

The Concept of “Authority” and Procedural Principles in the Administrative Procedural Law of the European Union¹

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Abstract. The question of a uniform European administrative (procedural) law has recently entered centre stage in the legal scholarship and gradually in the EU policy-making. As an element of this discourse, the paper analyses the concept of ‘authority’ (a basic concept of the European administrative law) from three aspects: The first question is whether ‘administrative authority’ has a *sui generis* definition in EU law and what its characteristic features are. Second, the exercise of ‘public authority’ will be described, especially the forms of cooperation between authorities. Third, the concept of ‘authority’ will be examined as a set of principles governing the exercise of public powers in the administrative procedures, with the help of primary and secondary sources of EU law and some non-binding documents. The interpretation of the principles is possible on the basis of the case-law of ECJ. In the final part of the paper, the practical appearance of the principles will be outlined with the help of the recently published ReNEUAL Model Rules. Using these techniques a general overview will be set out concerning the concept of ‘authority’ in EU administrative law.

Keywords: EU administrative law, authority, public authority, ReNEUAL Model Rules

The development of public administration law in the European Union can be characterized by two tendencies: the Europeanization of national administrative laws and the evolution of the European administrative law. The first expression refers to the fact that the EU plays an increasingly important role in determining the directions of how administrative law develops. Additionally the term refers to the ‘influence of European law and policies on the domestic systems’.² The second expression refers to ‘the implementation and application of EU law in a broad sense’,³ which may be understood as the area of EU law, which is directly related to administrative law⁴ and as the system of enforcement mechanisms of EU law by the institutions, bodies and agencies of the EU as well as by the national administrations and authorities.⁵ The question then arises, as to how these two phenomena

¹ The theses of this paper have been discussed at the Third ASIL-ESIL-MPIL Workshop, held in Vienna on 8th September 2014. I thank all the participants who have contributed with their comments to the further development of this paper.

² Chris Hilson, ‘The Europeanization of English Administrative Law: Judicial Review and Convergence’ (2003) 9 *European Public Law* 125.

³ René Seerden and Fam Stroink (eds), *Administrative Law of the European Union, Its Member States and United States* (Intersentia 2002) 259.

⁴ Jean-Bernard Auby, ‘À propos de la notion de droit administratif européen introduction à l’ouvrage droit administratif européen’ (2007) 123 *Revue française d’administration publique* 373–385.

⁵ Anita Boros, ‘Közigazgatási eljárás az Európai Unióban’ (2013) 2/1 *Kodifikáció és Közigazgatás* 49; Paul Craig, *EU Administrative Law* (Oxford 2012) 3; Thomas von Danwitz,

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result in the development of a new legal field. Those authors who argue that there is a 'convergence or approximation of traditionally divergent administrative systems'⁶ find a reference point in the concept of the 'European Administrative Space' meaning the area where a high level of administrative cooperation is pursued within the framework of the common values of the Member States.⁷ Although the difference in the administrative traditions of the Member States cannot be denied, 'an increasingly solid framework of common principles is emerging'.⁸

In order to define the developmental tendencies of this unique area of research, its framework formed by common goals, concepts and principles have to be analysed in detail. Probably the most explicit of these three 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 common goals are – among others – the guaranteeing of citizens' rights, ensuring the rule of law, separation of powers, promoting transparency and accountability in administrative law, enhancing the EU's legitimacy and strengthening the process of integration via a better convergence of national administrative laws.⁹

These goals can only be achieved if the concept of authority (as a basic precondition of the efficient administrative procedure) is sufficiently well-elaborated not only from the point of view of powers, but also from that of guarantees as well, with special regard to the rights guaranteed in the Charter of Fundamental Rights of the European Union (hereinafter:

Europäisches Verwaltungsrecht (Springer 2008) 5; Hans Christian Röhl, 'El procedimiento administrativo y la Administración "compuesta" de la Unión Europea' in Javier Barnés (ed.), *La transformación del procedimiento administrativo* (Derecho Global 2008) 120. On the development of the execution of EU law especially in light of the Lisbon Treaty: Robert Schütze, 'Le domaine des compétences d'exécution' in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Bruylant 2014) 69–86.

