substantive in character.

2) Procedural 'good administration': The dichotomy of functions underlying process rules

The significance of 'procedural good administration' is necessarily predetermined by the philosophy generally governing (administrative) procedural law. Without need be to engage into deep comparative analysis it seems common ground in modern legal orders governed by the 'rule of law' that formalised procedures - i.e. the way in which administrative decision-making is to

\[\text{footnote}{\text{For a general outline of the implications of the 'rule of law' in European legal orders in this regard see Schwarze, 'European Administrative Law', 1992, Chapter 7 (Principles of administrative procedure under the rule of law), p. 1173 ff. See also the comparative overview (Germany, France and United Kingdom) given by Starck, 'Droits fondamentaux, Etat de droit et principe démocratique en tant que fondements de la procédure administrative non-contentieuse. Approche comparative', [1993] European Review of Public Law, Special Number, p. 31, which highlights the complex interaction between three 'constitutional' parameters, namely, the protection of basic rights, the rule of law and the principle of democracy.}}\]
be carried out according to constitutional principles, statutes or judge-made law - essentially are determined by two fundamental rationales, namely, rationality and efficiency on the one hand and individual protection on the other.\textsuperscript{45} The first is an instrumental justification to the existence of process rules, the granting of procedural rights included. It is assumed that the observance of those rules renders it more likely that the substantive policy which is to be implemented by the competent agency will be accurately and efficiently attained.\textsuperscript{46} From this perspective, the formality of the administrative rule-making process combined with the opportunity for and duty of participation of individual parties - who adduce important information either by making use of their procedural rights or by fulfilling their duty to cooperate - are considered

\textsuperscript{45} For the following distinction with respect to the Common law see Craig, 'Procedures and Administrative Decisionmaking: A Common Law Perspective', [1993] European Review of Public Law, Special Number, p. 55; as regards US public law cf. Rabin, 'Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases', [1979] San Diego Law Review p. 301 (302 f.). See also Schmidt-Assmann and Krämer, 'Das Verwaltungsverfahren und seine Folgen', [1993] European Review of Public Law, Special Number, p. 98 f. who stress that both rationales, although with a distinct weight, exist in all European public law systems. Generally speaking, the twofold justification of administrative process norms merely reflects the double-functionality of administrative law in general, namely, to set the framework and the conditions for the proper implementation of public policies and to protect the citizen's rights from unjustified encroachments caused by the exercise of public power, see, e.g., v. Danwitz, Verwaltungsrechtliches System und Europäische Integration', 1996, p. 5 ('Doppelfunktionalität des Verwaltungsrechts').

\textsuperscript{46} Cf. with respect to the Common Law Craig, ibid., p. 56; for the German perspective see Schoch, 'Der Verfahrensgedanke im Allgemeinen Verwaltungsrecht (Anspruch und Wirklichkeit nach 15 Jahren VwVfG)', [1992] Die Verwaltung p. 21 (24 f.) and Ossenbühl, 'Verwaltungsverfahren zwischen Verwaltungseffizienz und Rechtsschutzauftrag', [1982] Neue Zeitschrift für Verwaltungsrecht, p. 465 who speaks of 'optimizing the administrative output'.

24
as necessary preconditions for administrative efficiency as well as the rationality and, eventually, albeit to a lesser extent, the legitimacy and acceptance of the final outcome. Under this concept, procedural law thus operates in a subsidiary function to the substantive law and merely provides effective means in order to correctly attain the latter's object.

The instrumental rationale needs to be completed by - and opposed to - a somewhat overlapping dignitarian or protective justification of procedural rules in general and process rights (embodied in these rules) in particular. This concept essentially takes into account the impact of administrative decisions on the individual who is subject to the exercise of public power. The recognition of personal dignity, autonomy and freedom as inalienable fundamental values has as its corollary the need to effectively protect them against arbitrary and unlawful encroachments on the part of the public bodies. Within administrative decision-making procedures this protection is provided, in a more general sense, by the concept of formality and, in particular, by the granting and the observance of individual

47 This, however, is often considered rather as a mere (welcome) side-effect than as an inherent tenet of the instrumental justification, see for the German public law Schmidt-Assmann and Krämer, ibid., p. 100 and Schoch, ibid., p. 31 f. who state that legitimacy and acceptance are merely secondary objects of administrative procedures. For a plea in favour of legitimacy and acceptance through participation as values of procedural law on their own cf. Würtenberger, 'Akzeptanz durch Verwaltungsverfahren', [1991] Neue Juristische Wochenschrift p. 257.


49 See the famous words of Rudolf Jhering: "Formality (is) the sworn enemy of the arbitrary, and the twin sister of freedom.", cited after Schwarze, ibid., p. 1178.
process rights. The dignitarian rationale thus corresponds to the results achieved by modern constitutional and human rights theory which rejects the thesis of the subordinated individual to be treated as a mere 'object' of State activity. The duty to protect individual (fundamental) rights not only binds the State when taking substantive policy decisions but also refers to the processes by which these decisions are being implemented under concrete circumstances. The more the protective justification is emphasized the more it grants procedural law a value on its own and, accordingly, increases its legitimizing function. In so far, the dignitarian aspect clearly reaches beyond the instrumental rationale of process rules which perceives individual protection as a mere 'by-product' to the need for accurate and efficient policy-implementation.

50 Cf. Craig, ibid., p. 57 f.. The aspect of protection of (substantive) fundamental rights by procedural safeguards has also been emphasised by the German Federal Constitutional Court, Case 1 BvR 385/77, Mühleim-Klarlich, BVerfGE 53, p. 30, cf. Schwarze, ibid., p. 1176 f. and Schoch, ibid. p. 26 f. with further references.

51 See, e.g., the jurisprudence of the Federal Constitutional Court, ibid.. Expressions such as procedural fairness, due process and natural justice commonly used in the Anglo-American terminology reflect well the perceived need to construct procedural law in compliance with a given standard of justice, see Hoffmann, 'Verfahrensgerechtigkeit', 1992, p. 34-38 with further references.

52 In so far the protective justification puts more emphasis on legitimacy and acceptance than the instrumental rationale. The aspect of legitimacy also underlies discourse-theory which grants the administrative process an autonomous participatory or 'deliberative' object, see Pitschas, 'Verwaltungsverantwortung und Verwaltungsverfahren - Strukturprobleme, Funktionsbedingungen und Perspektiven eines konsensualen Verwaltungsrechts', 1990 and Hoffmann, 'Verfahrensgerechtigkeit', 1992, p. 192 ff.. For a general presentation of the ethical and theoretical underpinnings of procedural justice which are beyond the scope of this study, see Hoffmann, ibid..
Both fundamental purposes, i.e. administrative performance and correctness on the one hand and individual protection on the other, are closely intertwined and may be easily combined in many instances. However, administrative practice and debates on administrative efficiency have shown that a considerable potential for conflict exists which fosters the need for a proper balancing. Clearly, too excessive an emphasis on procedural safeguards and individual participation may go beyond what is required in order to attain a correct and transparent decision. It is furthermore submitted that severe constraints on the decision-making process, such as the duty to respond to each and every argument put forward by interested parties, may finally do more harm than good and endanger the proper and timely implementation of the substantive policy. Moreover, experience in sensitive areas such as environmental law teaches us that the use of process rights is a double-edged sword. At the worst, if participation does not merely pursue the aim of protecting one's legitimate interests but of preventing the agency from taking an unwelcome decision at all process rights are likely to be strategically instrumentalised (or misused) in order to

---

53 See on the discussion in Germany following the jurisprudence of the Federal Constitutional Court cited above, amongst others, Wahl & Pietzcker, 'Verwaltungsverfahren zwischen Verwaltungsfizienz und Rechtsschutzauftrag', [1983] Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (41) p. 151 and p. 193 respectively. See also Schwarze, ibid., p. 1177 with further references.

obstruct and delay the administrative procedure.\textsuperscript{55} On the other hand, attempts to bring about a high degree of administrative efficiency and rationality automatically bear the risk of unreasonably limiting the scope of procedural protection by simply subjecting the latter to the former rationale.\textsuperscript{56}

The correct balancing is thus a delicate task and involves a policy decision which, in general, lies with the legislator\textsuperscript{57} and in some instances, if no clearcut statutory guidelines or none of them\textsuperscript{58} are provided, with the courts when reviewing administrative decisions. Unsurprisingly, European public law systems tend to make different choices with respect to the weight to be respectively accorded to the underlying rationales of administrative procedures. Some of them, such as the German\textsuperscript{59}

---

\textsuperscript{55} Schmidt-Assmann and Krämer, ibid., p. 104 use the pertinent expression 'Verfahren als Verhinderungsstrategie' (procedure as strategic obstructionism).

\textsuperscript{56} This, however, is advocated by the adherents of a strict utilitarian concept. They accept the granting and the observance of process rights only up to the point at which an improvement of the substantive decision may be reached; from this perspective administrative efficiency or correctness is always capable of outweighing individual protection; cf. Craig, ibid., p. 57 referring to the work of Bentham.

\textsuperscript{57} Thus, the German legislator commented on the enactment of the Federal law on administrative procedures that "administrative activity is an expression of a constant balancing process between public and individual interests", cf. Bundestagsdrucksache 7/910, p. 29.

\textsuperscript{58} Cf. the case of the United Kingdom, Schwarze, ibid., p. 1273 ff..

\textsuperscript{59} This seems somewhat inconsistent with the above-referred statement of principle given by the Federal Constitutional Court as to the protective function of procedural law, ibid., but is still the prevalent doctrine which also governs the Federal law on administrative procedure of 25.1.1976 (Bundesverwaltungsverfahrensgesetz, Bundesgesetzblatt I 1976 p. 1253). The key-term
and French system\textsuperscript{60}, seem to give priority to the instrumental rationale whereas others, such as the English\textsuperscript{61}, put more emphasis on the protective justification of administrative process.\textsuperscript{62}

In summary, the above highlighted purposes of administrative process norms, irrespective of their potential weight in particular instances, constitute the very essence of what can be described as procedural 'good administration'. Indeed, seen

is 'dienende Funktion' ('serving function' of the administrative procedure) and means that procedural law functions as a law of an auxiliary nature, alongside the (correct) operation of substantive law, see Schmidt-Assmann and Krämer, ibid., p. 101 f. In the same vein, they stress that procedural justice is subsidiary in that it does not necessarily lead to substantive justice but merely constitutes an essential precondition of the latter. The legal concept that procedural protection is not an end in itself is furthermore reflected by the rather relaxed standard of review applied by German administrative courts with respect to breaches of process rights; see the criticism expressed by Schoch, ibid., p. 24 f. and 37 ff. with further references.


See also the general comparative survey on the so-called 'rights of defence' by Schwarze, ibid., p. 1243 ff..
from the perspective of the modern performant and accountable executive, administrative procedures which completely lack one of the above referred components can hardly be regarded as fulfilling the requirement of proper administrative practice. In view of their 'universal character' it is quite safe to assume that both rationales of procedural law also constitute basic features or minimum requirements of Community administrative process. In actual fact, the case-law which will be examined in the following chapters confirms this assumption. In the context of this analysis it is to be questioned whether the Community courts successfully strike a reasonable balance between the functional needs of the administration on the one hand and the protection of individual rights and interests on the other. It remains further to be seen whether the hitherto commonly accepted purposes of Community administrative process will be subject to change in the near future. The concept of 'participatory democracy' on the level of administrative decision-making which is well known in US administrative law could also make its entrance in Community administrative process in order to remedy some of the deficiencies regarding accountability and transparency which are associated with the 'democratic deficit' of the European Community.

---


III. The 'principle of good administration' in the jurisprudence of the Community courts

The notion of 'good administration' has repeatedly made its appearance in litigation before the Community courts. In particular, private litigants have increasingly attempted to rely on the 'principle of good administration' in order to have quashed decisions adversely affecting them. A detailed analysis of the case-law however shows that the meaning assigned to this 'principle' varies considerably from one case to another. Interestingly, its alleged significance overlaps with three distinct process principles which will be considered more closely in the following sections, namely, the right to access to information, the right to be heard and the principle of care. It will also be seen that the Community courts, on the whole, have not shown much responsiveness to pleas submitting a breach of the 'principle of good administration'. They rather have tried to avoid addressing the issue by either simply rejecting those pleas as unfounded or by dealing with the underlying problem under the heading of other legal principles. However, in a first period the ECJ appeared, at least in some of its judgments, to have thought of a particular scope of application to be accorded to the 'principle of good administration'. It will be shown that these first attempts

66 Synonymous to the principle of 'sound' or 'proper administration'.

67 This principle has also been pleaded in staff-cases which will not be considered in this paper; cf. Lindemann, 'Allgemeine Rechtsgrundsätze und europäischer öffentlicher Dienst: zur Rechtsprechung des Europäischen Gerichtshofs in Personalsachen,
of concretisation have not resulted in the recognition of a legal concept on its own. In the following analysis the related case-law will be subdivided in several categories according to the specific significance respectively imparted to the 'principle of good administration'; each category will be considered chronologically in order to reveal the great caution with which the courts have generally handled the issue.

1) The 'principle of good administration' and access to information: The 'Tradax' case

One of the early references to the 'principle of good administration' was made in the Tradax case. The applicant, a trading company operating in the agricultural field, had vainly requested the Commission to disclose figures on the basis of which the levies charged on certain imported products had been calculated or, at least, to grant it access to the relevant documents contained in the Commission's file. In the subsequent proceedings brought before the ECJ Tradax, inter alia, explicitly relied upon a breach of the general 'principle of good administration' in support of its claim that access to information


had been unlawfully refused by the Commission.\(^6\) The Commission, for its part, argued that it was not subjected to the requirement of 'good administration' since it did not act as an administration, but as a legislature inasmuch as the levies had been fixed by Regulations.\(^7\) It furthermore contended that a general obligation of disclosure would seriously impede proper management of the common market organizations in question.\(^8\) Advocate General Slynn, in his Opinion, denied the term 'good administration' to embody a general principle of law or to have a specific legal and enforceable content in Community law. He pointed to the indeterminate character of this notion which might overlap with a range of legal rules, such as proportionality, but whose scope strays beyond the bounds drawn by the law.\(^9\) Nor did the Advocate General accept the applicant's plea to have an enforceable right to access to information since no legal base or 'unwritten rule' providing for such a right existed. Despite this straightforward rejection of the applicant's main pleas the Advocate General appears to have had strong doubts as to the just outcome of the legal approach

---

\(^6\) Ibid., p. 1366-1370.

\(^7\) Ibid., p. 1377, par. 17.

\(^8\) Ibid. and p. 1385.

\(^9\) Ibid., p. 1385 f., partly cited by Usher, ibid., p. 269. The AG thus seems to have accepted the existence of a socio-ethical dimension of 'good administration' which, however, he did not further elucidate. He simply and ambiguously stated: 'The maintenance of an efficient filing system may be an essential part of good administration but is not a legally enforceable rule'; and 'when courts urge that something should be done as a matter of good administration, they do it because there is no precise rule which a litigant can enforce' (emphases added), p. 1386.
chosen. These doubts were based on two interrelated aspects likely to unreasonably reduce judicial protection of traders: First, the levies had been introduced by means of several Regulations, i.e. by legislative activity, which would not be (directly) challengeable by individual traders under Article 173 EEC Treaty. Second, non-disclosure of the figures used for calculating the levies prevented the traders from verifying whether the calculation had correctly been carried out; it thus rendered any prior evaluation as to the successful use of judicial remedies in the national courts (against national administrative implementation measures) impossible. In the face of this dilemma the Advocate General opted for a somewhat ambiguous solution which manifestly influenced the decision of the ECJ: On the one hand, he held the applicant to be sufficiently protected since the Commission had a duty to reveal the relevant documents and calculations in proceedings before the national courts — even though this solution would place the burden on the applicant to start proceedings without knowing his

Ibid., p. 1386 referring to the 'principles of legality and the protection of legal rights'.

Article 189 par. 2 EEC Treaty.


This, however, was a mere assumption which, at that time, had no express legal basis in Community law; it was nonetheless correct in the light of the subsequent case-law, see Case C-2/88, Zwartveld and Others, [1990] ECR I-3365 (par. 16-22) in which the ECJ proceeded to an extensive interpretation of Article 5 EC Treaty, recently confirmed by CFI, Case T-353/94, Postbank NV v Commission, judgment of 18.9.1996, par. 64 ff. (not yet reported).
chances of success. On the other hand, he invited the Court to create a new, albeit injusticiable, rule of good administration by advocating that 'the Commission should, as a matter of good administrative practice, though not as a legal obligation', grant access to information in cases in which a trader questions the validity of the Commission's assessment with sufficient reason.\textsuperscript{77}

The ECJ, unlike its Advocate General, did not explicitly address the question as to whether a general 'principle of good administration' existed in Community law and eventually rejected the plea based on the alleged breach of a right to access to information. Yet, drawing manifestly on the final part of the Advocate General's Opinion, albeit slightly departing therefrom, it held in a partial obiter dictum that 'it would be consistent with good administration for the Commission periodically to publish for the information of the traders concerned the main data taken into account'; however this would not 'include a duty to reply to individual requests' or a right to accede to the Commission's file.\textsuperscript{78} This central passage of the judgment is remarkable in several respects: First, it evidences the Court's readiness to create a new category of 'soft-law' rules of good administration, when - for legal policy reasons - it neither wants to establish enforceable process rights nor to simply reject the application as unfounded. Second, the formal argument put forward by the Commission to be immune from requirements of 'good administrative practice' on the grounds

\textsuperscript{77} Ibid., p. 1387 (emphases added).

\textsuperscript{78} Ibid., p. 1379, par. 22.
of its acting in a legislative function is being overtly rejected. The Court thus recognizes, at least partially, the administrative nature of the Commission's activity in the field of agricultural policy when the existence of a concretized relationship between Community institutions and individual traders cannot be denied. Third, behind the judgment lurks the Court's obvious discontent with the intransparent rule-making policy hitherto adopted by the Commission. The Court's obiter dictum, albeit legally non-binding, constitutes a forceful accusation of administrative malpractice which the Commission is not likely to ignore. The judgment thus induces the Commission to regulate the problem either by adopting legally binding measures or so-called soft law rules on administrative practice. In the latter case, in turn, it will be seen that the Court seems not unwilling, under certain circumstances, to impart to those rules legally binding effect to the advantage of individual parties.

Thus, the technique chosen by the Court is likely to foster a development of 'juridification' of administrative procedure in either alternative; it also reveals how the Court is capable of canalizing the Commission's policy discretion - and of imple-

---

79 This is further corroborated by the fact that the Court had circumvented the problematic issue of admissibility of the action brought under Article 175 EEC Treaty by directly dealing with the merits of the case, ibid., p. 1376, par. 12.

80 The potential effects of (non-binding) judicial language on the Commission's administrative policy is impressingly developed by Snyder, 'Soft Law and Institutional Practice in the European Community' in The Construction of Europe: Essays in Honour of Emile Noël, Martin (ed.), 1994, p. 197 (211 ff.).

menting its own policy attitudes - in the long run in a subtle and dynamic manner without necessarily making use of its cassatory power.

In the aftermath of the Tradax precedent the right to access to information has seldom been linked to the 'principle of good administration'. However, a violation of this 'principle' was pleaded in one of the BEUC cases in order to complain of the alleged incoherent Commission policy relating to transparency in anti-dumping proceedings; the applicant, a consumer organisation, had been refused access to the Commission's non-confidential file on the grounds that it did not belong to the category of 'interested parties' as provided for by the Basic Regulation. The ECJ, without addressing in more detail the meaning of the principle of sound administration, did not accept the applicant's argument as regards the incoherence of the administrative practice and rejected the submission.


Ibid., p. I-5723 (principle of 'sound' administration), I-5734 (principle of 'good' administration). For access to file see Article 7 par. 4 a) of Regulation No. 2423/88 (OJ 1988 L 209/1). It should be noted that, as a result of the GATT 1994 Agreements, this provision has been replaced by Article 6 par. 7 of Regulation No. 384/96 (OJ 1996, L 56/1) which now provides for a right of 'users and consumers organizations' to inspect the non-confidential file; see also Stanbrook and Bentley, 'Dumping and Subsidies. The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community', 3rd ed., 1996, p. 169.

Ibid., p. I-5741 f., esp. par. 26 f.. The argument of incoherence was further based on the discrepancy of the applicant's rights as an intervener in the Court's proceedings - in which full access to the file may be granted pursuant to Article 93 par. 4 of the Rules of Procedure - as compared to the less protected status in the pre-litigation phase.
The 'principle of good administration' therefore does not impose enhanced transparency duties on the administration. Yet, this principle has also been pleaded, in a comparable manner, in connection with alleged breaches of the right to be heard. The related case-law will be considered in turn.

2) The 'principle of good administration' and the right to be heard

Attempts to convince the courts to recognize the principle of good administration to embody a right to a hearing, in particular, in instances in which this was not expressly provided for by legal texts were largely unsuccessful. In a case relating to administrative process under the ECSC Treaty the applicant argued that 'the general principle of proper administration' had been breached by the High Authority by not giving it sufficient opportunity to submit its comments in the course of the proceedings which eventually lead to the adoption of a decision imposing a fine against it. The Advocate General and the Court merely treated the plea under the heading of Article 36 ECSC Treaty laying down a right to be heard for affected parties and finally rejected the submission as unfounded.

In two recent cases in the field of State aids law the applicants had lodged complaints with the Commission alleging the

86 Ibid., p. 2352, 2358.
87 Ibid., p. 2353 and 2358 f. respectively.
grant of illegal aid to competitors.\textsuperscript{88} The Commission, after completion of the informal preliminary inquiry pursuant to Article 93 par. 3 EC Treaty, had implicitly rejected the applicant's complaints by adopting a decision 'to raise no objections' against the aids. This decision amounted to a refusal to initiate the formal stage of the investigative procedure under Article 93 par. 2 EC Treaty in the course of which affected competitors are entitled to participate and, in particular, enjoy a right to be heard.\textsuperscript{89} The applicants respectively sought to rely before the ECJ on a breach of 'the (general) principle of sound administration' on the grounds that the Commission had neither granted them an opportunity to submit comments during the preliminary investigation nor taken their objections into account.\textsuperscript{90} Thus, the applicants tried to introduce 'through the back door' a right to be heard in favour of complainants in the preliminary stage of procedure under cover of the 'principle of good administration'. The Court, unsurprisingly, did not take up the issue and annulled


\textsuperscript{89} Cf. ECJ, Case C-225/91, ibid., p. I-3263, par. 52; for a discussion of the discrepant levels of procedural protection in the two distinct stages of the proceedings see Advocate General Tesauro, Case C-198/91, ibid., p. I-2503 ff.

\textsuperscript{90} Case C-198/91, p. I-2520 f. and I-2528: 'the principles of the rights of the defence and of proper administration'; Case C-225/91, p. I-3249: 'the general principle of sound administration' and I-3262 f.
the Commission's decision on other grounds in the one case\textsuperscript{91} and rejected the plea without much ado in the other.\textsuperscript{92}

3) The 'principle of good administration' and the principle of care: The 'IAZ' case

Reference to the 'principle of good administration' has most frequently been made in conjunction with failures which are now generally recognized to fall under the scope of application of the 'principle of care'; and, it is arguable that the ECJ had initially held these principles to have a synonymous meaning. The growing significance of the 'principle of care' will be intensively dealt with in a separate section.\textsuperscript{93} For the purposes of the following considerations it may suffice to recall that this principle requires the administration, when conducting an inquiry, to impartially collect and carefully consider the facts of each individual case. In Case IAZ v. Commission\textsuperscript{94} the applicants, accused of anti-competitive practice

\textsuperscript{91} Case C-198/91, ibid., p. I-2531, annulment on the ground of a breach of 'the principle of care'; see also the discussion below under D. regarding CFI, Case T-49/93, SIDE v. Commission, [1995] ECR II-2501 and Case T-95/94, Sytraval and Brink's France v. Commission, [1995] ECR II-2651 in which the CFI derived a duty to grant complainants a hearing in the preliminary procedure from the principle of care.

\textsuperscript{92} Case C-225/91, ibid., p. I-3263. It should be added that the plea as to a breach of the 'principle of sound administration' was withdrawn by the applicant in a follow-up application relating to alleged infringements of Articles 85 and 86 EC Treaty, cf. Case T-17/93, Matra Hachette v. Commission, [1994] ECR II-595, par. 31.

\textsuperscript{93} See below under D.

\textsuperscript{94} ECJ, Joined Cases 96 and others/82, IAZ v. Commission, [1983] ECR 3369, shortly commented by Usher, 'The "Good Administration"
pursuant to Article 85 EEC Treaty, contended, inter alia, that the Commission had breached the 'principles of good administration'. More specifically, the applicants argued that the Commission had failed to respond to attempts made by them in order to remedy the infringements complained of as well as to react to a revised draft of 'Special Agreement' which had been sent to it long before the adoption of the final decision. The Court, in principle, agreed with the applicants on this point; it blamed the Commission for not having shown more responsiveness in negotiating the settlement of the matter by stating that it would be 'regrettable and inconsistent with the requirements of good administration' that the Commission did not react to the draft 'Special Agreement'. As will be seen at a later point in this paper, the failure to react to substantive submissions made by interested parties or the omission to consider essential facts of the case, which are capable of altering the outcome of the decision-making process are to be regarded as violations of the principle of care or due diligence. Thus, the Court had chosen, as early as in 1983, a different and somewhat ambiguous terminology in order to describe the duty of care. The Court made it clear, though indirectly, that non-compliance with this obligation leads, in principle, to illegality of the decision finally reached; and it seems that it was only the lack of causality between the infringement and the


95 Ibid., p. 3408 f..

96 Ibid., p. 3409, par. 15 (emphases added).
content of the final decision which eventually prevented the Court from annulment: It held that the draft did not meet all objections raised by the Commission and that accordingly the failure could not 'be regarded as a procedural defect vitiating the legality of the Decision'. 97 Following on from this, the IAZ case may be regarded as an early acknowledgement of a substantial and enforceable duty of diligence on the part of the Community administration. 98 The judgment, however, does not clearly spell out whether the Court intended to introduce this duty under the name of the 'principle of good administration'. As will be seen, this uncertainty continues to be felt in the more recent case-law.

The relation with diligence/care and 'the rules of good administration' was further emphasized in Case 223/85 RSV v. Commission, 99 in which the Commission was reproached to have unnecessarily protracted the investigative procedure for assessing the legality of a State aid granted to the applicant. Interestingly, the Court did not invalidate the decision for lack of careful conduct of the investigation 100 but for having frustrated

97 Ibid., p. 3409, par. 15 (emphasis added).
98 In the same vein Usher, ibid., p. 276 who also refers to Case 179/82, Lucchini, [1983] ECR 3083 (ECSC Treaty; failure of the Commission to reply to a telefax from the applicant offering to cut its future production in order to compensate for having previously exceeded the quota).
100 For the relation between the requirement of proper diligence and the time-factor see also Case 120/73, Gebrüder Lorenz GmbH v. Germany, [1973] ECR 1471 in which the Court established a time-limit of two months for the preliminary review procedure under
the applicant's *legitimate expectation* which was such as to ultimately prevent the Commission from ordering the Member State to recover the aid.\(^{101}\) A further mention of the 'principles of good administration' was made in a case in the field of the CAP in which the Court held that these principles required the Commission to inform the Member States in due time of the period to be respected for processing applications for birth premiums for calves in favour of economic agents.\(^{102}\)

In more recent cases brought before the CFI in competition matters the applicants sought to revitalize 'the principle of good administration' by expressly relying on the *IAZ* precedent referred to above, yet without substantial success. The cases related to the alleged failure on the part of the Commission to reply to the allegations made as well as to examine the documents produced by the applicants during the competition investigation procedure and thus, in reality, involved alleged breaches of the principle of care. Whilst the CFI (First Chamber) in Case T-46/92, *Scottish Football Association v. Commission*\(^{103}\) avoided defining the potential content of the 'principle of good administration' altogether and bluntly rejected the plea as unfounded, it (Second Chamber) was only little more responsive in Case

---


\(^{103}\) [1994] ECR II-1039, esp. at p. II-1058.
T-5/93, *Tremblay and Others v. Commission.* It held that the applicant had not sufficiently specified the documents allegedly neglected by the Commission and not given the reasons supporting these omissions in order to enable the Court to judge whether a breach of the 'principle of sound administration' had occurred. Although the submissions made by the applicants could easily be rejected in both cases on grounds pertaining to the individual case, the 'constitutional' terminology taken on by the CFI suggests that it was not entirely sure about the inferences to be drawn from the IAZ precedent. Its reluctance to address in more depth the potential meaning to be imparted to the 'principle of good administration' supports this assumption. Yet, whatever the correct terminology might be, the language used in both judgments testifies the importance which the CFI assigns to the Commission's duty of care in investigation procedures. And the most recent development in the CFI's case-law clearly shows that it now tends to distinguish between 'the principle of care and the principles of proper administration'.

---


105 Ibid., par. 83.

4) Conclusion: The inexistence of the 'principle of good administration' in Community law?

On the whole, the case-law analysed above sketches a fairly heterogeneous picture of the meaning to be attached to the 'principle of good administration'. Litigants have repeatedly availed themselves of the principle as a sort of 'multifunctional weapon' in order to have introduced a degree of procedural protection which, under the given circumstances and the available process standards, did not exist. These attempts quite naturally reflect a legitimate litigation strategy in any legal system which consists of invoking precedents and their 'abstract' or 'legal' content in order to influence the outcome of the particular case. Surely, the ambiguous and rather terse reasoning-style of the Community courts, as exemplified in the IAZ case, has reinforced the tendency towards invoking unspecified 'principles' of administrative law in this manner. Apart from the puzzling case-law analysed above, the term 'good administration' has been used in an even less specified manner in a range of other decisions handed down by the CFI and the ECJ, thus adding to the confusion. Hence, the courts increasingly become victims of their own inclination to spell out principled statements.

without building them on transparent and deductive reasoning. The repeated 'multi-purpose' instrumentalization of the principle of good administration is a good example to this development. The principle is continuously being reproduced in litigation by the sole reason of its derivation from a few ambiguous precedents and, in turn, induces the courts to deal with them at least cursorily. The chain reaction resulting therefrom may only be cut by a - still lacking - judgment of principle on the part of the Community courts.

What is then the conclusion to be drawn from all this? And more specifically, can the 'principle of good administration' really be said to exist in Community law? As far as can be seen, somewhat surprisingly, the problem is not being discussed at all in Community legal doctrine and thus opens the opportunity for a very first (doctrinal) assessment. From the standpoint taken in this paper - with regard to the general framework of administrative process standards as it stands at present and as it is likely to develop in the near future - the answer is clearly negative. Although the relation to the principle of care/due diligence appears more pronounced than the linkage to other process standards, the Community courts so far have refrained from establishing a clearcut categorization in this respect.

The reasons underlying the reluctance of the courts to utter a statement of principle are not entirely clear. It is submitted that three main arguments provide a useful explanation for this reticence:

First, a determinant factor certainly is that the legal problems for the resolution of which the 'principle of good administration' has been employed by litigants, in most cases, could easily be tackled under the heading of already existing Community principles of good administration, such as the right to access to information or the right to be heard. The 'economy of process'-argument underlying this approach is evidence of the courts' willingness to circumvent the discussion of complicated legal issues of principle. Second, it is striking that in none of the cases referred to above an attempt has been made - by neither of the actors involved in the litigation process - to support the existence of the 'principle of good administration' by reference to the national legal orders or to comparative analysis. The obvious reason for this omission lies in the fact that such a principle simply does not exist in any of the Member States' legal orders. A cursory overview on the national administrative laws appears to corroborate this view: The few Member States' systems expressly referring to the term 'good administration' merely impart it the function of a general notion describing a set of particular standards of proper ad-

---

109 See, e.g., Case Tradax in which the applicant merely asserted that this principle 'is common to the laws of the Member States' without producing any evidence for this statement, ibid., note 68, p. 1366, 1369, 1376.
ministrative practice. Third, the Community courts seem to be well be aware of the highly vague, complex and broad implications of the notion 'good administration' which has been briefly addressed in the first part of this chapter. Indeed, the litigants' and the courts' ambiguous language mirrors the high degree of opaqueness which is apparently being associated with this notion. And the difficulty felt in granting the 'principle of good administration' an autonomous field of application is further underpinned by the fact that it is often incorporated in one and the same line of reasoning relating to other principles, such as legal certainty, legitimate expectations, the right to be heard etc..

Whatever the pertinent explanation might be, the most recent jurisprudence of the Community courts correctly suggests that the term 'good administration' merely is to be understood as comprising a set of principles of good administrative practice and that it has no specific legal content and purpose of its

---


111 Cf., e.g. CFI, Joined Cases T-79 and others/89, BASF AG and Others v. Commission, [1992] ECR II-315, par. 76.
This result corresponds to the line of argument adopted in this paper. The functions which the alleged principle purports to fulfill is entirely covered by existing process standards. Thus, the 'principle of good administration' exclusively exists as a phrase but not as a procedural standard with substantial content and purpose. The notion of 'good administration' as such however will continue to play its part in the constitutional debate on the future development of the European Community and its administrative system. The consolidation and expansion of principles of good administration, such as those which will be analysed in the following chapters, contributes to the construction of a coherent administrative framework in which 'good administration' purports to reflect a meaningful legal or constitutional concept.

