From the Editors

For quite some time now, the constitutionalisation of European private law has been a topical issue in legal writing and debates. It is not entirely clear what this process covers exactly but one of the central issues of constitutionalisation are the effects fundamental rights have on relationships governed by private law. In public law, and therefore also in administrative law, subjecting the exercise of public powers to the discipline of constitutional procedures and norms, fundamental rights included, is by its very nature, less surprising. Nevertheless, even in this area, at least in the EU context, one may wonder whether we are not witnessing a constitutionalisation of European administrative law. By this we refer to the very fact that questions of European administrative law are cast in terms of fundamental rights, while previously simple principles or, where appropriate, general principles of law 'would do the job'. This phenomenon gives rise to a number of interesting questions. Some of them are addressed in the present issue of REALaw.

The *DEB* case has obviously triggered the question about the relationship between 'effectiveness' as laid down in the Rewe-case law and 'the principle of effective judicial protection'. On the one hand, one may argue, as Advocate General Trstenjak recently did, that the minimum content of the right to an effective remedy includes the requirements that the remedy to be granted to the beneficiary must satisfy the principle of effectiveness,[1] and that the somewhat slipshod use of the terms in the case law is a matter of inconsistent legal terminology. On the other hand, the fact is that in the *DEB* case the Court very clearly reformulated a question from a national court about the principle of effectiveness into a question of effective judicial protection as laid down in Article 47 of the Charter of Fundamental Rights. Johanna Engström in her case note on the *DEB* case poses the question of why the ECJ has done so. In her further discussion of the case she also reflects upon the possible difference between the two principles. The differences and similarities between the principles is also the core issue of the article by Prechal and Widdershoven, who also briefly address the development of the principle of effective judicial protection and, further, speculate about the direction the future development could take.

No doubt, the very fact that since the entry into force of the Lisbon Treaty the Charter of Fundamental Rights acquired a status of binding EU law, which the Court, ever since then using it as the primary source of fundamental rights, has contributed to the increased focus on Article 47 and other fundamental rights. The article by Luchtman addresses another legal principle that has been codified in the Charter, the *non bis in idem*. In his opinion it is again the very fact that this principle has been codified now in the Charter that will make the

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1 Opinion of 22 September 2011 in Case C-411/10 *NS* v. *Secretary of State for the Home Department*, pending, point 161.

application of the principle much more dynamic, not only extending it to all punitive sanctions, regardless of whether the case involved administrative or criminal law, but also to application in a transnational context. The topicality of Luchtman's article is for a great part illustrated by the case of *Åkerberg Fransson* (C-617/10, pending before the ECJ) that concerns the application of the principle in a case of an accumulation of administrative and criminal sanctions. However, the case also concerns a preliminary question, namely whether Article 50 of the Charter applies at all, as it is not certain whether the sanctions at stake can be qualified as a matter of implementation of EU law required by Article 51 (1) of the Charter.

This last point brings us back to the questions triggered by the process of the constitutionalisation of European administrative law. What are the implications of the codification of certain general legal principles in the Charter? What is the relationship between these principles and the corresponding provisions of the Charter? How far should the limitations to the application of the Charter provisions also apply to general principles of law? Are the principles more flexible and forceful than the Charter or is it vice versa? What role is left to the legal principles next to the Charter provisions? Will the codification of the principles lead to petrifaction of administrative law? Enough food for thought!

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