⁶ Ivan Koprić and Anamarija Musa, 'Good Administration as a Ticket to the European Administrative Space' (2011) 5 *Zbornik Pravnog fakulteta u Zagrebu* 1517; Jürgen Schwarze, 'The Convergence of the Administrative Laws of the EU Member States' in Francis G. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart 2000) 166; Edoardo Chiti and Bernardo Giorgio Mattarella (eds), *Global Administrative Law and EU Administrative Law* (Springer 2011) 1.

⁷ Torma András, 'Az Európai Közigazgatási Térségről – magyar szemmel' [On the European Administrative Space – from Hungarian View] (2011) 6 *Miskolci Jogi Szemle* 196; Ani Matei, Lucica Matei and Diana-Camelia Iancu, 'The Internalization of the European Administrative Space Principles in National Public Administrations' (Study Case: Romania) *Academic Public Administration Studies* 11–12. <http://www.balcanet.eu/materiale/raport_final.pdf> accessed 15 July 2014; Herwig C. H. Hoffmann, 'Mapping the European Administrative Space' in Deirdre Curtin and Morten Egeberg (eds), *Towards A New Executive Order In Europe?* (Routledge 2009) 24.

⁸ Jean-Marie Woehrling, 'Judicial Control of Administrative Authorities in Europe' (2006) 3 *Hrvatska Javna Uprava* 36. Further literature: Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *The European Journal of International Law* 188, 209; Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union* (Oxford 2011) 143; Schwarze 166; Renato Rolli and Diego d'Amico, 'Principios, organización, funcionamiento y protección el el derecho administrativo europeo' (2013) 22 *Dereito* 13–14.

⁹ 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 [2013] 2012/2024(INL) (hereinafter: Resolution).

ChFR). Given these reasons it is the aim of this paper to introduce this concept from both sides in the context of European administrative procedural law. The aim of this paper is not to deliver a compilation of the existing concepts in the individual Member States, but to detect those features that can be deducted from EU law [primary and secondary sources, as well as the case-law of the European Court of Justice (hereinafter: ECJ)] directly, and so, to establish – together with the relevant sources of secondary literature – a *sui generis* conceptional framework for the exercise of authority in EU-level administrative law.

1. 'AUTHORITY' AS AN INSTITUTION: THEORETICAL DEFINITION

The first task is to determine the concept of authority via an organisational method. This would include the institutional structures and those offices which apply EU law.¹⁰ The question is whether it is possible to give a *sui generis* definition of 'administrative authority'¹¹ in EU law, and if yes, what are its characteristic features.

A possible starting point might be to examine the definition of administrative agency in the context of EU law.¹² According to a summary by the Commission,¹³ EU agencies are: a) bodies governed by European law; b) set up by an act of secondary legislation (regulation/joint action/decision); c) having own legal personality; d) sometimes taking legally binding individual decisions for third parties; e) most often receiving financial contribution from the Community budget; f) permanent bodies with seat in one of the Member States; g) having financial and administrative autonomy and are independent in the execution of the assigned mission/tasks. It is not difficult to see that this definition is too specific; it cannot be a basis for the definition of administrative authorities throughout the EU. Nevertheless, if one considers the definition of 'public authority' developed in the case-law of the ECJ, several conceptional elements can be found which highly resemble those of an EU agency, but are elaborated with respect to the national administrative traditions of the Member States.

That is why the definition of authorities in the sense of EU administrative law can be based on the following four major elements:

¹⁰ Not ignoring the diversity (or even fragmentation) of EU policies including horizontally governed, vertically governed, centralised, decentralised ones, the aim of this part is rather to identify the general elements of the concept of administrative authority applying EU law. The detailed examination of sectoral rules would go far beyond the scope of this paper; they are used only in an exemplificative manner to undermine more general statements.

¹¹ Under the expression 'public authority' we mean only administrative authorities, which do not include bodies or institutions acting in a judicial or legislative capacity. Confirmed by the ECJ with regards to the Aarhus Convention (Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L 41/26) in C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany* (14 February 2012) para 41. Explained in details: Richard Moules, 'Significant EU Environmental Cases: 2012' (2013) 1 *Journal of Environmental Law* 145.