---


113 See also Weber, ibid, p. 82; Gornig and Trüe, ibid., p. 893.
C. Expansion of process principles: The right to access to information and the right to be heard

I. Introduction

The following inquiry and that of the subsequent chapter will focus on a range of procedural standards of good administration in order to exemplify the dynamic process of expansion referred to in the introductory part. As will be seen, these principles have not been chosen at random. Rather, it is suggested that the growing emphasis being placed on each of them is not explainable without shedding light on both their mutual intertwining and their parallel 'up-grading' which is taking place within the broader process of constitutionalization of procedural requirements. In the context of this chapter two closely linked procedural standards, namely, the right to access to information and the right to be heard will be addressed.

The right to access to information is well on its way to become a fundamental procedural right with a significance reaching beyond the bounds of administrative process. Until very recently, access to information collected by the administration has been perceived as a mere accessory prerogative and, more specifically, as the essential prerequisite to the effective exercise of the right to be heard in the course of administrative
proceedings. However, in the face of the increasing endeavour to enhance transparency in the Community institutions' decision-making processes, it seems fair to assume that the right to be informed is gradually loosing its ancillary function and developing into a constitutional entitlement of its own with a strong democratic connotation.

The most prominent process principle, which is deeply rooted in common law systems under the heading of natural justice or due process, is the right to a fair hearing (or the principle of audi alteram partem). The pivotal role which this right has come to play in a variety of Community administrative procedures, even when not enshrined in written rules, has been forcefully underpinned in the recent case-law of the Community courts. It therefore furnishes an excellent, perhaps even the most significant example to judicially boosted constitutional entitlement.

114 Cf., e.g., the pronounced statement in CFI, Joined Cases T-10/92 and others, SA Cimenteries CBR and Others v. Commission, [1992] ECR II-2667, par. 38.


117 This is the terminology used in US constitutional and administrative law; see the Fifth Amendment of the US Constitution: "No person shall be deprived of life, liberty or property, without due process of law" (emphasis added).

tutionalization' and expansion of process principles.\textsuperscript{119}

The above referred process principles will be considered separately in the subsequent two sections. The analysis will be eclectic and focus on the more recent case-law of the Community courts so as to carve out both the broader lines of the current evolution of expansion and its prospects. Attendant issues of a rather technical nature as well as those which appear to be severable from the overall development to be described will therefore be omitted or only be addressed cursorily.

II. The right to access to information

1) \textit{Competition law as the origin of the Community right to access to information}

The right to access to information contained in the administration's files, like many other process standards or 'rights of the defence',\textsuperscript{120} has undergone its most significant evolution


in the realm of competition policy, which will therefore form
the focus of this section. From a historical perspective this
finding is not that surprising since competition policy is the
first domain of Community competence - and actually one of the
few - which was very early equipped with a comprehensive and
workable administrative framework for direct implementation
to be ensured by a Community institution, i.e. the Commission.
In competition matters the Commission has been conferred with
far-reaching supervisory and investigative powers vis-à-vis
individual parties (in reality, mostly undertakings, i.e. legal
persons), including the possibility of inflicting significant
pecuniary sanctions in the event of the establishment of anti-
competitive behaviour. Yet, competition infringement procedures
have generated a tremendous amount of legal controversy. After
the coming into force of Regulations No. 17 and No. 99/63, it
soon became clear that the standard of procedural fairness to
be observed by the Commission according to those texts was -
apart from an explicit reference to the right to be heard - largely insufficient; likewise, no explicit reference to the

---

121 For a general account see Hix, 'Das Recht auf Akteneinsicht im
europäischen Wirtschaftsverwaltungsrecht', 1992; Girnau, 'Die
Stellung der Betroffenen im EG-Kartellverfahren. Reichweite der
Akteneinsicht und Wahrung von Geschäftsgeheimnissen', 1993. For
further references cf. Ortiz-Blanco, 'European Community Compe-
tition Procedure', 1996, p. 179 (under note 64).

122 See Articles 85 and 86 EC Treaty; Council Regulation No. 17 (OJ
Sp.Ed. 1989-62, p. 87) setting the procedural framework for the
Commission's supervisory activity in conjunction with, as con-

123 See recital 11 of the preamble and Article 19 of Regulation No.
17 as well as Regulation No. 99/63 (Articles 2, 4 and 7).
right to access to information was made. Since then the debate of principle on both the propriety of the Commission's combined role as investigator, prosecutor and (administrative) 'judge' and its implications for the degree of procedural protection to be afforded to undertakings has not yet come to an end. Indeed, it seems that the drafters of the Regulations, in view of the need to attain the imperative goal of market integration, had put more emphasis on the aspect of efficient policy


Cf. Article 3 c) and g) EC Treaty (formerly EEC Treaty).
implementation through enhancing the Commission's supervisory powers than on the necessity for protecting incriminated undertakings.\(^\text{126}\) This is in line with the manifest omission to introduce a catalogue of basic rights in the EEC Treaty which, apart from a few provisions, such as Article 190, contains no procedural rights or 'constitutional' constraints on administrative conduct so as to prevent unlawful and arbitrary encroachments on individual freedom and liberties.\(^\text{127}\) As a consequence, competition procedures have quite necessarily become an area of predilection for judicial activism and, more specifically, an extremely propitious (test-)field for the sustained development of judge-made process principles designed to remedy the lack of protection resulting from the gaps in both the Treaty and secondary legislation.\(^\text{128}\) Likewise, it will be argued that the

\(^{126}\) Cf. the rejection of proposals made in the 'Deringer Report' on the draft of Regulation No. 17 (Doc. No. 57 of 7.9.1961, European Parliament) criticising the lack of legal constraints to be placed on the Commission's powers pursuant to the 'general principles in force in a State founded on the rule of law'; cf. also Curtin, note 119, p. 293 (297 f.).

\(^{127}\) For a pertinent 'speculative' account (in the face of the inavailability of the 'travaux préparatoires' of the Treaties) of the reasons for this omission see Weiler, 'Methods of Protection: Towards a Second and Third Generation of Protection' in European Union: The Human Rights Challenge, Cassese, Clapham and Weiler (eds.), 1991, p. 555 (esp. 571 ff.).

right to access to information has gone through an evolution of expansion which is largely determined by creative judicial intervention. However, as will be seen, the Commission as a policy-maker, though not as a 'legislator' in the formal sense, and other actors, such as litigants and pressure groups or institutions, have also played an important part in this process which is to be understood as one of dynamic interaction.

2) The dynamic mutation of 'access to information' into a fundamental process right in competition proceedings

a) The early case-law: The right to access to file as an inherent part of the right to be heard

It is to be seen against this background, that, notwithstanding the silence of written Community law on the question, the right to access to information in the Commission possession was early recognized by the ECJ to exist in competition proceedings.\textsuperscript{129} The Court emphasized the necessity for the party against whom

\textsuperscript{129} As to the early case-law of the ECJ cf. Schwarze, 'European Administrative Law', 1992, p. 1341 ff. and Hix, note 121, p. 57 ff. See also, by contrast, Article 18 par. 3 of Council Regulation 4064/89 (as amended at OJ 1990 L 257/14) relating to merger-control which lays down: '.. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties parties directly involved ..' (emphasis added).
an infringement procedure is directed to take cognizance of the essential factual and documentary evidence on which the Commission relied in support of its (preliminary) finding, as set out in the 'Statement of Objections',\textsuperscript{130} that a breach of competition rules had occurred; only if the individual party were in the position to comment on the provative value of this documentation, it would be enabled to properly defend itself against the objections based thereon. The Court thus considered the right to be informed of the relevant evidence as an intrinsic element of or an essential precondition to the effective exercise of the right to be heard (or the rights of defence in general).\textsuperscript{131} However, the Court took the view that the Commission was not required to make the whole contents of its files accessible to the parties since no such general or absolute principle of Community law could be said to exist in the absence of express legal rules.\textsuperscript{132}

\textsuperscript{130} See Articles 2 and 4 of Regulation No. 99/63 from which the right to be informed can be held to flow implicitly, cf. Lauwaars, note 128, p. 502.


b) The Commission's 'access to file' policy as the basis for further expansion

Both the early case-law and the Commission's practice were heavily criticised by numerous commentators, business groups and institutions; the main points of critique were that disclosure, and the extent to which it was to be granted to defendant undertakings, was largely subject to the Commission's discretion and, in particular, that no possibility of inspecting the Commission's files in search of 'exculpatory' evidence not referred to in the 'Statement of Objections' existed.133 The Commission quite promptly yielded the sustained pressure and engaged in a more liberal practice of disclosure which it programatically spelled out in its XIIth Report on Competition Policy of 1982.134

Further be noted that according to the ECJ the Commission was only under a duty to refer (in the Statement of Objections) to the essential facts supporting its allegations, cf. Case 41/69, ACF Chemiefirma v. Commission, [1970] ECR 661, par. 26; Case 48/69, ICI v. Commission, [1972] ECR 619, par. 22 - quite necessarily disclosure of evidence was equally reduced to such essentialia. See, however, Vaughan, 'Access to File and Confidentiality' in Procedure and Enforcement in EC and US Competition Law, Slot and McDonnell (eds.), 1993, p. 169 (170 f., 175) suggesting a different reading of the Dutch Book case referred to above.


Subsequently it became the Commission's regular practice, subject to the exceptions relating to confidentiality enumerated in the Report,\(^{135}\) to annex lists or copies of the evidential material relied on to the Statement of Objections or to invite companies to inspect the files at the Commission's offices.\(^{136}\)

Although the Commission's move towards more transparency went even beyond the legal requirements set up by the ECJ it did not actually settle the controversy of principle but rather created new problems.\(^{137}\) A focal and still unresolved issue, especially acute in so-called 'multi-defendant' cases, was how to reconcile the basic requirement of confidentiality (in particular, the protection of business secrets) with the principle of upholding the right to be heard in the event of a clash of interests between involved undertakings;\(^{138}\) the implications...
of this issue however are far too broad and complex to be set out in more detail here. Yet, the chief reason giving rise to enduring debate was that even under the new regime it was still exclusively for the Commission to decide on both the possibility and the necessity of disclosure. Thus, the extent to which individual parties were entitled to receive (exculpatory) information - and hence procedural protection - continued to be subjected to the 'good will' of the Commission. Furthermore, in the subsequent years the Commission appears to have, at least implicitly, reconsidered its liberal stance towards disclosure by strengthening its conditions and rejecting numerous requests for access to file in a range of major cartel proceedings.

The prevailing climate of distrust between the defendant undertakings on the one hand and the Commission on the other as well

---


140 Cf. Girnau, note 121, p. 79 f.; Vaughan, note 132, p. 173 f. referring to the PVC, LDPE, Cement and Soda–Ash cases; in PVC the Commission stated, inter alia, that it would grant 'access to documents, other than those on which the Commission actually relied, which the Commission considered would be helpful to the defence.' and that 'full access to the file would be inconsistent with .. efficient administration' (emphasis added; cited after Vaughan, ibid.).
as the continuous criticism emanating from defendant's counsels and non-partisan commentators\[141\] induced the CFI to take an important step towards improving access to file in competition proceedings. In its pathbreaking judgment in the Hercules case the CFI bluntly stated, referring to the XIIth Report on Competition Policy, that 'the Commission may not depart from rules which it has imposed on itself'\[142\] and that it had 'an obligation to make available to the undertakings involved .. all documents, whether in favour or otherwise, which it has obtained during the course of the investigation' save those falling under the enumerated confidentiality exceptions.\[143\] As regards the expansion of the right to access to file, the ruling is notable in mainly two respects. First, it acknowledges in a somewhat revolutionary step that an administrative practice embodied in soft-law rules published in an official Report may create justiciable effects to the benefit of individual parties. Yet, any sound dogmatic explanation for this finding unfortunately lacks in the judg-

\[141\] See the arguments put forward in the big 'polypropylene'-case as summarized by Advocate General Vesterdorf in his Opinion in Case T-1/89, Rhône-Poulenc v. Commission, [1991] ECR II-878 ff.. Whilst the AG's proposal that the fines imposable under Article 15 of Regulation No. 17 should be regarded - contrary to the established case-law - as criminal in nature (ibid., p. II-885) was rejected by the CFI in Case T-11/89, Shell v. Commission [1992] ECR II-757, par. 39, his argument in favour of full access to the documentary evidence in complex cartel cases seems to have paved the way for a subsequent shift in jurisprudence. The AG pertinently emphasized that the ECJ, as early as in the AEG case (see note 131, par. 24), had held that 'it was not for the [Commission] to judge whether a document or a part thereof was or was not of use for the defence' (ibid., p. II-899); cf. also Vaughan, note 132, p. 173.


\[143\] Ibid., par. 54 (emphases added).
It is nonetheless suggested that the Court thereby laid the foundation for important future 'juridifying' effects of soft-law rules, at least in so far as they are designed to regulate the positive procedural status of individuals in administrative proceedings. The second important novelty lies in the fact that the Court established a duty of disclosure which, it is submitted, reaches even beyond the rules contained in the Report in that it obliges the Commission to make available both (non-confidential) 'inculpatory' and 'exculpatory' evidence in its entirety. On the whole, the judgment shows the CFI's readiness to take the opportunity for building on a legally non-binding Commission policy framework in order to maximize the legal standard of procedural protection, even though this might go beyond the established case-law of the ECJ and run counter the Commission's original intent of maintaining its

---

margin of manoeuvre with respect to transparency. In so far the CFI's approach is to be seen as a policy measure designed to promote the expansion of procedural protection. This is confirmed by both the lack of reasoning in the judgment and the subsequent jurisprudence which shortly afterwards took the next step into the direction of the recognition of an autonomous procedural right to access to information.

c) Developing a fundamental procedural right of access to information?

aa) The Cement and Soda-Ash judgments

Whereas the duty to comprehensive disclosure as set up in Hercule Les was exclusively based on a 'protective reflex' fostered by autonomous administrative practice, a major shift in judicial language as regards the legal basis for the right to access to information was operated in the so-called 'Cement'-case.\textsuperscript{145} The Court, this time tentatively alluding to the 'constitutional' dimension of the issue, held that access to file is 'one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that the right to be heard provided for in Article 19 par. 1 of Regulation No. 17 and Article 2 of Regulation No. 99/63 can be exercised effectively'.\textsuperscript{146} It might appear daring to infer therefrom that

---


\textsuperscript{146} Ibid., par. 38 (emphases added).
the right to access to file is henceforth to be considered as an inherent part of the rights of defence or as being of equal 'fundamental value'; in fact, such an interpretation would seem inconsistent with the Court's emphasis on its complementary, perhaps even subsidiary function in relation to right to be heard or the rights of defence in general. It remains that the Court refrained from further elaborating on the *Hercules* concept and accordingly recognized the right to access to file to be a 'procedural safeguard' of its own, thus paving the way to further expansion at a later stage of its jurisprudence.

The Commission reacted to the aforementioned case-law in its XXIIIrd Report on Competition Policy of 1993 by announcing that it would henceforth annex to the Statement of Objections copies of all non-confidential documents relied on as well as, after a careful examination of the file, all the ('exculpatory') particulars which appear to go against or contradict the Commission's case. In 1994 this practice, amongst other procedural rules relating to access to (confidential) documents, came to

---


148 Cf. however Kerse, ibid., par. 4.08 expressing doubts about the settlement of the issue 'as to whether, and to what extent, access to file is a fundamental right of legitimate expedition dependent on the Commission's procedure'.

149 XXXIIIrd Report on Competition Policy 1993, Brussels/Luxemburg, 1994, par. 201 f..
be laid down in a legally binding Decision. However, the critics claiming full access to the Commission's files did not release pressure.

A decisive step in the continuous 'levelling-up' of the right to access to information in competition procedures was made in the so-called Soda-Ash cases. Among a variety of legal problems addressed in these judgments the Court, albeit once again not being very explicit on the dogmatic level, gave significant hints as to the utmost importance which it accords to the right to have access to the entire file. First, it confirmed that 'it is not for the Commission alone to decide which documents are useful to the defence' and 'that the advisers of the companies must have the opportunity to examine documents which may be relevant so that their probative value for the defence

---


153 For an extensive discussion, in particular, with respect to the conflict between access to file and confidentiality see Ehlermann and Drijber, note 137; Ortiz-Blanco, note 121, p. 188 ff.; Joshua, note 124, p. 122 ff.; Moore, annotation in [1996] Common Market Law Review p. 355.
can be assessed.\textsuperscript{154} Second, illuminating the rationale of the first statement, the Court for the very first time relied on the 'general principle of equality of arms', which, in its view, presupposes that both the Commission and the defence must have the same knowledge of the case-file. The Court explicitly rejected the Commission's having an exclusive power of discretion in deciding on the probative value of documents and, accordingly, on the question as to which of those documents are to be used in the proceedings for what purpose whatsoever. Otherwise the rights of defence would be excessively restricted in relation to the powers of the Commission, which 'would then act as both the authority notifying the objections and the deciding authority...'.\textsuperscript{155} Third, the Court was of the opinion that access to file is no longer subject to an explicit request on the part of the defendant undertaking but is to be granted ex officio.\textsuperscript{156} Fourth, the Court showed its readiness to inflict the severe consequence of illegality on the final decision even in the event of a mere hypothetical infringement of the rights of the defence. Thus, for the defendant it is sufficient to establish that exculpatory documents may exist and that non-disclosure might have adversely influenced the course of the procedure and the content of the decision to its detriment.\textsuperscript{157}


\textsuperscript{155} Ibid., par. 93 (emphases added).

\textsuperscript{156} Cf. Case T-36/91, ibid., par. 51.

\textsuperscript{157} Cf. Case T-36/91, ibid., par. 78; Case T-30/91, ibid., par. 68.
It is suggested that the *Soda-Ash* judgments are very close to recognizing a *fundamental* procedural right to access to information.\textsuperscript{158} Surely, the Community courts still emphasize the close interdependence between the right to be heard and the right to access to file or the subsidiary nature of the latter in relation to the former. Yet, this does not exclude to impart to the right to information a degree of procedural protection which is by and large equal to that of other basic process rights; in this case the choice of terminology is indeed no more than a matter of form and none of substance. In fact, the right to access to information has been granted - through sustained judicial activity over the last twenty years coupled with a partly progressive, partly retrograde policy on the part of the Commission - distinct, albeit not yet completely settled, features which would seem to justify to acknowledge its autonomous status.

Admittedly, the 'access to file-saga' in competition proceedings has not yet come to an end. The Commission took again the initiative as a policy-maker and put forward its interpretation of the recent case-law by edicting a Notice.\textsuperscript{159} The Notice sets out in detail - according to a uniform standard for a number of competition proceedings - the conditions and procedures to be observed for the granting of access to file to defendant

\textsuperscript{158} Somewhat differently Ehlermann and Drijber, note 137, p. 382 and Moore, note 153, p. 363 stating that the 'judgments finally establish that *general access to the file is a fundamental right of the defence in competition proceedings* ' (emphases added).

\textsuperscript{159} Commission Notice 97/C 23/03 on the internal rules of procedure for processing requests for access to file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation No. 4064/89 (OJ 1997 C 23/3).
undertakings. The Commission expressly recognized that 'all documents not regarded as 'non-communicable' [under the confidentiality criteria] are accessible to the parties concerned' and that 'thus, access to the file is not limited to documents which the Commission regards as 'relevant' to an undertaking's rights of defence'. Nonetheless, the Commission has been criticized for not having drawn all necessary consequences from the case-law as well as having omitted to clarify a range of unsettled legal issues, such as access to file of complainants. It is thus to be expected that further judicial intervention will bring about an additional fine-tuning to these questions. In particular, it will have to settle the controversial issue as to whether and to what extent the protection provided for defendant undertakings is transposable to complainants and other third parties. Moreover, even though the Notice is in principle

---


161 Ibid., point I.B., par. 1 f.

162 Cf. introduction, fourth par. and point II.D.1. Most of the remaining issues are of a rather technical nature and will not be addressed here, cf. Levitt, ibid., p. 188 ff.; Lenaerts and Vanhamme, ibid., p. 548 f. It should however be noted that the Commission refrained from extending the rules to anti-dumping and State aids procedures.

163 To date, the ECJ has conferred the complainant a lesser degree of protection as regards the right to be informed of evidential material in competition proceedings, cf. Joined Cases 142 & 156/84, BAT and Reynolds v. Commission, [1987] ECR 4487, par. 19 f.; the CFI has complied with this jurisprudence, Case T-17/93, Matra Hachette v. Commission, [1994] ECR II-595, par. 34. See Or-
a legally non-binding measure it appears more than likely, with a view to the Hercules precedent, that the rules contained therein constitute a justiciable minimum standard of procedural protection from which the Commission may not depart to the detriment of individual parties. Hence, the Community courts will have ample opportunity for a definitive acknowledgement of the fundamental character of the right to access to file as a constituent part of the rights of defence.

bb) Some speculative remarks on the reasons for 'constitutionalizing' access to information

The outlook of a further 'constitutionalization' of the right to access to information in competition procedures may be based on two strands of reasoning. The first is to be found, albeit not clearly outspoken, in the Soda-Ash cases themselves. The second relates to recent developments with respect to transparency taking place in the broader framework of Community administrative law or Community law in general.


Cf. also de Bronett, ibid., p. 387. Such a self-binding effect, however, has no legal relevance of its own to the extent to which the Commission's rules go not beyond the standard of protection already provided by the case-law.
(1) Community competition proceedings as criminal in nature?

The novel emphasis on the principle of equality of arms in the Soda-Ash judgments implies, according to the CFI, that the Commission should not act as a notifying and deciding authority in personam (which it actually is since the enactment of Regulation No. 17) having more detailed knowledge of the file than the defence. The new approach suggests that the Court envisages operating a (disguised) volte-face as to its basic understanding of both the nature of competition proceedings and the role of the Commission. Though not very explicit, the Court in Soda Ash took up a model of argumentation which has been persistently used by opponents of the Commission's combined function as an investigator, prosecutor and judge. One of its basic assumptions is that a supervisory agency entrusted with a range of exorbitant and to some extent contradictory functions in one hand, by definition, is scarcely capable of applying the requisite degree of objectivity, impartiality and procedural fairness. It is further argued that competition proceedings which may lead to the imposition of heavy fines are to be regarded as criminal in nature and thus warrant - also in order to compensate for the aforementioned structural deficiencies - the application of a range of protective principles originating

---

165 Cf. the authors cited under note 124.

in criminal process law.\textsuperscript{167} In fact, the latter view appears to have become predominant in legal doctrine in recent years and, in particular, has been adhered to, as regards national competition proceedings, by the European Commission of Human Rights which gave a wide interpretation to Article 6 ECHR.\textsuperscript{168} It is submitted that the CFI was impressed by this fundamental shift in the underlying legal philosophy. Soda-Ash sets a marked sign that the Court is beginning to endorse the widely shared doubts as regards the objectivity and the impartiality of the Commission's case-handling, thus implicitly rejecting both the hitherto prevailing presumption of the Commission's acting in good faith and the applicability of Article 6 ECHR to Community competition proceedings.\textsuperscript{169} This is indirectly confirmed by the

\begin{footnotesize}
167 Ibid.

169 This would run counter the established case-law of both the ECJ and the CFI which rejects the Commission to be considered as a 'tribunal' in the sense of Article 6 ECHR, cf. the jurisprudence under note 124. On the other hand, it was the ECJ itself which imposed a heavy burden of proof on the Commission in cartel proceedings in Case C-89/85, Ahlström and Others v. Commission (Re Woodpulp II), [1993] ECR I-1307 - cf. Joshua, note 124, p. 113 ff. - thus suggesting a move towards the acceptance of the principle in dubio pro reo; cf. also CFI, Joined Cases T-68, 77 & 78/89, Vetro v. Commission (Re Flat Glass), [1992] ECR II-1403
\end{footnotesize}
manner in which the *Soda-Ash* judgments have been commented on and justified by a prominent judge of the CFI.\(^{170}\) Thus, it is not excluded that the CFI will seek to further strengthen the standard of procedural protection to be observed by the Commission\(^{171}\) and, in parallel, to establish a maximum of harmony between the Community legal order and the human rights protection ensured by the ECHR system.\(^{172}\)

(2) Democracy and transparency: A new legal basis for procedural participation and access to information?

A second argument explaining for the increasing endeavour to 'constitutionalizing' the right to access to file in competition proceedings (and perhaps even beyond) stems from the recent

---

\(^{170}\) Cf. Lenaerts and Vanhamme, note 160, p. 546 ff. merely citing voices in favour of the Court's new approach (p. 547 at note 47); see also p. 555 f. and 561 f. where the authors justify the CFI's 'comprehensive review' in administrative matters involving 'sanctions' by reference to Article 6 ECHR. A more elaborate version of the statements are to be found in Lenaerts, 'Sanktionen der Gemeinschaftsorgane gegenüber natürlichen und juristischen Personen', [1997] Europarecht p. 17 (36 ff.).

\(^{171}\) However, it should be noted that this argumentation does not warrant a parallel expansion of procedural protection of parties not subject to infringement procedures, such as complainants.

evolution with respect to a general right to access to information held in the possession of the Community institutions. Interestingly, the process of strengthening the right to access to file beginning in 1991 with the Hercules case is accompanied by a huge debate - started in the framework of the negotiations on the 'Maastricht' revision of the Treaties - on how to remedy the 'democratic deficit' of the Community and to reduce the intransparency of its decision-making processes; this finally led to the adoption by both the Council and the Commission of a 'Code of Conduct concerning public access to Council and Commission documents'. Even though the broader dimension of the transparency discussion legally did not matter at all in the above referred litigation before the CFI, it is arguable that the overall political climate was not without influence on the attitude of the judges. This seems to be corroborated by the first ruling of the CFI on the general right to access to Council documents given shortly after the Soda Ash judgments. There the CFI imparted, at least implicitly, the

---


citizen's right to information - even though narrowly defined and solely derived from internal working rules set up by the Community institutions - an individual value of its own open to further evolution.\textsuperscript{175} Indeed, it is to be assumed that the general right to information, understood as an inherent element of citizenship and of the democratic principle, is slowly growing into a fundamental (procedural) right of the citizen in the Community legal order. Although the ECJ appears still reluctant in this respect, its jurisprudence has left the gateway open to such a development,\textsuperscript{176} which has been forcefully advocated by the Advocate General Tesauro.\textsuperscript{177} Moreover, it may be inferred from the general trend in the ECJ's case-law towards incorporating the basic values enshrined in Article 10 par. 1 ECHR (freedom of expression and the freedom to receive and impart information)\textsuperscript{178} that the Community legal system will evolve in the same

\begin{footnotesize}


\textsuperscript{177} Ibid., p. I-2178 ff.; according to the Advocate General the right to information is a specific expression of the democratic principle and already existent in the Community legal order. He considers it an 'essential precondition for effective supervision by public opinion of the operations of public authorities' and accords it therefore a significance reaching beyond the administrative principle of access to documents as shaped by the case-law (par. 19). In the same vein Curtin and Meijers, ibid..

\textsuperscript{178} For freedom of expression cf., Joined Cases 43/82 & 63/82, VBVB and VBBB, [1984] ECR 19, par. 33 f.; Case 60 & 61/84, Ciné-thèque, [1985] ECR 2605; as to freedom of information cf. Case C-260/89, ERT v. DEP, [1991] ECR I-2925; Case C-159/90, Grogan,
direction as the ECHR system does in this respect. In any event, it is quite safe to assume that, in the light of the broader transparency discussion, a subjective right to access to administrative documents is gradually taking shape, thus exerting further pressure towards developing a coherent concept of access to information in any administrative procedure governed by Community law. Accordingly, increased horizontal convergence of procedural protection - even beyond the results so far achieved by judicial activism - will be the necessary consequence.

However, the striking parallelism as regards the gradual leveling-up of both the administrative and the general right to information in the Community hierarchy of norms should not conceal the fact that these rights still are to be founded on different legal bases. The latter clearly has its origin in the


179 However, it should be noted that the right to access to documents has not yet been recognized to be part of the fundamental values protected by Article 10 ECHR, cf. Curtin and Meijers, ibid., p. 103 f. with further references to the enduring controversy (footnote 59); on the other hand see Council of Europe, Committee of Ministers, Resolution No. 77 (31) of 18.9.1977 mentioning explicitly the right to access to information in administrative procedures; cf. also Recommendation No. R (81) 19 of 25.11.1981 'considering the importance for the public in a democratic society of adequate information on public issues' cited by Tesauro, ibid., par. 16.


181 Cf. Gassner, 'Rechtsgrundlagen und Verfahrensgrundsätze des Europäischen Verwaltungsrechts', [1995] Deutsches Verwaltungsblatt p. 16 (20) who distinguishes between traditional (subjective) rights of access to file derived from administrative procedure and general rights to access to information which create a concrete relationship between the citizen and the administration.
democratic principle and perhaps even in Article 10 ECHR. As the law stands, the former is primarily to be derived from the basic requirement of procedural fairness or rule of law considerations. However, this dichotomical conception may change with time. Not only in the Community it is increasingly being questioned as to whether procedural rights in administrative proceedings should be imparted a 'democratic rationale' as well; this, surely, would also contribute to a gradual merging of the legal philosophy underlying the different types of the right to access to information. Yet, the discussion on the benefits of 'participatory democracy' on the levels of legislative and administrative decision-making is to be placed in the broader context of the debate on how to reform the Community's institu-

Cf. also AG Tesauro, ibid.; Girnau, note 121, p. 104 ff. See, on the other hand, ECJ, Case 64/82, Tradax Graanhandel BV v. Commission, [1984] ECR 1359 considering access to information in administrative proceedings as a matter of 'good administration'; this open-textured statement, in principle, allows for an extension of the purposes underlying procedural participation, cf. also above under B.III.1.

tional and procedural framework. Important and complex problems are at stake which go beyond the subject of this paper. A few remarks may suffice to highlight some of the cornerstones of the issues involved.

(3) The democratisation of administrative process?

The current (in fact, tentatively beginning) debate seeks to bring about solutions on how to counterbalance the Community's marked democratic deficit by ensuring more legitimacy, governmental accountability, transparency and subsidiarity in its rule-making processes through enhanced participation of individuals and interest groups, such as consumer and environmental associations or alike. As regards administrative decision-making such a development would contribute to a strengthening of the hitherto neglected status activus processualis of 'interested third parties' - representing individual or corporate economic/non-economic interests - from the perspective of a specific 'democratic rationale'. Yet, the search for a plu-

---


185 Cf., e.g., the reduced procedural participation and protection of complainants in competition proceedings referred to above.
ralist model of administrative process is quite necessarily combined with an extension of procedural protection and would equally foster the need to modify the parameters governing judicial process. Without going as far as to allow the *actio popularis* improved access to litigation would seem to be the necessary consequence. Individual and pluralist interests not sufficiently taken into account and protected on the level of administrative decision-making would thus have to be articulated on the second stage of 'policy making', namely, before the courts. It is arguable that the Community system of judicial protection is already evolving into this direction as the ECJ has increasingly emphasized the deep intertwining between procedural / participatory rights in administrative proceedings with *locus standi* under Article 173 par.4 EC Treaty; as it seems, this tendency is even strengthening in the

---

186 For a plea in favour of pluralist litigation, a broadening of the standing requirements and, in particular, the right to intervene in judicial proceedings as an appropriate means for mitigating the Community's democratic deficit cf. Harlow, 'Towards a Theory of Access for the European Court of Justice', [1992] Yearbook of European Law p. 213 (248). See generally on this topic the various contributions in Micklitz and Reich (eds.), 'Public Interest Litigation before European Courts', 1996.

187 In this vein Craig, note 184, p. 124. See also Shaw, note 175, p. 260 who regards the relaxing of standing requirements an essential precondition for the further development of European citizenship. On the other hand, regarding anti-dumping matters cf. Nettesheim, 'Article 173 of the EC Treaty and Regulations: Towards the Development of Uniform Standing Requirements' in Public Interest Litigation before European Courts, Micklitz and Reich (eds.), 1996, p. 223 (238) who wants to grant *locus standi* only in order to compensate for unfair exclusion of specific interest-articulation on the administrative level.

current case-law of the CFI. Interestingly, the Community courts thus appear to gradually pave the way for enhanced pluralism in both administrative and judicial decision-making. The development can be described as circular or recursive:

Participation of individual parties (not necessarily on the basis of procedural rights) in proceedings on the administrative level leads to *locus standi* and accordingly allows for challenging the result of the decision-making process in the courts.

The courts, in turn, in their decisions on the substance generally tend to reinforce the applicant's procedural status.

---

189 Cf. judgment of 11.7.1996, Case T-161/94, *Sinochem Heilongjiang v. Council*, not yet reported in which *locus standi* was deduced solely from the fact that the applicant had participated in the investigation proceedings carried out by the Commission (par. 47-49).


