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The Right to Good Administration of the EU: Definition, Scope and Content

ABSTRACT:
Article 41 of the Charter for Fundamental Rights of the EU guarantees the right to good administration as fundamental right of the citizens of the EU. This right, as defined in the Charter, applies to situations between the citizens and the institutions, and bodies of the European Union. This paper elaborates this right vs. the right to good governance as a broader concept, its status as a fundamental right and principle guaranteed in the EU, and its scope and content through an analysis of the practice of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).
Considering that the principle of good administration (or in a broader sense good governance) is a relatively new phenomenon in the EU and yet imprecisely defined, this research will be of great importance in defining the scope and content of the "right to good administration" through the light of the practice of the ECJ and ECtHR.
Key words: *good administration, Charter of fundamental rights of the European Union, Article 41, good governance, the right to good administration of the EU, Article 298 of the TFEU, European Court of Justice (ECJ), European Court of Human Rights (ECtHR).*

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INTRODUCTION

The right to good administration is one of the fundamental rights of the citizens of the EU, guaranteed with article 41 of the Charter of Fundamental Rights of the EU which became legally binding with the entering into force of the Lisbon Treaty. This right, as defined in the Charter, applies only to cases where an institution, body of agency of the EU is involved and includes several rights: impartiality and fairness, acting within a reasonable time, right to be heard, right to access to his or her file, the obligation of the administration to give reasons for its decisions, right to make good any damage, right to communicate to the institutions of the EU to any of the languages of the Treaties. The aim of this paper is to show the scope and content of the concept of good administration through the light of the case law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

This paper consists of an introduction, four headings and a conclusion. The first heading of this paper is a brief overview of the concept of good administration as a narrower concept in regards to the concept of good governance. The second heading shows the development of the right to good administration in the EU and in the Council of Europe. The third heading is dedicated to the legal basis of this right of EU citizens, while the fourth is the largest and includes two subheadings of which the first relates to the scope and content of the rights under the framework of the principle of good administration enshrined in the Charter for Fundamental Rights of EU seen through a wide range of cases from the case law of the ECJ, and the second subheading is dedicated to the scope and content of the "good administration" in the light of the European Convention of Human Rights (ECHR) and the case-law of the ECtHR.

1. THE CONCEPT OF GOOD GOVERNANCE VS. THE CONCEPT OF GOOD ADMINISTRATION

The concept of good governance is one of the three cornerstones of any modern state. The other two are: the rule of law and democracy. These three concepts are accepted in most modern countries in the world, but all three are defined differently in different countries depending on the economic and cultural factors in the countries concerned. [2]

Good governance is an obligation for the government and a right for citizens. These obligations are sometimes related to the rule of law or democracy, but usually have their own content.

Elements of good governance are: Appropriateness, transparency, participation, effectiveness, accountability and human rights (economic, social, cultural).

The concept of good governance can be formulated in a broad and narrow sense. More broadly “good governance” applies to all powers of the state and includes three types of principles for each of the three powers: principles of good legislation (legislative power), principles of good administration (executive power) and the principles of good

[2] H.Addink, G.Antony, Antoine Buyse & C. Flinterman, *Human Rights and Good Governance*, SIM Special No.34, Utrecht, 2010.

procedures (judicial power) [3]. In a narrower sense the concept of good governance is related only to the administration..

In some countries there is no distinction in the content of the terms "good governance" and "good administration", while in others the term "good governance" is formulated in a broader sense and it is associated with the three (or four[4]) powers in the state, and administration represents just one of those powers.[5]

The concept of good governance is developed at national, regional and international level, because different problems have occurred at these levels in the relations between government and citizens. This paper will be focused at the right to good governance at the regional level, or more precisely, at the European Union level. The right to good governance at the EU level is guaranteed as a fundamental right of citizens in the EU Charter of Fundamental Rights. Article 41 of the Charter states:

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.,, Секое лице има право на објективна, правична и навремена услуга за своите потреби, од страна на институциите, телата, канцелариите и агенциите на Унијата.

These provisions indicate that there is still no general right to good governance in the EU level, but the Charter guarantees a subjective

[3] G.H. Addink, 'Principles of Good Governance: Lessons from Administrative Law', in: D.M. Curtin & R.A. Wessel (eds.) *Good Governance and the European Union*, Antwerpen-Oxford-New York: Intersentia, 2005.

[4] In addition to the three classical powers (legislation, administration and judiciary) there is more and more attention for the "fourth" (controlling) powers like the Ombudsman and the Court of Audit. See: G.H. Addink, The Ombudsman as the fourth power. On the foundations of Ombudsman from a comparative perspective, in: E.C.H.J. van der Linden & F.A.M. Stronik (eds.) Judicial Lawmaking and Administrative Law, Antwerpen-Oxford:Intersentia 2005, pp. 251-273.

