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The Constitutional Basis of EU Administrative Law

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I. Introduction

The scarcity of norms about administration or administrative law in constitutions is sometimes deplored at national level. Indeed, constitutional texts are often silent or extremely brief as far as administrative law is concerned. Among the better known texts, the French Constitution of 1958 is perhaps the most copious, but there is few beyond the classic statement that government “dispose de l’administration” (Article 20 (2)) – only some rules on nomination, territorial entities, the ombudsman and budgetary audits.¹ In Germany with its great administrative tradition – just to mention Prussia and *Max Weber* –, the Grundgesetz (Basic Law) has a chapter on administration (Articles 83 to 91), but it is only on the distribution of administrative competences between the federation (Bund) and the States (Länder).² In the United States of America, most constitutional requirements for administrative law are drawn from Article II Section 2 (2) – appointment – and Section 3 – faithful execution of the laws, which leaves open many controversial questions of administrative law.³ In the United Kingdom, which – as we all know – does not have a written constitution, unwritten constitutional rules on administrative law are not abundant, to say the least.⁴ All in all, would it not be help-

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¹ Constitution du 4 octobre 1958 (JORF n° 0238 du 5 octobre 1958, page 9151), latest amendment: Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, Articles 13 (2), 34, 47-2 (2), 71-1 (1).

² On these articles Christian Heitsch, *Die Ausführung der Bundesgesetze durch die Länder*, Tübingen: Mohr Siebeck, 2001.

³ Cf. Alfred C. Aman and William T. Mayton, *Administrative Law*, 3rd edition, 2014, pp. 491 *et seq.*

⁴ See in general the introductory chapter of Paul Craig’s *Administrative Law*, London: Sweet & Maxwell, 7th ed., 2012.

ful to have clear constitutional indications on the organisation and activity of the administration to determine such issues as the establishment of new agencies, the scope of administrative rulemaking or the legitimacy of administrative action rather than addressing these issues by complicated interpretive operations of constitutional or administrative lawyers?

In the end of the day, this is up to national administrative legal systems. At the level beyond the State, however, the topic appears to be more important. Given the doctrine of conferral – an international or supranational entity cannot dispose of more powers than conveyed to it by the Member States – which is enshrined in Article 5 (1) Treaty on European Union (TEU) for the European Union,⁵ there is without doubt a need to describe administrative powers more precisely. It may therefore be quite astonishing that until 2009, the entry into force of the Lisbon Treaty⁶, the administrative powers of the EU were even hardly mentioned, and the said treaty did not introduce a particular chapter. There is a series of norms in the Treaties on administrative issues which will be explained in the third part of this short paper: Articles 17 TEU, Articles 197, 291 (1) and 298 Treaty on the Functioning of the European Union (TFEU) and Article 41 Charter of Fundamental Rights of the European Union (ChFREU⁷) (see below III.), but before doing so, two constitutional preliminaries have to be addressed.

II. Constitutional Preliminaries

1. Does the EU have a constitution?

First, it may be disputed whether we can really consider the legal order of the European Union as constitutional. This dispute, however, appears to be settled by now in a way that on the one hand, the divergent positions are clear and that on the other hand, there is consensus

⁵ Consolidated version: O.J. 2012, Nr. C 326 p. 13. On that Article see in particular Christian Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union*, Baden-Baden: Nomos, 2nd ed. 1999, pp. 69 *et seq.*, id., in: Christian Calliess and Matthias Ruffert (eds.), *EUV/AEUV – Kommentar*, Munich: C.H. Beck, 6th ed. 2016, Art. 5 EUV, paras 6 *et seq.*

⁶ O.J. 2007, Nr. C 306, p. 1.

⁷ O.J. 2012, Nr. C 326, p. 391.

on those points that are important for our subject. At any rate, the debate has cooled down compared with the one going on at global level – and it is also less German by now.⁸

There is clarity about the divergent positions: One line of argumentation puts particular stress on the assumedly inherent link between constitution and state and the notion of sovereignty.⁹ The difference between a constitution and a treaty is underlined, and there is a search for a constitutional moment when the *pouvoir constituant* exercises its creative power. It is a given community, a people or at least a communicative collectivity, that shapes its constitution. Following this school of thought, a supranational entity such as the EU cannot have a constitution, at least at this very point in time. The German *Bundesverfassungsgericht* (Federal Constitutional Court) is very near to that. In its judgment on the Treaty of Lisbon, it designates the Member States as “the constituted primary political area of their respective polities” and excludes some policy fields from the grasp of EU power.¹⁰ However, it opens towards other concepts using the term *Staatenverbund* which it describes as “a close long-term association of states”.¹¹ This approaches the other line of argumentation operating – more or less – on the basis of multilevel constitutionalism and understanding the EU as a polity created by the Treaties as its constitution.¹² The one and only constitutional moment is replaced by a process of continuous constitutionalisation,¹³ and the presumed obstacles to transnational communication are discovered as exaggerated. The ECJ has more than once alluded to these ideas and held that the EU had its “own constitutional framework”.¹⁴