192 In the *BEUC* case referred to under note 190, however, the ECJ whilst granting the applicant, a consumer association, standing has rejected to widen the scope of procedural protection in the ruling on the substance. On the other hand, cf. Case T-450/93, *Lisrestal and Others v. Commission*, [1994] ECR II-1177 (administering of the European Social Fund) at par. 46 where the CFI deduced the need for procedural protection, inter alia, from the fact that the applicant enjoyed standing to challenge the decision finally adopted by the Commission. See also the earlier judgment of the ECJ in Case C-49/88, *Al-Jubail Fertilizer v. Council*, [1991] ECR I-3187, par. 15 in which the Court for the first time used the formula of 'directly and individually affec-
(as is attempted to highlight in this paper) and thus lay the foundation for increased participation and procedural protection in administrative rule-making.\textsuperscript{193}

3) \textit{The case-law on the right to access to information in anti-dumping proceedings}

The development of the right to access to file in anti-dumping proceedings has been far less controversial and problematic than in competition matters because of the availability of written rules on the matter.\textsuperscript{194} Nonetheless, jurisprudence has played a crucial role in widening the significance of these rules. Already the first Council Basic Regulation No. 3017/79\textsuperscript{195} governing anti-dumping procedures expressly provided for such

\begin{small}
\textsuperscript{193} Cf. Craig and de Burca, note 188, p. 480. See, on the other hand, Harlow, note 186, p. 243 who rightly points out – referring to the BEUC case – that the outright refusal of procedural participation seems to block this dynamism. Yet, under the new approach of the CFI cited under note 189 this situation becomes even less likely since the Commission, at least in anti-dumping, competition and State aids proceedings, in order to be successful in its supervisory function and to enhance the effectiveness of Community law, is heavily dependent on the activity (e.g. complaints), information and expertise of interest groups; as to competition matters see Ortiz-Blanco, note 121, p. 212 ff.\

\textsuperscript{194} Generally cf. see Girnau, note 121, p. 86 ff.; Hix, ibid., p. 143 ff.; Vermulst and Waer, 'Anti-Dumping Law and Practice', 1996, p. 41 ff; Avot, 'Protection des droits des entreprises directement concernées dans les procédures antidumping communautes', [1994] Revue des Affaires Européennes No. 4.\

\textsuperscript{195} OJ 1979 L 339/1 as amended in OJ 1980 L 62/40.\
\end{small}
a right in Article 7 par. 1 lit. a). Yet, following controversy\textsuperscript{196} on the adequacy of disclosure as laid down in this provision, the right to access to information came to be broadened and rendered more transparent in Article 7 par. 4 lit. a) and b) of the follow-up Regulation No. 2423/88.\textsuperscript{197} Although this Regulation has equally been repealed in the meantime by a new procedural framework\textsuperscript{198} it still constitutes the focal point of reference as the case-law of the Community courts has primarily evolved on its basis. In general, the right to access to information in anti-dumping proceedings is more widely construed as in competition matters in that it allows a range of interested parties to the procedure, whether directly targeted - e.g. as an exporter or producer of the dumped product - by the investigation or not, to be supplied with non-confidential information.\textsuperscript{199} Notwithstanding the codification of the right to access to information by secondary legislation first tendencies towards its 'constitutionalization' in connection with the right to

\textsuperscript{196} Cf. the first major anti-dumping case before the ECJ, Case 113/77, NTN Toyo Bearing v. Council, [1979] ECR 1185; the applicant argued - approved by AG Warner - that the Commission had unlawfully refused to disclose figures on which the calculation of the dumping margin was based; the ECJ annulled the regulation on other grounds without addressing the issue.

\textsuperscript{197} OJ 1988 L 209/1 as last amended by Regulation No. 522/94 (OJ 1994 L 66/10).

\textsuperscript{198} Cf. Council Regulation No. 384/96 (OJ 1996 L 56/1); the right to access to file is regulated in Article 6 par. 7 in combination with Articles 19 and 20.

\textsuperscript{199} As to the difficulty to clearly differentiate the status and the rights of the various categories of parties in anti-dumping proceedings under the Basic Regulation cf. Hix, note 121, p. 146 ff.; Weber, 'Das Verwaltungsverfahren im Antidumpingrecht der EG', [1985] Europarecht p. 1 (15).
be heard were felt very early. The ECJ, for the very first time, uttered a statement of principle in the *Timex* case in which it annulled an anti-dumping regulation for breach of an essential procedural requirement because access to information had not been duly provided. The Court held that in principle all non-confidential information relevant to the decision-making supplied by any informant had to be disclosed in order to enable the complainant to ascertain whether the facts had been established correctly. As to the protection of confidentiality the Court rejected any wholesale reliance on this exception to be permissible. This obligation could not deprive the right to access to information of its substance and the Commission would have to make every effort to provide the information relevant to the defence.

A pathbreaking judgment as regards the constitutionalization of procedural requirements was given by the ECJ in Case C-49/88, *Al Jubail Fertilizer v. Council.* Although the case more generally dealt with the right to a fair hearing - for the first

---

200 Cf. AG Warner, in the first *Ballbearings* case, stressed the fundamental right character of the right to be heard of affected parties; he noted that the right to be informed of the facts and considerations on the basis of which the authority is minded to act 'is part and parcel' of that right and the prerequisite to its effective exercise, Case 113/77, ibid., 1263.


202 Ibid., par. 25 and 27.

203 Cf. also Advocate General Darmon, ibid., p. 857, stating that 'the Commission could not simply decide *ex officio* that any particular information was confidential'.

204 Ibid., par. 29 f.

time expressly recognized by the Court as a fundamental procedural right - the process failures allegedly committed by the Commission by and large concerned instances of insufficient disclosure of information during the investigation procedure which was directed against the applicants. As in the earlier case-law the Court considered access to information an essential part of the right to be heard; it stated that the Community institutions must act with all due diligence in performing their duty to provide the information necessary to the defence of the individual parties' interests so as to enable them to effectively make known their views on the correctness and relevance of the facts and evidence presented by the Commission. The effectiveness of the protection stemming from the duty to give information is underpinned by the remarkable link made with the principle of due diligence. The Court derived therefrom a far-reaching burden of proof which requires the administration to adduce sufficient evidence in support of its compliance with the duty to provide information throughout the administrative procedure. The Court finally annulled the contested anti-dumping regulation because the Community institutions, which had solely relied on their internal verification reports and

---

206 Cf. par. 15. For an extensive discussion of this point see below under III.

207 Ibid., cf. the applicants' contentions listed in par. 8 ff..

208 Ibid., par. 17.

209 Cf. also Vermulst and Hooijer, annotation in [1992] Common Market Law Review p. 380 (390 ff.) stating that 'it would seem that the Court imposes the general obligation upon the Commission to be able to show that whatever findings it reaches are in effect communicated to the parties affected by them'.
internal minutes, were not able to prove that they had actually communicated - which they possibly had - all the relevant information to the applicants.  

Thus, the Court considerably strengthened the enforceability of the right to information in anti-dumping procedures, which, however, continues to be subject to the confidentiality exception and the interpretation as to what is to be considered as essential or relevant information.  

Yet, even though the Court had thus imparted to the right to be informed - at least implicitly in conjunction with the right to be heard - the character of a fundamental procedural right, it was reluctant to interpret Article 7 par. 1 a) beyond its actual wording in other instances. In the BEUC judgment handed down only five months later the Court somewhat surprisingly accepted the Commission's refusal to supply non-confidential information to 'interested parties' not expressly mentioned in Article 7 as lawful. The Court did not feel the need to grant the applicant, a consumer organization, a procedural status worth protecting because anti-dumping proceedings were not

---

210 Ibid., par. 18-22.

211 The Court, e.g., rejected one plea on the ground that the information not supplied was not essential, par. 23 f. (criticized by Vermulst and Hooijer, ibid., 394 ff.). See on the general problem of how to combine access to information with the confidentiality exception in anti-dumping matters (not addressed by the Court) Advocate General Darmon, p. 1-3227 ff.; Vermulst and Hooijer, ibid., p. 392 ff.; Curtin, note 119, p. 304 f.; Stanbrook and Bentley, 'Dumping and Subsidies. The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community', 3rd ed., 1996, p. 173 ff..


213 As already discussed under B. III. the Court refused to grant the BEUC procedural protection under the general principle of good administration.
directed against practices attributable to such organizations (or to consumers) and could hence 'not result in a measure adversely affecting them'.\(^{214}\) Admittedly, the Courts's reticence to further widen the ambit of the right to access to information in this particular instance is difficult to grasp. This is the more so since the application could have easily been dismissed as inadmissible.\(^{215}\) Instead, the Court had chosen in a somewhat contradictory way to open in favour of the \textit{BEUC} the avenue for participation in judicial proceedings whilst, so to say in one breath, nullifying in the ruling on the substance the opportunity for effective participation on the level of the administrative procedure. Thus, the balance between procedural participation on both stages of decision-making would seem to be seriously disturbed; this solution furthermore is unjustifiable in terms of economy of process.\(^{216}\) Arguably, the only plain reading

\(^{214}\) Ibid., par. 21. See also the Opinion of Advocate General Mischo who drew a comparison with competition proceedings; referring to Case 142 & 156/84, \textit{BAT and Reynolds v. Commission}, [1987] ECR 4487 he argued that if complainants are less protected than defendant parties this must be all the more so with regard to mere 'interested parties', such as the \textit{BEUC}, p. 1-5732.

\(^{215}\) Cf. the Advocate General Mischo, ibid., p. I-5725 ff. who found that the answer to the question whether the Commission's letter rejecting the request for access to information produced legal effects vis-à-vis the applicant was dependent on whether the latter could claim to have a right to be heard in the investigation proceedings. This reasoning was not adopted by the Court; it bluntly stated that refusal to give the requested access automatically adversely affects the applicant's interests and renders the application admissible, ibid., par. 11. Compare this with Joined Cases T-10/92 and others, \textit{SA Cimenteries CBR and Others v. Commission}, [1992] ECR 11-2667 in which the CFI rejected an application brought against an administrative letter refusing access to file as inadmissible on the grounds that it was a preparatory measure forming part of the competition procedure.

\(^{216}\) This is partly in line with the argument put forward by the \textit{BEUC} that it would be contradictory to grant it access to the relevant documentation in the proceedings before the Court whilst
of the judgment is that the Court wanted to take the opportunity of showing its capability of judicial self-restraint after its bold approach in Al Jubail shortly before.\textsuperscript{217} An even more speculative explanation may be found in the Court's disbelief in the benefits of public interest participation and litigation.\textsuperscript{218} Finally, it should be added that the judgment has become obsolete since, as a result of the GATT 1994 Agreements, the new Basic Regulation No. 384/96 in Article 6 par. 7 now explicitly provides for a right of 'users and consumers organizations' to inspect the non-confidential file.

4) \textit{Conclusion - the right to access to information}

The above made analysis purports to show how and to what extent the Community courts were willing both to disregard the silence of the legislator and to go beyond the wording of available rules on access to file by establishing a fundamental procedural right of access to information. This right has become part of the higher law which the Community is committed to respect and whose observance, as evidenced by the judgments in cases Soda-

\begin{itemize}
  \item \textsuperscript{217} See also Gassner, 'Rechtsgrundlagen und Verfahrensgrundsätze des Europäischen Verwaltungsrechts', [1995] \textit{Deutsches Verwaltungsblatt} p. 16 (24).
  \item \textsuperscript{218} Cf. Harlow, note 186, esp. p. 245 ff. who argues in favour of interest group litigation; see also generally Micklitz and Reich, ibid..
\end{itemize}
Ash and Al-Jubail, is quite effectively supervised by the courts. Indeed, the administration bears a far-reaching burden of proof as regards its duty to provide information and runs a great risk of seeing its decision quashed if it does not comply with this duty. And it seems that the courts not always sufficiently take into account the organisational and technical burden which the Commission has to face in abiding by the newly established judicial rules on access to file.\footnote{See, in particular, the criticism expressed by Ortiz-Blanco, note 121, p. 193; Joshua, note 124, p. 118 ff.; cf. also Ehlermann and Drijber, note 137, p. 283.}

Surely, the legal base of the right to access to information is still to be exactly defined in view of the gradually developing constitutional features of the Community legal system as a whole, which has increasingly come under pressure to enhance its legitimacy by strengthening rule-making transparency. Nonetheless, it would seem that the right to be informed as fashioned by the courts in the areas of competition and anti-dumping has become a point of reference for administrative procedures in other domains. Specific codifications of this right in secondary legislation are to be understood as the statutory corollary of a constitutional requirement rather than creating an original subjective right. Such legislation may be found in other fields of Community administration and it is assumed that they will be subjected to the same degree of judicial supervision and (extensive) interpretation as the rules discussed above.\footnote{Cf. Article 18 par. 3 of Regulation No. 4064/89. For the extensive interpretation of Article 9 of Directive 64/221 (OJ 1964, Sp.Ed. 1963-64, p. 117) laying down procedural requirements to}
need for specific procedural protection is to be derived from
the very character of the administrative procedure in question
and the potential adverse effects it may have on the individual
party. Thus the degree of protection, if any, cannot be the
same in all instances. This has been shown with regard to the
status of complainants or third parties in competition and
antidumping proceedings. Though they have to be afforded the
means to effectively defending their interests this does not
necessarily require the same degree of protection as that accorded
to parties targeted directly by an administrative procedure.
The problem will be dealt with in more depth in the following
section which is devoted to the analysis of the right to be
heard.

---

221 See the leading case ECJ, Joined Cases 142 & 156/84, BAT and
referred to above.
III. The right to be heard (the rule of *audi alteram partem*)

The right to a fair hearing can be said to form the very central standard of administrative justice whose fundamental importance is recognized in almost every European legal order governed by the rule of law.\(^{222}\) Unsurprisingly, the high degree of consensus among the national legal orders obviously facilitated both its implantation and expansion in the Community legal order.

In Community law it has primarily been fashioned in the domain of competition law where it constitutes the cornerstone among the 'rights of the defence'.\(^{223}\) Taking competition matters as

\(^{222}\) Cf. the comparative survey on the laws of the Member States in Schwarze, 'European Administrative Law', 1992, p. 1245; the only exception seems to be Italy, ibid., p. 1272. The principle *audi alteram partem* is of central significance in common law systems where it is - besides the rule against 'bias' - part of the principles of 'natural justice / procedural fairness' or 'due process', cf. Craig, 'Administrative Law', 3rd.Ed., 1994, p. 281 ff.. See also Council of Europe, Resolution (77) 31 of 28.9.1977 which refers to the right to be heard under the following terms: '1. In respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests, the person concerned may put forward facts and arguments ...'.

\(^{223}\) Cf. Lauwaars, 'Rights of Defence in Competition Cases' in *Institutional Dynamics of European Integration*, Liber Amicorum Henry G. Schermers, Curtin and Heukels (eds.), Vol. II, 1994, p. 497. It is not always plain whether the ECJ intends to impart a synonymous meaning to both the 'rights of the defence' and the right to a fair hearing or whether the latter is only part of a broader concept denoted by the former expression; cf. Joined Cases 46/87 & 227/88, Hoechst AG v. Commission, [1989] ECR 2859, par. 14 mentioning the 'rights of the defence' in the English version whilst translated into German by the terms 'Anspruch auf rechtliches Gehör'. The same holds true for Case 322/81, Michelin v. Commission [1983] ECR 3461, par. 7 and CFI, Joined Cases T-10/92 and others, SA Cimenteries CBR and Others v. Commission, [1992] ECR II-2667, par. 39; see on the other hand, Case 85/76, Hoffmann La Roche v. Commission, [1979] ECR 461, par. 9 (mere reference to the right to be heard). See also Lenaerts and Vanhamme, note 119, p. 534 at note 7 who seem to advocate a synonymous conception.
a starting point the principle of *audi alteram partem* has come to be extrapolated to a wide range of administrative procedures whose nature sometimes differs considerably from that of competition infringement proceedings. The development thus underpins the constitutional weight imparted to this principle and furthermore is an excellent example of judicially supported expansion of basic process standards.

It was however not foreseeable at the outset that such an expansive evolution would take place. Generally speaking, *audi alteram partem* may be understood as the entitlement of an individual to be heard before the administration takes a decision affecting him. Accordingly, the adverse effect which an administrative measure may produce vis-à-vis individual parties appears to be the central justifying criterion for applying the principle. However, as the following survey will attempt to show, the ECJ initially was reluctant to give this criterion a broad interpretation. Instead of weighing the actual detrimental (economic) effects which an administrative measure may have on individual rights or interests it rather used to question from a more formalistic standpoint as to whether a (pecuniary) 'sanction' or 'penalty' in the narrow sense was to be imposed; hence, if the measure did not amount to a 'sanction' the right to be heard would not apply.\(^{224}\) It was only very recently that the Community courts seem to have definitely abandoned the formalistic approach in favour of a more liberal 'substantive' stance. They

\(^{224}\) See however the early but seldomly cited judgment in Case 121/76, *Moli v. Commission*, [1977] ECR 1971, par. 20: '... when any administrative body adopts a measure which is liable gravely to prejudice the interests of an individual it is bound to put him in a position to express his point of view.'
have accordingly opened the gateway to the successive spreading of the *audi alteram partem* principle into diverse areas of administrative decision-making which involve individual interests liable to be adversely affected by its outcome.²²⁵ As will be seen, the administrative procedures concerned not only vary according to the subject-matter dealt with but also are quite diversely structured, in particular, with regard to the normative instruments used as well as the participation of Community and national administrative bodies in the decision-making.

The subsequent analysis will focus on the 'constitutional' dimension of this development. It will not, or to a lesser extent, address the concrete features displayed by the *audi alteram partem* principle in actual instances as well as technical issues associated with its implementation save if necessary for the understanding of the broader evolution.

1) *Competition law*

The right to be heard was explicitly provided for by secondary legislation since the early days of the coming into operation of competition policy.²²⁶ Irrespective of this normative frame-

---


work, the rule that an undertaking against which a competition procedure is directed is to be duly heard before a decision may be taken against it was soon 'constitutionalized' by the ECJ. In the Transocean Marine Paint case of 1974 the Court established the right to be heard as a 'general rule' in relation to which the rules under Regulation 99/63 were only to be regarded as statutory concretisations. This was pathbreaking in mainly two ways. First, at the time being it was somewhat revolutionary in 'constitutional' terms that the Court, without much ado, dared adopt the audi alteram partem rule as a general principle of Community law despite existing, albeit minor, divergences in the laws of the Member States on the matter. Second,

Case 17/74, Transocean Marine Paint v. Commission, [1974] ECR 1063, at par. 15: '...the general rule that a person whose interest are perceptibly affected by a decision taken by a public authority, must be given the opportunity to make his point of view known' (emphases added).

the ruling constitutes the first explicit up-grading of a judge-made procedural rule onto the level of higher Community law and thus paved the way for an activist constitutional jurisprudence of the Court in the field of procedural law. The principle was soon reiterated by the ECJ in case Hoffmann La Roche, yet, - widely unremarked by legal doctrine - by using a somewhat different, in effect far more restrictive terminology, which nonetheless determined the subsequent development of the case-law for a very long time. The Court held that 'observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law...'. This statement of principle, although equally clothed in 'constitutional' language, clearly falls short of the Court's ruling in the Transocean case: Neither had the Court expressly confined the audi alteram partem rule to administrative procedures leading to the imposition of sanctions nor could this be deduced from the general context of the judgment. In Transocean, the applicants sought the annulment of a disadvantageous provision contained in a Commission decision renewing in their favour an exemption

---

228 Cf. the commentators cited under note 228 and Schwarze, note 222, p. 1192.


230 Ibid., par. 9 (emphasis added).
under Article 85 par. 3 EEC Treaty on the grounds that they had not been enabled to submit their views in this respect prior to the adoption of the final decision.

The restrictive formula set up in Hoffmann La Roche came to be regularly repeated and thus restrained, in a first period, the scope of application of the fundamental right to be heard to competition proceedings. It furthermore seems to be largely responsible for the reduced degree of protection of complaining competitors - who may not be subjected to 'sanctions' and only have a 'legitimate interest' in participating in the proceedings - as compared to the undertakings directly targeted by an infringement procedure. It is however questionable whether the 'legitimate interest' of a complainant seriously suffering from unlawful cartel-behaviour is less worth protecting in competition proceedings than the financial interests of undertakings presumably guilty of an infringement of competition rules with all its harmful and anti-social implications. Moreover, the denial of full protection under the audi alteram partem rule - including reduced access to information - appears to be illogical a stance with regard to the recent expansive interpretation


of the 'principle of care' to the benefit of complainants which, in effect, compensates for many of the shortcomings of the aforementioned doctrine.\textsuperscript{234} As will be seen in the course of the following analysis, the forceful expansion of both the audi alteram partem rule and the principle of care in the realm of European administrative law would seem to point to a beginning assimilation of the standard of procedural protection imparted to defendant undertakings and complainants.

2) Anti-dumping law

a) The 'human rights' jurisprudence of the ECJ

It took the ECJ quite a long time, namely, until 1991 to acknowledge that the audi alteram partem rule was also applicable to anti-dumping proceedings.\textsuperscript{235} Actually, this could not surprise very much in view of a range of basic features common to competition and anti-dumping proceedings, such as the independent conduct of investigations by Community institutions, the participation and the involvement of important economic interests of specific undertakings.\textsuperscript{236} Moreover, the need for further pro-


\textsuperscript{236} Note also the many dissimilarities between the two procedures which induced some commentators to believing that the case-law in competition matters is not transposable, cf. Due, 'Le respect
tective constraints on administrative rule-making and, in particular, the recognition of the right to be heard as a fundamental entitlement in the area of dumping had been long recognized, inter alia, by Advocate General Warner in the first major dumping case brought before the Court. On the other hand, it had always been questionable whether a difference in treatment could be justified on the basis of the normative instruments respectively utilized in both decision-making processes. As opposed to the the clearly administrative nature of competition proceedings leading to the adoption of decisions vis-à-vis individuals anti-dumping procedures are directed at the enactment of generally applicable regulations and thus, strictly speaking, are to be equated with legislative rule-making. Nonetheless, it was acknowledged at an early stage that the formal dichotomy could not be taken too seriously. The proximity to an administrative-type of procedure is to be deduced from the fact that anti-dumping proceedings generally target a certain type of imported goods and thus normally affect only a distinct number of sufficiently individualized producers, exporters and importers, which furthermore are entitled to participate during

---

237 See above note 200.

238 Cf. Article 189 par. 4 EC Treaty in combination with, in particular, Article 15 of Regulation No. 17.

239 Cf. Article 189 par. 2 EC Treaty in combination with Article 14 of Regulation 384/96.
The relatively high degree of individualization in the decision-making thus was liable to lead to a widening of both the standard of procedural protection and the opportunity to have access to the courts in order to challenge anti-dumping measures. Elaborating on this line of argument, the Opinion of Advocate General Darmon in Al Jubail paved the way to the extrapolation of the right to a fair hearing to anti-dumping procedures. According to him 'the loss of the Community market as a result of the imposition of a high anti-dumping duty .. has financial consequences which are comparable to those which follow the imposition of a fine for an infringement of [competition rules]'. And he went on to state that 'a principle as general as the one defined by the Court in its judgment in Hoffmann LaRoche.. would seem to apply to dumping proceedings

240 Cf. Article 7 of Regulation No. 2423/88; Article 6 of Regulation No. 384/96. The fact that the real character of the decision-making thus considerably departs from standard legislative rule-making was acknowledged as early as by Advocate General Warner in the first Ballbearings case when he referred to the hybrid nature of anti-dumping proceedings, [1979] ECR 1262; see also Weber, 'Das Verwaltungsverfahren im Antidumpingrecht der EG', [1985] Europarecht p. 1.


242 Ibid., p. I-3221, par. 73.
The Court, in its judgment on the substance, a step further and touched the high constitutional ground by expressly placing the recognition of the fundamental right to a fair hearing in the frame of its activist human rights jurisprudence. According to the Court the requirement of a hearing 'must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of antidumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them'. Interestingly, the Court departed from its general approach in human rights matters and this time expressly uttered its inclination towards opting for a maximal standard of (procedural) protection available in the legal orders of the Member States. It held that the Community insti-

Ibid., par. 75; however, he omitted to refer to Case C-142/87, Belgium v. Commission, [1990] ECR I-959 where the Court had already held at par. 46 that 'observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules'.


Ibid., par. 15. Note the formulation similar to the standing requirement of 'direct and individual concern' under Article 173 par. 4 EC Treaty (formerly Article 173 par. 2 EEC Treaty).

For a pertinent critique as to the erroneous endeavour to establish a so-called maximal standard of human rights protection in the European Community see Weiler, inter alia, in 'Methods of
tions had all the more to scrupulously observe the right to be heard since the rules of the basic regulation 'do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems'.

Obviously, the Court wanted to send out a clear signal as to its commitment to ensure that the highest standards of procedural protection are to be applied in anti-dumping proceedings, even in the absence or incompleteness of express written rules on the matter. However, as already discussed, the expectations regarding a further expansion of the right to a fair hearing to other 'interested parties' in anti-dumping investigations turned soon out to be lowered in the BEUC case. It proved crucial that the Court had chosen the terms 'directly and individually affect' and 'adverse consequences' in order to delimit the circle of beneficiaries of procedural protection to those parties which had a financial or economic interest at stake. Nonetheless, for the very first time in years of jurisprudence the key-term 'sanction' as a decisive criterion for the invocability of the right to be heard had ceased to apply.

b) The more restrictive approach of the CFI in Nölle I

Unfortunately, the CFI seems not willing to draw the necessary
CFI has shown its obvious unwillingness to endorse the progressive stance adopted in *Al-Jubail*.*249* The CFI merely relied on the BEUC case in two terse paragraphs so as to deny an independent importer (the applicant) a right to a fair hearing in antidumping proceedings. The result is unconvincing in several ways. The CFI clearly manipulated the BEUC precedent by stating that 'according to the case-law' anti-dumping proceedings 'are directed only against foreign producers and exporters or non-member countries as well as, where relevant, associated importers, and not against independent importers such as the applicant'.*250* It further asserted that the anti-dumping procedure 'was not against the applicant and could not for that reason result in a measure adversely affecting it, since no allegation was made against it'.*251* This conclusion simply amounts to a circular reasoning or legal fiction. It constitutes bizarre an interpretation of the ECJ's ruling in *Al-Jubail* to assume that an independent importer of products subject to an anti-dumping duty - who accordingly suffers losses in terms of reduction of profits - is 'not adversely affected'. In reality, the CFI had neatly sidestepped the central (and problematic) issue of whether the applicant was 'directly and individually affected'*252* by the

---


250 Ibid., par. 62; the CFI cited the BEUC case as authority for this statement, yet, omitted to make it clear that neither there (cf. par. 20–21 in BEUC) nor in *Al-Jubail* the ECJ had addressed the issue of the procedural status of independent importers.

251 Ibid., par. 63 (emphases added).

anti-dumping investigation. Such an outspoken denial would have been truly difficult since it was undisputed that the applicant had intensely taken part in the investigation procedure. The CFI's reasoning was directly transposed from the BEUC precedent without questioning whether the procedural status of an independent importer would have to be judged differently from that of a consumer organization. Thus, the Court had not checked as to whether the applicant had suffered loss in actual fact or would have been likely to do so so that the granting of an opportunity to be heard would have been imperative. The denial of the right to be heard is further inconclusive inasmuch as the CFI, in the same judgment, granted the applicant the required protection in equivalent terms under the 'principle of care'; it held that the applicant as an 'interested party' could avail himself of this principle in order to have protected his interests during the anti-dumping procedure and, in particular, to ensure that his allegations were duly examined by the Community institutions.\textsuperscript{253} This aspect of the judgment will be considered more closely in part D.

Apart from the dogmatic aberration in the latter ruling of the CFI, the case-law on the right to be heard in anti-dumping matters highlights how the first step towards (horizontal) convergence of procedural protection in administrative decision-making was made. The Court, in \textit{Al-Jubail}, alleviated the conditions for the test set up in \textit{Hoffmann La Roche} and thus instigated a further development of expansion in other areas of administra-

\textsuperscript{253} Ibid., par. 73 ff..
tive process. In fact, only a few months after the Al-Jubail ruling the Court reconsidered its case-law regarding the right to be heard in general customs matters by issuing a judgment of central importance for the concept of procedural review henceforth adopted by the Community courts.

3) Customs law

a) The ECJ's judgment in Technische Universität München

The ECJ's judgment in Case Technische Universität München, given in the framework of a preliminary reference procedure under Article 177 EEC Treaty, is pathbreaking in many respects. To name but two, it not only implants a novel duty to give interested parties an opportunity to be heard in composite or cooperative administrative procedures - involving both Community and national authorities -, such as in customs matters, but also constitutes an important volte-face in the Court's general

---


255 It would lead too far to set out the various legal frameworks existing before the entry into force of the Customs Code (Council Regulation No. 2913/92, OJ 1992 L 302/1) which henceforth comprehensively codifies this kind of cooperative procedure.
approach with respect to procedural review in the face of the exercise of wide administrative discretionary powers. The latter point will have to be analyzed more closely in the context of the discussion of the 'principle of care' and the 'duty to state reasons'. As to the first, it is worth noting that the Court, in its former case-law in customs matters, had stubbornly denied a right to be heard of individual parties applying for, e.g., the duty-free importation of goods or the remission of customs duties, when the procedure came to be transferred from the national customs authorities to the Commission for definite clearance. This was mainly motivated by the fact that the regulatory frameworks providing for cooperation between the national administration and the Commission did not foresee any direct participation in the stage of the procedure taking place before the Commission. Advocate General Jacobs endorsed this view and believed that the granting of a right to a hearing would place too excessive a burden on the Commission. Although he felt some hesitations in view of the fundamental importance imparted to the audi alteram partem rule and the 'preferability', in the interest of 'good administration', to supply information to the applicant before the decision is reached, he reiterated the formula coined in Hoffmann La Roche that the

---

256 See below under D.

257 Cf., e.g., ECJ, Case 203/85, Nicolet Instrument GmbH v. Hauptzollamt Frankfurt am Main-Flughafen, [1986] ECR 2049, par. 15; for further references on the earlier case-law see the Opinion of Advocate General Jacobs in Case Technische Universität München, ibid., par. 41.

258 Ibid., par. 42.

259 Ibid.
imposition of a fine or penalty was not at issue in the actual instance but only the loss of a benefit, namely, a duty-free import.\textsuperscript{260} The Court, unimpressed by this line of argument, gave a laconic but unambiguous answer: 'The right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances and, where necessary, on the documents taken into account by the Community institution...'.\textsuperscript{261} It should not be overestimated that the Court did not cite its earlier jurisprudence as to the fundamental nature of the \textit{audi alteram partem} principle since the message is unequivocal.\textsuperscript{262} Even in the absence of rules providing for procedural participation of individuals whose economic interests are liable to be directly affected by the outcome of the proceedings an opportunity to be heard is imperatively to be granted by the Commission \textit{itself}.

b) The CFI's concept established in \textit{France-Aviation}

In a judgment relating to a somewhat different, albeit in its basic structure comparable regulatory framework the CFI interpreted the ECJ's ruling in \textit{TU München} in a rather ambiguous

\textsuperscript{260} Ibid., par. 43.

\textsuperscript{261} Ibid., p. I-5501, par. 25 (emphases added).

\textsuperscript{262} Cf. however par. 14 where the Court for the very first time held that 'respect for the rights guaranteed ... in administrative procedures is of even more fundamental importance' in the event of the existence of a power of appraisal (emphasis added). On this point see below under D.
manner. The applicant had claimed the repayment of customs duties. The Commission, to which the matter had been referred by the national customs authorities, rejected the application without having given the applicant an opportunity to make known his views. This Commission decision (addressed to the case-handling national customs authorities) was motivated, inter alia, by reference to the alleged 'obvious negligence' on the part of the applicant which constitutes a statutory ground for refusal of repayment. Irrespective of the clear statement in *TU München* the CFI argued - with a view to the fact that no direct contacts between the applicant and the Commission were provided by the relevant legislation - that the applicant's right to be heard must actually and foremost be secured before the national administration. The Commission had merely 'to ensure that the applicant's right to be heard was respected through the provision of additional explanations first provided by the applicant to the [national] administration and subsequently transmitted to the Commission'. The CFI did not base the applicant's somewhat peculiar 'indirect' right to be heard on constitutional grounds but derived its existence from the fact that the Commission enjoyed a power of appraisal under the Regulation in question. The denial of a right of the interested

---


264 Ibid., par. 30; see also par. 36 where the Court held that the Commission had the duty to arrange for the applicant to be heard by the national authorities.

