

Bucura C. Mihaescu Evans

The right to good administration at the crossroads
of the various sources of fundamental rights in the
EU integrated administrative system



Luxemburger Juristische Studien –
Luxembourg Legal Studies

edited by

Faculty of Law, Economics and Finance
University of Luxembourg

Volume 7

Bucura C. Mihaescu Evans

The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system



Nomos

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-8487-2638-7 (Print)
978-3-8452-6798-2 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-2638-7 (Print)
978-3-8452-6798-2 (ePDF)

Library of Congress Cataloging-in-Publication Data

Mihaescu Evans, Bucura C.

The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system
Bucura C. Mihaescu Evans

573 p.

Includes bibliographic references and index.

ISBN 978-3-8487-2638-7 (Print)
978-3-8452-6798-2 (ePDF)

1. Edition 2015

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2015. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

To Christopher and Catalina

Foreword

Good administration is a central constitutional notion of the European Union. Constantly evolving, it had been developed by the Court of Justice of the European Union since the very early case law under the European Coal and Steel Community in the 1950ies. A general principle of EU law, it is also partially codified in Article 41 of the Charter of Fundamental Rights of the European Union, which is a most innovative feature of EU fundamental right protection.

This book on the «The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system» addresses the very essence of these fundamental questions for EU law and policy. It was defended as a PhD thesis at the University of Luxembourg in December 2014. The book is marked by its high quality, methodological clarity, accessibility and the innovative dimension of the topic. The book is based on tremendous body of knowledge acquired through detailed study of the case law in combination with an analysis of the legal literature from various jurisdictions. This leads to a critical evaluation of major issues arising from the still dynamically evolving right to good administration within Europe's de-central system of administration.

The book thereby highlights the importance and vast potential of this right and has the great merit of assessing the right to good administration in its diverse facets, touching upon its different historic, contextual and linguistic developments. It also provides an in-depth assessment of the various sub-components of the right to good administration, such as the right to be heard or the right of access to the file – to name but a few.

The book has the great merit to highlights the (problematic) protection of the right to good administration in the EU integrated administrative system, where decisions are often taken in composite procedures with input from various interlocutors from both national and EU levels, each using different procedural rules.

The study convincingly puts forward some concrete proposals in order to overcome such problematic gaps in protection. It shows that the author is a skilled legal researcher who is equally informed by experience of observation from within of the workings of the Court of Justice of the European Union. Overall, this book is to be recommended due to its great qual-

Foreword

ities in advancing the knowledge in EU law whilst linking its field of study with matters relating to legal theory and public law in general.

Herwig C. H. Hofmann
Professor of European and Transnational Public Law,
University of Luxembourg

Acknowledgments

I would like to take this opportunity to present my acknowledgments to all those who have contributed, in one way or another, to the accomplishment of this thesis.

First of all, I would like to express my deepest gratitude to my PhD supervisor, Professor Herwig Hofmann, for his guidance and persistent encouragements during the entire period of my thesis. I would like to thank him for his continuous assistance with this research and for all the priceless comments which have radically contributed to the improvement of this thesis. I am also very thankful for his enthusiasm and faith in our collaboration. He has been a tremendous mentor for me; without his guidance and invaluable help, this thesis would probably have not seen the light.

I would also like to thank my PhD committee members, Professors Stefan Braum and Luc Heuschling for their insightful comments and suggestions. A special word of gratitude also goes to all the other members of the Jury, Judge Koen Lenaerts, Professor Jacques Ziller and Dr Claire Micheau. I am very honored and thankful for their interest in my topic and for having accepted to be part of this project.

My deepest thanks are also due to Advocate General Yves Bot who gave me the opportunity, during the first years of my thesis, to work in his cabinet at the Court of Justice of the European Union. This experience gave me a tremendous insight into the creation of EU jurisprudence and broadened and strengthened my knowledge in EU law. Besides this priceless opportunity, I am also thankful to Mr. Bot for his continuous encouragements and insightful suggestions as regards my own PhD.

