CHAPTER -3

ADMINISTRATIVE DISCRETION AND FUNDAMENTAL FREEDOM UNDER EUROPEAN UNION

The European Union, like its Member States, must comply with the principle of the rule of law and respect fundamental rights when fulfilling its tasks foreseen by the Treaties. These legal obligations were framed progressively by the case law of the Court of Justice of the EU (ECJ). The Court filled gaps in the original Treaties, thus ensuring simultaneously the autonomy and consistency of the EU legal order and its relationship with national constitutional order.

Since the entry into force of the Lisbon Treaty, these principles are also clearly laid down by the Treaties and by the Charter of Fundamental Rights (With the same legal value). The Charter draws on the European Convention on Human Rights (ECHR), the European Social Charter and other human rights conventions, the constitutional traditions common to the EU Member States, and the Court's case law. Even if some of its provisions refine, or even develop, existing human-rights instrument, the Charter does not extend EU competence. However, as part of the body of EU constitutional rules and principles, the Charter is binding upon the EU institutions when adopting new measures as well as on the Member States when implementing them.

1. Introduction:

The protection of fundamental rights was not explicitly included in the founding Treaties of the European Communities, which contained only a small number of articles that could have had a direct bearing on the protection of the rights of individuals.

For example, in the EEC Treaty, the rules on the general prohibition on discrimination on grounds of nationality (Article 7), on the freedom of movement for workers (Article 48), on the freedom to provide services (Article 52), on improved working conditions and an improved standard of living for workers (Article 117), on equal pay for men and women (Article 119), and on the

protection of persons and protection of rights (Article 220), may be considered to have had a such bearing.

An explicit reference to fundamental rights at Treaty level appeared only over 30 years later, with the entry into force of the Maastricht Treaty (1993). Indeed, according to Article F of the Treaty on European Union, the EU was obliged to:

Respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional tradition common to the Member States as general principles of Community law.

Since the entry into force of the Amsterdam Treaty (1999), and notably of the Lisbon Treaty (2009), protecting fundamental rights is a founding element of the European Union and an essential component of the development of the supranational European Area of Freedom, Security and Justice.

Under the Lisbon Treaty, the EU Charter of Fundamental Rights, originally solemnly proclaimed in Nice in 2000, has the same legal value as the Treaties. Even if it does not extend the competences of the Union, it gives them a new 'soul' by focusing on the rights of the individual with regard to all EU policies. The Charter draws on the European Convention on Human Rights (ECHR), the European Social Charter and other human-rights conventions, as well as the constitutional traditions common to the EU Member States, as stated in case law of the European Court of Justice. However, it also updated them by recognising new kinds of rights protecting individuals from new forms of abuses by public or private entities (such as the right to the protection of personal data and to good administration). The Charter is binding upon the EU institutions when enacting new measures, as well as for the Member States whenever they act within the scope of EU law.[1]

Long before the entry into force of the Lisbon Treaty and the EU Charter of Fundamental Rights became binding, the ECJ recognised a number of fundamental rights in the guise of general principles of EU law. Examples include the right to **protection of human dignity and personal integrity,**[2] the right to **freedom of expression**.

With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights became a legally binding catalogue of fundamental rights within the EU legal order. It has been increasingly referred to by the Court of Justice, and – as Judge Marek Safjan underlines – these references are not 'simply ornamental' but, on the contrary:

> *They influence the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provde for the enlargement of the field of application of the European rules in the national legal orders.*

Even if the Charter is worded taking into account all previous ECJ case law, **it enjoys a higher degree of legitimacy, thanks to its ratification by all the Member States on behalf of their citizens.** As Judgs Koen Lenaerts observed, the EU Charter can be described as the outcome of a pan-European political consensus which should frame both the activity of the EU legislature and EU judges.[3] An important aspect of the EU Charter, indicated explicitly in its preamble, is that it places the individual at the heart of EU activities.

The Charter is divided into six titles organised to reflect the importance of EU principles:

- Dignity (Articles 1-5)
- Freedoms (Articles 6-19)
- Equality (Articles 20-26)
- Solidarity (Articles 27-38)
- Citizens' Rights (Articles 39-46)
- Justice (Articles 47-50)

Even if fundamental rights are *per se* universal and indivisible, the ECJ has, since the Community's beginnings, claimed that its jurisdiction is limited only to domains which fall within the scope of its competence and to Member States' activities whenever they act within the scope of Union law.[4] As far as the Charter is concerned, the same principle is enshrined in Article 6(1) TEU according to which the EU Charter's provisions 'shall not extend in any way the competences of the Union as defined in the Treaties'.