¹² Of course, it is not presumed that the definition of EU agency would be directly transferable to the concept of the EU administrative authority. Nevertheless, it has a definition elaborated and accepted by the EU institutions, so it can serve as an adequate starting point.

¹³ Analytical Fiche Nr 1 '*Definition and classification of Agency*' <http://europa.eu/agencies/documents/fiche_1_sent_to_ep_cons_2010-12-15_en.pdf> accessed 15 July 2014.

1.1. Authorities are empowered by law to perform public administrative functions

First of all, it is acknowledged that an administrative authority has to be empowered to perform public administrative functions by virtue of a legal basis specifically defined in legislation.¹⁴ The empowerment can stem from national legislation or directly from EU law [e.g. in case of the Aarhus Convention (as referred to in footnote 10.) or the Data Protection Directive¹⁵]. At this point, the question arises what we mean under the expression 'public administration function'. A possible way of definition could be the distinction between *acta iure imperii* and *acta iure gestionis*.¹⁶ Although the definition of these two terms is quite well-elaborated in international law, in EU law it still has to be evaluated on a case-by-case manner whether a certain claim of the State arose in relation to the exercise of public powers. In this context, attention has to be paid to the legal relationship between the parties and the subject-matter.

1.2. Authorities have legal personality

When considering the role of legal personality, especially whether it is of public or private law nature, attention must be paid to the distinction between 'pure' and 'functional/hybrid' public authorities.¹⁷ Pure public authorities encompass legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve. Functional/hybrid public authorities encapsulate those legal persons that can be governed by public or private law, and which are not primarily administrative authorities, but are entrusted with the performance of services of public interest.¹⁸ Although the distinction between pure and functional public authorities stems from a very special document [as referred to in footnote 16, dealing with the scope of the Human Rights Act¹⁹ and European Convention on Human Rights (hereinafter: ECHR)], the basic division behind it seems to be applicable with respect to other fields of EU administrative law. 'The test whether a body is part of the state is a dual one. A body might be deemed to be part of the state on functional grounds: an entity is carrying out a public service and for that reason, has special powers. (...) In other cases (...) any entity which forms part of or is subject to the control of a public authority, forms part of the state.'²⁰ That is why the legal personality of the

¹⁴ C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others* (19 December 2013) para 48.

¹⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281.

¹⁶ C-279/12 *Fish Legal*, Opinion of AG Cruz Villalón, paras 99–102.

¹⁷ Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 2003-04, HL 39, HC 382) 5–6.

¹⁸ C-279/12 *Fish Legal*, paras 51–52.

¹⁹ Human Rights Act, 1998 c. 42, < <http://www.legislation.gov.uk/ukpga/1998/42/contents>> accessed 2 March 2015.

²⁰ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press 2012) 312. With regards to public procurement law: Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities, SEC(2011) 1169 final <http://ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf> accessed 16 February 2015. Concerning internal market law: Michael Wendler, Bernd Tremml and Bernard John Buecker (eds), *Key Aspects of German Business Law* (Springer 2008) 149; Wolf Sauter and Harm Schepel,

authority and the powers transferred are strongly interwoven elements of the concept of administrative authority.

1.3. Authorities are independent in executing missions/tasks

The independence that administrative authorities enjoy in executing their tasks should be safeguarded and it should be ensured that authorities enjoy an independence allowing them to perform their duties free from external influence.²¹ This requirement is a necessary consequence of the increased importance of independent administrative authorities, e.g. in the fields of competition law or electronic communication-data protection. The necessity of independent execution of tasks – in the framework of EU law – can be explained by the fact that in fulfilling their missions these authorities have to ensure the uniform application and *sui generis* interpretation of EU law, that can only be achieved by acting ‘to an appreciable extent independently from both parliament and government in the implementation and application of substantive regulations and policies’.²²

The independence expected from the authorities may be understood at an operational level. This means that the members of the authority are not bound by instructions of any kind in the performance of their duties.²³ This might be extended in a way, that authorities, primarily independent administrative authorities fulfilling a supervisory function under EU law, should be independent from ‘any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task’.²⁴ The criteria stemming from this approach and determining the independence of authorities in general are rather formal ones: they determine how the management is nominated, how it can be dismissed, how the controlling ministry may intervene in single procedures (via repealing, modifying or annulling decisions), but do not and cannot reflect to other possible (rather informal) mechanisms of influence.²⁵ That is why the cooperation mechanisms and the appropriation of the principles to be described later should also contribute to independent decision-making in the administrative procedures of EU law.