A special thank you is then addressed to Professor Jean-Pierre Bourgeois who, at the beginning of my studies in law, provided me with a tiny but precious assistance without which I would most probably have changed my field of study.

I would further like to express my thanks to some of my previous colleagues from the CJEU with whom I have had the opportunity to discuss my ideas on the thesis. I am particularly indebted to Flavien Mariatte who very kindly provided me with help at different stages. Not only has he given me a research training which became a valuable tool in my work, but he has also continuously kept me informed of the most recent legal infor-

Acknowledgments

mation which might, in one way or another, be relevant for my thesis. Our fruitful discussions have undoubtedly provided a considerable input to this work. Many thanks also go to Judge Arjen Meij, Bernard Chevalier, Jacques Laurent, Olivia Davidson, Hanns Peter Nehl, Pekka Aalto and Jean-Christophe Puffer who shared with me their experience and knowledge in the field; their comments and suggestions have contributed decisively to sharpen some of my arguments. Alexandre Geulette and Vivien Terrien have further provided me with great professional advice for which I am very grateful. Special thanks are also due to Markus Senn who afforded me precious help in formatting of the thesis.

The drafting of this PhD would not have been possible without the funding of the European Commission (within the INCOOP Marie Curie Project) and of the University of Luxembourg for which I am very thankful. I am also grateful to the staff of the University and the coordinators of INCOOP for their guidance and support.

I would also like to express my warm thanks to my family and friends for always being there for me and believing in me. Special words of thanks are due to my best friends Aicha Ali Taiga, Nathalie Stenier and Adriana Miu and to all my other friends who have supported me during the whole period of the thesis and have incited me to strive towards my goal. A sincere thank you further goes to my parents Doina and Tavi, my sister Irina and my family at large including my family in law, for their continuous support and encouragements. My father in law David Evans has provided me with precious help from the linguistic point of view in correcting some of my still unclear uses of his mother tongue, for which I am very grateful.

Last but not least, I wish to express my sincere gratitude to my husband Christopher Evans and my daughter Catalina. During the entire period of the thesis, Christopher has provided me with encouragements, guidance and love; his patience and support have been an indispensable tool for the finalization of this project. For the last part of this work, Catalina has been my most powerful source of inspiration and motivation. In recognition of my immeasurable gratitude and love, this thesis is dedicated to them.

Summary Contents

Abbreviations	27
Introduction	31
1. Aims of the present study	34
2. Approach of the thesis. Methods and sources	39
3. Existing literature on the principle of good administration. Delimitation and input of the present contribution	41
4. Outline of the thesis	46
Part 1. Background to the General Principle of Good Administration	49
I. Problematic aspects stemming from the confluence of the various sources of fundamental rights	49
II. Case study of the right to good administration as a GPL and as a CFR right	64
Part 2. The Substance of the Right to Good Administration	153
I. “The right to be heard” as a sub-component of good administration	153
II. “The right of access to the file/documents” as a sub-component of good administration	192
III. “The obligation of the administration to give reasons for its decisions” as a sub-component of good administration	259
IV. “The right to languages” as a sub-component of good administration	294
V. “The right to damages” as a sub-component of good administration	331
VI. “The principle of care” as a sub-component of good administration	392

Summary Contents

Final Conclusions	469
1. The right to good administration at the confluence of its protection as a GPL and as a CFR right	471
2. Sub-principles of the right to good administration and implications stemming from their juxtaposition	475
3. Substance of the right to good administration and other interrelated issues which highlight the importance of the right to good administration in the EU legal order	479
4. Final conclusions	510
Bibliography	511
Index	567

