ELISABETTA LANZA

The right to good administration in the European Union. Roots, *rationes* and enforcement in antitrust case-law

SUMMARY: 1. The roots. – 2. The *ratio* of the right to good administration as fundamental right. – 3. Good administration and maladministration. – 4. Competition law: the "cradle" of the European right to good administration.

1. *The roots*

Through the Article 41 of the Charter of the Fundamental Rights of the European Union, proclaimed in Nice on December, 7, 2000 (hereinafter "the Charter"), the right to good administration figured in an international catalogue of human rights for the first time.

This right developed from EC jurisprudence (1). In fact, at the beginning of the proceedings involving European Community administrations, the principle of good administration didn't exist. In the frame of trials in the competition field the principle of good administration was considered, on demand of some private parties to the European Court of Justice, in order to claim for damages against the European administration (2). The ECJ had to consider whether the claimed administration respected some procedural standards. After a long process (3), the Court of Justice assumed the

(1) See S. MANGIAMELI, *La Carta dei diritti fondamentali dell'Unione Europea*, in *Nuovi studi politici*, 2/2002, 32. The author sustains that the rights included in the Charter weren't born in that document, but that through it they became more evident.

(2) C-96/102, 104, 105,108 and 110/82, ECJ sentence, 8 November 1983: *NV IAZ, International Belgium and others* vs. *Commission*; C-64/82, ECJ sentence of 15 march 1984, *Tradax Graanhandel BV* vs. *Commission*; C-46/85, sentence of 10 July 1986, *Manchester Steel LTD vs. Commission*.

(3) The attention to the duties of European administrations started with the well known *Algera* (*Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen* vs. *Common Assembly of the European Coal and Steel Community*, Joined cases 7/56, 3/57 to 7/57), when the ECJ had to deal with the revocation of administrative acts, which is not provided for by the Treaty. Hence, the Court, in order to avoid refusal of justice, found itself oblie to decide this question on its own, on the grounds of legal principles accepted in legislation, jurisdiction and legal science of the Member States. See further in J. SCHWARZE, *The administrative law of the Community and the protection of human rights*, in *Common Market Law Review*, 1986, 402.

concept of good administration as a general principle. In the Explanation of Article 41 alleged to the Treaty establishing a Constitution for Europe, the Drafters explained that Article 41 (Article II-101 in the Treaty) is based on the existence of the Union as subject to the rule of law, whose characteristics were developed in the case-law which enshrined, *inter alia*, good administration as a general principle of law (4).

Nevertheless, the first step to codification (5) of the concept of good administration, and its formulation as a right, was made by the European Ombudsman Jacob Söderman. At his 2000 Public Hearing before the Convention of the Draft Charter on Fundamental Rights of the European Union, Söderman, using the Finnish administration as an example, stressed "that the true test of a good Government is its aptitude and tendency to produce a good administration" and the importance of including the right of the citizen to a good administration among the classic fundamental rights. During the following European Convention, the need to foster and codify a right to good administration became increasingly urgent. So, following the Ombudsman's proposal, the Charter of Fundamental Rights of the European Union includes the fundamental right to good administration in the Chapter dealing with citizens'rights. In time, it will be valued as a general principle belonging to the constitutional traditions of the Member States. In fact, the Court of First Instance, in T-54/99, Judgment of 30.1.2002, *max.mobil / Commission*, has already stated that "it must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States".

The principle of good administration becomes, in Article 41 of the Charter, the right to good administration, a fundamental

---

(4) In Declaration concerning provisions of the Constitution, Final Act of the Treaty Establishing a Constitution for Europe, *Official Journal of the European Union*, C-310, XLVII, 14.12.2004.