[5] H.Addink, G.Antony, Antoine Buyse & C. Flinterman, *Human Rights and Good Governance*, SIM Special No.34, Utrecht, 2010, 20.

right to good administration which covers certain aspects of the right to good governance. It would be more proper to say that certain aspects of the right to good governance is codified in Article 41 of the Charter of Fundamental Rights.[6]

This is why, in the further elaboration of the scope and content of this right under Article 41, I will use the term "right to good administration" as a narrower term than the term "right to good governance", which will more appropriate when talking about this right guaranteed at the European Union level.

2. THE DEVELOPMENT OF THE RIGHT TO GOOD ADMINISTRATION

2.1. The development of the right to good administration as a right of the citizens of the EU

Despite its great importance, the term "good administration" has not been sufficiently defined in the EU to this point. EU institutions perform many functions during which they make direct contact with citizens, but still lack proper regulation in this area at the EU level, in contrast to the member states, which regulate this issue in detail.

In 1995 the first European Ombudsman, Jacob Sodermen attempted to give a definition of what is the opposite of "good administration" - "maladministration", which in its Annual Report from 1995 defined the maladministration as a "failure to act in accordance with EC law ", and in its Annual Report 1997 noted that other activities may also constitute maladministration, such as: administrative irregularities, administrative omissions, abuse of power, negligence, illegal procedures, unfairness, mistreatment or incompetence, discrimination, undue delay, disability or refusal to provide information.[7]

The idea of good administration as a right of the citizens has been introduced at EU level in the context of drafting of the Charter of Fundamental Rights of the EU, primarily by the Jacob Sodermen, who at the public discussion on the draft Charter stated that the right to good administration should to be included on the basis of:

"the idea that the citizen has a right that his or her affairs be dealt with properly, fairly and

promptly by an open, accountable and service-minded public administration."[8]

Many of these elements are included in Article 41 (right to good administration) of the Charter of Fundamental Rights of the EU which

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[6] G.H. Addink, *Good Governance: a norm for the administration or citizen's right*, Deventer 2008.

[7] Annual Report of the European Ombudsman 1995, 17 and Annual Report of the European Ombudsman 1997, 22.

[8] Speech of Jakob Soderman, the European Ombudsman at the Public Hearing on the draft Charter of Fundamental Rights of the European Union, Preliminary remarks, Brussels, Belgium, 02 February 2000, available at <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/355/html.bookmark>.

became legally binding with the entering into force of the Treaty of Lisbon. The Lisbon Treaty also introduced a new legal basis for secondary legislation for good administration (Article 298 TFEU).
Unfortunately, after a few years of the introduction of this provision, secondary legislation in this area is still missing. Certain elements are regulated by soft law or unilateral commitments made by the institutions themselves, but that is unsatisfactory in terms of the current needs.

2.2. The development of the concept of "good administration" in the Council of Europe

The Council of Europe in its Resolution 77 (31)[9] pointed out that since the development of the modern state resulted in increased importance of public administration activities, individuals are often affected by administrative acts. Considering that the main task of the Council of Europe is to protect the fundamental rights and freedoms of individuals, there is an efforts for improvement of the position of the individuals vis-à-vis the administration by promoting the adoption of rules that would ensure fairness in the relationship between citizens and administrative authorities. The following principles were highlighted in the Resolution:

1. The right to be heard;
2. The right to access to information;
3. Assistance and representation;
4. Statement of reasons;
5. Indication of remedies;

In order to limit the scope of application of these principles, the Council of Europe stated that the aforementioned principles are applied in cases of "protection of persons (natural or legal) in administrative procedures related to an individual action or a decision which is taken in the execution of public authority and which is of such a nature that directly affects the rights, liberties or interests of persons whether natural or legal (administrative act)." The term *administrative procedures* exclude court proceedings from the scope of application, the term *individual measures or decisions* excludes administrative acts of general application, while the term *directly* excludes those who are indirectly affected by the administrative act.[10]

This resolution became an important first step in establishing the concept of "good administration" as a legal concept that includes a set of today key principles for the right to good administration. Council of Europe

[9] Council of Europe, Resolution 77 (31) 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.
[10] Statskontoret, *Principles of Good Administration in the Member States of the European Union*, Sweden, 2005, 11.

continued to establish principles regarding the right to good administration[11] and a project group for administrative law was set up (CJ-DA).

3. THE LEGAL BASIS OF THE RIGHT TO GOOD ADMINISTRATION IN THE EU

The Charter of Fundamental Rights of the EU in Article 41, together with the general principles of EU law, provide a solid starting point of administrative law, but they are not sufficiently comprehensive. [12]

The Treaty of Lisbon introduced a new legal basis, Article 298 TFEU, according to which:

"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. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end."

The text of Article 298 TFEU clearly expresses the intention of the writers of the Treaty for adoption of secondary legislation for good administration that will ensure minimum quality standards and procedural safeguards which would apply to all EU administration. [13] These rules have to ensure that the EU administration is "open, efficient and independent."

