Administrative Procedure and Basic principles of Administrative Procedural Law

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Article 5 TEU: Principle of conferral

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
Article 5 TEU: Principle of conferral

- Absence of a legal basis for harmonisation of administrative procedures in the Member States.
- The treaties provide only for a possible legal basis for a general codification of administrative procedure of the EU institutions, bodies, offices and agencies: art. 298 TFEU, according to which (par. 2) “the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to [the] end” of making sure that “in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration”.

• **PART I:** THE DEVELOPMENT OF GENERAL PRINCIPLES OF EU LAW CONCERNING ADMINISTRATIVE PROCEDURE

• **PART II:** THE EUROPEAN PARLIAMENT RESOLUTION ON AN OPEN, EFFICIENT AND INDEPENDENT EUROPEAN UNION ADMINISTRATION (2016/2610(RSP))
PART I: THE DEVELOPMENT OF GENERAL PRINCIPLES OF EU LAW CONCERNING ADMINISTRATIVE PROCEDURE
The basis for the development of so-called general principles of EU law

- Art. 340, para 2, TFEU is an essential point of reference in this context.

- This provision remained in essence unchanged in its formulation since the original version of the Treaty of Rome

**Art. 340, para 2, TFEU**

“In the case of non-contractual liability, the Union shall, **in accordance with the general principles common to the laws of the Member States**, make good any damage caused by its Institutions or by its servants in the performance of their duties”
The starting point: the case *Algera* of 1957

The Algera case is clear evidence of the fact that the Court has followed, since the very beginning of its case-law, the approach described in Art. 340 TFEU far beyond the specific hypothesis contemplated by it (the non-contractual liability of the EEC).
The starting point: the case *Algera* of 1957

- The decision in the *Algera* case (Court of Justice, 12.07.1957, in joined cases 7/56, 3/57-7/57)
- The central topic under discussion concerned the possibility - or not - to withdraw an unlawful administrative act issued by a body of the European Coal and Steel Community
- There was no provision ruling on such an issue in the Treaty
The starting point: the case *Algera* of 1957

The Court of Justice, after declaring that:

“... the possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the community, but for the solution of which the treaty does not contain any rules”

concluded that:

“unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the Member States”
The starting point: the case *Algera* of 1957

Starting from this first, important ruling, the Court of Justice has developed, over time, an organic body of general principles of EU law, many of which relate to the organisational structure and the activity of administrative bodies.
The general principles of EU law have the aim and the purpose to fill gaps in the EU legal order.

In the EU legal order there are often regulatory gaps, due especially to the limits/constraints set by the principle of conferral.

For the adoption of a legislative act (Regulation or Directive) an appropriate legal basis has to be referred to in the preamble of the legislative act.
The principle of the rule of law

- It is part of the Union’s values.
- As recalled in Article 2 TEU it applies to administrative action.
- According to that principle any action of the Union has to be based on the treaties according to the principle of conferral.
- Furthermore the rule of law requires that EU institutions, bodies, offices and agencies shall act in accordance with the law and apply the rules and procedures laid down in the legislation.

The hierarchy of legal norms must be recognized and respected so that no act may violate higher-level Union law.
The principle of legality, as a corollary to the rule of law, requires that actions of European administration occur under and within the law.

Any limitation on the exercise of the rights and freedoms recognized by EU Law must be provided for by law and respect the essence of those rights and freedoms.
The principle of legal certainty

• The principle of legal certainty is another corollary of the rule of law.

• It requires EU legal rules to be **clear and precise**.

• The principle aims at ensuring that situations and legal relationships governed by EU law remain **foreseeable** in that individuals must be able to **ascertain unequivocally** what their rights and obligations are and be able to take steps accordingly.

• Under the principle of legal certainty **retroactive measures** shall not be taken except in legally justified circumstances.

• Further, public authorities shall act and perform their duties **within a reasonable time**.
The principle of protection of legitimate expectations has been recognised since the very early case law of the CJEU as sub-principle of the rule of law.

Actions of public bodies shall not interfere with vested rights and final legal situations except where it is imperatively necessary in the public interest.

Legitimate expectations shall be duly taken into account where an administrative decision is cancelled or revoked.
The principle of proportionality

- The Court of Justice of the European Union has interpreted the principle of proportionality to require that:
  1) any measure of the European administration be **based on law**
  2) to be **appropriate**
  3) and **necessary** for meeting the objectives legitimately pursued by the act in question
  4) where there is a choice among several appropriate measures, **the least onerous measure must be used**;
  5) and the charges imposed must **not be disproportionate to the aims** pursued.
The right to an effective remedy is enshrined in Article 47 of the Charter, in Articles 6 and 13 European Convention of Human Rights and is recognised as a general principle of EU law and as a key component to a legal system under the rule of law.
The right to an effective remedy