Both opinions, however, concur in the hierarchical nature of the Union’s legal order. The institutions are bound by the Treaties and are obliged to implement any requirement they

⁸ On the debate in international law cf. Stefan Kadelbach and Thomas Kleinlein, ‘International Law – a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles’, 50 *German Yearbook of International Law* (2007), 303.

⁹ Cf. above all Dieter Grimm, *Sovereignty*, New York: Columbia University Press 2015 (translation of *Souveränität*, Berlin: Berlin University Press 2009); id., ‘Wer ist souverän in der Europäischen Union?’, in: *Die Zukunft der Verfassung II*, Berlin: Suhrkamp, 2012, at 275.

¹⁰ Bundesverfassungsgericht, judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, available at www.bundesverfassungsgericht.de, paras 250 *et seq.*; quotation para 301.

¹¹ Bundesverfassungsgericht, *supra* note 10, para 229.

¹² Cf. only Ingolf Pernice, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’, 15 *Columbia Journal of European Law* (2009), 349.

¹³ Anne Peters, *Elemente einer Theorie der Verfassung Europas*, Berlin: Duncker & Humblot, 2001, at pp. 360 *et seq.*

¹⁴ ECJ, Opinion 2/23, ECLI:EU:C:2014:2454, para 158 (ECHR II).

would contain. Today, the general primacy of EU law with respect to national law is also beyond question; it had been held as early as 1964 and is now generally accepted subject only to limitations in very exceptional cases.¹⁵ This is exactly what a constitutional basis of administrative law shall all be about: The existence of principles and rules binding on administrative law and administrative activity are without doubt whatever line of argumentation is followed. It is submitted that such principles and rules rooted in very basic concepts of the rule of law, democracy and human rights can be called constitutional. What is at stake is simultaneously enabling and constraining power – at supranational level – in the fulfilment of its tasks.

2. Does Administrative Law need a Constitution?

Second, the general discussion about the relationship between constitutional and administrative law should not be set aside. We can find illustrations about this sometimes conflictual relationship in the history of European administrative legal systems. Thus, the *Conseil d'État* developed its supervisory role and the standards for controlling government from general principles without considerable attachment to the content of constitutions at that time.¹⁶ This state-of-the-art was quoted by the 'founding father' of German administrative law, *Otto Mayer*, when, in the preface to the third edition of his seminal *Verwaltungsrecht* he said that "Verfassungsrecht vergeht, Verwaltungsrecht besteht." – Constitutions come and go, administrative law remains, which was outrageous to be uttered in 1924 after the German monarchies which had been partly in place since the early middle ages, had collapsed.¹⁷

Today, the situation is different in France as well as in Germany. In France, administrative law cases were for a long time subject to scrutiny according to the *bloc de constitutionnalité*, and the *question préjudicielle de constitutionnalité* (QPC) considerably strengthened the constitutional influence on administrative law.¹⁸ In Germany, *Mayer's* proverb has been replaced for a long time by another saying. *Fritz Werner*, the first president of the *Bundesverwaltungsgericht* founded after WWII, said that "Verwaltungsrecht ist

¹⁵ ECJ, Case 6/64, ECR 1964, 1253 (*Costa v. ENEL*); Bundesverfassungsgericht, Order of 6 July 2010, 2 BvR 2661/06, para 53 (Honeywell), available at www.bundesverfassungsgericht.de.

¹⁶ Pierre Legendre, 'L'histoire du droit administratif', in: Pascale Gonod, Fabrice Melleray and Philippe Yolka (eds.), *Traité de droit administratif*, Paris: Dalloz 2011, p. 3 at p. 22 *et seq.*

¹⁷ Otto Mayer, *Deutsches Verwaltungsrecht*, Munich and Leipzig: Duncker & Humblot, 3rd ed. 1924, Preface.