1.4. Authorities make legally binding individual decisions for third parties

The procedural guarantees mentioned in the introduction are especially important, because ‘if “public authority” is characterised by anything, it is the capacity of persons who wield it to impose their will unilaterally. While a public authority may impose its will unilaterally – that is, without the need for the consent of the person under the relevant obligation – an individual, on the other hand, may impose his will only if such consent is forthcoming’.²⁶ Furthermore,

State and Market in European Union Law (Cambridge University Press 2009) 65; Werner Schroeder, *Das Gemeinschaftsrechtssystem* (Mohr Siebeck 2002) 388.

²¹ C-518/07 *European Commission v Federal Republic of Germany* [2010] ECR I-01885, para 30.

²² Saskia Lavrijssen and Maartje de Visser, ‘Independent Administrative Authorities and the Standard of Judicial Review’ (2006) 1 *Utrecht Law Review* 111.

²³ C-288/12 *European Commission v Hungary* (8 April 2014) para 52.

²⁴ C-518/07 *Commission v Germany*, para 30.

²⁵ Marian Döhler, ‘Regulative Politik und die Transformation der klassischen Verwaltung’ in Jörg Bogumil, Werner Jann and Frank Nullmeier (eds), *Politik und Verwaltung. Politische Vierteljahresschrift* (VS Verlag für Sozialwissenschaften 2006) 219.

²⁶ C-279/12 *Fish Legal*, Opinion of AG Cruz Villalón, para 81.

the binding decision on rights and entitlements ensures the protection of rights conferred on individuals by EU law,²⁷ that is why the obligatory nature of the administrative decisions also fulfils an essential function of the protection of rights.²⁸ This also means that it is an obligation of the Member States to provide the necessary empowerment to national administrative authorities, to establish the necessary procedural rules and to ensure the execution of administrative decisions in order to safeguard the effective application of EU law.²⁹

This summary has shown some basic features of the concept of 'authority' in terms of EU law. Nevertheless, these statements, and definitions influence rather the legal scholarship or the legislation as *de lege ferenda* suggestions, but they are not necessarily helpful in the everyday practice of administrative law, especially as they cannot reflect on the diversity of the tasks and procedures of authorities executing different policies of the EU. In this regard it could be more beneficial to define the appearance of 'authority' in the EU with help of the possibilities of cooperation between the single (EU-level and national) administrative units together with common procedural principles.³⁰

2. 'AUTHORITY' AS INSTITUTION: PRACTICAL APPEARANCE

The exercise of 'public authority', which safeguards general procedural rights and principles and ensures at the same time a uniform and efficient application of EU law is promoted by the cooperation mechanisms foreseen within the European Union. The cooperation mechanisms affecting primarily the decentralized execution of EU law involve EU institutions and the national authorities participating in the execution of EU law, which are set up or designed by the Member States according to the requirements of EU law. Concerning the designation of the national authorities a recent adequate example might be the system of National Contact Points (NCPs) established by the 'cross-border patients' rights' directive.³¹ These are bodies responsible for providing information to patients and practical assistance for cross border healthcare.³² The designated NCPs are either the

²⁷ C-61/81 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, [1982] ECR 02601, para 9.

²⁸ The principles described later serve among others that the interim legal protection which Community law ensures for individuals remains the same before (EU or national) authorities, courts, etc. C-143/88 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] I-00415 para 16. In this framework special attention has to be paid e.g. to the principles of legal certainty {C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] I-00837 para 24} or the obligation on public authorities to make good damage caused in the performance of their duties {C-46/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] I-01029 para 29}.

