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The provisions of the new Article 6 TEU concerning European Administrative Procedure

- using the example of the right to be heard -

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Abstract

The Treaty of Lisbon completely changed the substance of Article 6 of the Treaty on the European Union.. The rights guaranteed in administrative procedure are protected by three sources of fundamental rights which are named in Article 6 TEU. The right to be heard in administrative procedure is one of the most important procedural rights, not only on national but also on European level. On account of this, the thesis will deal with the right to be heard in European administrative procedure as guaranteed in the Charter of Fundamental Rights, in the European Convention on Human Rights and in the general principles of the Union's law where the constitutional traditions of Germany and the United Kingdom are at centre of interest.

Due to the Lisbon Treaty coming into effect, the Charter of fundamental rights became a legally binding source of law under Article 6 TEU. To be entitled to a fair and public hearing is not only mentioned in Article 41 (2) CFR; the ECJ jurisdiction had already clarified before that the right to be heard prior to unfavourable administrative decisions has to be guaranteed even without the existence of an express secondary provision.

First, the thesis analyses how the sources of law of Article 6 TEU work together. In the course of this, the existence of a 'triple' protection of fundamental rights will be revealed. Furthermore, the investigation shows that there still is a need for the 'general principles'.

Secondly, the thesis describes the structure of the right to a fair and public hearing of Article 41 (2) CFR, the functions of a hearing and particularly who is bound and who is legitimated by the provision.

Thirdly, this thesis shows that Article 6 ECHR is directly applicable in a narrow range of administrative proceedings and has indicative effect to the European administrative procedure in general.

At last, the thesis goes into the matter with the right to be heard as a general principle of the Union's law. Hereby the constitutional traditions of Germany and the UK are compared. This examination shows how distinct approaches of implementing Union law in the different Member States de facto lead to a fragmentation of technically harmonized Union law. Even though all Member States guarantee this right in general, the specific forms of granting still differ. This thesis points out that this mainly affects functions of administrative procedure in general as well as the requirements of the forms of action or effects of procedural errors. The thesis closes with a look into the future and poses the question whether a uniform codification of European administrative procedure is possible and / or desirable.

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Author's declaration

I declare that, except where explicit reference is made to the contribution of others, this thesis is my own work and has not been plagiarised.

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Signature

List of abbreviations

AC	Appeal Cases
AJDA	Actualité Juridique – Droit Administratif
AO	Abgabenordnung (German taxation regulations)
Art.	Article
Bd.	Band
BT-Drs.	Drucksache des Deutschen Bundestages
Bull.dr.h.	Bulletin des droits de l'homme
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court of Germany)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Collection of Decisions of the Federal Constitutional Court of Germany)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court of Germany)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (Collection of Decisions of the Federal Administrative Court of Germany)
CBNS	Common Bench New Series
CD	Collection of Decisions of the European Commission of Human Rights
CDE	Cahiers de droit européen
CFR	Charter of Fundamental Rights of the European Union
Ch.	Chapter
CMLR	Common Market Law Review
Cost.	Costituzione della Repubblica Italiana
CST	Civil Service Tribunal
DVBl.	Deutsches Verwaltungsblatt
EC	European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms / Reports of Judgements and Decisions
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports
ed.	editor
edn.	edition

eds.	editors
EJIL	European Journal of International Law
ELJ	European Law Journal
EL Rev	European Law Review
ERPL	European review of public law
et seq.	and the following page / following paragraph
et seqq.	and the following pages / following paragraphs
EuGRZ	Zeitschrift für Europäische Grundrechte
FILJ	Fordham International Law Journal
fn.	footnote
GC	General Court (formerly the Court of First Instance) / Grand Chamber of the ECHR
GG	Grundgesetz (German Constitution)
Hdb.	Handbuch
I-ss	Not yet reported in the European Court Reports
JCMS	Journal of Common Market Studies
LIEI	Legal Issues of Economic Integration
lit.	litera
NJW	Neue Juristische Wochenschrift
No.	number
NVwZ	Neue Zeitschrift für Verwaltungsrecht
OECD	Organization for European Cooperation and Development,
OJ	Official Journal of the European Union
para	paragraph
paras	paragraphs
QB	The Queen's Bench of the High Court of Justice of England and Wales
RDUE	Revue du droit de l'Union européene
REDP	Revue européenne de droit public
ReNEUal	Research Network on European Administrative Law
Rep.	European Human Rights Reports
Rs.	Rechtssache
RTDE	Revue trimestrielle de droit européen
RTDH	Revue trimestrielle des droits de l'homme
Sect.	Section
SGB X	Sozialgesetzbuch X, (German Social Code)

SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union (formerly EC Treaty)
VwVfG	Verwaltungsverfahrensgesetz (German Law on administrative procedure)
YEL	Yearbook of European Law
ZEuS	Zeitschrift für europarechtliche Studien
ZRP	Zeitschrift für Rechtspolitik
ZUR	Zeitschrift für Umweltrecht

1. Introduction

1.1. Purpose and aim of the thesis

Europeanisation does not only affect the direct implementation of Union law by the institutions and bodies of the Union. Furthermore it affects the public law of the Member States when they are implementing Union law. Due to the increasing expansion of economic integration and the further deepening of European co-operation, the area of European administrative law also has become more and more important. Now, Union law has to face the challenge of implementing its economic rules and framework in administrative proceedings, in administrative proceedings in the Union's own administrative law and in the administrative law of the Member States, which they use to implement the Union's requirements. Even in the area of administrative procedure, the impacts of European law on national proceedings occur more and more. However, a common integrative 'European administrative procedure' like a codification of administrative procedure does not exist until today. Reference points for procedural rights to be respected and upheld by the institutions and bodies are first of all the innumerous regulations of secondary legislation in significant fields of law.[1] Moreover, requirements for individual procedural rights in administrative procedure are imposed especially by the Charter of Fundamental Rights, the European Convention on Human Rights, the constitutional traditions common to the Member States as well as the general principles developed by the Union's courts case law.

This thesis examines the provisions of the new Article 6 TEU concerning the guarantee of one of the most important procedural rights: The right of the individual to be heard in European administrative procedure. The right to be heard, respectively the right to a fair and public hearing constitutes one of the most important parts of the rule of law[2] and of the fundamental rights, not only in administrative court proceedings, but also in administrative procedure.[3]

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[1] See for example Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ [2004] L 24/1; Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ [2009] L 343/51.

[2] See Case 294/83 *Les Verts* [1986] 1339, para 23. In the United Kingdom, this principle occurs in the form of 'natural justice', see below.

[3] See the jurisdiction of the German ‚Bundesverfassungsgericht' regarding the administrative court proceedings BVerfGE 9, 89 (95) and BVerfGE 34, 1 (7) and the 'Rechtsstaatsprinzip', see P. Kunig, *Das Rechtsstaatsprinzip,* p. 217 et seq. with additional references.

Even on the European level, the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known, became accepted at an early stage.[4]

The ECJ as well has recognized the right to be heard in administrative procedure and stated in the *Lisrestal* case that

> '*Observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question.*'[5]

By including the right to good administration in the Charter of Fundamental Rights in 2002, this right became part of an international declaration of human rights for the first time.

Even though the Charter of Fundamental Rights did not become legally binding until coming into force of the Treaty of Lisbon in 2009, its inherent right to be heard was part of the general principles of Union law even before.

The new Treaty of Lisbon completely changed the substance of Article 6 of the Treaty on the European Union. Article 6 TEU describes the sources from which the fundamental rights of the Union can be derived. The new Article 6 TEU does not only state that the Charter of Fundamental Rights shall have the same legal value as the Treaties, but also states that the Union shall accede to the European Convention on Human Rights. The general principles of Union law are also still mentioned in Article 6 TEU. The aim of the thesis is to not only to look at the substance of the guarantee, but also it is to examine how the new sources work together and what this means for the European administrative procedure, especially with regards to the right to be heard. Additionally, the question of establishing a consistent right to be heard from the different sources will be analysed.

1.2. Structure of the thesis

It is the objective of this thesis to point out which standards and demands the sources of Article 6 TEU provide for the right to a fair and public hearing in European administrative procedure as well as to outline similarities and differences of the different sources regarding the right to be heard.

Subject of this thesis is the examination of the guarantee of the right to be heard in European administrative procedure as well as the opportunity to derive a consistent right to

[4] Case 17/74 *Transocean Marine Paint* [1974] 1063, para 15.
[5] Case C-32/95 P *Lisrestal* [1996] ECR I-5373, para 21.

be heard from the different sources of law. Reference points are the different sources of law provided by Article 6 TEU.

First, the research intends to analyse how the sources of law of Article 6 TEU work together. In the course of this, the possible existence of a double or triple protection of fundamental rights will be examined. Furthermore, the investigation will try to determine if – besides the (future) binding force of the Charter and the Convention – there still is a need for the 'general principles', and how the mentioned sources rank amongst themselves.

Secondly, it is proposed to describe the structure of the right to a fair and public hearing of Article 41 (2) CFR. For this purpose, a discussion will show how the Charter came into effect and how the Courts of the Union referred to Article 41 (2) even before it became binding. In addition, the functions of a hearing will be described, particularly who is bound and who is legitimated by the provision.

Thirdly, the research will deal with the question whether Article 6 ECHR is applicable to the administration and the administration procedure and if so to what extent. It will be outlined how the right to a fair hearing is guaranteed and how the article might be only applicable in a narrow range of administration procedures.

At last, the thesis will go into matter with the right to be heard as a general principle of Union law as it results from the constitutional traditions of the Member States. Hereby, the constitutional traditions of Germany and the United Kingdom will be analysed and compared. Finally, soft law provisions will also be dealt with.

Due to Article 6 TEU as initial point, the proposed research does not have the objective to describe the right to be heard in secondary legislation or to analyse the ECJ's jurisdiction concerning these provisions in detail.

2. The sources of Article 6 TEU – double or triple protection of fundamental rights

2.1. Fundamental and procedural rights as general principles of European Union law

Apart from its codification in the Charta of Fundamental Rights, the right to be heard belongs to the general principles of Union law. According to Article 6 (3) TEU the fundamental rights arise from the general principles of Union law in the way they are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

Therefore, the fundamental rights as they have been developed by the ECJ from the general principles constitute an integral part of Union law.

Under the principle of conferral of Article 5 (2) TEU, the Union shall act only within the limits of its competences. Hence, the ECJ requires competences conferred upon this principle in the Treaties for the development of fundamental rights. This necessary competence can be derived from Article 19 TEU. Furthermore, the *effet utile* principle as well as the principles of equivalence and effectiveness contribute to the evolution of general principles by the ECJ. Apart from the 'original' fundamental Union rights, the procedural rights of administrative procedure also belong to the general principles developed by the ECJ.

The first point of reference in administrative procedure for case law developments based upon Article 19 TEU was the *Algera* case, where the ECJ resolved to develop the administrative law of the Community, taking into account the rules recognised in the legislation, academic writing and case law of the Member States.[6] Hence, Article 220 EC, now Article 19 TEU, played a key role for the Community's qualification as 'Community of Law'. Parallel to this qualification, the ECJ developed the rule of law principle[7] which is common to the constitutional principles of the Member States[8] and codified in the preamble and Article 2 TEU. Consequently, the competence of the ECJ to develop general principles of Union law results from the duty stated in Article 19 (1) TEU namely to ensure that in the interpretation and application of the Treaties the law is observed.

General principles are fundamental legal principles of Union law in the way they have been developed by the evolution of the Treaties and are specific for Union law. Another component of the general principles are fundamental rights as they result from the constitutional traditions common to the Member States and as guaranteed by the ECHR and elaborated by means of a comparative analysis of legal systems of the Member States.[9] In its jurisprudence, the ECJ expressively acknowledged that fundamental rights belong to the general principles of Union law.[10] Administrative procedural rights also constitute general principles in the sense of Article 6 (3) TEU, in particular the right to be heard as part of the administrative principle of a fair administrative procedure. As a general European administrative procedure has not been codified, neither in the field of direct nor indirect implementation of Union law, the general principles developed by the ECJ are of

[6] Joined Cases 7/56 and 3-7/57 *Algera* [1957] 83, 118; see Lord Millett, 'The Right to Good Administration in European Law' (2002) *Public law* 309 at p. 313.
[7] Case 294/83 *Les Verts* [1986] 1339, para 23.
[8] R. Arnold, 'A Fundamental Rights Charter for the European Union' (2000-2001) 15 *Tulane European and Civil Law Forum* 43, at p. 51.
[9] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 302.
[10] First in Case 29/69 *Stauder* [1969] 419, para 7.

special importance in the field of administrative procedure. Also the right to be heard as general principle of administrative procedure arises from the Courts´ jurisdiction. Even long before the codification in Article 41 (2) of the Charter of Fundamental Rights, the right to be heard was part of the general principle of good or sound administration.
A further source of interpretation of rights for the general principle of the right to be heard are according to Article 6 (3) TEU the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the constitutional traditions common to the Member States. In addition, specific rights to be heard can be derived from other international human rights agreements as well as *soft law* provisions.

2.2. The Union's accession to the European Convention on Human Rights

According to Article 6 (3) TEU fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, shall constitute general principles of the Union's law. Due to the coming into force of the Lisbon Treaty, the newly inserted Article 6 (2) TEU comes into focus. It provides that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.' The wording suggests that the TEU does not only empower the Union to accede to the ECHR, it also obliges it to take the necessary measures. An empowerment as currently stipulated in Article 6 (2) TEU became necessary due to Opinion 2/94 of the ECJ on Accession the ECHR. The ECJ stated that the accession of the Union to the ECHR had to face two main problems: Firstly, the competence of the Community to conclude such an agreement and secondly, its compatibility with the provisions of the Treaty, in particular those relating to the jurisdiction of the Court. Furthermore, the ECJ concluded that such a modification of the system for the protection of human rights in the Community would be of constitutional significance and therefore would go beyond the scope of ex-Art. 308 EC, now Art. 352 TFEU. It could be brought about only by way of Treaty amendment.[11] However, Article 6 (2) TEU now emphasises that 'Such accession shall not affect the Union's competences as defined in the Treaties' and the accession to the ECHR demanded modifications of the ECHR. According to Protocol No. 14 to the European Convention on Human Rights, the possibility was given that Article 59 ECHR could be amended in lights of the possible accession by the Union. The new second paragraph 'The European Union may accede to this Convention' makes

[11] Opinion 2/94 on Accession to the ECHR [1996] ECR I-1759, paras 9, 35; see S. Weatherill, *EU Law,* 8th edn. (Oxford, 2007), 64.

provision for this possibility.[12] Due to Article 19 of the Protocol, it entered into force after ratification of all Member States on 01 June 2010. Even after entering into force of the protocol, further modifications to the Convention will be necessary. Those could be brought about either through an amending protocol to the Convention or by means of an accession treaty to be concluded between the European Union, on the one hand, and the State Parties to the Convention, on the other.[13]

What is more, obstacles have to be overcome even from the Union's point of view. On the one hand the Member States have imposed several conditions in Protocol No. 8[14] to be respected when proceeding with the accession. This Protocol requires that the specific characteristics of the Union must be preserved and the competences of the Union and the powers of its institutions must not be affected. On the other hand, the Treaty of Lisbon stipulates further procedural barriers for the accession in Article 218 (6) a) ii) TFEU. This provision states that the conclusion of the agreement will require the consent of the European Parliament. Article 218 (8) TFEU provides that such accession will require unanimity in the Council as well as approval by the Member States.[15]

Due to these high requirements, the question arises when the accession of the Union to the Convention will finally take place. Furthermore, it can be assumed that concessions have to be made to certain Member States, comparable to the debate regarding the legal binding of the Charter of Fundamental Rights. However, the ECHR is going to become a direct source of law as part of the general principles, besides the function of source of interpretation of rights, which is its actual legal status. For this thesis it is presumed that the accession will take place. Therefore the question arises how the different sources of law of Article 6 TEU rang amongst themselves.

2.3. Relationship between the Charter of Fundamental Rights and the general principles in the protection of human rights

Thus, according to Article 6 (2) and (3) TEU, the right results from three already named sources of rights: The Charter of Fundamental Rights, the European Convention on Human Rights and the general principles.

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[12] E. Myjer, 'Can the EU join the ECHR – General Conditions and Practical Arrangements' in I. Pernice et al. (eds.), *The future of the European judicial system in a comparative perspective* (Baden-Baden, 2006), 297 at p. 298.

[13] Study of the technical and legal issues of a possible EC/EU accession to the European Convention of Human Rights, Report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting (25-28 June 2002), DG-II(2002)006.

[14] Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[15] J.-C. Piris, *The Lisbon Treaty* (Cambridge, 2010), 163 et seq.

Firstly, the question of the relationship between the Charter of Fundamental Rights and the general principles of Article 6 TEU should be examined. The relation between those two sources could become a challenging task, if the scope of protection of the general principles exceed those of the Charter. Thus, Article 6 TEU or the Convents documents should be analysed with reference to the matter if they provide a hierarchy of sources of fundamental rights.

At the outset, it has to be stated that with regard to substance, the guarantees of the Charter largely match the ones of the general principles.

It might be assumed that the parallel existence of paragraphs (1) and (3) of Article 6 TEU already demonstrates the equal status of both sources and thus no specific order of precedence of the sources can be extracted from Article 6 TEU.[16] In this case, both guarantees would be applicable cumulatively and the entitled person could refer to the guarantee which offers a wider scope of protection.

Attention should be paid to the fact that the Charter of Fundamental Rights shall have the same legal value as the Treaties according to Art. 6 (1) TEU; thus, these components constitute equal cornerstones of the Union's primary law. In the case that the general principles would be ranked equally to the rights derived from the Charter, an unwritten source of law would be ranked equally to the Treaties. This conclusion however cannot be drawn from Article 6 TEU.