The Treaties contain other provisions whose content is linked to this right. Thus Article 296 of the TFEU includes provisions relating to the publication, informing and enforcement of acts. In Article 10, Article 18 and Article 19 of the TFEU, general principles of non-discrimination are established. Articles 15 and 16 of the TFEU include provisions for transparency of the activities of the Union, access to documents of the EU institutions and the protection and processing of personal data. All these regulations are quite extensive and further specification is needed by adopting secondary legislation. In certain specific sectors, the secondary legislation that the Union has adopted provides some general rules of administrative law character. For example, the Regulation 659/1999 refers to the procedural rules and principles that the

[11] See: Recommendation No.R (80) 2 concerning the exercise of discretionary powers by administrative authorities; Recommendation No R (87) 16 on administrative procedures affecting a large number of persons; Recommendation No R (2000) 10 on Codes of conduct for Public officials.

[12] Paivi Leino-Sandberg, 'Enforcing Citizens' Right to Good Administration: Time for Action', *European Added Value Assessment on Law on Administrative Procedure of the European Union* EAVA 1/2012, Brussels, 2012, I-10.

[13] Proposal of the Swedish government concerning the ratification the Treaty of Lisbon, Regeringens proposition 2007/08:168 Lissabonfordarget, 27.

Commission should apply in the areas of state aid regarding the relations between the Commission and the authorities of the member states.[14]

In the area of competition law, the Regulation 1/2003 establishes rules for effective application of competition rules and mechanisms for cooperation between the Commission and the authorities of the Member States.[15] The directive concerning services[16] includes a number of provisions such as control and quality of service, transparency and disclosure of information, consultation with stakeholders and out of court dispute resolution. Other provisions also exist in secondary legislation in different areas. Something that should also be mentioned here is the "soft law" in the form of a codes of good behavior and codes of ethics. Here we will mention "The European Code of Good Administrative Behaviour" of the European Ombudsman and the "Code of Good Administrative Behaviour" of the Commission.[17]

Despite the existence of such provisions in the secondary legislation, the problem is that it is very fragmented, and does not cover all the areas included in the Treaty and Charter. This is also confirmed by the case law, for example in the case Max.mobil Telekommunikation Service GmbH, the Court said:

> *„... it must be concluded that the Commission's general duty of supervision and its corollary, the obligation to undertake a diligent and impartial examination of complaints submitted to it, must apply, as a matter of principle, without distinction in the context of Articles 85, 86, 90, 92 and 93 of the EC Treaty, even though the precise manner in which such obligations are discharged varies according to the specific areas to which they apply and, in particular, to the procedural rights expressly conferred by the Treaty or by secondary Community law in those areas to the persons concerned.... "*[18]

This fragmentation of rules that should be applied, not only affects the coherence in the standards that have to be applied, but also affects the citizens who may have an interest to invoke them. This current situation raises fundamental questions concerning the relationship between citizens and the EU administration, which is also confirmed by the new legal grounds added in the Treaty for the adoption of secondary legislation in this area. Many experts.[19] believe that the adoption of

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[14] Council Regulation (EC) No 659/1999 laying down detailed rules of the application of Article 93 of the EC Treaty, OJ 27.3.1999 L83/1.

[15] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJ (2003) L1/1.

[16] Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communication networks and services, OJ (2002) L 108/51.

[17] Code of Good Administrative Behavior, Relations with the public , 2000/633/EC, ECSC, Euratom: Commission Decision of 17 October 2000 amending its Rules of Procedure, OJ (2000) L 267/63.

[18] Max.mobil v. Commission, T-54/99, Judgement of the Court of first instance (Second Chamber, Extended Composition), 30 January 2002, para 53.

[19] Dr. Paivi Leino Sandberg, Professor Jacues Ziller, The Blomeyer consortium ect.

secondary legislation is needed in this area, and will give a clearer picture of the key principles and procedural requirements in the exercising of the right to good administration, guaranteed by Article 41 of the Charter.

4. THE RIGHT TO GOOD ADMINISTRATION THROUGH THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE (ECJ) AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR): SCOPE AND CONTENT

4.1. The right to good administration in light of the case law of the ECJ

4.1.1. Fairness and impartiality

The first two principles enshrined in the Charter are the principles of fairness and impartiality. According to these principles the decisions brought by the administration should not be influenced by personal opinion, national interest or political pressure. The purpose of the existence of these principles is to ensure proper handling of the administration.[20]

Some elements of these principles are subject of the practice of the ECJ, but not all. So in the case Technishe Universität München which is related to exemption from customs duties for scientific instruments imported in the EU, the Court said that:

> *„… where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.. "*[21]

Similarly in the Hoechast case, the applicant complained for a violation of the principles of sound administration and equal treatment regarding access to data. The Court in this case held that: *„ It must be borne in mind that during an administrative procedure before the Commission, the Commission is required to observe the procedural guarantees provided for by Community law. Among the guarantees conferred by the Community judicial order in administrative*

[20] Olli Maenpaa, 'Hyva hallinto oikeutena ja yleisena oikeusperiaattena' in Heidi Kaila, Elina Pirjatanniemi and Markku Suksi (eds.), 465-474, 467.
[21] Case C-269/90 Technishe Universität München. Para 14.

procedures is, in particular, the principle of sound administration, which entails the obligation for the competent institution to examine carefully and impartially all the relevant elements of the case.“[22]