²⁹ René Seerden and Frits Stroink (eds), *Administrative Law of the European Union, Its Member States and the United States* (Intersentia 2002) 273. Similarly in: C-224/01 *Gerhard Köbler v Republik Österreich* [2003] I-10239, para 32.

³⁰ Thomas Mann, 'Gibt es ein Europäisches Verwaltungsrecht?' (2011) 2 *Zeitschrift für Europäische Rechtslinguistik* 9 <<http://www.zerl.uni-koeln.de/mann/2011/gibt-es-ein-europaeisches-verwaltungsrecht/?output=pdf>> accessed 27 May 2015.

³¹ Directive 2011/24/EU of the European Parliament and of the Council of March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45.

³² European Patients' Forum 'EU Directive 2011/24/EU on the application of patients' rights in cross-border healthcare: Legislation Guidance for Patient Organisations' (2013) 19. <<http://www.eu->

competent ministries (e.g. Cyprus, Estonia, France, Italy); health insurance funds (e.g. Croatia, Germany, Poland, Iceland); or agencies of special jurisdiction including patients' rights or reimbursement issues (e.g. Greece, Hungary, Czech Republic, Denmark). The framework of their activities is defined by EU law, their names and contact details are available to the Commission and this way – via internet – to the public as well ensuring the transparency and legal security of their activities.

Besides the designation in accordance with the EU law, the adequate application of EU law is also safeguarded by the cooperation between authorities. The cooperation of authorities applying EU law can be either horizontal (between national authorities) or vertical (between EU institutions and national authorities), however, in the latter case there is usually a similar horizontal mechanism foreseen as well. Furthermore, the cooperation can be either compulsory (usually prescribed by a binding piece of EU legislation) or voluntary (where the EU legislation provides only a framework or establishes the technical or diplomatic environment for the national authorities).

Probably the most well-known example of compulsory and vertical form of cooperation is the administrative cooperation in the field of competition law as foreseen in Articles 11–14 of the so-called Modernising Regulation³³ and the Commission's notice on³⁴ the Network of Competition Authorities (NCA). 'The close cooperation between the Commission and the NCAs essentially concerns the allocation of cases and the exchange of information (...), the rules applying to the parallel application of EU and national competition law, as well as the successive application of EU competition law by the NCAs and the Commission or vice versa.'³⁵ A similarly structured cooperation mechanism exists in the fields of consumer protection³⁶ or – in a slightly different way – in the field of monetary issues³⁷. These forms of collaboration are extended by a purely administrative tool: the IMI-system³⁸, which enables authorities implementing EU law an exchange of information with similar bodies in other countries providing surface for information requests, alert mechanisms, registers directory and notifications. These examples show that this form of cooperation is typical in the fields where the EU has exclusive or shared competence.

patient.eu/Documents/Policy/Cross-borderHealthcare/2013%2011%2018_CBHC_guidance-final.pdf> accessed 15 July 2014.

³³ 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 [2003] OJ L 1/1.

³⁴ Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03) [2004] OJ C 101/43.

³⁵ Frank Wijckmans and Filip Tuytschaever, *Vertical Agreements in EU Competition Law* (Oxford University Press 2011) 9–10.

³⁶ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L 364/1.

³⁷ Article 3 and Recitals (7) and (14) of Council Regulation No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63; Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5).

³⁸ Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC [2012] OJ L 316/1.

As far as horizontal and voluntary forms of cooperation are concerned, these affect mainly areas where the EU has only competence to carry out actions to support, coordinate or supplement the actions of the Member States, like health care [Article 6 Point a) TFEU] or administrative cooperation [Article 6 Point g) TFEU]. Concerning the collaboration in the field of health care, the already mentioned Directive on cross-border patients' rights offers an example³⁹: Article 12 Para 1 rules that 'the Commission shall support Member States in the development of European reference networks (ERNs)'. The networks are based on voluntary participation, but the conditions members must fulfil are set down in the Directive as well as the objectives of the cooperation. Furthermore, the Directive defines the tasks of the Member States and the Commission (Article 12 Para 3 and 4, respectively) in order to facilitate the collaboration between the framework of ERNs. A similarly structured collaboration exists in the field of administrative cooperation: the SOLVIT-mechanism⁴⁰ helping to solve problems if someone's EU rights as a citizen or as a business are breached by public authorities in another EU country and the case has not yet been taken to court.