¹⁸ Pierre-Laurent Frier and Jacques Petit, *Droit administratif*, Paris: LGDJ, 9th ed., 2014, para 67.

konkretisiertes Verfassungsrecht” – administrative law is a concretised form of constitutional law.¹⁹ We have to note, however, that the debate continues in the United Kingdom – what would be the added value of giving constitutional status to basic rules and principles if they are already firmly enshrined in the rule of law, and if they have been so for ages?²⁰

Looking at EU administrative law, however, we have to bear in mind the supranational character of the EU. The need to formulate constitutional foundations is higher due to the particular legal nature of an entity that depends on a conferral of powers in the Treaties. Although we can discern a common European rule of law, laid down in general principles formulated by the ECJ over years, the idea of concretising constitutional aims and values at the level of administrative law is appealing for the sake of legal clarity and normative precision.

III. Constitutional Issues of EU Administrative Law

1. The Complexity of Federalism: The European Composite Administration

The first constitutional issue of EU administrative law is related to the obvious fact that government in the EU must be considered as some form of combination of the Member States’ administration together with administration at supranational level. The entity to be administered is obviously not a State, but a union of States, and in terms of administrative law, the concept of the ‘European Administrative Space’ is a metaphorical expression that is quite common and useful to describe this situation and at the same time avoid the intrusion of constitutional complexities into the debate in administrative law.²¹ The starting point of analysis is certainly not a constitutional one.

From the very beginning, administrative powers have been exercised by institutions/authorities of the (then) European Economic Community and of the Member States, and

¹⁹ Fritz Werner, ‘Verwaltungsrecht als konkretisiertes Verfassungsrecht’, 74 *Deutsches Verwaltungsblatt* (1959), 527.

²⁰ Paul Craig, *UK, EU and Global Administrative Law. Foundations and Challenges*, Cambridge: CUP, 2015, at pp. 166 *et seq.*

²¹ Cf. SIGMA, *European Principles for Public Administration*, SIGMA Papers Nr. 27 CCNM/SIGMA/PUMA(99)44/REV1), S. 6, and Johan P. Olsen, *Towards a European Administrative Space*, ARENA Working Papers WP 02/26.

the principle of separation applied.²² In general, this is still valid: When analysing administrative activity in the European Union, we have to attribute it either to EU institutions or to Member States' authorities.²³ This is important for judicial review – which court is competent for judicial review under which standards? – and liability – against whom damages can be claimed in which court? –, and it causes particular difficulties concerning liability, which shall be addressed later.

The Treaty of Lisbon, for the first time, contains a constitutional rule on the relationship between EU- and Member States' administration. Article 291 (1) TFEU reads as follows: “Member States shall adopt all measures of national law necessary to implement legally binding Union acts.” There is a dispute on what really can be deduced from that sentence. Some authors argue that it is only about rulemaking, not on any administrative activity including adjudication.²⁴ They can base their argument on the position of that article within the Treaties. It is not placed in a passage on administration – which does not exist – but in the section on rulemaking (“The legal acts of the Union”). However, it appears to be more convincing to apply the article to the whole range of administrative activity.²⁵ The wording hints at such openness – “all measures ... necessary” is not only abstract or general rules. Further, the section on legal acts also encloses decisions of the EU institutions (cf. Article 288 (4) TFEU. When interpreted in such a broad sense, section (1) of Article 291 must be read in the following way: When implementation of EU law is necessary, it is first and foremost up to the Member States to do this; implementing powers of the EU institutions have to be drawn from other provisions of the Treaties.

²² Cf. Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, Berlin: Springer, 2nd ed., 2004, paras 7/7 *et seq.*

²³ Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund*, Berlin: Duncker & Humblot, 2004, at pp. 163 *et seq.*

²⁴ Above all Ulrich Stelkens, ‘Rechtsetzungen der europäischen und nationalen Verwaltungen’, 71 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2012), 369, and *id.*, ‘Art. 291 AEUV, das Unionsverwaltungsrecht und die Verwaltungsautonomie der Mitgliedstaaten’, 47 *Europarecht* (2012), 511.

²⁵ Jürgen Bast, ‘New categories of acts after the Lisbon reform: Dynamics of parliamentarization in EU law’, 49 *Common Market Law Review* (2012), 885 at 919; Steve Peers and Marios Costa, ‘Accountability for Delegated and Implementing Acts after the Treaty of Lisbon’, 18 *European Law Journal* (2012), 427 at 446; Herwig Hofmann and Alexander Türk, 27 *Zeitschrift für Gesetzgebung* (2012), 105 at 112, Christoph Krönke, *Die Verfahrensautonomie der Mitgliedstaaten der Europäischen Union*, Tübingen: Mohr Siebeck, 2013, pp. 59 *et seq.*; Matthias Ruffert, in: Calliess and Ruffert, *supra* note 5, Art. 291, para 1.