After the Lisbon Treaty, this so-called 'principle of conferral' has been further codified by the TEU, notably in Article 5, according to which:

> *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality..... Under the principle of conferral,* ***the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.*** *Competences not conferred upon the Union in the Treaties remain with the Member States.* [emphasis added]

It is, then, the scope of EU law which determines EU jurisdiction on fundamental rights and not the reverse. The same applies to the **content** of EU fundamental rights. In fact, according to Article 52(2) of the Charter:

> *Rights recognised by [the] Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.*

In the light of this specification, in several areas where the same subject matter is regulated both by an Article of the Treaty and by an Article of the Charter.

2. Duty of Member States to respect EU fundamental rights:

Despite the existence of a common constitutional culture of fundamental rights across the EU, there are still noteworthly differences in the protection of specific fundamental rights in various Member States.[5] The relationship between national fundamental rights' instruments and the EU Charter is thus all the more relevant. According to Article 51(1) of the Charter:

> 'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only **when they are implementing Union law.**

This concept is not new, as it was previously formulated in ECJ case law (*Wachauf,ERT* and *Annibaldi*). It is worth recalling that in the *NS*[6] case the Court made it clear that the notion of 'implementing EU law' also covers those cases where the Member States enjoy discretionary powers as to the method of

implementation, and not only those where they have no choice as how to implement the EU rule.

Some problems of interpretation could, however, arise from the ambiguity of the 'Explanations' dealing with this Article,[7] which state that:

> *As regards the Member States, it follows unambiguously from the case law of the [ECJ] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act* ***in the scope of [EU] law.***

This expression is wider than the reference to 'implementing EU law' which, in any case, requires the existence of an EU legislative measure to be implemented. However, it would be difficult to accept that, as a general rule, the Charter could be directly applicable to the Member States in all the domains covered by the Treaties as an alternative to the national constitutional standards, in the absence of specific EU legislation.

The ECJ's position is that:

> *fundamental rights guaranteed by the Charter must..... be complied with where national legislation falls* ***within the scope of European Union law*** *[therefore] situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.*[8]

According to this statement, the ECJ assimilates the meaning of 'implementing EU law with 'the scope of EU law', which is obviously wider than the previous expression. As Judge Safjan indicated, in *Akerberg Fransson,* the ECJ adhered to the so-called 'functional approach' to the scope of application of the Charter by national courts, whereby the duty to apply the Charter:

> *concerns not only the specific provisions adopted specifically for implementation purposes but also other national provisions, which are necessary to ensure an effective application of the European provision. ..... [it] requires the indication of a concrete, precisely identified rule of EU*

law applicable within the scope of national law, so that the Charter could be applied.[9]

Finally, as has been recently pointed out by Federico Fabbrini, Member States' duty to conform with EU fundamental rights can either appear in the guise of a 'floor', whereby national law may not fall below the level of protection provided for by EU law, or in the form of a 'celling', whereby the European level of protection constitutes the maximum that Member States may not exceed.[10]

3. Nature of Judicial Review in the European Union:

Review in the EU: judicial creativity is apparent in EU law.[11] The general test

under EU law is that factual and discretionary determinations will only be set aside if there is some manifest error, misuse of power or a clear excess of the bounds of discretion. This test has remained generally unchanged since the inception of the European Community. The meaning given to the test has however altered over time.

a) In the early years of the Community's existence the test was applied with a 'light touch'. The ECJ repeatedly emphasized that its task was not to substitute judgment for that of the Commission and that it would only intervene if there was some patent error or misuse of power, more especially if the decision or rule being challenged involved the complex balancing of factors that was normal in the context of the Common Agricultural Policy.[12] This test was applied with a 'light touch', in the sense that the ECJ would commonly devote only one or two paragraphs of its judgment to the issue, and would then conclude that no such manifest error existed in the instant case.

b) The more modern case law reveals a rather different picture. The criteria for review are formally the same. Manifest error, misuse of power or a clear excess of the bounds of discretion remain the grounds of review, with the corollary that the Community courts do not substitute judgment. It is however clear that while retaining the established grounds of review the Community courts, and more especially the Court of First Instance, the

