

PRINCIPLES OF A EUROPEAN ADMINISTRATIVE PROCEDURAL LAW

(Procedural principles in the ReNEUAL Model Rules on EU Administrative Procedure)

Dr. Ágnes Váradi PhD.

research fellow

HAS Centre for Social Sciences Institute for Legal Studies

INTRODUCTION: GENERAL THOUGHTS ABOUT EU ADMINISTRATIVE PROCEDURAL LAW

In the last few years, the elaboration of a uniform European administrative procedural law has entered into centre of attention not only in the legal scholarship but gradually in the EU policy-making as well. The most general question is what kind of tendencies and legal phenomena justify the development of a new legal field in EU law, and so the necessity of approximation of laws. Those authors who argue that there is a ‘convergence or approximation of traditionally divergent administrative systems’[1] find a reference point in the concept of the ‘European Administrative Space’ meaning the area, where a high level of administrative cooperation is pursued while safeguarding the common values of the Member States.[2] Although the difference in the administrative traditions of the Member States cannot be denied, ‘an increasingly solid framework of common principles is emerging.[3]’ Using a more practical approach, we can argue that the necessity of elaborating common procedural reference points arises from the EU policies extending over more and more fields and resulting in the need of similarly framed administrative procedures.

In order to define the development tendencies of this new area of research, its framework formed by common goals, principles and concepts [4] has to be analysed in details. [5] Probably the most explicit of these three elements is the definition of common goals, as it can be clearly derived from documents of EU institutions, like the European Parliament resolution on a Law of Administrative Procedure of the European Union. These are – among others – to guarantee citizens’ rights, to ensure the rule of law, separation of powers, to promote transparency and accountability in administrative law, to enhance the EU’s legitimacy and to strengthen the process of integration via a better convergence of national administrative laws. [6]

These goals can only be achieved if the administrative procedure is based on a sufficiently well-elaborated system of principles, in accordance with the general principles of EU law, as well as the rights and obligations derivable from the Charter of Fundamental Rights of the European Union (hereinafter: ChFR). That is why the concept of administrative procedural principles should be understood rather broadly, extending over the specifically and exclusively administrative principles [7], covering general principles of EU law and other judiciary rights and principles (in accordance with the right to good administration to be described later).

In the following the aim is to introduce those procedural principles that can be derived from the existing EU legal framework, and then, to introduce the appearance of these principles in the recently published ReNEUAL Model Rules on EU Administrative Procedure (hereinafter: Model Rules). [8] The analysis is based on the primary and secondary sources of EU law, as well as the case-law of the European Court of Justice (hereinafter: ECJ) and on sources of relevant secondary literature concerning the European administrative procedural law.

SOURCES OF PRINCIPLES IN EU LAW

In order to summarize the principles that can be the foundation of a European administrative law (irrespective of the fact whether its application would be binding or optional for the Member States), firstly, a sum up of the relevant sources in the context of EU law is necessary. The general starting point is Article 41 of the ChFR, namely the right to good administration. Concerning the definition of 'good administration', in this paper that approach is followed, which regards this concept from the practical point of view, as a set of rules governing the exercise of public authority [9] and therefore as a determinant of the quality of the single procedures. In this context, it has to be set down, that the scope of the right to good administration as provided for in the ChFR is limited to the 'institutions, bodies, offices and agencies of the Union'. The rights enlisted in it (right to be heard, right to access to information, duty of the authorities to state reasons, right for redress, right to turn to the institutions) [10] and the general principles of EU law elaborated in details in the case-law of ECJ (e.g. principles of equality and effectiveness) should be respected by the institutions and national administrations as a result of the theories of direct effect and primacy. [11] [At this point it should be noted that the principles of effectiveness and equality usually do not govern the specific procedure, but rather define the nature of the national procedural norms governing the administrative process in lack of Community rules.]