The real problem lies elsewhere. The normative emphasis on the Member States' power of implementation is in conflict with administrative reality in the European administrative space. For a long time, co-operative structures have been developed in that space.²⁶ Several types of such structures can be discerned, in particular in various fields of product licensing.²⁷ The model of transnational State licensing is most common: A product is licensed in one Member State to be marketed in the whole Union. Co-operation is reduced to mutual trust, which is an institutionally low level, but a high one in substantive terms, as it requires common standards and the legitimate expectation in their overall sound implementation. Another model of product licensing is called referential State licensing in which the licensing of a product in one Member State does not have automatic transnational effect but triggers a transnational administrative procedure involving several Member States' authority and – in many instances – the Commission. Such licensing procedures, whether transnational or referential, may apply to ordinary products but also food or chemicals. A further type of co-operation is the erection of networks of authorities which can be seen in the field of telecommunication and (formerly) energy, but also in the field of antitrust law.²⁸ Member States authorities together with the Commission co-operate in network structures, in particular to prepare rules for the respective field. Often these rules are elaborated as some form of soft law ('guidelines'). Such networks may also have operative tasks, as does the European Competition Network which has to distribute competition law cases between the Commission and the competent antitrust authorities of the Member States.²⁹ Some networks have grown into agencies which may be considered as part of the complex federal structure of EU administration; we will consider them under the following headline.

²⁶ Cf. Eberhard Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft', 31 *Europarecht* (1996), 270.

²⁷ Cf. in particular Jens-Peter Schneider, 'Regulation and Europeanisation as Key Patterns of Change in Administrative Law', in: Matthias Ruffert (ed.), *The Transformation of Administrative Law in Europe*, 2007, p. 309 at 315 *et seq.*, referring to Gernod Sydow, *Verwaltungskooperation in der Europäischen Union*, Tübingen: Mohr Siebeck, 2004, at 118 *et seq.*

²⁸ Matthias Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund', 60 *Die öffentliche Verwaltung* (2007), 761; Spanish version: (translated by Silvia Díez Sastre): 'De la europeización del derecho administrativo a la unión administrativa europea', in: Francisco Velasco Caballero/Jens-Peter Schneider (eds.), *La unión administrativa europea*, 2008, p. 87 at 92 *et seq.*

²⁹ See http://ec.europa.eu/competition/ecn/index_en.html. Legal basis: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 No. L 1, p. 1; Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Council Document 15435/02 ADD 1.

The overall picture shows a combination of co-operation and hierarchical elements. In implementing EU law at the administrative level, the Member States are not acting in isolation, but co-operate horizontally. Often, the supra-national element is represented in the vertical co-operation with the Commission. The overall construction was named composite or integrated European administration (*Verwaltungsverbund*) by administrative legal scholarship.³⁰ Obviously, such a composite or integrated view on European administration is likely to be in conflict with the rule in Article 291 (1) TFEU as explained.

Therefore, that provision must be read together with another one, Article 197 (1) TFEU, which reads: “Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.” This article is the only one in the title on Administrative Cooperation of the TFEU, and it transfers rather limited powers to the EU, namely to support Member States in their implementing efforts by measures including the exchange of information and training schemes.³¹ Member States cannot be obliged to avail themselves of such support, and the Article is without prejudice to virtually every other administrative obligation of the Member States or the Commission (Article 197 (2) and (3)). However, the principle in the first paragraph of Article 197 TFEU is formulated in a general way and clearly proclaims that implementation (i.e. administrative performance) is not a matter for the Member States alone, but one of common interest.³²

Consequently, the first constitutional basis of EU administrative law is that the administrative implementation of EU law is a primary responsibility of the Member States but to be con-

³⁰ On this terminology Eberhard Schmidt-Aßmann, ‘Einleitung: Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts’, in: id./Bettina Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund*, Tübingen: Mohr Siebeck, 2005, p. 1; Gabriele Britz, ‘Vom Europäischen Verwaltungsverbund zum Regulierungsverbund – Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei Telekommunikation, Energie und Bahn’, 41 *Europarecht* 2006, p. 46; Edoardo Chiti, ‘Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies’, 10 *European Law Journal* (2004), p. 402; Herwig C. H. Hofmann/Alexander Türk, ‘The Development of Integrated Administration in the EU and its Consequences’, 13 *European Law Journal* (2007), p. 253; cf. also Sabino Cassese, ‘European Administrative Proceedings’, 68 *Law and Contemporary Problems* (2004), p. 21.