CFI, have been applying these with greater intensity than hitherto, at least when reviewing certain types of action, in particular risk regulation and competition cases. This is apparent from cases such as *Pfizer*.[13] One of the applicant's arguments was that the Commission was in breach of the test of manifest error in the way that it exercised its discretion. It was therefore necessary for the CFI to decide whether 'the Community institutions made a manifest error of assessment when they concluded .... that the use of virginiamycin as a growth promoter constituted a risk to human health'.[14] The CFI proceeded in line with orthodoxy. It cited the well-established case law that in matters concerning the common agricultural policy the Community institutions had a broad discretion regarding the objectives to be pursued and the means of doing so. Judicial review should therefore be confined to examining whether the exercise of the discretion was vitiated by a manifest error, misuse of power of clear excess in the bounds of discretion.[15] The CFI also referred[16] to settled case law to the effect that where a Community authority was required to make complex assessments in the performance of its duties, its discretion also applied to some extent to the establishment of the factual basis of its action.[17] It followed said the CFI that in a case such as the present where the Community institutions were required to undertake a scientific risk assessment and evaluate complex scientific facts judicial review must be limited. The court should not substitute its assessment of the facts for that of the Community institution, but should confine its review once again to manifest error, misuse of power or clear excess in the bounds of discretion.[18] The CFI nonetheless considered in detail the argument put forward by the applicant company. The CFI devoted 28 pages or 92 paragraphs of the judgment to this matter, which contrasts markedly with the 1 or 2 paragraphs to be found in the earlier jurisprudence. The same intensity of review is apparent in recent cases concerned with judicial review of competition decisions. It should be made clear that the CFI and ECJ have not always reviewed for manifest error in the modern law with the intensity that is evident in *Pfizer*

and *Airtours*. There are many cases where they apply the test of manifest error more intensively than in the early case law, but less intensively than in the two cases considered above, with the consequence that there is in effect a differential standard of review for discretion in EU law depending upon the nature of the subject matter that is being reviewed by the courts.[19, 20]

c) Proportionality is of course also a general ground for review of Community and Member State action. It is commonly used to challenge discretionary determinations made by the Commission, or by Member States when acting within the confines of EC law. It is also well recognized that proportionality is a test for review that can and is used with varying degrees of intensity by the Community courts.[21] Discretionary determinations may also be challenged on other grounds, such as equality.

A number of points may be made by way of normative reflection on the tests for review of discretion.

a) It is doubtful whether a legal system truly needs both rationality review and proportionality review, for the following reasons.

Firstly, if rationality review is limited to legal intervention only when the decision being reviewed is so unreasonable that no administrative authority would have reached it, then there is little doubt that this is a narrower form of substantive review than that which normally exists under the three-part proportionality test. If however the courts of a legal system really believe that administrative action should only ever be annulled if it is irrational in the extreme sense set out above, then it would be very strange for that system to countenance proportionality review as an additional head of judicial review operating alongside rationality review in this narrow sense. This is because proportionality review would allow the courts to annul administrative action in circumstances where it would not be open to challenge under the narrow conception of irrationality. The logical solution would therefore be for the courts of this legal system either to retain their narrow sense of rationality review, refusing to review on grounds of

proportionality, or to recognise and apply proportionality as a general head of review, in which case the narrow sense of rationality review would become redundant.

Secondly, there are considerable advantages to proportionality as a test for review of discretion. It provides a structured form of inquiry. The three-part proportionality inquiry focuses the attention of both the agency being reviewed, and the court undertaking the review. The agency has to justify its behaviour in the terms demanded by this inquiry. It has to explain why it thought that the challenged action really was necessary and suitable to reach the desired end, and why it felt that the action did not impose an excessive burden on the applicant. If the reviewing court is minded to overturn the agency choice it too will have to do so in a manner consonant with the proportionality inquiry. It will be for the court to explain why it felt that the action was not necessary etc in the circumstances. A corollary is that proportionality facilitates a reasoned inquiry of a kind that is often lacking under the traditional *Wednesbury* approach.

