ELTE LAW JOURNAL

2018/1

ELTE LJ

ELTE LAW
EÖTVÖS LORÁND UNIVERSITY

ELTE Law Journal, published twice a year under the auspices of ELTE Faculty of Law since 2013

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Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1-3, Hungary
For submission check out our submission guide at www.eltelawjournal.hu

Recommended abbreviation for citations: ELTE LJ

ISSN 2064 4965

Editorial work • Eötvös University Press
18 Királyi Pál Street, Budapest, H-1053, Hungary

EÖTVÖS UNIVERSITY PRESS www.eotvoskiado.hu

Executive Publisher: András Hunyady, Eötvös University Press
Layout: Tibor Anders
Cover: Ildikó Csele Kmotrik
Printed by: Multiszolg Bt.

Contents

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Breach of the Right to Good Administration: So What?

The right to good administration is now enshrined in Article 41[1] of the Charter of Fundamental Rights of the European Union. It is undisputable that this right is not limited to EU institutions but covers all aspects of the European Union law: as regard the institutions, Article 41 is directly applicable to them[2] and as regard the application of EU law by Member States, the general principle of good administration is equivalent in substance to the content of article 41.[3]

As a consequence, a reference to a standard for administrative action and production of administrative decisions is clearly set by the CJEU. We would like to examine the concrete effect of these standards as regard the consequences that the national and EU courts have to draw in the event of a breach of these requirements. We submit that, according to CJEU case-law, a breach of right to good administration doesn't lead to automatic annulment of the decision that was challenged and that this position may lead to substantial legal difficulties of interpretation for national courts.

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1 Article 41 of EU Charter of Fundamental Rights: '
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies 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 Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles 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 Treaties and must have an answer in the same language.'

2 See for instance C-141/12 and C-372/12, 17 July 2014 YS paragraph 67: 'It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, the judgment in *Cicala,* C-482/10, EU:C:2011:868, paragraph 28). Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application.'

3 See same case paragraph 68: 'It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in *HN,* C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.'

I No Automatic Annulment of Decision in the Event of Breach of the Right to Good Administration

In several recent decisions, the CJEU stated clearly that the breach of one of the various rights composing the right to good administration in the administrative procedure does not automatically makes the decision itself illegal:

> C-383/13 10 September 2013 *G. and R.*
>
> 40 To make such a finding of unlawfulness, the national court must – where it considers that a procedural irregularity affecting the right to be heard has occurred – assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.
>
> C-129/13 3 July 2014 *Kamino International Logistics BV*
>
> 79 According to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different.

The approach of the CJEU is a pragmatic one: the right to good administration is a procedural right and a breach would only have an effect if it has a direct consequence on the outcome. This is a pure teleological reasoning, which is a legal technique of interpretation which is very frequently used by the EU Court.

It should be noticed that, in the C-129/13 judgment, the right to be heard, which is an element of the right to good administration, is explicitly linked with the rights of the defence. More precisely, the right to be heard is fully considered to be part of the rights of the defence[4] and the CJEU logically refers not only to Article 41 of the Charter but also to Article 47 and 48 of the Charter, which cover all aspects of the right to fair trial. Articles 47 and 48 are the equivalent of Article 6 and Article 13 of the European Charter of Human Rights. Therefore, given the importance of the rights of the defence, one could be surprised to see that the breach of these rights is of so little consequence. If a right is to be considered as a fundamental right, it would logically lead to the annulment of the decision in the case of breaching this right without further discussions. However, it does not seem to be so automatically. In other words,

[4] C-249/13 11 December 2014, Boudjlida, paragraph 31: 'The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (the judgments in Kamino International Logistics, EU:C:2014:2041, paragraph 29, and Mukarubega, EU:C:2014:2336, paragraph 43).'

does this mean that a breach of a fundamental right is not always severe enough to lead to illegality of a decision that is adopted in violation of this right?

Indeed, the position of the CJEU does not appear to be based on a general consensus and has led to different views from the Advocates General.[5] The reasoning that is opposed to the CJEU case-law is based on the question that, if the right to good administration is part of the fundamental rights and in particular is to be included in the rights of the defence, how is it possible to bargain with this fundamental right?