Table of Contents

Abbreviations	27
Introduction	31
1. Aims of the present study	34
2. Approach of the thesis. Methods and sources	39
3. Existing literature on the principle of good administration. Delimitation and input of the present contribution	41
4. Outline of the thesis	46
Part 1. Background to the General Principle of Good Administration	49
I. Problematic aspects stemming from the confluence of the various sources of fundamental rights	49
A. The (problematic) coexistence of fundamental rights protected as both GPL and CFR rights	49
1. Hierarchical approach	54
2. Pluralistic approach	57
B. An alternative approach: the “lexical order of review”	59
C. Conclusions on the problematic aspects stemming from the confluence of GPL and CFR rights	62
II. Case study of the right to good administration as a GPL and as a CFR right	64
A. Development of the right to good administration into a GPL and a CFR right respectively	65
B. Content of the right to good administration in the EU legal order	72
1. “Judicialisation” of the Administration	79

Table of Contents

2. Good administration as a counterweight to the discretionary powers of the administration: administrative efficiency versus individual's procedural protection	88
3. Good administration within EU "composite" administrative proceedings	91
a. Overview of the EU integrated administrative system and classification of the various "composite" administrative procedures	93
(1) The protection of the right to good administration in the context of "composite" proceedings where a Member State is implementing an EU act with input from one or more EU administrative authorities	99
(2) The protection of the right to good administration in the context of "composite" proceedings where a final decision is taken by an EU administrative authority on the basis of input from Member States' authorities	103
(3) The protection of the right to good administration in the context of EU law implementation by the Commission with the input of the various "composite" Comitology committees	107
C. The scope of protection of good administration as a GPL and as a CFR right	110
1. The personal scope of protection of good administration as a GPL and as a Charter's right	110
a. Good administration at the confluence of its "subjective" and "objective" facets	111
b. Good administration: "principle" or "right" for the purposes of Articles 51(1) and 52(5) CFR?	117
c. Good administration: addressed to "every person" or merely to "EU Citizens"?	123
d. Good administration: a tool for protecting interested third parties in administrative proceedings?	125
2. The material scope of protection of good administration as a GPL and as a Charter's right	132

3.	The institutional scope of protection of good administration as a GPL and as a Charter's right	135
a.	The institutions, bodies, offices and agencies of the Union to which the right to good administration is addressed	136
b.	The absence of the EU Member States from the institutional scope of application of Article 41 CFR and the more extensive protection provided under the GPL status of the notion	137
D.	Conclusions on the right to good administration as a GPL and as a CFR right	144
Part 2.	The Substance of the Right to Good Administration	153
I.	"The right to be heard" as a sub-component of good administration	153
A.	The right to be heard in the EU legal order and its interrelation with the right to good administration	154
1.	Roots and development of the right to be heard in the EU legal order	154
2.	The right to be heard as part of the defence rights and as a sub-element of the right to good administration respectively: interrelation between these two "umbrella" notions	158
B.	The codification of the right to be heard in Article 41 CFR: the protection of the right to be heard as a GPL and as a Charter's right	160
1.	The personal scope of protection of the right to be heard as a Charter's right and as a GPL	160
a.	The "initiated against" condition for the purposes of the right to be heard as a Charter's right and as a GPL	161
b.	The "adversely affected" condition for the purposes of the right to be heard, as a Charter's right and as a GPL	167
(1)	The right to be heard of an interested third party in administrative proceedings: criteria	168

Table of Contents

(2) What does the “adversely affected” requirement mean in practice? The example of the measures by which OLAF transmits information to the national authorities	171
2. The material scope of protection of the right to be heard as a Charter’s right and as a GPL	175
3. The institutional scope of protection of the right to be heard as a Charter’s right and as a GPL	178
C. The right to be heard as part of the right to good administration in the EU composite administrative proceedings	180
D. Conclusions on the interrelation between the right to be heard and good administration	186
II. “The right of access to the file/documents” as a sub-component of good administration	192
A. The right of access to the file and the right of access to documents in the EU legal order and their respective interrelation with the right to good administration	193
1. The respective interconnections between the right of access to the file/the right of access to documents and the right to good administration	194
a. Interlinks between the right of access to the file and the right to good administration	194
(1) Roots and development of the right of access to the file in the EU legal order	194
(2) The right of access to the file as part of the defence rights and as a sub-component of the right to good administration: status of the notion	198
(i) The right of access to the file and the the rights of the defence	198
(ii) The right of access to the file and good administration	200
b. Interlinks between the right of access to documents and the right to good administration	202
(1) Roots and development of the right of access to documents in the EU legal order	202
(2) The status of the right of access to documents	204