Another option would be to refer to the history and evolution of the general principles. Comparable to ex-Article 6 TEU, they could be allowed to enjoy primacy over the Charter whereas the latter could be referred to a supporting position for interpretation of the scope of protection.

This approach interferes with the wording of Article 6 TEU. The wording of the new Article 6 TEU which emphasises the legal binding and equality of the Charter to the Treaties as well as the European legislator's will would be undermined. This is due to the fact that otherwise the revision of Article 6 TEU after the Treaty of Lisbon would be dispensable and not even only declaratory.[17]

Another possibility for the ECJ would be to manage two separate but parallel fundamental rights regimes: The Charter applying to the institutions of the Union and Member States implementing Union law and the general principles applying in all other situations, such as Member State derogations from the Treaties.[18]

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[16] W. Weiß, 'Grundrechtsquellen im Verfassungsvertrag' (2005), *ZEuS,* 323 at p. 325.

[17] Similarly E. Schulte-Herbrüggen, 'Der Grundrechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon' *ZEuS* (2009), 343 at p. 353.

[18] M. Dougan, 'The Treaty of Lisbon: Winning minds, not hearts' *CMLR* 45 (2008), 617 at p. 664.

This approach would undermine the required unity and transparency as well as the clarity of the protection of fundamental rights.

Article 6 TEU expressly issues a clear statement: The three sources of fundamental rights shall guarantee the protection of these rights. Due to the explicit wording and the systematic position in Article 6 (1) TEU, the Treaties and the Charter of Fundamental Rights rank equally on the top of the fundamental rights' hierarchy. This leads to the conclusion that the Charter takes precedence and ranks at the top of the fundamental rights hierarchy pyramid. This conclusion is as well in accordance with the rule of law which stipulates the primacy of written law. The provisions of the Charter thus function as *leges speciales* to the general principles of Article 6 (3) TEU.[19]

The general necessity of the general principles as source of the Union's fundamental rights still remains even after coming into force of the Lisbon Treaty. They keep their status as fundamental rights with 'constitutional status', but rank below the Charter. They mainly have a -highly important- complementary function.

Due to the fact that, with regards to substance, the guarantees of the Charter largely match the ones of the general principles, the general principles serve to acknowledge additional fundamental rights, which occur by the evolution of the traditions common to the Member States.

This is in line with classic constitutional doctrine which never interprets the catalogues of fundamental rights in constitutions as being exhaustive, thus permitting the development of additional rights through case-law as society changes.[20]

For reasons of transparency and legal certainty of the European protection of fundamental rights, it is necessary that the clear-cut guarantees of the Charter which are well refined and differentiated by the jurisdiction of the ECJ will not be undermined by also taking into account the general principles.

In summary, the fundamental rights are guaranteed in a three-tier hierarchy under the Treaty of Lisbon. First and foremost, the guarantees as provided by the Charter of Fundamental Rights, having the same legal value as the Treaties themselves, rank at the top of the fundamental rights hierarchy pyramid.

In case of the Union's accession to the European Convention on Human Rights, it would become a directly enforceable source of rights as an international treaty following the

[19] C. Grabenwarter, 'Auf dem Weg in die Grundrechtsgemeinschaft?' *EuGRZ* (2004), 563 at p. 569.
[20] The European Convention, CONV 528/03, p. 14.

procedure of Article 218 TFEU, but it would be subordinated to the Treaties and hence the Charter of Fundamental Rights with the addition to be prior to secondary legislation.[21]
The fundamental rights of the general principles, and with them the ECHR and the constitutional traditions common to the Member States still serve as a source of inspiration and interpretation of rights and hence as an omnibus clause; as far as the Charter codifies identical rights, the ones codified in the Charter are prior and more particular compared to the general principles.

2.4. The guarantees of Article 6 TEU – double or triple protection of fundamental rights?

The coming into force of the Treaty of Lisbon along with the revision of Article 6 TEU led to a far-reaching change in the system of protection of fundamental rights on European level. Consequently, the new relationship and hierarchy of the different sources of law had to be determined. Through the chance, sources of interpretation became directly binding sources of law, leading to an alteration of the system of protection of fundamental rights within a multi-level system. Hence, this raises the question, of how many levels and sources the Union's system of protection of fundamental rights is composed.
Firstly, the wording of Article 6 TEU has to be investigated. In its three paragraphs, Article 6 TEU provides three different sources of European fundamental rights.
Article 6 (1) TEU acknowledges the binding legal force of the Charter. Additionally, it is granted the same legal value as the Treaties. Its second paragraph stipulates that the Union shall accede to the Convention on Human Rights whereas the third paragraph still guarantees the fundamental rights as provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.
By virtue of its wording, Article 6 TEU provides a threefold system of protection of fundamental rights on Union level.
As soon as the Union will accede to the Convention on Human Rights, it will become a directly applicable source of law. Simultaneously, it will remain a source for the interpretation of fundamental rights for the general principles in the context of Article 6 (3) TEU. Additionally, by the virtue of Article 52 (3) CFR, the general principles will continue to incidental influence on the significance as well as the scope of the fundamental rights as acknowledged in the ECHR and CFR.

[21] E. Pache & F. Rösch, 'Die neue Grundrechtsordnung der EU nach dem Vertrag von Lissabon' *EuR* (2009), 769 at p. 785.

Because of its new legal binding force the Charter now constitutes a part of primary law. Due to its equality concerning the 'same legal value', it represents the third corner pillar of the Union's primary law besides the TEU and the TFEU. Insofar, this results in a 'double' protection of fundamental rights on Union level.

It can be deduced from Article 6 (3) TEU, which correlates to ex-Article 6 (2) TEU that the unwritten fundamental rights remain part of the primary law as general principles. The protection of fundamental rights is even strengthened by the continuity of the general principles in the way it is stipulated in Article 6 TEU in addition to the legal binding of the Charter.

What is more, Article 6 (3) TEU makes it clear that the incorporation of the Charter does not prevent the ECJ from drawing on the general principles in form of the two sources ECHR and common constitutional traditions to recognise additional fundamental rights which might emerge from any future developments in those two sources.[22]

In addition, the Charter as a written catalogue of fundamental rights is limited to the extent it had on the day of its proclamation. On that account, it naturally could not foresee future developments. The evolution of rights is a dynamic process particularly in communities across state-borders whereas a continuous modification of the written Charter in fact is not realisable.

The general principles are therefore still necessary to adapt the level of protection of fundamental rights to the particular requirements of the Union and its Member States. The application of the general principles as a third corner pillar of the protection of fundamental rights is therefore inevitable.

In conclusion, it can be assumed that Article 6 TEU recognises three different sources of rights by keeping the general principles as an important source of law. The protection of fundamental rights on the European level hence is guaranteed by a multi-level system of fundamental rights, namely a triple protection consisting of the Charter of Fundamental Rights, the Convention on Human Rights and the general principles.

[22] The European Convention, CONV 528/03, p. 13.

3. The right to a fair and public hearing in Article 41 (2) CFR

3.1. The legal binding force of Article 41 CFR in its historic development

3.1.1. The history of the Charter – from the preliminary works to the Lisbon Treaty

Even long before the decision was made to establish a European Charter of Fundamental Rights the significance of protection of fundamental rights became acknowledged on European level. Whereas the founding Treaties originally were established as traditional international treaties intending to create an Economic Community due to which an infringement of individual fundamental rights could not be foreseen, a discussion with questions of protection of fundamental rights became inevitable by establishing the direct applicability[23] and supremacy[24] of Community law at the latest.

In the *Stauder* case of 1969 the ECJ expressly derived fundamental rights from the general principles of Community law for the first time.[25] In the subsequent decisions the commitment to the protection of fundamental rights became even more serious. The ECJ concretised its point of view in a way that the Court shall be bound to draw inspiration from constitutional traditions common to the Member States to safeguard the fundamental rights.[26] In the following years several attempts were made to consolidate the fundamental rights created as part of the legal order and to codify them in a modern catalogue of European fundamental rights.[27]

At the European Council Cologne meeting in June 1999 the Council finally decided on the drawing up on a Charter of Fundamental Rights of the European Union.[28] The Presidents of the European Parliament, the Council and the Commission signed the Charter and it was solemnly proclaimed at the European Council Meeting in Nice on 07 December 2000.[29] However, the Charter explicitly did not become legally binding by its proclamation.

After the Treaty of Nice came into force in February 2003, the heads of state and heads of government of the Member States called for proceeding reforms.

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[23] Case 26/62 *Van Gend & Loos* [1963] 3.
[24] Case 6/64 *Costa/ENEL* [1964] 1251; now „direct applicability and supremacy of Union law".
[25] Case 29/69 *Stauder* [1969] 419, para 7; now „general principles of Union law.
[26] Case 11/70 *Internationale Handelsgesellschaft* [1970] 1125, para 4; Case 4/73 *Nold* [1974] 491, para 13.
[27] For example the 'Declaration of Fundamental Rights and Freedoms', OJ [1989] C 120/51 and the 'Resolution of the Constitution on of the European Union', OJ [1994] C 61/155.
[28] Conclusions of the Presidency, European Council Meeting Cologne, 3-4 June 1999, Annex IV.
[29] Concerning the drafting of the Charter see G. de Burca, 'The drafting of the European Union Charter of fundamental rights' (2001) 26 *EL Rev* 126.

Therefore, the main purposes of the European Council Meeting in Laeken in December 2001 were simplifying the Treaties, setting out the powers of the Union and the Member States as well as considering the status of the Charter of Fundamental Rights.[30] In these matters, the Council decided to establish a 'Convention on the Future of Europe' under the leadership of Valéry Giscard d'Estaing, a former French president, who finished its work with the Draft Treaty establishing a Constitution for Europe, in which the Charter of Fundamental Rights should be incorporated into Part II and be given legal force.[31]

The Treaty establishing a Constitution for Europe[32] was finally signed in Rome on 29 October 2004 and was supposed to come into force in November 2006. However, by 01 January 2007, eighteen Member States had ratified the Treaty, seven had suspended their ratification process and France and the Netherlands had rejected the Treaty by referendum.[33] Finally, the Treaty failed due to serious reservations concerning fundamental problems of legitimacy as well as objections against the Constitution which did not only address its innovative parts, but also principles and rules regarding the common market.[34] What is more, the incorporation of the Charter into Part II of the Constitution met further concerns.

After a pause for reflection imposed by the European Council, the German presidency decided to convoke a new intergovernmental conference, which was instructed to elaborate a new draft Treaty before the end of 2007 on the basis of a detailed mandate adopted by the European Council.[35] The new Treaty was signed at Lisbon on 13 December 2007 and came into force on 01 December 2009.

The direct incorporation of the Charter into the Treaty became abandoned due to the United Kingdom's, Poland's and Czech Republic's objection.

However, the Charter's exclusion from the Treaty does not change its primary law status. The legal binding force of the Charter in the way it was intended by the Constitutional Treaty is created by the 'detour' via Article 6 (1) TEU, except for the United Kingdom, Poland and the Czech Republic, which succeeded to be granted a special protocol.[36] According to Article 6 (1) TEU, the Charter shall have the same legal value as the Treaties,

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[30] A. Reid, *European Union,* 4th edn. (Edinburgh, 2010), 8.

[31] C. W. Timmermanns, 'The Genesis and Development of the European Communities and the European Union' in P. J. G. Kapteyn et al. (eds.), *The Law of the European Union and the European Communities* 4th edn. (Alphen aan den Rijnn, 2008), 1 at p. 40 et seq.

[32] Treaty establishing a Constituion for Europe, OJ [2004] C 301/1.

[33] J.-C. Piris, *The Lisbon Treaty* (Cambridge, 2010), 25.

[34] C. W. Timmermanns, 'The Genesis and Development of the European Communities and the European Union' in P. J. G. Kapteyn et al. (eds.), *The Law of the European Union and the European Communities* 4th edn. (Alphen aan den Rijnn, 2008), 1 at p. 42.

[35] C. W. Timmermanns, 'The Genesis and Development of the European Communities and the European Union' in P. J. G. Kapteyn et al. (eds.), *The Law of the European Union and the European Communities* 4th edn. (Alphen aan den Rijnn, 2008), 1 at p. 42.

[36] See below, Protocol on the application of the Charter to Poland and the United Kingdom.

whereas their provisions shall not extend in any way the competences of the Union as defined in the Treaties. Due to the Union's obligation to accede the ECHR codified in Article 6 (2) TEU, Article 6 TEU thus arises to become an 'Article of recognition of human rights'.

3.1.2. The Protocol on the application of the Charter to Poland and the United Kingdom

According to Article 6 (1) TEU the Charter shall have the same legal value as the Treaties, whereas their provisions shall not extend in any way the competences of the Union as defined in the Treaties. In the negotiations before signing the Lisbon Treaty, the United Kingdom and Poland succeeded to be granted the Protocol on the application of the Charter to Poland and the United Kingdom.[37] This protocol has later been amended to the Czech Republic. It has often been viewed as being an 'opt-out', and that its aim and result would be that the Charter would not be binding for the United Kingdom and Poland.[38]

It might be argued that the question of the legal binding status is factually obsolete whether the fundamental right concerned as well constitutes a general principle, which is the case with regards to the right to be heard. This will be examined by the thesis. However, the fundamental rights which constitute general principles of Union law are binding for Poland and the United Kingdom anyhow.

However, this question is debatable. Firstly, it is necessary to have a look at the wording. Article 1 (1) of the Protocol states that the Charter does not extend the ability of the ECJ or any court or tribunal of Poland or the United Kingdom to declare that the laws, regulations or administrative provisions, practices or actions of Poland or of the United Kingdom are inconsistent with the Charter. According to Article 1 (2) of the Protocol, Title IV of the Charter does not create justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom have provided for such rights in their national laws. Article 2 ensures that a provision of the Charter which refers to national laws and practices does only apply to Poland or to the United Kingdom to the extent that the rights or principles that it contains are recognised in their law or practices.

None of the provisions of this protocol clearly state that the Charter should not be legally binding to Poland or the United Kingdom. Article 1 (1) basically ensures that the Charter does not create new rights. This fact, however, is not a new one, but already stated in

[37] Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OF [2007] C 306/156.
[38] J.-C. Piris, *The Lisbon Treaty* (Cambridge, 2010), 160.

Article 51 CFR.[39] Notably, the European Union Committee of the House of Lords clearly said 'The Protocol is not an opt-out from the Charter. The Charter will apply in the United Kingdom even if its interpretation may be affected by the terms of the Protocol.'[40]
Except from Article 2, which could be possible evidence of an opt-out from the rights of Title IV,[41] the Charter will evidently continue to apply to Poland and the United Kingdom. Therefore, they will have to respect the rights of the Charter under Article 6 (1) TEU when they are implementing Union law. Due to this, the Charter of Fundamental Rights constitutes a source of law under Article 6 TEU for all Member States even for The United Kingdom, Poland and the Czech Republic.

3.1.3. Legal status and force of the Charter

As mentioned above, the Charter did not become a direct legally binding source of law not until coming into force of the Lisbon Treaty. Until this point, the Charter had the status of a non-binding declaration notwithstanding serving as a decisive source of inspiration for the general principles. To analyse the structure and substance of the Charter, the right to good administration and its inherent right to be heard, it is indispensable to examine the development of its legal binding force, its acknowledgement in the Court's case law and the commitment of the European Union institutions. The treatment of the Charter and in particular of its provided rights in the past has decisive impact on today's legal status. This especially applies to the substance and scope of protection of those rights, which have not been established in primary legislation before coming into force of the Lisbon Treaty. They have been developed by the Courts' case law for which the Charter served as source of inspiration of rights. In spite of the lack of binding force, the point of view of the European Union institutions became clear by the solemnly proclamation of the European Parliament, the Council and the Commission in Nice on 07 December 2000. Furthermore, it became fixed in the public's consciousness. Additionally, the Charter de facto took on great importance as a source of interpretation of rights. This became clear by the commitment of the European Union institutions as well as the frequent references to the Charter in the jurisdiction of the courts and the opinions of many Advocates General.

[39] J.-C. Piris, *The Lisbon Treaty* (Cambridge, 2010), 161 et seq.
[40] Report by the House of Lords, European Union Committee, 10th Report of Session 2007-2008, *The Treaty of Lisbon: An Impact Assessment,* 13 March 2008, HL Paper 62, para 5.87.
[41] See the analysis of C. Barnard, 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in S. Griller & J. Ziller (eds.) *The Lisbon Treaty* (Heidelberg, 2008), 257 at p. 268 et seqq.

3.1.4. References to the Charter in the jurisdiction of the courts of the European Union

A self-commitment of the Courts to the Charter was not given and de facto not possible before it became legally binding by virtue of the Lisbon Treaty. However, the jurisdiction of the Courts showed a tendency towards referring to the Charter, even though they did not acknowledge it as the decisive legally binding source of law.

The Charter was mentioned by the General Court for the first time in the *Mannesmannröhren-Werke*[48] case. The General Court pointed out that the Charter could be of no consequence for the purpose of review of the contested measure, because it was adopted prior to that date.[49]

Soon afterwards the General Court referred for the first time expressly to the Charter and the right to good administration of Article 41 CFR. It stated that the Charter provides additional evidence of the status and relevance of the right of good administration.[50] The contested measure in the *max.mobil*[51] case also took place prior to the date of the Charter's proclamation, but the General Court referred to the Charter and the right to good administration only in the course of the examination of admissibility. In this case, the General Court uses the set phrase of the Charter's confirmation of the general principles that are common to the constitutional traditions of the Member States.[52] Special attention is should be paid to the Order of the President of the General Court in the *Technische Glaswerke Ilmenau*[53] case where the right to good administration is described to be the result of the rule of law. It also makes reference to the *max.mobil* case and Article 41 CFR.[54]

In the *Alrosa*[55] case, the General Court expressly referred to the right to be heard pursuant to the first indent of Article 41 (2) CFR for the first time in recent jurisdiction. The applicant based her right to be heard on the European regulation on the implementation of the rules on competition.[57] According to recital No. 37 of the regulation it respects the fundamental rights and observes the principles recognised in particular by the Charter.