These examples show the multilevel nature of EU administrative law: it includes mechanisms for the collaboration of national administrative authorities, providing at the same time a regulated cooperation for the national authorities with the institutions, bodies and agencies of the EU.⁴¹ This way it ensures a framework for the uniform⁴² and efficient⁴³ application of EU law, which 'helps to reach informed and consistent or at least non-conflicting outcomes' and 'contributes to avoiding inconsistent remedies and obtaining those that are more coherent'⁴⁴.

3. 'AUTHORITY' AS A SYSTEM OF PRINCIPLES

The third possible approach can be to take a look at 'authority' as a set of principles governing the exercise of public powers in the administrative procedures connected to the execution of EU law. This point of view seems to be in accordance with the recent

³⁹ According to Recital (51), the Commission should encourage cooperation between Member States in the areas set out in Chapter IV of the Directive in accordance with Article 168(2) TFEU. That is why – although some provisions of the Directive are based on Article 114 – the provisions mentioned here can be used as examples in the field of actions to support, coordinate or supplement the actions of the Member States.

⁴⁰ Commission Recommendation of 17.9.2013 on the principles governing SOLVIT, Brussels, 17.9.2013, C(2013) 5869 final.

⁴¹ Ines Härtel (ed.), *Handbuch Föderalismus – Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt* (Springer 2012) 450.

⁴² The uniform application of EU as a fundamental requirement of the Community legal order appears in: C-46/93 *Brasserie du Pêcheur* para 33; C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* (4 December 2014) para 18; C-143/88, *Zuckerfabrik*, para 26; C-627/13 and C-2/14 joined cases, *criminal proceedings against Miguel M. and Thi Bich Ngoc Nguyen and Nadine Schönherr* (5 February 2015) para 48.

⁴³ The principle of effectiveness will be discussed later.

⁴⁴ EU Merger Working Group, 'Best Practices on Cooperation between EU National Competition Authorities (2011) 2 *Merger Review* <http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf> accessed 26 January 2015.

developments in the field: in the earlier mentioned Resolution the European Parliament has requested the Commission to submit a proposal for a regulation on the law of administrative procedure of the EU.

3.1. Sources of principles in EU law

Before an overview can be given of the principles it is necessary to summarise the relevant sources of EU law. The general starting point is Article 41 of the ChFR, namely the right to good administration.⁴⁵ Nevertheless, its scope 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)⁴⁶ and the general principles of EU law elaborated in detail in the case-law of the ECJ (e.g. principles of equality and effectiveness⁴⁷) should be respected by the institutions and national administrations as a result of the theories of direct effect and primacy.⁴⁸

Furthermore, the Founding Treaties contain sporadic references to a few 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 Articles 105 and 108 TFEU, which 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.

Several sectorial sources of secondary law contain procedural principles at special fields of administration as well. Continuing the example of competition law, the already mentioned Modernising Regulation refers to such principles as the right to be heard (Article 27), data protection principles (Article 28) and 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 secondary law.

Turning from the obligatory and general sources of law to the not-generally binding attention must be given to the European Code on Good Administrative Behaviour⁴⁹. This

⁴⁵ In this paper ‘good administration’ is regarded as a set of rules governing the exercise of public authority and is not intended to give a more theoretical definition, but rather to detect its practical forms of appearance. For a detailed conceptional analysis: Francisco Javier Sanz Larruga, ‘El ordenamiento europeo, el derecho administrativo español y el derecho a una buena administración’ (2009) 13 Anuario da Facultade de Dereito da Universidade da Coruña 731–734.

⁴⁶ For a detailed analysis: Siegfried Magiera, ‘Das Recht auf eine gute Verwaltung in der Europäischen Union’ in Jürgen Meyer (ed.), *Charta der Grundrechte der Europäischen Union* (Nomos Kommentar 2011) 518–528.

⁴⁷ These principles usually do not govern the specific procedure, but affect rather the national procedural norms governing the administrative process in lack of Community rules.