265 Ibid., par. 33 ff. This stems from a peculiar interpretation of a passage in the *TU München* ruling (there par. 14) whose signi-
party to directly intervene before the Commission itself seems unconvincing; this not only is at variance with the unequivocal statement of the ECJ in *TU München* but also with the fundamental right character of the *audi alteram partem* rule which is applicable even in the absence of written rules on the matter. Moreover, it is questionable whether the solution adopted by the CFI actually guarantees that the individual party is able to make its views known by the intermediate of the national customs authorities as effectively (and as rapidly) as it would have been able to when directly intervening before the definitely deciding body, the Commission. In any event, there seems to be no justification for choosing the 'bureaucratic detour' and to deny a hearing before the Commission if the individual party demands so and if this may accelerate the proper termination of the proceedings in its favour.

c) A decisive step in the achievement of 'horizontal convergence' of the *audi alteram partem* principle

The judgments *TU München* and *France-Aviation* impressingly evidence the trend towards convergence of process standards of good administration in Community administrative procedures. Whatever the correct reading of the somewhat complicated findings in *France-Aviation* might be from the doctrinal standpoint, the right to be heard appears to have become an inalienable part of customs proceedings involving the exercise of administrative discretionary powers provided that financial interests

...ficance will be discussed further below under D.
of individual parties are at stake. This holds true regardless of whether specific rules provide for a hearing and irrespective of the fact that the procedure is regularly initiated by the individual party itself. The latter point is an important progress in relation to the formulae established in Hoffmann La Roche and Al-Jubail which focussed on proceedings 'initiated' and 'directed' ex officio against individual parties who, in turn, had to fear the imposition of pecuniary 'sanctions'. The second novelty is that the criterion of 'adverse effects' of an administrative measure would seem to be henceforth subjected to broad an interpretation inasmuch as it also covers the denial of an advantage which the individual party seeks to achieve by setting the administrative procedure in motion. Thus, in effect, the criteria governing the applicability of the audi alteram partem rule have come to be considerably relaxed; and, as will be seen, the concept clearly enhances the likelihood of (horizontal) expansion in further areas of administrative decision-making.

d) First signs of a move towards 'vertical convergence'?

A second major aspect of the above discussed case-law in customs matters relates more generally to the strengthening of the procedural status of individual parties in cooperative or composite administrative procedures. It is arguable that a tentative move

---

See also Lenaerts and Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process', [1997] Common Market Law Review p. 531 (536) who however express doubts as to whether the right to be heard applies in all circumstances.
in the direction of 'vertical convergence' of procedural standards of individual protection is detectable in these cases. For the very first time, the Community courts seem to accept a concept of comprehensive protection against and imputability of administrative failures committed either on the Community level (TU München) or on the national level (France-Aviation). In particular the France-Aviation judgment provides a good example to this hypothesis: The failure determining the wrongful outcome of the case was primarily attributable to the national customs administration which had omitted to transfer a comprehensive account of the arguments put forward by the applicant during the (national) administrative procedure to the Commission. As it was the Commission decision which was challenged before the CFI the applicant could only 'win' the case if this (procedural) failure was somehow imputed to the Commission. In actual fact, this was achieved by obliging the Commission, in view of the incompleteness of the file, to ask the national authorities for further clarification or to urge them to hear the applicant once again. This suggests a careful tendency towards equal standards of protection of individual interests, no matter at which stage of the administrative process a mistake to the detriment of private parties has been made. The CFI, by choosing its peculiar solution of the 'indirect' entitlement of the applicant to make its views known before the national authorities before the Commission decision is adopted, seems to have implicitly endorsed this concept of imputability. For the sake of individual protection the procedure 'at the first

267 Cf. par. 12 and 35 of the judgment.
stage taking place before the national authorities would seem to be regarded, so to say by legal fiction, as if it was fully integrated in the system of Community administration or as if the national authorities acted as a Community agency. This legal fiction responds to the enhanced need for protection stemming from the fact that the procedure is 'split up' between different authorities with distinct responsibilities and subject to different jurisdiction. The underlying philosophy appears to be that the individual's procedural status shall not suffer from this organizational defect and it shall make no difference at which stage of the procedure a failure occurs and by whom it is caused. Thus, the CFI engages into developing a concept of coherent protection throughout mixed administrative proceedings whose observance is guaranteed by the Community courts.\footnote{See, on the other hand, Case C-97/91, Oleificio Borelli v. Commission, [1993] ECR I-6313 relating to composite administrative procedures in the field of the CAP in which the ECJ denied the imputability of (substantive) defects occurred on the stage of national administrative conduct and, accordingly, the possibility of challenging them before the Community courts (so-called 'separation doctrine'). It however established a duty of the national courts to grant effective judicial protection against the (unlawful) national act; cf. Garcia de Enterria, 'The Extension of the Jurisdiction of National Administrative Courts by Community Law: The Judgment of the Court of Justice in Borelli and Article 5 of the EC Treaty', [1993] Yearbook of European Law p. 19.} A further example to this phenomenon of 'vertical convergence' will be addressed in the following section.

4) Administration of the European Social Fund

a) The judgments in case Lisrestal
A development comparable to that in customs matters is discernible in the field of the procedural law governing the administration of the European Social Fund with respect to individual beneficiaries of Fund assistance. The granting, suspension, reduction or withdrawal of Fund aid is primarily ensured by the Commission but also — by way of delegation of supervisory tasks with respect to specific projects of approved assistance — involves the activity of national (social) authorities and thus displays characteristic features of cooperative administration.

In two recent judgments relating to one and the same case the CFI and the ECJ respectively extrapolated the fundamental concept of *audi alteram partem* in favour of individuals to administrative proceedings of this kind. One of the applicants, a Portuguese company named *Lisrestal*, had received assistance from the European Social Fund. For a variety of reasons, in particular, alleged financial mismanagement on the part of the beneficiary, the Commission, after having carried out an investigation at the applicant's premises, issued a decision addressed to the competent Portuguese ministry asking for the repayment of the funds received by the applicant *Lisrestal*. The relevant provision in Regulation No. 2950/83, namely, Article 6 par. 1 curiously provides only for an opportunity for the respective Member State of commenting on the case prior to the

---


adoption of the final decision but not for the concerned undertaking primarily liable for repayment. The Commission had thus only collected the views from the Portuguese ministry which did not object to the repayment order and not from the recipient of the assistance; neither had the latter been heard by the national authorities before giving the Commission their approval to the decision of recovering the aid. Lisrestal subsequently challenged the Commission decision on the grounds that its 'rights of defence' had not been respected during the administrative procedure leading to the adoption of the repayment demand. The CFI in its judgment, confirmed by the ECJ on appeal, held 'that the respect of the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question'. Notwithstanding the fact that on


272 This construction is indeed somewhat contradictory since the Member State whilst being the sole interlocutor of the Fund incurs only secondary liability for the repayment of the sums, cf. Case T-450/93, ibid., par. 47.

273 Ibid., par. 42 (emphases added) with reference to ECJ, Joined Cases C-48 & 88/90, Netherlands and Others v. Commission, [1992] ECR I-565 and Case C-135/92, Fiskano v. Commission, [1994] ECR I-2885. Interestingly, the CFI 'slightly' modified the last part of the statement taken from the Fiskano judgment (there at par. 40) in which the ECJ connected the applicability of the right to be heard to administrative procedures leading to the imposition of penalties.
the basis of the Regulation the sole interlocutor of the Social Fund is the Member State the Court found that the effect of the relevant provisions would be to establish a direct link between the Commission and the recipient of the assistance.\textsuperscript{274} The Court deduced this from the fact that Lisrestal as the beneficiary of the aid was 'directly and individually concerned' by the contested measure because, inter alia, it had to bear its immediate (detrimental) economic consequences.\textsuperscript{275} Thus, the Commission could not lawfully adopt the repayment decision before first giving the applicant the possibility, or ensuring that they had had the possibility, of effectively making known its views.\textsuperscript{276} On appeal, the Commission claimed that reliance on the audi alteram partem principle was to be excluded since a direct (financial) relationship only existed between the Commission and the Member State on the one hand and the Member State and the recipient of the aid on the other.\textsuperscript{277} The ECJ however agreed with the finding of the CFI that, in actual fact, an informal direct link between the Commission and the applicant had been established on the grounds that the latter was directly implicated in the investigation 'initiated against' it by the Commission and that it was expressly named and referred to in the contested decision.\textsuperscript{278} In the Court's view it was sufficient for the right to be heard to be applicable that the admi-

\begin{itemize}
  \item \textsuperscript{274} Ibid., par. 47.
  \item \textsuperscript{275} Ibid., par. 43-46.
  \item \textsuperscript{276} Ibid., par. 48 ff..
  \item \textsuperscript{277} Cf. Case C-32/95 P, par. 22.
  \item \textsuperscript{278} Ibid., par. 23 ff..
\end{itemize}
nistrative measure significantly affected the applicant's interests in that it would directly suffer the negative economic consequences of the decision.\textsuperscript{279} Finally, the Court dismissed the argument that the direct consultation by the Commission of individual recipients of Fund aid prior to the adoption of a decision would place too heavy an administrative burden on it;\textsuperscript{280} such practical difficulties would not justify an infringement of a 'fundamental principle such as the observance of the rights of the defence'.\textsuperscript{281}

The \textit{Lisrestal} judgments are in line with the development of the case-law in customs matters as regards the filling of gaps of procedural protection in instances of cooperative administration. Furthermore, the judgments constitute an important step in promoting the 'horizontal expansion' of the principle of \textit{audi alteram partem} to social administration. This is the more significant as both the weight and scope of Community social administration is not unlikely to increase in the near future if, e.g., the concept of European citizenship is once taken seriously.\textsuperscript{282} The new approach clearly contrasts with the early case-law which focussed on administrative process with purely repressive character. The \textit{Lisrestal} judgments make it

\begin{itemize}
\item \textsuperscript{279} Ibid., par. 33.
\item \textsuperscript{280} Ibid., par. 35. The Commission feared that its regular practice consisting of entirely delegating administrative tasks to the competent national authorities once an assistance project approved would be endangered.
\item \textsuperscript{281} Ibid., par. 37.
\item \textsuperscript{282} Cf. Chiti, 'Are there Universal Principles of Good Governance?', [1995] \textit{European Public Law} p. 241 (253 ff.).
\end{itemize}
clear that it is henceforth sufficient for the right to be heard to apply when the administrative measure in question produces detrimental economic consequences - i.e. a pecuniary loss in the widest sense - for individual parties regardless of whether implied in a 'sanction' or in the negation / restitutio of an economic advantage.\(^\text{283}\) It further would seem to be of no significance whether the proceedings are initiated ex officio, at the instigation of third parties (complainants) or by the concerned individual party itself. An important criterion appears to be that the administration engages in an investigation involving data related to specific individual parties and the gathering of evidence which might be utilized to the detriment of those parties irrespective of whether they are formally entitled to participate in the proceedings under the relevant secondary legislation.\(^\text{284}\) Moreover, albeit more cautiously than in the France-Aviation case, the trend of 'vertical convergence' of individual procedural protection in mixed administrative procedures appears to be corroborated. This is highlighted by the overt acknowledgement of both the CFI and the ECJ that a

---

\(^{283}\) See also Lenaerts and Vanhamme, note 266, p. 535.

\(^{284}\) However, as has been pointed out by Lenaerts and Vanhamme, note 266, p. 537, the majority of participants in the latest FIDE Conference advocated that the extension of the right to be heard to administrative procedures with respect to which legislation does not expressly provide for a hearing should be rather the exception than the rule. In this context Case T-109/94, Windpark Groothuysen v. Commission, [1995] ECR II-3007, par. 48 is cited as authority; there the CFI accepted that the granting of aid under a scheme designed to financially support projects of energy technology is exclusively conducted on the basis of the documentation submitted by private applicants. However, it seems doubtful whether this judgment is really capable of being generalized in the above mentioned way; see as to the most recent development in jurisprudence below under 5).
procedural relationship ("direct link") between Community institutions and individuals may also exist if the regulatory frameworks or the administrative practice in question only provide for direct contacts between the individual parties and the national administration to which part of the administrative task is delegated. No matter how the administrative duties are shared between the Community and the national administration in cooperative administrative procedures, the need for individual protection imperatively calls for the observance of basic procedural principles throughout the 'double-staged' proceedings. The constitutional significance of the right to be heard thus overcomes the complicated structure of administrative process conditioned by the division of competences between the Community and the Member States.

b) Federalizing Community administrative process?

It is arguable that these are the first signs of the establishment of a common fundamental standard of individual protection in administrative process to which the Member States when executing Community law are also being incrementally subjected. The ongoing growth of regulation relating to Community administrative process and the strengthening of the intertwinements of Community and national administrative activity suggest that further federalizing tendencies on the basis of fundamental procedural rights protection are to be expected. It may be

---

assumed that a development is triggered at the final stage of which the Member States would have to comply with harmonized standards of procedural protection in the event of acting, so to say as 'Community agents', in the sphere of (substantive) Community competence. This seems not too daring a prospect if one considers the similar evolution of incorporation in human rights matters in general as well as the ECJ's first step to 'vertical harmonization' on procedural grounds in the famous Heylens case. The Community standard of audi alteram partem would thus not only fill gaps of national legislation governing administrative procedures to the extent to which they (also)

286 See also Harlow, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot?', [1996] European Law Journal p. 3 (21) taking a similar stance, albeit more generally, with respect to indirect administration.


116
regulate the implementation of Community law but also trump weaker statutory protection existing on the matter in the national legal orders. Yet, as regards the right to be heard, so far, the Community courts refrain from taking this step explicitly and prefer guaranteeing individual protection on the Community level by means of imputing process failures to the Commission. This seems logical with a view to the fact that it is the Commission which is finally responsible for the adoption of the administrative measure susceptible to judicial review only before the Community courts.

The issue is of highly practical and theoretical importance as regards the construction of a coherent concept of process standards of good administration in the domain of the European administrative 'system' as a whole. The various gaps of indivi-

---

289 See for the somewhat different development of incorporation with respect to 'substantive' Community principles of good administration the recent case-law on the recovery of State aids. In this context individuals may only rely on the principle of protection of legitimate expectations as recognized under Community law whereas possibly even higher standards of protection under national law are to be discarded, cf. ECJ, Case C-5/89, Commission v. Germany (Re BUG-Alutechnik) [1990] ECR 1-3437 and more recently ECJ, judgment of 20.3.1997, Case C-24/95, Land Rheinland-Pfalz v. Alcan Deutschland GmbH, not yet reported; on the latter judgment see respectively the annotations by Hoenike [1997] Europäische Zeitschrift für Wirtschaftsrecht p. 279 and Classen [1997] Juristenzeitung p. 724; for a recent assessment of the case-law cf. Schwarze, 'Deutscher Landesbericht' in Administrative Law under European Influence (On the convergences of the administrative laws of the EU Member States), Schwarze (ed.), 1996, p. 123 (155 ff.).


291 In the same vein the ECJ in the Lisrestal case, note 270, par. 29. As to the exclusive competence of the Community courts to review legally binding Community measures see ECJ, Case 324/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, [1987] ECR 4199.
dual protection existing on account of shared administrative
tasks in cooperative or 'double-staged' procedures will increa-
singly call for judicial intervention and trigger further ten-
sions of 'vertical' harmonization. Indeed, under specific
circumstances the complicated structure of administrative pro-
cess may lead to an acute denial of justice as shall be high-
lighted by the following example: In the event of (procedurally)
defective national measures which bind the Community institu-
tions by virtue of the division of competence established by
the Treaty, in principle, only the national courts can provide
the necessary protection. Effective procedural and judicial
protection of individuals however is blocked if under the
relevant national law no access to the courts is possible. This
may happen when the national administrative measure is
only preparatory in nature and to be seen as an inherent part
of the Community administrative process. Even though the
procedure is to be closed by way of a decision formally adopted
by and under the responsibility of a Community institution its
substance can be predetermined and thus 'infected' by national
measures suffering from both substantive and procedural defects

---

292 See, e.g., CFI, Case T-42/96, Eyckeler & Malt AG v. Commission, pending (OJ 1996 C 180/29); CFI, Case T-50/96, Primex Produkte Import-Export GmbH & Co.KG, Gebr. Kruse GmbH and Interporc Im-

293 For the Community fundamental right of effective judicial pro-
tection which also binds the Member States cf. ECJ, Case 222/84,
Johnston [1984] ECR 1651, par. 18; Case 222/86, UNECTEF v. Hey-

294 See, e.g., under German law Article 44a of the Verwaltungsge-
richtsordnung excluding the reviewability of preparatory measu-
res preceding the administrative decision which closes the pro-
cedure; see also Garcia de Enterría, note 268, p. 21 referring
to similar legislation in France, Spain and Italy.
(e.g. a hearing had not been granted which would have altered the substance of the national measure). It remains to be seen whether the ECJ will pursue its bold and unsatisfactory approach in the judgment Borelli of setting 'harmonized' standards for judicial protection to be observed by the national courts or adopt a stance in line with the concept of imputability of procedural defects tentatively applied by the CFI in France-Aviation. Under the latter option the Commission, which is bound by the opinion issued by the national authority, could be imputed process failures occurred on the first procedural stage and be subjected to judicial control by the Community courts. The theory of imputability of procedural defects could thus play a decisive role in the improvement of individual protection in cooperative administrative proceedings. It would mitigate the shortcomings of the hitherto prevailing 'separation doctrine' on the jurisdictional level in the interest of both consistent judicial protection and procedural economy by encouraging a further shift towards centralized judicial review secu-

---

295 This is, apart from the fact that a substantive and not a procedural defect was at issue, exactly the problematic context of Case C-97/91, Oleificio Borelli v. Commission, [1993] ECR 1-6313 relating to the implementation of the CAP.

296 Cf. the harsh criticism by Garcia de Enterria, note 268; see also Caranta, 'Judicial Protection Against Member States: The Indirect Effects of Art. 173, 175, and 177' in Public Interest Litigation before European Courts, Micklitz and Reich (eds.), 1996, p. 95 (98 f.).

297 As has been rightly pointed out by Garcia de Enterria, note 268, p. 25 the 'separation doctrine' as applied by the ECJ in Borelli amounts to an artificial splitting up of a unitary procedure solely for the purpose of judicial protection before the national courts.
red by the CFI\textsuperscript{298} in so far as composite administrative proceedings are concerned. At the very least in the realm of procedural law\textsuperscript{299} it would finally help avoiding the necessity of using a much more controversial instrument, namely, establishing harmonized conditions for judicial review in the national courts in order to secure the uniform and effective protection of Community law and rights in all Member States.\textsuperscript{300}

\textsuperscript{298} Cf. the landmark decision (concerning State aids matters which display comparable features of cooperative administration) of the ECJ in Case C-188/92, 


\textsuperscript{299} As regards substantive requirements of good administration, such as legitimate expectations or legal certainty, this appears to be less obvious. Referring again to State aid matters (cf. note 289), which involve characteristic features of composite administration, the Community courts deny any imputability of breaches of such substantive principles by the national administration to the Commission; on the contrary, possible administrative failures are so to say attributed to the individual beneficiary of the aid; cf. recently ECJ, judgment of 20.3.1997, Case C-24/95, \textit{Land Rheinland-Pfalz v. Alcan Deutschland GmbH}, not yet reported. This is due, in the face of the fundamental Community goal of creating a single market with undistorted competition, to the imperative requirement of recovery of (unnotified or unlawfully granted) State aids. Under the principle of 'effectiveness' of Community law such recovery may not be defeated by the the Member States behaviour whatsoever so that, in effect, the individual party has to fully bear the consequences of unlawful conduct on the part of the national case-handling authorities. It is highly questionable whether this conception is compatible with the requirements of effective individual protection in composite administrative proceedings; cf. also the critique by Hoenike, note 289. One has however to bear in mind that this approach constitutes an effective means of preventing (often patent) 'collusive behaviour' on the part of the beneficiary and the national authorities in order to circumvent the requirements of Community law.

\textsuperscript{300} As to the enduring controversy on the 'harmonization' of judicial process through judicial activism see the literature cited under note 5.
5) *More recent jurisprudence and outlook*

The expansion of the right to be heard into various areas of Community administrative decision-making has not yet come to an end. This outlook is forcefully underpinned in the recent judgment *Air Inter*.  

There the CFI repeated the statements of principle given in the *Lisрестал* judgments and made it clear once and for all that 'the application of the fundamental principle of the rights of the defence cannot be excluded or restricted by any legislative provision. Respect for that principle must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle'.  

This unambiguous formula needs hardly commenting on and seems to refute 'tentative conclusions' as to the exceptional application of the *audi alteram partem* rule in the event of legislative gaps. Thus, the universal character of the right to a fair hearing seems to be definitely established and it is only a question of time and further litigation that it will have conquered the remaining domains of direct and composite administrative process.

Furthermore, the judgment in *Air Inter* reiterates the finding in *Lisрестал* that the only precondition for the *audi alteram partem* principle to be applied consists of the individual party's being (directly and individually) economically affected.

---


302 Ibid., par. 60.

303 Cf. Lenaerts and Vanhamme, note 266, p. 537.
by the administrative measure. The Commission decision challenged by Air Inter was adopted in the context of the Community competition framework on air transport - which also involves elements of cooperative administration\textsuperscript{304} - and was not addressed to the applicant but to the French Republic. Although the decision prohibited the further granting of exclusive rights in the air transport sector to national airlines in general the applicant enjoying hitherto such rights was in fact the only operator affected. The CFI therefore held that 'the applicant was going to bear the economic consequences of the contested decision directly'\textsuperscript{305} so that it was imperative for the Commission to respect the applicant's rights of defence in the administrative procedure\textsuperscript{306} even though no explicit statutory rule to this effect existed.

One may legitimately ask in view of the above described widening of the scope and impact of the right to be heard whether this may also lead, in the long run, to a further strengthening of the procedural status of complainants and interested third parties in so far as they are directly affected by the outcome of the decision-making. A recent move into this direction is to be noted, inter alia, in the State aid sector where the CFI has created, so to say ex nihilo, a fairly high standard of

\begin{itemize}
  \item \textsuperscript{304} Cf. Council Regulation No. 2408/92 (OJ 1992 L 240/8), in particular, at its Article 8.
  \item \textsuperscript{305} Ibid., par. 62 (emphasis added).
  \item \textsuperscript{306} Ibid., par. 63. In result, the CFI rejected the plea based on a breach of the right to be heard since the applicant had been sufficiently informed of the legal issues and facts and had been heard during the procedure, cf. par. 64-72.
\end{itemize}
procedural protection with respect to complainants in the so-called preliminary investigation procedure under Article 93 par. 3 EC Treaty. However, even though this jurisprudence might be categorized under the subject of an additional expansion of the right to a fair hearing in State aid procedures its complex implications are rather related to an application of the principle of care and will be analyzed in the next chapter. Furthermore, as has been attempted to show in the preceding chapter with respect to the right to access to information, the right to a fair hearing appears equally liable to be granted a democratic participatory rationale within administrative rule-making which might further reinforce its value from the viewpoint of interested third parties.


Tentative hints as to such a development exist, cf. CFI, judgment of 11.12.1996, Case T-521/93, Atlanta AG and Others v. Council, not yet reported, par. 70 ff. where the Court discussed the question as to whether traders should be consulted in the context of legislative rule-making in the agricultural field on the basis of the democratic principle; it concluded that the ECJ had 'implicitly recognized that the Community legislature had not failed to take into account the interests of this category of traders'. See also CFI, judgment of 19.6.1997, Case T-260/94, Air Inter SA v. Commission, not yet reported (discussed above),
The 'constitutional weight' which is henceforth attributed to the right to be heard in administrative procedures leading to the adoption of decisions directly affecting individual economic interests is further underpinned by the fact that the Courts increasingly allow reliance on a breach of the right to be heard even if this right protects a person or body different from the applicant.\textsuperscript{310} Thus, the \textit{audi alteram partem} rule seems to develop into an \textit{objective standard of good administration} of its own serving not only the individual interest in and need for procedural protection but also the common interest in the observance of procedural requirements throughout administrative proceedings. The recent emphasis by both the ECJ and the CFI to proceed of their own motion to considering whether essential procedural requirements have been met by the administration points into the same direction; and it may be assumed that the invocability of third party's rights is simply to be regarded as the corollary or as a part of that latter concept.\textsuperscript{311} Thus,


\textsuperscript{311} See, e.g., Case C-304/89, Oliveira v. Commission, [1991] ECR I-2283, par. 18 with further references to the earlier case-law. See also the CFI, Joined Cases T-79 and others/89, BASF AG and Others v. Commission, [1992] ECR II-315; Joined Cases T-68, 77 & 78/89, Vetro v. Commission (Re Flat Glass), [1992] ECR II-1403 in which the Court examined both procedural and substantive defects of Commission decisions in competition matters on its own initiative; on this see the critique by Van der Woude, 'The Court of First Instance: The first three years', [1992-1993]
the right to be heard - also under Community law - would seem to combine two essential rationales to be equated with 'good administration' which appear to justify to grant it utmost importance in administrative rule-making. First, it has a fundamental instrumental function or value within administrative process in that it contributes to the accuracy of the substantial outcome of the case; it thereby serves the aim of efficient, economic, impartial and just administration. Second and foremost, it reflects a dignitarian rationale of administrative procedural law in that it constitutes a process right designed to protect individual (substantive) rights and interests. It enables the individual party to take part in the decision-making process as a subject or citizen and to put forward its views in order to influence the result of the rule-making process in his favour. How significant and decisive this opportunity can be with respect to both rationales is well shown in the above discussed cases of Technische Universität München and France-Aviation: The expertise and highly relevant information held by the applicants would certainly have altered, or at least heavily influenced, the outcome of the proceedings conducted by the Commission and could thus have prevented litigation before the Courts. Moreover, the 'levelling-up' of the audi alteram partem rule onto the constitutional ground appears to

be reinforced by the increasingly restrictive handling of the controversial 'harmless error principle' meaning that the Courts tend to annul administrative decisions without asking whether the procedural defect would have actually altered the outcome of the decision-making process.

In summary, the above analyzed jurisprudence provides an excellent example to the alleged 'horizontal expansion' and constitutionalization of process standards. Furthermore, it is submitted that a tentative move towards what has been described as 'vertical convergence' is also detectable. It is to be expected that the marked development towards universalism will also 'infect' the status of other closely related procedural standards, such as the right to access to information (which is regarded by many as an inherent aspect of the right to be heard) and the principle of care. As has already been hinted at, the latter


313 The doctrinal question as to when the 'harmless error principle' is to be applied in Community procedural law in general is largely unsettled; cf. recently Lenaerts and Vanhamme, note 266, p. 544 f.; Harlow, note 286, p. 16 f.; as to the earlier (inconsistent) case-law cf. Due, 'Le respect des droits de la défense dans le droit administratif communautaire', [1987] Cahiers de Droit Européen p. 383 (391 f.); Schwarze, 'European Administrative Law', 1992, p. 1422 ff..

314 See most recently Lenaerts and Vanhamme, note 266, p. 541.
principle fulfills at least in part a 'mirror function' to audii alteram partem inasmuch as it governs the question to which extent the administration is obliged to take into account the submissions made by the individual parties under the exercise of their right to be heard during the proceedings. Recent controversies on the scope of this obligation, which will be discussed under the heading of the so-called 'dialogue requirement', show that both the right to be heard and the principle of care are indeed deeply intertwined process standards. In the following chapter it will be attempted to analyze the somewhat inconsistent and inadequate approach of the Community courts in handling (and intermingling) these standards. It will be argued that, for reasons of doctrinal clarity and legal certainty, a clearcut dividing line between the respective scope of application of these process principles should be established.

---

See, e.g., the claim made by the European Association of Lawyers in 'Rights of Defence and Rights of the European Commission in EC Competition Law', 1994, p. 348 f. to establish in competition matters a 'right to be listened to', meaning that the Commission should be obliged 'to actually and effectively take into account in its decision of what has been said by the parties during the hearing'.
D. Expansion of process principles: The principle of care (or of diligence)

I. Introduction

So far, no comprehensive assessment of the dogmatic characteristics underlying the principle of care (or the principle of due diligence) as a procedural standard of administrative justice of its own exists in Community administrative law. On the contrary, the debate in legal doctrine, if any, has only tentatively begun.\[^{316}\] As the discussion of the 'principle of good administration'\[^{317}\] has shown this might be, at least partly, imputed to the hitherto prevailing terminological confusion to be observed in the case-law of the Community courts. On the jurisprudential level two judgments given by the ECJ in 1991\[^{318}\] set hallmarks regarding the establishment of the concept of care as a standard of both procedural legality and individual protection in administrative procedures.\[^{319}\] Unsurprisingly, this has led to increased reliance on the principle by litigants

---


\[^{317}\] See under B.III.


\[^{319}\] It is implicit in the above cited judgments that the principle of care is to be regarded an 'essential procedural requirement' in the sense of Article 173 par. 2 EC Treaty.
in administrative litigation in the aftermath, in particular, before the CFI. However, even though litigation has given ample opportunity for further judicial settlement of the issue, the case-law generated by the Courts since then displays patent deficiencies in the doctrinal handling of the concept. Great uncertainty persists as to the standard of judicial review henceforth applicable to (discretionary) administrative acts. The same holds true with regard to the question how to properly demarcate the respective field of application of the principle of care on the one hand and that of similar process standards, such as the right to be heard, on the other.

More specifically, it remains to be settled whether and to what extent the principle of care is equally to be regarded a substantive concept of good administration and, accordingly, a vehicle of substantive judicial review. The recent jurisprudence unfolds a marked trend in this direction which is intimately linked to the parallel metamorphosis of the giving reasons requirement (Article 190 EC Treaty) into a means of substantive judicial control of administrative measures.\(^{320}\) The important evolution of expansion which the principle of care is going through thus not only pertains to its function as a process standard as such but also relates to its capacity of enhancing the judiciary's powers of control over administrative policy and, in particular, the exercise of discretion. In this context expansion denotes a twofold but intimately interrelated develop-

ment: In the first place, it relates to the enhancement of individual protection through the extensive interpretation of the principle of care in actual instances of administrative process. This is coupled with a marked shift of 'policy making power' from the administration to the courts inasmuch as the intensification of judicial review is mirrored by a reduction of administrative leeway. Second, the term 'expansion', similarly to the extrapolation of the *audi alteram partem* rule - albeit not to the same marked extent - intends to describe the dynamic spreading of the concept of care in the realm of Community administrative process as a whole. This will be exemplified by an analysis of the case-law mainly in competition matters, anti-dumping and customs law as well as State aids law.

It will be seen that the 'levelling-up' and extrapolation of this process standard has produced its most significant effects by improving the degree of procedural protection endowed to complainants. In so doing it has remedied many of the shortcomings traditionally associated with the handling of other process principles in this respect.\textsuperscript{321} The proximity of the principle of diligence to the *audi alteram partem* rule on the one hand and its overlapping in scope with the giving reasons duty on the other indeed makes for an enhanced mutual substitutability of those standards and explains many of the incon-

\textsuperscript{321} As to the reduced degree of protection afforded to complainants under the *audi alteram partem* principle see the discussion above under C.III.
sistencies in the case-law of the courts.\footnote{322} The interchangeability of those concepts of procedural legality apparently induces the courts to make a pragmatic choice; they tend to opt for the standard which, at face value, fits best for the situation at issue, yet, without questioning the dogmatic implications of this approach. However, for the sake of developing both a proper doctrinal concept and sufficiently clear guidelines for judicial intervention it is submitted that it is necessary to neatly distinguish the functions of the principle of care as a \emph{process standard} from those of other procedural principles.

Before analyzing the more recent jurisprudence of the Community courts with respect to the principle of care it appears appropriate to give a survey on some of its dogmatic and political underpinnings. As will be seen, the contextual elements to be set out in the following discussion seldom are outspoken as such, if considered at all, in the case-law. Rather the courts seem to adhere to a pragmatic style of decision-making which is primarily governed by policy considerations. Because increasingly exposed to pressure to intensify the degree of judicial review, in particular, of administrative discretion, they tend to switch to a peculiar kind of controlling procedural issues: Instead of overtly yielding the pressure on the level of substantive judicial control they increasingly make use of 'hybrid' control.

\footnote{See also above under B.III. the discussion of the 'principle of good administration' whose meaning was associated with either the right to be heard (including access to information) or the principle of care.}
process standards, such as the principle of diligence and the duty to state reasons, in order to quash administrative decisions which display doubts regarding their substantive accuracy. In so doing the Courts, on the one hand, attempt to meet the expectations of litigants and national courts as to improved judicial protection of individuals against the Community 'bureaucracy' and their 'unfettered discretion' in economic policymaking. On the other hand, they seek, at least at face value, to maintain the institutional balance. They pretend to apply judicial self-restraint inasmuch as their control practice is foremost procedural in nature, thus leaving enough margin of manoeuvre for the other Community institutions in their policy guesses. However, even though clothed in 'procedural language' the current practice of reviewing administrative measures incrementally turns out to be, in effect, a substantive check of administrative decision-making and thus highlights the 'hypocrisy' underlying the new approach of the Community courts. It is assumed that the courts will pursue this policy since it gives them much more flexibility on both the legal and the political level.\(^\text{123}\) It enables them to easily fine-tune their approach in two possible directions, namely, in either increasing their control powers or retreating from an intrusive style of judicial review without having to acknowledge that a change in their policy is actually coming about.