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[48] Case T-112/98 *Mannesmannröhren-Werke* [2001] ECR II-729.
[49] Case T-112/98 *Mannesmannröhren-Werke* [2001] ECR II-729, para 76.
[50] J. Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' (2002) 40 *JCMS* 471, at p. 474.
[51] Case T-54/99 *max.mobil* [2002] ECR II-313.
[52] Case T-54/99 *max.mobil* [2002] ECR II-313, para 48; concerning the significance of this case in the context of good administration, see K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 305; L. Azoulai, 'Le principe de bonne administration' in J.-B. Auby & J. Dutheil de la Rochère (eds.), *Droit administrative européen* (Bruxelles, 2007), 493 at p. 505 et seq.
[53] Case T-198/01 R *Technische Glaswerke Ilmenau* [2002] ECR II-2152.
[54] Case T-198/01 R *Technische Glaswerke Ilmenau* [2002] ECR II-2152, para 85.
[55] Case T-170/06 *Alrosa* [2007] ECR II-2601.
[57] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

Accordingly, this regulation should be interpreted and applied with respect to those rights and principles. Thus, the regulation directly submits to the Charter in its recitals which leads to a case of de facto self-commitment.[58]

Also in the following judgements, the General Court repeatedly referred to the Charter and in particular to the right to good administration pursuant to Article 41 CFR, for example in the *JCB Services*,[59] *Sunrider*[60] and *Compagnie maritime belge SA*[61] cases.

The case law makes clear that the Charter became more and more referred to, to confirm or underline the rights derived from the general principles.

The Advocates General of the Court of Justice have established a practice of invoking the Charter as legal authority. Most of the references attribute a rather limited value to the Charter.[62] Advocate General *Alber* stated less than two month after proclamation of the Charter that the Charter underlined the importance of a fundamental value judgment of Community law.[63] In the following decisions the Charter was referred to confirm the particular Advocate's general point of view. [64] The Advocate General *Tizzano* went so far to refer to the Charter as a stand-alone source of law for legal testing of human rights even without legal force of the Charter.[65]

Worth mentioning are the recent references to the Charter which deal with the right to good administration pursuant to Article 41 (1) CFR. In the *Koldo Gorostiaga Atxalandabaso*[66] case, the appellant alleged breach of the Code of Good Administrative Behaviour as well as Article 41 CFR. However, the Code constitutes a resolution of the European Parliament to put forward a legislative proposal and not a binding legal

[58] Case T-170/06 *Alrosa* [2007] ECR II-2601, para 203.
[59] Case T-67/01 *JCB Servies* [2004] ECR II-49, para 36.
[60] Case T-242/02 *Sunrider* [2005] ECR II-2793, para 51.
[61] Case T-276/04 *Compagnie maritime belge SA* [2008] ECR II-1277, para 39.
[62] See for example the first and most recent references to the Charter, Opinion of Advocate General Alber, Case C-340/99 *TNT Traco SPA* [2001] ECR I-4109, para 94; Opinion of Advocate General Tizzano, Case C-173/99 *BECTU* [2001] ECR I-4881, para 26 et seqq.; Opinion of Advocate General Mischo, Case C-192/99 P *D and Sweden v. Council* [2001] ECR I-4319, para 97; Opinion of Advocate General Kokott, Case C-97/08 P *Akzo Nobel NV* [2009] ECR I-8237, para 63; Opinion of Advocate General Kokott, Case C-441/07 P *Alrosa* [2010] ECR I-5949, para 167 concerning the right to be heard pursuant to Article 41 CFR.
[63] Opinion of Advocate General Alber, Case C-340/99 *TNT Traco SPA* [2001] ECR I-4109, para 94.
[64] Opinion of Advocate General Mischo, Case C-192/99 P *D and Sweden v. Council* [2001] ECR I-4319, para 97; Opinion of Advocate General Jacobs, Case C-50/00 P *Unión de Pequeños Agricultores* [2002] I-6677, para 39; concerning the scope of application see J. de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration' in A. Arnull et al. (eds.), *Continuity and Change in EU Law* (Oxford, 2008), 157 at p. 164 et seq.
[65] Opinion of Advocate General Tizzano, Case C-173/99 *BECTU* [2001] ECR I-4881, para 26 et seqq.; J. Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' (2002) 40 *JCMS* 471, at p. 474.
[66] Opinion of Advocate General Trstenjak, Case C-308/07 P, *Koldo Gorostiaga Atxalandabaso* [2009] ECR I-1059, para 73 et seq.

provision.[67] Therefore, the appellant's rights have not been infringed, so that Advocate General *Trstenjak* did not consider Article 41 CFR as infringed.[68]

Contrary to the General Court's and the Advocates' General opinions, the European Court of Justice did not mention the Charter for a very long time. Regardless whether the applicants asserted rights from the Charter or the Advocates General referred to it, the ECJ ignored those attempts, probably to not be forced to take an unequivocal stand.[69] For the first time, the Charter has been explicitly referred to in an ECJ-case by its President in the Order *Technische Glaswerke Ilmenau.*[70] The ECJ's Order used a similar formula to the one of the General Court stating that Article 41 CFR confirms 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.

Explicit reference in an ECJ's judgement was not made before 2006 when the ECJ dismissed a case filed by the European Parliament against the Council directive 2003/86/EC on the right to family reunification.[71] Even though the ECJ pointed out that the Charter constitutes a non-legally binding document, it emphasised its significance by mentioning it in the recitals.[72]

In the following cases the ECJ took the same path as the General Court and proved that the particular fundamental right is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in the ECHR and which has also been reaffirmed by the Charter.[73] Since then, the ECJ regularly makes references to the Charter.[74]

After the failure of the Constitutional Treaty, the Charter is now legally binding by link in Article 6 (1) TEU. Due to this fact, it can be assumed that the ECJ is now going to refer to

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[67] See below section 3.2.6. 'The Code of Good Administrative Behaviour'.

[68] Opinion of Advocate General Trstenjak, Case C-308/07 P, *Koldo Gorostiaga Atxalandabaso* [2009] ECR I-1059, para 73 et seq.

[69] As well J. de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration' in A. Arnull et al. (eds.), *Continuity and Change in EU Law* (Oxford, 2008), 157 at p. 165.

[70] Case C-232/02 P (R) *Technische Glaswerke Ilmenau* [2002] ECR I-8977, paras 85 and 115.

[71] Council directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ [2003] L 251/12.

[72] Case C-540/03 *European Parliament v Council* [2006] I-5769, para 38; a direct recourse to the Charter remained avoided, see J. de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration' in A. Arnull et al. (eds.), *Continuity and Change in EU Law* (Oxford, 2008), 157 at p. 168.

[73] Case C-432/05 *Unibet* [2007] ECR I-2271, para 37.

[74] For example Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, para 46; Case C-411/04 P *Salzgitter Mannesmann GmbH* [2007] ECR I-959, para 33; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, para 90 et seq.; Joined Cases C-402/05 P and C-415/05 P *Kadi and al Barakaat* [2008] ECR I-6351, para 335.

the Charter permanently and will increasingly consult it not only as source of interpretation of rights, but in the future also as direct binding source of law.

3.2. Structure and substance of the right to be heard of Article 41 (2) CFR

3.2.1. Formation and development of Article 41 (2) CFR

Article 41 CFR, which guarantees the right to good administration and the therein included right to be heard before any adversely measure, can be found in Chapter V of the Charter under the headline 'Citizen's Rights'. Besides the right to good administration, 'Citizen's Rights' contains the right of access to documents in Article 42 CFR, the right to refer to the Ombudsman in Article 43 CFR and the right to petition the European Parliament in Article 44 CFR. The provision of the right to good administration is structured in four paragraphs. Despite its systematic position in the 'Citizen's Rights' chapter, the wording of the law shows clearly its status as a human right for 'every person'. Article 41 (1) CFR states that …'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union'. The incorporation of the right to good administration in general as well as in particular its arrangement in the first paragraph is mainly based on the activities of the Ombudsman *Jacob Söderman.* His influence on the drafting of Article 41 of the Charter is apparent. His proposals and initiatives concerning a codification of administrative law considerably contributed to the inclusion of the right to good administration during the consultations about the creation of the Charter. In his famous speech in front of the Convention on the draft Charter under the Chairman *Roman Herzog* on 02 February 2000, he pointed out …'that the citizen has a right that his or her affairs be dealt with properly, fairly and promptly by an open, accountable and service-minded public administration'.[75] The second paragraph of Article 41 CFR represents in detail some of the guarantees which are already covered by the first paragraph. This is proved by the wording due to which the right to good administration 'includes' the following rights of the second paragraph. The incorporation of the right to good administration into the Charter was the first explicit recognition of the right in an international human rights declaration, although it had been

[75] Available online at http://www.ombudsman.europa.eu/en/activities/speech.faces (date viewed April 4th 2012); Charte 4131/00 Contrib 26, at p. 4; Charte 4284/00 Convent 28, at p. 26; concerning the role of the Ombudsman regarding the right to good administration see W. Yeng-Seng, 'Le médiateur européen, artisan du developpement du droit à une bonne administration communautaire' *RTDH* (2004) 527, at p. 529 et seq. and N. Scafarto, 'Quelques considérations sur le rôle du médiateur européen dans la sauvegarde du principe de bonne administration' *RTDE* (2007) 899, at p. 899 et seqq.

mentioned before in documents of the Council of Europe and in OECD documents.[76] One of the first legal documents dealing with the principles of good administration was the 1977 Resolution of the Council of Europe 'On the protection of the Individuals in Relation to the Acts of Administrative Authorities'[77] which was the first document on the organisation of European administrative procedure. It contained fundamental principles concerning the right to be heard, the right of access to information, the right of assistance and representation, the obligation to state reasons for decisions and finally the obligation to state available remedies against an act by an administration.[78] Even if it is in the nature of a resolution that it is not legally binding, for the first time a minimum standard of procedural guarantees became established in the form that later became concretised in the right to good administration of Article 41 CFR.

Reactions in the doctrine concerning the provision of Article 41 CFR are restrained and differentiated.[79] This might be reducible to the fact that whereas Article 41 (1) and (2) essentially constitute a summary of existing case law, the right of every person to have his or her affairs handled 'fairly' is in some way new and undetermined. It is striking to see that none of the judgements which have been referred to by the Convention in its explanatory notes grants this right to be treated 'fairly'.[80] As a result, the Charter surpasses the established juridical status with this term. Although the European Ombudsman already required a right to be treated 'fairly' and its subsequent incorporation into the Charter, this does not change the fundamental new creation of an undefined legal term, whose precise substance can only be developed and concretised by and by. Due to the legal effect of the Charter due to coming into force of the Lisbon Treaty, it can be expected that case law will precise and concretise this wording and provide a direction for a definition. This constitutes the opportunity to challenge the criticism concerning the indefiniteness of the provision and further develop this guarantee.

[76] See below section 5.3.; J. Södermann, 'Gute Verwaltung als Grundrecht in der Europäischen Union' *Die Union* (2001) 60, at p. 62.

[77] Resolution of 28 September 1977 No. R 77 (31) of the Council of Europe 'On the protection of the Individuals in Relation to the Acts of Administrative Authorities'.

[78] C. H. Hofmann 'Good administration in EU law – a fundamental right?' *Bull.dr.h.* 13 (2007) 44 at p. 44.

[79] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 324 et seqq. is of the opinion, that Article 41 CFR cannot provide a solution for political and financial accountability of the Union's administration. C. H. Hofmann 'Good administration in EU law – a fundamental right?' *Bull.dr.h.* 13 (2007) 44 at p. 52 criticises the limitation of the scope of Article 41 CFR and is of the opinion, that the notion of good administration as formulated in Article 41 CFR is far too detailed.

[80] Explanatory note to Article 41 CFR, Notes from the Praesidium on the draft Charter of Fundamental Rights of the European Union, Charte 4473/00 Convent 49, p. 36.

3.2.2. Constituent parts of the right to be heard

The right to be heard is applicable in the overall administrative procedure and provides different components in individual process stages. In its first step, the right to be heard requires in principle that the person concerned should be informed of the commencement of the proceedings, since without such information the person cannot submit observations on the objections.[97] This claim is released in all proceedings which are liable to culminate in a measure adversely affecting that person and if his or her interests are perceptibly affected by a decision taken by a public authority.[98] The person concerned has to be given sufficient information about the objections made against him or has to be informed about the material object of the procedure, in general.[99] The right to be informed besides the right to express one's opinion, is a decisive aspect of the right to be heard.

In performing their duty to provide information, the Union institutions must act with all due diligence by seeking to provide the persons concerned with information relevant to the defence of their interests. Furthermore they have to choose, if necessary on their own initiative, appropriate means of providing such information.[100] The institutions have to display all factual and legal aspects which led to the procedure and present the possible adversely measures which might be taken.

On the next level, the authorities must give the person concerned the opportunity of submitting observations in the matters of fact which it intends to make the basis for its decision.[101] The question whether an oral hearing is necessary is decided by the Union institutions; however, it is not required by the provision.[102]

On the third and final level, the right to be heard includes the right of consideration of the submitting observations in the course of the decision-making process.[103]

3.2.3. Who is entitled by Article 41 CFR?

3.2.3.1. Entitled persons

According to the wording of Article 41 CFR, the scope of application *ratione personae* is 'every person'. Its systematic position under Chapter V 'Citizen's rights' indicates

[97] J. Schwarze, *European administrative law* (London, 2006), 1335.
[98] Case 17/74 *Transocean Marine Paint* [1974] 1063, para 15; Case C-32/95 P *Lisrestal* [1996] ECR I-5373, para 21.
[99] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 315; P. J. Kuyper & T. van Rijn, 'Procedural guarantees and investigatory methods in European Law' *YEL* 2 (1983) 1, at p. 12.
[100] Case C-49/88 *Al-Jubail Fertilizer* [1991] ECR I-3187, para 15 et seqq.
[101] Case 322/81 *Michelin* (1983) 3461, para 7; Case C-135/92 *Fiskano* (1994) ECR I-2885, para 40; Case T-613/97 *Ufex* [2000] ECR II-4055, para 85; J. Schwarze, *European administrative law* (London, 2006), 1358.
[102] Joined Cases 209-215 and 218/78 *Van Landewyk* [1980] 3125, para 18.
[103] Case C-315/99 P *Ismeri Europa Srl* [2001] ECR I-5281, para 31 et seq.

however that the qualification as a human right for every person is not undisputed. Already in the course of the Convention the question whether third country nationals should be involved in the scope of application was controversially inculded.[104] An early draft of the Charter intended to grant the right to good administration to persons residing in a Member State only.[105] This very narrow scope of application regarding the entitled persons was extended in the next draft,[106] whereas the systematic position under Chapter V 'Citizen's Rights' has not been changed.

Furthermore, the particular constellations coming into question for application of the right to good administration are usually not limited to Union citizens. Consequently, the ECJ acknowledged a right to be heard for third country nationals in the *Al-Jubail Fertilizer* case.[107]

The wording of Article 41 CFR does not expressly distinguish between natural and legal persons. The term 'citizen' in the headline of Chapter V connotes a natural person rather than a corporation. However, the term 'citizen' is not used in the wording of Article 41 CFR, which leads to the assumption that the drafters chose to refer to 'every person' instead of 'citizen' for a reason.[108] What is more, the mere fact that 'every person' does not expressly include legal persons besides natural persons should not lead to the conclusion that the former are excluded from the scope of application. This is confirmed by the ECJ's acknowledgement of providing for application of fundamental rights as well as to legal persons governed by private law.[109] Not least, the ECJ and the General Court concede the principle of good administration and in particular the right to be heard to legal persons governed by private law in settled case law.[110]

The question whether legal persons governed by public law can rely on the Charter in general or Article 41 CFR in particular has not been solved yet. Without specific reference to the Charter, part of the doctrine is of the opinion that in specific constellations fundamental rights can be granted to legal persons governed by public law. There might be an analogy to the legal form of a *grundrechtstypische Gefährdungslage* established in German Constitutional Law. This means a situation in which the legal person finds itself in a situation where – comparable to natural persons – it sees itself confronted with the danger of infringement of rights where there is no reason to distinguish between legal

[104] S. Baer, 'Grundrechtecharta in der Europäischen Union' ZRP (2000) 361, at p. 364.
[105] See Charte 4170/00 Convent 17, p. 5 referred to as Article E.
[106] See Charte 4284/00 Convent 28, p. 26.
[107] Case C-49/88 *Al-Jubail Fertilizer* [1991] ECR I-3187, para 15 et seqq.
[108] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 308.
[109] See the early Case 11/70 *Internationale Handelsgesellschaft* [1970] 1125, para 4 et seqq.; Case 267/87 *Schärder* [1989] 2237, para 15; Case C-18/95 P *Baustahlgewerbe* [1998] ECR I-8417, para 2.
[110] Case 374/87 *Orkem* [1989] ECR 3283; Case T-231/97 *New Europe Consulting* [1999] ECR II-2403.

persons of private or public law. Thus, the fundamental rights would be applicable to the legal person by virtue of their nature. This legal form might be applicable as well in European Law to legal persons of public law, which indeed do fulfil a public service but without being controlled by the authorities, maintain their independence and by this are protected from government encroachment.[111] The ECHR awarded a legal person governed by public law in such a comparable case as well fundamental rights as well.[112]

On the one hand, providing fundamental rights in general and without exception meets strong concerns due to the defensive function of fundamental rights. On the other hand, legal persons governed by public law might require a right to be heard for stating their positions to the same extent as natural persons, particularly in administrative procedure. Granting fundamental rights to legal persons governed by public law cannot directly be derived from the wording or meaning and purpose of the Charter but might be derived from Union's general fundamental rights. At least as far as Member States as legal persons governed by public law can invoke procedural rights and in particular the right to be heard vis-à-vis Union institutions, insofar should other legal persons governed by public law be awarded such a right to be heard, in the extent that they are in the mentioned state of a *grundrechtstypische Gefährdungslage*.