(5) First of all, it's useful to underline that in the European Union legal system the role of the case-law and written-law is different than in a model of civil law: there is no strong distinction between written general principles and case-law general principles. In fact the case-law of ECJ and the general principles are essential elements of the *acquis communitaire*. See M.P. CHITI, *Diritto amministrativo europeo*, Milano 2004, 416.

right of every person. Hence, Article 41, in referring to "every person", goes further than the suggestions of the Ombudsman made in 2000. In fact, it is the only provision in Chapter V which is not confined to European citizens or residents. It could be adduced that the drafters chose to refer to "every person" instead of "citizen" for two reasons. Firstly, the good behaviour of Community administration should not be dependent on the nationality of a party to the proceedings. Secondly, the term "citizen" connotes a natural person, rather than a corporation. As it is mainly legal persons who are subject to direct Community administration, the scope of Article 41 is better defined as applying to "every person" in order to avoid possible ambiguities ([6]).

From the subjective point of view, Article 41 concerns the liability of the institutions and bodies of the Union, and not of the Member States, even if Article 51 of the Charter, Chapter VII, *General provisions*, rules that the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States, but only when they are implementing Union law. Therefore, the right to good administration distinguishes itself for its beneficiaries ("every person" and not only any citizen of the Union) and those responsibles (institutions and bodies of the EU and not also the Member States). However, the Charter constitutionalises fundamental principles of administrative procedure to an extent unknown to the Constitutions of Member States ([7]).

Indeed, the passage from an economic perspective of the European Union towards a political view relies on the democratic relationship between administration and citizens. The formation of the right to good administration was developed by the European judges and, it is, without any doubt one of the best results they achieved ([8]).

Nevertheless, this passage could be fully obtained through the binding codification of a right able to guarantee the citizens by uncorrect behaviour of the public European administration.

([6]) K. Kanska, *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights*, in *European Law Journal*, X, 3/2004, 308.

([7]) Ivi, 297.

([8]) See M.P. Chiti, *Diritto amministrativo europeo*, cit., 423, and R. Bifulco, *Commento all'art. 41. Diritto ad una buona amministrazione*, in *L'Europa dei diritti*, edited by R. Bifulco, M. Cartabia, A. Celotto, Bologna 2001, 285.

Nowadays, the Charter of Nice is not yet become binding for the States, nor a constitutional catalogue of fundamental rights, considering the sort of the Treaty establishing a Constitution for Europe and then, the Treaty of Lisbon, in which it was included. Thus, just only if the Treaty enters into force, will the European Institutions and the Member States be legally bound to uphold them.

2. *The* ratio *of the right to good administration as fundamental right*

The setting out of the right to good administration represents the establishment of a new fundamental right. It's the only right, in Chapter V, to be recognised to "every person" coming into contact with the Union's institutions and bodies (9).

Exactly, Article 41 includes:

– the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union;
– the right of every person 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 (10);
– the right of every person to communicate with the institutions of the Union in one of the languages of the Treaties;
– the obligation of the administration to give reasons for its decisions.

The procedural and formal character of the articles of the Chapter V of the Charter not only presents a new way to defend the citizens'interests (11), but also represents the clearest difference of the citizens'rights in comparison to the other fundamental rights. This is partly due to the jurisprudential origins of Chapter V provi-

(9) Overview of the article 41 of the Charter in http://www.europarl.europa.eu.

(10) Article 41, para. 3, reproduces the same right guaranteed by Article 288 EC, in the case of non-contractual liability.

(11) See C. MARZUOLI, *Carta europea dei diritti fondamentali, "amministrazione" e soggetti di diritto: dai principi sul potere ai diritti dei soggetti*, in *Carta europea e diritti dei privati* edited by G. Vettori, Padova 2002, 265.

sions. They are procedural fundamental rights aiming to guarantee the interests of the citizens in their substantial performances.

In the Communication on the Charter the Commission confirmed that the Charter "enshrin[es] certain new rights which already exist but have not yet been explicitly protected as fundamental rights, notwithstanding the values they are intended to protect, such as the right to good administration" (12).