In the case Max.mobil the Court, citing Article 41 (1) of the Charter noted that diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States.[23] The Court further noted that the obligation for detailed and impartial review by the Commission is explicitly indicated through the case law: "The Commission is required to consider all factual and legal elements of the complaints"[24] The Court also pointed out that such fulfillment of obligations must be subject to review by the court instances.[25]

The principle of fairness is linked to the principle of legality and the duty to respect the law and duty for proper application of the provisions and procedures. The principle of fairness requires the substance of the decisions to be lawful. The court did not elaborate much on this issue, but his focus is more on possible abuse of powers. In the case O 'Hannrachain v. the Parliament, the Court in terms of misuse of powers found that: *„ … the concept of misuse of powers has a precise scope and refers to the use of powers by an administrative authority for a purpose other than that for which they were conferred on it.“* [26]

However the principle of fairness does not only cover misuse of power, but it is associated with the need for finding an appropriate balance between private and public interests, and with the principle of proportionality. [27] The behavior of the administration may be legal but still unfair.

From the above mentioned we can conclude that the case law of the ECJ does not sufficiently elaborate these two principles: impartiality and fairness. For this reasons, more detailed specification of these two principles is needed. The Ombudsman Code of 2001 is more detailed and includes several articles related to these principles: legality (Article 4), the absence of abuse of power (Article 7), independence and

[22] Case T-410/03 Hoechst GmbH v Commission, paras 128-130. See also: (Case T‑348/94 Enso Española v Commission [1998] ECR II‑1875, paragraph 56) and (Case T‑44/90 La Cinq v Commission [1992] ECR II‑1, paragraph 86, ABB Asea Brown Boveri v Commission, paragraph 99, and Joined cases T-355/04 and T-446/04 Co-Frutta Soc. Coop. v. Commission, para 55, in which it is also pointed out that the Commission in the administrative proceedings before it, has to take account of the procedural guarantees provided by Community law.

[23] T-54/99 max.mobil v. Commission, para 48.

[24] Ibid., para 49.

[25] Ibid., para 56.

[26] C-121/01 P O 'Hannrachain v. the Parliament, para 46; See also: Case C-110/97 Netherlands v. Council, para 137.

[27] See Article 5(4) of the TEU: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. ".

impartiality (Article 8), objectivity (Article 9), legitimate expectations, consistency and the advise (Article 10) and fairness (Article 11).

4.1.2. Acting within a reasonable time

The Charter of Fundamental Rights of the EU sais that the administration should act within a "reasonable time." Defining of what "reasonable time" means, is difficult. ECJ had the opportunity to consider this issue in terms of the time limits and the failure to act within a reasonable time, given that the implementation of this principle obviously causes problems in the administration of the EU. There is an extensive case law of the ECJ concerning the silence of the administration, the so-called "implied decisions" in cases where no decision is taken in due time, the effects of it, and bringing decisions after the expiry date.[28] For example, in the Ryanair case which refers to a request for access to documents related to the review of State aid on the basis of Regulation 1049/2001 - a procedure that involves very specific time limits for acting on such requests, the Court said that when there are exactly specific deadlines and a rule to extend those limits again, then not taking action within the extended term represents "implied decision" for refusing access.[29] In Vieira case which is about suspension of payment of financial aid awarded to a project related to fisheries, the applicant complained that the Commission had violated its duty to act in a "reasonable time" since it passed more than four years from the applicant's request for payment before taking the contested decision by the Commission. The applicant in this case claimed that:

> *„ ....a general principle exists in Community law, based on the need for legal certainty and good administration, which requires the administrative authority to exercise its powers within a given period in order to protect the legitimate expectations which those subject to it have of it. Therefore, when the Commission requires the reimbursement of financial aid after an unreasonable delay, it is not acting with the necessary diligence, is not complying with the requirements of legal certainty and is no longer acting within the limits of good administration.“*[30]

The Court said that "respect for reasonable time limits is a general principle of Community law which the Commission must observe in the administrative procedures" and that in this case the procedure was long, with periods of inactivity by the Commission (paragraphs 167-169). However, the Court was not convinced of the effects of such delay and in its opinion "a violation of the principle of deciding a reasonable time limit, does not justify the automatic annulment of the contested decision," [31] or in other words the delay in

[28] See: Cases T-494/08, T-500/08 и T-509/08, Ryanair Ltd v. Commission; Joined cases T-355/04 and T-446/04 Co-Frutta Soc.coop v. the Commission; Case T-42/05 Rhiannon Williams v. the Commission.

[29] Cases T-494/08, T-500/08 and T-509/08, Ryanair Ltd v. Commission, para 40.

[30] Joint cases T-44/01, T-119/01 and T-126/01 Eduardo Vieira v. the Commission, para 165.

[31] Ibis, para 170.

taking action does not automatically mean that the decision to suspend the payment should not be taken.

