EXECUTIVE SUMMARY

The European Union has become the locus of an extraordinary range of activities that the academic and professional community in the United States associates with the field of administrative law. This range of decisional activity is of interest from both a practical and academic point of view: practical, if only because no other regulatory regime outside the U.S. affects American businesses and individuals as regularly and intensively as the European; and theoretical, if only because no other regulatory regime constitutes as steady a frame of reference for comparison with American administrative law processes.

The present study was launched initially with a view to providing to an American audience an accurate and reasonably comprehensive account of European Union administrative law processes, chiefly for the purposes stated above. However, the study has taken on added resonance in light of its implications for the emerging phenomenon best known under the term "transatlantic regulatory cooperation." Clearly, progress in any measure of regulatory convergence is aided by a better understanding of the procedural differences between U.S. and EU administrative processes and their capacity in turn to shape substantive differences in outcome.

The study is organized, apart from its Introduction, around five principal phenomena central to any understanding of U.S. administrative law: adjudication, rulemaking, judicial review, transparency and oversight. Because these are the arenas in which we are most accustomed to observing and evaluating American administrative law processes, these are also the lenses through which this study observes and evaluates their nearest European Union law counterparts – notwithstanding the recognition that categories such as these translate by no means perfectly.

Adjudication

Most individual decisionmaking (in the U.S. administrative law sense) that is predicated on EU law is conducted at the Member State level; the EU largely confines itself to the adoption by regulation or directive of the rules and standards according to which those individual decisions will eventually be made. Direct administration of policy in individual cases at the EU level thus remains the exception.

The authors of the Adjudication chapter have examined a series of adjudicatory sectors – competition law, state aids, pharmaceutical licensing, food safety, trademarks and trade remedies – in which individual decisions, in the U.S. administrative law sense, are indeed made by an institution of the EU. In most cases, this institution will be the European Commission. In exceptional cases, it will be a specialized administrative agency at the EU level.

Processes of EU administrative adjudication (in the accepted U.S. administrative law sense of individual decisionmaking) proved perhaps the most difficult in this study to depict, chiefly on account of their diversity. Unlike the U.S., where there exists at the federal level in the Administrative Procedure Act a statutory "default" model for adjudication (at least for adjudication that is, so to speak, "on the record"), no single procedural model or template of administrative adjudication prevails at the EU level. Essentially, each sector has its own particular procedural regime.

Where individual decisionmaking authority is lodged in the Commission (as is usually the case where decisions are taken at the EU level), it is exercised either by the Commission collectively (the "college of Commissioners") or by a single Commissioner via delegation by the Commission. (For a brief account of the institutions and processes of the EU, see the Introductory Chapter.) As a practical matter, the decision will have been prepared within one or more units of the Directorates-General among which the work of the Commission is distributed. However, a striking EU law development, with implications for both adjudication and rulemaking, is the emergence of more or less specialized administrative agencies – currently 22 in number, depending on how one counts – at the EU level. Among the powers of a minority of these bodies is the taking of binding individual decisions. (Three of the adjudicatory sectors in this study were chosen precisely because specialized agencies play important roles in the decisionmaking process. These include the Office of Harmonization in the Internal Market (OHIM) for trademarks, the European Agency for the Evaluation of Medical products (EMEA) and the Committee for Medicinal Products for Human Use (CHMP) for pharmaceutical licensing, and the European Food Safety Authority (EFSA) for food safety.)

Some of the differences that may be observed across sectors are entirely predictable. Thus, some adjudicatory procedures are triggered by a private party application for a benefit, while others are triggered by administrative action leading to a possible sanction or deprivation of a benefit. But this is a variation which is equally observable in U.S. administrative law and probably universally among administrative law regimes.

Other differences – some of which probably have parallels in U.S. law – include the following:

Jurisdictionally, the sectors appear to differ in the extent to which adjudicatory authority at the EU level is shared with adjudicatory authority at the Member State level, with variations among sectors in the way such sharing is organized. Given their subject matters, adjudication in the areas of trade remedies and state aids is lodged exclusively at the EU level.