The right to good administration is based on the rule of law, *i.e.* the principle of legality, and the principle of democracy. The Explanations to the text of the Charter, prepared by the Praesidium, confirm this approach by stating: "Article 41 is based on the existence of a Community subject to the rule of law whose characteristics were developed in the case-law which enshrined *inter alia* the principle of good administration" (13). Moreover, the approach is confirmed by Article 6 TEU and by the Preamble of the Charter of Nice.

The innovation of Article 41 of the Charter is that it transforms some elements of the objective principle of legality into a subjective right to good administration (14).

Before the Charter, the concept of good administration was referred in judgment as a principle, not as a right. Hence, it could not have formed a separate basis for a claim, despite the fact that litigants frequently tired to rely on this concept.

In fact, governing the relationships between citizens and public powers, on one hand, means setting rules for public administrations to respect and, on the other hand, to establish rights for "every person". Thus, the right to good administration is a fundamental right because it builds the citizen's rights to expect a certain standard of behaviours from public powers, a behaviour based on the rule of law. It differs from "classic" fundamental rights, such as the human dignity or freedom of thought, conscience and religion, due to the fact that it defends the interest not only by recognizing its existence, but in also establishing forms and procedures that must be respected by the public institutions.

Moreover, the Preamble of the Charter outlines that the Union is founded, not only on the indivisible, universal values of

---

(12) *Commission Communication on the Charter of Fundamental Rights of the European Union,* Brussels, COM (2000) 559 final 13 September 2000.

(13) See *Charter of Fundamental Rights of the European Union. Explanations Relating to the Complete Text of the Charter*, Luxembourg 2000, 58.

(14) K. Kanska, *op. cit.*, 300.

human dignity, freedom, equality and solidarity, but also on the principles of democracy and the rule of law, the grounds of the right to good administration. Furthermore, Article 8, Title II of the Treaty of Lisbon (*Provisions on democratic principles*), states that in all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Consequently, the urge to respect the principle (*rectius* the right to) of good administration is stressed by the Union's duty to treat its citizens equally.

The Charter follows the tendency of according the status of fundamental rights with procedural rights, by including them with substantive rights and elevating them to constitutional status ([15]).

3. *Good administration and maladministration*

As Nehl said, generally speaking, "good administration, it seems, is a deliberately chosen indeterminate legal notion meant to comprise a set of procedural and substantive – not necessary legally enforceable – guidelines or norms for administrative decision-making. It is often used to denote a standard of practice of any modern democratic system committed to the rule of law: serving the attainment of "administrative justice", transparency or openness of decision-making processes, or the improvement of the relationship between State authorities and citizens. Surely, this very abstract and somewhat tautological description does not shed much light on what "good administration" might imply in actual instances. It gives no information on what particular type of rule ought to be subsumed under good administration, nor does it enlighten what purpose, scope of application and legal force (if any) such rules shall possess" ([16]).

On the contrary, Usher grouped the principles of good administration ([17]), as developed by the European Court of Justice, in

([15]) K. KANSKA, *op. cit.*, 310.

([16]) H.P. NEHL, *Principles of Administrative Procedure in EC Law*, Oxford 1999, 17.

([17]) J.A. USHER, *The "Good Administration" of European Community Law*, in *Current Legal Problems*, 1985, 269 and in *General Principles of EC law*, London and New York 1998, 101.

administrative good faith ([18]), consistency ([19]), diligence ([20]) and communication ([21]). Nowadays, adding the principle of legitimate expectation Usher's criteria are still the basic principles of good administration, as confirmed by Article 41 of the Charter of Nice and by the administrative domestic legislation. From the studies of Nehl and Usher, it can be assumed that the principle of good administration is a polysense principle, that can have more meanings, as a duty to pursue the effective and efficient use of the financial resources of the European Community, or as a constraint aiming to respect the development of the administrative proceeding, or it can even be read as prohibition of maladministration ([22]).

Indeed, the "indeterminate notion with a tautological description", indicated by Nehl, raises to a substantive description just only through the jurisprudencial experience and its following inductive process ([23]).