At this stage, an ambiguity is to be clarified. The CJEU makes a substantial difference between administrative procedure and judicial procedure. If the right to good administration is to be included in the more general set of the rights of the defence, it does not mean that the rights of defence are automatically violated in the event of breach of these rights during the administrative procedure. This could be interpreted as referring to the fact that, during the judicial procedure, the rights of the defence could potentially compensate the breach during the administrative procedure. This means that the right of the defence is to be evaluated globally, from the administrative procedure leading to a decision to the final judicial decision. A mere breach of one step in the administrative procedure does not contaminate the whole procedure if some further steps could compensate the breach. Or, to put it in different words, the lack of contradictory debates during the administrative phase has no effect on the outcome of the judicial procedure as long as the judicial procedure is based on contradictory exchanges between parties.

This differentiation between administrative and judicial procedure is most likely to be a crucial argument in favour of mitigating the effects of flaws in administrative procedures, taking into account that national procedures could be more stringent that the minimum standards proposed at EU level. It should also be stressed that, at first glance, the judge evaluates the legality of the administrative decision and does not prolong, at the judicial stage, the administrative action. It should however be acknowledged that, on this point, administrative justice cultures in Europe probably differ widely and the separation between administrative and judicial action is not always so strict. For instance, in Sweden, first instance courts are delivering environmental consent for industrial plants and are indeed on this specific point playing the role of administrator. In this specific case, there is indeed no clear border line between pure administrative procedure and judicial procedure but this situation is an exception. Countries with autonomous administrative jurisdictions (France, Germany, Italy, Sweden etc.) have historically justified the development of administrative justice by the need for specific procedures when the State's authority is involved. It is understandable that, in this context, the judicial procedure can accommodate a capacity to preserve the public

[5] See for instance Advocate General M. Wathelet in C-383/13 G. and R.: 'I propose therefore that the Court should answer the question referred to the effect that infringement by the national administrative authority of the general principle of respect for the rights of the defence (in the present case, of the right to be heard, as provided for in Article 41(2)(a) of the Charter) (...) means that the measure must be annulled and that the person concerned must be released immediately (...).'

general interest by avoiding pure procedural annulments of administrative decisions. All these cultural differences are highly important and a detailed evaluation would require an in-depth analysis of each national legal system. For the purpose of our demonstration, it suffices to note that there is no Chinese wall between administrative and judicial procedures in Europe.

However, it should also be taken into account that the arguments in favour of differentiated treatments of public authorities are less and less tolerated by citizens.

Another aspect related to the development of this flexible EU case-law is its impact with regard to decisions taken by national authorities on the basis of EU law. In this context, national courts are generally in charge of applying EU law in combination with national procedural rules, as EU law provides in most cases a framework with some possibilities of adaptation to the national context. The case-law of the CJEU states a clear position as regard an infringement of procedural rights: it does not necessary lead to the annulment of a decision. However, this clear position may also be combined with another clear option of the CJEU case-law: the Court also states explicitly that the exact effect of a breach of procedural rules is to be governed by national law as long as the effectiveness principle is not affected.[6] This approach developed in C-129/13 preliminary reference creates an additional ambiguity. What does the effectiveness of EU law mean? One could consider that the effectiveness of EU law lies in material law – such as ensuring the effectiveness of competition rules or avoiding state-aid. One could also see effectiveness as preserving the rule of law the fundamental rights and principles, such as the rights of the defence.

The CJEU approach of the breach of right to good administration is therefore not straightforward and the way to combine national and European procedural case-law is only the first issue to tackle for its implementation.

II A Pragmatic Approach Which Leads to Serious Difficulties

A serious problem in the implementation of EU case-law lies in the burden of proof. It is well-established that rules governing burden of proof are crucial in determining the outcome of a case. The current case-law of the CJEU tends to rely only on the teleological argument: would the decision be different if administrative procedural rights had not been broken? However, it is clear that, depending on who has to demonstrate the absence of effect on the administrative decision, the balance between the parties is completely different. The CJEU rightly excludes to imposing on the complainant the need to prove that the decision would have been different without the breach. Obviously, demanding that complainant prove the effect would not make sense, since the administration could always argue that, being the one who took the decision, it is certain that the decision was not affected by the breach!