(3) Interrelation between the right of access to documents and the right of access to the file	207
(i) The (polemic) articulation between the right of access to documents and the right of access to the file	207
(ii) The articulation between the right of access to documents and the right of access to the file at the confluence of their (respective secondary legislations’) sources	210
(iii) The right to good administration as a means to ensure the articulation between conflicting legislations – case study of Regulation 1049/2001 v Regulation 45/2001	216
(4) The right of access to documents and the right to good administration	222
B. The codification of the right of access to the file and the right of access to documents in the Charter: their respective protection as GPL and as CFR rights	229
1. The personal scope of protection of the right of access to the file and the right of access to documents: personal scope in the CFR v its protection as a GPL	229
2. The material scope of protection of the right of access to the file and the right of access to documents: material scope in the CFR v material scope stemming from the GPL status	232
3. Institutional scope of protection: the right of access to the file and the right of access to documents: institutional scope in the CFR v institutional scope flowing from the GPL status	235
a. The protection of the right to of access to the file and the right of access to documents by the institutions, bodies, offices and agencies of the Union	236
b. The protection of the right of access to the file and the right of access to documents by the EU Member States	239

Table of Contents

C. The right of access to the file and the right of access to documents in the EU composite administrative proceedings	243
D. Conclusions on the interrelation between the right of access to the file / the right of access to documents and good administration	252
III. “The obligation of the administration to give reasons for its decisions” as a sub-component of good administration	259
A. The obligation of the administration to give reasons for its decisions in the EU legal order and interrelation with the right to good administration	260
1. Roots and development of the obligation of the administration to give reasons for its decisions in the EU legal order	260
2. The obligation of the administration to give reasons for its decisions and the rights of the defence	264
3. The obligation of the administration to give reasons for its decisions and the right to effective judicial review: the “statement of reasons” requirement at the confluence of the administrative and judicial levels	269
4. The obligation of the administration to give reasons for its decisions and the right to good administration	271
B. The protection of the obligation of the administration to give reasons for its decisions as a GPL v its codification in Article 41 CFR	274
1. The personal scope of protection of the administration’s obligation to give reasons for its decisions under the CFR v its protection as a GPL	275
2. The material scope of protection of the administration’s obligation to give reasons for its decisions under the CFR v its protection as a GPL	277
3. Institutional scope of protection of the administration’s obligation to give reasons for its decisions under the CFR v its protection as a GPL	281
C. The obligation of the administration to give reasons for its decisions as part of the right to good administration in composite administrative proceedings	287

D. Conclusions on the interrelation between the obligation of the administration to give reasons for its decisions and good administration	290
IV. “The right to languages” as a sub-component of good administration	294
A. The right to languages at the confluence of its “subjective” and “objective” facets and its interrelation with the right to good administration	297
1. Roots and development of the right to languages in the EU legal order in its various “objective” facets	297
2. Roots and development of the right to languages as a “subjective” right of individuals in the EU legal order	301
3. Language rights and the right to good administration	306
B. The protection of language rights in the EU Courts’ case-law v its protection as a sub-element of the right to good administration in Article 41 CFR	308
1. The personal scope of protection of the right to languages in the EU Courts’ case-law v its protection as a sub-element of the right to good administration in Article 41 CFR	309
a. Language rights of EU minorities	309
b. Language rights of EU officials	312
2. The material scope of protection of the right to languages in the EU Courts’ case-law v its protection as a sub-component of the right to good administration in Article 41 CFR	314
3. The institutional scope of protection of the right to languages in the EU Courts’ case-law v its protection as a sub-element of the right to good administration in Article 41 CFR	316
C. The protection of language rights in the context of composite administrative proceedings	320
1. The protection of individuals’ language rights at the crossroads of two or more EU Member States	320
2. The protection of language rights in the context of EU law implementation by the institutions of the Union following the advice of the various Comitology Committees	324