Furthermore, the Founding Treaties contain sporadic references to some principles, which, however, have to be respected not only by the EU institutions, but by the national authorities as well in their role as decentralized executors of EU law. Such an example could be Article 105 and 108 TFEU regulate the procedure of the Commission and the national competition authorities with respect to the general principles, like duty to state reasons, right to be heard, test of appropriateness, judicial review.

Some sectoral sources of secondary law might contain procedural principles at special fields of administration as well. Continuing the example of competition law, the so-called Modernising Regulation in the field of competition law [12] refers to such principles from the right to be heard (Article 27), through data protection principles (Article 28) to the right to judicial review (Article 20 Para 4 and 8). However, such norms are binding only for the authorities involved in the proceedings subjects to the material scope of the given piece of secondary legislation.

Switching from the obligatory and general sources of law to the not-generally binding ones, firstly, the European Code on Good Administrative Behaviour [13] has to be mentioned. This can be regarded as a general recommendation, which applies to the relations of EU institutions with the public. The document drafted by the European Ombudsman and approved by the European Parliament in its Resolution of 6 September 2001[14] contains two sets of general principles: ‘substantive principles, considered as the minimum substantial requirements for establishing good administration’ (like lawfulness; non-discrimination, proportionality) and ‘yardsticks of normality for the factual conduct of the institutions’ (like obligation to be service-minded and act with courtesy; the obligation to give an indication of remedies available to all persons concerned). [15]

Finally, the institutions’ staff regulations and internal codes of conduct have to be mentioned, which govern not only the internal relations of the officials with their institutions, but might also contain guidelines for the administration of cases. The problem with these codes is that they are very heterogeneous, [16] are not easily accessible and that is why they are usually not known in advance by the clients. The importance of internal codes of conduct cannot be denied in the everyday practice of administrative authorities, however, they cannot serve as sources of general procedural principles from the point of view of the clients. As it is apparent from the examples above, there are several binding or at least easily accessible and quite uniform sources of procedural principles in EU law, which are rather proper basis for the listing and interpretation of procedural principles.

INTERPRETATION OF THE PRINCIPLES

Summarizing the principles stemming from the above mentioned sources, the following ones can be identified: 1.) principle of equality and effectiveness; 2.) principle of non-discrimination; 3.) proportionality; 4.) lack of abuse of power; 5.) impartiality, independence and objectivity; 6.) legal certainty; 7.) transparency and accountability; 8.) right to be defended, represented; 9.) right to be heard; 10.) right to decision within reasonable time; 11.) duty to state reasons; 12.) legal remedy and judicial review; 13.) courtesy and friendly treatment; 14.) linguistic rights; 15.) protection of personal data; 16.) access to information; 17.) right to redress. [17]

The next question is how the exact content of the principles can be detected. The solution seems to be the easiest with regard to the principles of EU law, like those of effectiveness and equivalence. In both cases there is a clearly elaborated praxis of the ECJ, also in terms of administrative procedures: ‘in the absence of Community rules in the field it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)’[18]

However, the other principles mentioned (e.g. right to be heard, right to legal remedy) can also be deduced from the international human rights conventions, especially from the European Convention of Human Rights (ECHR).

At this point the thesis of an interpretation in accordance with ECHR elaborated by the ECJ will play an important role, as it makes an equilibrium between the requirements of EU law, national constitutional law and international law possible. Interpreting Art. 52 Para 3 ChFR, if the situation is governed by EU law, the level of protection has to be compared in the two documents. If the ChFR grants wider protection, [19] it forms the legal basis of the judgment. Are there any uncertainties concerning the meaning or scope of terms or provisions, they ‘must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights (ECtHR)’.[20] If the level of protection of a particular right is the same[21] in the ECHR and in ChFR, the interpretation/perception given by the ECtHR[22] has to be taken into account.[23] In cases, falling outside the scope of EU law, national courts have to orientate towards the standards of the ECHR.[24]

PRINCIPLES IN THE RENEUAL MODEL RULES ON EU ADMINISTRATIVE PROCEDURE

After defining the administrative law principles and detecting their interpretation, the next question is how they could influence the EU administrative procedural law. In this context, the example of the Model Rules should be analysed.