\(^{123}\) The parallel development in US administrative law has been forcefully demonstrated by Shapiro, note 320, p. 184 ff..
II. The (dogmatic) foundations of the principle of care

1) A cursory conceptualization of the principle of care in the early case-law

The origins of the principle of care can be traced to the early case-law of the ECJ in ECSC and competition matters. In a series of judgments in the field of the ECSC the ECJ established the obligation of the High Authority, in particular, in the case of discretionary decisions to establish and examine carefully the concrete circumstances of the individual case. At some later point the ECJ transposed this jurisprudence to competition infringement proceedings under the EEC Treaty. In this context, slight modifications to the concept were brought about by judgments which emphasized the Commission's duty to respond to and examine essential submissions made by the individual parties to the proceedings. The principle of diligence


Cf. ECJ, Joined Cases 96 and others/82, IAZ v. Commission, [1983] ECR 3369 in which the Court however dealt with this duty under the term 'good administration'; see above under B.III.;
was further given a time-dimension in the important Lorenz decision in State aids matters concerning the establishment of a time-limit of two months for the achievement of preliminary investigations under Article 93 par. 3 EEC Treaty. These early developed features of the principle of care shall be taken as a starting point for the development of its dogmatic foundations which, in turn, will help us in assessing the more recent case-law of the Community courts.

2) A process principle with a strong connotation of substantive legality

The central feature of the principle of care, which has only recently come to be named as such, is that it establishes a duty of the administration to impartially and carefully examine the relevant (factual and legal) aspects of the individual case. This definition in itself suggests that the principle

---


Cf. ECJ, Case 120/73, Gebrüder Lorenz GmbH v. Germany, [1973] ECR 1471 using the term 'proper diligence' (at p. 1481); see also the comparable Case 223/85, Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v. Commission, [1987] ECR 4617 in which the ECJ opted for a solution under the substantive principle of protection of legitimate expectations. By contrast cf. CFI, Case T-5/93, Tremblay and Others v. Commission, [1995] ECR II-185, par. 76 ff. where the Court did not find against the Commission's investigation already lasting for 14 years (!).


See, e.g., the formula used in Case C-269/90, Hauptzollamt München-Mitte v. Technische Universität München, [1991] ECR I-
of care - similar to the giving reasons requirement - is to be placed in a 'shadow zone' which overlaps the line of demarcation between mere process standards and principles of substantive legality. This stems from mainly two reasons: 

First, the thorough factual assessment of the individual case is preconditioned by the prior collection of the necessary information. The administration may ensure this ex officio, i.e. by actively using its investigative powers (requests for or coercive collection of information from the parties concerned); or the case-handling authority may simply invite the parties to the proceedings to submit the elements of fact which they consider to be relevant. It seems plain that the process of gathering the relevant data is merely procedural in nature. However, the question as to what information is actually needed in order to correctly decide the case involves an evaluation necessarily reaching beyond questions of procedure, namely, at the very least a preliminary assessment of the merits of the case. It is submitted that the situation is only different in instances in which the administration has no possibility of sampling the necessary information of its own motion, such as in purely adversarial proceedings. If the agency fulfills a mere adjudicative function, as opposed to an inquisitorial function, the particulars forming the basis of the decision are exclusively to be supplied by and under the responsibility of the individual parties to the proceedings.\footnote{Cf. the anglo-american model of administrative adjudication, which, in recent times, has become the object of huge debates, in particular, with respect to the adequate degree of procedural}
however, modern administration enjoys at least rudimentary investigative powers - and this is always the case for the Commission so that it may proceed to seek information on its own initiative. Under those circumstances the expression 'careful gathering of the relevant facts' automatically implies an appraisal of substantive issues on the part of the administration in order to know how far its duty of sampling the factual evidence actually reaches. Consequently, procedural and substantive issues are easily becoming intermingled.

Second, as to the assessment of the legal considerations pertaining to the individual case, the 'principle of care', if it can be said to have a 'procedural' meaning at all in this context, simply constitutes a tautology with regard to the principle of legality. The latter implies the duty to observe both procedural and substantive legal requirements in administrative decision-making under all circumstances. The concept of care,


It should however be noted that the scope of the investigatory powers held by the Commission considerably differs depending on which process framework is applicable. Thus, its investigative powers in anti-dumping matters are not as far-reaching as in competition infringement proceedings; see van Rijn, 'The Investigative and Supervisory Powers of the Commission' in The Institutional Dynamics of European Integration. Liber Amicorum Henry G. Schermers, Curtin and Heukels (eds.), Vol. II, 1994, p. 409.

in this context, displays a significance of its own only in so far as the administration enjoys a power of appraisal which allows to make a choice between a range of legal considerations or consequences equally applicable to the particular case and in accordance with legality. But also under this condition, the principle of care ceases to be a mere procedural requirement since it requires the thorough assessment of substantive legal issues. Thus, a court would always be able to either reproach the administration a substantive error in the legal assessment or a procedural defect by reason of the non-observance of the duty of care.

The above mentioned implications exhibit the potential for development inherent in the principle of care as both a standard of procedural law and a substantive requirement of legality. It thus, in principle, allows the courts not only to review as to whether the administration has met the procedural requirement of collecting the relevant information but also, at least to some extent, the substantive correctness of the administrative decision finally reached. The latter aspect is particularly important, as will be discussed, with respect to controlling the exercise of administrative discretionary powers. It is therefore not surprising that the Courts often proceed to check the fulfillment of the principle of due diligence — yet without overtly acknowledging it — under the heading of a 'manifest error of assessment of fact and law'\textsuperscript{331} whose emphasis

is clearly rather on substantive than procedural legality of
the administrative conduct in question.\textsuperscript{335}

3) The relationship between the principle of care and the
administration's investigatory powers

a) The inquisitorial principle and the principle of care

The principle of care can be held to constitute a specific
feature or the corollary of the inquisitorial principle which
governs a variety of Community administrative procedures.\textsuperscript{336}

In certain fields of Community policy implementation investiga-
tory powers are explicitly granted to the Community institutions
- i.e. regularly to the Commission - by secondary legislation,
the most famous examples of which are to be found in competition
and anti-dumping matters.\textsuperscript{337} Such express statutory conferment

\textsuperscript{335} The linkage between the principle of care and the concept of ma-
manifest error of assessment seems to have its origins in French
administrative law, cf. Kahn, 'Discretionary Power and the Admi-
nistrative Judge' [1980] International and Comparative Law Quar-
terly p. 521 (526 ff.).

\textsuperscript{336} For the early recognition of this principle in competition mat-
ters see ECJ, Case 27/76, United Brands Co and United Brands
Continental BV v. Commission, [1978] ECR 207 (306); cf. also
Sedemund, 'Allgemeine Prinzipien des Verwaltungsverfahrensrechts
- dargestellt am Beispiel des europäischen Verwaltungsverfahrens-
rechts in Kartellsachen' in Europäisches Verwaltungsrecht im
Werden, Schwarze (ed.), 1982, p. 45 (55 f.); Weber, 'Das Ver-
waltungsverfahren' in Europäisches Verwaltungsrecht, Schweitzer

\textsuperscript{337} Cf. Council Regulation No. 17 (OJ Sp. Ed. 1959-62, p. 87), Ar-
ticles 11 and 14 (competition proceedings); Council Regulation
No. 4064/89 (OJ 1990 L 257/14), Articles 11 and 14 (merger con-
trol); Council Regulation No. 384/96 (OJ 1996 L 56/1), Article 6
(anti-dumping). See also, as to competition matters, Jansen,
'Les pouvoirs d'investigation de la Commission des Communautés
Européennes en matière de concurrence', [1990] Revue du Marché

138
of investigative authority is however not the rule; but even in its absence the acknowledgment of the administration’s entitlement to collect information is to be derived from the general clause in Article 213 EC Treaty or is implicit—so to speak as ‘implied powers’—in the framework of provisions regulating the administration’s task to execute or supervise the implementation of a certain policy. The link to the duty of care seems obvious in that its fulfillment is to a large extent dependent on the correct use of the investigatory powers held by the administration. The (procedural) requirement to proceed carefully in assessing the individual case can thus be said to flow directly from the inquisitorial principle. Following on from this, the inquisitorial principle would seem to imply a dichotomical, to some extent conflicting, rationale. In the first place, the Community administration is granted the powers of investigation for the sake of the effective and efficient implementation of Community policies the execution or supervision of which is entrusted to it. The power to collect the relevant information is an indispensable tool to


Cf., e.g., the State aid sector which still lacks a concise framework of procedural rules (to be adopted under Article 94 EC Treaty). However, the supervisory task of the Commission is clearly set out in Article 93 EC Treaty.

this end and is therefore primarily designed to serve the Community interest in achieving the goals set out in the Treaty. The principle of care, in turn, aims at providing individual protection in administrative proceedings and may hence be regarded as the protective reflex of investigatory powers which applies as soon as the administration is empowered to decision-making liable to affect the interests of citizens and, a fortiori, if it enjoys a margin of discretion in that regard. Accordingly, the inquisitorial principle and the concept of care can be said, at least with regard to procedural relationship between the administration and the individual, to constitute the two sides of one and the same coin. This is commensurate with the twofold rationale of process principles of good administration in general, namely, the combination of an instrumental and a dignitarian purpose under the heading of one process standard.

b) The obligation to use investigatory powers in the interest of the citizen

The link to the inquisitorial principle raises the question to what extent the principle of care may oblige the administration to make use of its investigatory powers in the interest of individual parties. The problem matters since private in-


341 See above under B.II.
terests in conducting inquiries, in particular in polycentric decision-making involving a variety of individual parties, are not always coincident with one another; nor are those private interests always compatible with the policy preferences of the case-handling agency, i.e. with the 'public interest'. If its dignitarian component is taken seriously the principle of care is likely to gain a protective significance which reaches beyond the standard of protection provided under the *audi alteram partem* rule. Whereas the right to be heard affords private parties only the opportunity of supplying information in the possession of which they already are, the principle of care goes further (or could be regarded as providing complementary protection) in that it places a duty on the administration to impartially gather all the necessary information - whether disadvantageous or advantageous to the individual party - on its own initiative and irrespective of whether the parties have knowledge therefrom or access thereto.

However, it is to be assumed that the duty to investigate a case in the interest of individual parties is not boundless. The protective rationale underlying the principle of care is not generally able to defeat the instrumental rationale of the inquisitorial principle, especially in the event of an administrative margin of discretion as to the implementation of a policy and, accordingly, the use of administrative instruments and resources to this end. Hence, the concept of care does not

---

342 See however the entitlement to have access to information (in the possession of the administration) which is generally held to flow from the right to be heard; cf. the discussion under C.II.

343 See also Schwarze, 'European Administrative Law', 1992, p. 1227.
reach as far as the administration's investigatory power does; it may not urge the administration, even though the latter might have the (legal and actual) capacity of doing so, to make excessive efforts in sampling the relevant data and assessing the individual case. Instead, a reasonable balance has to be struck between the interest of individual procedural protection (i.e. the dignitarian rationale) and the need for economic and efficient policy implementation in the Community interest (i.e. the instrumental rationale). Such a careful balancing, in last resort, is to be ensured by the judiciary and it will be discussed whether the Community courts have complied with this task in a reasonable manner.\textsuperscript{344}

c) Investigatory powers and the burden of proof

aa) The administration's duty to collect evidence

Part of the debate on where to draw the bounds of the duty to investigate a case is the question of how to partition the burden of adducing the necessary evidence between the administration on the one hand and the interested individual parties on the other. The problem is more acute in the context of adversarial proceedings, such as in competition matters, which involve the 'accusation' of an individual party and threaten it with

a sanction than in procedures of a rather 'administrative' nature, such as proceedings relating to the remission of customs duties. The question of whether the administration has collected enough evidence in support of its case is, quite naturally, of utmost importance in litigation before the Community courts. The courts may annul Commission decisions on the grounds that the gathering of evidence had been insufficiently carried out either by applying the rules of evidence or by stating that a breach of the principle of care occurred. Moreover, the courts' general stance towards handling the principle of care as a ground for review in this respect will vary in the light of their own attitude to investigate the particular facts of the case and to second-guess the factual findings of the administration. It has been argued that the reticence of the ECJ to engage into a second factual evaluation and to take additional evidence in judicial proceedings triggered the need to

---


346 See, e.g., the approach chosen by the ECJ in Joined Cases 56 & 58/64, Consten & Grundig v. Commission, [1966] ECR 299 (347).


have all factual issues decided at the administrative level; it was therefore crucial to put heavier emphasis on the observance of the principle of diligence on the part of the deciding administrative body in order to secure an adequate degree of individual protection.\footnote{349} From this standpoint, the principle of care - in combination with the statement of reasons - would fulfill a necessary prerequisite for the effective exercise of judicial review since the adducing of additional facts and evidence before the Court is widely barred.

If however a court decides to thoroughly scrutinize the factual basis of an administrative measure and to investigate of its own initiative whether the sampling of the factual elements had been complete and its evaluation correctly carried out, the situation completely changes. In this event, the principle of due diligence looses its function of alleviating some of the court's workload and judicial proceedings tend to become a simple 'repetition' of the administrative decision-making process. As it seems, the latter option is the one which the CFI has increasingly endorsed in its jurisprudence\footnote{350}. This shift in the technique of judicial review, it is suggested, is quite necessarily accompanied by a modification of the significance underlying the concept of care. Here, two completely different


options are possible: Either the principle of care looses much of its protective function on account of an increasing trans-ferral of the tasks to be fulfilled within administrative pro-cesses - including procedural protection - to judicial pro-cesses. Or, and this is more likely, the principle of care gains even more weight in that it allows the court to further enhance its powers of review: The higher the requirements governing the duty of care imposed on the administration are the more the court is able to control and second-guess by comparing the findings resul-ting from its own investigation and factual evaluation with those of the administration. It will be seen that the CFI seems to actually move into this direction.\footnote{See, in particular, CFI, Case T-7/92, \textit{Asia Motor France and Others} v. \textit{Commission}, [1993] ECR I-669; Case T-95/94, \textit{Sytraval and Brink's France} v. \textit{Commission}, [1995] ECR I-2651.}

bb) The duty of individuals to cooperate and to provide evidence

In accordance with the point made that the duty to investigate is not boundless, it would obviously lead too far to place the burden of gathering all necessary facts and evidence exclusively on the administration. It is a commonplace in every public law system that the individual parties to administrative proceedings are called upon to contribute to the clarification of the factual and legal considerations on the basis of which the decision is to be taken, in particular, if these elements are easily accessible for them or even originate in their own sphere of
Thus, individual parties not only have a right to participate (or to be heard) in administrative proceedings but also a duty to cooperate in the face of the common interest in efficient and substantively correct decision-making. This is the more evident in so-called polycentric rule-making procedures in which the administration easily runs short of (human) resources for collecting solely on its own initiative the immense flow of information needed.

Even though the duty of care may thus have limits in that the administration can rely on - and sometimes even enforce - the obligation of private parties to cooperate this does not necessarily mean that the requisite degree of evidence to be

---


353 See, e.g., in competition matters Article 11 of Regulation No. 17 laying down the duty of targeted undertakings to supply information; a paradigm case in this respect is CFI, Case T-46/92, Scottish Football Association v. Commission, [1994] ECR II-1039. More generally cf. Schwarze, 'European Administrative Law', 1992, p. 1219. The power of requesting such information, in turn, is part of the investigatory power enjoyed by the administration and, as regards the targeted undertakings non-protective in nature. However, somewhat paradoxically negligence in using this power may amount to an infringement of the duty of care in so far as it protects third parties to the proceedings, such as complainants.

354 Cf. Allison, note 331, p. 457 ff.. See, e.g., huge cartel proceedings in competition matters or anti-dumping proceedings involving a great number of producers, exporters and importers; in these cases the information provided by the parties forms the very essence of the data on which the Commission relies.

reached by the administration is lowered. Especially in competition infringement proceedings - which appear to have a particular status on account of their quasi-penal character - the requirements of proof incrementally tend to be toughened to the detriment of the administration whereas, e.g., in anti-dumping matters the Community institutions have much more leeway in establishing the factual basis for their rule-making when the parties to the proceedings do not cooperate. In general, one may assume that the duty of individual parties to provide the necessary evidence supporting their case increases propor-


Cf. Article 18 par. 1 of Regulation No. 384/96 empowering the Community institutions in the event of non-cooperation to decide on the basis of the facts available; see on this Stanbrook and Bentley, 'Dumping and Subsidies. The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community', 1996, p. 167 ff..
tionally to the degree to which the decision-making process is conducted at the instigation and in the interest of the individual. In such a case it is quite natural and appropriate to place the burden of proof — with regard to the facts supporting a favourable decision — on the applicant rather than on the administration. The obverse finding however should be the rule if the individual is liable to face a sanction in the widest sense; the administration would then be under the obligation to prove that the imposition of the sanction is well-founded. The balancing of the duty to investigate the necessary evidence on the one hand and the duty to cooperate on the other is thus a difficult operation which, in view of the lack of regulatory guidelines, lies with the courts. It is suggested that the Community courts, to date, have not been able neither to establish a consistent policy in this respect nor to propose an acceptable doctrinal solution to the problem.

4) The core justification for the concept of care:

Administrative discretionary powers

a) Care as a counterbalance to discretion

Cf., e.g., administrative procedures following the application for a duty-free import or for the remission of customs duties.

As to competition matters cf. Ortiz-Blanco, 'European Community Competition Procedure', 1996, p. 44 f. with further references.

Cf., e.g., the ongoing discussion on the applicability of the principle of *in dubio pro reo*, the *legal privilege* and the *right to silence* in competition infringement proceedings; cf. Montag, note 345; *Association Européenne des Avocats* (ed.), 'Rights of Defence and Rights of the European Commission in EC Competition Law', 1994, p. 343 ff. setting out suggestions for reform in this respect; Curtin, note 356, p. 305 ff.
A perusal of the national public laws shows that an essential justification for the imposition of a duty of diligence on the administration is to be found in the existence of administrative discretionary powers. The French administrative system which is marked, for historical reasons, by the conferment of wide and - at least in the early days of its development - hardly justiciable discretion to the administration seems to be largely responsible for the transposition of the concept of care onto the Community level. Yet, also other national legal orders - in part manifestly influenced by the French legal tradition - know the principle of care as a standard of good administration. The link established between administrative dis-


363 Cf. the landmark decision of the Conseil d'Etat in Case Piron CE, 24 July 1942, Rec. 233, in which it was held that every authority which possesses discretionary power must examine the circumstances of each individual case. On the development see, e.g., Emiliou, 'The Principle of Proportionality in European Law (A Comparative Study)', 1996, p. 78 ff..

364 See, in particular, for Belgium Andersen, 'Les principes généraux de la procédure d'élaboration de la décision administrative en droit administratif belge', [1993] European Review of Public Law, Special Number, p. 138 (145 ff.); for the Netherlands De Vos and Bax, 'The Procedure of Administrative Decisions in the Netherlands', [1993] European Review of Public Law, Special Number, p. 239 (244). For the comparable concept under the common law see Ndejatigil, note 362, p. 100; as to its significance in the UK cf. Gregory and Hutchesson, 'The Parliamentary Ombudsman', 1975, p. 309 (cited after JUSTICE, 'Administrative Justice. Some Necessary Reforms', 1988, p. 18): 'But by far the commonest procedural defect identified by the Commissioner in connection with discretionary decisions has been a failure to take account of all the circumstances relating to the case in question' (emphasis added); see also the proposal made by JUSTICE, ibid., p. 13 to establish a principle of good administration un-
cretion and the concept of care is to be viewed against the backdrop of 'rule of law' and dignitarian considerations which require that executive discretion may never be unfettered or yield the power of arbitrary decision-making. The wide power entrusted to the administration to choose the most appropriate policy measure among a variety of legally valid options is coupled with the duty to place itself in the best possible conditions when assessing the propriety of the decision.\textsuperscript{365} This complementary function of the concept of care is further highlighted by the fact that the administration, in principle, has no discretion as to the sampling of the relevant factual elements;\textsuperscript{366} only the assessment of those facts falls within the realm of administrative freedom.\textsuperscript{367} Whereas discretion is thus to be equated with a basically injusticiable legal choice on

\begin{small}
\begin{enumerate}
\item\hspace{1em}\textit{The authority, before deciding, must take all reasonable steps to ascertain the material facts.}\textsuperscript{365}
\item\hspace{1em}\textsuperscript{365} Cf. Emiliou, note 363, p. 79.
\item\hspace{1em}\textsuperscript{366} Cf. Everling, note 347, p. 880. As to the rare cases in which the ECJ has granted the Commission a power of appraisal regarding the establishment of the relevant facts cf. Rausch, note 347, p. 190 ff.;
\item\hspace{1em}\textsuperscript{367} Cf. Kahn, note 335, p. 524. See also Emiliou, note 363, p. 77 f. who almost literally reproduces on one and a half pages the statements made by Kahn without referring to his work. At the latest FIDE conference it was equally argued that the courts should comprehensively review the establishment of the facts but only marginally control their assessment in order to leave sufficient leeway to the authority's policy discretion, cf. Lenaerts and Vanhamme, note 352, p. 560.
\end{enumerate}
\end{small}
a given basis of factual elements the duty of care constitutes the corresponding justiciable requirement to impartially and completely collect the relevant facts forming the basis of the discretionary decision. The combination of administrative discretion with the duty of care accordingly fulfills a twofold function whose significance is best elucidated when considering its interplay with judicial review. On the one hand, the original concept of discretion aims at protecting the administration's policy guesses from the intervention of the courts. The latter would only be able to control whether the administration has acted on the basis of a thoroughly examined case but not double-check as to whether the findings contained in the administrative measure are substantively correct or reasonable, save under extreme circumstances, such as abuse of powers or manifest errors. On the other hand, reduced substantive ju-

---


270 Cf. the standard formula chosen by the ECJ, inter alia, in Case 42/84, Remia BV and Verenigde Bedrijven Nutricia NV v. Commission, [1985] ECR 2545 that it must limit its review of discretionary decisions 'to verifying whether the relevant procedural
A review of discretionary power held by the administration fosters a particular need for individual protection which, in turn, is secured, inter alia, by the introduction of a fully reviewable (allegedly procedural) duty of care to be observed by the administration prior to and during the exercise of discretion. It has thus rightly been pointed out that the duty of care constitutes a necessary (procedural) counterbalance or corrective to the exercise of administrative discretion and it may be argued that the wider the margin of discretion enjoyed by the administration is the more demanding are the 'procedural' constraints inflicted on the deciding body under rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

Cf. Oeter, note 364, p. 273 who notes a tendency of convergence among a number national legal orders in this respect. As to the recognition of this concept in Community administrative law see, in particular, Advocate General van Gerven in Case C-16/90, Eugen Nölle v. Hauptzollamt Bremen-Freihafen, [1991] ECR I-5163 (I-5186 f., par. 28) discussed below.

Cf. Everling, note 347, p. 882 and Schwarze, 'European Administrative Law', 1992, p. 1231: 'The obligation to examine the concrete circumstances of the individual case appears .. to be a necessary balance to the wide discretionary powers given to the administration, as a corrective which, from the point of view of the protection of fundamental principles of the rule of law in administrative action, makes the granting of a discretionary power to the executive tolerable in the first place'. In the same vein Schwarze, 'Developing Principles of European Administrative Law', [1993] Public Law p. 229 (232) and 'The Procedural Guarantees in the Recent Case-law of the European Court of Justice' in Institutional Dynamics of European Integration, Liber Amicorum Henry G. Schermers, Curtin and Heukels (eds.), Vol.II, 1994, p. 487 (495).

As to the general emphasis on the observance of procedural requirements in the event of wide discretionary powers see the landmark judgment of the ECJ in Case C-269/90, Hauptzollamt München-Mitte v. Technische Universität München, [1991] ECR I-5469 par. 14 discussed below; see also CFI, Case T-346/94, France-Aviation v. Commission, [1995] ECR II-2843, par. 33 f.
the principle of care.

b) The duty of care as a promotor of an intrusive style of judicial review with respect to discretion

It has been argued when dealing with the 'hybrid' nature of the principle of care by reason of its combining procedural and substantive elements that the related distinction between substantive and procedural judicial review of administrative action, in reality, is far from clearcut. As soon as the courts are able to check whether the relevant facts were taken account of they may also, in order to assess what relevant actually is, second-guess the substantive findings of the deciding institution. The actual extent to which the procedural duty of care may be instrumentalized to review the substantive foundation of administrative discretionary measures is however dependent on the stance adopted by the reviewing judiciary. If a court for whatever reason is willing to proceed to a more intrusive style of judicial control in the face of administrative discretion it is to be assumed that it will readily take up the concept of care as a (procedural) vehicle to achieve this end. It has been convincingly argued that judicial review regarding the observance of 'hybrid' procedural standards - as allegedly the 'mildest form' of controlling administrative discretion - is an ideal cover for the courts in order to both

proceed to a 'disguised' substantive check of administrative measures and mask their 'resource and democratic deficits'.

The inclination of the courts to censure administrative measures on procedural rather than on substantive grounds is also to be explained by the fact that the courts feel themselves as the experts on procedural issues whereas their expertise in substantive policies is often less developed than that of their administrative counterparts. Moreover, mere procedural control of administrative discretion is best suited to shield the courts' review practice from being accused of judicial activism on political grounds. The manifold advantages of this approach easily leads the courts into temptation to embark on this avenue and the recent jurisprudence of the Community courts, in particular that of the CFI, suggests that the above mentioned prospect is far from being theoretical. Procedural review is thus perfectly capable of becoming an effective means of judicial policy-making. The effective use by the courts of the principle of care as a means of controlling administrative discretion is however dependent on and intimately linked to


Shapiro, ibid., p. 37.

See the impressing development in US administrative law where the growing suspicion of wide discretionairy powers enjoyed by the administration in technocratic rule-making has fostered an intrusive style of judicial review - in particular on the basis of procedural standards, such as the giving reasons duty - as well as increased requirements of transparency and participation in administrative process ('dialogue requirement'), cf. Shapiro, 'Who Guards the Guardians? Judicial Control of Administration', 1988 and in [1996] European Law Journal p. 26 (33 ff.).

154
another factor. In order for the court to check as to whether the requirements of care are met it needs a material basis for analysis and comparison. A comparative analysis between the factual findings established by the court itself — including the information adduced by the applicants — and those taken account of by the administration is only possible on the basis of a factual record or a detailed statement of reasons contained in the challenged decision.

5) The relationship between the principle of care and the giving reasons duty

a.) Giving reasons and care as tandem requirements

The question as to whether the administration has fulfilled its duty of care is ascertainable only in the event of the existence of a reasoned decision in which the relevant factual and legal particulars as well as their assessment by the deciding body are sufficiently set out. Giving reasons as required by Article 190 EC Treaty,\(^{377}\) which is to be considered a fundamental

---

\(^{377}\) This provision requires the Community institutions to give reasons for legislative and administrative measures having binding effect. The breach of the duty to state reasons has become one of the most utilized pleas in administrative litigation, cf. Lenaerts and Vanhamme, note 352, p. 563. As to the 'vertical extrapolation' of the giving reasons requirement into the realm of national administrative process (when dealing with the implementation of Community law) cf. ECJ, Case 222/86, UNECTEF v. Heylens, [1987] ECR 4097, par. 15; on this see Dubouis, 'A propos de deux principes généraux du droit communautaire', [1988] Revue française de Droit administratif p. 691 (697 ff.); Schockweiler, 'La motivation des décisions individuelles en droit communautaire et en droit national', [1989] Cahiers de Droit Européen p. 3.
principle of Community law,\textsuperscript{378} thus forms the necessary precondi-
tion for reviewing an alleged breach of the principle of care.\textsuperscript{379} Yet, the statement of reasons not only provides a reli-
able material basis for double-checking \textit{ex post facto} the ful-
fillment of the duty of care; the phenomenon that a defect in
the conduct of an investigation is so to speak reproduced or
reflected in the elaborated reasoning, in effect, also leads
to an increased merging of the legal meaning and impact imparted
to both the principle of care and the giving reasons require-
ment.\textsuperscript{380} In fact, from the viewpoint of the courts, both process
standards are deeply intertwined and sometimes hard to dis-
tinguish when controlling the exercise of administrative discre-
tion. They equally deal with the establishment and the process-
ing of the factual\textsuperscript{381} and legal elements on which the adminis-
trative decision at issue is finally based. Both principles

\textsuperscript{378} Cf., e.g., CFI, Case T-61/89, \textit{Dansk Pelsdyravlerforening v.

\textsuperscript{379} Cf. the consistent case-law regarding the twofold purpose under-
lying the giving reasons duty, e.g., recently CFI, judgment of
Commission}, not yet reported, par. 66, namely, 'on the one hand,
to permit the interested parties to know the justification for
the measure in order to enable them to protect their rights;
and, on the other, to enable the Community judicature to exer-
cise its power to review the legality of the decision'.

\textsuperscript{380} Cf. also Van der Woude, note 316, p. 463 ff. (465): 'the prin-
ciple of administrative diligence may overlap the obligation to
state reasons'.

\textsuperscript{381} See, e.g., ECJ, Case 323/82, \textit{Intermills v. Commission}, [1984]
ECR 3809 (3828) dealing with the plea concerning an 'accurate
assessment of the facts and a contradictory and inadequate
statement of reasons' under one and the same heading. Cf. also
Shapiro, note 320, p. 214 with respect to Case 42/84, \textit{Remia BV
2545: 'In \textit{Remia}, stating facts and giving reasons are tandem
requirements'.
Furthermore display a comparable potential for evolution on account of their 'hybrid' nature, i.e. their capability of developing from a mere procedural standard into a substantive requirement of administrative legality.\(^382\) It is suggested that a parallel gradual modification of both standards in this sense is actually taking place in Community administrative law and that the development is understandable only if one considers them in tandem. This intimate interrelational makes for an enhanced mutual substitutability of the duty to state reasons and the principle of care as grounds for judicial review. Therefore, it rather is a question of form than of substance when the courts quash administrative decisions flawed by a breach of the duty of care either on exactly those grounds or on the basis of an infringement of the duty to adequately state the reasons. The Community courts however not always seem aware of the involvement of two basically different standards of procedural legality; they thus contribute to the dogmatic confusion by annulsing in one case for careless conduct\(^383\) and in the other

---

\(^{382}\) For the principle of care see above under 4.b). As regards the giving reasons duty cf. the pertinent analysis by Shapiro, note 320; cf. also Advocate General Vesterdorf in Case T-1/89, Rhône-Poulenc v. Commission, [1991] ECR II-908 who warns of such shift in meaning to be accorded to the reasoning duty; in the same vein Müller-Ibold, note 373, p. 4 ff. advocating a doctrinal proper distinction between the duty to state 'reasons' as a procedural requirement and the substantive correctness of the 'reasoning'; he however does not take into account the important factor of judicial activism.

for defective reasoning. 384 These inconsistencies reflect the fact that a proper doctrinal categorization of the principle of care as a ground for review of administrative discretion has to date not been achieved. This is even more patent in the face of the traditional formula adopted by the Courts when reviewing wide discretion ary powers, i.e. the verification as to 'whether the relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers'. 385 As will be discussed, the Community courts so far have indeed been able to bring a breach of the principle of care under all of the four in the previous sentence underlined grounds for review.

b) Towards a 'dialogue requirement'?

(1) The potential for developing a dialogue duty

An increasingly important issue common to the duty of care and the giving reasons requirement is the question of whether they furnish the basis on which to develop a so-called 'dialogue

---


385 Cf., e.g., ECJ, Case 42/84, Remia BV and Verenigde Bedrijven Nutricia NV v. Commission, [1985] ECR 2545.
requirement' in Community administrative process. It should be recalled in this context that the principle of care requires the administration to impartially collect and evaluate the relevant factual and legal circumstances of the individual case. If each and every factual element and legal argument put forward by the individual parties to the administrative proceedings is to be considered as relevant in this sense the duty of care turns out to become a requirement to actually take into account, discuss and explicitly reply to all those particulars. Whether this requirement has been met by the administration can only be proven by setting out a detailed discussion of the issues involved in the statement of reasons. In addition, the more detailed the statement of reasons is the more likely it is that lacunae, inconsistencies and contradictions in the argumentation become apparent. This, in turn, invites the courts to intervene and to establish a breach of either the duty of care or the obligation to give adequate reasons; it furthermore allows them to double-check much more intensely whether the reasoning is substantively correct than in the event of a brief outline of the essential factual and legal aspects underlying the decision. It is submitted that the Community courts, so far, do not overtly take such an intrusive stance. According to a


388 See on the other hand, as to competition proceedings, the claims for such a dialogue duty put forward by the European Association
well-established formula valid since 1963 the Courts generally refrain from accepting a dialogue requirement in the sense of the above sketched version. They consistently hold that 'it is sufficient for the decision to set out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning ... may be understood' and that the administration 'is not required to discuss all the issues of fact and law raised by every party during the administrative proceedings'. Nonetheless, the concept is principally open to further evolution. The extent to which the administration faces a duty

of Lawyers in 'Rights of Defence and Rights of the European Commission in EC Competition Law', 1994, p. 348 f. (under the heading of the right to be listened to) and, in particular, p. 358 f. (motivation of Commission decisions): '[The Commission] must reply to all the arguments raised by the parties'.