³¹ Cf. the explanations by Christoph Ohler, in: Rudolf Streinz (ed.), *EUV/AEUV*, Munich: C.H. Beck, 2nd ed., 2012, Art. 197, paras 8 *et seq.*, and Claus Dieter Classen, in: Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds.), *Das Recht der Europäischen Union*, Munich: C.H. Beck, 2015, Art. 197, paras 80 *et seq.*

³² See Matthias Ruffert, in: Christian Calliess and Matthias Ruffert, *supra* note 5, Art. 197, para 21.

sidered as a matter of common interest, which implies that the supra-national level is to be involved if necessary.

2. The Plurality of Supranationalism: The Administration of the EU

The starting point for analysing the administration of the EU as such is easier to be discerned, although the relevant provisions were only inserted into the Treaties when the Treaty of Lisbon entered into force. It is common knowledge that the European Commission is at the heart of the EU's administrative activity, but only since 2009 Article 17 (1), 4th and 5th sentences TEU provide that the Commission "... shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties." It is clear from this that the core administrative body of the EU shall be the Commission; perhaps it is interesting to note that the German version uses the term "Verwaltungsfunktionen" (i.e. administrative functions) in the place of management functions. At any rate, the Commission with its large body of Directorates General³³ is at the same time empowered and able to perform these administrative functions.

The unitary picture of supra-national administration is subject to profound changes in recent years. Internal problems of accountability led to the sourcing out of a range of tasks, usually with considerable budgets to be distributed such as in the field of research of education, to (now) six executive agencies.³⁴ However, these executive agencies lack independence in many respects so that their action can be attributed to the Commission. This is completely different for the so-called regulatory agencies. These agencies are conceived to be independent. They are vested with diverse administrative tasks to be performed in an independent way. Over the years, this 'agencification' led to a significant pluralisation of the EU administration.³⁵ In the beginning, it was a pluralisation in quantity. The number of new agencies was high (it is now 34), but their powers were rather limited, in most instances to the collection of statistical data or other information and on giving advice following the data col-

³³ Overview: http://ec.europa.eu/about/ds_en.htm.

³⁴ Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 Nr. L 11, p. 1. On their creation see Paul Craig, *The Constitutionalization of Community Administration*, Jean Monnet Working Paper 3/2003.

³⁵ Herwig Hofmann and Alessandro Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through 'Agencification'', 36 *European Law Journal*, 419.

lected.³⁶ Since the end of the last decade, pluralisation was given a qualitative shift. Agencies in the field of network industries received real regulatory competences,³⁷ and the powers of the agencies newly created for the supervision of financial markets are considerable,³⁸ even after many of these powers were transferred to the European Central Bank (ECB) in 2014.³⁹

Although the process of agencification could have been taken up by the Lisbon Treaty in a separate chapter or title, they are only mentioned in several provisions (“institutions, bodies, offices and agencies of the Union”⁴⁰). Two constitutional issues have to be addressed:

First, there has to be a legal basis for any agency that is founded at EU-level. The founding regulations mention the respective basis. There is no general power of organization as in a State, but the ECJ is quite lenient in accepting a legal basis for the establishment of an agency.⁴¹ Following this line of jurisprudence, the Court allowed the EU institutions to base the foundation of the European Securities Market Organisation ESMA on Article 114 TFEU, i.e. the power to establish the internal market through harmonisation. If harmonisation needs an institutional background, an agency can be established. Further, Article 298 TFEU vests the EU with the power to regulate the organization of an agency once it is duly established.⁴² Its first paragraph makes clear that the EU needs an administrative body: “In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.”⁴³ The power to regulate internal matters of organisation is laid down in the second paragraph: “...the European Par-

³⁶ Matthias Ruffert, ‘Verselbständigte Verwaltungseinheiten: Ein europäischer Megatrend im Vergleich’, in: Hans-Heinrich Trute, Thomas Groß, Hans Christian Röhl and Christoph Möllers (eds.), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, Tübingen: Mohr Siebeck, 2008, 431.

³⁷ See, in the field of energy, http://europa.eu/about-eu/agencies/regulatory_agencies_bodies/policy_agencies/acer/index_en.htm.

³⁸ Natalia Kohtamäki, *Die Reform der Bankenaufsicht in der Europäischen Union*, Tübingen: Mohr Siebeck, 2012.

³⁹ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ 2013, Nr. L 287, p. 63.

⁴⁰ This enumeration can be found in 15 articles in TEU and TFEU (see the list in Ruffert, supra note 32, para 9) plus in Articles 41 and 42 of the Charter of Fundamental Rights of the European Union.

