# CONSIDERATIONS ON THE PRINCIPLES AND EVOLUTIONS OF E.U. ADMINISTRATIVE PROCEDURE

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**ABSTRACT:** *Form is the sworn enemy of arbitrary! The existence of formal legal rules on non-contentious administrative procedure – applied in most public administration activity – represents a procedural guarantee for citizens and a counterweight for the discretionary powers of administration. Rule of law implies the obligation to adhere to impartial and fair administrative procedures. At EU level we cannot identify a uniform philosophy related to administrative proceedings mainly because of national administrative autonomy. The need for fairness and efficiency lead to a substantial influence of the EU on national law and administrative procedures. The establishment of uniform regulations for similar actions, which are not less favourable than European ones (principle of equivalence), ensure the effectiveness of European standards. Which are the principles and directions for non-contentious administrative procedures in European law and the elements that could realize the uniformity of national rules in the field? Which are the steps adopted at European Union level in order to create a common set of principles for administrative procedures? EU realities and the doctrine answering these questions represent the topic of our study together with the presentation of the most recent developments registered in order to create a single European law of administrative procedure.*

**KEYWORDS:** *E.U. law, administrative procedures, good administration, principles, evolutions.*
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## 1. HISTORY AND DEVELOPMENTS ON EUROPEAN ADMINISTRATIVE PROCEDURE

With resolution 77 (3), the Council of Europe in 1977 reveals that with the development of modern states, public administration activities have increased in magnitude and with these individuals became more affected by administrative procedures[1]. Assuming the role of main protector of fundamental rights and freedoms, and desiring to strengthen the procedural position of the individual before public authorities, the Council of Europe made in the same resolution a number of principles reiterated 30 years later in Recommendation (2007)7[2] designed to ensure fairness in relations between the individual and administrative authorities:

- The right to be heard of the person concerned;
- Access to information at the request of the person concerned;
- Assistance and representation;
- The obligation to state reasons for the decision;
- Obligation on the administration to indicate possible remedies or redress.

In the absence of formal legal rules, the European Court of Justice was the institution that has contributed significantly to the development of principles of European administrative procedure by deriving them from the fundamental principle of legality. Thus, the ECJ jurisprudence has tended to broad interpretation - throughout the judicial process - of the rules concerning the legal protection of individuals as well as the tendency to develop procedural guarantees for the parties involved in administrative procedures[3].

In practice, the ECJ held that where an individual acquires a subjective right, there must be, as a corollary, also a procedural right by which he or she may obtain remedies in the case his or her right has been violated[4].

The European jurisprudence has emphasized the importance and necessity of procedural guarantees to the discretion of administrative institutions. Principle of good administration and thus of fair administrative procedure has found expression in a series of cases beginning with Transocean Marine Paint Association v Commission of the European Communities in 1974, which gave effect to recognize the right to be heard.

The establishment in 1988 of the Court of First Instance has become a catalyst for more and more procedural rights to acquire inherent effects. This court has acquired jurisdiction to deal with all the court cases on fair competition, anti-dumping and state aid, also, in general, cases of direct administration, where frequently were debated the administrative procedures followed by the Community institutions.

Enriching the European jurisprudence, the ECJ recognized the legal effect of procedural guarantees, and the following general administrative principles[5]:

- The general principle of public administration based on law (principle of lawfulness);

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[1] Resolution 77 (3) on the protection of the individual in relation to the acts of administrative authorities, adopted by the Committee of Ministers, on 28 September 1977 at the 275th meeting of the Ministers' Deputies.

[2] Recommendation CM/Rec (2007)7 of the Committee of Ministers to member states on good administration, adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers' Deputies.

[3] Schwartze J. 1992, *European Administrative Law*, Sweet and Maxwell, London, pp. 1175 – 1186.

[4] Court of Justice of the European Communities, *Jean-E. Humblet v Belgian State* (C-6/60, 1960).

[5] Court of Justice of the European Communities, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v Council of the European Communities* (C-49/88, 1991); *E. Nolle vs Hauptzollamt Breman- Freihafen* (C-16/90, 1991).

- The principle of non-discrimination;
- The principle of proportionality;
- The principle of legal certainty / predictability;
- The principle of legitimate expectations;
- The right to be heard before any individual measure is taken by an administrative authority;
- The principle to state reasons for the acts and measures taken;
- The principle to remedy the damage caused.

A development has been the use of the above principles in situations for which there were no written legal regulations. For example, in the case of Holland & Co. v European Commission[6], the European Court of Justice concluded that the absence of written rules does not prevent the Commission to base its decisions on the general principles of Community law, including the principle of good administration.