Thirdly, the experience with proportionality in EU law reveals that the concept is applied with varying degrees of intensity so as to accommodate the different types of decision subject to judicial review. Cases involving rights with be subject to the strictest review, cases involving broad discretion will see the courts being more deferential to the administration and adopt lower intensity proportionality review, while cases involving penalities with entail a level of proportionality review intermediate between the other two.[22]

b) We should also be aware of the inherent judicial creativity in the application of the tests for review of discretion. It is the courts that will determine the real meaning to be given to the criterion of review used by the particular legal system. This is so whether review is characterized as being in terms of rationality, arbitrary and capricious, manifest error or abuse of power.

i) The language of each of these terms, *Wednesbury* unreasonableness, arbitrary and capricious and manifest error, would suggest that the court would only intervene on these heads of review if the discretion were exercised in some extreme manner. The reality has proven to be rather different in each of the legal systems mentioned. The courts, while retaining the same head of review in each legal system, have transformed them into a far more potent mechanism for substantive review of administrative discretion. The precise reasons why they have done this have varied in each legal system, but the common denominator is that the courts in those systems wish to exert more control over the exercise of discretion than hitherto; they wish to be able to intervene and control discretionary determinations even if they are not manifestly absurd or tainted by unreasonableness that is so extreme that no reasonable authority would ever have reached that decision.

ii) It is axiomatic that if the courts operating in any system of administrative law wish to expand the scope of substantive review of discretion they can do so in one of two ways. They might choose to add new heads of substantive review to those currently available within that system, a classic example being the recognition and generalisation of proportionality review. They might also expand the reach of substantive review by taking existing heads of review and giving them a more expansive interpretation than hitherto. Both techniques might be used in tandem. The latter does however have 'attractions' for the judiciary. It is, other things being equal, easier for courts minded to expand substantive review to preserve the impression of continuity with existing doctrine if they continue to use well-recognised labels or heads of review, while at the same time imbuing them with greater force than hitherto. This approach obviates the need for the type of judicial self-inquiry that normally attends the decision as to whether to introduce a new head of review to the existing armoury. It will moreover often be the case that investing existing heads of review with more vigour will only became apparent when the task has been judicially

accomplished. Reflection on the new status quo, whether by academics or courts, will therefore take place against the backdrop of an already developed jurisprudence that embodies the new or modified meaning given to the 'classic' head of review. It is in that sense *ex post facto*, as compared with the judicial and scholarly discourse that will attend the decision as to whether to introduce a new head of review, which will normally be *ex ante.*

iii) It is equally important to understand the 'driving force' behind this development. If the courts within a legal system decide that they wish to exercise more intensive rationality review, or that they desire to imbue an arbitrary and capricious test with more force than hitherto, then a principal tool used to achieve this end is to demand more reasons from the administrative authority and to subject those reasons to closer scrutiny. They may also demand more by way of inquiring into the evidentiary foundations underlying the particular decision that is being challenged. The latter, the evidentiary foundations for the contested decision, is related to the giving of reasons, but is nonetheless separate. A legal duty to provide reasons imposed by the courts will force the administrator to reveal why it acted in the way that it did, and thereby renders it easier for the reviewing court to decide whether those reasons were acceptable in the light of the relevant statute and its objectives. The provision of reasons is therefore an essential tool when the courts undertake substantive review of discretionary determinations, whether though a test framed in terms of rationality, manifest error or arbitrary and capricious. However a reviewing court may well feel that the reason that has been given is indeed rational, provided that there is some evidence to substantiate it. It is for this reason that reviewing courts will consider looking to the evidentiary foundations of the contested decision. There is therefore a proximate connection between procedural and substantive review. Thus expansion of the duty to give reasons will normally lead to closer judicial scrutiny of the administration's reasoning process in order to discover whether there has been a substantive error. While it is perfectly possible in principle for the

courts to demand more by way of reasons, but still to engage in low intensity review of the reasoning process in the context of substantive review, the reality is that expansion of process right will at the least encourage the courts to engage in more intensive substantive review, because they have more to work with and therefore feel more confident about asserting judicial control.

iv) This still leaves open the issue touched on above, which is the reason or reasons why the courts have sought to expand their control over discretionary determinations. The reasons may of course differ from one legal system to another, but there are nonetheless certain common themes. Thus, in the US, the transformation of the arbitrary and capricious test from a relatively minimal 'long stop' to catch clear arbitrariness into a more potent tool for substantive control over discretion, was motivated in part by an increasing distrust of technical expertise combined with a greater willingness to engage in more serious review of technocratic decision-making.[23] This was combined with increasing emphasis placed on the importance of transparency and participation in the making of the initial decision or rule.[24] The served to place before a reviewing court a wider range of arguments about the content of the contested norm, thereby facilitating closer review of the cogency of the reasoning used by the agency.