⁴¹ ECJ, Case C-217/04, ECR 2006, I-3771, paras 42 *et seq.* (ENISA); Case C-270/12, ECLI:EU:C:2014:18, paras 88 *et seq.* (UK v. Parliament and Council).

⁴² Matthias Ruffert, in: Christian Calliess and Matthias Ruffert, supra note 5, Art. 298, para 12.

⁴³ On the underlying model of government see Jacques Ziller, ‘L’administration’, in: Michel Troper and Dominique Chagnollaude (eds.), *Traité international de droit constitutionnel*, Vol. 3, Paris: Dalloz 2012, 735 at 740 *et seq.*

liament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.” It is submitted, however, that the power to organise the EU administration should have been laid down in a more precise and coherent way.

The second constitutional issue is on legitimacy of agencies. This matter is not settled by a provision of the Treaties, but there are many developments to be combined to get an overall picture. The most astonishing aspect is that the core standard is being drawn from a jurisprudence that dates back to the ECSC and originally related to the transfer of single administrative tasks to private companies. Following the ECJ in *Meroni* (1958), the institutions of the (now) EU may delegate competences to newly created entities such as the agencies but have to preserve political discretion.⁴⁴ This jurisprudence could and can be challenged under various aspects; what we can say at least is that even though heavily criticised it was not given up by the Court.⁴⁵ It is however somehow deplorable that the ECJ never considered that the principle of democracy, now well enshrined in Article 10 (1) and (2) TEU was important in this respect.⁴⁶ If Article 10 (2) TEU puts the European Parliament at the core of the institutional design for the sake of democracy and if the European Commission is accountable towards the European Parliament (Article 17 (8) TEU), how do all these agencies find their place in a democratic construction of the European Union as a whole? The obviously main reason for this deficiency is the federal element in the agencies which makes them appear a perpetuation of the network structures already mentioned.⁴⁷ Their board is composed of Member States’ representatives together with the Commission, so we somehow see in the agencies “mini-Unions” led by “mini-Councils” for the fulfilment of certain administrative tasks. One last matter becomes clearer as time advances: It is by no means sound to declare that administrative functions exercised by the agencies were not political – and therefore not subject to strict requirements of democratic legitimacy – as they were so technical. Issues like chemicals safety management, energy supply regulation or financial market supervision are without any doubt highly political, but no one would assert that they were not based on politi-

⁴⁴ ECJ, Case 9/56, ECR 1958, 133 (*Meroni I*) and Case 10/56, ECR 1958, 157 (*Meroni II*).

⁴⁵ Paul Craig, *EU Administrative Law*, Oxford: OUP, 2nd ed., 2012, at 154-5.

⁴⁶ Matthias Ruffert, ‘Personality under EU Law: A Conceptual Answer towards the Pluralisation of the EU’, 20 *European Law Journal* (2014), 346 at 361.

⁴⁷ See above 1.

cal choice.⁴⁸ All in all, it is by no means settled that the polycentric construction of legitimacy that develops at EU level⁴⁹ will find general acceptance in all Member States.

It is one thing to develop constitutional guidelines given the scarcity of explicit provisions, but it is another to apply existing constitutional rules to the new, agencified structures. The ECJ was faced with this issue when it had to decide whether agencies could be involved into delegated rulemaking. It should be noted that the preparation of binding delegated legislation or the issuance of soft law is well known and that the legal soundness of these phenomena are at least not called into question with respect to specific norms in the Treaties. However, in the ESMA case,⁵⁰ it occurred that an agency was empowered to emit binding rules, to be precise: ESMA was enabled to prohibit short selling in the stock market. The Court – upon an action for annulment brought by the UK – used two arguments to back its rather generous approach. First, It used two lines of argument. First it denied that delegated and implementation powers under Articles 290 and 291 TFEU were exclusively held by the Commission.⁵¹ Although there was no explicit conferral of such powers to a Union body, office or agency, the Treaty presupposed the possibility of such conferral in its Articles 263, 265, 267 and 277 which contained judicial review mechanisms that applied “to the bodies, offices and agencies established by the EU legislature which were given powers to adopt measures that are legally binding on natural or legal persons in specific areas”.⁵² Second, the Court placed an emphasis on the need for rapid intervention in financial markets and for a high degree of professional expertise on the part of the authorities involved.⁵³

Obviously, this is rather weak. Methodically, it is highly questionable to infer a power to issue certain acts from powers to call into question such acts by means of judicial review.⁵⁴

⁴⁸ Thomas Groß, ‘Ist die Wirtschaftskrise ein Katalysator für das Entstehen unabhängiger Behörden? Reformen der Bankaufsicht im Vergleich, 47 *Die Verwaltung* (2014), 197 at 207.