[6] C-129/13 3 July 2014 Kamino International Logistics BV paragraph 77: 'None the less, while the Member States may allow the exercise of the rights of the defence under the same rules as those governing internal situations, those rules must comply with European Union law and, in particular, must not undermine the effectiveness of the Customs Code (G and R, EU:C:2013:533, paragraph 36).'

C-141/08 1 October 2005 *Foshan Shunde Yongjian Housewares & Hardwares Co. Ltd* paragraph 94

> Moreover, according to the case law of the Court of Justice, the appellant cannot be required to show that the Commission's decision would have been different in content but *simply that such a possibility cannot be totally ruled out,* since it would have been better able to defend itself had there been no procedural error (see *Thyssen Stahl v Commission,* paragraph 31 and the case law cited).

But what does it mean 'that such a possibility cannot be totally ruled out'? Taken literally, the expression leads to an impossible proof for the administration. It would only save the administrative decisions in cases where the breach is 'external' to the decision process itself or where the appellant does not indicate what information he would be able to provide to the administration. However, one should also emphasise that the wording of the Court stresses the procedural aspect by referring to the capacity for the person to defend themselves. In practice, an appellant just claiming that, by not being heard in the administrative procedure, was not in a position to try to convince the administration would potentially fall under this category.[7] This is equivalent to the hearing in courts: one can never exclude that, by pleading, the judges could change their minds!

There is obviously a remaining tension between the teleological approach, which only looks at the result of the process, and an approach that highlights the role of the procedure: the CJEU case-law does not completely forget procedure. The C-141/08 case is an illustration of this tension. One can consider that at least there is an obligation for the appellant to demonstrate that he had some arguments to present. This could be seen as dialectic reasoning in the evidential process: the appellant has to provide some indications that the hearing would be a serious opportunity to defend the case. This first step would establish a presumption of usefulness for the hearing and the administration would have to react and oppose this presumption.

However, at this stage, these observations are not fully supported by the limited case-law of the CJEU on the topic and one should only conclude that there is still a need from clarification from the Court of Justice.

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[7] See in particular the interesting discussion of the role of oral hearings in the opinion of Advocate General Wahl under case C-154/14 P.: '79. In my view, there is a difference between considering whether a party might have been able to better defend itself, on the one hand, had it been given access to the entire case file and, on the other hand, had it been granted an in camera hearing. While the significance of unlawfully withheld documents can be appraised ex post, (39) that of an in camera hearing cannot: it is impossible to be entirely certain of what actually takes place during such meetings. There is also nothing to prevent a party from submitting other relevant confidential information to the Commission during such a meeting that has not been alluded to beforehand. Hence, if there is a right to an in camera hearing before the Commission, and if an oral hearing is held only once – as in the case under consideration – then the party who was entitled yet deprived thereof, cannot be considered to have been heard at all. (40) In the interest of justice being seen to done, I am thoroughly unconvinced by the idea of validating a pre-emptive reasoning denying an in camera hearing because it could not possibly have helped that party.'

III Access to Justice and Individual Decision

More generally, the issue of access to the Court of Justice for individual decisions remains difficult. The Treaty on the Functioning of the EU in its Article 263 states that:

> 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of *direct and individual concern* to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

This wording is similar to that stated in the initial Treaty (1957) as regard individual decisions. The Lisbon Treaty has however released the condition of 'individual concern' for actions against regulatory acts. As regard administrative decisions, standing is granted only in the case of an act addressed to the person or that the act has a direct and individual effect on the person.

The EU case-law has very often referred to this condition of 'direct and individual concern' for not granting access to the Court to individuals.[8] The so-called *Plaumann* test reads the notion of individual concern in a relatively narrow way by imposing specific qualities on the applicant. Moreover, despite several attempts from many applicants, the *Plaumann* case-law has been regularly recalled by the Court, including in very recent decisions.[9]

It should be noted that this case-law is far from being easily mastered by national courts needless to say that it is complex for applicants to understand as well. For instance, a Dutch Council of State preliminary reference in 2014 reads as follows:

> (1) Must the fourth paragraph of Article 263 TFEU be interpreted as meaning that operators of installations to which, as from the beginning of 2013, the emissions-trading rules laid down in Directive 2003/87 have been applicable, with the exception of operators of the installations referred to in Article 10a(3) of that directive and of newcomers, could undoubtedly have brought an action before the General Court seeking the annulment of Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined by that decision?