The Steering Committee of the Research Network on EU Administrative Law has recently published a set of model rules on EU Administrative Procedure. This document is a set of rules – not merely guidelines - based on ‘current law (norms and regulations of the treaties, secondary legislation, case law) in order to systematize, fill existing gaps, and also make innovative proposals for the fields where there are no clear rules and principles for the protection of citizens and businesses.’[25] From this definition would follow that the procedural principles, due to their lack-filling function would play a central role in the system of the Model Rules. Especially, because the drafters of the Model Rules acknowledge that ‘the current rules and procedures for administrative procedures are fragmented and mostly policy-specific; there are gaps and it is not always possible to have a coherent interpretation of the rules that apply in different sectors even though they are intended to be similar.’ [Model Rules (14) p. 5] This statement strengthens the necessity for a uniform founding of administrative procedural principles.

In this sense, the Preamble of Book I. of the Model Rules defines the principles, which should be taken into account in the interpretation and development of the Model Rules: The most general framework for the activity of public authorities in administrative procedures – according to the Preamble – is provided by the rule of law and the right to good administration. Furthermore, regard should be taken to general principles, like ‘equal treatment and non-discrimination, legal certainty, fairness, objectivity and impartiality, participation, proportionality, protection of legitimate expectations, transparency, and due access to effective remedies’.

Next, it adds that public authorities shall have regard to efficiency, effectiveness and service orientation. Finally, the Preamble states that ‘within European administrative procedures due respect must be given to the principles of subsidiarity, sincere cooperation, and clear allocation of responsibilities’.

Nevertheless, further clarification of these principles is not intended in the book on General Provisions. As the drafters argue ‘these principles are already laid down in various provisions of the EU treaties and the ReNEUAL Model Rules do not intend to duplicate those provisions.’

At this point the question arises, whether such a detailed description should be included into the Model Rules. The main argument for a rather practical way of thinking could be that the principles set out above are basic constitutional values of the Union and their correct interpretation can be deduced with help of the already mentioned interpretation guidelines. So, a compilation, like the Model Rules should rather translate the principles into rules on administrative procedure covering the non-legislative implementation of EU law and policies.

Some examples for this phenomenon: Chapter 6 of Book III on the rectification and withdrawal of decisions sets out strict conditions for the rectification or withdrawal a lawful decision that is beneficial to a party. [Article III-36 (3)] This way the rules take the increased legitimate expectations of the beneficiaries into account while creating a balance to other private or public interests. Similarly, the principle of transparency is not included *expressis verbis* in Book IV, but as Article IV-14 rules on the equal access for economic operators from all Member State in tenders, it prescribes that ‘the contracting EU Authority shall only impose conditions which do not cause direct or indirect discrimination against persons who might be interested in the contract in specific Member States.’ This way, the duty of determining objective criteria for the limitation results in the same effect.

To sum up, concerning the application of procedural principles, the Model Rules fulfil their basic function: the approximation of administrative procedural laws into one, which can form the basis of the activities of administrative authorities while applying European law. This way (as for the practical use of procedural principles) it is in accordance with the general expectation towards the EU administrative procedural law codification: ‘the reform of administrative procedure legislation, along with the subsequent modernization of its theoretical underpinning, cannot be found in the complete codification of existing administrative procedure laws, or the simple addition of new procedures to the traditional laws (...) On the contrary, there is a crucial need to elaborate criteria or principles of procedure suited to these new situations, and to include qualitatively distinct procedures or characteristic actions that more faithfully represent today’s administrative reality.’[26]

CONCLUSIONS

What conclusions can be derived from this analysis of the principles of EU administrative procedural law? It seems to be a more and more general claim to establish general reference points for the administrative procedures within the EU.

