

Towards a European Administrative Procedure Act

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Abstract

Under the joint responsibility of the Member States to implement EU law, administrative law systems of the EU are converging and a common body of EU administrative law is emerging. Most debates on this process of EU administrative law integration have focused on differences and divergences between national systems vis-à-vis the EU system. The concept of administration at the level of the EU, however, is difficult to compare to that in use in most domestic systems in continental Europe. In this contribution, we bring the lens of the United States (U.S.) approach to the debate. The problems and challenges the EU administration faces do resemble those which confronted the federal administration in the U.S. more than 50 years ago. The article discusses some of the parallels between the U.S. and EU system and zooms in on the EU's 'problem zones': preparation of regulation – in particular the role of participation and the use of evidence therein – and the position of agencies. On the basis of experiences with the Administrative Procedure Act (APA) in controlling the U.S. administration and the federal agencies, the contribution then reflects on the desirability of a general EU Administrative Law Act, especially in view of the upcoming extension of judicial review of general rules the Lisbon Treaty will most likely bring. The conclusion is in short that the American APA offers food for European thought and that a lot could be gained with a European styled APA 'light version'.

I Introduction: Towards 'New Administrative Law' in Europe?

The variety in systems of legal protection against administrative action in the European Union (EU) is immense. Even though administrative law and the accompanying systems of legal protection in a lot of EU Member States stem from common roots, differences in historical developments, culture, political systems, organization of the judiciary and organization of the administration have resulted in wide-ranging and state-specific structures.¹ For example, it varies from one country to another in what way

¹ Hofmann & Türk 2009.

the dividing line between public and private law is drawn, whether or not rules with a general application can be challenged, or how appeals can be lodged.

The discussion on the development of some form of integrated EU administrative law system has, hitherto, mainly focused on a debate over the ‘European’ differences or – as the case might be – similarities of systems of administrative law and legal protection against administrative action.² In this paper we aim to show that the debate on European administrative law can be usefully enriched by including the United States (U.S.) approach as well. We do so mindful of some important caveats. Evidently at the EU level the classical continental concept of administration is not readily applicable and we acknowledge that the EU itself is not a fully fledged parliamentary system, and that – as a consequence – the control over the administration is set up differently than in conventional parliamentary systems.³ Moreover, in the EU the administration is not a mere executive but an important regulator as well. This does however prompt discussion similar to the ones we find in the U.S. context. The discretionary powers of the administration, its regulatory politics and the limited control of parliament ask for an approach of administrative law that differs from national concepts in the Member States. Or, in Shapiro’s words, ‘[a]s in the US, the new administrative law for the European Union is very much about the location and intensity of regulatory authority.’⁴

We are certainly not the first to compare and contrast the U.S. system of administrative law system – especially that of administrative procedure – to Europe’s evolving administrative law system.⁵ The overall conclusion of various comparisons by others was that American procedural administrative law can be an important source of inspiration for EU administrative law but that the U.S. and EU system are too different, not only in architecture but also in context, to go further than that. At this particular moment in time, however, there are reasons to review this assessment. Important developments do occur in European horizontal regulatory policy (usually labelled ‘Better Regulation’, but also encompassing wider shifts in modes of regulatory governance), as well as small but significant changes in the EU’s constitutional design. The Treaty of Lisbon introduces a new paragraph four to Article 230 of the EC Treaty (‘Treaty on the Functioning of the European Union’⁶, now the Lisbon Treaty is ratified) which makes it possible to appeal

² Seerden & Stroink 2002.

³ The EU system of separation of powers is that of ‘institutional balance’, and this, according to Yatanagas, connotes the difficulty of describing in familiar public law terms a necessarily unprecedented system (that of the EU), Yatanagas 2001, p. 33.

⁴ Shapiro 1996a, p. 42.

⁵ See e.g. Harlow 1999; Shapiro 2003.

⁶ Article 263 in the consolidated version to be exact.

a ‘regulatory act’, without being ‘individually’ affected. Although the jury is not out yet on what exactly constitutes a regulatory act⁷, it is clear that delegated regulations, delegated directives and implementing acts (hereafter ‘executive regulations’) will fall under the scope of the new provision. In effect this will give any natural or legal person the right to obtain judicial review of EU executive regulations. The possibility of appeal against executive regulations has proven central to the U.S. system of administrative legal protection. Whereas the adoption of an Administrative Procedure Act (APA) was instrumental to the development of administrative law, it was the combination with judicial review that produced such a coherent system.⁸ Without shunning some negative side effects of the way in which judges at times have exercised judicial review, such as a culture of legal adversarialism, ossification of the rulemaking procedure, we revisit the American mechanisms as solutions for European problems in this article.

The structure is as follows: First we draw out some historic parallels between the two systems (section 2). Next, we zoom in on the EU’s ‘problem zones’: the preparation of regulation, and in particular public participation and the use of evidence (section 3) and the position of agencies (section 4). We describe the legitimacy problems in those areas but we also analyse shifts that have taken place in the last decade or so. Then we turn to the concrete experiences of the Administrative Procedure Act (APA) in controlling the U.S. administration and the federal agencies (section 5). In the conclusion we reflect – in the light of the respective problem zones described – on the desirability of an EU Administrative Law Act, possibly inspired by the Administrative Procedure Act of the U.S.

2 Comparing Two Traditions in Legal Protection Against Administrative and Regulatory Action

2.1 Administration, Regulation and Governance

Discussing the relevance of an instrument like the American APA for the European Union might look like a futile exercise in the traditional scholarly view since the concepts and context of administration and administrative law on both sides of the Atlantic differ substantially. The U.S. concept of administration is distinctive from the European one because

⁷ The term ‘regulatory act’ does not tie in well to the distinction the Articles 249a and 249b of the Lisbon Treaty (Articles 290 and 291 in the consolidated version of the Treaty on the Functioning of the EU) make between legislative acts and non-legislative acts. Several authors have already noticed that it is unclear what is exactly meant by ‘regulatory’ act here. See e.g. Barents 2008, p. 508 and Koch 2005, p. 511 and 520-521.

⁸ Shapiro 2003.

it is an emanation of the system of separation of powers under the U.S. Constitution, the presidential system of government and the system of control primarily via judicial. The courts operate in a long tradition of constitutional review and its ability to strike down rules form a cornerstone of American administrative law. Thus, in the American context administrative legal protection lies at the intersection of regulation and constitutional law, as a consequence of the presidential system with a semi-independent administration in charge of regulatory governance.

Speaking of ‘administration’ has often been discarded as ‘old-fashioned’ in the European Union and it has therefore been substituted by terms such as ‘governance’.⁹ By contrast, the ‘Global Administrative Law’ movement claims that revisiting administrative law concepts actually helps us understand processes of ‘global governance’.¹⁰ It also observes that even transnational and supranational instances of public-decision-making over time gravitate towards administrative law constructions originally exclusively found in the context of the nation state. This could be evidence of a transsystemic conception of what counts as the best way to protect citizens against government, sometimes coupled with the notion of ‘regulatory capitalism’.¹¹ There is a normative element to this approach, namely that the return to classical administrative law arrangements is to be applauded. Translated to the EU context, this means thinking in terms of an ‘administrative *ius commune*’.¹² Analyses of the similarities between the European administrative process and the processes of the Member States, point to convergence in some areas as well as divergence in others, instead of to one ‘European administrative space’.¹³ A second approach, which can be normative or merely descriptive, focuses on legal borrowing by one system from another.¹⁴ In the EU context this ties in with reports of perceptions within Commission services that the EU is converging towards the American approach through a juridification of Europe’s regulatory policies,¹⁵ as Majone has long predicted.¹⁶

In any case it is important not to overlook that Europe’s concept of administration is – by and large – determined by another system of government, parliamentary democracy, in which administrations are – for the most part – controlled and overseen by political bodies. The functions and tasks of the administration differ widely in the U.S. and the EU, as does the

⁹ Joerges & Dehousse 2002; Harlow 2003; Hofmann & Türk 2006.

¹⁰ Kingsbury e.a. 2005.

¹¹ Levi-Faur 2005. See also Braithwaite 2008.