Cf. ECJ, Case 24/62, Germany v. Commission, [1963] ECR 63; on this Craig and de Burca, note 386, p. 108 f.; Usher, 'The "Good Administration" of European Community Law', [1985] Current Legal Problems p. 269 (280). Cf. also ECJ, Case 222/86, UNECTEF v. Heylens, [1987] ECR 4097, par. 15 where the Court regarded it imperative that the addressee of an administrative act should 'have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts' (emphases added).

to engage into a 'dialogue' with individual parties is strongly dependent on how the term 'principal' or 'essential' issue is to be understood. The power of defining this central aspect, in last resort, is vested in the courts when determining ex post facto whether the administration was correct or not in setting priorities in their factual and legal assessment. Admittedly, it is true that the courts will have difficulty in reviewing the fulfillment of the diligence duty if the statement of reasons does not even cursorily exhibit the aspects which the administration did not consider relevant. It is however submitted that the more the courts proceed to a thorough investigation of the 'relevant' facts and legal aspects on their own initiative the more they will tend to compare their findings with those stated in the administrative decision and prescribe

---

391 See, e.g., the early cases (discussed above under B.III.) ECJ, Joined Cases 96 and others/82, IAZ v. Commission, [1983] ECR 3369 and Case 179/82, Luchini v. Commission, [1983] ECR 3083 in which the Court established a duty to respond to important sub-missions made by the parties during the administrative procedure; on this cf. Usher, ibid., p. 276. See also CFI, Case T-46/92, Scottish Football Association v. Commission, [1994] ECR II-1039 in which the Court denied a 'dialogue requirement' because the applicant previously had not actively cooperated in the clarification of the case.

392 Cf. also Van der Woude, note 316, p. 464. See, on the other hand, Advocate General Vesterdorf, ibid., p. II-909 who neglects the relevance of an activist judicial control on the basis of the duty of care and believes that, under the case-law, the Commission has 'the absolute power to determine the matters to be discussed' and 'complete control over the scope of the case'. First signs suggesting a more intrusive stance are discernable, cf. ECJ, Case C-360/92 P, Publishers Association v. Commission, [1995] ECR I-23, par. 44; CFI, Case T-95/94, Sytraval and Brink's France v. Commission, [1995] ECR II-2651, par. 62 discussed below. See also Lenaerts and Vanhamme, note 352, p. 566.

393 Cf. Lenaerts and Vanhamme, note 352, p. 566 who advocate a duty of the administration to set out what it considers to be an irrelevant aspect of the case.
the administration what actually constitutes an 'essential' aspect of the case.

(2) Dialogue, transparency, participatory democracy and the rule of law

According to one commentator a development towards a dialogue requirement is less likely if the Community courts rather 'stick closely to transparency as the sole goal of Article 190' than to enhancing 'participation' in administrative procedures.324 Yet, if it is true that participatory rights in Community administrative process, in view of the democratic deficit of the European Community, increasingly come to be accorded a democratic rationale,325 the obverse evolution - in parallel to the US American experience - seems to be the more probable option, at the very least in the long run. To date, on the contrary, it appears to become the rule that intense participation during the decision-making process alleviates the duty of the administration to give a detailed account of the issues of fact and law dealt with in the administrative procedure.326 The rationale underlying this approach is that the participants to the deci-

324 Shapiro, note 320, p. 204 f..
325 See the discussion above under C.II., p. 72 ff..
sion-making have sufficient knowledge of the factual and legal particulars of the case already so that they may effectively defend their rights before the courts.\footnote{397} It would thus seem that the doctrinal concept of administrative process governed by the 'rule of law' and the principle of 'effective judicial protection'\footnote{398} prevails over aspirations for democratically inspired participation. Clearly, such a stance, if pushed too far, risks to considerably reduce or even nullify the giving reasons requirement as a device for providing transparency in administrative decision-making.\footnote{399} However, the above cited case-law does not go as far; it simply rejects the entitlement to a particularly detailed statement of reasons because the participants need no specific protection in this regard.\footnote{400} Accordingly, under the protective rationale, if no such participation has been possible at all (or participation has been possible only to a lesser degree) the strict observance of the giving reasons duty and the principle of care gains more relevance in order to compensate for the lack of effective protection of individual rights and interests afforded through participa-

\footnote{397} Cf., e.g., Case T-266/94, ibid., par. 239.


\footnote{399} Shapiro, ibid., p. 205 f.. See also Lenaerts and Vanhamme, note 352, p. 565 who argue that the duty to give reasons thus tends to become a less promising plea in administrative proceedings in which participation of private parties is of utmost importance, such as in competition and anti-dumping matters.

\footnote{400} See also Lenaerts and Vanhamme, ibid., p. 565.
On the whole this reasoning is entirely constructed
on a concept of participation which serves the protection of
individual rights only; it thereby implicitly rejects a demo-
cratically inspired dialogue requirement as well as the endeav-
our to attain absolute transparency which would necessitate
the discussion of every single issue for its own sake.

(3) The principle of care and the potential conflict between
dialogue and time-limits

The possible evolution of a dialogue requirement triggers a
tension between two basic rationales of administrative process,
i.e. the workability and efficiency of the administration on
the one hand and increased participation of individual parties
on the other. The US American experience with regard to the
development of a dialogue requirement in administrative rule-
making shows that the burden imposed on the administration may
be excessive.\(^\text{402}\) Whilst the decision-making process targets a
maximum of both transparency and participation and its outcome
to become more rational, its conduct is rendered more and more
costly in terms of agency decisional resources.\(^\text{403}\) Moreover,
the increasing difficulty felt by the administration in making
its decisions 'judicial review proof' creates a tendency towards
eschewing the avenue of formal decision-making in favour of

\(^{401}\) In the same vein Lenaerts and Vanhamme, ibid., p. 565 f..

\(^{402}\) Shapiro, 'Codification of Administrative Law: The US and the

\(^{403}\) Shapiro, ibid.
an informal - and not judicially supervised - approach of policy-making.\textsuperscript{404}

In the Community context the development of a dialogue requirement with all its negative consequences in terms of expenditure of resources and time on the basis of the principle of care is not without doctrinal difficulties. The principle of diligence was explicitly granted a time-dimension in Community administrative law. The ECJ, in a case relating to State aids proceedings, deduced from this principle, in the absence of express provisions, a specific time-limit of two months for the conduct of preliminary administrative inquiries under Article 93 par. 3 EC Treaty.\textsuperscript{405} Yet, even though this has become settled case-law in this particular instance\textsuperscript{406} doubts remain as to whether the requirement to come to a decision within a reasonable period of time\textsuperscript{407} as a specific feature of the principle of diligence is open to generalization in Community administrative law.\textsuperscript{408}

On the other hand, the partly excessive duration of administrative procedures conducted by the Commission, in particular in

\begin{itemize}
\item \textsuperscript{404} Shapiro, ibid., p. 39.
\item \textsuperscript{405} Cf. ECJ, Case 120/73, \textit{Gebrüder Lorenz GmbH v. Germany}, [1973] ECR 1471.
\item \textsuperscript{406} Cf., e.g., Hancher, Ottervanger, and Slot, 'EC State Aids', 1993, par. 17.17 ff.; Gyselen, 'La transparence en matière d'aides d'Etat: Les droits des tiers', [1993] \textit{Cahiers de Droit Européen} p. 417 (427 ff.).
\item \textsuperscript{407} See also Article 6 par. ECHR whose applicability to administrative process however is subject to controversy, cf. Bradley, 'Administrative Justice: A Developing Human Right?', [1995] \textit{European Public Law} p. 347.
\item \textsuperscript{408} Cf. Struys, 'Questions choisies de procédure en matière d'aides d'Etat', [1993] \textit{Revue Trimestrielle de Droit Européen} p. 17 (27 ff.) who advocates the extrapolation of the tow months time-limit to the procedure under Article 93 par. 2 EC Treaty.
\end{itemize}
In the Community context the development of a dialogue requirement with all its negative consequences in terms of expenditure of resources and time on the basis of the principle of care is not without doctrinal difficulties. The principle of diligence was explicitly granted a time-dimension in Community administrative law. The ECJ, in a case relating to State aids proceedings, deduced from this principle, in the absence of express provisions, a specific time-limit of two months for the conduct of preliminary administrative inquiries under Article 93 par. 3 EC Treaty. Yet, even though this has become settled case-law in this particular instance doubts remain as to whether the requirement to come to a decision within a reasonable period of time as a specific feature of the principle of diligence is open to generalization in Community administrative law. On the other hand, the partly excessive duration of administrative procedures conducted by the Commission, in particular in competition matters, has increasingly come to be criticized

---

405 Cf. ECJ, Case 120/73, Gebrüder Lorenz GmbH v. Germany, [1973] ECR 1471.


409 Cf. Montag, note 345, p. 433. See also CFI, Case T-5/93, Tremblay and Others v. Commission, [1995] ECR II-185 in which the Court refused to establish a breach of the principle of legiti-
and it is to be assumed that the principle of care will gain more significance in this respect in the near future. In any event, if the duty of care hinders the 'unreasonable' protraction of procedures whilst requiring to take account of and discuss all issues of fact and law raised by the individual parties, the administration easily comes to be placed in a 'no-win' or 'catch 22' situation. In the light of this dilemma the concept of care would thus have to be redefined and it is not to be excluded that a further emphasis on rule-making efficiency and rapidity will hamper tendencies towards developing a dialogue requirement.

mate expectations although the Commission had conducted the investigation over 14 years; on this see Kerse, 'The Complainant in Competition Cases: A Progress Report', [1997] Common Market Law Review p. 213 (243). Cf., on the other hand ECJ, Case 223/85, RSV v. Commission, [1987] ECR 4617 (State aid matters) where the ECJ annulled a decision for having infringed the legitimate expectation of the applicant on account of the excessive delay in the conduct of the proceedings.

Cf. the results of the latest FIDE conference briefly reported by Lenaerts and Vanhamme, ibid., p. 567.

This problem is not a theoretical one. See CFI, Case T-49/93, SIDE v. Commission, [1995] ECR II-2501 and Case T-95/94, Sytraval and Brink's France v. Commission, [1995] ECR II-2651 (both State aid matters) which seem to establish a dialogue requirement in the preliminary investigation procedure under Article 93 par. 3 EC Treaty which may not exceed two months (Case Lorenz v. Commission cited above). See also below.

III. The case-law on the principle of care

The preceding overview on the complex dogmatic and practical implications of the principle of care provides the basis for understanding the following inquiry into the related recent case-law of the Community courts. The focus will be on the procedural status of 'third parties' or complainants in mainly three types of administrative proceedings, namely, in anti-dumping, competition and State aid matters; however, the significance of the concept of care for parties 'directly involved' as in the case of general customs proceedings will also be addressed. It is suggested that improved 'procedural' protection of individuals under the duty of care is gradually fostering a 'multipartite' type of administrative procedure within which the differences between 'targeted parties' and mere 'interested third parties', in effect, becomes increasingly blurred.

1) Anti-dumping matters: The 'Nölle' cases

The breakthrough regarding the recognition of the principle of care as a successful ground for review in administrative litigation was brought about in 1991 by a preliminary ruling given by the ECJ under Article 177 par. 1 lit b) EC Treaty in Case Nölle v. HZA Bremen-Freihafen (hereinafter Nölle I).\(^\text{[413]}\)

A few years later, following an action for damages, the CFI

handed down a follow-up decision on the basis of the same case (hereinafter Nölle II)\textsuperscript{414} in which the principle of care was explicitly established as a rule protecting individuals.\textsuperscript{415}

a) Nölle I

As already mentioned\textsuperscript{416} the applicant Nölle was an independent importer - and therefore less affected than the targeted producers and exporters of the product under investigation - who had actively participated in the anti-dumping investigation leading to the adoption of the contested regulation. The main problem of the case was whether the Community institutions should have taken into account the applicant's suggestion made during the administrative procedure that Taiwan instead of Sri Lanka should be used as a reference country for the determination of the normal value of the Chinese products (paint brushes) at issue.

The Advocate General put particular emphasis on the 'duty of care'\textsuperscript{417} after having rejected dealing with the problem under the heading of the giving reasons requirement.\textsuperscript{418} His Opinion provides the very first serious attempt to assign the principle of care a sound dogmatic foundation as a general principle of


\textsuperscript{415} Case T-167/94, par. 76.

\textsuperscript{416} Cf. the discussion of Case Nölle II under C.II. with respect to the right to be heard.

\textsuperscript{417} Ibid., p. I-5179, par. 15 and p. I-5186 f., par. 28.

\textsuperscript{418} Ibid., p. I-5175.
Community administrative law. The Advocate General argued that where 'the Community institutions have a wide discretion [as in the matter at issue], it is all the more important that the decision adopted shall be subject to a careful review by the Court with regard to observation of essential formalities and the principles of good administration, which include the principle of care'; therefore, 'the Court reviews the question whether, in accordance with the duty of care, an authority on which a wide discretion is conferred has determined with the necessary care the features of fact and of law on which the exercise of its discretion depends'. The Advocate General came to the conclusion that 'the duty of care required the Community institutions to give serious consideration to the suitability of the alternative proposed by Nölle'. In his opinion, after having thoroughly considered the grounds put forward by the Community institutions to justify the decision to reject Taiwan, they had failed to do so. The ECJ fully endorsed the Opinion of the Advocate General. After having made it clear that it was only entitled to marginal control in the face of complex discretionary economic assessments made by the Commission, the Court considered it 'desirable to verify whether

---

419 It should however be noted that Article 2 par. 5 lit. a) of the applicable basic regulation No. 2423/88 (OJ 1988 L 209/1) expressly provides that the normal value is to be determined 'in an appropriate and not unreasonable manner'. This may be seen as a concretisation of the duty of care by secondary legislation, a solution which was apparently adopted by the Court; see below.

420 Ibid., par. 28 (emphases added).

421 Ibid.

422 Ibid., par. 29.
the institutions neglected to take account of essential factors' and 'whether the information contained in the documents in the case were considered with all the care required'. It is interesting to note that the Court did not spell out under which ground for review it exactly intended to examine a possible breach of the duty of care. In its subsequent considerations the Court, for the first time in the field of anti-dumping, scrutinized extensively and thoroughly the various arguments and the factual elements put forward by the parties in order to assess the propriety of the choice (of reference country) made by the Community institutions. The Court came to the result 'that Nölle [had] produced sufficient facts . . to raise doubts as to whether the choice of Sri Lanka as a reference country was appropriate and not unreasonable'. However, it did not go as far as to require the Community institutions to engage in a 'dialogue' since they were under no obligation 'to consider every reference country suggested by the parties during an anti-dumping proceeding'; nonetheless, the Court held that the patent doubts regarding the correctness of the choice made 'ought to have led the Commission to examine the proposal made by the plaintiff in greater depth'. Although the Court formally

---

423 Ibid., par. 11-13 (emphases added).

424 According to par. 12 the relevant ground for review could by either a procedural rule, the accurate statement of the facts on which the choice is based or a manifest error of appraisal.

425 Ibid., par. 14-30; cf. also Vermulst and Hooijer, note 413, p. 399, 403.

426 Ibid., par. 30.

427 Ibid., par. 31; see also par. 35 where the Court stated that 'the Community institutions did not make serious or sufficient
struck down the regulation for having infringed Article 2 par. 5 lit. a) of the basic regulation the overall reasoning suggests that incompatibility with the requirement of care in collecting and assessing the relevant information was the decisive factor for reaching this result.\footnote{428}

It is submitted that the Court's thorough check as to whether the investigation of the case had been conducted with all due care amounts, at least to some extent, to second-guessing the exercise of discretion entrusted to the Community institutions under the basic regulation. Even though the Court went out of its way to clothe its argumentation in 'procedural language',\footnote{430} thereby mixing it up with elements which suggest a justification of annulling the measure on the basis of Article 190 EC Treaty,\footnote{431} its approach clearly strays beyond the realm of mere procedure. The ECJ could not come to a conclusion whatsoever regarding the reasonableness of the choice of the reference country without making an own, at least cursory, assessment of the underlying factual elements and substantive determinations involved.\footnote{432} Thus, the first step towards a more intrusive stance in reviewing administrative discretion on the basis of the principle

\begin{itemize}
\item attempt to determine the appropriate reference country'.
\end{itemize}

\footnote{428} Ibid., par 36.

\footnote{429} This is also the way in which the CFI in its judgment Nölle II understood the ECJ's approach; see below.

\footnote{430} Cf., in particular, par. 33 f..

\footnote{431} Par. 34: 'These statements [in the preamble of the regulation] were not supported by any details and no facts were produced'.

\footnote{432} See also, albeit somewhat differently, Vermulst and Hooijer, note 413, p. 403.
of care was made.

b) Nölle II

The judgment given by the CFI following a claim for compensation under Article 215 par. 2 in combination with Article 178 EC Treaty goes a decisive step further in the assessment of the legal implications underlying the principle of care. This is partly due to the conditions governing the non-contractual liability of the Community for 'legislative' acts, a category under which the adoption of anti-dumping regulations is to be ranged according to the settled case-law. These conditions are far more severe than the criteria determining the legality of administrative conduct inasmuch as they require a 'sufficiently serious breach of a superior rule of law for the protection of individuals'. The CFI however neatly sidestepped the important question as to whether the principle of care is to

---

This was corroborated by the CFI in Case T-167/94, Detlef Nölle v. Council, [1995] ECR II-2589, par. 51 even though, as correctly pointed out by the applicant (par. 44 f.), the proceedings leading to the adoption of anti-dumping regulations exhibit many characteristics of an administrative-type of decision-making, cf. the discussion under C.III. The case-law is to be criticized in that it contradicts the more liberal stance of the Community courts as regards locus standi ('direct and individual concern' under Article 173 par. 4 EC Treaty) and the granting of process rights to individual parties; cf. ibid.. In so far, the handling of anti-dumping proceedings widely differs from that of legislative rule-making, e.g., in the field of the CAP and, dogmatically speaking, it is not convincing to uphold equality in treatment on the level of liability only.

be considered a 'superior rule of law' in this sense. Yet, it will be argued in line with the general stance taken in this paper that there can be no doubt as to the qualification of the principle of diligence as a 'constitutional' norm.

The CFI started its assessment of an alleged 'breach of the principle of care' by making reference to the wide discretionary powers enjoyed by the Community institutions in antidumping matters and by citing the landmark decision of the ECJ in Case Technische Universität München, which had been given only one month after the first Nölle judgment. As will be seen further below, the ECJ established in TU München the important formula that respect for procedural rights in the event of wide administrative discretionary powers is 'of even more fundamental importance' and that 'those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case'.

Taking the line of considerations in Nölle I as a basis the CFI concluded that the Commission 'had failed to take account of essential factors' when choosing the reference country, had omitted to give 'more detailed consideration to the applicant's proposal' and had not supported its own findings 'by any details or by the submission of any facts'. In conclusion, the CFI found, somewhat hesitantly in the face of the ambiguous solution

---

435 Cf. headline par. 68.


438 Ibid., par. 74.
adopted by the ECJ in *Nölle I*, that the conduct of the Community institutions 'may be regarded as having constituted a breach of the principle of care'. More importantly, the CFI went on to state that 'the protective nature of the principle thus breached cannot be brought into question in this case'. As regards the procedural status of independent importers, it adopted a line of reasoning which is strikingly at odds with its finding that this category of parties to the proceedings may not rely on the right to be heard. According to the Court, an independent importer who successfully demonstrates a sufficient interest as an 'interested party' is provided protection under the principle of care 'which is a rule protecting individuals'. Unfortunately, the CFI subsequently circumvented the question of whether the principle of care constitutes a 'superior rule of law' by reversing the sequence of legal analysis and giving priority to the examination of a manifest and serious breach of the principle which it finally denied.

The central aspect in the CFI's judgment would seem to be that the principle of care is to be regarded a procedural guarantee on which the parties to the proceedings, whether directly targeted or not, may rely in order to have protected their

---

439 Ibid., par. 75.
440 Ibid., par. 76.
441 Cf. the discussion above under C.III., p. 99 ff..
442 Ibid., par. 76.
443 Ibid., par. 78-91; cf., in particular, par. 89: '..the Community institutions did not fail completely in the duty of care and proper administration .. but simply failed properly to appreciate the extent of their obligations under that principle ..'.
interests either before the deciding agency or before the courts. However, this categorization raises the problem of how to define the relationship of this safeguard with other process rights, such as the right to be heard. In this regard the judgment is, from the dogmatic standpoint, highly defective. The CFI unconvincingly distinguished between the ambit of protection respectively provided by the right to be heard and the principle of care: An independent importer recognized as 'interested party' to the anti-dumping proceedings and actively submitting his views may not rely on the right to be heard because he is not targeted by the investigation. Conversely, and strangely enough, he may rely on the principle of care which requires the Community institutions to take into account and carefully examine his suggestions. The distinction made by the CFI amounts to splitting hairs since both procedural safeguards serve one and the same objective in this context, namely, to guarantee a certain degree of influence of individual parties on the decision-making. If one were to accept the CFI's reasoning as correct this would suggest that, speaking in constitutional terms, the principle of care as a procedural safeguard displays greater an importance and scope of application than the 'fundamental' right to be heard. This is hardly compatible with the ECJ's forceful approach in Case Al-Jubail in which the right to a fair hearing was recognized to have fundamental

---

444 Ibid., par. 62 f..
445 As to the critique of the CFI's stance not to grant a right to be heard to independent importers see above under C.III.
character in anti-dumping matters. On the other hand, taking the attitude of the CFI for granted, there can be no doubt as to whether the principle of care constitutes a 'superior rule of law for the protection of individuals'.

In any event, the judgment in Nölle II triggers the need to define the interrelation between the right to be heard on the one hand and the principle of care on the other as well as their respective ambit of protection in order to meet the requirement of coherent application of the principles of good administration. Yet, irrespective of this doctrinal defect in the judgment, it seems now plain that independent importers possess a procedural status which, in effect, is largely equivalent to that of directly affected parties, no matter under which process standard this is achieved. It is hardly imaginable that the applicant Nölle would have enjoyed a greater degree of protection when relying on the right to be heard than under the principle of care.\footnote{This however leads to the question whether the outcome of the judicial proceedings would have been different if the CFI had granted Nölle a right to be heard. Yet, even though the CFI could not have denied the right to be heard the status of a 'superior rule for the protection of individuals' it seems less likely that it would have decided the question of a 'manifest and serious breach' differently. This however suggests that individual protection under the regime of non-contractual liability in the event of breaches of fundamental procedural rights is hard to achieve. Even if a gross procedural failure is at issue the so-called 'harmless error principle' (meaning that the outcome of the case would not have been altered in the event of the observance of the procedural requirements) is apt to nullify individual protection; cf. Case Nölle II, par. 90 where the CFI denied such a hypothetical causal link between the process failure and the outcome of the investigation.}
2) General customs matters: The cases 'TU München' and 'France-Aviation'

a) TU München

The judgment of the ECJ given in Case Technische Universität München\textsuperscript{448} is of utmost importance in many respects. One of its central aspects was the establishment of the right to be heard in double-staged customs procedures which has already been dealt with.\textsuperscript{449} The second landmark, highly responsible for the current boost of procedural judicial review, was the 'constitutionalization' of a range of protective process standards in the face of administrative discretion. The Court explicitly extrapolated the doctrinal concept which justifies the imposition of a duty of care as a counterbalance to discretion\textsuperscript{450} to similar procedural principles, such as the giving reasons requirement and the right to be heard. Third, it recognized the applicability of the principle of care in customs proceedings. The Court thus considerably enhanced both the improvement of procedural protection in this kind of administrative process and, in the light of the statements of principle made, laid the foundation for the expansion of the duty of care into a variety of Community administrative procedures. Finally, it is implicit in the judgment that the ECJ felt the relevance of the concept of care as ground

\begin{itemize}
\item \textsuperscript{448} ECJ, Case C-269/90, Hauptzollamt München-Mitte v. Technische Universität München, [1991] ECR I-5469.
\item \textsuperscript{449} Cf. the discussion under C.III.
\item \textsuperscript{450} See above under II.4.
\end{itemize}
for review which would allow a more intrusive degree of judicial review of the exercise of discretion. These various aspects are 'packed' in one paragraph of the ruling worded as follows: 

"Where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present." 451

It is submitted that the above made principled statement constitutes a turning point in the philosophy hitherto underlying both judicial review of administrative discretion in general and, more specifically, judicial control on procedural grounds. Partially in accordance with Schwarze452 who is a strong proponent of the Court's new approach it is to be inferred from the above cited passage that the ECJ shows increased inclination to strengthening the constraints on administrative decision-making, in the first place, by reason of considerations based on the 'rule of law' and effective judicial process. Furthermore, as

---

451 Ibid., par. 14 (emphases added).
has been attempted to show when dealing with the doctrinal assumptions governing the concept of care, the new case-law is replete with potential for expansion in several directions. This conceptual revolution prompts the question what the reasons determining the volte-face of the ECJ are. The answer calls for a more detailed presentation of the factual background and the history of the case. It will emerge that the result reached in TU München is not conceivable without the forceful intervention of the referring national court and the overwhelming defectiveness of the administrative conduct at issue.

The case related to an import of an electronic microscope from Japan by the applicant, the Technical University of Munich. Its application for an exemption from customs duties had been transferred by the competent national customs authorities to the Commission which, after having consulted a group of experts, finally rejected it on the grounds that an 'apparatus of equivalent scientific value' was being manufactured and available in the Community. In subsequent litigation the German Federal Court of Finance (Bundesfinanzhof) who was of the opinion that the Commission decision was substantively wrong requested the ECJ under Article 177 par. 1 lit. b) EC Treaty to give a preliminary ruling on its validity.\footnote{Cf. Article 3 par. 1 lit. b) of Regulation No. 1798/75 (OJ 1975 L 184/1).}

\footnote{The applicant did not challenge the Commission decision but the national implementation measure. It is suggested that under the new approach of the ECJ established in Case C-188/92, TWD Textilwerke Deggendorf v. Commission, [1994] ECR I-833 (State aid matters) a reference for a preliminary ruling on the validity of the decision would have been rejected as indamissible.}
At this point a highly interesting discourse between the Bundesfinanzhof and the ECJ about the concept of judicial review regarding administrative discretion to be followed in Community law began. Its content is pertinently reported elsewhere so that a few remarks may suffice for the purpose of this study.\textsuperscript{455} The Bundesfinanzhof questioned whether the hitherto fairly restrictive stance of the ECJ in reviewing discretion involving the assessment of complex technical issues\textsuperscript{456} is compatible with the 'constitutional principle of effective legal protection recognized in Community law'.\textsuperscript{457} The crucial point in this invitation addressed to the Court to reconsider its case-law was that under German doctrine, as required by Article 19 par. 4 of the Basic Law, such a restrained review of administrative discretion is to be regarded 'unconstitutional'.\textsuperscript{458} The Bundesfinanzhof thereby implicitly threatened to engage once again into a 'constitutional' or 'supremacy' quarrel with the ECJ by involving the Federal Constitutional Court (Bundesverfassungsgericht).\textsuperscript{459} The ECJ was thus faced with a strong 'argument'
in favour of a more intense scrutiny of the Commission's conduct. And the genesis of the Commission decision, as forcefully pointed out by Advocate General Jacobs, involved a number of gross failures\(^{460}\) so that the Court would not have been able to avoid quashing the measure in any case. On the other hand, the fact that various procedural irregularities had occurred during the decision-making process opened for the Court the gateway to adopt a compromise solution which would appease the 'constitutional' concerns of the German judges without having to fundamentally and overtly reconsider the established case-law on the reduced control of administrative technocratic discretion (so-called 'manifest error' doctrine). The ECJ thus annulled the Commission decision on the grounds of a range of procedural defects, namely, a breach of the duty of care,\(^{461}\) a breach of the right to be heard and an inadequate statement of reasons.\(^{462}\)

Even though the judgment is hence, at face value, all about procedural review it has, in the light of the discourse with the referring court, a tentative connotation of substantive

---

460 Cf. Advocate General Jacobs' Opinion, ibid., p. I-5480 ff. who elaborated on the fact that the members of the expert group whose judgment determined the outcome of the case had no particular scientific expertise (par. 21), the fact that they merely relied on a document (not disclosed to the applicant) prepared by the only Community competitor of the Japanese producer (par. 25) and the obvious non-examination of the particular case by the Committee (the decision simply reproduced the wording of an earlier decision in a similar case) (par. 30).

461 According to the Court, the Commission had infringed its obligation to examine carefully and impartially all the relevant aspects of the case by relying on the judgment of 'experts' who did not possess the necessary technical knowledge in the fields required, par. 22 ff..

462 Ibid., p. I-5499 ff., in particular, par. 22 ff..
control of administrative discretion.463 Furthermore, and this is more clearly felt in the judgment, it was 'the uneasiness of German courts about a lack of substantive review' which 'paradoxically' induced 'the further development [i.e. constitutionalization] of procedural rights in European administrative law'.464

Unsurprisingly, the ECJ's ruling in TU München, unsurprisingly has come to live a life on its own in litigation before the CFI within which procedural failures increasingly tend to be pleaded by plaintiffs.465 As will be seen in the case-law analysis which follows, in particular, with respect to competition and State aid matters, this precedent has furthermore considerably promoted the more 'aggressive' use of the principle of care as a vehicle of both procedural and substantive judicial control.

Cf. also Harlow, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot?', [1996] European Law Journal p. 3 (13) who argues: 'Lurking behind the fidgety procedural ruling, one senses the Court's discontent with the substantive decision.'

Nolte, note 455, p. 208. See also Schwarze, inter alia, in 'Developing Principles of European Administrative Law', [1993] Public Law p. 229 (231 f.) who sees the importance of the judgment in the 'strict conformity of the decision-making process to procedural requirements' (emphasis added). As has been rightly pointed out by Harlow, note 463, p. 16 this view does not take into account the still largely unsettled question under what conditions the so-called 'harmless error principle' in Community process law applies.

b) *France-Aviation*

The judgment given by the CFI in case *France-Aviation*,\(^{466}\) as extensively discussed above,\(^{467}\) is particularly important in so far as it deals with the establishment of the right to be heard in composite administrative procedures (here customs proceedings). One now realizes, in view of the link which the ECJ had made in *TU München* between procedural legality and administrative discretion, why the CFI deduced the applicability of the right to be heard from the existence of the Commission's power of appraisal rather than from the fundamental rights discourse in *Al-Jubail*.\(^{468}\) This paper has furthermore argued that *France-Aviation* lays the foundation for fostering a doctrine of 'imputability' of process failures occurring on either stage of the composite administrative procedure (whether committed by national or Community authorities) to the Commission. The following considerations intend to corroborate this assumption.

When carefully reading the factual background of *France-Aviation* one wonders why the CFI did not take the opportunity of resolving the case on the basis of the concept of care as established in *TU München* instead of engaging in an extended and dogmatically difficult discussion of the applicability of the right to be heard. This is the more curious in the light of the fact


\(^{467}\) Cf. under C.III.

\(^{468}\) Ibid., par. 33 f.; see also above C.III.
that the CFI explicitly elaborated on the TU München ruling and that the same Chamber of the Court (although in extended composition) had decided Nölle II only a few months before.

The only sound explanation for this omission is that the applicant had not pleaded a breach of the principle of care and that the Court either did not realize its relevance (this is actually the most likely option) or did not dare raise it on its own motion. In actual fact, the case is a paradigm example of a breach of the duty of care. The Commission undisputedly had adopted its decision on the basis of an incomplete documentation of the underlying factual elements and the correspondance exchanged between the applicant and the national authorities in the 'first stage' of the remission proceedings. The file transferred from the national customs authorities to the Commission manifestly contained only part of the relevant aspects and, in particular, lacked those crucial elements which would have proven that the applicant had not acted by 'obvious negligence'. Although the Commission was thus faced with a manifest breach of the duty of care on the part of the national administration it took no steps in order to ask for supplementary information which would have shown that there was no legal

---

469 Ibid., par. 32 where the CFI cited only part of the central statement made in TU München (there par. 14).

470 Both the ECJ and the CFI make increasingly use of this possibility with respect to essential procedural requirements cf. note 311.

471 Ibid., par. 12, 35 and 36 where the CFI stated: 'Such a decision on the degree of negligence involved a complex legal appraisal which could be effected only on the basis of all the relevant facts, including the decisions and statements of the national administration vis-à-vis the applicant' (emphasis added).
ground for not acceding to the applicant’s request for repayment of customs duties. Against this factual background the somewhat complicated solution based on a violation of the audi alteram partem rule opted for by the CFI seems wholly inconclusive. Dogmatically speaking, it would have been sound to establish a breach of the principle of care committed either by the national authorities (attributable to the Commission) or by the Commission itself since it had made no serious attempts to compensate for the procedural failure occurred on the ‘first stage’. In either instance the responsibility would have been with the Commission and the outcome of the case the same. This, in turn, shows the propriety of the concept of care in providing a harmonious standard of procedural protection throughout composite or cooperative administrative procedures. Under the principle of care the Commission could be attributed, in accordance with its leading and supervisory task, a specific protective function with respect to the administrative procedure as a whole whose fulfillment is reviewable before the Community courts.