The basis for such efforts would be the elaboration of a general list of procedural principles and a clear interpretation for them. This intention could play an especially important role especially after the EU's accession to the ECHR. A compilation of the relevant procedural principles with respect to the interpretation requirements elaborated by the ECJ (and the ECtHR) could be summarized in a two-tier system (binding for EU institutions, bodies and agencies, recommendation for national authorities executing EU law). In order to define the role of the Model Rules in this system, a possible approach would be to look at them as an instrument which 'could establish general requirements at Union level that could foster the evolution of national administrative law in the direction of bridging gaps between EU and national administrative law methods.' [27] This interpretation of the Model Rules would result that the Member States could adjust these non-binding rules to their administrative traditions and existing practices. However, the Model Rules could only serve as an adequate reference point at EU level as well, if the principles of equivalence and effectiveness are safeguarded. "This gives a green light to the CJEU to indulge in 'levelling up'." [28] This solution would be highly flexible and would respect the specificities of EU law (exercise of powers) as well. [29]

A rather unified administrative procedure would be also in accordance with the latest tendencies of harmonization of internal market law [30]: the simplification of administrative procedures (e.g. promoting electronic solutions) or the reduction of administrative burden for companies. The measures foreseen by the Commission include e.g. the possibility of collecting information via Internet, a better access to explanation concerning laws, the reduction of reporting duties and deadlines. These measures do not only affect the execution of EU law, but will have a significant effect on the organisation of public administration in the Member States in general as well.

So it can be concluded, that although the Europeanization of administrative law and the development of EU administrative law can be divided well in theory, [31] the practical effects show in case of both tendencies in the same direction: the evolution of an administrative procedural law within the EU determined by common concepts, principles, and aims.

[1] KOPRIĆ, I. –MUSA, A.– LALIĆ, G.: **Good Administration as a Ticket to the European Administrative Space**. Zbornik Pravnog fakulteta u Zagrebu, Vol.61 No.5. 2011. p. 1517.

[2] Basis of the definition:

TORMA, A.: **Az Európai Közigazgatási Térségről – magyar szemmel**. [About the European Administrative Space – the Hungarian Point of View.] Miskolci Jogi Szemle VI. évf. 2011. p. 196.

MATEI, A. – MATEI, L. – IANCU, D.: **The Internalization of the European Administrative Space principles in national public administrations**. Study Case: Romania. p. 11-12.

Available at: http://www.balcannet.eu/materiale/raport_final.pdf

[3]WOEHLING, J-M.: **Judicial Control of Administrative Authorities in Europe**. Hrvatska Javna Uprava. 6/3. (2006.), p. 36.

[4] The analysis of the concepts of administrative procedural law in the European context go beyond the scope of this paper and is therefore left out of consideration.

[5] A more detailed theoretical analysis on the legal character of the European administrative procedural law in: BOROS, A.: **Úton egy európai közigazgatási (eljárási) jog felé.** [Towards a European Administrative (Procedural) Law] MTA Law Working Papers 2014/58.

Available at: http://jog.tk.mta.hu/uploads/files/mtalwp/2014_58_Boros.pdf

[6] Basis of the enumeration: European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)) (Resolution)

[7] E.g. some authors limit the list of principles to those which are primarily characteristic to the administrative procedure, like the adversarial principle, procedural economy, in dubio pro actione, official impulse.

RUSCH, W.: **Administrative Procedures in EU Member States.** Sigma, 2009.

Available at: <http://www.sigmaxweb.org/publications/42754772.pdf>

[8] HOFMANN, H.C.H. – SCHNEIDER, J-P. – ZILLER, J. (eds.): **ReNEUAL Model Rules on EU Administrative Procedure.** ReNEUAL SC 2014. Available at: <http://www.europarl.europa.eu/document/activities/cont/201410/20141023ATT91730/20141023ATT91730EN.pdf>

[9] For a detailed conceptional analysis: SANZ LARRUGA, F. J.: **El ordenamiento europeo, el derecho administrativo español y el derecho a una buena administración.** Anuario da Facultade de Dereito da Universidade da Coruña, 13, 2009, p. 731-734.