v) We can see analogous considerations at work in the development of EU law. The application of manifest error with a light touch in the early years was likely influenced by the ECJ's reticence in overturning norms in the new Community order, more especially when they were brokered through hard fought battles in the legislative arena. The EU is now firmly established and the Community courts may well justifiably feel that it can withstand annulment of some of its initiatives without thereby sending shock waves through the system as a whole. More intensive deployment of manifest error in relation to discretion and fact may also be explicable in terms of legitimacy. There has as is well known been a growing discourse

> on the legitimacy of the EU and on accountability of the decisions made therein. Imbuing the manifest error test with greater force and thereby bolstering substantive review is one way in which to enhance the accountability of those who made the initial decision and hence to increase the legitimacy of the resulting norms. The creation of the CFI is also undoubtedly of importance in this respect. It was established to ease the burden on the ECJ. Its initial jurisdiction was for complex cases with a heavy factual quotient, which required in-depth scrutiny of facts and attention to the reasoning of the primary decision-maker. These skills could be carried over when its jurisdiction was expanded to cover all direct actions brought by non-privileged applicants. The CFI was therefore well placed to put more intensive substantive review into practice. This is reflected in the view expressed by Advocate General Vesterdorf that the creation of the CFI as a court of both first and last instance for the examination of facts in the cases brought before it was 'an invitation to undertake an intensive review in order to ascertain whether the evidence on which the Commission relies in adopting a contested decision is sound'.[25]

The European Union, like its Member States, has to comply with the principle of the rule of law and respect for fundamental rights when fulfilling the tasks set out in the Treaties. These legal obligations have been framed progressively by the case law of the European Court of Justice. The Court filled the gaps in the original Treaties, thus simultaneously ensuring the autonomy and consistency of the EU legal order and its relation with national constitutional orders.

Since the entry into force of the Lisbon Treaty, there principles have also been expressly laid down in the Treaties and in the Charter of Fundamental Rights. Being part of the body of EU constitutional rules and principles, the Charter is binding upon the EU institutions when adopting new measures, as well as for Member States during implementation.

The Charter is the Point of reference, not only for the Court of Justice, but also for the EU legislature, especially when EU legislation gives specific

expression to fundamental rights. Moreover, fundamental rights are also of relevance for EU legislation covering all the other areas of Union competence.

The UK courts will also use proportionality as a test for review of discretion in certain types of case. They will clearly do so in cases where EU law is concerned and will also do so when reviewing discretionary determinations under the Human Rights Act 1998. There is also now case law authority that proportionality is the standard of review to be used when a public body seeks to resile from a legitimate expectation. The courts have moreover also used proportionality, or something very similar, in cases concerned with challenges to penalties. Proportionality is not however thus far a free-standing, general principle of administrative law in the UK.

The Standard of Review in the US: A similar development is evident in US law. Under the Administrative Procedure Act 1946, agency finding can be set aside if they are 'arbitrary, capricious or an abuse of discretion'.[26]

a) The arbitrary and capricious test is therefore a principal tool for substantive review of discretion. Judicial interpretation often matched the facial language of the test. Plaintiffs faced an uphill task to convince a reviewing court that an agency decision really was arbitrary and capricious, The criterion tended to be narrowly interpreted, it being sufficient for the agency to show some minimal connection between the statutory goal and the discretionary choice made by it;[27] or to put the matter conversely the plaintiff would have to demonstrate some manifest irrationality before the court would intervene. Thus as Shapiro states, 'in fact in the 140s and '50s, rules almost never failed the arbitrary and capricious test',[28] with New Deal judges being very reluctant to say that New Deal bureaucrats had failed 'the APA sanity test, that is had done something arbitrary and capricious'.[29]

b) The label 'hard look' developed because the courts began to desire more control than allowed by this limited reading of the arbitrary and capricious test.[30] In *State Farm*[31] the Supreme Court founded its intervention on the arbitrary and capricious test, but then gave a broader reading to that phrase than that provided in earlier cases. The court accepted that it should not