From the above mentioned, as well as from the other case law can be found that in practice the institutions have flexibility in observance of the time limits and can make decisions after their expiration. In many cases, decisions are taken after the expiry of the time limit, when it becomes obvious that the party concerned will appeal to "the implied decision." [32]

In the Co-Frutta Soc. Coop[33] case the Court finds that a decision taken after the expiry date is not automatically annulled. On the contrary, the Commission may withdraw its "implied decision" by adopting a new one at a later stage after the expiry of the time limit.

Similarly, in the Z v. the European Parliament[34] case which is related with disciplinary measure imposed on a employee, the Court said that: *„ The time-limits laid down in Article 7 of Annex IX to the Staff Regulations are not mandatory but constitute rules of sound administration, with the result that a failure to observe those time-limits may render the institution liable for any damage caused to those concerned, but cannot of itself affect the validity of a disciplinary sanction imposed after their expiry.. "*[35]

ECJ case law shows that although there is a recognition of the need to act within a reasonable time, this principle is not strict enough to force the administration to act whithin a "reasonable time." Silence of the administration is a serious and obvious problem, but the way that applicants propose to solve this - a decision taken by the administration after the expiry date not be valid - perhaps is not a universal solution considering the differences in administrative procedures in the EU and their purposes. The Code from 2001 is much more ambitious than current case law regarding the time limits, and sets a time frame of not later than two months for decision taking, answering letters and administrative notes (Article 17). If substance is complex and decision could not be brought within this period, the Code requires officials to inform the client about the delay and bring a decision "as soon as possible." The possibility of bringing a lawsuit against the institution for failure to act on the basis of Article 265 TFEU is slightly attractive option for an individual and that remedy is not enough to solve this relatively widespread phenomenon.[36]

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[32] Paivi Leino-Sandberg, 'Enforcing Citizens' Right to Good Administration: Time for Action', *European Added Value Assessment on Law on Administrative Procedure of the European Union* EAVA 1/2012, Brussels, 2012, I-15.

[33] Joined cases T-355/04 и T-446/04 Co-Frutta Soc. Coop v. the Commission, para 71.

[34] Case C-270/99 P Z v. the European Parliament, para 21.

[35] Ibid, para 21. See also: Case 13/69 Van Eick v. Commission (1970) para 3; Case 228/83 F. v. Commission (1985) para 30; Joined cases 175 and 209/86 M. v Council (1988), para 16.

[36] Paivi Leino-Sandberg, 'Enforcing Citizens' Right to Good Administration: Time for Action', *European Added Value Assessment on Law on Administrative Procedure of the European Union* EAVA 1/2012, Brussels, 2012, I-17.

4.1.3. Right to be heard

Besides the above mentioned basic principles, Article 41, paragraph 2 (a) of the Charter of Fundamental Rights also establishes "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken". In other words the individual has the right to be informed about the facts that affect his/her case, hence the administration has obligation to create an opportunity for review of the facts that could affect the proceeding in the case, to evaluate and verify whether they are accurate and to determine whether all the facts that were relevant to the case are taken into consideration.

This right is analyzed in the case law of the ECJ. [37] In practice, the Court requires strict adherence to the principle of being heard before the adoption of measures that will adversely effect the individual. In Fiskano case, the ECJ emphasized that: *"It must be stressed in this respect that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question "*[38]

The Court citing the previous case law said that "…observance of the right to be heard requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on the basis of which the Commission imposes the penalty."[39] The need for respecting of rights of the defense were pointed out in Lisrestal case where the Court said that *"any person who may be adversely affected by the adoption of decision should be in a position where he/she can effectively make known its views on the evidence against him*[40]

In this judgment The court said that the Commission was not entitled to adopt the contested decision without previously giving to those that are concerned the possibility, or ensuring that they had had the possibility, of effectively setting forth their views on the dispute (in this case the reduction of assistance).[41]

Failure to respect the right to be heard also leads to the duty to pay compensation. In the Fresh Marine v. Commission case[42] the applicant complained that he was not informed by the Commission of the relevant facts and views on grounds of which the Commission wanted to impose certain duties on imports of his products and demanded the right to comment on the Commission's decision with which the company would be possible to avoid charges. The Court noted that the Commission has changed the relevant report unilaterally, without hearing the applicant and in doing so it has made a mistake that would not be done otherwise, if the administrative authorities have carried out

[37] Case 32/62 Alvis v. the Commission.
[38] Case C-135/92 Fiskano v. the Commission, para 39.
[39] Ibid, para 40-41.
[40] Case T-450/93 Lisertal v. the Commission, para 42.
[41] Ibid, para 49.
[42] Case T-178/98 Fresh Marine Company AS v Commission.

their duties with due attention.[43] Since there is a causal link between the damage and the violation of the applicant's right to be fairly heard, the Commission was also responsible for half the loss of the profit of the applicant.