¹² Verhey e.a. 2002; Hofmann 2009.

¹³ Siedentopf & Speer 2003.

¹⁴ Wiener 2006.

¹⁵ Kwast & Simon 2005.

¹⁶ Majone 1996.

law permitting and harnessing administrative action.¹⁷ In Europe debates on regulation, the regulatory state, oversight mechanisms and even public participation tend to be conducted in separate forums. However, the EU's development as a super-regulator has changed that. Fuelled by the limited possibilities for steering through spending and built on the principle of conferred powers and defined regulatory mandates in the EC Treaty, the Institutions have developed their regulatory capacity. The introduction of a comprehensive horizontal policy for lawmaking, entitled 'Better Regulation' in 2002 (see next section) can be seen as a confirmation of this broader development.

2.2 Legitimizing Administrations

Any excessive focus on the differences between the two systems risks turning a blind eye to converging developments. The developments of administrative law in the U.S. and in the EU share an important feature. In both regimes the need for economic regulation and the creation of administrative law have gone hand in hand.¹⁸ Starting out with the U.S., agencies like the ICC (Interstate Commerce Commission) and the FTC (Federal Trade Commission), said to be one of the first agencies created in the U.S., were established near the turn of the century to control the anticompetitive behaviour of powerful corporations, such as the railroad companies. A wave of new agencies could be observed during the New Deal. After the Great Depression in the 1930s President Roosevelt established agencies to stabilize the economy, regulate the free market and provide financial security for individuals.

The New Deal agencies were confronted with problems of a totally new dimension. They were involved in the regulation of private markets under increasingly indefinite and vague mandates that offered them significantly more discretion than the older ones.¹⁹ Defenders of the New Deal highly valued the expert knowledge of the new independent regulatory agencies and their discretionary powers to combat effectively the excesses of the free market. Courts and lawyers on the other hand were sceptical and feared the lawless exercise of discretion. The ABA (American Bar Association) advocated imposing detailed procedural checks and strict judicial review on

¹⁷ Wade, Ragnemalm and Strauss 1991, p. 491.

¹⁸ 'Understandably, administrative law could grow no faster than the subject to which it attached: government regulation of the economy. But administrative procedure was, ironically, both an adjunct to and a reaction against economic regulation. It developed as much from deeply felt objections to government interference with the marketplace as from the necessity to make that interference coherent and credible', Verkuil 1978, p. 261.

¹⁹ Pierce, Shapiro & Verkuil 2004, p. 31.

agency action.²⁰ A debate began between progressives, favouring agency flexibility in organization and decision-making, and traditionalists, seeing the adversarial system as the only legitimate way for decision-making.²¹

Criticism on the legitimacy of administrative actions also grew because the blended powers of the administration (both rulemaking and adjudication) did not fit with the doctrine of the separation of powers to which Americans traditionally pay reverence.²² The broad delegation of legislative power made 'agencies, rather than Congress, the arena for debate and decision on complex policy questions of fundamental importance to our democracy'.²³ In contrast with Congress the constitutional and political legitimacy of agencies rulemaking is rather weak. Agencies are not directly accountable to the electorate and delegation of legislative powers to them is controversial. As all legislative powers are vested in Congress and cannot be delegated, the question arose whether broad delegation of regulatory powers was unconstitutional. The vague mandates and far reaching regulatory powers of the New Deal agencies put this 'nondelegation doctrine' to the test. In 1935 in several cases, the Supreme Court did find the delegation unconstitutional.²⁴ The degree of specificity of the mandate, the scope of power and the level of procedural protection offered to affected persons, defined whether the delegation stood up to the test. Although the Supreme Court has rejected nondelegation challenges concerning vague statutory language and no legislation has been struck down after the New Deal era, the non-delegation doctrine has never been overturned expressly. It is widespread and still debated, especially whether it should and even could be reinvigorated. The determining factors of the doctrine have played a role in later case law (besides means of statutory interpretation to avoid constitutional questions). At least one of the arguments to strike down legislation with a broad mandate has changed significantly over time: the procedural safeguards available to interested persons have increased considerably.

Eventually, when the power of the administration had increased significantly and the enthusiasm over the New Deal had faded, many felt the need for some form of legislation to limit the agency's discretion. Judicial review alone, which had been available from the beginning of the administrative state, could not provide enough safeguards. After a turbulent period in the New Deal era, academic and legislative debate between progressives and traditionalists, the Administrative Procedure Act was introduced.²⁵

²⁰ Breyer a.o. 2006, p. 19.

²¹ Shapiro 1996b, p. 97-98; Verkuil 1978, 261-279.

²² Breyer a.o. 2006, p. 31; Freedman 1974.

²³ Freedman 1974, p. 1054.

²⁴ Breyer a.o. 2006, p. 36-74; Majone 2005, p. 83; Pierce, Shapiro & Verkuil 2004, p. 49-61.

²⁵ 5 U.S.C. §§551-559.

Currently the European administrative process finds itself in equally turbulent waters. Euro-scepticism flourished fervently the last two decades, criticizing the rule of bureaucrats in far away Brussels and the lack of transparency. Academic evaluations of the legitimacy of EU administration vary: the assessments range from 'secretive and unaccountable' to 'healthy and efficient'.²⁶ But most agree that the EU system for public decision-making is one of a kind and consists of a patchwork of borrowed arrangements, compromises and constitutional oddities. The proper role and function of the European Commission as the EU's administration is hard to define because it is permanently torn between a political one (a type of 'government' at the heart of European politics) and an objective one (a type of 'agency' executing the will of the Member States through the mandates of the Treaty).

Many of the recent policies to improve the accountability of the EU Institutions – not only Better Regulation, but the White Paper on Governance more broadly, as well as comitology reform – can be interpreted as looking for legitimacy outside the paradigm of parliamentary democracy, or at least a narrow version of it. This is where the U.S. experience can be of great use: its constitutional system is built around independent pillars of public powers, each deriving their legitimacy from a different source. The rulemaking power of the administration over time has come to be embedded in a fine net of presidential and judicial checks. Within this system of checks and balances enhancing citizen access to public decision-making has been a crucial building block for achieving the accountability of government. Even if one does not want to go as far as to state that the structure of government in the EU bears a certain resemblance to the U.S. Constitution,²⁷ it is likely that the EU can learn from the U.S. when it comes to solving the problems that come with a 'regulation-centred' system. Bignami identifies these problems as 'how to hold the bureaucracy accountable in a system of divided lawmaking' and 'how to guarantee stakeholder participation'.²⁸ In the next sections we zoom in on three examples of these Bignami 'problem zones' and highlight shifts of policy in these areas in reaction to these problems and the underlying legitimacy issues.

²⁶ For an overview, see Bignami 2004, p. 2.

²⁷ Bignami 1999.

²⁸ *Ibid.*, p. 455.

3 Problem zone 1: ‘Notice and Comment’ and Information-Base in EU Regulatory Procedures

3.1 ‘Regulating Regulation’ through Better Regulation?

As a ‘regulatory power house’ the Commission has traditionally favoured legislation to other policy instruments.²⁹ From 2002 onwards, an enthusiasm for what was long considered an ‘Anglo-Saxon’ approach to lawmaking has swept the EU. After some doomed attempts to reform the regulatory environment step-by-step in the 1990s, the European Commission announced a more structural and non-sector specific approach to regulatory reform under the label ‘Better Regulation’. A comprehensive and integrated impact assessment (IA) system,³⁰ a continuous simplification programme, and in 2005 a dedicated programme to reduce administrative burdens triggered by EU policies by 25% by 2012, among other measures.

In parallel to the Better Regulation initiative, the Commission also stepped up its commitment to public consultation in the lawmaking process. The commitment to systematically carry out, in an early stage of the policy cycle, assessments of the potential economic, social and environmental effects of all policy initiatives (IA) and to listen to all stakeholders in the course of the process (consultation) has required an overhaul of the traditional way of law preparation in the European Commission. These measures are intended to contribute to the solution for what have been identified above as the two main problems facing a constitutional system built around checks and balances between independent branches: accountability of the bureaucratic part of the lawmaker and public participation. The main source of the potential transformative power of EU IA stems from the developing regulatory oversight mechanisms. A secondary line of change consists of the capacities of EU IA to serve as a multi-level tool, facilitating the involvement of public and private actors from various levels.³¹ To illustrate the change in EU regulatory procedures the link between IA and public participation (or ‘consultation’ in EU jargon) is crucial.