[10] For a detailed analysis: MAGIERA, S.: **Das Recht auf eine gute Verwaltung in der Europäischen Union,** in: MEYER, J. (ed.), **Charta der Grundrechte der Europäischen Union,** NomosKommentar, Baden-Baden, 3. Aufl. 2011, S. 518-528

[11] NIZZO, C.: **National public administration and European integration.** OECD, Sigma, Paris, 2011. p. 2.

[12] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Official Journal L 1, 04.01.2003, p.1-25

[13] European Ombudsman: **The European Code of Good Administrative Behaviour.** Available at:

<http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>

[14] Minutes of the European Parliament session from 3 to 6 September 2001, OJ C 72 E/ 331, 21.3.2002

[15] HIRSCH-ZIEMBINSKA, M.: **The application of the European Code of Good Administrative Behaviour by the European institutions.** DA/ba/Conf (2007) 9 e. Strasbourg, 2008. p. 7. Available at:

http://www.coe.int/t/dghl/standardsetting/cdcj/administrative%20law/conferences/D_A-ba-Conf%20_2007_%209%20e%20-%20M.%20Hirsch-Ziembinska.pdf

[16] MENDES, J.: **Good Administration in EU Law and the European Code of Good Administrative Behaviour.** EUI Law Working Paper 2009/9. p. 11. Available at:

http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW_2009_09.pdf?sequence=3

[17] A similar list in: Síndic, El defensor de les persones: Code of best administrative behaviour.2009. Available at:

<http://www.sindic.cat/site/unitFiles/2527/codi%20bones%20practiques%20administratives%20angles.pdf>

[18] C-2/06, Willy Kempter KG v. Hauptzollamt Hamburg-Jonas., ECR 2008 I-00411, para 57.

[19] C-400/10 PPU, *J. McB.*, para 53.

[20] C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 2010 E.C.R. I-1384, para 37.

[21] An example for the determination of ‘similarity’: C-400/10, *PPU, J. McB. v L. E.*, [2010] ECR I-08965, para 53.

[22] In the DEB-judgment, the Court concluded that ECHR is inseparably linked to the practice of the ECtHR: C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, [2010] ECR I-13849, para 35.

[23] C-450/06, *Varec SA v. État belge*, [2008] ECR I-0058, para 48.

[24] C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, [2011] ECR I-11315, para 70-74.

[25] DELLA CANANEA, G. (University of Rome “Tor Vergata” & ReNEUAL): **Towards a Codification of the Administrative Procedures of the European Union?** Available at:

http://sna.gov.it/fileadmin/files/attivita_internazionali/DISPA/ROMA/DellaCananea.pdf

[26] BARNES, J. (ed.): **Transforming Administrative Procedure**. Global Law Press, Sevilla, 2008. p. 34.

[27] HARLOW, C. – RAWLINGS, R.: **Process and Procedure in EU Administration**, Hart Publishing, Oxford, 2014. p. 335

[28] HARLOW, C. – RAWLINGS, R.: **Process and Procedure in EU Administration**, Hart Publishing, Oxford, 2014. p. 335

[29] Similar approach in:

VON BOGDANDY, A.: **General Principles of International Public Authority: Sketching a Research Field**, German Law Journal, Vol. 9, Issue 11. (2008), p. 1926

This way even those concerns could be eliminated that question a pressing need for such a codification and fear from the natural development of administrative procedure to be disturbed.

COPELAND, N.: **A law of administrative procedure for the EU**. Library Briefing, 120396REV1 (10/01/2013) Available at:

[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/120396/LDM_BRI\(2013\)120396_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/120396/LDM_BRI(2013)120396_REV1_EN.pdf)

[30] For detailed description of the Action Programme and its results: European Commission: Action Programme for Reducing Administrative Burdens in the EU Final Report (SWD(2012) 423 final) Strasbourg, 12.12.2012

[31] BOROS, A.: **Közigazgatási eljárás az Európai Unióban**. (Administrative procedure in the European Union.) Kodifikáció és Közigazgatás. 2013/2. p. 49.