The wording of Article 41 CFR does not mention the Member States as entitled persons of the right to good administration. To grant the Member States the right to be heard as directly derived from the Charter, an explicit regulation would have been necessary. For this reason, even in the prevailing doctrine there is consensus to a great extent, that Member States cannot invoke the right to good administration respectively the right to be heard as directly derived from the Charter.[113] Independent form the Charter, they have absolutely to be granted the general rule-of-law principles of a good and sound administration as they have been developed by the jurisdiction. Consequently, the ECJ has granted the Member States enforceable rights concerning the right to be heard and the obligation to state reasons.[114] The principles derived from the general principles regarding the legal persons' possibility to be granted fundamental rights are also applicable to the Member States. Procedural rights as well as in particular the right to be heard for Member States can only be exercised insofar as they are applicable by virtue of their nature. Transferring sovereignty rights to the Union might result in a link of subordination which

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[111] J. Kühling, 'Grundrechte' in A. v. Bogdandy & J. Bast (eds.), *Europäisches Verfassungsrecht* (Berlin, 2009), 657 at p. 687.

[112] *The Holy Monasteries v. Greece* – 301-A (9.12.94), para 49.

[113] C. H. Hofmann 'Good administration in EU law – a fundamental right?' *Bull.dr.h.* 13 (2007) 44 at p. 46, fn. 13; B. Grzeszick, 'Das Grundrecht auf eine gute Verwaltung' *EuR* (2006) 161 at p. 170.

[114] Joined Cases C-48/90 and C-66/90 *Kingdom of the Netherlands v. Commission* [1992] ECR I-565, paras 40 et seqq.; Case C-301/87 *French Republic v. Commission* [1990] ECR I-307, para 29.

leads to the necessity of defensive rights. This is the case when Member States are addressees of a Commission's decision and as a result find themselves in a comparable situation to natural or legal persons governed by private law.[115]

Even if it was the primary aim of the Charter to only make visible the rights of the citizens and not the ones of the Member States or other legal persons, the application of procedural rights could be supported in specific constellations.

3.2.3.2. 'Affairs' of the entitled person

The wording of Article 41 (1) CFR ensures every person's right to 'have his or her affairs' handled according to the principle of good administration. The question is how this term has to be interpreted and how far-reaching 'his or her affairs' are. The term already indicates the requirement of a link between the person concerned and the measure to take. The existence of the necessary link can undoubtedly be answered in the affirmative with regards to those persons, who are a party of the procedure or addressee of a measure or decision. To exclude steadfastly third parties off the scope of application would run contrary to the aim of the provision and would not be in line with the case law.[116] Such a link in the sense of 'his or her affairs' is given beyond the situation, when a measure directly and individually affects the person concerned and entails adverse consequences for him or her.[117] The admission of a third party to the administrative procedure or his or her claim to be admitted has indicative effect. In administrative procedures of specific fields of law, rights to be heard are explicitly granted to third parties as well. In the field of competition and merger law, for example, applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.[118] In other fields, parallels might be drawn to the requirements of application to annulment in Article 263 (4) TFEU. It should be noted, however, that Article 41 (1) CFR considered individually does not provide any stipulation for the third party issue. The wording however indicates a special link between the person concerned and the measure. It can be assumed that after becoming legally binding the scope of the guarantee will no longer stand back behind the scope of the general principle as developed by the ECJ.

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[115] This was the case in Joined Cases C-48/90 and C-66/90 *Kingdom of the Netherlands v. Commission* [1992] ECR I-565, paras 44 et seqq.

[116] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 310.

[117] Case C-49/88 *Al-Jubail Fertilizer* [1991] ECR I-3187, para 15.

[118] Article 27 (3) of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; Article 18 (4) of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

Indeed, it is demonstrated by the wording of Article 41 (2) CFR, that an individual measure which would affect him or her adversely to be taken is required.

Finally, it is debatable if associations pursuing public concerns can be affected in 'his or her affairs'. The ECJ has denied this question in the *BEUC v. Commission*[119] case and ruled that an association – at least in anti-dumping and anti-subsidy proceedings – cannot rely on the principle of the right to be heard if there is no specific legislation. The association has not been affected adversely because it did not see itself confronted by accusations.[120] The ECJ would have granted the association the right to be heard, if it had been itself directly and adversely affected and had been not just pursuing public concerns.

3.2.4. Who is obliged by Article 41 CFR?

3.2.4.1. The institutions, bodies, offices and agencies of the Union – direct implementation of Union law

The implementation of Union law is ensured by two different types of administration. Administrative decisions are taken on European level as well as on national level. The direct administration takes place on the European level whereas administrative measures on the national level can be described as 'indirect administration'.[121]

As a rule, the implementation of Union law is left to the administrative authorities of the Member States.[122] This is a result of the principles of conferral and subsidiarity laid down in Article 5 (2) and (3) TEU.

The direct implementation, on the contrary, represents the exceptional case and only applies when it is explicitly ordered by primary or secondary law. The direct implementation can also be divided in two sections: The area of internal administration[123] and the area administration external to the Union.[124] One the one hand, the area of internal administration covers matters of personnel, the Union budget as well as internal organisation. The area external to the Union on the other hand, covers the direct implementation of Union law by Union bodies vis-à-vis Members States and individuals, mostly in the area of competition, anti-trust and anti-dumping law, State aid control as well as trade and social policies.

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[119] Case C-170/89 *BEUC v. Commission* [1991] ECR I-5709.
[120] Case C-170/89 *BEUC v. Commission* [1991] ECR I-5709, para 19 et seqq.
[121] D. Chalmers & A. Tomkins, *European Union public law* (Cambridge, 2007), 340; Lord Millett, 'The Right to Good Administration in European Law' (2002) *Public law* 309 at p. 317.
[122] J. Schwarze, *European administrative law* (London, 2006), clxix.
[123] See J. Schwarze, *European administrative law* (London, 2006), 25 et seqq.
[124] See J. Schwarze, *European administrative law* (London, 2006), 27 et seqq.

After coming into force of the Lisbon Treaty, Article 298 TFEU implements a specific legal basis for European administration. However, it is not the purpose of the provision to create a self-contained administrative unit, but the European administration is supposed to be comprised of the single institutions, bodies, offices and agencies of the Union.[125] Accordingly, the notion 'European administration' of Article 298 TFEU only describes the direct implementation of Union law. Therefore Article 298 TFEU does not create competences for the indirect implementation of Union law. What is more, Article 298 TFEU does not contain a legal basis for institutions' rules for procedure and self-organisation; this, however is already established by primary law.[126]

Considering the scope of obligations arising from Article 41 (1) CFR, it explicitly addresses the institutions, bodies, offices and agencies of the Union. Consequently, when in first instance only taking into account the wording of the provision, just the direct implementation, as well as the internal as external administration, is concerned.
The field of application of the Charter is codified in Article 51 (1) CFR. This provision obliges in compliance with Article 41 (1) CFR institutions, bodies, offices and agencies of the Union. According to Article 13 (1) TEU, the Union's institutions are the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. The term Court of Justice of the European Union includes pursuant to Article 19 (1) TEU the Court of Justice, the General Court and specialised courts. The in Article 13 (1) TEU listed institutions of the European Central Bank, the European Council as well as the in the term of Court of Justice included General Court and specialised courts had not been contained in ex-Art. 7 EC and have been added by the Lisbon Treaty.
Thus, it is debatable, if the number of addressees ina Article 13 (1) TEU that was extended by coming into force of the Lisbon Treaty has an effect on the scope of obliged addresses of the Charter. Whereas following the draft Charter, the term 'institutions' is enshrined in Article 7 of the EC Treaty,[127] due to the explanations relating to the Charter of Fundamental rights, the term 'institutions' is now enshrined 'in the Treaties' in general.[128] Hence, it can be concluded that the term 'institutions' of the Charter changes and develops in a linked and accessory way to the terms used by the Treaties. Consequently, the term

[125] W. Hummer in C. Vedder & W. Heintschel v. Heinegg, *Europäischer Verfassungsvertrag* (Baden-Baden, 2007), Art. III-398, para 1.
[126] See Article 232 subs. 1 TFEU, Article 235 (3) TFEU, Article 240 (3) TFEU, Article 249 (1) TFEU.
[127] Charte 4473/00 Convent 49, p. 46.
[128] Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17, p. 32.

'institutions' of the Charter in Article 41 (1) CFR and Article 51 (1) CFR includes all institutions listed in Article 13 (1) TEU.

According to the explanations of the Charter, the expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation.[129] Consequently, the entire scope of European direct administration is covered by the Charter. This as well includes the Economic and Social Committee, the Committee of the Regions, the European Investment Bank and Europol.[130]

It is not quite clear, however, if the named addressees are bound to Article 41 CFR in general or if they are only obliged, when acting in the scope of 'administration'. In the course of Article 41 CFR, the term 'administration' is only mentioned in Article 41 (2) CFR, concerning the right to a reasoned decision. Regarding the right to be heard, no explicit reference to the administration is made. The application to the area of administration already arises from the headline which names the right to good administration without any limitation to a certain paragraph. This result is underlined by the genesis of the provision in the Convention,

Additionally with regards to the genesis of the provision, it is to be assumed, that the addressees should only be obliged, when acting as 'administration'.[131] On the contrary, the obligation on the contrary has to be denied when acting as judicial or legislative power. The following question is what constitutes 'administration' on European level. There is no clear division of legislative and administrative powers, therefore the principle of separation of powers cannot simply be transferred to the European level and certain institutions cannot be assigned to specific functions or powers. European administration can be defined functionally as the implementation of Union law in individual cases or concrete situations.[132] Particular forms of action are not required. Hence, not only the decision pursuant to Article 288 (4) TFEU which as case-by-case decision can be compared most likely to the German administrative act *Verwaltungsakt, § 35 VwVfG*[133] comes into question, but also all other forms of action, as far as they serve the implementation of Union law in concrete situations. The term 'administration' therefore should not be understood in a subjective sense as organs of the administration but regardless of the institution which performs them.[134]

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[129] Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17, p. 32.
[130] C. Nowak, 'Grundrechtsberechtigte und Grundrechtsadressaten' in F. Heselhaus & C. Nowak (eds.), *Handbuch der Europäischen Grundrechte* (Bern, 2006), § 6, para 29.
[131] Explanatory note to Article 41 CFR, Notes from the Praesidium on the draft Charter of Fundamental Rights of the European Union, Charte 4473/00 Convent 49, p. 36.
[132] J. Schwarze, *European administrative law* (London, 2006), 22.
[133] See below section 5.1.3. 'Germany'.
[134] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 310.

This interpretation corresponds to the wording of Article 41 (2) CFR. Where the right to a reasoned decision which as well can be found in Article 41 (2) CFR is only granted in the context of 'decisions', the right to be heard is explicitly applicable to 'individual measures'. Therefore it does not require a particular or specific form of action but is covering all activities of an administrative character.

Hence, the definition of 'administration' cannot be determined by the institution or the form of action alone. Additionally, the necessary kind of activity can constitute any activity of an administrative character.[135] According to settled case law, the principles of good administration are not only applicable to individual and concrete forms of action. However, they are applicable in all areas where the Union institutions have a discretion or wide power of appraisal, respect for the safeguards guaranteed by the Union legal order in administrative procedures is of even more fundamental importance.[136] Those guarantees include, in particular, the duty of the competent institution to carefully and impartially examine all relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision.[137] In these cases, the concreteness of the administrative situation is the decisive approach.

This becomes even more clearly in some ECJ's decisions, where it gradually qualified the adoption of certain regulations as 'administration'. Already in 1973, it stated tht the adjustment method in the Community's Staff Regulations only constituted an implementing measure of an administrative rather than a legislative nature.[138] In the anti-dumping *Al-Jubail Fertilizer* case, the ECJ held that the right to be heard must be observed not only where it might lead to penalties, but also where the investigative proceedings prior to the adoption of the duty might directly and adversely affect the undertakings and entail adverse consequences for them.[139]

This case law provides a guideline for the obligations for the Union's institutions, bodies, offices and agencies, which as well have effect on the scope of the Charter, especially after coming into force of the Lisbon Treaty and the legal force of the Charter. The Union's authorities are obliged by Article 41 CFR when implementing an activity of an administrative character, whereas the term 'administration' does not require a specific form of action. The emphasis is put on the individual and concrete form of action.

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[135] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 310.
[136] Case T-151/05 *NVV and others v. Commission* [2009] ECR II-1219, para 165 with reference to further case law.
[137] Case T-167/94 *Nölle* [1995] ECR II-2589, para 73.
[138] Case 81/72 *Commission v. Council* [1973] 575, para 10.
[139] Case C-49/88 *Al-Jubail Fertilizer* [1991] ECR I-3187, para 15.

3.2.4.2. The Member States – indirect implementation of Union law

Like stated before, the direct implementation of Union law constitutes an exception. The indirect implementation is the usual practice due to the principles of conferral and subsidiarity laid down in Article 5 (2) and (3) TEU.

The greater part of Union law is implemented by national authorities. The main areas of indirect implementation are the common agricultural policy and the external protection of the Union through the common customs tariff.[140]

The traditional distinction between direct implementation by the authority of the Union itself and indirect implementation by the Member States is still decisive today.[141] In the course of structural changes of Union law a new category of implementing Union law evolved. In the course of phased proceedings, the administration of the particular scheme is divided or shared between the Union and the Member States as in the context of Structural Funds.[142] These phased proceedings combine elements of direct and indirect administration to a kind of joint administration. Therefore, the prevailing literature already describes this principle of co-operation as a third stand-alone category of implementing Union law,[143] namely 'shared administration'[144] or 'integrated administration'.[145]

The indirect implementations can be divided in two areas as well. On the one hand, the implementing bodies can act directly on the basis of provisions of Union law, for example regulations. Fields of application are in particular European Customs law or the agricultural sector. On the other hand, the implementing bodies can act on the basis of national rules which render Union law in particular directives, concrete and apt for implementation,[146] for example the implementation of directives.

The Member States are in principle competent for the administrative implementation of Union law according to their constitutional and administrative provisions.[147] This comes as

[140] J. Schwarze, *European administrative law* (London, 2006), 34.
[141] J. Schwarze, *European administrative law* (London, 2006), clxix.
[142] P. Craig, *EU Administrative Law* (Oxford, 2006), 315.
[143] J. Schwarze, *European administrative law* (London, 2006), clxxv; this is discussed especially in the German doctrine, see G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Tübingen, 2004), 7 et seq., 517 et seqq.; T. v. Danwitz, *Europäisches Verwaltungsrecht* (Berlin, 2008), 313; E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Berlin, 2006) Chap. 7, para 18 et seq.; H. P. Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung* (Berlin, 2002), 39 et seqq.
[144] J. Schwarze, *European administrative law* (London, 2006), clxxv.
[145] G. Bermann, 'A restatement of European Administrative Law: problems and prospects', ReNEUal 2009, available online at http://www.reneual.eu/intro/general_descriptions/Bermann_YaleEurAdmLawRestatement Sept %2029.pdf.
[146] J. Schwarze, *European administrative law* (London, 2006), 34.
[147] Ruled for the first time in Joined Cases 205-215/82 *Deutsche Milchkontor* [1983] 2633; J. Schwarze, *European administrative law* (London, 2006), clxxi et seq.

a result form the procedural autonomy of the Member States,[148] which is from now on laid down in Article 291 (1) TFEU, codifying that Member States shall adopt all measures of national law necessary to implement legally binding Union acts as well as the fact that there is a lack of European regulation in the field of administrative procedure. The general competence of the Member States for the administrative implementation of Union law is not unlimited. To secure the uniform application of Union law, the limits of the principles of equivalence and effectiveness apply, which result from the *effet utile*, codified in Article 4 (3) TEU. The principle of equivalence requires that actions based upon Union law brought before the domestic courts should not be furnished with less favourable remedies and procedural rules than those available in respect of similar actions based upon purely national law. This does not only apply to procedural rules before national courts, but also to those applied by the national authorities in reaching administrative decisions.[149]
According to the principle of effectiveness, in the area of indirect implementation it also requires that national remedies and procedural rules should not render the exercise of Union law as virtually impossible or excessively difficult.[150]
The new Article 197 TFEU, which is part of Title XXIV 'Administrative Cooperation', demands that the effective implementation of Union law by the Member States shall be regarded as a matter of common interest. This covers as well the indirect administration , which is essential for the proper functioning of the Union. However, this new Article 197 TFEU strengthens the existing basics of the European administrative legal order but does not modify its essential underlying competence structure.[151] Describing the indirect implementation of Union law as a matter of common interest, it can be regarded as a first step to administrative integration. Most of all, it clarifies the duty to loyalty and obligation to cooperate in good faith under Article 5 (3) TEU.

Coming to the consequences of indirect implementation concerning the right to good administration, Article 41 CFR does not explicitly name the Member States as addressees of this provision. Article 51 (1) CFR, which sets the field of application of the Charter, states that its provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. Even if this does not solve the problem to what extent the Member States are bound to the right to be heard as stated in Article 41 (2) CFR,

[148] Case C-1/06 *Bonn Fleisch Ex- und Import* [2007] ECR I-5609; Case C-201/02 *Wells* [2004] I-723, paras 65 et seqq.
[149] Case C-34/02 *Pasquini* [2003] ECR I-6515; A. Dashwood et al., *European Union Law* (Oxford, 2001), 292 with fn. 28.
[150] A. Dashwood et al., *European Union Law* (Oxford, 2001), 294.
[151] J. Schwarze, *European administrative law* (London, 2006), ccxix.