The chapter observes that some sectors (competition law enforcement notably) are marked by what can be highly intrusive investigations, including unannounced site visits, while others rely heavily on the exchange and examination of documents produced by the interested private party, by the EU and relevant Member State government institutions, as well as on expert material available elsewhere. Enforcement authority is shared, with

variations in the modality of sharing, in the sectors of competition law, pharmaceutical licensing and trademarks.

Although a "hearing" of some sort will be available, as a matter of practice and fundamental policy, across the adjudicatory sectors, the nature of the hearing may vary widely. The prevalence of oral testimony, for example, is uneven across sectors: it is the norm in some areas (including, predictably competition law) and a rarity in others (such as trademarks and state aids). More curious is the finding that oral hearings are held routinely upon request in pharmaceutical licensing; they evidently are rarely if ever held in the area of food safety.

Even as to adjudication centered in the Commission, the chapter notes considerable differences in policy and practice concerning access to the Commission's files – ranging from the broad (as in competition law and trademarks) to the limited (as in trade remedies and, particularly, state aids).

There appears to be no generalized opportunity for reconsideration of an individual decision. However, at least in trade remedies, there is provision for an interim review at a later date, and an actual board of appeals hears appeals in trademark cases. Otherwise, the typically remedy available will be judicial review in the Community courts, where standing is established, which will readily be the case in appeals by the addressee of a decision.

The Adjudication chapter attributes the procedural heterogeneity to a range of factors: the differing periods of time when the matter came within EU law purview, different patterns of authority-sharing – even at the adjudicatory level – with the Member States, differences in the character of the parties involved in the proceedings, and unevenness in the creation of specialized administrative agencies with disparate mandates. Of course, all of these factors are present on the U.S. scene as well, and a common "default" adjudicatory procedure model has nevertheless been statutorily developed.

Despite the heterogeneity among adjudicatory procedures at the EU level, some salient themes nevertheless emerge. One of these of particular salience is the requirement of reasons. All individualized decisions must state the reasons for the decision, in both their factual and legal dimensions, providing enough detail to permit effective judicial review.

By comparison with U.S. practice in agency adjudication, the authors conclude that the EU decisionmakers follow a predominantly "inquisitorial" model – a term meant to suggest that their processes are viewed chiefly as investigations and inquiries designed to produce and ultimately justify a decision. Accordingly, they entail much less of the structured and formal presentation of evidence and its countering that we associate with an adversarial model. The outcome of what will in most cases be a largely "written" investigatory procedure will be a notice to the applicant or target setting forth the Commission's tentative findings

This is not to suggest that the procedure lacks the fundamentals of due process, for it is considered essential that all parties to such proceedings have a fair and reasonable opportunity to present their position and to know and rebut opposing evidence. This imperative is commonly referred to as *les droits de la defense*. This basic "right to be heard" is one that courts of the European Union – the Court of Justice and Court of First Instance – have consistently championed as a condition of validity of the resulting act, invoking the notion of "general principles of law" (*principes généraux du droit*).

A second more or less salient difference – but one that by no means typifies all of the sectors examined – relates to separation of functions. In some sectors at least, the hearings that lead to an individual decision may be conducted by the same personnel as participated in and even possibly led the investigation.

Where oral hearings are held, they are usually conducted by the personnel who had been involved in the investigation of the matter. This represents a significant departure from standard U.S. practice, in which the principle of separation of functions in most cases bars such an arrangement. A major and interesting exception is competition law, where the hearing procedure is conducted by a hearing officer who specializes in that function, does not perform investigatory activity in that case or any other, and reports not to DG Competition but to the Commission. Competition cases are also distinctive in that the hearing officer prepares a report on substantive as well as procedural matters in the case, commenting on the Commission's internal draft decision. Independent hearing officers have recently been added to trade remedies disputes as well.

Notwithstanding contrasts with the generally more formalized adjudicatory approach in the U.S., and notwithstanding substantial variations across sectors even at the EU level, the conclusion is drawn that "there is an abundance of process and . . . in most cases a substantial opportunity to represent an interest."

Rulemaking

Unlike adjudication, regulatory activity at the EU level (which we call "rulemaking" in this report, though that term, is not generally employed in the EU arena) does generally follow reasonably common and established procedural paths. Generalization is accordingly more feasible, though nevertheless risky.