- Neither the EU nor Member States can render virtually impossible or excessively difficult the exercise of rights conferred by EU law, are obliged to guarantee real and effective judicial protection and are barred from applying any rule or applying any procedure which might prevent, even temporarily, EU rules from having full force and effect.
The principle of good administration

- The principle of good administration is now enshrined in Article 41 of the EU Charter: the right to a good administration.
- It synthetises some of the case law of the Court of Justice in this field and is of particular relevance to administrative procedures.
- According to the EU Charter the right to good administration requires that decisions be taken pursuant to procedures which guarantee fairness, impartiality and timeliness.
The principle of good administration

- Good administration includes the right to be given reasons and the possibility of claiming damages against public authorities who have caused harm in the exercise of their functions.
- Good administration also requires the protection of the rights of defense and of language rights.
- In addition, good administration extends to information rights which include privacy and business secrets as well as access to information.
Principles of good administration can be understood to further contain the following elements:

A) The duty of care

- It includes the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time.
- It obliges the administration to carefully establish and review all the relevant factual and legal elements of a case.
Principles of good administration can be understood to further contain the following elements:

A) The duty of care

- It obliges the administration take into account not only the administration’s interested but also all other relevant interests, prior to making decisions or taking other steps.

- Impartiality requires the absence both of arbitrary action and of unjustified preferential treatment including personal interest.
B) Timeliness

- It pertains to the principle of fairness
- It means that decisions have to be taken within a reasonable time: since slow administration is bad administration and might be in violation of the concept of legal certainty.
Principles of good administration can be understood to further contain the following elements:

C) The right to a fair hearing

- It regards all proceedings initiated against a person and which are liable to culminate in a measure **adversely affecting** that person.
- The *audi alteram partem* principle is addressed in Article 41(2)(a) and (b) Charter.
- It cannot be excluded or restricted by any legislative provision.
Principles of good administration can be understood to further contain the following elements:

C) The right to a fair hearing

- The right to a fair hearing requires that the party concerned must receive an exact and complete statement of the claims or objections raised and must also be given the opportunity to make its views known on the truth and relevance of the facts and on the documents used.
Principles of good administration can be understood to further contain the following elements:

D) The right of access to the file

- It is essential in order to enjoy the right to a fair hearing.
- The right of access to the file is the right to get full information on matters which may affect a person’s position in an administrative procedure, especially where sanctions may be involved.
Principles of good administration can be understood to further contain the following elements:

D) The right of access to the file
It includes:

- the right to get the administration’s response to complaints or representations,
- as well as the right to receive notice of the outcome of procedures and of decisions made, including information related to the rights of appeal.
Principles of good administration can be understood to further contain the following elements:

E) The duty to give reasons for decisions

- It arises from Article 296(2) TFEU and is recognised as a right under Article 41(2)c) of the EU Charter
- It is also an essential component of the right to an effective remedy recognised in Article 47 of the Charter of Fundamental Rights of the European Union.
E) The duty to give reasons for decisions

- The obligation to give reasons comprises an indication of the legal basis of the act, of the general situation which led to its adoption and of the general objectives which it intended to achieve;
Principles of good administration can be understood to further contain the following elements:

E) The duty to give reasons for decisions

• the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the authority which adopted the measure in such a way as enable the persons concerned to decide if they want to defend their rights by an application for judicial review.
Principles of good administration can be understood to further contain the following elements:

F) The principles of transparency and of participatory democracy

- They are applicable also to situations where the proceedings lead to the adoption of an act of general application including decisions with general applicability.
- In order to ensure that such hearing can effectively take place, active information of the public and structured means of feedback and response should be created.
Principles of good administration can be understood to further contain the following elements:

G) The right of access to documents

- It is under Article 15 (3) TFEU and Article 42 of the EU Charter a fundamental right of EU law and also a basic condition of an open, efficient and independent European administration.
- Any limitation of this principle must be narrowly construed to comply with the criteria of Article 52(1) of the Charter of Fundamental Rights of the European Union and must therefore be based on law, must respect the essence of the right and follow the criteria of proportionality.
H) The right to protection of personal data

- It is embedded in Article 16(1) TEU and in Article 8 of the EU Charta.
- An essential point of reference is the principle of transparent information management, which includes duties to record data processing activities.
Principles of good administration can be understood to further contain the following elements:

H) The right to protection of personal data

- According to the principle of data quality, data used by the EU Administration shall be accurate, up-to-date and lawfully recorded.

- The data supplying authority shall be responsible for ensuring that the data are accurate, up-to-date and lawfully recorded.
PART II: THE EUROPEAN PARLIAMENT RESOLUTION ON AN OPEN, EFFICIENT AND INDEPENDENT EUROPEAN UNION ADMINISTRATION (2016/2610(RSP))
The role of administrative procedure in order to assure an open, efficient and independent administration.

See also Document PE 519.224
The General Principles of EU Administrative Procedural Law