Arguably, the one defining feature of EU IA and one in which it differs from its American counterpart is that there is no fixed decision criterion. The IA Guidelines by the European Commission recommend applying cost-benefit analysis where possible and without any obligation to choose the least

²⁹ Meuwese & Senden 2009.

³⁰ Not to be confused with the Community law obligation for Member States to carry out ‘environmental impact assessments’ on projects or plans. See Council Directive 97/11 amending Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, and Directive 2001/42 of the European Parliament and of the Council on the Assessment of the Effects of Certain Plans and Programmes on the Environment.

³¹ Meuwese 2008.

costly policy option. Because IA is used in the first instance as an internal tool by non-democratically elected officials who are only mandated to *prepare* proposals and not *decide* on them, care is being taken to leave the final decision on what the content of a proposal should be to the College of Commissioners. But even the College does not have a ‘blank mandate’ to propose just anything. As mentioned above, the Commission’s lawmaking powers are heavily restricted by the Treaty, which for many policy areas specifies certain policy goals to be pursued or certain considerations to be taken into account. A new framework for policy-making such as EU IA, which has not been put in place by a Treaty revision, but by ‘soft law’ and by changes in internal procedures only, cannot superimpose any decision criterion. Instead, the European Commission opted for a ‘warm’, procedural type of IA, where the main goal is to make lawmakers aware of the costs and benefits – or ‘impacts’ in the terminology preferred by the European Commission – associated with the legislation they plan to adopt. The primary strength of IA as a tool of Better Regulation is that it is supposed to make legislative actors more intelligent and more accountable.³² But IA is not only meant to simply inform those involved in the formation of law and policy at the EU level. By structuring the deliberation process and by highlighting the trade-offs that the political decision-makers face, IA is envisaged to make more transparent the way in which various actors – including private stakeholders – exercise their powers.

Here we get to the bottom of the nature of European IA. Instead of replacing political decision-making, it accommodates other mechanisms that support the political process, such as pressure from interest groups, political discussion in the cabinet, white papers and evidence produced by expert committees. Stakeholder consultation and collection of expertise are integrated in the IA process and inform the wider assessment process. At the end of this internal assessment process, the Commission publishes an IA report³³ summarizing the results and ideally highlighting the trade-offs between the impacts associated with various options. The IA tool is mainly intended to be used in decision-making regarding ‘secondary legislation’ (directives and regulation). In the early days of the new regime, IA was not applied to comitology decisions (see next section) at all, but recently ‘voluntary’ IAs have appeared in this decision-making procedure too.

For the position of private stakeholders in regulatory procedures we should go back to the White Paper on Governance from 2001 and the policy documents that the European Commission published subsequently, such as the report on Improving and Simplifying the Regulatory Environment and

³² Radaelli and Meuwese 2009.

³³ Often simply referred to as the ‘impact assessment’ even if in fact the term ‘impact assessment’ covers the whole process and not just the report. All impact assessment reports can be downloaded from http://ec.europa.eu/governance/impact/practice_en.htm.

the Communication on Better Lawmaking from 2002. In this latter communication, the promotion of a culture of dialogue and participation, through the establishment of minimum standards for external consultations, was emphasised. Concretely, the Commission adopted, on 11 December 2002, a communication ‘General principles and minimum standards for consultation of interested parties by the Commission’, the provisions of which entered into effect on 1 January 2003.³⁴ The general principles articulated are participation, openness and accountability, effectiveness, coherence.³⁵

The crucial question is what happens when the Commission violates its own minimum standards on consultation? There is some degree of enforcement of the requirement to consult by the Commission’s new internal IA quality control body. The Impact Assessment Board (IAB) is a hybrid body which is part of a subtle system of checks and balances with carefully formulated competences: it has no veto power but it is entitled to ask for resubmission of draft IAs, with the Secretariat General, represented on the Board in the person of the Deputy Secretary General, expected to guard the line between quality control and control over substance will become blurred. Although it does not possess the clear regulatory overview task that the Office of Information and Regulatory Affairs (OIRA) in the United States Office of Management and Budget has, the IAB has considerable leverage, especially because it raises the profile of IA among the higher ranks of the Commission administration. For instance, it will tell services to incorporate the views of consultees more clearly or to justify better why consultation has been undertaken in a more limited way than usual.

All IAB opinions are published online but only once the proposal and the IA themselves have been published. This is in order to avoid the IAB opinions being regarded as ‘previews’ of the real IAs by stakeholders. Prob-

³⁴ COM (2002)704.

³⁵ The main provisions that operationalise these principles are the following:

‘All communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses.’

‘When defining the target group(s) in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions.’

‘The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be published on the Internet and announced at the ‘single access point’.’

‘The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings.’

‘Receipt of contributions should be acknowledged. Results of open public consultation should be displayed on websites linked to the single access point on the Internet.’

ably for that very reason, stakeholders would have liked to see the opinions be made public earlier, but the Commission holds on to the position that this would undermine the necessary and constitutional space in which it can exercise discretion.³⁶ The same reasoning applies to the publications of the impact assessment reports themselves. However, the information that is available in the usual phase in which consultation takes place – early on in the process is often so minimal that it is difficult for stakeholders to focus on their comments. This does however somewhat undermine the gist of the general principles and minimum standards. As Craig has pointed out, in the U.S., participation rights have been given teeth by a requirement in the case law to provide for a sufficient information base.³⁷ The mechanism works both ways: if more information is available courts are more likely to review it, or to use it when reviewing regulation. And, if participation rights are valued, it makes more sense to require a sound information basis for stakeholders to base their input on and for courts to evaluate the soundness of the decision-making process.

3.2 New Directions in Case Law

To the amazement of many American observers, many of whom would name this as the first requirement for ‘good regulation’, EU citizens do not have standing in the European court to apply for review of EU directives and regulations. As mentioned in the introduction, this may change with the scrapping of the ‘individuality requirement’ in the Lisbon Treaty, although it is by no mean certain and according to many even unlikely that the term ‘regulatory acts’ will be interpreted to encompass directives and regulations (‘secondary legislation’) as well. But even apart from this change, it should be noted that the European Court of Justice has paved the way – through its famous *Francovich* case law – for individuals and stakeholders to resort to their *national* courts for enforcement of EU law against their *national* governments. Yet, this case law also has its limitations and in the current state of affairs lawyers still find it hard to imagine a kind of ‘right to require effective regulation’ in the EU – whether it is at the domestic or the supranational level.³⁸ Instead, most significant case law developments have taken place in the realm of procedural review. The Court of Justice, as final arbiter on the validity of EU law, has shown some signs of an ambition to play a role in IA oversight, albeit indirectly.

One emerging line of case law deals with the information base of legislation.³⁹ The case most often cited in the context is *Pfizer*, which stipulated that

³⁶ Regulation 2001/1049 would probably have obliged the Commission to grant access to most of these opinions upon application by members of the public anyway.

³⁷ Craig 2006 p. 480.

³⁸ Baldwin & Cave 1999, p. 167.

³⁹ Scott & Sturm 2007, p. 16 ff.

although some assessment is required, the Institutions still have a rather large degree of discretion in carrying out these assessments.⁴⁰ However, the limitation of this case is that ‘assessment’ refers to the highly technical risk assessment, the requirement for which is usually well delineated in a European law. This is distinct from the general requirement to support any EU law or policy with an impact assessment that helps political decision-making by highlighting trade-offs between different policy options whilst incorporating the views of stakeholders. As far as those more general Better Regulation requirements are concerned, for the time being, the threat of an increased judicial interest in the evidence-base of lawmaking is having more of an impact on the lawmaking process than the actual legal consequences of the case law.