Like the Adjudication chapter, this chapter is based on a series of sectoral studies: competition law environmental protection, financial services, food safety, telecommunications and workplace law. In these and other domains, the institutions of the EU exercise substantial and far-reaching rulemaking authority.

On the other hand, rulemaking provides a challenge of a different sort that permeates the rulemaking chapter within this study. Under the rulemaking umbrella in the EU fall processes that correspond in the U.S. *both* to the federal legislative activity of

Congress *and* to the rulemaking activity of federal administrative agencies. In the former case, regulations and directives are based directly on provisions of the European treaties that expressly confer norm-creating authority on the political institutions of the EU. In the latter, the same political institutions make norm-creating use of the authority delegated to them by the kind of treaty-based regulations to which reference has just been made. The chapter on rulemaking in this study thus effectively distinguishes between the EU's "legislative" processes, on the one hand, and its "regulatory" processes, on the other. The basic ground rules between these two species of norm-creating activity differ significantly.

Clearly, from an institutional perspective, the Commission occupies center stage in what we are calling EU rulemaking. As shown in the Introduction to this project, as well as in the discussion of the Commission in the Rulemaking chapter itself, the Commission is a distinctive body with a set of highly distinctive interests. While it is an appointed bureaucracy, without a firm basis in democratic legitimacy and accountability, it has historically played the role of "engine" or "motor" of integration and prime fashioner of the "idea of Europe."

The Rulemaking chapter concludes that the Commission has worked hard, and to an extent succeeded at, developing innovative governance tools and producing transparent administrative processes. It notes, however, that much of this progress is self-imposed, which is both good and bad news. It shows that the Commission has felt the incentive to move in a progressive direction, and yet it reveals that these strides are not necessarily supported by legal compulsion or obligation, and therefore not judicially enforceable. (This will change, however, as and when the standing rules in the EU-level courts make it easier for interested private parties to mount direct challenges to EU regulations. For the moment, the political controls on Commission rulemaking appear to play a larger role than the judicial ones that loom so large on the U.S. administrative law landscape.)

The Commission's role in the "legislative" process, as just defined, consists of proposing legislation to the Council and Parliament, a process that has from the beginning been detailed in the constitutive treaties themselves. For the most part, no such proposal will ripen into EU level legislation without an affirmative vote of the Council (which is responsive, and designed to be responsive, to Member State interests) and the directly-elected Parliament (which is meant to represent the peoples of Europe). That fact alone implies political bargaining and compromise, the particular shape of which may be determined by the fact that the Council typically votes according to Member-State-weighted votes in a qualified majority voting formula.

The Rulemaking chapter opines favorably on various aspects of this legislative process. The Commission comes in for particular praise in terms of the rigor and professionalism of its preparation of legislative proposals, but also in terms of transparency and opportunities for structured and highly interactive public participation. The authors find that the Commission has effectively exploited web-based technological opportunities for expanding public participation, input and feedback (collectively termed

"stakeholder consultations") in the development of legislative proposals for adoption by the Council and Parliament. A particular advantage is what the chapter terms the procedural "plasticity" of the process, one aspect of which is that consultation occurs well before the Commission's policy preferences have taken firm shape resistant to change. At the same time, the specific and structured character of the consultations may inhibit the spontaneous and free-wheeling exchange of views and opinions. Each style has its advantages.

As far as the "regulatory" process is concerned, here the Commission essentially exercises delegating implementing powers pursuant to the kind of legislation just mentioned. This phase of the regulatory process has certain highly distinctive features.

First, in the absence of any specifics in the constitutive treaties on how delegated legislative authority should be exercised, and in the absence of an EU-level administrative procedure act, it is not possible – at least formally – to speak of a unified statutory and legally binding procedural model for the exercise of delegated rulemaking authority by the Commission. This does not mean, however, that no coherent rulemaking model has emerged, because one has, but it lacks the "strong" statutory support of an APA.

Second, the Commission works through various committees under a so-called system of "comitology," which is really a short menu of consultative procedures laid down in general legislation governing the role of committees in the review of exercises of delegated legislative authority. (Specific sectoral regulations will indicate which method from this menu is to be used in the case of any given area of delegated rulemaking.) Basically, comitology functions as a way not only to harness expert knowledge and advice outside the Commission, but also as a channel for the exertion of Member State influence (paralleling the opportunity for Member State representation in the legislative process through the Council). Through comitology, the Council and Parliament condition the Commission's exercise of delegated rulemaking authority to various forms of collaboration with legislatively designated "committees," composed of representatives of the Member States and chaired by a Commission representative. (The parent legislation will establish the kind of committee and committee procedure to be used.)