The case law as well as the Charter, limit the right to be heard to cases in which the measure has adverse effect on the party. The Court has considered this issue in the Windpark Groothusen case, which concernes to the procedure for submission of projects where the applicants, considering their large number and work overload during the evaluation, have not been given the opportunity to continue to express their views after the submission of project proposals, unless the Commission expressly requests that from them. ECJ accepted this practice and said that:

> *„ a person's right to a hearing before adoption of an act concerning that person arises only where the Commission contemplates the imposition of a penalty or the adoption of a measure likely to have an adverse effect on that person's legal position..“*[44]

In the future, possible extension of this approach should be considered, because not always could be clear whether the measure that is planned to be imposed will have a positive or negative impact on the person, or will be positive for some people and negative for others. For these reasons it is necessary to consider the right to be heard should to be extended to all proceedings that result in a decision that affects the individual on one way or another, unless it is not obvious that such hearing is necessary. In this regard the Code of the Ombudsman from 2001, in Article 16 treats this question broadly than the jurisprudence and says that: "Every member of the public shall have the right, in cases where a decision affecting his or her rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken.*"*

4.1.4. The Right to access one's own file

The Charter in Article 41, paragraph 2 (a) establishes the right of access to one's own file. In Aalborg Portland v. Commission case, which is a case related with European manufacturers of cement and trade associations, the applicant complained that he was not aware and familiar with the entire documentation used against him when the decision was made. ECJ was not fully convinced in that and said:

> *„ The failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document“*[45]

[43] Ibid, para 82.
[44] C-48/96 P Windpark Groothusen, para 47.
[45] C-204/00 P Aalborg Portland v. Commission, para 71. See also: Case 322/81 Michelin v. Commission (1983); Case 107/82 AEG v. Commisson (1983); Case T-30/91 Solvay v. Commission (1995).

The Court placed the burden of proof on the undertaking to show that the result to which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it, had to be disallowed as evidence[46].

The burden of proof seems difficult, considering the fact that even though the process is administrative in nature, it has the characteristics of a situation of a "fair trial". From the client perspective, knowing his/her own file is a necessity in order to be able to evaluate whether the institution acted properly or not. Otherwise, not knowing his/her own file on the grounds on which the decision is brought in his/her own case, can lead to unnecessary judicial proceedings. Furthermore, this is also a factor that can influence on the increase or decrease of trust in the institutions and therefore it is a key element of "good administration". Hence, many questions arise whether the currently established case law is correct.[47]

Case law also exists of the implementation of Regulation 1049/2001 which refers to another related topic - access to documents. It looks like in some sectors access of the party to his/her own file is so limited that is often examined whether the court would make a less severe decision in the cases of public access to information than in cases of the client's access to its own file.[48] The Commission repeatedly emphasizes that limited or no access of the party to his/her file, creates pressure in the implementation of the rules on public access to documents. The existence of such cases testifies about the problems with the right of the party to have access to his/her file: the party should enjoy greater rights than the general public that receives information that can be given in public and do not cause damage by their publication. The access of the party to the documents in its own case is limited only to the party itself, and it is justified by ensuring the right of defense of the party.

4.1.5. Duty to reason a decision

Paragraph 2 of Article 296 states that: The legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties". In article 41, paragraph 2(c) of the Charter and in the case law, this obligation is extended to administrative decisions. In case UNECTEF v. Heylens, a case concerning the qualifications of football coaches, the Court said:

> „*The competent national authority is under a duty to inform the persons concerned about the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.*"[49]

[46] Ibid, para 73-75.
[47] Paivi Leino-Sandberg, *Enforcing Citizens' Right to Good Administration: Time for Action*, European Added Value Assessment on Law on Administrative Procedure of the European Union EAVA 1/2012, Brussels, 2012, I-20.
[48] Case T-237/02 Technische Glaswerke Ilmenau v. Commission.
[49] Case 222/86 UNECTEF v Heylens, para 15.

The Court limits this duty only to "final decisions refusing to recognize equivalence and do not extend to opinions and other measures occurring in the preparation and investigation stage".[50]

In the case of Belgium v Commission , a case concerning the validity of the Commission decision on State aid which forbade financial assistance to a steel company , the Court upheld the previous court practice and said that the statement of the reasons must be appropriate to the act which is brought and must give an explanation for the adoption of such a decision by the institution on a clear and unambiguous manner, in a way that will enable the persons concerned to ascertain the reasons for the adoption of the measure and to enable the court to exercise its power of legal review of the decision.[51]

In the Williams case, the Court said that "the implied refusal thus established implies also, by definition, an infringement of the obligation to state reasons".[52] Related to this, the Court said that the possibility for review of the contested decision must be allowed even for implied decision.[53]

From the established jurisprudence we can see that the duty of reasoning is well established principle (also guaranteed in Article 18 of the Code), although in practice there are many cases related to violations of this principle, which are brought before the courts. Although sometimes this principle seems like an unnecessary and technical hindrance for the public servants, it is the only guarantee for the individual that all relevant facts and rules were taken into consideration when the case was solved. The adequate reasoning of the decisions is in a clear linkage with the trust of the individual in the administration. The need for additional trials is reduced if the client knows the grounds on which the decision is made. This shows that the reasoning of decisions is a key element of good administration.

4.1.6. The right to have the Union make good any damage

Paragraph 2 of Article 340 TFEU establishes the principle of non-contractual liability, stating that: „ In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".This content is regulated in Article 41 paragraph 3 of the Charter, and there is also a rich jurisprudence regarding this issue.