The Charter of Fundamental Rights of the European Union states not only civil and political rights, economic, social and cultural rights, but capitalizes and brings recognition to a new category of fundamental rights, the administrative rights. Thus, proclaiming in art. 41 right of everyone to good administration, the Charter raises to fundamental level the principle of administrative procedure[7]. It is argued that this right together with the right to an effective remedy and the right to a fair trial create the premises of a subjective right that is more extensive: the right to administrative justice.

Administrative justice requires that public authorities act and use its powers to those administered in a fair manner and efficient mechanisms are provided to citizens to receive fair treatment, fair and equitable. Administrative justice is based both on ex-ante and ex-post. One of the most important aspects regarding the ex-ante stage is that of procedural fairness or proper administrative procedure, which requires that public authority' activities to be conducted in a certain order and in strictly determined legal procedural forms. With regard to ex-post elements, they refer to the possibility of exercising judicial control and non-judicial mechanisms by which can be resolved the disputes of public law, such as Ombudsman institutions.

Also, for the Court, the principle of proportionality is an indispensable tool used frequently. In cases where the Convention enables the exercise of individual rights is limited, such limitations or restrictions shall meet certain conditions:

- To be legal, the mere fact that limiting individual on no legal basis will be sufficient for a finding of infringement;
- Any restriction must be caused by one of the objectives / legitimate interests listed in the Convention. These objectives include national security, public safety or the economic well-being of the country, public order and prevention of crime, protection of health or morals, prevent the disclosure of confidential information and so on;
- Limitation of rights must be "necessary in a democratic society." This means that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aims pursued.

[6] European Court of Justice, Netherlands and Others v. Commission (C - 66/90, 1992).
[7] Kanska, K 2004, 'Towards Administrative Rights in the E.U. Impact of the Charter of Fundamental Rights', *European Law Journal*, no. 3, p. 300.

Where individual rights are restricted, in addition to the criteria mentioned above, the Court is not limited to examining only whether the State acted reasonably, diligently and in good faith, and whether the reasons adduced by the national authorities are relevant and sufficient and the measures taken are proportionate to the legitimately aim / objective pursued.

The principle of legitimate expectations is one of the general principles recognized by public law doctrine in Europe, but also by ECJ jurisprudence, although it has an encoded form in the fundamental documents of the European Union or its Member States. Through this principle is recognised the subjective right of a person that their justified expectations towards the administration should be realized[8]. This principle is correlated in generally with the principle of judicial security, which is why it regards the activity of public administration in general and imposes obligations to the organisms invested with legal and judicial functions that function and interact with the administrative system.

Analyzing the ECJ jurisprudence, Jurgen Schwarze suggests that this principle can be employed especially in circumstances where predictability of public administration is strongly influenced by the rapidly changing politico-economic environment. From this perspective, in our view, the principle of legitimate expectations outweighs the unpredictable reactions of administrations and governments in economic globalization, in that it requires public authorities to report to their citizens by respecting specific parameters of predictability, reliability and consistency.

In the European Union doctrine are recognized several sources of administrative procedural law which can be considered as its normative basis, such as:

- Primary legislation - treaties;
- Secondary legislation where are found numerous details on access to documents, protection of personal data or different procedures in areas such as competition, state aid, etc.:
- General principles of law developed by the ECJ case law which constitute the main source of administrative procedural law.

## 2. GOOD ADMINISTRATION - ESSENTIAL ELEMENT OF EUROPEAN ADMINISTRATIVE PROCEDURE

The principle of good administration is conceived as a right when it is expressed in the form of procedural guarantees provided to individuals and as a standard when is expressed in the form of procedural rules that constrain and limit the discretion of authorities. According to Jurgen Schwarze, not being a traditional right, the right to good administration does not enjoy the same legal force as those brought before the courts by administrative contentious, but the principle of good administration is both a procedural guarantee to protect individuals and a standard / instrument required to exercise the control of the courts over the administration[9].

The content of the right to good administration is entered in Article 41 of the Charter of Fundamental Rights of the European Union:

[8] Schwartze, J 2006, *European Administrative Law*, Sweet and Maxwell, London, p. 63.
[9] Schwartze, J 2004, 'Judicial Review of European Administrative Procedure', *Law and Contemporary Problems*, vol. 60, no. 1, pp. 85-106.