If any aspect of rulemaking processes comes in for criticism in the Rulemaking chapter, this is it. Not only this chapter, but commentary on comitology generally, finds it to be obscure and sometimes hyper-technical, as well as regrettably non-transparent.

Third, the Commission characteristically interacts – even outside comitology – with EU-level and international standards-setting bodies to which the Commission effectively delegates standard-setting functions. (An example of the former is the quasi-private body known as the European Committee for Standardization, or CEN, and of the latter is the FAO.) Under the so-called "new approach to technical harmonization" pioneered by the Commission, the Council and Parliament legislate general "minimum essential requirements" for product conformity, while allowing the Commission to delegate to national, EU level or international standards bodies the authority to

"implement" these standards, compliance with which will afford producers a regulatory "safe harbor," ensuring the free movement of goods across Member State borders.

Fourth, just as in adjudication, but even moreso, the Commission is beginning to share rulemaking authority with the more or less newly created administrative agencies.

Turning to regulatory instruments themselves, the report finds them to be highly detailed and sector-specific and yet, at the same time, influenced by cross-cutting principles such as subsidiarity (the requirement that action not be taken at the EU level rather than the Member State level unless necessary to effectively achieve the result sought) and proportionality (the prohibition on the taking of measures that are excessive in relation to their aims).

Finally, the EU regulatory landscape is particularly rich in what has come to be called "soft law" – that is to say, norms that are not in themselves legally binding on private parties or the institutions, but undoubtedly shape and influence behavior and expectations, and may find themselves indirectly invoked in the enforcement of related norms that are legally binding. Much of this takes the form of "framework legislation" earmarked for statutory or regulatory implementation at the national level.

The salience of soft law is undoubtedly linked to the emergence of flexible "new governance" approaches to regulation which place a premium on benchmarking and mutual learning rather than top-down norm creation, and leave considerable leeway and discretion to authorities within the Member States. In at least one sector studied – workplace law – a related "open method of coordination" has been followed, according to which the Commission identifies goals for mutual and cooperative pursuit by Member States.

Judicial Review

Although most judicial enforcement of EU law by far takes place in the courts of the Member States, attention in this study is directed to judicial review at the EU level. This is a matter of necessity. Each Member State retains autonomy, in principle, to organize access to its courts, as well as the procedure and remedies before them, even when EU law rights or claims may be at issue (though the Court of Justice requires that Member State procedures and remedies both be non-discriminatory as against EU law claims and attain at least a minimum level of adequacy). The number and diversity of Member State adjudicatory regimes renders it impracticable to deal in this study with judicial review at other than the EU level.

This study finds that the court system of the European Union offers a comprehensive system of judicial recourse, though it must be emphasized at the outset that the Treaty of Lisbon, signed in December 2007 and due to enter into force on January 1, 2009 (if duly ratified by all 27 Member States) would not only bring changes,

but bring changes to some of the features of the current system that come in for considerable commentary and criticism in the Judicial Review chapter.

As all who are familiar with judicial remedies at the EU level would agree, the current system continues to offer a bundle of distinct channels for various parties to enjoy access to the EU courts. The centerpiece is probably Article 230 of the current EC Treaty, permitting the institutions, Member States and, exceptionally, private parties with standing to challenge the validity under EU law norms of all legal acts of general application taken by the institutions of the EU. It is the strictness of the criteria for individual standing ("direct and individual concern") that has come in for the greatest criticism and that actually stands, under the Lisbon Treaty, to be very substantially relaxed. Article 230 also permits parties to whom individual decisions are addressed (and exceptionally persons to whom such decisions may not be addressed but are of direct and individual concern) to challenge the validity of those decisions in the EU courts. (The chapter also sets forth the closely related remedies whereby parties may challenge "inaction," as well as "action," on the part of the EU institutions (art. 232), whereby issues of the legality may be raised incidentally or collaterally in the context of other actions entertainable by the courts (art. 241), and whereby exceptionally private parties may recover damages against the institutions for their illegal acts (art 288).)