Despite threats from Vice-President Verheugen to that effect there has been no judicial action by any Institution to date against another for failing to provide a sound *information* base which can be related to but is distinct from the *competence* base for legislative decisions.⁴¹ Alemanno has pointed to a link between this judicial threat and the establishment and development of the IAB, asking whether Better Regulation and the IA framework in particular is not some sort of ‘trojan horse’ that the Commission will regret having welcomed in its ranks.⁴² Another way of looking at it is that the constant risk of juridification of Better Regulation may be an explanation for the deliberate malleability of the IA framework.⁴³

Apart from some anecdotal evidence that IAs have been used by parties in judicial proceedings in front of the Court, there is one notable example of a case in which IA played a role. In *Spain v. Council*⁴⁴ the issue at hand was that Commission and Council had amended the rules on the aid to cotton farmers, decoupling aid from actual production because the old system only led to overproduction. Spain objected and took the case to court, putting forward the argument that Commission and Council had failed to take labour costs into account, leading to a disproportionate outcome in the regulation concerned. On 16 March 2006 Advocate-General Sharpston in her opinion on this case explicitly mentioned the lack of impact assessment, as a factor in concluding that proportionality had been breached because it made choices by the Commission and the Council appear arbitrary, ignor-

⁴⁰ Case T-13/99 *Pfizer Animal Health v. Council* [2002] ECR II-3305.

⁴¹ Vice-President Verheugen at his examination by the European Union Committee of the House of Lords on 4 July 2005 said: ‘If in the co-decision process Parliament and/or Council produce amendments, changes which are not only just minor but real changes, then there should be an Impact Assessment. If it is not there the Commission will make it very clear that the Commission does not feel that there is a sound basis for a proper decision.’

⁴² Alemanno 2009.

⁴³ Meuwese 2008, p. 157. Joerges, 1999, p. 153, citing Majone 1996, p. 291 et seq.

⁴⁴ Judgment of 7 September 2006, C-310/04 *Spain v. Council* [2006] ECR I-7285.

ing the Commission's defence that no IA was required in this case. The Court agreed on the outcome of her conclusion and annulled part of Council Regulation 864/2004 for breach of the principle of proportionality. It also concurred with the Advocate-General in that failure by the Council and Commission to take into account certain relevant costs, were of crucial importance, but it did not attach similar importance to the absence of an official IA as such. However, it does raise the question for how long the Institutions will continue to be protected by the established case law on the marginal review of the reason-giving requirement of Article 253 EC Treaty and the wide margin granted to them when it comes to applying the proportionality principle.

The second body of emerging case law centres around participation rights.⁴⁵ Scott and Sturm see evidence in the new judicial attention for fair participation in regulatory procedures or more widely, 'governance' in their terminology for a new role for European Courts as 'catalysts' for a more deliberative and/or reflexive administrative style.⁴⁶ The most important case illustrating their argument is *UEAPME*; a case on whether a stakeholder organisation that was on the Commission's list of organisations with a right to participate at the early stage of the 'social dialogue' was entitled to a place at the negotiating table for a European directive on parental leave.⁴⁷ A pressing issue in this case was whether the organisation had standing before the court. The court resolved this issue by engaging with constitutional arguments: because the legislative procedure at hand did not include proper involvement of the European Parliament, the 'participation of the people' must be assured in a different way.⁴⁸ In other cases the court has been more restrictive. In *Bactria* for instance, the court only engaged in a very marginal review of a comitology procedure, of which a stakeholder had complained that it had not received proper access to the regulatory decision-making.⁴⁹

The case law points to an increasing willingness on the part of the Court to compensate for deficits such as the meagre evidence base and the lack of openness in European Community rulemaking. Minimum standards for the evidence base and enforcement of participation rights – if the Court is indeed going in that direction – are solutions that could draw further inspiration from the U.S. system. For instance, one remedy already suggested in 1999 by Bignami is a notice and comment procedure in comitology to resolve the democratic deficit of this type of rulemaking.⁵⁰

⁴⁵ Craig 2006, p. 134.

⁴⁶ Scott & Sturm 2007.

⁴⁷ Case T-135/06 *UEAPME*.

⁴⁸ *Ibid.*, para 89.

⁴⁹ Case T-339/00 *Bactria*.

⁵⁰ Bignami 1999.

4 Problem Zone 2: The EU Framework for Agencies as a Vehicle?

4.1 The Rise of European Agencies

As we have seen above, historically the primary objectives of the U.S. APA were to control and standardize the decision-making procedures of federal administrative agencies, to counteract the rapid growth of the administrative regulation of private conduct, and to recalibrate the constitutional balance of governmental powers in the 'administrative state'.⁵¹ The face value parallels between the set of circumstances in pre-war U.S. and the socio-economic environment of present day European Union must be pointed out. Like under the Roosevelt administration the EU's executive power has grown considerably over the last decades – in institutional terms and in substance. EU agencies – administrative EU bodies set up to accomplish a specific technical, scientific or managerial task – are mushrooming.⁵² Their numbers have surged from 14 in 2003 to 21 in 2009. Administrative regulation, although we are not used to labelling it as such, is on the rise too, due to comitology,⁵³ and the EU Commission is, as Craig⁵⁴ observes, increasingly undertaking administration directly, without a systematic relationship with national administrations. One cause behind this development is that the Commission was given wider responsibilities over the years, in part because the subject matter involved did not always lend itself to shared management with Member State authorities, and in part because certain policies were best implemented through non-governmental bodies.⁵⁵

Agencies are an attractive instrument to meet the new administrative challenges of the EU. They are used ever more frequently and this is likely to continue. For instance, the enactment of REACH, the huge chemicals regulation,⁵⁶ in 2006 was accompanied by the establishment of the European Chemicals Agency (ECHA) in Helsinki. The drive to use more agencies has partly come from within the Commission. As a result of an internal audit the Commission in the year 2000 committed itself to a reform. This entailed, among other things, more focus on the core functions such as policy making by delegating administrative responsibilities to agencies.⁵⁷

⁵¹ Burnham, 1999, p. 12-16.

⁵² Andoura and Timmerman call it the 'agencification frenzy'. Andoura & Timmerman 2008, p. 3.

⁵³ Majone 1996.

⁵⁴ Craig 2006, p. 32.

⁵⁵ See Craig 2006 and Barkhuysen et al. 2008.

⁵⁶ EC 1907/2006. 'REACH' stands for 'Registration, Evaluation, Authorisation and Restriction of Chemical substances'.

⁵⁷ Reforming the Commission – A White Paper, Part I COM (2000) 200 final/2.

Craig notes that agencies ‘are here to stay’ as a part of the EU’s institutional framework.⁵⁸ Agencies however do not have a fixed footing in the Treaties and there is no general framework or law governing their set-up or operation.

4.2 Governing Agencies

At present there are 21 agencies in the European Union in the EU’s first pillar, 35 if we add the second and third pillar agencies.⁵⁹ According to the Community’s website a Community agency is ‘a body governed by European public law; it is distinct from the Community Institutions (Council, Parliament, Commission, etc.) and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task, in the framework of the European Union’s ‘first pillar’.⁶⁰ These agencies come in different shapes and sizes and have different responsibilities and powers. Different typologies are circulating.⁶¹ The Commission itself distinguishes two broad types of agency,⁶² regulatory agencies and executive agencies, each with different characteristics. ‘Regulatory’ or ‘traditional’ agencies⁶³ have a variety of specific roles, set out in their own legal basis, case-by-case. Executive agencies, on the other hand, are set up under a Council regulation adopted in 2002⁶⁴ with the much more narrowly defined task of helping to manage Commu-

⁵⁸ Craig 2006, p. 190.

⁵⁹ See for an overview the EU website at http://europa.eu/agencies/index_en.htm.

⁶⁰ See http://europa.eu/agencies/community_agencies/index_en.htm.

⁶¹ Vos for instance – following a functional approach – distinguishes four types of agencies. Agencies which have as their mean function to provide information and are generally charged with the coordination and supervision of this information and the creation of networks (category 1); agencies which provide specific services and/or specific measures to implement Community regimes or programmes (category 2); agencies which provide specific information, expertise and/or services and/or facilitate co-operation (category 3); agencies which provide specific information, expertise and/or services, as well as a specific measures to implement Community regimes or programmes and monitor at their correct implementation (category 4). Vos 2003, p. 119.