*"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies of the Union.*

*2. This right includes:*

- *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
- *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
- *the obligation of the administration to give reasons for its decisions.*

*3. Every person has the right to have the Union make good any damage caused by its Institutions or by its servants in the performance of their duties, in accordance with the general principle common to the laws of the Member States.*

*4. Every person may write to the Institutions of the Union in one of the languages of the Constitution and must have an answer in the same language."*

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies with the respect of the subsidiarity principle and to the Member States only when they are implementing Union law.

The right to good administration, by the content provided in the Charter, summarizes and codifies the principle of good administration, as it was developed by solving various practical litigations before the European Courts and deals with the following principles:

- The precautionary principle;
- The principle of the right to be heard;
- The principle of access to personal information;
- The principle of the right to a reasoned decision;
- The principle to remedy the caused damage.

The precautionary principle has been used in the European Court of Justice under different forms and names: diligence, the principle of care, principle of good / sound / proper administration. This principle imposes to public authorities a defensive position, and a call to ensure rational and legal conditions necessary to solve problems specific to their activity. It was described as being a procedural tool designed for the benefit of private parties / individuals. The private parties can ensure that the European public authorities manage personal interests in an impartial, careful manner allowing each party interested or affected to contribute effectively both in the elaboration of the decision and the process of substantiating thereof .

This principle includes elements that cover both procedural form and the substance of the decision, aiming that discretionary power to be exercised in a manner that allows the protection of the legitimate interests of private parties and not to be used in their detriment.

The principle of the right to be heard and access to personal information are procedural safeguards for those who are affected directly or negatively by a decision / administrative measure and also for third parties suffering loss of a possible benefit. Regarding the content of the right to be heard, the European Court of Justice has held that it refers to the possibility that individuals have during the course of decision-making process the possibility to express their views on the truth and relevance of the facts, circumstances and on the documents analyzed or evaluated in developing the decision /

administrative measure[10]. However, the concrete manifestation of this principle is closely connected with the exercise of the right of access to personal information.

The principle of the right to a reasoned decision is one of the most important rules of administrative procedure, considered essential for a transparent decision making process at EU level. European Court of Justice found that this principle addresses the three subjects involved in the settlement of disputes:

- Private parties or individuals for which reasons represent an explanation on the issues that were identified during the investigation;
- Courts which give them the opportunity to serve as control and to review arbitrary administrative decisions;
- Public, which enables them to determine how and in what form the Union institutions legitimize their use of powers provided by the Treaties.

According to Jurgen Schwarze, the obligation to give reasons contributes to the effect of self-regulating internal administrative processes, as forcing the institution to present credible, legitimate and objectives arguments, better manage their expectations and objectives, on which a particular decision was reached[11].

The principle to remedy the caused damage can be seen both as an element of good administration and also as a right on its one.

The principle to remedy the caused damage can be both an element of good management and a basic right. When the administration causes damage to a person, the remedy is a *sine qua non* right, an issue of fairness and reasonableness, and not just an element of good administration.

## 3. EUROPEAN ADMINISTRATIVE PROCEDURE – THE WAY FORWARD

During the decades, the European Union has evolved and developed a large administration composed of institutions, agencies, offices and bodies established in order to achieve the fundamental goals of the Union.

Taking into consideration the EU administrative procedures and legislation it was obvious that until recent years we could not identify a comprehensive set of norms that regulated the relations between EU administration and European citizens or norms that regulated EU citizens rights during administrative procedures.

As stated earlier the European courts played a central role in developing the principles of EU administrative procedure, contributing to the establishment of a clear set of principles by developing the general principles of law. Based on the European Ombudsman efforts the European administrative procedure framework developed by 2000 trough the incorporation of article 41, the right to good administration in the Charter of Fundamental Rights of the European Union during the Nice summit in December 2000. Having as a starting point the new introduced right, the European Ombudsman proposed a general Code intended to develop and transpose into practice the rights and principles stated by article 41. The new stage was reached on 6 September 2001 with the resolution

[10] Court of Justice of the European Communities, *Hoffmann - La Roche v Commission* (C-85/76, 1979).
[11] Schwartze, J 2004, 'Judicial Review of European Administrative Procedure', *Law and Contemporary Problems*, vol. 60, no. 1, pp. 85-106.

adopted by the European Parliament approving the European Code of Good Administrative Behaviour.

As stated, the Code contains the general principles of good administrative behaviour which apply to all relations of the institutions and their administrations with the public, unless they are governed by specific provisions (article 3.1.)

Signed on 13 December 2007 by the Member States and entered into force on 1 December 2009, the Lisbon Treaty marked a new stage in the process of European integration and was intended to enhance further the democratic and efficient functioning of the European institutions, as stated in the Preamble. For our study dedicated to administrative procedure we identify 4 articles of great importance in the texts of the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union.