The categories of legal claims that may be advanced on the occasion of such challenges may be distinctively framed, but resemble in practice the grounds for judicial relief from administrative action in the U.S. Going perhaps further than U.S. courts do in their reliance on due process to supplement statutory grounds for review, the European Court of Justice has relied importantly on general principles of law drawn from the common constitutional traditions of the Member States and from international agreements such as the European Convention on Human Rights, including such principles as proportionality, equality, legitimate expectations and protection of basic civil and political rights.

So far as the intensity of judicial review of the legality of EU legal acts is concerned, EU law shows as many variations in practice as does U.S. law. One area in which the courts have been exercising what looks very much like a "hard look doctrine" is review of competition law and merger law rulings by the Commission.

If private parties have only limited access to the courts in Luxembourg (even under the Lisbon Treaty), they have broad opportunities for their claims in national court to reach the Luxembourg courts anyway. This is due to the widely used and (subject to complaints of delay) widely praised procedure under current EC Treaty Article 234, whereby a national court may or must (depending on the stage of the national litigation) refer a question to the Court of Justice on the proper interpretation and occasionally the validity of an EU law instrument. (The national court then resumed its proceedings, resolving the relevant EU law questions in conformity with the ruling it will have received.) This "preliminary reference" procedure, culminating in a "preliminary ruling" by the Court, makes it possible for parties to cases or controversies in national courts not only to invoke EU law in support of their contentions, but to urge those courts to seek

authoritative guidance from the Court. Clearly, the preliminary reference procedure is the principal means by which authoritative understandings of EU law become diffused throughout the legal systems of the Member States.

Alongside its many other vital functions, the Commission plays a prosecutorial role within the Court of Justice, bringing so-called "enforcement" or "infringement" actions against Member States under the current Article 226 for their violation of EU law obligations – though not, of course, unless and until the Commission and the States in questions have failed in an elaborate administrative procedure to resolve their differences amicably. The introduction of the possibility of a fine against a recalcitrant State is reported to have introduced a new and important incentive to compliance. (That weapon is vastly amplified by the Court's case law, introduced by the celebrated *Francovich* judgment, requiring Member States to open their own courts to damage claims by persons injured due to the States' failures in their EU law obligation.)

The caseload consequences for the Court of Justice of this robust set of judicial remedies, in eras of widening EU competence and widening membership, are obvious. The result has been the creation, first, of a Court of First Instance in Luxembourg where most (but still not all) actions are brought in, as the name would indicate, "the first instance," and then in one of what may now become a series of specialized judicial tribunals of first instance (the initial creation being a court for the resolution of staff or civil service cases).

If the Treaties laid down the available remedies before the EU courts, and the grounds for relief, they did not however lay down the full range of "constitutional" legal doctrine that the Court of Justice has elaborated on its own and that has served to render EU law all that much more potent within the Member States. Thus, in addition to rendering opinions on the "meaning" of treaty provisions and provisions of secondary legislation, the Court has established certain fundamental principles that address the relationship between EU and Member State law ("supremacy"), the interpenetration of national law by EU law and the recognition that EU law gives rise presumptively to individual rights that are, in turn, presumptively enforceable in the courts of Member states ("direct effect"), and the requirement that Member States make adequate administrative and judicial remedies available for the assertion of such claims ("effective remedies").

The Judicial Review chapter also describes in some detail the distinctive institutions within the Court of Justice (such as the *avocat-general*, who issues an advisory opinion to the Court following the hearing but prior to judgment in then case), the distinctive aspects of practice and procedure before the courts, the distinctive principles on the scope of appellate review, and the distinctive approaches to statutory construction (including both teleological interpretation and the reality of the existence of multiple authoritative language texts).

Transparency

As the relevant chapter of this study observes, the term "transparency" connotes a wide range of different things to different people. In this chapter, attention is given to (a) the legally required publication or dissemination of information by the institutions of the EU, (b) the requirements for disclosure to members of the public of specifically requested documents, and (c) the protections nevertheless afforded to privacy interests.