⁴⁹ This is developed by Thomas Groß, *Die Legitimation der polyzentralen EU-Verwaltung*, Tübingen: Mohr Siebeck, 2015. The issue of legitimacy is at the core of Enrico Peuker, *Bürokratie und Demokratie in Europa*, Tübingen: Mohr, 2011.

⁵⁰ ECJ, Case C-270/12, ECLI:EU:C:2014:18 (UK v. Parliament and Council)

⁵¹ ECJ, supra note 50, paras 77 *et seq.*

⁵² ECJ, supra note 50 paras 65 and 80.

⁵³ ECJ, supra note 50, para 85.

⁵⁴ The relevant Working Group in the European Convention where the amendments to the articles quoted were adopted was more cautious: “It is also impossible to state categorically, when an agency is set up, that it will not perform such acts, even if the Regulation establishing it does not give it power to adopt decisions

Besides, only Article 277 TFEU of the articles enumerated by the Court clearly mentions an “... *act of general application* adopted by an institution, body, office or agency of the Union” (emphasis added). Articles 265 and 267 TFEU are only concerned with “... acts of bodies, offices or agencies of the Union...”; Article 263 TFEU with “... acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.” Indeed, the difference between acts of general application on the one hand and decisions in individual cases on the other hand is unduly levelled by the Court’s first line of argument. The second line of argument is even more flawed. The urgency of the need for rapid intervention into the markets and the expertise of the rulemaking body cannot in themselves replace a clear conferal of power.⁵⁵

This is not to say that rulemaking by agencies was unacceptable *per se*, as it should not be asserted here that the polycentric structure of the EU administration could be anything but illegitimate. The argument is that the more constitutional provisions on administrative matters are thin and sparse, the more academic effort is needed to provide a sound basis for EU administrative law.

3. The Individual and Government: A Europe of Citizens

The whole search for constitutional content in EU administrative law might appear futile if we consider that administrative law should be above all about the limitation of power to the benefit of the individual. At least, this is the first limb of the ratio of administrative law, the second – which was dealt with in the sections above – being enabling administration to exert proper action.⁵⁶ So where is the individual, where is the citizen in EU administrative law – or do we have to accept that the Union’s citizens are reduced to *administrés* in this respect, as this used to be the law in France for a long time?

in the formal sense.” (Final report of the discussion circle on the Court of Justice Doc. CONV 636/03, para 25). Cf. also ‘Right of appeal against agencies created by secondary legislation’ Working Document 09 of 10 March 2003; Communication from the Commission - The operating framework for the European Regulatory Agencies, Doc. COM(2002)718 final, pp. 13 et seq.

Ulrich Stelkens, in: Paul Stelkens, Heinz-Joachim Bonk and Michael Sachs (eds.), *Verwaltungsverfahrensgesetz*, 8th ed. 2014, § 35, MN 345 *et seq.*, explicitly takes the contrary view.

⁵⁵ Kohtamäki, *supra* note 38, and similarly (before the Court’s decision) Merijn Chamon, ‘EU agencies between Meroni and Romano or the devil and the deep blue sea’ 48 *CMLRev.* (2011), 1055 at 1074.

⁵⁶ Cf. the seminal passage in Eberhard Schmidt-Aßmann’s *Das allgemeine Verwaltungsrecht als Ordnungsidee*, *supra* note 22, para 1/30 *et seq.*

Indeed, the original Treaties turned a blind eye on the protection of the individual. It was beyond imagination of those who drafted them that the newly created Communities could be so powerful as to intrude into individual rights. However, the highly interventionist Common Agricultural Policy deeply affected individual rights, and it is in this field – admittedly beyond the reach of most ordinary administrative lawyers – that administrative legal principles and rules were first developed in the course of European integration.⁵⁷ The European Court of Justice reacted upon this challenge by creating general principles of law, which partly matured into the ChFREU, binding since 2009⁵⁸. It should however be noted that the development of the Court's jurisprudence is not about human rights only. Of course there are links between the protection of human rights and the protection of the individual in administrative law; there is a great overlap of both fields. What we have to consider, though, is that some of the principles developed are genuinely administrative legal ones, and they continue to be applied next to the guarantees of the Charter: certainty, non-retroactivity, proportionality.