On the doctrinal level, the findings of the CFI in France-Aviation furthermore appear to be at variance with those made in Nölle II, which, as discussed above, operated an unjustifiable distinction between the principle of care and the right to be heard. The judgment France-Aviation regrettably adds to the uncertainty about how to properly define the relationship between these process standards. In France-Aviation both process principles seem to be interchangeable depending on the strategy

---

472 See the criticism expressed under C.III.
chosen by the litigants whilst in Nölle II they are given a distinct scope of application although serving the same objective and producing the same protective effects. It is to be hoped that a range of cases (equally relating to composite customs proceedings) currently pending before the CFI will bring about a settlement of the dogmatic problem.473

3) Complainants in competition proceedings: The cases 'Automec II' and 'Asia Motor France II'

The principle of care has repeatedly made its appearance in litigation relating to competition matters even prior to the landmark ruling in TU München.474 However, it has produced its most significant impact in a series of more recent judgments, in particular, in cases Automec II and Asia Motor France II,475


475 Cf. the leading cases are CFI, Case T-24/90, Automec Srl v. Commission, [1992] ECR II-2223; Case T-7/92, Asia Motor France SA and Others v. Commission, [1993] ECR II-669; for a comment on these judgments see Idot, 'La situation des victimes de pratiques anticoncurrentielles après les arrêts Asia Motor et Automec.
which deal with the status of complainants in competition infringement proceedings.\textsuperscript{476} It will be seen that, in these judgments, the intimate link between the concept of care on the one hand and the giving reasons requirement and the 'manifest error' doctrine on the other is particularly relevant and that a sound doctrinal explanation of the CFI's approach is extremely hard to achieve. The judgments furthermore exhibit well the double-faced structure of the inquisitorial principle, which both serves the public interest in efficient policy-making - the so-called 'Community interest' - and, as concretized by the principle of care, the protection of individuals in and through administrative proceedings.

a) The different facets of the principle of care in 'tripartite' procedures

In the context of 'tripartite' procedures, which in their basic structure involve the case-handling authority, the party against

which the proceedings are directed (hereinafter the 'targeted party') and the complainant, the protective reflex of the inquisitorial principle or the duty of care embraces a range of distinct facets depending on the procedural status of the respective party. In accordance with the case-law on 'bipolar' proceedings dealt with so far, the concept of care purports to protect the individual party directly targeted by a formally initiated procedure against administrative negligence in assessing the particular case and exercising discretion.\textsuperscript{477} For the complainant the situation is necessarily different. He is not the 'object' of a running procedure but seeks to induce the administration to both formally start proceedings and actively use its investigatory powers against another person (presumably a competitor). Interestingly, the complainant is afforded protection under the principle of care in two distinct phases of 'participation'. The first phase, which is informal or preliminary in nature, runs from the submission of the complaint to the adoption of a decision on either the initiation of proceedings or the rejection of the complaint.\textsuperscript{478} The second phase begins with the formal opening of the investigatory procedure against the targeted party. The reason for this 'double-phased' implication of the concept of care is that the formal procedure is not automatically triggered by the lodging of a complaint; its initiation is dependent on a discretionary decision on the part

\textsuperscript{477} Cf., e.g., the above discussed cases \textit{TU München} and \textit{France-Aviation}.

\textsuperscript{478} The very controversial issue whether the complainant is entitled to obtain a formal decision from the Commission on his complaint is now settled in the affirmative, cf. CFI, Case T-186/94, \textit{Guérin Automobiles v. Commission}, [1995] ECR I-1753, par. 34.
of the Commission which is basically free to reject complaints.\footnote{175} In this situation, the duty of care, i.e. the obligation to thoroughly examine the complaint, fulfills its traditional function as a corrective to discretionary powers.\footnote{180} The submission of the complaint as such has thus the effect of creating a preliminary 'procedural relationship' between the administration and the complainant which is determined by a specific duty of care of the former to the benefit of the latter.\footnote{181} On the other hand, if the Commission decides to take up and actually investigate the complaint a real tripartite procedural or quasi-adversarial relationship formally comes to be established. Starting from this moment the duty of care, in principle, provides parallel protection to both the targeted party and the complainant since it is in the interest of both of them that the Commission 'impartially and carefully examines the concrete circumstances of the individual case' and, in particular, the factual and legal arguments submitted to it. In this context, from the viewpoint of the complainant, the duty of care equally serves as a corrective to the Commission's discretion as to whether it wants to continue the investigation or what means it intends to use to this end.

\footnote{175}{Cf. Case Automec II, par. 76 f.}
\footnote{180}{Cf. the discussion above under II.4.}
\footnote{181}{This is implicit in Article 3 of Regulation No. 17 and Article 6 of Regulation No. 99/63; cf. similarly Case Automec II, par. 79. As to the Commission's three-stage procedure for the handling of complaints (including the so-called 'Article 6 letter') which will not be addressed here in detail cf. Kerse, note 476, p. 225 ff.; Ortiz-Blanco, 'European Community Competition Procedure', 1996, p. 248 ff.}
The granting of procedural protection to the complainant under the principle of diligence in either phase of participation is justified by the material interest which he may have in the conduct of an investigation. It is assumed, depending on the circumstances of the case, that the complainant's interest may display a weight which is no less worth protecting than that of directly affected or targeted persons (who may avail themselves of the highest standard of procedural protection, namely, the rights of the defence).\(^{482}\)

b) The duty of care vis-à-vis complainants in the recent case-

This somewhat complicated double-phased model of applying the principle of care lies at the basis of the approach chosen by the CFI in cases *Automec II* and *Asia Motor France II*. *Automec II*\(^{483}\) made it clear once and for all that the Commission enjoys a power of appraisal as regards the taking up of competition cases and that 'it cannot be compelled to conduct an investiga-

---

\(^{482}\) Cf. Article 3 par. 2 lit. b) of Regulation No. 17 which allows private parties claiming a 'legitimate interest' to lodge complaints with the Commission (technical term: 'application') alleging the infringement of competition rules. The individual interest of competitors and aggrieved parties in the Commission's opening of the formal procedure has been stressed by Casati, note 475, p. 302: 'if the Commission accepts the complaint as justified, the complainant has secured a powerful ally at no cost, which is particular important for small - and medium-sized undertakings confronting large ones'.

Even though this is not clearly outspoken in Automec II, the existence of the corresponding discretionary power to reject complaints for lack of Community interest is to be regarded the crucial factor which caused the CFI to put particular emphasis on the duty of care in examining complaints. This is further underlined by the fact that the Court used its standard formula regarding judicial review of discretion. The above described twofold protective function ascribed to the principle of care is succinctly set out in Case Asia Motor France II. There, the Court held that the Commission is required, first, 'to examine carefully the factual and legal particulars brought to its notice by the complainant' (the careful examination of the complaint). This formula implies that the discretionary power to (wholly or partially) reject the complaint remains principally untouched provided the Commission

---

484 Ibid., par. 76 and 77 where the CFI stated that the (general regulatory and supervisory) nature of the administrative activity in question implies the power to set priorities in the handling of complaints.

485 Cf. ibid., par. 79 where the Court referred to 'the procedural safeguards provided for by Article 3 of Regulation 17 and Article 6 of Regulation 99/63' as the legal foundation of the duty 'to examine carefully the factual and legal aspects of which [the Commission] is notified by the complainant'.

486 This is highlighted in Asia Motor France II, par. 34 where the Court explicitly refers to the TU München case (there par. 14). It was already implicit in earlier judgments of the ECJ that the Commission could not simply disregard complaints brought to its attention; cf. ECJ, Case 298/83, CICCE v. Commission, [1985] ECR 1105, par. 18; Joined Cases 142 & 156/84, BAT and Reynolds v. Commission, [1987] ECR 4487, par. 20.

487 Case Asia Motor France II, par. 33; somewhat differently, Case Automec II, par. 80.

488 Case Asia Motor France II, par. 35.
fulfills the requirement of care. Yet, if the Commission decides to take investigative measures - and this is the second facet of the duty of care - it must conduct the investigation with the 'requisite care, seriousness, and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants' (the careful conduct of the investigation).\footnote{Case \textit{Asia Motor France II}, par. 36. On this 'double-relevance' of the duty of care see also Ortiz-Bianco, note 481, p. 242; Kerse, note 476, p. 234; Maselis and Gilliams, ibid., p. 110 f.}

The almost coincident wording with respect to the Commission's duty to examine the 'factual and legal particulars' submitted 'by the complainants' suggests difficulties in properly distinguishing the respective ambit of protection provided by the duty of care in either of the above-referred stages of the procedure. In practice, the complainant will be inclined to submit the whole set of information and evidence available to him immediately with the lodging of the complaint in order to maximize the pressure on the Commission to take the complaint up. This, in turn will automatically increase the degree of diligence required from the Commission already in the preliminary phase. However, it does not follow therefrom that the concept of care becomes meaningless in the course of the \textit{formal} investigatory procedure. There, the protection provided by the duty of care is nonetheless more far-reaching in that it obliges the Commission to \textit{diligently} employ its investigative powers \textit{vis-à-vis the targeted party}. Moreover, the Commission must then take account of new submissions made by the complainant, e.g., in relation to the evidence collected through investiga-
In summary, the new case-law made it clear that the Commission has a duty to carefully consider each and every complaint which it receives before making use of its discretionary power to reject it for lack of Community interest. Moreover, if it proceeds to investigate the complaint the duty of care comes to be strengthened and encompasses the whole investigatory process until its (successful or premature) termination.\footnote{490} The concept of care thus serves as a (procedural) device to counterbalance the Commission's wide discretion regarding both the commencement and the manner in which it conducts an investigation of alleged breaches of competition rules. It urges the administration to place itself in the best possible position so as to evaluate the existence and seriousness of such infringements as well as the possibility and the propriety of taking specific investigative measures.\footnote{491} The duty of care thereby serves the interest of the complainant inasmuch as it enhances the likelihood of the Commission's intervention against the targeted party. In this regard, the complainant may influence the Commission's reaction: The more evidence the complainant is able to submit the more thoroughly must the Commission examine and the more difficult becomes it to refrain from acting for lack of Community interest. The effectiveness of the protection provided by the principle of care is however heavily dependent on the review practice adopted by the Community courts.

\footnote{490}{Cf. also Kerse, note 476, p. 235.}
\footnote{491}{Cf. also Vesterdorf, note 476, p. 85.}
c) The policy implications in balancing discretionary powers
and the duty of care

In the light of the above discussed 'hybrid' nature of the principle of care and its potential of substantively restricting administrative discretion, the balancing of the Commission's freedom of action on the one hand and the duty of care on the other remains a delicate task for the courts. Given the limited resources which the Commission has at its disposal to pursue competition violations and the increasing number of complaints submitted to it one easily realizes the enormous practical relevance of the balancing process on both the administrative and the judicial level. In this context the Community and the private interests in using the Commission's investigatory powers to uncover anti-competitive behaviour are very much likely to clash. In recent years the conflict of interest has increasingly fostered (and will continue to do so) the need for judicial settlement. Thus, litigation gives the Community courts ample opportunity for striking a sound balance between policy discretion and individual protection. The actual measure of administrative and political leeway endowed to the Commission depends on how widely the courts draw both the protective ambit of the principle of care and its own power of (substantive) review in the face of discretionary power. The following analysis will show that the CFI currently tends to shift the balance to the benefit of the complainant as well as its own powers of review.
d) Asia Motor France II: The development of the twin-concept of care and giving reasons into a means of substantive control of discretion

The judgment of the CFI in case Asia Motor France II, it is submitted, is a paradigm example of judicial control of discretion on mere 'procedural' grounds which comes very close to nullifying the Commission's power of appraisal with respect to the initiation or the further conduct of an investigation. The intrusive style of judicial control established by the CFI in this case is based on a peculiar technique which combines the 'procedural' requirement of care with that of giving reasons in order to achieve a substantive check of the Commission's exercise of discretion.

The CFI already emphasized in case Automec II that the statement of reasons is an indispensable means for reviewing the legality of a decision rejecting a complaint for lack of Community interest and, in particular, for checking whether the Commission has met the requirements of care in assessing the factual and legal elements set out in the complaint. In case Asia Motor France II the CFI was faced with a plea alleging an inadequate statement of reasons contained in the contested decision by

492 Cf. Case Automec II, respectively at par. 81 and 85 where the Court made it clear the the Commission may not simply refer to the 'Community interest' but must set out the reasons which induced it to think that there is no such interest in pursuing the complaint. The statement of reasons must furthermore reflect the Commission's careful assessment of the (non-)existence of a Community interest; cf. par. 86: 'To assess the Community interest in pursuing the examination of a matter, the Commission must take account of the circumstances of the particular case.'

493 Case Asia Motor France II, par. 22 ff.
which the Commission - after having taken a range of investiga-
tive measures \(^{494}\) had rejected the applicant's complaints. The
CFI, for the first time ever, split up the giving reasons re-
quirement in a purely procedural component ('insufficient state-
ment of reasons') and a component of a rather substantive nature
and with a strong connotation of reasonableness ('whether the
reasoning ... is well founded').\(^{495}\) Whilst the first component
was without defect because the statement of reasons set out
the 'facts and legal considerations having decisive importance
in the context of the decision',\(^{496}\) the Court engaged in an ex-
tensive analysis of the legality regarding the second component,
namely, of whether the 'reasoning is well-founded'. Under this
label the CFI developed a comprehensive assessment of whether
the Commission had observed the requirement of care when exami-
nining the applicants' complaints.\(^{497}\) By basing its approach on
this peculiar combination of the widely interpreted giving rea-

\(^{494}\) Ibid., par. 2 ff.. The Commission had requested information from
several importers and the French government. This obviously
amounted to a formal opening of an investigation (cf. the
wording of the decision rejecting the complaints, par. 13 ff.).

\(^{495}\) Cf. case *Asia Motor France II*, the headlines above par. 31 and
33 respectively (emphases added). Cf. also Pais Antunes, note
475, p. 276 who applauds this new approach; according to him the
statement of reasons (l'obligation de motivation) is to be
connected to the 'contrôle de la légalité externe' whereas the
question as to whether the reasoning is well founded (le bien-
fondé de la motivation) is to be linked to the 'contrôle de la
légalité interne'. It is however highly questionable whether the
latter aspect is to be ranged among the standards of procedural
legality at all (at p. 278 the author unconvincingly refers to
case *TU München*).

\(^{496}\) Ibid., par. 31.

\(^{497}\) Cf. par. 34-37 by which the CFI 'incorporated' the review refer-
ring to a breach of the principle of care into that of an inade-
quate 'reasoning'.

197
sons duty and the principle of care the Court created an important tool so as to thoroughly double-check the accuracy of the Commission's findings under the mask of 'mere procedural' review. Setting out the programme of its following analysis the Court held: 'in order to assess the legality of the first ground for rejecting the complaints, first the evidence adduced by the complainants should be verified and secondly the contested decision should be checked to determine whether it contains an appropriate examination of the factual and legal particulars submitted for the Commission's appraisal'. In the subsequent paragraphs the Court proceeded, in a first step, to a painstaking evaluation of the factual particulars and documentary evidence supplied by the complainants to the Commission. This, in effect, amounted to a more or less complete 'repetition' of the administrative decision-making process inasmuch as the CFI substituted its own 'careful' assessment of the evidence for that of the Commission. In a second step, the Court engaged in a thorough 'synoptic' analysis of the accuracy of the Commission's findings - as set out in the statement of reasons - in the light of its own evaluation of the evidence contained in the case-file. The CFI came to the conclusion that the Commission's findings do not meet the relevant legal and procedural standards.

498 The CFI placed the whole analysis under the heading of an 'infringement of an essential procedural requirement', cf. the headline above par. 22.

499 Ibid., par. 37.

500 Ibid., par. 39-44. The CFI went out of its way to state that it merely cursorily checks the probative value of the relevant information by repeatedly using the term 'prima facie' or 'on initial appraisal' (par. 39, 43, 44).

501 Cf., ibid., par. 45 ff.: 'The next step.. is to compare those findings of fact relating to the evidence furnished by the
sion had not carefully and impartially examined the documentation submitted to it and that the factual and legal particulars of the case 'were such as to induce [the Commission] to pursue its investigation'.\footnote{502} Although the Court finally annulled the decision on the grounds of a 'manifest error in the assessment of the facts which led [the Commission] to err in law'\footnote{503} it seems plain in the light of the whole argumentation that, in reality, a breach of the principle of care was at issue.

The case very impressingly shows how the principle of care in conjunction with the duty to state reasons, if extensively interpreted, is able to both restrict the discretionary powers of the Commission and enhance the scope of judicial review on substantive issues. One cannot avoid the impression that the only lawful decision of the Commission in the face of the evidence submitted to it would have been to pursue the investigation in the alleged anti-competitive practice complained of by the applicants. In other words, the clear message of the Court was that in this instance there was no discretion to close the file. The judgment furthermore is evidence of the growing tendency of the Community courts to intermingle procedural and substantive legality of administrative decisions and, accordingly, the standards of procedural and substantive review. The ex-

\footnote{502}{Ibid., in particular, par. 53.}
\footnote{503}{Ibid., par. 35.}
licit reference made by the CFI to the dichotomy 'reasons' - 'reasoning' under the single heading of Article 190 EC Treaty testifies that the Court not only intends to scrupulously review whether 'sufficient' reasons generally capable of justifying the decision exist (transparency requirement) but also reveals its propensity to controlling whether these reasons are actually good enough and substantively correct so as to materially justify the outcome of the decision-making (reasonableness requirement). Moreover, the duty to state reasons appears to virtually develop into a kind of 'dialogue requirement' because it is intertwined with a concept of care which would seem to require to thoroughly consider each and every 'relevant' piece of evidence put forward by the complainants. This development seems to be somewhat at variance with the consistent formula accepted by the Court that 'the Commission is not obliged to adopt a position, in stating the reasons for its decisions, on all the arguments relied on by the parties'.

Taking these two strands of development together one is tempted to state that the forecast made by Shapiro has come to be confirmed in Community administrative law. If the new dogmatic

---


approach as regards the interpretation of Article 190 EC Treaty comes to be generally established a further shift in the intensity of judicial control of administrative discretion under the mask of procedural review will be very likely.\textsuperscript{507} On the whole, the new technique chosen by the CFI is dogmatically unconvincing and dangerous. It overly undermines the hitherto more or less marked distinction between procedural and substantive legality which constitutes, as reinforced by the judgment in \textit{TU München}, one of the cornerstones of Community judicial review doctrine. The CFI itself seems to have become aware of the dangers inherent in its novel jurisprudence; so far, the formula used in \textit{Asia Motor France II} has not been reiterated in the subsequent case-law.\textsuperscript{508} However, in other instances this has not prevented the Court from thoroughly double-checking the reasons stated by the Commission in decisions rejecting complaints.\textsuperscript{509} A further shortcoming of the judgment in \textit{Asia Motor France II} is that the Court embedded its analysis in a dogmatically fairly unsound construction of several grounds for review. It first pretended to examine a violation of Article 190 EC Treaty but then clearly proceeded to analyze the exis-

\textsuperscript{507} Cf. also the State aid cases dealt with in the following section.

\textsuperscript{508} See, in particular, CFI, judgment of 18.9.1996, Case T-387/94, \textit{Asia Motor France SA and Others (III) v. Commission}, not yet reported, par. 103-105 where the Court, albeit referring to \textit{Asia Motor France II}, did not repeat the 'reason'-'reasoning' dichotomy.

tence of a breach of the principle of care. Finally, instead of annulling on the grounds of an infringement of one of these procedural requirements it came to the conclusion that the Commission had committed a 'manifest error of assessment', a ground for review which is clearly non-procedural in nature.\footnote{510} Irrespective of these deficiencies the judgment in \textit{Asia Motor France II} (and also in \textit{Automec II}) constitutes a landmark in the establishment of a fully fledged procedural protection of complainants in competition matters. The handling of complaints by the Commission has come to be radically strengthened under the doctrine of care. It requires the Commission, in principle, to adopt a 'dialogue-style' of case-handling when examining complaints. In so far, many of the shortcomings inherent in the generally recognized procedural status of complainants are compensated for. However, the move towards a dialogue requirement is more pronounced with regard to complainants in the field of State aids matters. The latest jurisprudence in this respect will be analyzed in the following section.

4) Complainants in State aids proceedings: From 'Cook' to 'Sytraval'

The position of complainants in State aid matters differs to a considerable extent from that in competition proceedings.

This is mainly due to the lack of secondary legislation in this regard\textsuperscript{511} and the deficiencies of procedural protection inherent in the somewhat peculiar construction of a double-phased investigatory procedure pursuant to Article 93 par. 3 and 2 EC Treaty. The two stages of procedure are nonetheless comparable to those in competition matters described above when dealing with the different phases of protection provided to complainants under the concept of care after having lodged a complaint. It will be seen that the duty of care in the context of State aid procedure fulfills a similar function. Before addressing in more detail this aspect it is necessary to shed some light on the complicated structure of the double-staged investigatory procedure under Article 93 EC Treaty and, in particular, its implications for the standard of procedural protection afforded to individual parties. The basic conception, as in the case of competition proceedings, refers to a 'tripartite' procedural relationship involving the case-handling Commission, the targeted party - this is in principle the Member State granting aid but, in a wider sense, also the private recipient of the aid - and the complaining party (mostly a competitor of the recipient). The following considerations will exclusively address procedures following the notification of new State aids.\textsuperscript{512}


\textsuperscript{512} As to the different handling of existing and new State aids cf. Craig and de Burca, 'EC Law: Text, Cases, and Materials', 1995, p. 1098 ff.; Hancher, Ottervanger and Slot, 'EC State Aids', 1993, par. 17.13 ff..
a) The principle of care and its significance in the double-staged investigation procedure under Article 93 EC Treaty

As already briefly discussed,\(^{513}\) State aids proceedings consist of, on the one hand, an informal or preliminary stage of investigation regulated by Article 93 par. 3 EC Treaty and, on the other hand, a formal or 'adversarial' inquiry procedure under Article 93 par. 2 EC Treaty. The distinction is important in several regards. The preliminary procedure is designed to allow the Commission to come to a 'prima facie' opinion on the compatibility of the notified State aid with the common market within a limited period of two months.\(^{514}\) At this stage the Commission must achieve a preliminary assessment on the basis of the facts available so as to come to the conclusion whether it has 'serious difficulties' or not in determining the lawfulness of the aid.\(^{515}\) Partly due to the short duration and its preliminary nature, this stage of the inquiry is characterized by a high degree of opacity and the lack of any participation of third parties.\(^{516}\) After notification by a Member State of plans to grant aid the Commission is under no obligation to make this

---

\(^{513}\) Cf. under B.III.

\(^{514}\) This time-limit was derived by the ECJ from the principle of diligence, cf. ECJ, Case 120/73, Gebrüder Lorenz GmbH v. Germany, [1973] ECR 1471.

\(^{515}\) See, e.g., ECJ, Case 84/82, Germany v. Commission, [1984] ECR 1451, par. 11 and 13.

public;\(^\text{517}\) neither is it required to draw the attention of potentially interested third parties to the planned measures or to give them an opportunity to make their views known.\(^\text{518}\) It is only in connection with the second procedural stage, the formal inquiry under par. 2 of Article 93, which formally is not limited in time,\(^\text{519}\) that the Commission has to assess the case with full knowledge of all relevant facts, that third parties are entitled to intervene before the Commission and enjoy fully fledged procedural protection.\(^\text{520}\) However, the Commission is not obliged to engage in this stage of the proceedings in any case. It may restrict itself to the preliminary inquiry if this is sufficient to conclude that the aid in question is compatible with the common market. Only if the initial investigation reveals (serious) difficulties in this regard, the Commission is 'under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 92 par. 2' EC Treaty.\(^\text{521}\)

\(^{517}\) Only the decision terminating the preliminary procedure is published (OJ C series).


\(^{519}\) See on this point the criticism by Struys, 'Questions choisies de procédure en matière d'aides d'Etat', [1993] Revue Trimestrielle de Droit Européen p. 17 (27 ff.).

\(^{520}\) Cf. the wording of this provision: ' .. after giving notice to the parties concerned to submit their comments ...'; see generally Advocate General Tesauro, note 516, p. I-2505 ff..

In the light of the foregoing, one easily understands the end-endeavour of third parties or complainants to urge the Commission to initiate the formal inquiry. If the Commission refuses to start a formal investigation and adopts a so-called 'decision to raise no objections' against the aid at issue, third parties (competitors) who might be adversely affected by the aid will be left without any procedural protection.\textsuperscript{522} They have no procedural rights at the preliminary stage and the opening of the formal procedure which would allow them to participate and to submit their views in order to influence the outcome of the Commission's decision-making is barred. Complainants who submit to the Commission information about allegedly illegally granted subsidies (mostly to the benefit of competitors) for preliminary review are therefore, in principle, devoid of any possibility to protect their interests in the administrative procedure.

In the face of this 'protective vacuum' the principle of care comes to fulfill an important function. At the preliminary stage it plays a significant part by both compensating for the lack of procedural protection and counterbalancing the Commission's policy discretion. As in the case of competition matters the Commission enjoys wide powers of discretion regarding the implementation of State aids policy and principally cannot be compelled to establish a breach of the rules of the Treaty governing

\textsuperscript{522} Cf. the pertinent analysis of this dilemma by Advocate General Tesauro, ibid., p. I-2505 ff.; see also Maselis and Williams, note 476, p. 117; Hancher, 'State Aids and Judicial Control in the European Community', [1994] European Competition Law Review p. 134 (146 f.).
State aid measures. This is so because the assessment of the compatibility of an aid with the common market involves complex evaluations of an economic and social nature which must be made within a Community-wide context. It follows from the discretionary nature of this judgment that the Commission has basically also discretion as to whether the case requires the initiation of the formal inquiry procedure under Article 93 par. 2 EC Treaty. The Commission's discretion in that regard is however counterbalanced by the above mentioned 'serious difficulty test'. Here the protective reflex of the principle of care, which requires the Commission to carefully examine the concrete circumstances of the case, comes forcefully into play. It urges the Commission to decide under the best possible conditions whether it meets such difficulties in its preliminary assessment of the lawfulness of the aid or not. Even in the


Compare this to the margin of discretion enjoyed by the Commission in competition proceedings to reject complaints for lack of Community interest.

context of the preliminary stage of the procedure the duty of care thus displays a considerable potential for evolution: The higher the requirements of care are and the more information the complainant submits in the course of the preliminary inquiry the more likely becomes it that the Commission will actually have 'difficulties' or that the Court will detect them when reviewing the Commission's decision. 527

Yet, the duty of care is also relevant on the second stage, the formal inquiry under Article 93 par. 2 EC Treaty where it requires the Commission to diligently conduct its investigation. 528 In that regard the requirements of care basically do not differ from those already discussed in the framework of competition proceedings. Hence, in the context of the formal inquiry, as opposed to the preliminary procedure, the concept of care is to be understood as serving the protection of both the targeted Member State (and accordingly the recipient of the aid) and the complainant alongside other procedural safeguards endowed to the parties to the decision-making process. The focus in the following analysis will however be on the protective function of the principle of care at the informal stage of the procedure where it has produced its most significant effects.

527 See also Hancher, note 522, p. 147.

528 Compare this to the function of the duty of care in formally initiated competition proceedings. See also Advocate General Tesauro, ibid., p. I-2505, par. 14 f.
b) The tentative recognition of the duty of care by the ECJ in Cook and Matra

In State aid matters, apart from the specific features of the Lorenz precedent, the concept of care as a means of protecting individuals and counterbalancing the Commission's discretion in investigating notified aids or complaints has come very late to the forefront. The first important judgment in this respect was given by the ECJ in Case Cook v. Commission. Advocate General Tesauro, in a remarkable Opinion, recognized the general importance of the TU München ruling with regard to procedural legality in the face of discretionary decisions and transposed the concept established therein, including the requirement of care, to proceedings in State aid matters. Regarding the patent lack of individual protection and transparency in the preliminary investigation procedure under Article 93 par. 3 EC Treaty, which extremely contrasts with the protective features of the formal procedure under par. 2, the Advocate General argued that 'strict limits must be set to the Commission's power to determine the compatibility of aid solely on the basis of the outcome of the preliminary procedure'. According to him, if the lawfulness of the contested aids is not already 'manifestly apparent'

---

529 ECJ, Case 120/73, Gebrüder Lorenz GmbH v. Germany, [1973] ECR 1471 establishing the time-limit of two months derived from the principle of diligence.


532 Ibid., par. 16 (emphasis added).
upon an initial examination, the participation of third parties as provided for by Article 93 par. 2 is 'absolutely essential'; only the contentious procedure would afford adequate protection of the legitimate interests of competitors as well as those of undertakings in receipt of aid and enable the Commission 'to gain the information it needs for a full assessment of the nature and Community-wide impact of the relevant national measure'.

The Court, in its judgment, appears to have widely endorsed the concerns of the Advocate General. The endeavour to reduce the significance of the preliminary procedure and, in turn, to increasingly shift the decision-making onto the level of the formal inquiry procedure in the interest of both individual parties and a more thorough investigation of State aid measures is felt in the judgment on mainly two levels. First, the Court - in accordance with the Advocate General - accepted third parties to have standing (under Article 173 par. 4 EC Treaty) to challenge a Commission decision 'to raise no objections' given at the end of the preliminary procedure in order to secure their procedural safeguards which they would have enjoyed if the second stage of the investigation had been opened. Second, the Court implicitly strengthened the 'serious difficulty test' by requiring the Commission 'to determine, subject to review

---

533 Ibid., par. 17.

534 See, e.g., the Advocate General, ibid., par. 43 ff. and the ECJ, ibid., p. 1-2528, par. 23; see also ECJ, Case C-225/91, Matra SA v. Commission, [1993] ECR I-3203, par. 17. This approach contrasts with that in the COFAZ precedent where the actual participation in the (formal investigation) procedure was the essential reason to accord locus standi, ECJ, Case 169/84, COFAZ v. Commission, [1986] ECR 391.
by the Court, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid warrant the initiation of the formal investigation procedure. Even though the Court, as opposed to the Advocate General, did not explicitly mention the duty of care as such, it is fair to assume that it exactly had this concept in mind. In the following paragraphs of the judgment the Court thoroughly assessed whether the factual evidence submitted to the Commission was such as to raise difficulties in the evaluation of the legality of the aid at issue. Though more cautious in the reasoning as the Advocate General in this respect the ECJ finally quashed the contested Commission decision 'to raise no objections' on the grounds that the information available was such as to necessitate 'a complex analysis of the sub-sector in question and further investigations into the undertakings in that sub-sector' and that the Commission therefore 'should have initiated the procedure under Article 93 par. 2 EC Treaty'.

The judgment shows how the 'serious difficulty test' combined with the requirement of diligence (and the giving reasons duty) enables the Court to second-guess the Commission's (discretionary-

535 Cf. ECJ, ibid., par. 30. See also ECJ, Case C-225/91, Matra SA v. Commission, [1993] ECR I-3203, par. 34.

536 Ibid., par. 31 ff..

537 Ibid., par. 65 reproaching the Commission 'wholly arbitrary' and 'patently incorrect' findings.

538 Ibid., par. 37.

539 Ibid., par. 38.
ry) assessment of the factual elements of the case. The hook on which the ECJ hangs its entitlement to control the exercise of discretion, however, is clearly procedural in nature.\footnote{540} The Commission's preliminary assessment must be judicially reviewable in order to prevent it from unduly denying individual parties their procedural rights under Article 93 par. 2 EC Treaty.\footnote{541} Admittedly, in \textit{Cook} the wrongfulness of the Commission's preliminary findings was so obvious that one should be cautious in judging the Court's style of review as intrusive or activist in character.\footnote{542} As the tentative language in the judgment suggests, the ECJ seemed to be well aware of the impropriety to fully double-check the Commission's exercise of discretion in assessing the compatibility of State aids with the common market. That this was actually not the Court's intention was clearly spelled out in the immediate follow-up decision in case \textit{Matra}.\footnote{543} The Court appears to have accepted that in many cases a perfunctory review of the Commission's reasoning is sufficient.

\footnote{540} Cf. also Case \textit{Matra}, ibid., par. 32 ff. where the Court proceeded to the 'serious difficulty test' under the heading of a breach of procedural rules.

\footnote{541} Cf. even more pronounced Advocate General van Gerven in Case C-225/91, \textit{Matra SA v. Commission}, [1993] ECR I-3203, p. I-3248, par. 58 stating that 'if the Commission wrongly decides not to initiate the procedure under Article 93 par. 2, that quasi-automatically constitutes a breach of the rights of the defence of the third parties affected'.

\footnote{542} See also Hancher, note 522, p. 138.

\footnote{543} The judgment was given only one month later and dealt with a similar problem, Case C-225/91, \textit{Matra SA v. Commission}, [1993] ECR I-3203. Here, the Court refused to quash the contested Commission decision. It expressly held that it 'cannot substitute its own assessment of the facts, especially in the economic sphere, for that of the author of the decision' (par. 23) and it came to the conclusion 'that the Commission had carried out a subtle and detailed examination ..' (par. 26).
to allow for detecting whether the Commission itself felt difficulties in coming to a clearcut conclusion.\(^{544}\) The reviewability of the 'serious difficulty test' in conjunction with principle of care is thus to be understood rather as a tool for compelling the Commission to open the contentious phase of the procedure in the event of manifest errors of assessment,\(^ {545} \) than as a means to completely scrutinize the substantive correctness of the administration's findings.