([18]) For administrative good faith see: C-293/85, *Commission vs. Belgium*; C-56/90, *Commission vs. United Kingdom*; C-8/55, *Fédération Charbonnière de Belgique vs. High Authority*; T-33/89, and T-74/89, *Blackman vs. European Parliament*; C-155/85, *Strack vs. Parliament*.

([19]) For consistency see: C-81/72, *Commission vs. Council*; C-68/86, *United Kingdom vs. Council*; C-43/75, *Defrenne vs. Sabena*; C-188/82, Thyssen; C-188/83, *Witte vs. European Parliament*; C-68/86, *United Kingdom vs. Council*; C-29, 31, 36, 39-47, 50, 51/63, *Usines de la Providence vs. High Authority*; C-100-103/80, *Pioneer vs. Commission*.

([20]) For diligence see: C-120/73, *Lorenz vs. Germany*; C-96-102, 104, 105, 108 and 110/82, *IAZ International case*; C-179/82, *Lucchini*; C-61/74, *Santopietro vs. Commission*; C-19/69, *Richez-Parise*; C-103/85, *Usinor vs. Commission*; C-14/78, *Denkavit vs. Commission*; T-73/89, *Barbi*.

([21]) For communication see: C-49/88, *Al-Jubail Fertilizer vs. Commission*; C-316/82 and 40/83, *Kohler vs. Court of Auditors*; C-111/83, *Picciolo v European Parliament*; T-156/89, *Mordt*; C-322/81, *Michelin vs. Commission*; C-107/82, *Telefunken v Commission*; C-169/73, *Continental France vs. Council*; C-144/82, *Detti vs. Court of Justice*; C-270/82, *Estel vs. Commission*; C-24/62, *Germany vs. Commission*.

([22]) G. Della Cananea, *L'amministrazione europea*, in *Trattato di diritto amministrativo*, edited by S. Cassese, Milano 2000, 1587.

([23]) In a recent judgement of the 26 february 2003 (T-344/00, *CEVA Santé Animale vs. Commission*), the Court of First Instance stated that the inaction of the Commission constitutes a clear and serious breach of the principle of sound administration giving rise, in principle, to liability on the Community's part. According to the inductive process characterizing the right to good administration, this is one of the first sentences in which the European judge extends the liability of the institutions to the cases of normative inaction, considering it as violation of the good administration.

In order to understand the concepts of good administration and maladministration is necessary, first of all, to consider the development of the notion of maladministration, the pathologic expression of administrative activity (24).

The concept of maladmistration is directly linked to the Ombudsman, who is, pursuant to Article 195 EC, "empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies". In fact, since the introduction of the European Ombudsman, in September 1995, first Jacob Söderman and then P. Nikiforos Diamandouros, worked to develop the concept of maladministration, starting from the Court of Justice jurisprudence and the European administrative law principles.

This was hard work. As the first Parliamentary Ombudsman of the United Kingdom stated: "Nobody can define maladministration in plain terms" (25).

The first European Ombudsman Annual Report (1995) explained that there is maladministration if a Community institution or body fails to act in accordance with the Treaties or the Community acts that are binding upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance. In the same Annual Report the Ombudsman stressed that the experience of national ombudsmen shows that it is better not to attempt a rigid definition of what may constitute maladministration. Indeed, the open-ended nature of the term is one of the things that distinguishes the role of the Ombudsman from that of a judge.

In response to a call from the European Parliament for a clear definition of maladministration, in his 1997 Annual Report, the Ombudsman offered the following definition: "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it". In 1998, the European Parliament adopted this definition (26).

---

(24) M.P. CHITI, *Il mediatore europeo e la buona amministrazione comunitaria*, in *Riv. it. dir. pubbl. com.*, 2000, 313.

(25) K.C. WHEARE, *Maladministration and Its Remedies*, London 1973, 6.