Article 51 (1) CFR reveals that a binding is only given in area of indirect implementation of Union law.

As already stated, the Member States are not explicitly mentioned in the wording of Article 41 CFR. What is more, they do not generally constitute bodies of the Union and do not fall within the scope of the obliged institutions, bodies, offices and agencies of the Union. Basically, the Charter's field of application is regulated in Article 51 (1) CFR. By virtue of its wording, the Charter also applies to Member States, but only when they are implementing Union law. Due to this fact, the question arises, if and to what extent the Member States are bound by the right to be heard of Article 41 (1) CFR.

The explicit non-mentioning of the Member States in the wording of Article 41 (1) CFR might limit the field of application in the way that an obligation of the Member States to ensure the rights enshrined in Article 41 CFR does not exist. However, the indirect implementation of Union law is the normal case and the direct implementation only constitutes an exception. Would the obligation be limited to the direct implementation of Union law, the right to good administration as codified in Article 41 CFR would leave out of its scope a vast amount of administrative proceedings concerning application of Union law.[152] This would limit the practical effect of this provision on a large scale. By narrowing the field of application, the Charter would severely lack efficiency but also trustworthiness.

The case law of the ECJ and the General Court, however, apply the reach of the principles of good administration also to Member States administrations when acting 'within the sphere of Community law'.[153] This is as well in line with the *Lisrestal* case law in the area of co-administration.[154] After coming into force of the Lisbon Treaty and thus the legal binding of the Charter of Fundamental Rights, Member States are, when implementing Union law or general within the sphere of Union law, bound to the Charter in general. What is more, they are bound to the ECJ's case law as well as the general principles and therefore to the right of good administration. The right to good administration of the Charter is characterised by the jurisdiction of the Courts of the Union.

Thus, the Member States' binding in the area of indirect implementation has to be presumed. What is more, it is debatable, whether this applies to both areas of indirect implementation or if it has to be further differentiated. By deriving the obligation, it unquestionably includes the indirect implementation, when bodies act directly on the basis of Union law, thus implement direct applicable primary or secondary legislation. The

[152] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 309.
[153] Case C-260/89 *ERT* [1991] ECR I-2925, paras 42 et seq.; C. H. Hofmann 'Good administration in EU law – a fundamental right?' *Bull.dr.h.* 13 (2007) 44 at p. 47.
[154] Case C-32/95 P *Lisrestal* [1996] ECR I-5373.

justification of a binding in the area of indirect implementation, when the bodies act on the basis of national rules is even harder. The arguments stated above generally do also apply in this area; however, they have to be given less weight due to the procedural autonomy of the Member States. The Member States have sole authority by implementing Union regulations. What is more, by executing national acts on the implementation of directives, it might be difficult in specific cases to decide whether it still involves implementing Union law or if it constitutes only solely national issues. As a result, this would, lead to the necessity of a thorough examination and analysis as well as decision on a case-by-case basis in a large number of cases. Therefore, a general binding of the Member States in indirect implementation in the area where bodies act on the basis of national rules, seems not absolutely necessary. In fact, the general rules of good administration should apply here, what in combination with the requirements of Article 4 (3) TEU might modify the national administrative procedure in a citizen-protecting kind of way.

Due to the legal binding of the Charter, it can be assumed that the ECJ will adopt a clear position as well. What is more, it likely will concretise the substance and also the scope of the binding of the rule in the following way: The Member States explicitly will be named as addressees of Article 41 CFR in the area of indirect implementation, at least when bodies act directly on the basis of Union law.

3.2.5. Delimitation to the right of access to the file

The right of every person to have access to his or her file which is enshrined in the second indent of Article 41 (2) CFR also has its origin in the general principles and also belongs to the rights of defence,[155] even though the Courts of the Union only slowly acknowledged and accepted this right.[156] Furthermore, this guarantee only applies to 'one's file' of a person which means that it excludes access to information to files of other parties and thus does not constitute a general access to the file.[157]

In comparison to the right of access to documents of Article 42 CFR, the scope of protection is narrower due to the fact that the person has a right to access only to 'one's

[155] Case 85/76 *Hoffmann-La Roche* [1979] 461, para 13 et seq.

[156] Case 322/81 *Michelin* (1983) 3461, para 7; Case T-7/89 *Hercules Chemicals* [1991] ECR II-1711, para 51.

[157] Consistent case law since joined Cases 56 and 58/64 *Consten & Grundig* [1966] 322, 385, even though the jurisdiction slowly expanded the access to the file in the way that now only those documents are excluded which concern business secrets or contain internal Commission memos, see the development in the following cases, Case T-7/89 *Hercules Chemicals* [1991] ECR II-1711, Case T-30/91 *Solvay* [1995] ECR II-1775; Case T-36/91 *ICI I* [1995] ECR II-1847; Joined Cases T-10/92 and others *Cimenteries CBR SA* [1992] ECR II-2667; Joined Cases C-204/00 P and others *Aalborg Portland* [2004] ECR I-123, paras 66 et seqq.

file'. The right of access to a file could be treated as a component of the right to be heard.[158] However, the drafters of the Charter chose to treat it as an autonomous right.[159] The Union Courts however emphasise on the intimate interdependence between the right to be heard and the right to access to the file or the subsidiary nature of the latter in relation to the former and tend to treat the right of access to a file as a necessary prerequisite of an effective right to be heard[160] and consequently as pertaining to the substance of this guarantee.[161] What is more, the emphasis of the access to a file lies on written information and that is why it ensures the effective realisation of the right to be heard. Without access to all non-confidential files, the person concerned is not able to adequately exercise his rights in the way he or she is entitled to. The General Court as well held that the access to the file is one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively.[162] With explicit focus on the wording of the Charter, it has to be presumed that the right to the access to the file constitutes a fundamental procedural right of its own and thus has to be treated separately from the right to be heard. Despite this fact, it has the functioning of a preliminary stage to the realisation of the right to be heard.

3.2.6. Scope of protection, infringement and justification

The personal scope of protection guarantees every natural or legal person – as well as in a restricted sense the Member States – the right to be heard vis-à-vis the institutions, bodies, offices and agencies of the Union. It guarantees the protection of the right vis-à-vis the Member States in so far as they indirectly implement Union law by acting directly on the basis of Union law as well. Concerning the scope of protection with regards to content, the right to be heard of Article 41 (2) CFR has to be ensured on three levels. On the first level, the person concerned has to be informed about the administrative proceedings against him. On the second level, the authorities must give the person concerned the opportunity of submitting observations in the matters of fact. On the third and final level, the right to be heard includes the right of consideration of the submitting observations in the course of the decision-making process. The right is limited to the affairs of the person concerned and is only applicable to administrative measures.

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[158] J. Schwarze, *European administrative law* (London, 2006), 1341 et seq.
[159] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 316.
[160] Case 107/82 *AEG* [1983] ECR 3151, paras 24 et seqq.; Case T-36/91 *ICI I* [1995] ECR II-1847, para 69; H. P. Nehl, *Principles of administrative procedure in EC law* (Oxford, 1999), 52.
[161] K. Lenaerts & J. Vanhamme, 'Procedural rights of private parties in the Community administrative process' *CMLR* 34 (1997), 531 at p. 539 et seqq.
[162] Joined Cases T-10/92 and others *Cimenteries CBR SA* [1992] ECR II-2667, para 38.

Besides these already mentioned criteria, the scope of protection requires an 'individual' measure which affects the person 'adversely', whereas the notion of 'measure' does not require a certain form of action as shown above. The person who invokes the right has to be adversely affected; an adverse impact on a third party should not be sufficient. The measure affects a person adversely when his or her financial or other interests are concerned in a negative way. It might be conceivable to refer to the 'direct and individual concern' of Article 263 (4) TFEU or to require that the interests have to be 'perceptibly affected'.[163] A measure being adversely and favouring at the same time has to be examined regarding its main focus.

The earlier jurisdiction classified a measure to be adversely in cases where sanctions, in particular fines and penalty payments, might be imposed.[164] Later, it held that the right to be heard was applicable in all proceedings initiated against a person liable to culminate in a measure adverse to him or her and applied even in the absence of specific rules concerning the proceedings in question.[165]

A measure should be 'individual' when it is addressed to one or more persons; administrative proceedings leading to adoption of general measures are generally excluded from the scope of application. The courts however recognised that a regulation, although general in scope, might affect the position of an individual.[166] It is submitted that the right should rather be determined according to the interest that an individual has in the outcome of the proceedings and not according to the character of a measure being individual or general.[167] What is more, the characteristic feature of a measure being 'individual' does not inevitably limit the scope to the addressee of a measure. Thus it becomes clear that notions of 'individual' and 'adversely' are mainly already included in the requirement of 'his or her affairs' and are only concretised in regard of the impact and significant affect.

An infringement of the right to be heard has to be considered when the person concerned has not been granted the right to be heard even in parts of the guarantee or has been prevented to the execution of his right. Such a restriction might alternatively take place on every level of protection.

In contrast to the right of access to the file of the second indent of Article 41 (2) CFR, which requires to respect the legitimate interests of confidentiality and professional and

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[163] Like in Case 17/74 *Transocean Marine Paint* [1974] 1063, para 15.
[164] Case 85/76 *Hoffmann-La Roche* [1979] 461, para 9.
[165] Case 17/74 *Transocean Marine Paint* [1974] 1063, para 15; Case 85/76 *Hoffmann-La Roche* [1979] 461, para 9; Case C-49/88 *Al-Jubail Fertilizer* [1991] ECR I-3187, para 15; Case C-315/99 P *Ismeri Europa Srl* [2001] ECR I-5281, para 28; Case C-32/95 P *Lisrestal* [1996] ECR I-5373, para 21; Case T-613/97 *Ufex* [2000] ECR II-4055, para 85.
[166] Case C-49/88 *Al-Jubail Fertilizer* [1991] ECR I-3187, para 15.
[167] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 316.

business secrecy, the right to be heard of the first indent of Article 41 (2) CFR does not show any written limitation. However, the right may be limited when the conditions set out in Article 52 CFR are met. These conditions require that any infringement must be provided for by law and respect the essence of the rights or freedom at stake. Furthermore they have to be proportionate, necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[168]

Concerning the specific arrangement of these limitations, it is necessary to consult and examine the scope of protection in the light of the courts' jurisdiction. In that respect the right or the obligation to be heard does not apply unconditionally and might be dropped under certain circumstances. Advocate General *Warner* demanded a limitation of the principle of the right to be heard in the *NTN Toyo Bearing* case when an unconditional guarantee is opposed to the objective being pursued or to the need for efficient administration or is impossible due to any other reasons or impracticable.[169] This might be the case when the person concerned cannot be reached or impedes the receipt of information.[170] In the *National Panasonic* case, Advocate General *Warner* went so far to determine that the right does not only not apply without exceptions but that such an exception is appropriate when the pursued objective might only possibly be frustrated.[171] What is more, the scope of the obligation can depend on the intensity of the infringement. In cases of insignificant impairment, the right to be heard may not be granted or limited.[172] This may include measures for collecting evidence. Due to the ECJ's judgement in the *National Panasonic* case, a review procedure can be initiated without previous notification when the loss of evidence is presumed.[173] To ensure the objective pursued, it might be admissible to hold a hearing after the adoption of the measure. It is debatable, however, if the obligation to a grant a hearing can be limited in cases of imminent danger when immediate measures have to be adopted. This has to be the exceptional case and the measure should only be adopted without a hearing in due consideration and following the principle of proportionality. Additionally, the urgency must not be caused by the administrative body itself. The right to be heard can be dropped as well when the administrative procedure is the result of a request of the person concerned and he already has presented the relevant facts.[174] This includes all factual and legal facts which constitute the basis of the authority's decision.

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[168] Lord Millett, 'The Right to Good Administration in European Law' (2002) *Public law* 309 at p. 317.
[169] Opinion of Advocate General Warner, Case 13/77 *NTN Toyo Bearing* [1979] 1185 (1262).
[170] J. Schwarze, *European administrative law* (London, 2006), 1334.
[171] Opinion of Advocate General Warner, Case 136/79 *National Panasonic* [1980] 2033, 2069.
[172] Joined Cases 33/79 and 75/79 *Kuhner* [1980] 1677, para 25.
[173] Case 136/79 *National Panasonic* [1980] 2033, para 21.
[174] J. Schwarze, *European administrative law* (London, 2006), 1334 et seq.

If none of those exceptions are relevant in the specific case, the infringement of the right to be heard of Article 41 (2) CFR is not justified and thus constitutes a procedural error. Special attention is to be given to the fact that on European level a cure of procedural errors is only possible during administrative proceedings and not in court proceedings which means that the measure concerned is void.[175] Apart from that, the jurisdiction requires a causality imputation. However, in order for an infringement of the right to be heard to result in annulment, it is necessary to establish that, had it not been for such an irregularity, the outcome of the procedure might have been different.[176]

3.2.7. The Code of Good Administrative Behaviour

The incorporation of the right to good administration in the Charter of Fundamental Rights is mainly based on the activities of the Ombudsman *Jacob Söderman.* Even long before its proclamation, he called as well for an adoption of a Code of Good Administrative Behaviour by all Union institutions and bodies which concretises the right to good administration of Article 41 CFR. The role of the Ombudsman is defined in Article 43 CFR as well as in Article 228 TFEU. He is '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 Union institutions, bodies, offices or agencies, with the exception of the ECJ's acting in its judicial role'. Additionally, he is completely independent in the performance of his duties. In 1999, he drafted a model code which the Parliament endorsed as a European Code of Good Administrative Behaviour in form of a resolution.[177] Furthermore, the European Parliament called on the Commission to submit a proposal on the basis of ex-Article 308 EC for a regulation containing the Code.

According to the present Ombudsman, *Nikiforos Diamandouros* the Code tells citizens what the right to good administration actually means in practice and what they precisely can expect from the European administration.[178]

With regard to the personal scope of application, due to Article 2 the Code applies to all officials and other servants to whom the Staff Regulations and the Conditions of employment of other servants apply, in their relations with the public. The notion 'public' refers to natural and legal persons, whether they reside or have their registered office in a

[175] Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 33.
[176] Case C-301/87 *French Republic v. Commission* [1990] ECR I-307, para 31; Case C-288/96, *Federal Republic of Germany v. Commission* [2000] ECR I-8237, para 101.
[177] Code of Good Administrative Behaviour, OJ [2000] L 267/62.
[178] N. Diamandorous, *Foreword of the European Ombudsman of the European Code of Good Administrative Behaviour* (Luxembourg, 2005), 5.

Member State or not. The material scope of application, Article 3, establishes that the Code contains the general principles of good administrative behaviour which apply to all relations of the institutions and their administrations with the public unless they are governed by specific provisions. All rights contained in Article 41 CFR are also included in the Code and are concretised by it. Beyond that, the Code contains additional provisions for administrative procedure such as legitimate expectations, consistency and advice (Article 10), acknowledgement of receipt (Article 14), obligation to transfer to the competent service (Article 15) as well as the keeping of adequate records (Article 24). Concerning procedural rules of behaviour, the rule of courtesy (Article 12) requires that the officials shall be service-minded, correct, courteous and accessible in relations with the public.

Even the right to be heard was included in the Code and became more differentiated with regards to Article 41 CFR. What is more, it goes beyond the wording of Article 41 CFR. Due to Article 16 No. 1, in all 'cases where the rights or interests of individuals are involved, the officials shall ensure that, at every stage in the decision making procedure, the rights of defence are respected'. The notion of 'involved' is much wider than 'adverse effect'.[179] This leads to the fact that Article 16 even includes the rejection of a preferential treatment as well. Article 16 No. 2 states that 'member of the public shall have the right, in cases where a decision affecting his rights or interests has to be taken, to submit written comments and when needed, to present oral observations before the decision is taken'. Again, Article 16 deals with the notion of 'affecting' and not 'adversely affecting'. What is more, it refers to 'public' and not 'individuals'. This includes activities such as public hearings or similar. In fact, this is an undefined legal concept to be applied case by case, prior to specific assessment.[180] The right to be heard of Article 16 thus goes beyond the wording of Article 41 CFR. However it concretises the right in most parts in the course of the ECJ's jurisdiction to the principles of good administration.

The Code still has no legal binding force. Even a proposal for a regulation has not been submitted yet. In most parts it contains already codified rules or those developed by the jurisdiction of the Union's courts.

While the regulation was intended to be based on ex-Article 308 EC which now would be Article 352 TFEU, after coming into force of the Lisbon Treaty, new opportunities occurred. The adequate legal basis for such a regulation would now be Article 298 TFEU. As already stated, the notion 'European administration' only means the direct administration and does not create any competences for the indirect implementation of

[179] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, 318.
[180] J. Ponce Solé, 'Good administration and European public law, (2002) 14 *REDP* 1503 at p.1536.

Union law. A regulation on this legal basis would constitute a substantial codification of a part of the European administrative procedure. It is remarkable that such a partly codification on European level seems to be within the realms of possibility.
A legal binding force of the Code or a codification of part of the European administrative procedure in the area of direct administration might act as a role model even with regards to national administrative procedures.