⁶² In addition to agencies, special partnership bodies – set outside the traditional institutional structure – have been set up to stimulate research and economic development. We will not discuss them here.

⁶³ At present there are 29 of these agencies (sum total of all three of the EU’s pillars).

⁶⁴ 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 L 11.

nity programmes.⁶⁵ They do not have decision-making or policy-making powers, and therefore we will not deal with them in detail here.

The powers and tasks of regulatory agencies vary, but most of them do have advisory responsibilities.⁶⁶ Typically European agencies provide information, expert advice or services, and are generally charged with the coordination and supervision of this information, helping out with cooperation and implementation and the creation of networks.⁶⁷ Some of them do have decision-making powers as well.⁶⁸ This seems to set EU agencies apart from their federal American counterparts which are for the most part endowed with decision-making power and sometimes even with the power to legislate.⁶⁹ In this respect European agencies seem harmless – constitutionally speaking; they do not right away upset the balance of power and do not seem to have substantial wide ranging powers.⁷⁰ They seem to serve mere administrative purposes. Appearances may be deceptive however. In a lot of cases there is a substantial indirect effect of EU agencies on EU decision-making and legislation. Sometimes it is the Commission that makes the formal decision, but for that it relies heavily on the views of an agency.⁷¹ *De facto* it is the agency that weighs the interests and decides.⁷² Because it is still impossible

⁶⁵ These latter agencies are all based in Brussels.

⁶⁶ The label regulatory is somewhat confusing for the continental European observer since ‘regulatory’ doesn’t necessarily mean or indicate that such an agency has the power to legislate. See Meuwese 2004, p. 1127-1128.

⁶⁷ The 2008 Commission Communication on European agencies distinguishes the following categories:

- a) Agencies adopting individual decisions which are legally binding on third parties;
- b) Agencies providing direct assistance to the Commission and, where necessary, to the Member States, in the form of technical or scientific advice and/or inspection reports;
- c) Agencies in charge of operational activities;
- d) Agencies responsible for gathering, analyzing and forwarding objective, reliable and easy to understand information/networking;
- e) Agencies providing services to other agencies and institutions. See *European agencies – The way forward*, 11 March 2008 COM (2008) 135 final.

⁶⁸ According to Vos 2003 only 4 out of 14 in 2003.

⁶⁹ The Draft Interinstitutional Agreement on the Operating for the Regulatory Agencies COM (2005) 59 final even explicitly forbids agencies to adopt general regulatory measures, as well as exercising semi-judicial functions, political discretion or responsibilities conferred to the Commission. (Article 5).

The proposal for the Draft Agreement was rejected by the Council.

⁷⁰ Yatanagas points out that, although U.S. and European agencies are set in fundamentally different systems, they do face similar problems. Yatanagas 2001, p. 56.

⁷¹ Craig 2006, p. 167 gives the example of the European Medicines Agency (EMA).

⁷² Craig 2006, p. 155 labels these agencies that have the actual decisional power as ‘quasi-regulatory agencies’.

under the *Meroni*-doctrine⁷³ to delegate non-original⁷⁴ power to bodies other than those established by the Treaties or to delegate power involving a wide margin of discretion, ever more of these covert decision-making arrangements are set up in which the Commission merely rubberstamps decisions made by an agency.⁷⁵

4.3 Comitology as a Contributing Factor

Add to this that agencies also play an ever more important role in comitology, that is, the procedure in which the Commission is assisted by committees to enact implementing legislation. At present the bulk of EU legislation results from comitology. Szapiro estimates that the number of implementing measures adopted each year between 2500 and 3000 accounts⁷⁶ for 90 per cent of the Community's normative output, with often inestimable direct consequences on European citizen's everyday lives.⁷⁷ Comitology committees are rampant in the EU (around 250 today). By combining, at least in theory, technical expertise and member state control, they grease the wheels of the European integration.⁷⁸ Comitology, however, comes with serious concerns as regards democratic control of the work of, in particular, regulatory committees. On top of that the procedure is not transparent; it bypasses the checks and balances in the original institutional design of the treaties, and thus raises accountability issues. Although especially the European Parliament is trying to exercise some form of oversight and control over comitology by stretching the range of powers under the Comitology decision last revised in 2006,⁷⁹ many observers feel that this

⁷³ Case 9/56 *Meroni & Co. Industrie Metallurgische SpA v. High Authority* [1958] ECR 133.

⁷⁴ Meaning power different from the original power under the Treaty possessed by the body delegating the power.

⁷⁵ See Van Ooik 2005, p. 150-151. See section 2.2 footnote 24 in particular for the U.S. non delegation doctrine. Yatanagas observes that, although the U.S. and the EU face similar problems as regards the efficiency and legitimacy of the regulatory process in an increasingly complex and changing environment, that the Americans take a realistic and pragmatic approach, where the Europeans are always prisoners of a flagrantly dogmatic legalism (read: *Meroni*-doctrine). According to Yatanagas dogmatic legalism is rooted in a rigid conception of institutional balance within the Community based on case law dating back 45 years. It is – in his view – blocking any development of European decision making mechanisms. Yatanagas 2001, p. 56.

⁷⁶ 2654 in the year 2006.

⁷⁷ Szapiro 2009, p. 90.

⁷⁸ Dehousse 1997.

⁷⁹ Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 2006 11-13.

does not effectively bring comitology in line with contemporary democratic standards.⁸⁰ It may well be that the increased role of agencies in comitology enhances the coordination and expertise in implementation networks and answers to the functional needs of the Community. As Dehousse⁸¹ observes, they also add to the democratic and accountability issues and make for ever more controversial ‘technocratic’ regulation and insufficiently controlled administration. Although this does not compromise the institutional balance of powers in the EU in a formal sense, in reality it does.⁸² The original institutional design of the Treaties does not take full account of comitology as such.⁸³ In this vein of thought, comitology has been labelled a Trojan horse to the institutional balance of the EU.⁸⁴ Agencies are the product of the functional needs of the Community, as is comitology, but these interests need to be balanced with, what Everson⁸⁵ calls, the needs of the emerging political integration of the Union.

4.4 Agencification and Judicial Review

There is a more practical and pressing drawback of agencification too. Judicial review of agency decision-making at this moment resembles Swiss cheese.⁸⁶ The possibilities of bringing legal action against agency decisions or actions vary according to acts establishing the agency itself. The power of jurisdiction of the Court of Justice or the Court of First instance, and the scope of reviewable actions varies accordingly. For an aggrieved party it becomes especially difficult to find the way through the maze in case the formal authority and the one making the actual decision are two different bodies. The Court of First instance in its *Artegoda*-decisions

⁸⁰ Szapiro 2009, Neuhold 2009.

⁸¹ Dehousse 1997, p. 254 ff.

⁸² To solve this problem one could consider loosening the Meroni constraints and come up with agencies with autonomous discretionary powers. Majone has floated this idea, arguing that some regulatory task cannot be handled by the Commission itself due to constraints on its resources. Loosening the constraint however would prompt a whole new set of constitutional issues. See Craig 2006, p. 182-186. Yatanagas is critical of the *Meroni*-doctrine too. It cripples the ability to meet with the challenges of an increasingly complex and changing environment and – as prisoner of flagrant dogmatic legalism – misses out on enhancing the efficiency and legitimacy of regulatory processes. Yatanagas 2001, p. 56.

⁸³ The Lisbon Treaty does in its Articles 290 and 291. It is not clear however what impact these provisions will have for the future of comitology. See Szapiro 2009, p. 108-115.

⁸⁴ Neuhold 2008.

⁸⁵ Everson 2009.