Regarding the publication and dissemination of information by the EU institutions, the impression that emerges is a highly favorable one. Subject to varying degrees of user-friendliness, the websites of the Commission, Parliament and Council offer a wealth of information that is highly accessible electronically, well-organized and well-presented, and rather easily navigable. The chapter describes the instant availability of such well-ordered material as "enviable."

Any appraisal of the second dossier covered in this chapter – public access to documents – is necessarily more nuanced. Here, the authors conclude that the EU institutions have assembled a clearly workable system, consistent with the EU's treatment of transparency and the public's right of access as fundamental principles of practically a constitutional order. On the other hand, trouble spots are noted.

It is remarkable how quickly the EU has moved from a system of largely voluntary institutional "codes of conduct" on access to documents to a full-blown statutory and binding regime, with remedies. The basic Access Regulation of 2001 establishes a legally enforceable right of public access to documents, subject to exemptions, specified procedures and recourse to the EU courts or the EU Ombudsman at the requester's choice. The range of documents covered is broad, including materials produced preparatory to legislation, materials in the hands of the Commission Secretariat General, and documents prepared by the many comitology committees. While the Access Regulation is not available for obtaining information in the possession of Member states, it is available for documents produced by third parties if found in the files of the EU. The big and limiting exception is for documents originating from Member States as such. The Regulation authorizes Member States to request that documents originating with them not be disclosed, even though found in the files of an EU institution. Despite the implication that the EU institution might disclose such documents notwithstanding a Member State's request that it refuse to do so, practice suggests that the institutions routinely honor a Member State's request to that effect, without more. This practice is contested as inconsistent not only with the Regulation but also with the strong presumption in favor of disclosure and the principle of enumeration of exceptions.

The Access Regulation establishes a general right of access without a requirement of a showing of interest or need, and subject to a short deadline (presumptively 15 working days) for compliance and fees only for copying and mailing (but not search or compilations). The institutions are committed to seeking clarification of a request from an applicant rather than denial when the request is imprecise, and they are required to segregate or sanitize a document where certain portions or mentions are exempt but the document as a whole is not. Denials of access must be reasoned. The courts of the EU

have furthermore insisted, much as U.S. courts have done under the Freedom of Information Act (FOIA), that the exemptions, with the possible exception of the "public interest" exception (which does not appear in the FOIA), be narrowly construed.

As under FOIA, the devil is in the details and, more specifically, in details concerning the scope of exemptions. It should be noted, initially, that the exemptions are all declared to be mandatory, meaning that an institution has no authority in its discretion to release exempt documents. None of the exceptions is in itself surprising. A first series of exceptions requires refusal where disclosure would harm either the public interest (public security, defense, international relations or economic, monetary or financial policy) or individual privacy and integrity. If an exception of this sort is applicable, it is not to be balanced against other considerations. A second series establishes grounds for refusal to release documents – private commercial interests, litigation documents, and inspections, investigations and audits – but allows this result to be overridden by a public interest in favor of disclosure. A third exception relates to internal documents or documents, as the authors put it, that reflect the institution's "space to think."

The Transparency chapter describes favorably the regime for review of decisions to grant or deny access to documents. The regime includes "confirmatory applications" (i.e. administrative appeals), again subject to a 15-working-day time limit and a requirement of reasons. An applicant wishing to appeal further may invoke either the EU courts or the Ombudsman. The scope of a review in court of a denial of access has been summed up by the Court of Justice as "limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of power." The Court has granted a special "margin of appreciation" to the responding institution where one of the absolute exceptions (the first set) is in play,

The Ombudsman alternative gives the disappointed requester a non-judicial means of appeal beyond the institution. The Ombudsman will investigate the matter to determine whether maladministration has occurred; if that is the case, he or she will attempt to reconcile the parties or will issue a recommendation (and possibly a rebuke) to the institution, as appropriate. In the latter case, the institution is required to issue a reply to the recommendation. However, the Ombudsman's determination is in no sense binding on the institution and confers neither an enforceable right on the requester nor an enforceable duty on the institution.

Despite these weaknesses, the Ombudsman route presents certain advantages, notably economy, speed, moral suasion and the possibility of achieving an acceptable compromise. A good illustration is the Ombudsman's success in intervening with Member State authorities in certain cases to allow the Commission to disclose non-exempt documents originating with a Member State.