4. The rights to be heard and Article 6 ECHR

4.1. Relevance of a right to be heard derived from the ECHR

The Union's accession to the Convention on Human Rights has not yet taken place but Article 6 (2) TEU now clearly empowers the Union to finally accede the Convention. Even before coming into force of the Lisbon Treaty the fundamental rights, as guaranteed in the Convention, had constituted general principles of the Union's law and already had outstanding importance as source of interpretation of rights. Even the ECJ referred to the Convention at a very early stage.[181] In the *Schmidberger* case the ECJ emphasised the 'special significance' of the ECHR.[182]
The references to the guarantees granted by the ECHR included not only the wording of its provision but also the jurisdiction of the European Court on Human Rights, which thus further concretises the fundamental rights of the general principles.
Regarding a right to be heard derived from the ECHR, the right to a fair trial as stated in Article 6 ECHR comes to mind, which can be seen as one of the most fundamental principles of a democratic society in terms of the Convention.
The ECJ already expressly referred to Article 6 ECHR before coming into force of the Lisbon Treaty concerning the requirement of judicial control which is laid down in Articles 6 and 13 of the Convention.[183]

4.2. The application of 'Civil Rights' in the area of administration

According to the wording, Article 6 (1) ECHR assures that in the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal

[181] For the first time in Case 44/79 *Rutili* [1979] 1219, para 32.
[182] Case 112/00 *Schmidberger* [2003] ECR I-5659, para 71; see also Case C-260/89 *ERT* [1991] ECR I-2925, para 41; Case C-274/99 P *Connolly* [2001] ECR I-1611, para 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 25.
[183] Case 222/84 *Johnston* [1986] 1651, para 18; Case 222/86 *Heylens* [1987] ECR 4097, para 14.

established by law. This raises the question, whether Article 6 (1) ECHR covers the administration as well.[184] The determining factor for this question is the meaning of 'civil rights' or '*droits de caractère civil*'. The simple wording, however, does not suggest expanding the field of application to administration at first view.

An expansion to the public sector can be observed anyhow. The ECHR did expand the interpretation of 'civil rights' in particular administrative contestations.[185] The state's classification of the title or obligation is not decisive for the qualification as 'civil right'. In fact, those have an autonomous meaning in Article 6 ECHR.[186]

Certainly, the ECHR has not yet committed itself to a concrete definition of this meaning. The expansion of the field of application is still based on an individual and casuistic basis.[187]

Firstly, it applies to rights and obligations in the relationships between private persons. Often the key determinant in questions of an application to the area of administration or involving state action in general is whether the right or obligation in question is pecuniary in nature. Or otherwise, whether the state action that is decisive for the right nonetheless has pecuniary consequences for the applicant.[188]. However, this scope of application is limited. The guarantee of Article 6 (1) ECHR does not apply when the state is acting within one of the areas that still form part of the essence of public authorities' prerogatives.[189] Hence, Article 6 (1) ECHR does not apply to tax cases.[190]

The Court adopts a restrictive interpretation of the exceptions to the safeguards of Article 6 ECHR, which was the case in *Vilho Eskelinen* where the Court ruled that some disputes concerning employment in the public services fall within Article 6 ECHR.

Political rights and obligations, as well as questions of entry, conditions of stay and removal of aliens do not fall within Article 6 ECHR.[191]

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[184] Further requirements like 'rights and obligations' as well as 'contestation' do not cause problems within the scope of application of administration.

[185] *Ringeisen v. Austria* – 13 (16.7.71), para 94; *König v. Germany* – 27 (28.6.78) p. 30, para 89; *Le Compte, Van Leuven and De Meyere v. Belgium* – 43 (23.6.81), p. 21 et seq., paras 46-48; *Albert and Le Compte v. Belgium* – 58 (10.2.83), p. 15, para 28; *Benthem v. the Netherlands* – 97 (23.10.85), p. 16, paras 34-36; due to several citation changes in the official reports, judgements of the ECHR are cited as proposed under http://www.echr.coe.int (date viewed April 5th 2012).

[186] P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 524 et seq.

[187] For the different cases see P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 525 et seqq.

[188] *Editions Périscope v. France* – 234-B (26.3.92); *Stran Greek Refineries and Stratis Andreadis v. Greece* – 301-B (9.12.94); D. Harris et al., *Law of the European Convention on Human Rights* 2nd edn. (Oxford, 2009), 214.

[189] *Ferrazzini v. Italy* [GC], no. 44759/98, ECHR 2001-VII – (12.7.01), paras 24 et seqq.;

[190] Lord Millett, 'The Right to Good Administration in European Law' (2002) *Public law* 309 at p. 321.

[191] D. Harris et al., *Law of the European Convention on Human Rights* 2nd edn. (Oxford, 2009), 219 et seq.

In summary, contestations concerning 'civil rights' are in general not limited to actions between private parties. In certain cases, mainly when the decision might have pecuniary consequences for the applicant, state action or the area of administration can also be covered by 'civil rights'. The ECHR emphasised, that even though the meaning of 'civil rights' has to be interpreted autonomously, Article 6 (1) ECHR may not be interpreted in a way as it would not contain the limitation to 'civil rights and obligations'.[192]

4.3. Applicability beyond court proceedings?

Despite the expansion of the scope of application of Article 6 (1) ECHR beyond the wording even on certain administrative cases, the wording as well demands an 'independent and impartial tribunal', thus proceeding before a court.[193] Accordingly, Article 6 (1) ECHR only covers court proceedings and not administrative procedure. Comparable to the 'civil rights', the term of tribunal has an autonomous meaning as well. According to Article 6 (1) ECHR the tribunal has to be independent, impartial and established by law.

It is characterised by its judicial function, independence, impartiality and has a set of rules of procedure by which it operates.[194] Furthermore, it has to be competent to take legally binding decisions.[195]

The fact that a body completes other tasks as well, such as administrative functions, does not prevent it being a tribunal when exercising its judicial function.[196]

It occurs that the autonomous approach on the one hand allows the Convention bodies to consider multiple varieties of national decision-making bodies as tribunal in the sense of Article 6 (1) ECHR, thus the national qualification as tribunal does not constitute a requirement for its qualification on the European level. One the other hand the requirements for the qualification as tribunal on European level are however quite strictly predetermined so that in fact the Member States are not able to exercise considerable discretion. The requirements in terms of independence and impartiality apply to the relation of the tribunal to the parties, to the legislative and to executive authorities.[197] In order to establish the independence and impartiality, regard must be paid to the manner of appointment of its members and their term of office, to the existence of guarantees against

[192] *Ferrazzini v. Italy* [GC], no. 44759/98, ECHR 2001-VII – (12.7.01), para 50.
[193] *Ringeisen v. Austria* – 13 (16.7.71), para 95.
[194] *Belilos v. Switzerland* – 132 (29.4.88), para 64.
[195] *Benthem v. the Netherlands* – 97 (23.10.85), para 20.
[196] *Benthem v. the Netherlands* – 97 (23.10.85), para 20; *Campbell and Fell v. the United Kingdom* – 80 (28.6.84); D. Harris et al., *Law of the European Convention on Human Rights* 2nd edn. (Oxford, 2009), 219 et seq.
[197] *Ringeisen v. Austria* – 13 (16.7.71), para 95; *Benthem v. the Netherlands* – 97 (23.10.85), paras 41 et seqq.

outside pressures and to the question whether the body presents an appearance of independence.[198]

The criteria of independence is generally not matched by the Commission of the European Union, even if it has to observe the general procedural guarantees,[199] Hence, the Commission does not constitute a tribunal in the autonomous sense of the Convention.[200]

The administration in general, respectively single administration bodies, does not match the criteria of independence. In most cases they are subject to directives; in addition, the periods of establishment as well as the possibility of dismissing members do not match the criteria of the ECHR's jurisdiction. The Court still takes the view that Article 6 (1) ECHR is only applicable to Court proceedings and does not constitute a general rule for other procedures, respectively administrative procedures.[201]

However, the ECHR developed certain constellations concerning the application of Article 6 (1) ECHR in the context of administrative decisions.

4.4. The application of 'Criminal Charge' in the area of administration

Article 6 (1) ECHR also grants the right to a fair and public hearing in the determination of any criminal charge.

It is debatable, if and under which conditions an administrative procedure can fall under the conception of 'criminal charge'. Following the ECHR's jurisdiction, 'criminal charge' has to be interpreted autonomously as well. The interpretation of the term of tribunal also has an autonomous meaning.[202]

The ECHR's established case-law sets out three criteria, known as the 'Engel criteria' to be considered in determining whether or not there is a 'criminal charge'.[203] The first criterion is the legal classification of the offence under national law. Every charge which falls under

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[198] *Le Compte, Van Leuven and De Meyere v. Belgium* – 43 (23.6.81), para 55; *Findlay v. the United Kingdom* – Rep. 1997-I, fasc. 30 (25.2.97), para 73; P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 613.

[199] Joined Cases 209-215 and 218/78 *Van Landewyk* [1980] 3125, para 81; joined Cases 100-103/80 *S.A. Musique Diffusion Française*, [1983] 1825, para 7.

[200] Case T-348/94 *Enso Española* [1998] ECR II-1875, para 56.

[201] *Mantovanelli v. France* – Rep. 1997-II, fasc. 32 (18.3.97), para 33.

[202] *König v. Germany* – 27 (28.6.78), para 88; *Adolf v. Austria* – 49 (26.3.78), paras 30 et seqq.; *Deweer v. Belgium* – 35 (27.2.80), para 42; *Malige v. France* – Rep. 1998-VII, fasc. 93 (23.9.98), para 34; see P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 540 et seqq.

[203] First in Case *Engel and Others v. the Netherlands* – 22 (8.6.76), para 82; confirmed by *Janosevic v. Sweden*, no. 34619/97 (Sect. 1), ECHR 2002-VII – (23.7.02), para 67; *Escoubet v. Belgium* [GC], no. 26780/95, ECHR 1999-VII – (28.10.99); *Ziliberberg v. Moldova*, no. 61821/00 (Sect. 4) – (1.2.05); see S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford 2006), 13 et seqq.

criminal law of a Member State generally also falls under 'criminal charge' and this qualification will not be challenged by the ECHR. If the issue is not qualified as 'criminal' in the national law, the second criteria applies which is the very nature of the offence. By the use of this criterion, the ECHR autonomously reviews the scope of the relevant provision. First of all, this concerns the circle of its addressees, whether the norm is only addressed to a specific group or whether it is a norm of generally binding character. The first case indicates a disciplinary character of the provision and thus does not constitute a 'criminal charge'.[204] Additionally, it has to be examined whether the measure is of preventive repressive character, where only the last one relates to a 'criminal charge'.

The third criterion is the degree of severity of the penalty that the person risks incurring. Imprisonment is considered to be the criminal penalty par excellence, unless it is, by its nature, duration or manner of execution 'not appreciably detrimental'. It gives an otherwise disciplinary or administrative procedure a criminal character to such an extent that Article 6 ECHR must be held applicable.[205]

The relevant approach is the maximum penalty that may be imposed by the authority, that is to say in this respect not the actually imposed penalty but the maximum the person concerned risked when committing the offence is decisive in this respect.[206]

The second and third criteria are alternatives and not necessarily cumulative.

This does not exclude a cumulative approach where a separate analysis of each criterion does not make it possible to reach a clear conclusion to the existence of a 'criminal charge'.[207] Additionally, it is important if a fine can be turned into a prison sentence in the case of default of payment.[208] Due to the wide circle of addressees, the ECHR indicated that the German *Ordnungswidrigkeitenrecht* also constitutes a 'criminal charge'. The Court indicated in the *Öztürk* Case that it does not conflict with the Convention to distinguish between different categories of offences but that such a classification is decisive for the question whether Article 6 ECHR is applicable. In this case the offence was not qualified under German law as criminal but as a regulatory offence.[209] Administrative sanctions thus

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[204] P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 543 et seq.

[205] *Engel and Others v. the Netherlands* – 22 (8.6.76), para 82; *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, ECHR 2003-X – (9.10.03), paras 125 et seqq.

[206] *Engel and Others v. the Netherlands* – 22 (8.6.76), para 85; P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 550.

[207] *Sergey Zolotukhin v. Russia* [GC], no. 14939/03 – (10.2.09), para 53; see B. van Bockel, *The ne bis in idem principle in EU law* (Alphen aan den Rijn 2010), 222.

[208] *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, ECHR 2003-X – (9.10.03), paras 125 et seqq.; *Inocêncio v. Portugal* (dec.), no. 43862/98, ECHR 2001-I – (11.1.01).

[209] *Öztürk v. Germany* – 73 (21.2.84), paras 47 et seqq.; P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 555.

can be categorised as 'criminal charge' under certain conditions. In due consideration of the 'Engel criteria' these are especially the nature of the offence and that of the sanction that may be imposed, as well as the degree of severity of the penalty, irrespective of whether they formally have that criminal character under domestic law.

4.5. Indication of the principles of Article 6 ECHR for administrative procedure

According to previous considerations, a general applicability of Article 6 (1) ECHR on administrative procedure has to be rejected.

The wording of Article 6 ECHR requires that a tribunal has to be seised and only guarantees protection in the determination of civil rights and obligations or of any criminal charge.

The European Commission of Human Rights already decided at an early stage that Article 6 ECHR only applies to proceedings of courts of law and not to administrative decisions. What is more, it decided that the right to have a purely administrative decision based upon proceedings comparable to those prescribed by Article 6 ECHR is not included as such among the rights and freedoms guaranteed by the Convention.[210]

Consequently, the opportunity for an analogy to court proceedings has been excluded by the Commission. As a matter of fact, an analogy already fails with regards to the lack of an unintentional gap in the law as well as the lack of comparability of administrative procedure with court proceedings on the one hand and civil and criminal matters on the other hand.

In contrast to the not given opportunity of an analogous application of Article 6 (1) ECHR to administrative procedure, the Council considered to enact a new Article 6 a ECHR. With this provision, the scope of application should be extended to public law and to administrative decisions in particular. This approach has thus not been pursued.[211]

The ECHR, however, considers an advance effect of Article 6 (1) ECHR to the upstream administrative procedure, if it is formative for the subsequent court procedure. Thus, it at least allows Article 6 (1) ECHR an indicative effect for the upstream administrative procedure.[212] First of all, this applies to the reasonable-time and the statement of grounds

[210] Application No. 1329/62, 07.05.1962, CD 9, 28 (33). Application No. 2941/66, 08.04.1967, CD 23, 51 (61); Application No. 4304/69, 05.10.1970, CD 36, 76 (78).
[211] B. Münger, 'Die Arbeiten des Expertenkomitees Menschenrechte beim Europarat' in F. Matscher (ed.), *Verfahrensgarantien im Bereich des öffentlichen Rechts* (Kehl, 1989), 29 at p. 34 et seqq.
[212] *Funke v. France* – 256-A (25.2.93), paras 41 et seqq.

requirement,[213] but may be equally extended to the right to be heard. Thus a general transmission of the guarantees provided by Article 6 (1) ECHR on European administrative procedure has to be answered in the negative. However, they have to be granted indicative effect.[214]

What is more, it is important to fulfil these requirements not only in administrative procedure, but also in the subsequent court proceeding. A fulfilment of the requirement of a hearing in administrative procedure only cannot be sufficient at all.

It is an obligatory condition for the applicability that there is a possibility of judicial review or in some cases an appeal on the merits of administrative decisions that are directly decisive for civil rights and obligations or a criminal charge by a body that complies with Article 6 ECHR.[215] The courts of judicial review are obliged by Article 6 (1) ECHR, so that at this stage protection is ordered by the Convention at the latest. Meeting the requirements of Article 6 ECHR only in the upstream administrative procedure cannot be sufficient in reverse.

The question of the expansion of the scope of protection of Article 6 ECHR has been discussed and criticized by part of the doctrine as well.[216]

By virtue of the right to a fair trial and its incorporated right to be heard as a general principle of Union's law and the legal binding of Article 41 CFR, the necessary procedural rights are already guaranteed in a normative as well as in a 'de facto' way. Thus, effective protection of the right to be heard does not depend on an explicit expansion of Article 6 ECHR on European administrative procedure.

4.6. Substance of the guarantee

Due to the fact that the question of the indicative effect of Article 6 ECHR for the administrative procedure is answered in the affirmative, the substance of the guarantee has to be examined.

Article 6 ECHR requires a fair hearing. The notion of 'hearing' may be equated in this context with that of 'trial' or 'trial proceeding'. Additionally, it should not be seen as

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[213] *Hentrich v. France* – 296-A (22.9.94), para 56; *Morscher v. Austria*, no. 54039/00 (Sect. 3) (Eng) – (5.2.04), para 38.

[214] Similarly F. Sudre, 'Le droit à un procès équitable, „hors les jurisdiction ordinaires"' in L. Dubouis (ed.), *Au carrefour des droits* (Paris, 2002), 205 at p. 212 et seqq.

[215] D. Harris et al., *Law of the European Convention on Human Rights* 2nd edn. (Oxford, 2009), 228.

[216] P. Tavernier, 'Faut-il réviser l'article 6 de la convention européenne des droits de l'homme?' in L. Pettiti, *Mélanges an hommage à Louis Edmond Pettiti* (Bruxelles, 1998), 707 at p. 707 et seqq.; M. Hottelier, 'La Convention européenne des droits de l'homme après cinquante ans' *SZIER* (2001) 175, at p. 193 et seq.; V. Haïm, 'Faut-il supprimer la Cour européenne des droits de l'homme?' *Recueil Dalloz* (2001) 2988, at p. 2990 et seqq.

equivalent to 'hearing in person' or 'oral hearing', although these two aspects may be elements of the notion of fair and public hearing as contained in Article 6 ECHR.[217]

Article 6 ECHR consists of a variety of specific rights, inter alia the right to a fair hearing.