(26) Report *on the Ombudsman's special reports (Parliament's Committee on Petitions)* on the Special Report by the European Ombudsman to the European Parliament following his own-initiative inquiry into public access to documents (C4-0157/98). Rapporteur: Mrs. Astrid Thors. In www.europarl.europa.eu.

In 2003 the Ombudsman's Annual Report stressed that the concept of maladministration also includes "the lack of respect of the human rights, the rule of law and the principles of good administration". In this way, the European Ombudsman followed the Nordic Ombudsman model, for whom maladministration and illegality are not considerate separate ideas ([27]).

Nevertheless, the last Annual Report (2007) underlined that the principles of good administration go further, requiring Community institutions and bodies not only to respect their legal obligations, but also to be service-minded and ensure that members of the public are properly treated and enjoy their rights fully. Thus, while illegality necessarily implies maladministration, maladministration does not automatically entail illegality ([28]). Findings of maladministration by the Ombudsman do not therefore automatically imply that there is illegal behaviour that could be sanctioned by a court.

Moreover, in the 2007 Annual Report, the European Ombudsman affirmed that the main types of maladministration alleged were a lack of transparency, including refusal of information (in 28% of cases), unfairness or abuse of power (18%), unsatisfactory procedures (13%), avoidable delay (9%), discrimination (8%), negligence (8%), legal error (4%), and failure to ensure fulfilment of obligations, that is, failure by the European Commission to carry out its role as "guardian of the Treaty" vis-à-vis the Member States (3%).

The efforts of the European Ombudsman, aiming to define the concept of maladministration, showed that maladministration and good administration are not opposite concepts, but complementary principles. In fact, it can be inferred by the last Report that the cases of maladministration also occur when there is no illegality, *id est* in which circumstances that cause damages to the citizen, but that aren't so serious as to directly prejudice in order to obtain judicial protection ([29]). The concept of maladministration thus extends the defence

---

([27]) I. Harden, *Citizenship and Information*, in *European Public Law*, 2001, 169.

([28]) In this sense, Advocate General Sir Gordon Slynn in *Tradax* case, where he stated that he did not consider "that there is any generalised principle of law that what is required by good administration will necessarily amount to a legally enforceable rule. Legal rules and good administration may overlap (…); the requirements of the latter may be a factor of elucidation of the former. The two are not necessarily synonymous. Indeed, sometimes when courts urge that something should be done as a matter of good administration, they do it because there is no precise legal rule".

([29]) A. Cariola, referring to the Italian Ombudsman ("*difensore civico*"), asserts that the "*difensore civico*" action not only refers to the interests that don't

of the citizen to all the cases of bad behaviour of European administrations, which could result in potentially big damages. Hence, it could be given a legal remedy to those breaches that don't have any legal remedy and that, nevertheless, give rise to quantifiable harm.

4. *Competition law: the "cradle" of the European right to good administration*

The strengthening of the principles of good administration is due to the jurisprudence of Community Courts in four main areas (competition, anti-dumping, customs and State aid policy implementation) ([30]). The concentration of the jurisprudence in these fields may be partly explained by the assumption that the Community Courts feel less reluctant to proceed to judicial harmonisation of administrative principles in the frame of exclusive Community process competence than in the cases of national procedural autonomy ([31]).

At first, the principle of good administration appeared in disputes in the competition field during the 1980s, as already indicated above in paragraph n. 1. During these proceedings, the European judge aimed to call Commission's attention to the good administrative practices and to the importance to work for a sound administration.

In the *Tradax* judgment (C-64/82*, Tradax Graanhandel BV v Commission*, judgment of 15 March 1984), for the first time, the ECJ started to recognize the effective relevance of the principle of good administration in the European administrative proceedings, even if it didn't recognize as a duty of the Commission to give the price information required.