⁴⁸ Carlo Nizzo, *National Public Administration and European Integration* (OECD Sigma 2011) 2. <<http://www.sigmaweb.org/1850561.pdf>> accessed 27 May 2015. A more detailed analysis of these principles: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford 2012) 323–362. Lorenzo Mellado Ruiz, ‘Los principios comunitarios de eficacia directa y primacía frente a la funcionalidad del principio de autonomía procedimental: proceso de convergencia y estatuto de ciudadanía’ in Fernando Fernández Marín and Ángel Fornieles Gil (eds), *Derecho Comunitario Y Procedimiento Tributario* (Atelier 2010) 24–42.

⁴⁹ European Ombudsman: The European Code of Good Administrative Behaviour <<http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>> accessed 15 January 2015.

code 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 2001⁵⁰ 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 the obligation to be service-minded and to act with courtesy; the obligation to give an indication of remedies available to all persons concerned).⁵¹

Finally, the institutions' staff regulations and internal codes of conduct have to be mentioned. These regulations and internal codes govern not only the internal relations of the officials with their institutions, but might also contain directions for the administration of cases. The problem with these codes is that they are very heterogeneous,⁵² and are not easily accessible. This results in clients not normally being aware of the codes in advance. It is apparent from the examples above, that there are several binding or at least easily accessible and quite uniform sources of procedural principles in EU law, which could easily substitute the praxis of the internal codes of conduct.

3.2. 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.⁵³

The next question concerns how the exact content of the principles can be determined. The solution seems to be the easiest with regard to the principles of EU law, like those of effectiveness and equivalence. In both cases the general praxis⁵⁴ of ECJ can be applied, also in terms of administrative procedures: 'in the absence of Community rules in the field it is

⁵⁰ Minutes of the European Parliament session from 3 to 6 September 2001 [2002] OJ C 72 E/331.

⁵¹ Marta Hirsch-Ziembinska, 'The application of the European Code of Good Administrative Behaviour by the European institutions' (Strasbourg 2008) 7. <http://www.coe.int/t/dghl/standardsetting/cdcj/administrative%20law/conferences/DA-ba-Conf%20_2007_%209%20e%20-%20M.%20Hirsch-Ziembinska.pdf> accessed 11 July 2014.

⁵² Joana Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour' (2009) 9 EUI Law Working Paper 11. <http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW_2009_09.pdf?sequence=3> accessed 11 July 2014.

⁵³ A similar list in: Síndic, 'El defensor de les persones: Code of best administrative behaviour' 2009. <<http://www.sindic.cat/site/unitFiles/2527/codi%20bones%20practiques%20administratives%20angles.pdf>> accessed 12 November 2014.

⁵⁴ For a more detailed analysis on these two principles, see: Michael Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation* (Hart 2004) 53–55; Craig and de Búrca 421–430; Andreas Glaser, *Die Entwicklung des Europäischen Verwaltungsrechts aus der Perspektive der Handlungsformenlehre* (Mohr Siebeck 2013) 45–46; Luis Ortega Álvarez, *Derecho comunitario europeo* (Lex Nova 2007) 87–90.

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).⁵⁵ The principles mentioned (e.g. right to be heard, right to legal remedy) can also be deducted from the international human rights conventions, especially from the ECHR. The principle of interpretation in accordance with the ECHR elaborated by the ECJ will play an important role, as it creates an equilibrium between the requirements of EU law, national constitutional law and international law possible. Interpreting Art. 52 Para 3 of the ChFR, if the situation is governed by EU law, the level of protection has to be compared in light of the two documents. If the ChFR grants wider protection,⁵⁶ it forms the legal basis of the judgment. If there are 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)’.⁵⁷ If the level of protection of a particular right is the same⁵⁸ in the ECHR and in the ChFR, the interpretation/perception given by the ECtHR⁵⁹ has to be taken into account.⁶⁰

3.3. Principles in the ReNEUAL Model Rules

After defining the administrative law principles and detecting their interpretation, the next question that has to be considered is how they could influence the EU administrative procedural law. In this context, the example of the Model Rules on EU Administrative Procedure⁶¹ (Model Rules) published recently by the Steering Committee of the Research Network on EU Administrative Law should be analysed.