The fairly common practice in the U.S. of third parties seeking to block government disclosure of documents is not yet replicated in the EU. The Access Regulation provides for consultations with third parties, but evidently not if it seems clear

to the institution that the document must or must not be disclosed. This is compensated, however, by the strong personal data privacy protections in place in the EU, which easily may place limitations on the Commission's disclosure of documents containing information submitted by third parties. In fact, fundamental principles of the EU guarantee protection against disclosure of personal information, thus operating as a real limitation on access to documents – considerably more of a limitation than we are accustomed to in the U.S.

There exists important data privacy protection legislation that is binding not only on the institutions (via regulation), but equally on the Member States (via directive). The Member States are thereby obligated to put in place and enforce protections concerning the acquisition, maintenance and dissemination of personal data – not only by those governments themselves but by private parties as well. "Controllers" of data may not acquire such data except for specified and legitimate purposes, and they may not process those data in ways inconsistent with those purposes. They are obligated as well to ensure the accuracy and completeness of records, destroying them when the reasons for maintaining them cease to exist. Controllers must give persons detailed information about the personal data collected as well as the right to see the data and to rectify erroneous information. Judicial review must be made available for redress against breaches of obligations under the legislation, and damages afforded in the event of such breach. Finally, controllers must obtain the consent of individuals for the processing of data unless the processing fits within an exception to the requirement of consent. The exceptions are actually wide-ranging.

The Transparency chapter suggests that Member State implementation of these directives diverges substantially from Member State to Member State, jeopardizing the internal market integration purposes that lay behind them.

However, the greater concern from the U.S. point of view is the EU's effort to combat circumvention of these protections by controllers of data moving their operations or data to third countries. Subject to narrow exceptions, the legislation thus forbids the transfer of personal data to a third country unless and until it has been determined that that country offers "[an] adequate level of protection," and it is for national authorities to make the determination of adequacy. A crucial exception is the one permitting data transfer, even in the absence of an adequate level of protection in the country in question, where the recipient furnishes sufficient protection of privacy by contract or other means. This is the basis on which, after protracted negotiations, an important "safe harbor agreement" was entered into between the EU and U.S. establishing a process whereby U.S. companies may qualify for the transfer of personal data from the EU. There are concerns within the institutions as to how well the safe harbor mechanism is working and it is accordingly subject to regular review.

Turning back to the EU level, the interface between the access to documents legislation and the data privacy legislation is a potentially problematic one. In principle, the data privacy regulation permits disclosure of personal data as "necessary for the performance of a task carried out in the public interest on the basis of the Treaties

establishing the European Communities or other legal instrument adopted on the basis thereof…." As the authors observe, this means that where the Access Regulation requires disclosure, the data privacy regulation permits disclosure. Of course, the former legislation itself contains an exemption to protect personal privacy, phrased as mandating non-disclosure where disclosure "would undermine the protection of … privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data." Unfortunately, there are different interpretations among the Commission, the Ombudsman and the Data Protection Supervisor (the individual having responsibility for compliance with the data privacy protection legislation at the EU level) as to the scope of personal privacy within the meaning of the Access Regulation. It will be important for the European courts to begin to clarify the scope and meaning of "privacy and integrity" within the meaning of the Access Regulation.

Oversight

In any contemporary system of administrative law, bodies exercising rulemaking or adjudicatory power will be subject in their exercises of authority to various forms of scrutiny by another whole set of institutions that may be grouped together as exercising political "oversight." The latter institutions may not enjoy primary authority for the making of public policy, but they do perform an important set of evaluative functions. The "Oversight" chapter affords an overview of the distinctive roles that this diverse bundle of institutions plays and the means of influence that they enjoy in doing so.

The architecture of oversight in the EU is a complex one, compared to the U.S. This is due in part to the very fact that primary political authority in the U.S., at the federal level at least, is concentrated in two functionally and institutionally distinct bodies, the Congress and the Presidency (plus, of course, the federal administrative agencies which are in turn responsible to either or both the Congress and the Presidency). In the EU, principal political authority is organized more diffusely and, not surprisingly, oversight authority over these institutions is correspondingly more diffuse as well. At the root of this fragmentation is the fact that the EU exhibits at the same time both international and supranational features.