Table of Contents

D. Conclusions on the interrelation between the right to languages and good administration	326
V. “The right to damages” as a sub-component of good administration	331
A. The right to damages and its interrelation with the right to good administration	332
1. Roots and development of the right to damages in the EU legal order and interlink with the right to good administration	334
a. The status of the right to damages	334
b. “Fault” requirement v “general principles common to the laws of the Member States” as a pre-condition to confer a remedy for infringement of the principles of good administration	336
2. A right to damages for infringement of the principles of good administration in the EU Courts’ case-law	340
a. Breach of the principle of good administration conferring a right to reparation upon individuals	340
b. Infringement of the various sub-components of the right to good administration conferring a right to reparation upon individuals	346
(1) Breach of the “reasonable time” requirement conferring a right to reparation upon individuals	347
(2) Breach of the “impartiality” requirement conferring a right to reparation upon individuals	350
(3) Breach of the “confidentiality” requirement conferring a right to reparation upon individuals	352
(4) Breach of the “right to be heard” conferring a right to reparation upon individuals	355
(5) Breach of the “statement of reasons” requirement conferring a right to reparation upon individuals	357
3. The “contractual” liability of the Union for breach of the right to good administration	359

B. Protection of the right to damages under the EU Courts’ case-law v its protection as a sub-component of the right to good administration in Article 41 CFR	369
1. Personal scope of protection of the right to damages in the EU Courts’ case-law v its protection under the Charter	369
a. Liability of the Union for the acts of its civil servants in the performance of their duties	371
b. Liability of the Union for damage caused to its own civil servants – as a consequence of the violation of their right to good administration	372
2. Material scope of protection of the right to damages in the EU Courts’ case-law v its protection under the Charter	374
3. Institutional scope of protection of the right to damages in the EU Courts’ case-law v its protection under the Charter	378
C. The right to damages as part of the right to good administration in the EU composite administrative proceedings	382
D. Conclusions on the interrelation between the right to damages and good administration	386
VI. “The principle of care” as a sub-component of good administration	392
A. The principle of care in the EU legal order: origins, definitions, confusing terminology and status	394
1. Respective interrelations between the right to good administration and the principles of “care”, “diligence” and “solicitude”	398
a. Principle of care: definition, scope of application and interrelation with the right to good administration	398
b. Principle of diligence: definition, scope of application and interrelation with the right to good administration	401
c. Principle of solicitude: definition, scope of application and interrelation with the right to good administration	405

Table of Contents

2. Status of the “individuals’ right to have their affairs handled impartially, fairly and within a reasonable time”/ principles of “care”/“diligence”/“solicitude”	410
B. The codification of the principle of care in Article 41(1) CFR: analysis of the “impartiality”, “fairness” and “reasonable time” requirements as sub-components of good administration	412
1. The principle of impartiality	413
a. Origins and development of the “impartiality” requirement in the EU legal order	413
b. The respect of the “impartiality” requirement in the context of administrative proceedings	418
c. Status of the “impartiality” requirement and interrelation with the right to good administration	422
2. The principle of fairness	427
a. Fairness: origins and development in the EU legal order	427
b. Status of the “fairness” principle and its interrelation with the right to good administration	431
3. Reasonable time	434
a. Reasonable time: origins and development in the EU legal order	435
(1) “Reasonable time” determined by the circumstances of the case: the criteria serving to establish the reasonableness of a time-frame	437
(2) Some examples of “reasonable time” in EU administrative proceedings	439
b. Should a “global assessment” of the time-frames of the various administrative and judicial proceedings supplement the “piecemeal” way of assessing the reasonableness of the respective procedures’ lengths?	441
c. Status of the “reasonable time” requirement and interrelation with the right to good administration	453
C. The “individuals’ right to have their affairs handled impartially, fairly and within a reasonable time” / the “principle of care” in composite administrative proceedings	462