The Model Rules are a set of non-binding rules – but 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’.⁶² Based upon this definition it would follow that the procedural principles, due to their lack-filling function, would play a central role in the system of the Model Rules. This is particularly accurate because the drafters of the Model Rules acknowledge that ‘the current rules and procedures for administrative procedures are fragmented and mostly policy-specific; (...) it

⁵⁵ C-2/06 *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas* [2008] ECR I-00411, para 57.

⁵⁶ C-400/10 PPU *J. McB. v L. E.* [2010] ECR I-08965 para 53.

⁵⁷ C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR. I-1384 para 37.

⁵⁸ An example for the determination of ‘similarity’: C-400/10 PPU *J. McB* para 53.

⁵⁹ In the DEB-judgment, the Court concluded that ECHR is inseparably linked to the practice of the ECtHR: C-279/09 *DEB* para 35.

⁶⁰ C-450/06 *Varec SA v. État belge* [2008] ECR I-0058 para 48.

⁶¹ Herwig C.H. Hofman, Jens-Peter Schneider and Jacques Ziller (eds), *ReNEUAL Model Rules on EU Administrative Procedure* (ReNEUAL SC 2014). <<http://www.europarl.europa.eu/document/activities/cont/201410/20141023ATT91730/20141023ATT91730EN.pdf>> accessed 15 January 2015.

⁶² Giacinto della Cananea, ‘Towards a Codification of the Administrative Procedures of the European Union?’ <http://sna.gov.it/fileadmin/files/attivita_internazionali/DISPA/ROMA/DellaCananea.pdf> accessed 26 January 2015.

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 establishment 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 Preamble sets out the general framework for the activity of public authorities in administrative procedures. According to the Preamble their activity is to provide the rule of law and the right to good administration. Furthermore, regard should be had 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', as well as to 'efficiency, effectiveness, service orientation, 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: '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.' [Model Rules p. 30] The question arises, whether such a detailed description should be included into the Model Rules. The negative answer could be supported by the fact that the above mentioned principles are basic constitutional values of the European Union and their correct interpretation can be deduced with the help of the already described interpretation guidelines. Furthermore, it can be argued that a detailed catalogue of principles in the 'normative' part of the Model Rules would have made the inclusion of complicated definitions, interpretations necessary.⁶³ So, it seems to be more beneficial if a compilation like the Model Rules rather translates the principles into rules on administrative procedure.

Some examples for this phenomenon can be seen in Chapter 6 of Book III which sets out strict conditions for the rectification or withdrawal of 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 between 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 States 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 is included.

In conclusion, when considering 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. Despite this the Model Rules could only serve as an adequate reference point at the EU level if the principles of equivalence and effectiveness are safeguarded. 'This

⁶³ András Zs. Varga, 'Gyorsértékelés az európai közigazgatási eljárási modell-szabályokról' [A brief evaluation on the Model Rules on EU administrative procedure] (2014) 10 Magyar Jog 546–547.

gives a green light to the CJEU to indulge in “levelling up”.⁶⁴ This solution would be highly flexible and would respect the specificities of EU law (exercise of powers) as well.⁶⁵

4. CONCLUSIONS

This summary has established what the basic characteristics of an administrative authority in the context of EU law (regardless of the specific tasks carried out by them) are. Additionally the relevant principles which are directly derivable from EU law and govern their actions, their procedures, and how these should be interpreted were identified. It was also discussed how these theoretical statements could serve the practical needs of EU administrative (procedural) law. Such summaries – even in a more detailed manner – could contribute to the more efficient development of EU administrative law: ‘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.’⁶⁶

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⁶⁴ Carol Harlow and Richard Rawlings, *Process and Procedure in EU Administration* (Hart 2014) 335.

⁶⁵ Similar approach in: Armin von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’ (2008) 11 *German Law Journal* 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. Nic Copeland, ‘A law of administrative procedure for the EU’ (2013) <[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)> accessed 18 February 2015.

⁶⁶ Javier Barnes (ed.), *Transforming Administrative Procedure* (Global Law Press 2008) 34.

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