In proceedings which affect civil rights and obligations, the concept of equality of arms is essential part of the right to a fair trial and thus the right to a fair hearing. It was first mentioned in the *Neumeister* case[218] and requires a fair balance between the parties. In the context of civil cases between private parties, the procedural equality does not have to be absolute. What matters is that each party is afforded a reasonable opportunity to present izd case including izs evidence under conditions that do not place it at a substantial disadvantage towards the other side.[219]

It as well applies to criminal cases, where the very character of the proceeding involves a fundamental inequality of the parties. Thus, in criminal proceedings, if the prosecution enjoys a significant procedural advantage, there will not be a reasonable equality of arms between the parties.[220] The same applies to administrative procedures.[221]

The principle of equality of arms, that is closely connected to the right to adversarial proceedings, entails that the parties must have the same access to the records and other documents pertaining to the case, at least insofar as these may play a part in the formation of the court's opinion.[222]

Closely related to equality of arms is the right to have an adversarial trial which needs to be ensured both in civil and criminal proceedings. This means the opportunity for the parties to have knowledge of and comment on the observation filed or evidence adduced by the other party.[223] In order for the adversarial process to work effectively it is important that relevant material is available to both parties.

Additionally, the right to a reasoned decision is part of the right to a fair hearing; even if it is not expressively mentioned by Article 6 ECHR. This also has been recognised by the Court.[224]

Concerning the right to be present at the trial, it depends on the nature of the proceedings whether a failure to allow the individual accused or in area of civil litigation to attend in

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[217] P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 578.
[218] *Neumeister v. Austria* – 8 (27.6.68).
[219] *Dombo Beheer B.V. v. the Netherlands* – 274 (27.10.93), para 33.
[220] *Borgers v. Belgium* – 214-B (30.10.91); F. Jacobs & R. White, *The European Convention on Human Rights* 4th edn. (Oxford, 2006), 176.
[221] *Feldbrugge v. the Netherlands* – 99 (29.5.86), para 44.
[222] *Ernst and Others v. Belgium*, no. 33400/96 (Sect. 2) (fr) – (15.7.03), paras 60 et seq.; P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 580.
[223] *Ruiz-Mateos v. Spain* – 262 (23.6.93), para 63.; F. Jacobs & R. White, *The European Convention on Human Rights* 4th edn. (Oxford, 2006), 176.
[224] *Van de Hurk v. the Netherlands* – 288 (19.4.94)

person will constitute a violation of Article 6 (1) ECHR. As a general rule, an accused should always be present at first instance trial but there may be exceptions as far as trials in second or third instance are concerned. Moreover, in principle an exception is permissible only if the accused person was entitled to be present at a hearing at first instance.[225] However, this, is less strict in civil proceedings.[226]

It is not sufficient that the criminal defendant or civil party is present in court. In addition he must be able to participate effectively in the proceedings.[227]

5. The right to be heard as a general principle of European Union's law

5.1. The constitutional traditions common to the Member States

5.1.1. The right to be heard as a general principle

According to Article 6 (3) TEU fundamental rights as they result from the constitutional traditions common to the Member States shall constitute general principles of the Union's law. A right to be heard in administrative procedure or the basic thought of good administration is part of several constitutions of the Member States.[228] The right to be heard in administrative procedure is explicitly guaranteed in Article 105 c) of the Spanish Constitution,[229] the right to good administration is literally fixed in Article 97 of the Italian Constitution.[230]

The principle of the rule of law is common to all Member States' constitutional traditions and constitutes *acquis communautaire* and a value on which the Union is founded according to Article 2 TEU. Even if Article 6 (3) TEU talks about the *constitutional* tradition as source of law, the ECJ obviously refers not only to the Member States' Constitutions themselves, but as well to the implementation in the national administrative law.[231] Thus, the ECJ uses the methods of comparative law to develop general principles of procedural rights.

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[225] P. van Dijk & M. Viering, 'Right to a Fair and Public Hearing' in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, 2006), 511 at p. 589.
[226] *Fredin v. Sweden (no. 2)* – 283-A (23.2.94), para 22.
[227] F. Jacobs & R. White, *The European Convention on Human Rights* 4th edn. (Oxford, 2006), 180.
[228] J. Ponce Solé, 'Good administration and European public law, (2002) 14 *REDP* 1503 at p. 1514 et seqq.
[229] For further details see F. Garrido Falla, *Comentarios a la Constitución* 3rd ed. (Madrid, 2001), Art. 105, p. 1631 et seq. F. Lopéz Menudo, in J. Barnés Vázquez (ed.), *El procedimiento administrativo en el derecho comparado* (Madrid, 1993), p. 129.
[230] For further details see R. Bifulco, *Commentario alla Costituzione* (Torino, 2006), Art. 97, p. 1891 et seq.; V. Crisafulli & A. Ambrosi, *Commentario breve alla Costituzione* (Padova, 1990), p. 611 et seq.
[231] Case 32/62 *Alvis* [1963] 107, 123.

The fundamental idea of the much quoted wording of 'Verwaltungsrecht als konkretisiertes Verfassungsrecht'[232], meaning 'administrative law as materialised constitutional law',[233] has been picked up in a lot of Member States. The emphasis on the rules of the defence in the corresponding laws on administrative procedure therefore lies on the implementation of constitutional principles.

The systems of the United Kingdom and Germany are in the centre of interest as the currently exercise decisive influence in the field of European administrative procedure.[234] Especially with regards to the safeguarding of a fair administrative procedure, it is the influence of the English and German administrative law which is most visible.[235]

5.1.2. The United Kingdom

British law had a decisive impact on the development of European procedural rights.[236] Even by developing the right to be heard as a general principle, the ECJ referred to British law traditions as the principle of fairness and individual procedural rights.[237] In his opinion in the *Transocean Marine Paint* case, Advocate General Warner reached the conclusion, that there should be a general recognition of the British *audi alteram partem* as *rule of natural justice* on European level to establish the right to be heard.[238]

To begin with, it should be pointed to the fact, that there are different legal orders in the United Kingdom; England and Wales with its 'true' common law system on the one hand and Scotland with its special rules on the other, even if the differences regarding the principles of the natural justice rule are negligible.[239]

The United Kingdom does not have a 'Constitution' in the sense of a continental European thought of a codified Constitution.[240] A written or formal Constitution does not exist; the existing Constitution moreover is a result of an historic development. For this reason, it is not always clear which sources of law can be correctly labelled *constitutional* and which

[232] F. Werner, 'Verwaltungsrecht als konkretisiertes Verfassungsrecht' (1959) *DVBl.* 527.
[233] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, 301 in footnote 27.
[234] K. Kańska, 'Towards Administrative Human Rights in the EU' *ELJ* 10 (2004) 296, at p. 302.
[235] J. Schwarze, *European administrative law* (London, 2006), 1430.
[236] Specifically to the right to be heard, see T. C. Hartley, *European Community Law* 6th edn. (Oxford, 2007), 154 et seq.
[237] H. Papier, 'Die Rezeption allgemeiner Rechtsgrundsätze' *EuGRZ* (2007) 133 at p. 133.
[238] Opinion of Advocate General Warner, Case 17/74 *Transocean Marine Paint* [1974] 1063, 1090; concerning the effects on British administrative law see P. Birkinshaw, 'English Public Law under European Influence' in: J. Schwarze (ed.), *Bestand und Perspektiven des Europäischen Verwaltungsrechts* (Baden-Baden, 2008), 97 at pp. 98 et seqq.
[239] J. Schwarze, *European administrative law* (London, 2006), 1274 et seq.
[240] A. Bradley & K. Ewing, *Constitutional and administrative law* (Harlow, 2007), 1 et seqq.: strongly critical J. Bentham, *Bentham's handbook of political fallacies* (New York, 1971), 154 et seqq.

sources are non-constitutional sources of law[241] and belong to 'ordinary law'. However, the United Kingdom does possess a body of legal and other rules by which the process of government is regulated. Therefore it has a Constitution in the functional sense.[242] The Constitution hence consists of Acts of Parliament, *constitutional statutes*, judicial decisions in form of *case law*, *constitutional conventions* as well as general principles of law.[243] An explicit right to good administration or a right to be heard in administrative procedure does not expressly result from the constitutional sources of law. Notably, the lack of one of those rights in the classic historic sources of law like the Bill of Rights 1689 or the Human Rights Act 1998 shows the lack of a historic concept of good administration.

However, the procedural rights enforced by judicial review match the concept of natural justice which has been described as providing a kind of code of fair administrative procedure.[244]

The minimum standards of procedural fairness and therefore natural justice are two general principles: The right to a fair hearing, *audi alteram partem,* and the rule against bias, *nemo judex in causa sua.*[245] The right to be heard is recognised as to be central to the concept of natural justice.[246] The most characteristic matter of the British administrative law system is the absence of a formal separation between private law and public law.[247] Natural justice is not to be understood as a specific procedural rule, but as a general principle of fairness, which does not only apply to administrative procedure, but also to all areas of British law. Hence, its standing as general principle leads is comparable to the French *droits de la défense* .

According to the early and leading precedent *Cooper Wandsworth Board of Works* the principle of *audi alteram partem* says:

> *"(...) although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."*[248]

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[241] H. Barnett, *Constitutional and administrative law* 7th edn. (London, 2009), 23 et seqq. analyses the legal sources of the Constitution.
[242] A. Carroll, *Constitutional and administrative law* 2nd edn. (Harlow, 2002), 3.
[243] Regarding the sources of law see J. Alder, *Constitutional and administrative law* 7th edn. (Basingstoke, 2009), 43 et seqq.
[244] W. Wade & C. Forsyth, *Administrative Law* 9th edn. (Oxford, 2004), 435; Lord Millett, 'The Right to Good Administration in European Law' (2002) *Public law* 309 at p. 321.
[245] M. Fordham, *Judicial Review Handbook* (London, 1994), 329; J. Joshua, 'The right to be heard in EEC competition procedures' (1991-1992) 15 *FILJ* 16 at p. 21; M. Beloff, 'Judicial Safeguards for Administrative Procedure: The United Kingdom' in F. Matscher (ed.), *Verfahrensgarantien im Bereich des öffentlichen Rechts* (Kehl, 1989), 39 at p. 54.
[246] Lord Millett, 'The Right to Good Administration in European Law' (2002) *Public law* 309 at p. 314.
[247] J. Schwarze, *European administrative law* (London, 2006), 140.
[248] *Cooper/Wandsworth Board of Works* (1863) 14 CBNS 180 at p. 194; for this judgement in context of the 'natural justice' principle see A. Bradley & K. Ewing, *Constitutional and administrative law* (Harlow, 2007), 747 et seqq.; A. Carroll, *Constitutional and administrative law* 2nd edn. (Harlow, 2002), 299.

British law and along with it the British administrative law shows decisive structural differences to the German law as well as the Roman and civil law systems due to its case law orientated common law system. British administrative law developed remarkably late in opposite to continental administrative law systems.[249] The famous quote of A. V. Dicey 1885 says

> *'In England, (...) the system of administrative law and the very principles on which it rests are in truth unknown (...)'.*[250]

Even in 1964, Lord Reid stated in the Ridge v Baldwin case that

> *'We do not have a developed system of administrative law – perhaps until fairly recently we did not need it.'*[251]

Afterwards, beginning in the 1960s, the development of administrative law principles by case law increased. Administrative law first occurred as the judicial review of administrative action,[252] which until today is generally exercised not by a special administrative judiciary but by the ordinary courts[253] even if the 'Administrative Court' became established as a specialist court of the High Court of Justice in 2000.

Statutory requirements of administrative procedure are quite sparse.[254] However, few specified rules apply, for example the Tribunals and Inquiries Act of 1992. The Council on Tribunals issued a set of model rules on general procedural guidelines which provide that the Tribunal shall conduct the hearing in such manner that it considers it most suited to the clarification of the issues before it.[255] In 2007, the Tribunals, Courts and Enforcement Act came into force, which provided significant changes to the courts and legal procedures. Purpose of this Act is the unification of the British Tribunal system, which takes the next step to an independent administrative law.

However, due to the general absence of codified procedural rules, imposed by statute, the rules of natural justice as a general principle of law apply to British administrative procedure.

The principle of natural justice nevertheless provides minimum requirements for the parties to ensure a fair decision and leads to an administration's duty to act fairly.[256] In general it may be said that the rules apply to the exercise of a decision-making power by a

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[249] See the comment of J. Mitchell, 'The Causes and Effects of the Absence of a System of Public Law in the United Kingdom' (1965) *Public Law* 95 at p. 118.
[250] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 10th edn. (London, 1959), 330.
[251] *Ridge v Baldwin.* [1964] AC 40, House of Lords.
[252] H. Barnett, *Constitutional and administrative law* 7th edn. (London, 2009), 709.
[253] J. Schwarze, *European administrative law* (London, 2006), 152.
[254] For the relevant statutory rules see J. Schwarze, *European administrative law* (London, 2006), 1284 et seqq.
[255] A. Carroll, *Constitutional and administrative law* 2nd edn. (Harlow, 2002), 498.
[256] M. Fordham, *Judicial Review Handbook* (London, 1994), 329.

public body where this may have detrimental consequences for the person affected.[257] Natural justice as a procedural requirement constitutes a characteristic of the adversary system, where the hearing is an instrument for determination of the circumstances. A hearing thus is not necessary whether other measures to determinate the circumstances are given, for example in those cases, where the inquisitorial system applies. However, as a general rule the adversary system applies in court proceedings.

Until the judgement in the leading Ridge v. Baldwin case,[258] the application of the rules of natural justice still required that the decision-making body must be under a duty to act judicially.[259] Thus, an application to pure administrative procedures was not possible.[260] However, this case expanded the strict limitation of this principle.[261] The rules of natural justice furthermore became applicable to not only 'judicial' proceedings, but also to 'quasi-judicial' as well as to purely 'administrative' ones.[262] The requirements of the *audi alteram partem rule* thus became conferred by case law to administrative procedure.

The extent and substance of the requirements of the *audi alteram partem* guarantee are not strictly fixed, but depend on the particular case.[263] Basically, the principle may include 'notice' and 'hearing',[264] namely the right to be given notification of the procedure and the right to make representations and be given an opportunity to respond to possible evidences whether in writing or orally.[265]

Restrictions may apply to the right to notice where the public interest it requires.[266] Furthermore, an oral hearing is not required in all circumstances. However, where an oral hearing is held, the right includes the right to comment on any evidence presented and under circumstances the right to put questions to witnesses in a cross-examination.[267]

The consequences of a breach of the principles of natural justice are not always precise. It is controversial, if decisions which are based on an infringement of natural justice are void or only voidable.[268] In the outcome a breach will mostly lead to nullity of the decision.[269]

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[257] A. Carroll, *Constitutional and administrative law* 2nd edn. (Harlow, 2002), 297.
[258] *Ridge v Baldwin.* [1964] AC 40, House of Lords , at p. 132.
[259] Cane, Administrative law 4th edn. (Oxford, 2004), 140 et seq.
[260] To the limited scope of the natural justice principle see P. Craig, *Administrative law* 6th edn. (London, 2008), 373 et seq.
[261] M. J. Allen & B. Thompson *Constitutional and Administrative Law* 9th edn. (Oxford, 2008), 583.
[262] W. Wade & C. Forsyth, *Administrative Law* 9th edn. (Oxford, 2004), 418 et seq.; P. Craig, *Administrative law* 6th edn. (London, 2008), 375 et seq.
[263] A. Carroll, *Constitutional and administrative law* 2nd edn. (Harlow, 2002), 418;for further case law see A. Bradley & K. Ewing, *Constitutional and administrative law* (Harlow, 2007), 750 et seqq.
[264] P. Craig, *Administrative law* 6th edn. (London, 2008), 395 et seq, for 'notice' and 397 et seqq. for 'hearing'.
[265] For further details M. Fordham, *Judicial Review Handbook* (London, 1994), 345 et seqq.
[266] *R v Gaming Board of Great Britan, ex parte Benaim and Khaida* [1970] 2 QB 417; M. J. Allen & B. Thompson *Constitutional and Administrative Law* 9th edn. (Oxford, 2008), 582.
[267] *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 GB 456; M. J. Allen & B. Thompson *Constitutional and Administrative Law* 9th edn. (Oxford, 2008), 583.
[268] J. Schwarze, *European administrative law* (London, 2006), 1290 with further references.

Practically, it is the court which decides whether the measure adopted is appropriate and the decision may be upheld. This may be the case whereas the validity of the act is only of indirect relevance, whereas in cases where the infringement has a direct effect to the measure adopted, it will seek the nullity of the act as a result.[270]

Finally, the principle auf *audi alteram partem* contains a wider range of rules than the principle of a hearing in German law. It not only guarantees the actual substantive procedural right to be informed of the procedure and to be able to express an opinion, but also the access to the file, the right to legal representation and the right to be given reason[271] which has to be distinguished from the right to be heard as well in German as in European law.

5.1.3. Germany

Neither the German constitution nor the German administrative law know a right to good administration comparable to the one guaranteed in the Charter of Fundamental Rights. However, the elementary components of the right to good administration are covered by the principle rule of law, the 'Rechtsstaatsprinzip', which is stipulated in Article 20 (3) GG. Even the German Federal Constitutional Court, the 'Bundesverfassungsgericht', recognised the right to fair conduct in administrative proceedings, which shall be an elementary part of the rule of law.[272] Thus, the general right to due process and the right to be heard in particular already has been recognised as a general principle of German law even before it was codified,[273] merely the details have been partly controversial.[274]

The right to be heard in administrative procedure is not already the result of Article 103 (1) GG, which guarantees the right to be heard only in court proceedings.[275] Due to its systematic position as well as the clear wording 'in the court', Article 103 (1) GG refers only to the right to be heard before the court and not before any administrative body.[276]

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[269] W. Wade & C. Forsyth, *Administrative Law* 9th edn. (Oxford, 2004), 327 et seq., 417.
[270] J. Schwarze, *European administrative law* (London, 2006), 1291.
[271] M. J. Allen & B. Thompson *Constitutional and Administrative Law* 9th edn. (Oxford, 2008), 583; A. Carroll, *Constitutional and administrative law* 2nd edn. (Harlow, 2002), 304 et seqq.
[272] BVerfGE 51, 150 at p. 156.
[273] C. Ule & B. Becker, *Verwaltungsverfahren im Rechtsstaat* (Köln, 1964), 38; N. Michelsen, *Das rechtliche Gehör im Verwaltungsverfahren der Europäischen Gemeinschaften*, (Hamburg, 1974), 160 et seq.
[274] F. Kopp, Beteiligung, Rechts- und Rechtsschutzpositionen im Verwaltungsverfahren, in O. Bachof et al. (eds.) *Verwaltungsrecht zwischen Freiheit, Teilhabe und Bindung, Festgabe Bundesverwaltungsgericht*, (München, 1978), 387 at p. 388; F. Schoch, ‚Heilung unterbliebener Anhörung im Verwaltungsverfahren durch Widerspruchsverfahren?'(1983) *NVwZ* 249 at p. 250 et seq.
[275] C. Brüning, in C. Stern & F. Becker (eds.), *Grundrechte-Kommentar* (Köln, 2010), Art. 103 GG, para 14; F. Kopp & U. Ramsauer, *Verwaltungsverfahrensgesetz* 11th edn. (München, 2010), § 28, Rn. 3a.
[276] B. Bredemeier, *Kommunikative Verfahrenshandlungen im deutschen und europäischen Verwaltungsrecht* (Tübingen, 2007), 233 with further references.