substitute its judgment for that of the agency. It could, however, intervene if any of the following defects were present: if the agency relied on factors which Congress had not intended it to consider; failed to consider an important aspect of the problem; offered an explanation which ran counter to the evidence before the agency; was so implausible that it could not be sustained; failed to provide a record which substantiated its findings; or where the connection between the choice made by the agency and the facts found was not rational. The hard look doctrine therefore represented a shift from a previously more minimal substantive review, where interfere where the broader list of defects set out above are present. The hard look test proved to be a powerful tool, because of the insistence on the provision of reasons, the demand for a more developed record and a judicial willingness to assess the cogency of the reasoning process used by the agency when it made its initial determination. This is not to say that the test was unproblematic. There have been problems resulting from an excessive demand for information and justification by the courts, which led some to coin the phrase ‘paralysis by analysis’.

The courts may well decide that while they should not substitute their judgment for that of the administration, they should intervene when the decision reached by the administration was not reasonable, not simply where it was so unreasonable that no administrator could have reached the decision. It would then be necessary for the courts to articulate in some ordered manner the rationale for finding that an administrative choice was one which could not reasonably have been made, where that choice fell short of manifest absurdity. It is, however, difficult to see that the factors which would be taken into account in this regard would be very different from those used in the proportionality calculus. The courts would in some manner want to know how necessary the measure was, and how suitable it was, for attaining the desired end.

In the last we can conclude that fundamental rights of citizens of European Union are protected by EUJ at both legislature as well as administrative level.

References

1. See judgment in Case C-617/10 *Akerberg Fransson.*
2. Recognised in Case C-377/98 *Netherlands* v *Parliament and Council,* a decision concerning the patentability of the human genome. The ECJ rules, *inter alia,* that: '... is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed', and that '... all processes the use of which offend against human dignity are also excluded from patentability so that the EU Directive and that (...) human dignity is thus safeguarded' because '... human living matter could not be reduced to a means to an end.'
3. Koen Lenaerts and Jose Antonio Gutierrez-Fons, 'The Place of the Charter in the EU Constitutional in the European Union', *EUI LAW; Centre for Judicial Cooperation DL,* 2014/02, p. 2.
4. See Cases: 5/88 *Wachauf* and C-260/89 *ERT.*
5. Fabbrini, *Fundamental Rights in Europe....,* p. 256.
6. It is worth nothing that the EJEU in the *NS* ruling of 2011 considered that human beings should also be protected against potential breaches (not simply actual breaches), and this duty has a clear preventive function in relation to torture, degrading and humiliating treatment.
7. According to Article 6(1) of the TEU and to Article 52(7) of the Charter itself, the text of the explanations provides guidance to the Courts of the Union and of the Member States.
8. *Akerberg,* cit., para. 21.
9. Safjan, 'Fields of application.....', pp. 4-5.
10. Fabbrini, *Fundamental Rights in Europe...., passim,* and in particular pp. 39-41.
11. Paul Craig, *EU Administrative Law* (Oxford University Press, 2006).
12. *Westzucker GmbH v. Einfuhr-und Vorratsstelle fur Zucker* [1973] ECR 321

13. *Pfizer Animal Health SA v. Council* [2002] ECR II-3303.
14. *Ibid.* para. 311.
15. *Ibid.* para 66.
16. *Ibid.* para. 168.
17. *Roquette Freres v. Council* [1980] ECR 333.
18. *Pfizer,* n. 29.
19. *Airtours plc v. Commission* [2002] ECR II-2585.
20. Craig, *EU Administrative Law,* n 27.
21. Craig, *EU Administrative Law,* n 27.
22. Craig, *EU Administrative Law,* n 27.
23. Shapiro, n. 23.
24. Stewart, 'The Reformation of American Administrative Law', n. 25.
25. *Hercules v. Commission* [1991] ECR II-867.
26. Administrative Procedure Act 1946, s. 706(2)(a).
27. A. Aman and W. Mayton, *Administrative Law* (West, 2nd ed., 2001).
28. M. Shapiro, 'Codification of Administrative Law: The US and the Union' (1996) 2 *ELJ* 26, 28.
29. *Ibid.* at 33.
30. *Greater Boston Television Corp. v. Federal Communications Commission* 444.
31. *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.* 463 U.S. 29.