This preliminary reference highlights a very technical but very important point. It is well-known that the EU court system is not limited to EU Courts but includes national judges. National judges are recognised as main instruments for the implementation of EU law. It is clear that the development of EU law in virtually all domains of law leads to the need to control its application efficiently. National judges are therefore essential components in the design of

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[8] In judgment of 15 July 1963 *Plaumann*/Commission, 25/62 the Court interprets strictly the conditions for admissibility of a case as they are stated in the Treaty: 'persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'

[9] See for instance the opinion of Advocate General Kokott 12 November 2015 for joined cases C-191/14 and C-192/14

a comprehensive EU judicial system. The key procedural element of this dialogue between national Court and the EU Courts is the preliminary rulings mechanism.

However, an applicant does not have the choice of filing a case in the EU General Court or at national level. Action in national courts would only be admissible if no access to the EU General Court is granted.[10] The test is based on the evaluation of the absence of doubt that the applicant could challenge the decision in EU courts. In the absence of doubt, the national court should declare the application inadmissible. This absence of doubt criterion is not extremely easy to manage precisely due to the fact that the *Plaumann* test creates uncertainty as regard the admissibility: the rule seems to be 'no access to EU Courts,' with an exception in very specific cases where the decision at stake would have a side effect which was not foreseen at the time of the adoption of the act, as was the case, for instance, in the *Cordorniu* decision.[11]

This complexity leads to difficulties in the context of hybrid decisions, i.e. decisions which are a combination of national and EU decisions. For instance, decisions related to reimbursement of EU funds may find their source in a decision from the European Commission to invite the Member State to demand reimbursement of funding granted to a project, for instance in the case of ineligibility of expenses. In this hypothesis, the crucial question for challenging the decision of the Member States is to determine if there was some autonomy for the national authority[12] and if the European Commission decision could have been challenged in EU Courts. The case-law of the EU Court tends to deny the possibility to challenge the decision of the European Commission, considering it as a preparatory act and not as a full decision.[13] The EU case-law also does not easily recognise a direct effect of the decision of the European Commission, as it does not exclude a possibility for Member States to compensate the loss of the recipient of funds.[14]

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[10] See for a recent decision C-663/13 5 March 2015 *Banco Privado Português and Massa Insolvente do Banco Privado Português* paragraph 28: 'In this respect, it must be recalled that, in its judgment in *TWD Textilwerke Deggendorf* (EU:C:1994:90, paragraph 17), the Court held that it is not possible for a recipient of State aid forming the subject-matter of a Commission decision which is directly addressed solely to the Member State of that recipient, who could undoubtedly have challenged that decision and who allowed the mandatory time-limit laid down in this regard in the sixth paragraph of Article 263 TFEU to pass, effectively to call into question the lawfulness of that decision before the national courts (see, also, judgments in *Nachi Europe,* C-239/99, EU:C:2001:101, paragraph 30, and in *Lucchini,* C-119/05, EU:C:2007:434, paragraph 55). The Court has taken the view that to find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumes, by virtue of the principle of legal certainty, once the time-limit laid down for bringing proceedings has passed (judgment in *Nachi Europe,* EU:C:2001:101, paragraph 30 and the case-law cited).'

[11] C-309/89 18 May 1994 *Codorniu SA*.

[12] According to EU case-law, no autonomy is to be granted to national authorities in this context, see arrêt C-383/06 13 March 2008 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening.*

[13] See for instance T-314/04 et T414/04 14 December 2006 *Germany v Commission* or T-29/03 13 July 2004 Comunidad Autónoma de Andalucía c. Commission.

[14] C-417/04 P 2 May 2006 *Regione Siciliana c*/Commission.