In the Area Cova case the Court said that the Community law confers a right to reparation where three conditions are met, namely that the rule of law infringed is intended to confer rights on individuals, that the breach is sufficiently serious, and, finally, that there is a direct causal link between the breach of the obligation resting on the Community and the damage sustained by the injured parties.[54] In this case the Court found that the first condition is not fulfilled and that the applicants are

[50] Ibid, para 16.
[51] Case C-197/99 Belgium v. Commission, para 72.
[52] Case T-42/05 Rhiannon Wiliams v. the Commission, para 93.
[53] Ibid, 98.
[54] T-196/99 – Area Cova and Others v Commission and Council, para 42

complaining only for infringement of the principle of "sound administration".[55] What the Court wanted to say here is that a violation of the principle of good administration is not a clear violation of the rule of law, and this also leaves a space for this issue to be discussed again in the future.

4.1.7. The right to communicate with the institutions in any of the Treaty languages

Article 20, paragraph 2 (d) of the TFEU establishes the right of EU citizens "to address to the institutions and advisory bodies of the Union in any of the languages of the Treaties and to receive an answer in the same language." The charter in Article 41, paragraph 4 and the Code from 2001 also guarantees this right extended to "any person." The Code goes even further and includes entities such as organizations (NGOs) and companies.

The issue with the use of the languages by the institutions is also subject to regulation in the Regulation No. 1 of the Council. According to Article 6 " The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases."[56]

Although it is clear that the possibility of citizens to communicate with the EU institutions in their own language is of great practical and symbolic importance, yet it is also clear that it is impossible to provide every document to be translated into all official languages, especially when it comes to EU bodies with limited resources such as the European Institute for Gender Equality which is limited to 42 staff employees.

The court also showed understanding about the existence of such difficulties. In the Kik case the Court said that although the Treaty contains certain provisions for the use of languages, they can not be regarded as evidencing a general principle of EU law that gives the right of every citizen to have a version to his language of everything which may affect its interests in all situations and circumstances.[57] The Court also said that "an individual decision need not necessarily be drawn up in all the official languages, even though it may affect the rights of a citizen of the Union other than the person to whom it is addressed.[58]

In the case of Eurojust case[59] which was declared as inadmissible by the Court, the Advocate General Maduro has made a connection of the politics of the languages with the rights and fundamental objectives of the Union and said that:

> *„ It is clear that it is in the context of communications between the institutions and the citizens of the Union that the principle of respect for linguistic diversity deserves the highest level of*

[55] Ibid, para 43-44.
[56] REGULATION No 1 on determining the languages to be used by the European Economic Community (OJ L 17, 6.10.1958, p. 385), available at: < http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1958/R/01958R0001-20070101-en.pdf>
[57] C-361/01 P Kik v.OHIM, para 82.
[58] Ibid, para 85.
[59] C-160/03 Spain v. Eurojust.

protection. In such cases, that principle is linked with a fundamental democratic principle of which the Court takes the greatest care to ensure observance."[60]

He also stressed that in the context of administrative proceedings, the Member States and citizens should be able to understand the institution or body with which they communicate.

4.2. The right to good administration through the light of the European Court for Human Rights

The European Convention for protection of the human rights and fundamental freedoms is silent as to the question what good administration is. Nor did the Court developed, in its case-law, such a right of an individual character.[61] However elements of what today represents "good administration" have been developed through the case law of the European Court of Human Rights (ECtHR). Elements of a good administration are accompanied together with many individual rights guaranteed by the ECHR. It is clear that the effective enjoyment of human rights requires from the public authorities to respect certain principles of good administration present in various acts at national and international level.

Principles that are related to the right to good administration developed by the ECtHR practice are:

1. The public authorities have negative obligation to refrain from acts which violate the individual rights of citizens.[62]

2. The Convention sets an obligation to the public authorities to carry out their activities in accordance with law. Every act of public administration must have a legal basis and must be in accordance with the legal provisions adopted by the competent authority before the adoption of the act. In case Iatridis v. Greece, the ECtHR said:

„The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention "[63]

In the Malone v. UK case, the ECtHR said that the implementation of the rule of law requires that there must be a measure of legal protection in domestic law against arbitrary interference by public authority in the exercising of the rights guaranteed by the Convention.[64]

Domestic law itself, must meet certain minimum quality requirements. Firstly, the interference must have a legal basis in the national law (or other legal act in the nation-state), secondly, such a law should be available, and thirdly, it should be formulated in such a way

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[60] Opinion of AG Poiares Maduro, delivered on 16 December 2004, para 42-43.
[61] Krzyzanowska-Mierzewska, *Good administration and the case-law of the European Court of Human Rights*, Council of Europe: Strasbourg, 2008, 3.
[62] Ibid, 4.
[63] Iatridis v. Greece (GC), no. 31107/96, para 58, ECHR 1999-II. See also: Carbonara and Ventura v. Italy, no. 24638/94, para 63, ECHR 2000-VI. The case law of the ECtHR is available at the web-page: http://hudoc.echr.coe.int.
[64] Malone v. United Kindom, no. 8691/79, judgment of 2 August 1984, Series A no. 82, para 67.

that any person can foresee, to the extent that is reasonable considering the circumstances, the consequences which certain action will cause.