⁸⁶ I.e. cheese with a lot of wholes in it, like the famous Emmenthaler cheese.

sion⁸⁷ tried to come up with a remedy for this by reviewing an agency's decision although it was not itself the formal author of the decision. But the eclectic way in which legal remedies are provided in secondary legislation against agency action still remains very complicated and is almost prohibitive.⁸⁸ This in turn accounts for limited case law as regards agency operation. Courts can only supervise acts of agencies in a very *ad hoc* fashion: there is no uniform judicial review, no logical system. This is why Van Ooik feels the U.S. system of judicial review of agency action is 'more developed'.⁸⁹

These are not the only reasons to seriously consider a general framework for EU agencies. The need to increase transparency, accountability and constitutional fit of agency arrangements are also often voiced as an argument into that direction. In its White Paper on European Governance of 2001⁹⁰ the Commission spoke out in favour of such an instrument especially because such a framework could provide an enabling highway to set up new ones. It proved however to be tough going to arrive at this general framework. In 2002 the Commission kicked off with a Communication suggesting an operating framework for the European Regulatory Agencies, along the lines of the framework for Executive agencies.⁹¹ In 2005 the Commission followed suit with a draft *Interinstitutional Agreement on the Operating for the Regulatory Agencies*.⁹² It met with a lukewarm reception and finally failed because the Council did not make it a priority matter. The Commission withdrew the proposal and then in 2008 watered the initiative down by replacing the draft inter-institutional agreement to an invitation to an inter-institutional discussion which should lead to a common approach.⁹³

This dialogue is presently underway with deafening silence. Clearly the whole issue has grinded down into an institutional deadlock while the need for a general framework only seems to have grown. As Andoura and Timmermans observe: 'the advantages of decentralized, autonomous agencies in European governance are clear, this should not distract us from the issues of accountability, legitimacy, decentralization, subsidiarity and proportionality linked to the agencification process and the heterogeneity of the current system of European agencies'.⁹⁴ Not only does the lack of a

⁸⁷ Court of First Instance Cases T-74, 76, 83-85, 132, 137 and 141/00 *Artogodan GmbH v. Commission* [2002] ECR II-4945.

⁸⁸ Van Ooik has – for good reason – pleaded for a more horizontal approach. See Van Ooik 2005, p. 148-149.

⁸⁹ Van Ooik 2005, p. 148.

⁹⁰ White Paper European Governance COM (2001) 428 final.

⁹¹ COM (2002) 718 final.

⁹² COM 2005 (2005) 59.

⁹³ *European agencies – The way forward*, Communication from the European Commission 11 March 2008 COM (2008) 135 final.

⁹⁴ Andoura & Timmerman 2008, p. 28.

common framework for regulatory agencies cause confusion and hampers the understanding of the entire system of agencies,⁹⁵ it creates legal problems as well. The patchwork agency system boggles the minds of citizens seeking legal protection, raises constitutional questions, for example, in relation to legal basis,⁹⁶ legislative mandate and accountability, and ‘begs the question on subsidiarity’ according to Andoura and Timmerman.⁹⁷

Vos has argued for a Treaty base for agencies, enshrining the legal basis and provisions on judicial review and loosely knit constitutive framework encompassing the rules and principles governing the operation of such agencies. More recently Nieto-Garrido and Delgado in a study covering the latest developments added to the argumentation pointing out the need to standardize the judicial review of EU agencies and bodies.⁹⁸ But agencies did not gain a firm footing in the Lisbon Treaty. Agencies are mentioned in the Treaty and their existence is expressed in a list of reviewable actions in the Treaty, but for the most part it is lip service; no general legal basis is provided nor a general regime for judicial review of their actions.⁹⁹ Although we do see the various legal and political constraints, we think there is a window of opportunity if the general framework for regulatory agencies is set up as a cornerstone for European administrative law. This link between framing agencies and administrative procedure was made successfully in the U.S.

5 Learning from the U.S. Experience: The Administrative Procedure Act (APA)

In the U.S. system, the problems highlighted by Bignami – ‘how to hold the bureaucracy accountable in a system of divided lawmaking’ and ‘how to guarantee stakeholder participation’ – come together in the issue of how to control the wide discretion of agencies. The solution has been found in counterbalancing discretion by procedural safeguards, including participation rights for interested persons.

The APA can be seen as a compromise between supporters of the adversarial system on the one hand and the one’s advocating a more flexible,

⁹⁵ Andoura & Timmerman 2008, p. 19. Andoura and Timmerman feel that the Commission itself in part is to blame for that. The Commission has over the last five years come up with different, inconsistent definitions and typologies that have confused the issue.

⁹⁶ Most of the agencies are now set up under Article 308 EC, the flexibility clause, which stretches the edges of the competence-envelope to the extreme.

⁹⁷ See Andoura & Timmerman 2008, p. 22.

⁹⁸ Nieto-Garrido & Delgado 2007, p. 159-161.

⁹⁹ The European Defense Agency and the European Space Agency are the only ones named in the Treaty.

less formal procedure on the other. In the provisions a distinction is made between adjudication and rulemaking and between a formal and informal procedure. In studying whether an APA type act might be of inspiration to the EU, one has to realise that the APA is quite a flexible act. Courts played an essential role in developing administrative law and the procedural rules agencies have to comply with. Procedural rules could be tailored to developments in society, in shifts of power and in rulemaking. As a consequence the requirements of the notice-and-comment rulemaking procedure have changed over time. Also of relevance is that the APA is of a very general nature. Agency organic acts determine what procedure has to be followed and statutes may set different kind of rules including for instance the compulsory production of a regulatory impact assessment.¹⁰⁰ Although not strictly uniformizing the administrative law system, the APA serves as an important conceptual framework.

Nowadays the most important provision for rulemaking is §553 APA, which governs the procedure of informal rulemaking, also called 'notice-and-comment' rulemaking. This has not always been the case. The APA also contains a more formal procedure in §556 APA, that is followed when a statute requires rules to be made on the record after opportunity for an agency hearing (§553(c)). The formal procedure has features of a trial and the procedure also needs to be followed in formal adjudications; interested parties have several adversarial rights, such as the right to cross-examine witnesses. As rulemaking increased, partly due to 'social regulation' programs in the 1960's, these trial-type hearings were considered too formalistic, unnecessarily costly and cumbersome and delaying the regulatory program.¹⁰¹ An overload of adversarial rights formed a threat to effective administration, especially in rulemaking where many parties can be affected and the range of issues is wide. Against this background the Supreme Court in *Florida East Coast* by means of statutory interpretation significantly limited the number of cases in which rules have to be adopted in the formal procedure.¹⁰² Only a clear expression of congressional intent triggers the formal procedure; otherwise informal rulemaking will suffice. As a result formal rulemaking has been nearly abandoned.

Section 553 governs the procedure of informal 'notice-and-comment' rulemaking. The section applies, unless a statute explicitly makes an excep-

¹⁰⁰ In various acts, such as the National Environmental Policy Act, 42 U.S.C. §§4331-4335, Congress imposed upon regulatory agencies a duty to engage in regulatory impact assessment. Other, more general regulatory review requirements can e.g. be found in the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. Regulatory impact analysis nevertheless is primarily an instrument for the benefit of Presidential oversight over the executive. See Breyer a.o. 2006, p. 102 ff and Pierce, Shapiro & Verkuil 2004, p. 507 ff.

¹⁰¹ Breyer a.o. 2006, p. 514-520 .

¹⁰² *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973).

tion or when one of the exceptions in §553 occur. For example, interpretative rules, general statements of policy and rules of agency organization and procedure are exempted. Nor has the procedure to be followed whenever an agency for good cause finds the notice-and-comment rulemaking procedure impracticable, unnecessary or contrary to the public interest.¹⁰³ The informal procedure is much more flexible than its formal counterpart is. Interested persons have a right to participate, mainly by putting forward written comments. An oral hearing is not prescribed and interested persons lack adversarial kind of rights. A general notice of proposed rulemaking is published in the Federal Register. That notice includes, besides information on the procedure to be followed, either the terms or substance of the proposed rules or a description of the subject and issues involved.¹⁰⁴ After the notice the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.¹⁰⁵

In the early days the procedure was truly informal. Agencies were not obliged to create a record and could base a rule on almost any information. The rise in rulemaking in the sixties and seventies of the past century led to the abandonment of the burdensome formal procedure. But, the participation rights in the traditional informal procedure were considered too weak, in a society where the public increasingly distrusted agency action. Not all interest groups could participate equally in the rulemaking procedure and confidence in the expertise of agencies declined. The approach to science in general became more sceptical. A deferential review of technical rules would run the risk of accepting rules, that besides experts, no one could understand. The technical nature of many rules in the sixties and seventies for their acceptance asked for more public participation and a stricter review of their rationality.¹⁰⁶ In this time frame Courts transformed §553 to a more demanding procedure. They would not only review the constitutionality of agency rules, but also the rationality.