D. Conclusions on the interrelation between the principle of care and good administration	463
Final Conclusions	469
1. The right to good administration at the confluence of its protection as a GPL and as a CFR right	471
a. Personal scope of protection of good administration as a CFR right and as a GPL	472
b. Material scope of protection of good administration as a CFR right and as a GPL	473
c. Institutional scope of protection of good administration as a CFR right and as a GPL	473
2. Sub-principles of the right to good administration and implications stemming from their juxtaposition	475
a. Sub-principles of the right to good administration	475
b. Implications stemming from the juxtaposition of the various sub-principles of the right to good administration	477
3. Substance of the right to good administration and other interrelated issues which highlight the importance of the right to good administration in the EU legal order	479
a. The right to be heard as a sub-component of good administration	479
(1) The rights of the defence and good administration	480
(2) The “personal”, “material” and “institutional” scope of the right to be heard as a GPL and as a sub-component of good administration in Article 41 CFR	480
(3) The protection of the right to be heard in “composite” administrative proceedings	483
b. The right of access to the file documents as a sub-component of good administration	483
(1) The right to good administration as a means to ensure the articulation between the right of access to the file and the general right of access to documents	484

Table of Contents

(2) The “personal”, “material” and “institutional” scope of the right of access to the file documents Sas a GPL and as a sub-component of good administration in Article 41 CFR	486
(3) The protection of the right of access to the file documents in “composite” administrative proceedings	488
c. The obligation of the administration to give reasons for its decisions as a sub-component of good administration	489
(1) The “personal”, “material” and “institutional” scope of the obligation of the administration to give reasons for its decisions as a GPL and as a sub-component of good administration in Article 41 CFR	490
(2) The protection of the obligation of the administration to give reasons for its decisions in “composite” administrative proceedings	491
d. The right to languages as a sub-component of good administration	492
(1) The “personal”, “material” and “institutional” scope of the right to languages as a GPL and as a sub-component of good administration in Article 41 CFR	493
(2) The protection of the right to languages in “composite” administrative proceedings	496
e. The right to damages as a sub-component of good administration	496
(1) The protection of the right to good administration in contractual matters	497
(2) The “personal”, “material” and “institutional” scope of the right to damages as a GPL and as a sub-component of good administration in Article 41 CFR	499
(3) The protection of the right to damages in “composite” administrative proceedings	500
f. The principles of care/diligence/solicitude as sub-components of good administration	502
(1) The principles of care/diligence/solicitude: definition and scope of application of these particular sub-components of good administration	503
(i) Principle of care	503
(ii) Principle of diligence	504

(iii) Principle of solicitude	505
(2) The codification of the principle of care in Article 41(1) CFR: analysis of the “impartiality”, “fairness” and “reasonable time” requirements as sub-components of good administration	506
(i) The “impartiality” and “fairness” requirements as sub-components of good administration	507
(ii) The “reasonable time” requirement as sub-component of good administration: need for a “global” assessment of the respective time-frames of the various administrative and judicial steps to a procedure	508
4. Final conclusions	510
Bibliography	511
Index	567

Abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights of the European Union
CJ	Court of Justice
CJEU	Court of Justice of the European Union
CST	Civil Service Tribunal
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ECB	European Central Bank
EIB	European Investment Bank
EP	European Parliament
EU	European Union
GC	General Court
GPL	General Principles of EU Law
MS	Member States
OLAF	European Anti-Fraud Office
TEC	Treaty of the European Community
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

“To include [the right to good administration] in the Charter could have a broad impact (...) helping to make the 21st century the “century of good administration””¹

1 The European Ombudsman Jacob Söderman solemnly argued that a right to good administration should be inserted in the Charter of Fundamental Rights of the European Union – Jacob Söderman, ‘Speech of the European Ombudsman – Public Hearing on the draft Charter of Fundamental Rights of the European Union, Preliminary remarks’ (Brussels, Belgium, February 2000), available on <<http://www.ombudsman.europa.eu/en/activities/speech.faces/en/355/html.bookmark>>.