---

receive any jurisdictional defense, but also to the category of the *de facto* interests and to those interests that receive a slow, inefficient and expansive jurisdictional defense (in A. CARIOLA, *Commento all'art. 8 della legge 8 giugno 1990, n. 142*, in *Commentario della Costituzione, art. 128 supplemento legge 8 giugno 1990, n. 142*, established by G. Branca and continued by A. Pizzorusso, Bologna 1996, 126). *Mutatis mutandi*, this opinion can be applied also in the area of interests protected by the European Ombudsman, considering that the European citizens'rights develop, *de facto*, through the direct experiences within European bodies.

([30]) G. DELLA CANANEA, *op. cit*., 1590, underlines that the grounds of right to access to the documents are based on antitrust and antidumping proceedings law till 1992.

([31]) H.P. NEHL, *op. cit*., 6.

Infact, in paragraphs 21 and 22 of the judgement the Court states: "(…) The court therefore held that the need to protect persons concerned and the need for proper judicial review would be met if the commission put at the disposal of the parties the technical data used by it in fixing the free-at-frontier prices whenever that decision was challenged before a court having jurisdiction in the matter. 22. it should however be pointed out that it would be consistent with good administration for the commission periodically to publish for the information of the traders concerned the main data taken into account in fixing cif prices. Such an arrangement for the supply of periodic information does not however include a duty to reply to individual requests such as that made by the applicant or to allow inspection at the Commission's premises of all the data which it has assembled".

During the following years, the European judge refused to recognize a defence based on the above-mentioned principle against the Community acts, because it was not admitted by European legal system. Nevertheless, the ECJ underlined that the principle could be used in order to invite Community institutions to follow good administrative practices.

In the 1990s, European Courts revised their own position.

In 1995 the European judge took an important step. In fact, in *Detlef Noelle vs. Council* (T-167/94, judgement of 18 September 1995) the Court of First Instance recognized a claim for damages, in the case of violation of the principle of good administration. The Court stated: "In so far as the Community institutions did not fail completely in the duty of care and proper administration which they owed to the applicant but simply failed properly to appreciate the extent of their obligations under that principle, the breach of the principle of care cannot in this case be regarded as a sufficiently serious breach or a manifest and grave breach, as defined in the case-law of the Court of Justice". Indeed, even if in *Noelle* case the applicant didn't receive any satisfaction, the CFI recognized juridical autonomy to the principle of good administration, as a duty of care.

Furthermore, in *Technisce Universität München vs. Hauptzollamt München-Mitte* (C-269/90, judgement of 21.11.1991) the ECJ affirmed: "where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right

of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way the Court can verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present".

In the late 1990s, the European jurisprudence appeared more articulated and the institutions started and recognized the importance of the principle of good administration. In the 1999 case, *Limburgse Vinyl Maatschappij NV and others vs. Commission*, the Commission affirmed that the principle of good administration was a general principle of European Law. *Max-mobil Telekommunication Service vs. Commission* (judgement of 30 January 2002, T-54/99) was the first case of indirect jurisprudencial application of the Charter of Nice. It stated that "it must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41(1) of the Charter confirms that [e]very 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. It is appropriate to consider, first of all, the nature and scope both of that right and of the administration's concomitant obligations in the specific context of the application of Community competition law to an individual case, as called for in this instance by the applicant".

The European judge, since the first judgements dealing with the good administration, has valued the above-mentioned principle as a defence right. The development of the principle of good administration in the frame of the competition field is linked to the fact that, especially in this subject, private citizens claim against the abuses of the enterprises and against the subsequent inactivity of the administration.

In spite of the actual destiny of the Treaty of Lisbon and, consequently, of the binding role of the Charter of Nice, it may certainly be stated by way of conclusion that the right to good administration gives to the citizens a kind of indirect and further defence ([32]), underlining the importance to give a compulsory value to the respect of procedural duties by the European Institutions.

([32]) A. SERIO, *Il principio di buona amministrazione nella giurisprudenza comunitaria*, in *Riv. it. dir. pubbl. com.*, 2008, 300.