Courts increasingly have required agencies to give adequate reasons for their decisions.¹⁰⁷ The agency's statement is the basis for judicial review of the substance of the rule. Only if the statement is adequately precise, courts

¹⁰³ §553(b) (A and B).

¹⁰⁴ §553(b) (3).

¹⁰⁵ §553(c).

¹⁰⁶ Bignami 1999, p. 474-475; Shapiro 1996a, p. 33-38.

¹⁰⁷ Pierce, Shapiro & Verkuil 2004, p. 328; Shapiro & Levy 1987. See for example *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977), *Weyerhouse Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978) and *Motor Vehicle manufacturers' Association v. State Farm*, 463 U.S. 29 (1983).

can review carefully whether the rulemaking is not arbitrary or capricious. Also the notice has to be quite precise; without that interested persons can not effectively put forward their views. In §553(b) and 553(c) courts have read the obligation of the agency to disclose the data on which a proposed rule rests. Whenever the proposed rule is based on scientific information, the agency has to refer to the used studies, experiments, methodology and so on. Thus the duty to create an evidentiary record, although not fitting in the traditional idea of an informal procedure and although a regulatory impact assessment may not be prescribed by statute, has been created in judicial common law.¹⁰⁸ Whenever an agency does engage in IA, the information to be obtained in that procedure will be part of the rulemaking record. Although a court in general cannot directly review the substance of the IA, the collected information as part of the record can be used to review the substance of the rule.¹⁰⁹ Under some acts, a court may even have the power to remand a rule back to the agency if it failed to comply with the IA requirements.

The record in support of a rule facilitates the ‘hard look’ of courts on agency discretion. Courts can closely scrutinize the logical and factual basis of a rule, forcing agencies to explain in considerable detail their reasoning.¹¹⁰ There needs to be a rational connection between the facts found and the policy choice made by the agency. In this manner, the duty to state reasons is not solely a procedural safeguard that facilitates public participation. It also forces agencies to evidence based rulemaking, which enhances substantial review. Heightened scrutiny of the rationality of agency decisions became a pressing need once the courts accepted delegation of broad regulatory powers.¹¹¹

The insistence on procedural safeguards to limit agency discretion has played a prominent role in American administrative law.¹¹² One of the reasons to stretch the procedural safeguards for rulemaking can be found in the weak constitutional position of the agency, as described before. Public participation rights and judicial review provide a substitute for the lack of electoral accountability and thus enhance the legitimacy of agency rulemaking. As one American author puts it: ‘[w]hile most of us simply take that right for granted, foreigners express amazement’.¹¹³

¹⁰⁸ Breyer a.o. 2006, p. 520 ff.

¹⁰⁹ The Regulatory Flexibility Act and the executive orders concerning regulatory analysis exclude judicial enforcement of the requirements of an IA.

¹¹⁰ Breyer a.o. 2006, p. 347 ff.

¹¹¹ Shapiro & Levy 1987.

¹¹² Breyer a.o. 2006, p. 480.

¹¹³ Harter 1996, p. 310.

More than 50 years after the enactment of the APA, the general opinion seems to be that the act functions well.¹¹⁴ Its broad language and simplicity provides the flexibility needed for tailoring the rules to very different types of agency action and to changing relationships between Congress, agencies and the people. Rulemaking generally is considered to be more efficient than adjudication and to lead to more rational, fairer policy. Large segments of the public have the opportunity to effectively influence the agency's policy. To some extent informal rulemaking has diminished the importance of adjudications for the development of the legal system. Courts have been able to cope with this development in administration; thanks to the APA's flexibility. The provisions in the APA enabled the judiciary to review the informal rulemaking procedure more stringently. Also the changing nature of the rulemaking issues, becoming more technical and fact-orientated in time, asked for extra procedural requirements to the notice-and-comment rule-making provisions, such as an obligation to develop fact-gathering procedures. Courts have shown themselves to be eager to scrutinize the agency's fact finding.¹¹⁵ The increased procedural requirements have strengthened public participation, improved the transparency of agency action, facilitated a more stringent review and probably has led to a fairer procedure. Scholarly evaluations include one by Majone, who feels that the U.S. APA is an outstanding example of procedural control of agency discretion.¹¹⁶ According to McCubbins *et al.*¹¹⁷ an instrument like the APA not only facilitates fairness and legitimacy in agency decision-making but it fulfils important control functions, increasing the control and influence of political executives, stakeholders and citizens and enhancing the responsiveness of expert agencies.

This flexibility of APA and the leeway that it offers to courts also has a negative side to it. Numerous scholars have criticized the role of the judiciary and its strict review, leading to an 'ossification' of the rulemaking process.¹¹⁸ This refers to the complaint that the informal rulemaking procedure has become so burdensome and the risk of judicial rejection of the rule so high, that the increased procedural safeguards have an adverse effect in the end.¹¹⁹ For an agency it can be more efficient to shift to other means to change its policy, for example through adjudications (thus the policy change is less visible), through rules excluded in §553 (such as policy statements or procedural rules) or even secretive rules. The intensity of the review can also lead

¹¹⁴ Harter 1996; Morrison 1986; Pierce 1996; Shapiro 1996b.

¹¹⁵ Morrison 1986, p. 257, 258.

¹¹⁶ Majone 2005, p.85-86.

¹¹⁷ McCubbins, Noll, and Weingast 1987, p. 243-277.

¹¹⁸ Breyer a.o. 2006, p. 565-570; Pierce, Shapiro & Verkuil 2004, p. 397-403.

¹¹⁹ Pierce 1996, p. 82-84: the notice-and-comment rulemaking procedure takes an agency at least five years, requires tens of thousands of staff hours and fifty percent finally is rejected in courts.

to a more conservative policy, because proposing new rules might be too cumbersome. Another line of criticism is based on the idea of the separation of powers. Courts are criticised for overplaying their hand. With their 'hard look' courts are said to have encroached upon the executive power, while they lack political accountability. The inclusiveness of stakeholder participation is a sensitive issue as well. Some groups have more resources to effectively comment on proposals and therefore will have a larger influence than others on the outcome of procedures.

The legitimacy of agency actions, the legal and constitutional basis for their setup and operation and the checks on administrative discretion are themes that deserve constant attention. Public participation rights in rule-making and judicial review are generally highly valued, though the strictness of the judicial review has been challenged. Whether the APA needs adjustments and if so what kind, will be highly dependent on one's view of the nature of government and conception of democracy.¹²⁰

6 Conclusion: A Preliminary Verdict on the Desirability of a European APA

Outcomes of comparative research most of the time do not prove anything in the scholarly sense of the word, but comparisons are often inspirational since they sometimes show how different solutions were found for identical problems. Although the EU and U.S. systems of administration differ considerably in terms of constitutional settings and systems and styles of administration, they face certain similar challenges. In our view three main challenges ask for rethinking the desirability of a general EU administrative law act: the concept of control of the administration, efficiency and legitimacy.

The first challenge, the conceptual one, is a vital but under-researched one. The discussion on the future of the EU administration – becoming ever more important and powerful – is largely determined by the logic derived from the parliamentary democracy paradigm. But the EU system is not that of a parliamentary democracy and as a consequence the control exercised over the EU administration works differently, leaving gaps in accountability and judicial review.¹²¹ Not only is the underpinning system different, the EU administration differs increasingly from concepts of administration as we are familiar with in continental Europe. The EU administration is deeply involved in regulation, more independent and less intensely controlled by political bodies than Member States administrations are. These features imply that the present constitutional framework is not entirely fitting. This

¹²⁰ Pierce, Shapiro & Verkuil 2004, p. 38-40.