To sum up, it is far from being obvious that there is 'undoubtedly' a possibility to challenge the decision of EU institutions at EU level. This mechanism works like a trap for claimants: if they choose the EU Court path they risk being inadmissible, even in cases where *prima facie* they could are not obviously not excluded from the provisions of Article 263, and if they choose the national courts path, the courts could oppose the fact that they have not challenged the European decision.[15]

The narrow admissibility criteria of the *Plaumann* test is therefore a key factor, seriously mitigating the capacity to challenge EU decisions that have huge consequences for European citizens and companies. It should be mentioned that the Aarhus Convention Compliance Committee has explicitly indicated that this admissibility policy is not in compliance with the provisions of the Aarhus Convention.[16] The difficult discussions between the EU institutions and NGOs should be a good opportunity to reconsider access to EU justice for citizens.

This situation is most likely one of the factors explaining the lack of coherence and clarity in the EU case-law: combined with the complexity of each case, the number of cases brought to courts related to these situations, is not high enough. The contrast is huge between the very well developed case-law at national level as regard procedural rules with scarcity of these at CJEU level.

IV A Way Forward?

It could be seen as presumptuous to call for a change in the EU case-law. However, if one would take the right to good administration seriously, access to justice and judicial review of the EU administrative decision are key dimensions of the rule of law. It is not satisfactory that the main way to enforce good administrative behaviour by EU institutions is the action of the EU Ombudsman. As a matter of fact, the office of the European Ombudsman is today playing the central role for EU administrative decision review. Recommendations of the Ombudsman are not without effect and its decisions include all aspects of a case, such as financial compensation or implementation of EU Courts' decisions.

However, the Ombudsman would in any case not be able to restore legality: its role is to play the role of a mediator in order to find a friendly solution. In the complex situations which were identified above, such as reimbursement of EU funding, the ombudsman would have limited impact.

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15 See French Council of State decision 23 July 2014 Commune de Vendranges n°364466: 'Considering that it follows from the case-law of the Court of Justice of the European Union that a decision of the European Commission asking a Member State to recover Community aid unduly granted is binding on the authorities and the national courts when its validity was not disputed within the time-limits before the Union's courts by the aid recipient.' In this recent decision, the French Council of State do not discuss the potential limits of admissibility that the recipient may face.

16 See ACCC/C/2008/32 part I and part II on the website of the Aarhus Convention.

There is obviously a need to reassess the access to justice and judicial review of EU administrative decisions in the light of the substantial development of EU law. Similar standards are to be applied at national level and EU level as regard judicial review[17] and it is not possible to maintain confusion as regard the admissibility of application in EU courts.

It is also crucial to clarify the exact standards to be applied as regard breaches of rights to good administration. The current case-law of the CJEU tends to emphasise the teleological approach. It is fully understandable from a pragmatic point of view and one should avoid developing procedural complexity, which could paralyse administrative action. This is partially the approach taken in French administrative law with the famous *Danthony* case[18]. However, this case-law combines the teleological approach and an identification of procedural guarantees, which are preserved whatever the teleological approach would give. One can already see a step in this direction in the ECJ case-law with the *Altrip* case,[19] where a reference to protection of guarantees is explicitly provided. It remains to be seen if the *Altrip* case is to be understood as specifically targeting environmental law issues or is of a more general nature.

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17 It should be stressed that the CJEU is very demanding as regard access to justice in the context of Aarhus Convention in the context of Member States duties see C-240/09 8 March 2011 *Lesoochranárske zoskupenie VLK* paragraph 49: 'Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.'

18 French Council of State 23 December 2011 Danthony n°335033: 'Whereas these provisions regarding irregularities committed when an organisation is consulted, state a rule which takes inspiration from the principle according to which, although administrative measures must be taken according to the forms and in compliance with the procedures laid down by the laws and the regulations, an error affecting the course of a prior administrative procedure, followed on a mandatory or optional basis, the decision taken is only considered illegal if the evidence proves that it was likely, in this case, to have an influence on the decision taken or that it deprived the interested parties of a safeguard; whereas the application of this principle is not excluded in the case that a mandatory procedure has been overlooked, provided that such an omission does not result in the competence of the author of the measure being affected;' (translation as provided by the French Council of State website).

19 C-72/12 7 novembre 2013 Gemeinde Altrip: 'Subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.'

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