First, article 6 TEU which incorporates the Charter and states its legal value:

"The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

Second, as great importance, the Lisbon Treaty introduced directly for the first time in a European Union treaty the concept of European administration, stating the general principles for administrative action. Naming here is article 298 (1) of the Treaty on the Functioning of the European Union, which states:

*"In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration".*

The same article (298.2) empowers the European Parliament and the Council to establish the legal framework needed to support an administrative action based on openness, efficiency and independence.

Last, articles 41 and 42 of the Charter of Fundamental Rights of the European Union, dedicated to the right of good administration and the right of access to documents.

In the light of article 298 TFEU the Committee on Legal Affairs set up in March 2010 a working group on EU administrative law, which proposed a series of working documents focusing on the administrative procedures and citizens guaranties. The Final Report of the Committee from 12 November 2012 proposes a European law on administrative procedure. As stated in the explanatory statement, the law should be limited to direct EU Administration and be applicable to all Union's Institutions in order to reinforce the legitimacy of the Union and, at the same time, to give citizens and legal persons clearer rights and more legal certainty in their relations with the Union's administration[12].

Based on the right to good administration, the European Code of Good Administrative Behaviour, the Commission and the Council Codes and European jurisprudence, the final report stresses the importance to codify European administrative procedure in a single law containing the principles of good administration and the procedural rules for EU administration.

Adopted on 15th of January 2013, the resolution of the European Parliament marks the final stage in the development of a single law on administrative procedure at European

[12] Commission on Legal Affairs, Report of 12 November 2012.

Union level. The resolution requests in article 1 the Commission to submit a proposal for a regulation on a European Law of Administrative Procedure, taking into consideration a series of recommendations.

The resolution contains a total of 6 general recommendations:

- Recommendation 1 (on the objective and scope of the regulation to be adopted)
- Recommendation 2 (on the relationship between the regulation and sectoral instruments)
- Recommendation 3 (on the general principles which should govern the administration)
- Recommendation 4 (on the rules governing administrative decisions)
- Recommendation 5 (on the review and correction of own decisions)
- Recommendation 6 (on the form and publicity to be given to the regulation)

As stated in the resolution, there are 9 general principles which should govern the Union's administration in the relation with the public.

The proposed principles for the European administrative procedure are lawfulness, non-discrimination and equal treatment, proportionality, impartiality, consistency and legitimate expectations, respect for privacy, fairness, transparency, and last efficiency and service.

In relation with administrative decisions, the Resolution proposes a number of binding rules for the administration and recognizes a series of procedural rights for the public.

The binding rules indicated contains provisions on the initiation of the administrative procedures, the rules concerning the requests from the public, the obligations of impartiality, the provisions indicating the reasonable time-limit for adopting administrative decisions, the form of administrative decisions, and the duties of the administration to state reasons, notification and indication of remedies.

There are two procedural rights indicated in a direct manner, naming here Recommendations 4.4. and 4.5 which recognize the right to be heard at every stage of the procedure and the right to have full access to his or her file by an interested party.

## 4. CONCLUSIONS

In European law looms even larger the idea that the mechanism of procedural guarantees must protect the citizen from both illegal administrative decisions, as well as inequitable procedures. From this perspective, we consider that the principle of good administration, as an expression of the citizen – bureaucratic apparatus interaction, becomes a structural principle in the European administrative governance, along with the principles of subsidiarity, proportionality and effectiveness.

From our perspective, article 41 names in a vague and general way the rights and principles of good administration. We consider that by codifying the principles and the guaranties of good administration trough a general law, will enforce article 41 and will clarify what this new right means in the eyes of the citizens.

We agree with the findings of the European Added Value Assessment[13] from 2012, that a law of administrative procedure will mean clearer rights and more legal certainty for European citizens, will improve the relation between European citizens and EU

[13] European Added Value Unit, *Law of Administrative Procedure of the European Union – European Added Value Assessment*, 23 October 2012.

Administration, will conduct to a more efficient EU Administration and last will reinforce the legitimacy of the Union.

As Prof. Ziller stated, considering the need for clarification and easier access to law, the need for more coherence of principles and procedures at EU level, the need of default procedures to fill the gaps in EU legislation, and the specific nature of the EU and its policies, there is clearly a need for codification of EU law on administrative procedure[14].

At last we would like to point that taking into consideration all the developments, we can identify the foundations and emergence of a new field of public law, naming here EU administrative procedure law, in *statu nascendi* in the European Union.

[14] Ziller, J 2001, Is a Law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects, European Parliament's Committee on Legal Affairs, p. 25.