Political oversight organs in the EU context may be placed in four broad categories: executive, legislative, independent and external.

Executive oversight of administrative activity taken by the Commission and the administrative agencies is exercised principally by the Council of Ministers and, on more purely political matters, the European Council, both of which derive their authority primarily from representing the interests of the national executives. They also in turn exercise their oversight authority through other institutions that in one sense or another likewise represent the interest of national executives, albeit in designated sectors. We refer here to COREPER and the comitology committees.

Legislative oversight of administrative activity occurs at both the EU and national levels. While the European Parliament is a participant in the co-decision legislative process, it also performs oversight functions with regard to the Commission and the administrative agencies. For their part, national legislative assemblies are increasingly performing legislative oversight over EU administrative processes, with an emphasis on their policing of the principle of subsidiarity at the EU level. (The principle of subsidiarity posits that the EU should take action falling within the concurrent authority of the EU and the Member States only where the Member States are demonstrably unable effectively to attain the objectives sought to be achieved.) A special protocol to the Treaties organizes this function. National legislative oversight bodies act both separately and at times through an umbrella organization (COSAC).

A third category of oversight institutions consists of bodies that are themselves part of the EU governance architecture, but operate with political independence from the principal political institutions, such as the Parliament, Council and Commission. Here we encounter a diverse range of bodies, each providing oversight from a distinct point of view. These include the European Court of Auditors and the European Anti-Fraud Office (both of which review the EU's financial and budgetary integrity), the European Ombudsman (examining for "maladministration" at the EU level), the European Data Protection Supervisor (charged, as its name would suggest, with overseeing implementation of data privacy guarantees at the EU level), the European Agency for Fundamental Rights (whose special mission is reasonably clear from its name), the European Economic and Social Committee (designed to bring special economic and social concerns to bear in the legislative process), and the Committee of the Regions (meant to give effect to the interests of regions, as such, in the EU). As noted in the Oversight chapter, "[t]hese independent bodies serve the interests of oversight by uncovering information about the substance of regulatory policies, their costs, or how programs are being administered, which then becomes available to other bodies engaged in more direct forms of oversight."

Finally, as its name would suggest, external oversight is lodged in bodies wholly "external" to the institutions: staff unions, lobbyists, nongovernmental organizations, academia and the press.

From a comparative perspective, it is interesting to seek a counterpart in the EU to what has emerged as the paradigmatic oversight function in the U.S., namely, the role of the Office of Management and Budget (OMB) in performing review of the executive's and the administrative agencies' performance of regulatory functions, be it through impact assessment of various kinds, risk evaluation, or cost-benefit analysis. Increasingly, it appears that this role will be centralized within the Commission itself (which is the EU's "executive branch," after all), but in an organ within the Commission that sits apart both from the college of Commissioners and from the directorates-general, viz. the Secretariat General. This will explain why comparisons between regulatory oversight in the U.S. and EU see so much emphasis placed on the distinctive review methodologies of OMB, on the one hand, and the Commission Secretariat General, on the other.

The picture of overlapping and competing oversight mechanisms that emerges is highly untidy. This there is no denying. Yet, the authors conclude that, while no single entity or set of entities exercises ultimate "control" or "review" of norm production and law enforcement at the EU level, these activities may nevertheless be said to be reasonably "under control." The robust functioning of the diverse group of institutions encompassed in the notion of oversight bodies (particularly oversight by national executives and legislatures) contribute an important measure of legitimacy and accountability at the EU level.

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No executive summary can do justice to the institutional and procedural richness of the European Union's administrative processes. This is true not only of the Oversight chapter – which by definition gathers together a diverse bundle of legislative, executive, independent and external oversight mechanisms – but of the Adjudication, Rulemaking, Judicial Review and Transparency chapters as well. Comparing governance institutions and administrative processes in the U.S. and EU is a daunting task. It is daunting even to attempt an analysis of EU administrative law through the accepted categories of U.S. administrative law. In the pages that follow, the reader is nevertheless invited to find guidance and understanding on how the EU accomplishes the tasks that correspond in some measure to the adjudicatory, rulemaking, judicial review, transparency and oversight functions in terms of which U.S. administrative law is customarily understood.