¹²¹ Verhey, Broeksteeg & Van Driessche 2008.

realisation in itself is similar to the American awakening in the 1930s that the administration as it was developing no longer fitted the mole of the separation of powers under the U.S. Constitution.¹²² There is already a chorus of authors rallying for a paradigm shift or a redefinition of the concept of European administration.¹²³ We are as of yet not at that particular junction, but to our mind the analysis shows that we need to take a broader view on European administration to fully understand its complexity, operation and current problems. In early 21st century Europe ‘traditional legal categories have ceased to reflect adequately to the actual operation of the EU’s machinery’, in the words of Dehousse.¹²⁴ ‘Soft law’ solutions, like Better Regulation with instruments such as impact assessment and enhanced consultation, are triggering some changes but are also running into the limits of what is changeable outside of the formal Treaty framework. These new tools and procedures, as well as the refuge decision-makers are widely seeking in agency-based governance settings, can be seen as attempts to address the second and third challenges, those of efficiency and legitimacy. However, the analysis above shows that the half-hearted way in which the changes are implemented creates new problems as well.

No general code of European administration exists today and a lot of authors feel it is not likely to come about in the near future.¹²⁵ Treaty constraints and the composite and decentralized character of EU administration and administrative law hinder the development of a code. Some feel detailed codification is undesirable altogether.¹²⁶ That may hold true for comprehensive codification of European administrative law, but not for all parts of it. Some of the problems of EU administrative action leave no room for complacency. Proposals to adopt a European APA which would give interest groups the right to participate in rulemaking procedures and to bring actions before the ECJ for infringement of essential procedural requirements for manifest errors have been made in the past.¹²⁷

Yatanagas argues that a European APA is perfectly imaginable in the context of existing provisions of the Treaty and of secondary legislation. The Commission must propose a regulation on the basis of Article 308 on the

¹²² As Dwight phrased in his classic ‘The Administrative State’: ‘This expansion [of governmental activities] upset old balances, raised questions of the appositeness of the old theory. At the federal level the creation of ‘independent establishments,’ (...) raised a presumption that the ‘tripartite theory’ was being violated, that it should either be reapplied, or else be modified or abandoned.’ Dwight 1948, p. 104.

¹²³ Bignami 2004, Dehousse 2002.

¹²⁴ Dehousse 2002, p. 208.

¹²⁵ Jans, De Lange, Prechal & Widdershoven 2007, p. 369-371 and Kadelbach 2003, p. 204 in which he depicts the ‘leave-it-as-it-is’ approach as one of the possible avenues.

¹²⁶ Harlow 1999.

¹²⁷ Yatanagas 2001, p. 50.

administrative procedures to be followed in the regulatory process, that the Council and Parliament will confirm by co-decision.¹²⁸ A European style APA like the one proposed here would not need to entail a comprehensive codification of EU administrative law, but could stop at a 'light' bill that only touches upon 'regulatory' and 'institutional' issues. For that no Treaty amendment is needed: an APA 'light' could be enshrined in secondary legislation with ease.¹²⁹ The case of the Regulation 1049/2001 on the public access to EU documents proves important constitutional steps can be made without Treaty change.¹³⁰ The possibility to appeal executive EU regulation under the Lisbon Treaty can serve as a stepping stone (and maybe centre-piece) for a APA EU style.

The U.S. Administrative Procedure Act could serve as a source of inspiration for Europe in two different ways: first as a source of 'legal transplantation' of certain concepts and second as the generic (transsystemic) idea of an 'APA'. We are not the first to suggest this. Borrowing and transplanting solutions from foreign system is practical and sometimes wholesome, although there maybe side-effects which can turn legal transplants into legal irritants.¹³¹ Especially the APA notions of a notice and comment procedure, the elaboration of participation rights and a uniform system of judicial review against agency action and executive regulation¹³² are recommendable to tackle current regulatory and agency-related problems in the EU.

A European APA would be a compromise, just like the U.S. APA was, and as any attempt at a general framework or codification of administrative law would be. Yet this does not wipe out the principal and practical motives to favour an attempt at a European APA. Kadelbach, for one, believes there are various advantages to codification, one of them being that an administrative law act sends a signal to the European executive to adhere strictly to the rule of law and to enhance the awareness that its actions are subject to review. This could serve as a means to reduce widespread citizens' distrust in 'Brussels' and thus have a positive effect on public opinion.¹³³ More general we feel that, as a matter of principle, a European APA could rebalance the original institutional equilibrium in the EU context and update the legal regime for the EU administration. Legitimacy and efficiency problems, legal bottle-

¹²⁸ Yatanagas 2001, *ibidem*.

¹²⁹ Nieto-Garrido and Delgado have suggested cutting up the question of codification of administrative law into separate parts in order to overcome the problems of comprehensive codification. Nieto-Garrido & Delgado 2007, p. 126 ff.

¹³⁰ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, p. 43-48.

¹³¹ Teubner 1998.

¹³² See Article 294c, par. 2, of the Lisbon Treaty.

¹³³ Kadelbach 2003, p. 204-206.

necks and constitutional issues could be settled in one stroke. It would also tie in well with the possibility to appeal EU regulatory acts before the European Court of Justice under the Lisbon Treaty. Although somewhat indirectly the Lisbon Treaty introduces a balanced two tiered system of control and review of EU legislation. The first panel of this system is regular political control over 'legislative' acts by Commission, Council and the European Parliament via the ordinary legislative procedure enshrined in the Treaty (Article 294a of the Lisbon Treaty). The second panel of the constitutional framework consists of the possibility to appeal regulatory acts – delegated and implementing acts in the terms of the Lisbon Treaty – by individuals or legal persons. There are however missing links in this system. Participation rights and transparency issues as regards executive regulation remain unresolved. This can make the right of appeal a toothless tiger. For the same reason an obligatory impact assessment of proposed executive regulation is warranted in order to give the appellants means to dispute the evidence-base. In this more practical respect a European APA would benefit European regulatee seeking legal protection against agency action too. At present they are confronted with an 'unsystematic patchwork of highly specific rules, and on the other hand a set of general principles.'¹³⁴ The administrative procedure, the general principles involved, as well as the legal remedies are for the most part unfathomable for ordinary citizens and businesses at the moment. An APA could be used as a vehicle to operationalise some of these common principles of EU administrative law, for example, principles like legal basis, legality, legitimate expectations, general provisions on proportionality and transparency.¹³⁵

One may of course question whether 'American-inspired' judicial review of rules is the best way forward.¹³⁶ In many EU countries the judicial administrative law system is mainly built on the review of individual decisions and participation rights in rulemaking are rare. A radical break with this tradition might be a bridge too far. Furthermore, many observers feel that the U.S. example shows that judicial review of rulemaking carries the risks of activism and ossification. In view of this, compromise solutions such as standing rights for bodies with a 'watchdog-like' or 'whistleblowing function' have been proposed. The latter idea comes from Everson who gives the not so well-suited example of European parliamentary committees, but clarifies that she is referring to 'bodies who retain a degree of impartiality within the regulatory decision-making process and who thus are best placed to

¹³⁴ Kadelbach 2003, p. 192.

¹³⁵ These principles are already part of the community acquis, either expressed in case law, secondary legislation or other documents (like The general code of good administration elaborated by the European Ombudsman, the Commission's Code of Good Administrative Behavior) and do not impinge on the administrative law systems of the Member States.

¹³⁶ E.g. Harlow 1999.

trigger the judicial review of deliberation'.¹³⁷ Yet, as Shapiro argues, a phase of more intensive judicial review might be needed in the EU as an engine of change, in order to bring consistency to the changing system, much in the way that happened in the U.S.¹³⁸ Much will depend upon the way the ECJ will handle its new powers to review. Restrictively only marginally reviewing delegated 'regulatory' acts, or intensely, by reviewing both the regulatory act itself as well as the basic or parent act delegating the power?¹³⁹ A European APA offers the ECJ a useful framework for its task and offers legal certainty for European citizens. Ideally it will steer the development of EU administrative law in a direction that fosters a transparent and fair exercise of regulatory governance.

¹³⁷ Everson 1999, p. 309.

¹³⁸ Shapiro 2003, p. 235-239.

¹³⁹ Article 249B of the Treaty of Lisbon only allows for delegation of 'non-essential' elements of a legislative act. The question is whether or not appeals claiming that indeed essential elements have been delegated can and will be successful.

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