Whereas the ECJ arguably struck a reasonable balance between the complainants need for protection and the Commission's policy discretion in cases *Cook* and *Matra*, the CFI revealed once again its inclination to shift the balance to the benefit of individual parties and its own powers of review. As will be seen in the following analysis of the recent case-law the Commission's discretion in handling cases solely within the informal procedure under Article 93 par. 2 has been reduced to an absolute minimum.

c) Developing a 'dialogue requirement': The CFI judgments in *SIDE* and *Sytraval*

In its recent judgments *SIDE* and *Sytraval* (both appealed)\(^ {546} \)

__\(^{544}\)__ Cf. also Case C-225/91, ibid., par. 48 requiring the Commission to set out in the *statement of reasons* 'only the reasons why the Commission considers that it is not faced with serious difficulties . . .'.

__\(^{545}\)__ Cf. Case C-225/91, ibid., par. 22 ff..

the CFI went a decisive step further in both the establishment of the principle of care as a standard of procedural legality in State aids procedures and its extensive interpretation, in particular, with regard to the preliminary investigation procedure under Article 93 par. 2 EC Treaty. The judgment in case Sytraval which deals with an action for annulment directed against a Commission decision rejecting a complaint entirely rests on procedural grounds, namely, a breach of the giving reasons duty pursuant to Article 190 EC Treaty. The CFI detected numerous 'procedural' defects in this regard, yet, in reality intermingled the alleged inadequacy of the reasons given in the decision with a range of breaches of the duty of care as well as (substantive) manifest errors of assessment. Besides Asia Motor France II discussed above the two rulings in SIDE and Sytraval are two further brilliant examples of substantive judicial review under the mask of procedural requirements.

and Gilliams, note 476, p. 117 ff. and Kerse, ibid., p. 234 ff.

Somewhat paradoxically, case Sytraval formally relates to the legality of a decision given at the end of a 'preliminary investigation' although the complaint was rejected by the Commission after having dealt with the facts of the case for 51 months (!); cf. ibid., par. 55 ff.

Case Sytraval, ibid., par. 50 ff.. The same holds true, albeit to a lesser extent, for Case SIDE, ibid., par. 58 ff..

Cf. Case SIDE, par. 60 where the Court admits that it intends to objectively assess the adequacy of the reasons by comparing the grounds of the Commission's decision with the information available to the Commission at the time the decision was adopted. In Sytraval, par. 54 the CFI held that 'judicial review which such a statement of reasons must allow is not ... whether there has been a manifest error of assessment ... but a review of the interpretation and application of the concept of State aid ...'. And in par. 60 the CFI questioned whether 'the reasons set out in the contested decision are capable of supporting the contention that the measures complained of by the applicants did not constitute State aid within the meaning of Article 92 of the
However, the most far-reaching result achieved in these judgments is that they sharply establish, for the very first time ever in the case-law, a 'dialogue requirement' and a duty of the Commission to actively use its investigatory powers to the benefit of complainants. The following comment will focus on the Sytraval ruling which contains the most pronounced statements made by the Court with regard to the aforementioned aspects.

In case Sytraval the Court proceeded to a very detailed analysis of the accuracy of the reasons given by the Commission in the contested decision. The Court's review in this regard clearly strays beyond the realm of mere procedure; this is further underlined by the detection of 'manifest errors of assessment' in the course of the examination of the 'procedural' legality of the decision. Similar to its approach in Asia Motor France II the CFI compared in a synoptic manner the whole documentary evidence and the arguments put forward by the applicants with the findings made by the Commission; in SIDE it even engaged in a supplementary factual investigation by putting questions to the parties to the litigation in order to find out whether the factual elements relied on by the Commission were correct.

---

Treaty'.

550 Cf., in particular, Case SIDE, par. 71; Case Sytraval, par. 62, 66, 69 and 78.

551 Cf. Case Sytraval, par. 77.

552 Cf. ibid., par. 73.
and the reasoning based thereon well-founded.\footnote{553} In case Sytraval the Court developed in a revolutionary manner - on the basis of Article 190 EC Treaty in conjunction with the principle of care - a 'dialogue requirement' in the framework of the preliminary (in principle non-adversarial) investigation procedure under Article 93 par. 3 EC Treaty. Whilst acknowledging that the established case-law calls for the opposite stance and without giving any dogmatic sound explanation for its volte-face, the Court argued that the administration is 'nonetheless obliged to give a \textit{reasoned answer to each of the objections raised in the complaint}'.\footnote{554} The wording chosen by the Court however suggests that the duty of the Commission to engage in a 'dialogue' is not meant to be of general applicability but merely refers to the handling of complaints and the factual and legal arguments set out therein. In the light of this it remains to be seen whether the settled case-law which requires the Commission to discuss only the essential aspects raised by the parties during the administrative procedure is still to be regarded good law in general.\footnote{555}

In a second important step, the CFI stressed the relevance of the duty of care in the new 'dialogue style' of the Commission's case-handling in the preliminary procedure: The Court derived from the concept of care that, as soon as the Commission has

\footnote{553}{Cf. Case \textit{SIDE}, par. 67 ff..}
\footnote{554}{Case \textit{Sytraval}, par. 62 (emphasis added); see also par. 69 where the Court sanctioned the Commission for not having answered and examined an objection raised by the applicants.}
\footnote{555}{See also, with a somewhat different reading Maselis and Gilliams, note 476, p. 118.}
obtained relevant information during the investigation on which it bases its decision without having granted the complainant an opportunity to comment thereon, 'it is under an automatic obligation to examine the objections which the complainant would certainly have raised if it had been given the opportunity of taking cognizance of that information'. This passage of the judgment impressingly shows how far the CFI is ready to go in filling gaps of procedural protection left by statutory rules. The legal significance of the statement is twofold: First, it establishes so to speak ex nihilo a right to be informed and heard of the complainant in the preliminary procedure under Article 93 par. 3 EC Treaty. Second, it sanctions or attempts to compensate for violations of this entitlement by an extensive application of the principle of care. This concept requires the administration to investigate or to 'guess' the hypothetical objections 'which the complainant would certainly have raised' if he had been duly informed and heard. The non-observance of this duty, in turn, is penalized by the establishment of a defect in the statement of reasons. Thus the dialogue requirement comes to be extended even beyond the 'actual dialogue' to a 'hypothetical dialogue' between the administration and the individual party. At a later point in the judgment the CFI pushed the concept of 'hypothetical dialogue' even further by imposing a positive duty on the Commission to use its investigatory powers in the interest of the complainant if the latter is not able to submit conclusive evidence supporting his objec-

556  Ibid., par. 66 (emphasis added).
557  Ibid., par. 66.
In the Court’s view the superiority of the Commission’s means (in relation to those held by the complainant) to effectively and appropriately investigate complaints justifies to lower the standard of the evidence to be supplied by the complainants in support of their application. The non-utilization of the Commission’s powers to investigate 'inconclusive' evidence put forward by the complainant, in turn, constitutes a defect in the statement of reasons for lack of 'dialogue'; in other words, the Commission must make use of its investigatory powers in the interest of the complainant as soon as it is faced with 'prima facie' evidence and give 'a reasoned response to each of the objections' in support of which the evidence is submitted. In a final step, the Court reaffirmed the existence of a dialogue requirement by basing it on both the duty to state reasons and the duty of care. In so doing the Court held 'that the Commission's obligation to state reasons for its decisions may in certain circumstances require an exchange of views and arguments with the complainant, since, .. the Commission needs to ascertain what view the complainant takes of the information gathered by it in the course of its inquiry'. And the Court added: 'that obligation constitutes a necessary extension of the Commission's obligation to deal diligently and impartially with its inquiry into the matter by eliciting all such views

558 Ibid., par. 77. See also Kerse, note 476, p. 234 f.; Maselis and Gilliams, ibid., p. 119.

559 Ibid.; the Court furthermore pointed to the particular circumstances of the case which would seem to have it induced to adopt such a far-reaching approach in the interpretation of the giving reasons duty.

560 Ibid., par. 78 (emphases added), cf. also Case SIDE, par. 71.
as may be necessary'.

It needs hardly commenting on that the Court thus definitely created a right to be heard of complainants in the framework of the preliminary investigation procedure; and the astonishing facet of this entitlement is that it is, according to the Court, intimately linked to and to be derived from the duty to state reasons and the inquisitorial principle (or the principle of care) alike. If this approach is dogmatically to be taken seriously the Court would seem to have established a conception of procedural protection of individuals which is largely and ultimately based on the protective reflex of the inquisitorial principle. This 'super'-principle, in turn, is capable of creating by-entitlements, such as the right to be heard, in the interest of both accurate decision-making and procedural protection. Under certain circumstances, it even generates a right of individual parties to call upon the Commission to actively employ its investigatory authority to their benefit and, accordingly, considerably alleviates the burden of proof which normally lies with the complainant. The principle of care with its wide ambit therefore may compensate for the lack of procedural protection whenever the necessity of such protection is felt and irrespective of the content of the rules governing the administrative procedure in question. The Court obviously realized the boldness of its new jurisprudence and the fact that, in effect, it widely blurred the distinction between the informal and the formal stage of the investigation procedure.

---

561 Ibid. (emphasis added).
562 Cf. also Maselis and Gilliams, note 476, p. 119.
However, in a reaction to the Commission's critique that the introduction of adversarial elements in the preliminary procedure would automatically require the initiation of the formal inquiry, the Court went out of its way to deny that this had actually happened. Instead, the Court reiterated its emphasis on the principle of diligence by stating that the 'Commission.. has at its disposal, *during the preliminary stage of the procedure*, adequate means to carry out a diligent and impartial examination of the complaint and to comply with its obligation to give reasons for its decision to reject a complaint...'.

On the whole, the judgment draws a puzzling picture of a high standard of procedural protection achieved through the establishment of a very complex, dogmatically hardly explainable, interrelationship between the giving reasons duty, the principle of care and the right to be heard. Although the Court has thus reached a maximal standard of protection of complainants in State aid (preliminary) procedures one cannot avoid the impression that the Court, in this instance, has gone too far and touched the ground of 'excessive proceduralism'. The Court not only is to be criticised for the lack of sound dogmatic foundation of its new approach, which intermingles the scope of application of a range of procedural standards and completely blurs the distinction between Article 93 par. 3 and 2 respectively,  

563 Ibid., par. 79. The problem to which the Commission alluded in this respect was that the Member State would be obliged to suspend the implementation of the measure in question.  
564 Ibid. (emphasis added).  
565 See also Maselis and Gilliams, ibid., p. 119.
but also for its intrusive style of reviewing the substantive accuracy of the Commission's exercise of discretion.\textsuperscript{566} In so doing the CFI has operated a marked shift in relation to the more modest attitude of the ECJ in cases \textit{Cook} and \textit{Matra} discussed above. This is also true with regard to the establishment of a 'dialogue requirement' in the preliminary procedure which had been rejected by the ECJ in \textit{Matra}.\textsuperscript{567} Admittedly, the genesis of the case in \textit{Sytraval} displayed specific features which would appear to justify to severely sanction the Commission's case-handling which took place over a period of 51 months; and the Court several times reaffirmed that its considerations were tailored to the concrete circumstances of the case.\textsuperscript{568} Nevertheless, the abstract and generalized terminology used in the judgment with regard to the novel 'dialogue style' of judicial review suggests that the case will serve as a precedent whose central passages will readily come to be instrumentalized by both potential plaintiffs and the Court in subsequent litigation. As experience and the analysis of the case-law in this paper has shown, this prospect is fairly likely to become reality, unless the CFI does not expressly switch to a more humble stance in the near future or comes to be censured by the ECJ on appeal. So far, every statement made by the Court

\textsuperscript{566} One of the authors of the judgment has however unconvincingly attempted to justify the approach in \textit{Sytraval} as a 'mere marginal review' on procedural grounds, cf. Lenaerts and Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process', [1997] \textit{Common Market Law Review} p. 531 (560 esp. at footnote 90).

\textsuperscript{567} ECJ, Case C-225/91, \textit{Matra SA v. Commission}, [1993] ECR I-3203, par. 51 ff..

\textsuperscript{568} Cf., ibid., par. 55 ff., 77 ff.
in *Sytraval* and *SIDE* suggests a development to the contrary. In practice, it will be interesting to see how the Commission is apt to cope with the increased workload within the framework of the preliminary procedure. The already forecasted 'catch 22' situation is now likely to occur since the Commission is obliged to terminate this stage of the proceedings within two months. Thus, the time-dimension of the principle of diligence as established in the *Lorenz* case tends to conflict with the material aspect of the same principle to carefully and impartially investigate the case. The Court will have to address this dilemma, unless it is ready to accept that the preliminary procedure as provided for by the Treaty completely looses its practical relevance. In any event, the establishment of a dialogue style of handling complaints clearly brings about a marked approximation of the respective requirements governing the informal and formal part of the inquiry procedure under Article 93 EC Treaty.

5) **Conclusion - the principle of care/diligence**

The above made analysis of the case-law has shown that the principle of care has gone through a deep metamorphosis in recent years and that its significance is steadily growing. This not only relates to its expansion as a process standard into various fields of Community policy-implementation but also to its potential for mutating - in interaction with the giving reasons duty - into a quite intrusive vehicle of judicial review of adminis-
trative discretion. The reduction of administrative leeway resulting from this judicial practice is concomitant with both the increased use of the principle of diligence as a substantive requirement of administrative legality and a proportional growth of judicial powers of control. The gradually more intrusive stance taken by the Community courts - mirrored by the line of development starting with Nölle I to Asia Motor France II and Sytraval - suggests that the dynamism of judicial self-empowerment has not yet come to an end.

This shift in the practice of judicial control is primarily based on an up-grading of the protective or dignitarian rationale implicit in the principle of care which potentially runs counter administrative efficiency.\(^{270}\) It is difficult to predict whether the Community courts will be able to draw the necessary limits to the protective ambit of the principle of care in order to secure a reasonable margin of manoeuvre of the administration. This is all the more true with regard to the most remarkable feature of the recent case-law, namely, the imposition of a 'dialogue requirement' on the Commission when investigating complaints. The current evolution in this respect has much in common with the US American experience in judicial activism vis-à-vis administrative rule-making.\(^{571}\) Yet, one important difference should be noted: Whereas the Community

---


courts, besides individual protection, clearly also envisage to enhance the rationality and the transparency of the administrative decision-making process, the novel dialogue style, as opposed to US administrative law, would seem to widely lack a democratic dimension. Instead, from the standpoint of the Community courts, the 'rule of law', effective judicial process and dignitarian considerations still appear to be the very 'leitmotiv' for their increasing lack of deference to administrative policy-making.

In any event, the new 'dialogue style' of judicial review as created in the cases Asia Motor France II and Sytraval seems universally applicable to the handling of complaints lodged by competitors in a range of administrative proceedings, such as in competition, State aids and anti-dumping matters. And it remains to be seen whether the Community courts are willing to extrapolate the concept to all kinds of administrative procedures in which the Commission is called upon to use its investigative powers before reaching a decision liable to affect individuals. This prospect, in turn, opens the gateway for Community administrative process to move, in the long run, into the direction of a democratically inspired dialogue requirement as it is known in US American administrative rule-making, provided the Courts discover the opportunity of furthering the democratic impetus and show some inclination to depart from the 'rule of law' doctrine.

---

Another important dimension of the protective function of the principle of care is that it appears to be well-suited an instrument to achieving a harmonized and improved standard of procedural protection in so-called composite administrative procedures. From the viewpoint of individual parties it is of utmost importance that the Commission can be imputed the responsibility for procedural failures made by the national administration in the 'preparatory phase' of the decision-making process. The practical relevance of and necessity for establishing a concept of imputability is highlighted by the fact that the investigation and clarification of the individual case in this instance - as evidenced by the cases TU München and France-Aviation - is largely dependent on the thorough work of the national authorities on which the Commission must rely when adopting the final decision. Moreover, in the face of the lack of resources at the Commission's disposal and the current endeavour to promote subsidiarity it is fairly likely that the significance and complexity of cooperative administrative decision-making in the European Community will grow in the near future. The corollary of the continuous construction of an ever more complicated and intertwined Community administrative system - in parallel to the models of policy-implementation existing in federal States - is that administrative tasks are increasingly to be shared between the Community institutions or independent agencies on the one hand and the national authorities

---

As the Borelli precedent discussed above suggests, effective procedural and judicial protection against negligent conduct on the part of the national administration is not always available before the national courts. Hence, it is mandatory to centralize judicial protection before the Community courts and to enable them to effectively sanction such procedural defects when reviewing the legality of the final Commission decision. By applying this concept of imputability a first important step in the direction of 'vertical convergence' of procedural protection could be achieved.


E. Conclusion

This paper has attempted to show that and how a range of principles of good administration governing Community administrative process have gradually become - mainly through judicial activism - an integral part of the 'constitutional' foundations of Community administrative law. The term 'expansion' chosen to describe the various levels and directions of this development stands for a marked trend towards juridical universalism. On the level of direct administration, an evolution of 'horizontal convergence' of procedural standards is clearly discernable, in particular, with respect to the right to be heard and the principle of care. As the analysis of the case-law has further shown, the aforementioned standards display the capacity of narrowing the gap of procedural protection existing in composite administrative procedures by rendering possible the imputability of process failures committed on the national level to the Commission. In so far it is suggested to speak of a tentative move towards 'vertical convergence' of procedural protection, even though the concept of imputability which is being advocated in this paper has not yet been overtly recognized as such by the Community courts.

In order to adequately assess the practical and theoretical consequences of this evolution, it is useful to refer once again to the basic rationales determining the existence of process

standards. The Community courts have forcefully stressed the dignitarian purpose of those rules and thereby considerably improved individual protection in administrative procedures. Surely, also from the perspective of the instrumental rationale, the high degree of procedural protection and participation is paralleled by an increased standard of rationality, accuracy as well as transparency of the decision-making process. On the other hand, exaggerated emphasis on procedural protection and participation may produce counterproductive effects regarding administrative efficiency and the workability of the administration as such. Indeed, 'excessive proceduralism' or disproportionate curtailing of the administration for the sake of individual protection and transparency is to be regarded incompatible with 'good administration'. Both the dignitarian rationale and the instrumental rationale of process rules as essential components of this notion are to be combined in a reasonable manner. The task of the Community courts is delicate in this regard. They bear the responsibility for maintaining the workability of the administration and the institutional balance provided for by the Treaty. Thus, they will have to resist the clearly felt temptation of excessively enhancing their own powers of review by means of an extensive interpretation of process rules to the detriment of the freedom of manoeuvre enjoyed by the administration under the Treaty and secondary legislation. The novel dialogue style of judicial

---


228
control recently established by the CFI would seem to point into the wrong direction in that it tends to overestimate the protective rationale of process rules. Nonetheless, as a democratic component is arguably still lacking in Community administrative process, it would lead too far to forecast, at least as regards the near future, a revolutionary development in line with the US American experience in judicial activism. To date, the Community courts appear to primarily operate on the basis of the protective rationale of procedural rules and the 'rule of law'. These considerations still have priority over tendencies to lay the foundations of 'practicatory democracy' on the level of (economic) administrative decision-making dealt with so far. However this may change with time. As the democratic deficit of the Community on the legislative level, mainly for political reasons, continues to be strongly felt, the Community legal system will quite necessarily be induced to shift to other models capable of enhancing its accountability and legitimacy.\footnote{Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment', [1997] European Law Journal p. 105 (120 ff.).} This, in turn, may contribute to a further strengthening of judicial activism similar to the US American style of judicial supervision of administrative rule-making.\footnote{Shapiro, 'Codification of Administrative Law: The US and the Union', [1996] European Law Journal p. 26 (44 ff.). See also Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', [1996] European Law Journal p. 105 (127).}

Even though the dynamism of constitutionalizing procedural...
principles undeniably exists, it remains open to question whether 'fundamental' procedural rights actually deserve to be named as such if compared to the degree of protection afforded by 'substantive' fundamental rights. Whereas the latter category is generally recognized to have an untouchable core substance which renders impermissible any impingement on the part of the administration, process rights obviously have no such inviolable substance. Breaches of procedural rights are increasingly regarded negligible if the final outcome of the decision-making would not have been different even in the event of their observance. Seen from this perspective, process rules (and accordingly procedural justice) appear to have a subsidiary instrumental function, namely, of ensuring the substantive accuracy and legality of administrative acts (substantive administrative justice) rather than an autonomous dignitarian value of their own which is comparable to that of substantive fundamental rights. So far, the problem of how to handle the so-called 'harmless error principle' has not been

---


unequivocally settled by the Community courts. As the above analysed case-law has shown, they rather take a pragmatic and flexible stance on a case-by-case basis instead of setting universally applicable guidelines.

Finally, the question of a possible codification of process standards is to be raised. Indeed, why not codify the principles dealt with in this paper if their universal character is to be acknowledged in any event? Thus, the case-law of the Community courts could serve as the foundation for codifying horizontally applicable procedural standards in European administrative law. A further frame of reference is to be found in the (legally non-binding) catalogues of principles of good administration adopted by the Council of Europe (Committee of Ministers).


Cf., e.g., Resolution (77) 31 of 28.9.1977 entitled 'On the Protection of the Individual in Relation to the Acts of Administrative Authorities' which is of particular interest as it comprises a set of procedural standards governing administrative decision-making, such as the right to be heard, access to information and the duty to give reasons. For a short discussion cf. Schwarze, 'Der Beitrag des Europarates zur Entwicklung von Rechtsschutz und Verfahrensgarantien im Verwaltungsrecht', [1993] Europäische Grundrechte Zeitschrift p. 377 (381) and 'European Administrative Law', 1992, p. 1185 f.; Kuyper and van
The main argument in favour of this approach which is quite often raised is that of legal certainty.\footnote{586} However, it is questionable whether the establishment of written process rules would achieve much more as unwritten jurisprudential standards already do.\footnote{587} In the light of the broad and abstract formulation of such horizontally valid principles the leeway of judicial interpretation seems no less important as in the case of judicially 'created' general principles. The courts would thus continue to operate in quite the same manner as they hitherto used to do. Nevertheless, important aspects of the discussion on the constitutional value of process rules are clearly open to a regulated solution which could coherently predetermine the application of the law by the courts. Codification makes sense, in particular, with respect to the above mentioned issue of how to regulate the legal consequences of procedural defects. Much would be achieved if the actual extent of protection provided by fundamental procedural rights could be clearly defined. Rules governing the conditions under which a procedural failure is to be regarded material would remedy the obvious doctrinal confusion still prevailing in the Community courts in this regard. A second major aspect is the problematic lack of protection in composite administrative procedures. It has


\footnote{587}{Harlow, ibid., p. 8.}

\footnote{588}{Harlow, ibid..}
already been advocated to establish a doctrine of imputability of procedural failures in order to remedy these shortcomings. This doctrine could equally be implemented through codified rules which would ensure that procedural protection of individuals is guaranteed in certain instances of shared competence between the national authorities and the Commission. In the light of the foregoing the codification of a set of basic procedural standards of good administration would be an important step in the construction of a coherent process framework for Community administrative decision-making and for the development of Community administrative law as a whole.
Bibliography

I. General Books, Monographs and Dissertations


Chapus, R., 'Droit administratif général', Tome 1, 6th ed., 1992


Classen, C.D., 'Die Europäisierung der Verwaltungsgerichtsbarkeit' (Eine vergleichende Untersuchung zum deutschen, französischen und europäischen Verwaltungsprozessrecht), Jus Publicum, Beiträge zum Öffentlichen Recht, Band 13, J.C.B. Mohr (Tübingen), 1996


v. Danwitz, T., 'Verwaltungsrechtliches System und Europäische Integration', Jus Publicum, Beiträge zum öffentlichen Recht, Band 17, J.C.B. Mohr (Tübingen), 1996


Habermas, J., 'Faktizität und Geltung' (Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats), Suhrkamp (Frankfurt a.M.), 1992


Harden, Ian (ed.), State Aid: Community Law and Policy', Schriftenreihe der Europäischen Rechtsakademie Trier, Band 4, Bundesanzeiger (Köln), 1993


Hix, J.-P., 'Das Recht auf Akteneinsicht im europäischen Wirtschaftsverwaltungsrecht (Dargestellt am Beispiel des Kartell- und Antidumpingverfahrens der EWG)', Schriftenreihe Europäisches Recht, Politik und Wirtschaft, Band 154, Nomos (Baden-Baden), 1992

Hoffmann, R., 'Verfahrensgerechtigkeit' (Studien zu einer Theorie prozeduraler Gerechtigkeit), Rechts- und Staatswissenschaftliche Veröffentlichungen der Götter-Gesellschaft. Neue Folge, Heft 65, Ferdinand Schöningh (Paderborn, Munich, Vienna, Zürich), 1992

235


de la Mare, T., 'Judicial Cross-Fertilisation in the European Community', LL.M.-thesis, European University Institute (Florence), 1995


Pliakos, A., 'Les droits de la défense et le droit communautaire de la concurrence', Bruylant (Brussels), 1987
Rausch, R., 'Die Kontrolle von Tatsachenfeststellungen und -würdigungen durch den Gerichtshof der Europäischen Gemeinschaften' (Zur gerichtlichen Nachprüfung von Kommissionsentscheidungen im Vergleich zum deutschen und französischen Recht), Schriften zum Europäischen Recht, Band 19, Duncker & Humblot (Berlin), 1994

Schwarze, J., 'Europäisches Verwaltungsrecht', 2 Volumes, Nomos (Baden-Baden), 1988

Schwarze, J., 'European Administrative Law', Office for Official Publications of the European Communities (Luxemburg), Sweet & Maxwell (London), 1992


Schwarze, J. (ed.), 'Administrative Law under European Influence (On the convergences of the administrative laws of the EU Member States)', Sweet & Maxwell (London), Nomos (Baden-Baden), 1996


Sejersted, F. (ed.), 'Nordisk forvaltningsrett i mote med EF-retten', IUSEF nr. 21, Senter for Europa-rett Universitetet i Oslo, Universitetsforlaget, 1996


II. Articles

Andersen, R., 'Les principes généraux de la procédure d'élaboration de la décision administrative en droit administratif belge', [1993] European Review of Public Law, Special Number, p. 138

Akehurst, M., 'The Application of General Principles of Law by the Court of Justice of the European Communities', [1982] British Yearbook of International Law p. 29


Avot, D., 'Protection des droits des entreprises directement concernées dans les procédures antidumping communautaires', [1994] Revue des Affaires Européennes No. 4


Cappelletti, M., 'The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis', [1979] Legal Issues of European Integration p. 1


Caranta, R., 'Judicial Protection Against Member States: The Indirect Effects of Art. 173, 175, and 177' in Public Interest Litigation before European Courts, Micklitz and Reich (eds.), 1996, p. 95


Due, O., 'Le respect des droits de la défense dans le droit administratif communautaire', [1987] Cahiers de Droit Européen p. 383

Due, O., 'Verfahrensrechte der Unternehmen in Wettbewerbsverfahren vor der EG-Kommission', [1988] Europarecht p. 33

Dutheil de la Rochère, J., 'Le principe de légalité', [1996] L'Actualité Juridique - Droit Administratif, Special Number, p. 161


van Gerven, W., 'The Legal Dimension: The Constitutional Incentives for and Constraints on Bargained Administration' in Constitutional Dimensions of European Economic Integration, Snyder (ed.), 1996, p. 75


Gudin, C.-E., 'Le droit d'être entendu dans les procédures communautaires (Application des règles de concurrence et contrôle des concentrations)', [1994] Revue des Affaires Européennes No. 4


Harlow, C., 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot?', [1996] European Law Journal p. 3


Oeter, S., 'Die Kontroldichte hinsichtlich unbestimmter Begriffe und des Ermessens' in Die Kontroldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung, Frowein (ed.), 1993, p. 266


Rawlinson, F., 'The Role of Policy Frameworks, Codes and Guidelines in the Control of State Aid' in State Aid: Community Law and Policy, Harden (ed.), Schriftenreihe der Europäischen Rechtsakademie Trier, Band 4, 1993, p. 52


Saint-Esteben, R., 'Les droits de la défense dans l'application aux entreprises du droit communautaire de la concurrence', [1994] Revue des Affaires Européennes No. 4


Schwarze, J., 'Deutscher Landesbericht' in Administrative Law under European Influence (On the convergences of the administrative laws of the EU Member States), Schwarze (ed.), 1996, p. 123


Temple Lang, J., 'The Sphere in which Member States are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles', [1991/2] Legal Issues of European Integration p. 23


Van Bael, I., 'Insufficient Judicial Control of EC Competition Law Enforcement' in Annual Proceedings of the Fordham Corporate Law Institute, Hawk (ed.), 1993, p. 733


# TABLE OF CONTENTS

A. Introduction

I. The quest for and expansion of basic procedural rules in a heterogeneous administrative 'system'  
   2

II. Judicial procedural review as the catalyst for constitutionalizing process principles  
    12

B. Procedural 'good administration' in Community administrative law

I. Introduction  
   19

II. The significance of 'good administration' with regard to procedural rules  
    21

1) 'Good administration' as an indeterminate notion  
   21

2) Procedural 'good administration': The dichotomy of functions underlying process rules  
   23

III. The 'principle of good administration' in the jurisprudence of the Community courts  
    31

1) The 'principle of good administration' and access to information: The 'Tradax' case  
   32

2) The 'principle of good administration' and the right to be heard  
   38

3) The 'principle of good administration' and the principle of care: The 'IAZ' case  
   40

4) Conclusion: The inexistence of the 'principle of good administration' in Community law?  
   45

C. Expansion of process principles: The right to access to information and the right to be heard

I. Introduction  
   50

II. The right to access to information  
    52

1) Competition law as the origin of the Community right to access to information  
   52

2) The dynamic mutation of 'access to information' into a fundamental process right in competition proceedings  
   56

a) The early case-law: The right to access to file as an inherent part of the right to be heard  
   56

   249
b) The Commission's 'access to file' policy as the basis for further expansion 58

c) Developing a fundamental procedural right of access to information? 63

aa) The Cement and Soda-Ash judgments 63

bb) Some speculative remarks on the reasons for 'constitutionalizing' access to information 69

(1) Community competition proceedings as criminal in nature? 70

(2) Democracy and transparency: A new legal basis for procedural participation and access to information? 72

(3) The democratisation of administrative process? 77

3) The case-law on the right to access to information in anti-dumping proceedings 80

4) Conclusion - the right to access to information 86

III. The right to be heard (the rule of audi alteram partem) 89

1) Competition law 91

2) Anti-dumping law 95

a) The 'human rights' jurisprudence of the ECJ 95

b) The more restrictive approach of the CFI in Nölle I 99

3) Customs law 102

a) The ECJ's judgment in Technische Universität München 102

b) The CFI's concept established in France-Aviation 104

c) A decisive step in the achievement of 'horizontal convergence' of the audi alteram partem principle 106

d) First signs of a move towards 'vertical convergence'? 107

4) Administration of the European Social Fund 109

a) The judgments in case Lisrestal 109

b) Federalizing Community administrative process? 115

5) More recent jurisprudence and outlook 121
D. Expansion of process principles: The principle of care (or of diligence) 128

I. Introduction 128

II. The (dogmatic) foundations of the principle of care 133
1) A cursory conceptualization of the principle of care in the early case-law 133

2) A process principle with a strong connotation of substantive legality 134

3) The relationship between the principle of care and the administration's investigatory powers 138
   a) The inquisitorial principle and the principle of care 138
   b) The obligation to use investigatory powers in the interest of the citizen 140
   c) Investigatory powers and the burden of proof 142
      aa) The administration's duty to collect evidence 142
      bb) The duty of individuals to cooperate and to provide evidence 145

4) The core justification for the concept of care: Administrative discretionary powers 148
   a) Care as a counterbalance to discretion 148
   b) The duty of care as a promotor of an intrusive style of judicial review with respect to discretion 153

5) The relationship between the principle of care and the giving reasons duty 155
   a) Giving reasons and care as tandem requirements 155
   b) Towards a 'dialogue requirement' 158
      aa) The potential for developing a dialogue duty 158
      bb) Dialogue, transparency, participatory democracy and the rule of law 162
      cc) The principle of care and the potential conflict between dialogue and time-limits 164

III. The case-law on the principle of care 168
1) Anti-dumping matters: The 'Nölle' cases 168
a) Nölle I

b) Nölle II

2) General customs matters: The cases 'TU München' and 'France-Aviation'

a) TU München

b) France-Aviation

3) Complainants in competition proceedings: The cases 'Automec II' and 'Asia Motor France II'

a) The different facets of the principle of care in 'tripartite' procedures

b) The duty of care vis-à-vis complainants in the recent case-law

c) The policy implications in balancing discretionary powers and the duty of care

d) Asia Motor France II: The development of the twin-concept of care and giving reasons into a means of substantive control of discretion

4) Complainants in State aids proceedings: From 'Cook' to 'Sytraval'

a) The principle of care and its significance in the double-staged investigation procedure under Article 93 EC Treaty

b) The tentative recognition of the duty of care by the ECJ in Cook and Matra

c) Developing a 'dialogue requirement': The CFI judgments in SIDE and Sytraval

5) Conclusion - the principle of care/diligence

E. Conclusion

F. Bibliography