It can be noted that the case law does not go into the question whether a particular norm or a decision based on that norm is "fair" and "unfair". In this direction the statements of legal scholars that the Convention is an instrument of procedural, not substantive justice, should be taken into consideration.[65] On the other hand we can say that the principle of proportionality as applied by the court, plays that role, obliging the states to make balance between individual and public interests involved in the case.

Article 13 of the Convention imposes an obligation on states to provide effective domestic remedy for persons whose rights have been violated, regardless of the fact that the violation is made by public officials. Such procedures must be available in the domestic law, which will make possible the submission of a complaint against the state to refrain from acts that cause violation of the rights, to recognize such acts and to repare the situation.

In all situations where the Convention allows exercising of a right to be limited, such limitation must cumulatively fulfill three conditions. The first which has already been mentioned previously is that the limitation should be lawful. Second, the limitation must have a legitimate purpose such as: national security, public safety, economic well-being of the state, public order and prevention of crime, protection of health or moral or the protection of the rights and freedoms of others, preventing of disclosure of confidential information or for maintaining the authority and independence of the judiciary. This list of legitimate aims depends on the right which is put into question. Third, the restriction must be "necessary in a democratic society" i.e. the limitation must be proportionate to the legitimate aim that has to be achieved.[66]

1. The Convention requires from the public authorities to do certain obligations of positive character, because for effective enjoyment of certain rights is not enough that the state only refrain from acting. The obligation for the Parties that arises from Article 1 of The Convention, to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, requires from the States Parties to take measures that will ensure the enjoyment of these rights guaranteed to citizens. This positive obligation of the state is related to another principle of the Convention that the Court emphasized in the Airey v. Ireland case, according to which the state should ensure practical and effective, and not only theoretical and illusory rights.[67]

These general principles related to good administration are currently regulated in much more details in the Recommendation of the Council of Europe for good administration adopted in 2007[68]. The recommendation

[65] C. Gearty, 'The European Court of Human Rights and the protection of civil liberties: An overview', *Civil Libertas Journal*, 1993, 89-127.
[66] Matter v. Slovakia, no.31534/96, para 66.
[67] Aires v. Ireland, judgment of 9 October 1979, Series A no. 32.
[68] Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration.

urges governments of member states *to promote good administration within the framework of the principles of the rule of law and democracy, which will ensure effectiveness, efficiency and quality and will work in the interests of all*. Attached to the Recommendation is added a Code for good administration, which contains a number of important principles. The Code is divided into three sections:

1. *Principles of good administration* which contains the principles: lawfulness, equality, impartiality, proportionality, legal certainity, principle of taking action within a reasonable time limit, participation, respect for privacy and transparency;

2. *Rules governing administrative decisions* which includes rights related solely with administrative law and administrative decisions such as the right to be heard, form and publication of administrative decisions and etc.

3. *Appeals*. This section refers to the right to appeal against the decision of an administrative decision.

This suggests that the European legislator begins to focus not only on specific administrative acts, but on the administrative procedures too. This leads towards the thinking that "the principle of good administration" in the future will be for administrative law what "good governance" and "good legislation" are for international law.[69]

5. CONCLUSION

In recent decades we are witnesses to the formulation of the principle of "good administration" at the EU level. The principle of good administration (or more broadly: good governance) despite its significance, still remains imprecisely defined. Many issues still remain unresolved, and because of this the citizens are limited in the use of this right. Article 41 of the Charter of Fundamental Rights of the EU contains some elements on which the basis of the right to good administration should be built. ECJ case law shows that citizens can rely on certain fundamental principles in their relations with the EU administration, but there are many gaps which indicate that individuals can not exercise their rights without the adoption of more detailed mandatory legal provisions. Secondary legislation is necessary for an effective application of the principles and procedural guarantees. For example, the principles of impartiality and fairness which are central principles in the Charter are insufficiently developed in the case law of the ECJ. Although there are some cases in which the need to act within a reasonable time is recognized to some extent, still the case law is not strong enough to fight unreasonable deadlines or to remove the silence of the administration. The European Code of Good Administrative Behavior contains principles of good administration in more details, but it is not legally binding.

[69] Theodore Fortsakis, 'Principles governing good administration', *European Public Law*, Volume 11, Issue 2, Klauwer Law International, 2005, 211.

In recent decades, the Council of Europe adopted several recommendations concerning public administration and administrative procedures. The European Court of Human Rights also covers some issues regarding the public administration in connection with the exercising of public authority in some of its judgments, creating certain jurisprudence in this area. The Recommendation for good administration of the Council of Europe, adopted in 2007, is of particular importance in terms of its broad scope and the added attachment (Code) to it and represents a step towards establishing standards for member states under the framework of "good governance" about the way how to provide "good administration".

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