Some of those administrative law rights have found explicit recognition in Article 41 of the Charter, the Right to good administration: the right to impartial, fair and reasonably quick treatment, the right to be heard, the right of access to one's file, the right to be given reasons, the right to damages in case of a breach of law and – very important since the very beginning of European administration⁵⁹ – the right to be heard in any language of the Treaties. This very article is not exempt from critique. Some argue that such minimal rights were insufficient, others criticise the scope of the article which only applies to EU institutions' activities while other parts of the Charter are also applied to Member States' action quite extensively.⁶⁰ Although any such criticism must be taken seriously, it should be noted and underlined that in Article 41 there is at least a general recognition of the individual in EU administrative law, and that there is a basis for further codification of the individual's position – as it is done in the ReNEUAL project⁶¹ presented in the following paper. It is fair to say that if we construct the constitution of EU administrative law, the position of the individual can be put at the cen-

⁵⁷ Analysed by Jürgen Schwarze, *European Administrative Law*, London: Sweet & Maxwell, revised edition 2006.

⁵⁸ Article 6 (1) of the Treaty of Lisbon, *supra* note 5.

⁵⁹ EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, OJ 1958, Nr. 17, p. 385.

⁶⁰ On this debate cf. Matthias Ruffert, in: Christian Calliess and Matthias Ruffert, *supra* note 5, Art. 41, para 9.

⁶¹ www.reneual.eu.

tre. Other specific rights accompany Article 41, such as the right of access to documents (Article 42) and the right of access to justice (Article 47).

IV. Consequences for Comparative Research

What consequences should be drawn from this picture in administrative law research which extends beyond parochial developments and takes a cross-border, if not global perspective? Three final points shall be submitted here for discussion.

First, the various linkages between constitutional and administrative law that can be discerned in the EU reflect the political character of administrative law. Although doctrine more than once has made us believe that administrative law was purely technical and somehow a-political, it is not. Institution building, rulemaking, the attribution of powers in a federal entity, the position of citizens in relation to government – these are all highly political issues. The political impact becomes apparent in many fields of EU administrative law where the quest for deepening and broadening European integration shapes administrative law more than any theoretical or doctrinal approach in administrative law properly speaking. This is most visible in the rapid building of the Banking Union with a plethora of administrative instruments, many of them vested in the European Central Bank which is was certainly not designed to take such a core role in the field of supervision and resolution.⁶² Another instance of this topic is less spectacular, but more settled in its continuity: In the field of research policy, the EU has always been building new institutions and shaping new instruments of action, which sometimes matured into Treaty provisions over the years and sometimes did not.⁶³ To sum up: administrative law may be the concretisation of constitutional law, but at the same time administrative form follows political function.

Second, the political situation of the European Union as a supranational entity is certainly influenced by many peculiarities with respect to administrative law. However, it is most likely that there are similar developments in other jurisdictions. Also elsewhere, administrative law can be assumed to be coined by political developments. There are many comparative efforts

⁶² Cf. Marco Lamandini, David Ramos Muñoz and Javier Solana Álvarez, *Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection*, Rome 2015 (Quaderni di Ricerca Giuridica, Banca d'Italia ed., No. 79).

⁶³ Cf. Arne Pilniok, *Governance im europäischen Forschungsförderverbund*, Tübingen: Mohr Siebeck, 2011.

to understand how the institutions, instruments and norms of EU administrative law have been shaped out of parochial models within the EU.⁶⁴ There is less comparative activity undertaken to find out more about EU administrative law in comparing it with other federal entities such as the United States. This is supposedly a field for deeper research in a circle such as the one meeting in Yale.

Third, if the constitutional basis provides the link between political developments on the one side and administrative law on the other side, we are facing a challenge for any systematic view of administrative law. The course of politics follows its own rules, and democracy is not bound by administrative lawyers' needs. Not least for our constitutions being designed to secure democratic government, one might wonder whether such a systematic perspective was really needed as long as the institutions, instruments and procedures for the protection of the individual were safely in place. However, a systematic comparative view could help us to find out whether there are common (or at least) similar institutional developments, standard form of instruments for administrative action and above all global standards for the protection of citizens' interests that would call for a justification in the case of deviance to the detriment of the individual. The effort of building European administrative law out of a particular constitutional situation is impressive, but it is perhaps not unique.

⁶⁴ There is a most impressive handbook, *Ius Publicum Europaeum*, edited by Armin von Bogdandy, Sabino Cassese and Peter Michael Huber, Vols. III to V on Administrative Law (Heidelberg: C.F. Müller, 2010, 2011 and 2014).