The guarantee of the right to be heard can be put down to several linking points in the German Constitution. One the one hand, the right to be heard is seen as a required result of the rule of law.[277] Therefore, the principle of legality of public administration, as stated in Article 20 (3) GG, demands fixed rules in administrative procedure. These secure rights of individuals, which the right to be heard is part of.[278]

Furthermore, due process as part of the rule of law applies as well in administrative procedure, thus the rights of defence also have to be guaranteed in administrative procedure.[279]

Additionally, the right to be heard can be understood as the respect of human dignity in accordance with Article 1 (1) GG. Also outside court proceedings, every person must not be made an object of government or state action.[280] Human dignity demands that the person concerned has to be given rights of defence so that he can evade being made into an object of government action by exerting influence on the procedure.

The German jurisdiction consequently derives the right to be heard in administrative procedure in a synopsis of the principle of human dignity and due process as part of the rule of law.[281] Furthermore, the right to be heard serves as the protection of fundamental rights.[282] Eventually, even the principle of democracy demands a participation of the citizens in state actions. Therefore, administrative decisions might be legitimated by participation of the person concerned.[283]

As seen, the right to be heard is established in the German Constitution, even if it is not explicitly codified. Clear definitions of this right can be found in the laws on administrative procedure, 'Verwaltungsverfahrensgesetze' of both 'Bund' and 'Länder', namely in § 28 VwVfG, § 66 VwVfG for formal procedures and § 73 VwVfG for the plan approval procedure. What is more, almost identical rules concerning the hearing of parties can be found in the corresponding laws § 24 SGB X, the Social Code and § 91 AO of the taxation regulations.

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[277] H. Bonk & D. Kallerhoff, in P. Stelkens et al. (eds.), *Verwaltungsverfahrensgesetz* 7th edn. (München, 2008), § 28, para 2; introductory F. Kopp, *Verfassungsrecht und Verwaltungsverfahrensrecht* (München, 1971), 54 with further references; elementary to the rule of law in administration E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* 2nd ed. (Berlin, 2006), Ch. 2, para 6 et seqq.

[278] E. Eisenberg, *Die Anhörung des Bürgers im Verwaltungsverfahren und die Begründungspflicht für Verwaltungsakte* (Baden-Baden 1991), 110.

[279] H. Bonk & D. Kallerhoff, in P. Stelkens et al. (eds.), *Verwaltungsverfahrensgesetz* 7th edn. (München, 2008), § 28, para 2.

[280] F. Kopp & U. Ramsauer, *Verwaltungsverfahrensgesetz* 11th edn. (München, 2010), § 28, Rn. 3a.

[281] BVerwG, (2001) *NVwZ*, 94 at p. 95 to the applicability in administrative procedure; BVerfGE 101, 397 at p. 404 et seq.; BVerfGE 110, 339 at p. 342.

[282] W. Kahl, ‚Grundrechtsschutz durch Verfahren in Deutschland und in der EU' (2004) *VerwArch* 1 at p. 5.

[283] This question is quite controversial in German law, see B. Bredemeier, *Kommunikative Verfahrenshandlungen im deutschen und europäischen Verwaltungsrecht* (Tübingen, 2007), 254 et seqq.

According to § 28 (1) VwVfG, a hearing must be given before an administrative act, which interferes with the rights of the party involved, may be adopted. The person concerned must be given the opportunity of expressing his opinion on the facts relevant to the decision. According to the jurisdiction and part of the doctrine, this right only applies to unfavourable administrative acts, which does not include the refusal of a requested benefit.[284]

According to § 28 (1) VwVfG the hearing takes place on the facts relevant to the decision. This has raised the question whether the hearing only covers the actual facts of the circumstances,[285] or applies to questions of law as well.[286] Here the latter is clearly to recommend as questions of law are necessary to understand the actual circumstances. A special kind of form is not mandatory, so that a hearing can take place in a written or oral form or can even take place electronically.[287]

There are a couple of exceptions to the duty of a hearing stated in § 28 (2) VwVfG when it is not required by the circumstances of the individual case. Those could be the necessity of an immediate decision when there is danger ahead or a hearing would endanger the aims of the decision. According to § 28 (3) VwVfG a hearing shall be precluded when it would interfere with a compelling public interest.

The German law on administrative procedure follows the concept of a 'serving-function' of procedural rights to ensure the enforcement and protection of substantive law.[288] Basic idea of this principle is that procedural regulations are only relevant to the protection of subjective rights when there are specific effects to fundamental rights.[289] This is shown in the composition of §§ 45, 46 VwVfG, which regulates the suspension or annulment of incorrect issued administrative acts in a very restrictive way.[290] Also the fact that the right to be heard of § 28 VwVfG according to the jurisdiction and part of the prevailing doctrine

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[284] BVerwGE 66, 184 at p. 186; BVerwGE 68, 267 at p. 270; this point is discussed very controversial in German literature, H. Bonk & D. Kallerhoff, in P. Stelkens et al. (eds.), *Verwaltungsverfahrensgesetz* 7th edn. (München, 2008), § 28, para 28; dissenting most part of the prevailing doctrine J. Feuchthofen, ‚Der Verfassungsgrundsatz des rechtlichen Gehörs und seine Ausgestaltung im Verwaltungsverfahren' (1984) *DVBl.,* 170 at p. 174; F. Kopp & U. Ramsauer, *Verwaltungsverfahrensgesetz* 11th edn. (München, 2010), § 28, Rn. 26a with further references.

[285] F. Schoch, ‚Das rechtliche Gehör Beteiligter im Verwaltungsverfahren' (2006) *Jura* 2006, 833 at p. 836; C. Ule & H. Laubinger, *Verwaltungsverfahrensrecht* 4th edn. (Köln, 1995), § 24, para 4.

[286] Thus the prevailing doctrine K. Schwarz, in M. Fehling & B. Kastner (eds), *Verwaltungsrecht*, 2nd ed. (Baden-Baden, 2010), § 28, para 26; H. Pünder, in H. Erichsen & E. Ehlers (eds.), *Allgemeines Verwaltungsrecht* 14th edn. (Berlin, 2010), § 14, para 29; H. Maurer, *Allgemeines Verwaltungsrecht* 17th edn. (München, 2009), § 19, para 20.

[287] K. Ritgen, in H. Knack & H. Henneke (eds.), *Verwaltungsverfahrensgesetz* 9th edn (Köln, 2010), § 28, para 21.

[288] BVerfGE 105, 48 at p. 60.

[289] F. Kopp & U. Ramsauer, *Verwaltungsverfahrensgesetz* 11th edn. (München, 2010), § 28, Rn. 4.

[290] M. Sachs, in P. Stelkens et al. (eds.), *Verwaltungsverfahrensgesetz* 7th edn. (München, 2008), § 45, para 10.

does only apply to unfavourable administrative acts, reflects the German concept of the 'serving-function' of procedural rights in administrative procedure.

5.1.4. Consensus of the Member States' regulations and the Charter of Fundamental Rights

The requirements, the extent as well as the content of the right to be heard display a common European standard, which in so far corresponds to the one guaranteed by the Charter of Fundamental Rights. Indeed, differences occur for example regarding the rules concerning the effects of the breach of fundamental rights. It can be assumed, however, that these differences may diminish due to the Europeanisation of the national regulations on administrative procedure at least in cross-border context. The right to be heard in administrative procedure therefore arises out of the general principles of Union's law as they result from the constitutional traditions and their concretisations in ordinary law common to the Member States.

The question is whether the regulations in the Member States can provide specific guidelines for a standardised right to be heard on European level and to what extent this corresponds to the scope of protection guaranteed by the Charter of Fundamental rights. It is to say, that only the provisions of Germany and the United Kingdom have been examined here. A general proposition on what is the common Member States' principle of the right to be heard can therefore not be stated. Regulations in other Member States like France, Spain or Italy are quite comparable in their basic understanding of granting a right to be heard in an administrative procedure.[291] A common standard of all Member States' provisions is that the addressee of a decision taken by an administrative body must be given the opportunity of expressing his opinion on the facts relevant to the decision. An express duty to hear third parties however is not stipulated in the Member States regulations. The analysis of Article 41 (2) CFR showed that such a duty is not part of this provision as well. Third parties thus can rely on Article 41 (2) CFR, even without being the addressee of the decision in that extent as the individual measure would affect them adversely. Furthermore, the Member States provisions stipulate that a hearing has to be held only before taking specific measures or decisions like adopting an administrative act. The crucial point is, however, that the guarantee expressly is not unspecific regarding the form of measure or decision which shall be adopted, but has only to be granted before

[291] For France see R. Chapus, *Droit administratif général Vol. 1* 15th edn. (Paris, 2001), paras 1311 et seqq.; for Spain see J. González Pérez & F. González Navarro, *Comentarios a la Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (Madrid, 1997), Art. 84, paras 1458 et seqq.; for Italy see M. Fromont, *Droit administratif des États européens,* (Paris, 2006), 215 et seqq.

taking certain and specific forms of measures or decisions. Here lies a clear difference to Article 41 (2) CFR which does not require a specific measure but 'any individual measure'. The content and the scope of the guarantee in the Member States do not differ from the one guaranteed by the Charter of Fundamental rights. The party concerned has to be given the opportunity to express his opinion on the legal and actual facts before any individual measure which could affect him adversely is taken.

The problem concerning the question if the right to be heard applies also to administrative acts, which includes the refusal of a requested benefit, is disputed in the administrative law of the Member States. Also, the wording of Article 41 (2) CFR is not clear in this case. However, this provision is concretised by the Code of Good Administrative Behaviour. This Code is indeed not legally binding, thus it is a source of interpretation and may help defining the content and scope of protection of Art. 41 (2) CFR. Article 16 of the Code demands that the official shall ensure that in any cases where the rights or interests of individuals are involved, the rights of defence are respected at every stage in the decision making procedure. Therefore, the right to be heard is not limited to measures, which constitutes infringement of rights and therefore unfavourable measures, but as well applies to measures which constitute the refusal of a requested benefit.

5.2. The right to be heard in other international human rights agreements

5.2.1. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights from 1966 is one of the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories and thus can supply guidelines which should be followed within the framework of Union law.[292] The Covenant, which constitutes one of the most fundamental human rights agreements can therefore also function as a source of interpretation of rights for the general principles of Union law. Even the ECJ referred to the procedural rights of Article 14 ICCPR.[293]

Article 14 ICCPR ensures a right to justice and fair trial, which is very similar to Article 6 ECHR. Even its structure equals Article 6 ECHR as the first two paragraphs of both provisions contain related and partly identical statements. What is more, Article 14 (1)

[292] Case 4/73 *Nold* [1974] 491, para 13.
[293] Case 374/87 *Orkem* [1989] 3283, para 31.

ICCPR also contains general procedural rules for criminal or civil proceedings. Basic elements of the right to a fair and public hearing according to Article 14 ICCPR are – likewise to Article 6 ECHR – to be present in criminal cases and the opportunity to make representations as well as the latter in civil proceeding under the aspect of equal terms.[294] The provision of Article 14 (1) ICCPR also corresponds with regard to contents as well as the scope of protection to Article 6 ECHR. This leads to the fact, that for the interpretation of this provision not only the jurisdiction of the UN Human Rights Commission may be consulted.[295] Also the jurisdiction of the institutions of the ECHR subserves as source of interpretation.[296]

Concerning the scope of application of Article 14 ICCPR with respect to administration and administrative procedure, reference is made to the explanation regarding Article 6 ECHR. Concerning the civil rights and obligations, in certain constellations public contestations might be covered when rights of citizens are involved. In fact, administrative procedures might be involved in selective cases.[297] This does not lead to a general application to administrative procedure.[298] Regarding the area of criminal charge, the criteria developed by the ECHR may be consulted, so it might apply to certain specific cases in administrative procedure.

The indication which can be awarded for Article 6 ECHR concerning administrative procedure cannot be denied to Article 14 ICCPR due to its comparability. However, due to the huge significance of the ECHR to Union law, not only as source of law for the general principles but also regarding the future accession of the Union to the ECHR, the indication effect of Article 14 ICCPR for the general principles eventually lacks of practical relevance, since its scope of protection is already fully covered by Article 6 ECHR.

5.2.2. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights of 1948 as a declaration adopted by the United Nations General Assembly does not constitute legally binding international law. Most parts do constitute *ius cogens* and international customary law.[299] This declaration

[294] M. Nowak, *CCPR Commentary* 2nd edn. (Kehl, 2005) Art. 14 CCPR, para 29.
[295] For this jurisdiction see S. Joseph et al., *The international covenant on civil and political rights* 2nd edn. (Oxford, 2004, Art. 14 ICCPR, 14.04 et seqq., at p. 390 et seqq.
[296] M. Nowak, *CCPR Commentary* 2nd edn. (Kehl, 2005) Art. 14 CCPR, para 4.
[297] M. Nowak, *CCPR Commentary* 2nd edn. (Kehl, 2005) Art. 14 CCPR, para 17.
[298] S. Joseph et al., *The international covenant on civil and political rights* 2nd edn. (Oxford, 2004, Art. 14 ICCPR, 14.08, at p. 394; for the application in the United Kingdom see S. Bailey, 'Rights in the Administration of Justice' in D. Harris & S. Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford, 1995), 185 at p 212.
[299] A. Eide & G. Alfredsson, in A. Eide et al. (ed.), *The Universal Declaration of Human Rights* (Oslo, 1992), Introduction, p. 7.

contains a provision of judicial rights in Article 10 UDHR which says that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. This guarantee served as a role model for the creation of Article 6 ECHR and accordingly contains similarities to Article 14 ICCPR as well. Despite its lack of a hint to civil rights, the term of rights and obligations is to be understood identical to the provision in Article 6 ECHR.[300] In addition, exceeding procedural rights, notably concerning administrative procedure, cannot be derived from the Universal Declaration of Human Rights.

5.3. The right to be heard in *soft law*

5.3.1. *Soft law* – a not binding source of law

Besides the already examined Union's sources of law and sources of interpretation of rights, the EJC additionally takes into account the Union's *soft law* of its jurisdiction and considers it as a source of interpretation of rights like the Declaration on Democracy and the Declaration on the Fundamental Rights and Freedoms.

A generally accepted definition of *soft law* does not exist. This terminology is meant to indicate that the instrument or provision in question is not itself a 'law'. However, it is required to pay particular attention to its importance within the general framework of international legal development. *Soft law* is not 'law', it constitutes non-binding instruments or documents or non-binding provisions in treaties.[301]

In European Union law the term *soft law* applies to certain measures, which are not binding to its addressees such as guidelines, recommendations, declarations, opinions and codes of conduct. To those measures belong the following regulations on administrative procedure of the Council of Europe as well as OECD documents. What is more, the above mentioned Code of Good Administrative Behaviour, which concretises the right to be heard as stated in Article 41 CFR, is also part of the Union's *soft law*.

[300] L Lehtimaja & M. Pellonpää, in A. Eide et al. (ed.), *The Universal Declaration of Human Rights* (Oslo, 1992), Art. 10, p. 166.
[301] M. Shaw, *International Law* 6th edn. (Cambridge, 2008), 117.

5.3.2. Resolutions and recommendations of the Council of Europe

Furthermore, the non-binding provisions of the Council of Europe, for example the 'Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of Fundamental Rights and Fundamental Freedoms' of 1977 as well as numerous resolutions and recommendations concerning administrative procedure also belong to the Union's *soft law* provisions.

Those regulations constitute recommendations in the sense of Article 15 (b) of the Statute of the Council of Europe.

To create a common minimum standard of reference, the Committee of Ministers adopted the Resolution of 28 September 1977, No. R 77 (31) of the Council of Europe 'On the Protection of the Individuals in Relation to the Acts of Administrative Authorities'. In the recital, reference has been made to the fact that, in spite of the differences between the administrative and legal systems of the Member States, there was a broad consensus concerning the fundamental principles which should guide the administrative procedures and particularly the necessity to ensure fairness in the relations between the individual and administrative authorities. Although this legal text does not use the words of good administration, it is the first legal document dealing explicitly with its underlying principles.[302] This resolution sets out five fundamental principles: The right to be heard, the right of access to information, the right of assistance and representation and the obligation to state reasons for decisions and finally the obligation to state available remedies against an administrative act. A legal definition for the term 'administrative act' can be found in the Recommendation of 11 March 1980 No. R (80) 2 'Concerning the Exercise of Discretionary Powers by Administrative Authorities'. According to this recommendation, the term 'administrative act' means, in accordance with the above mentioned Resolution No. R (77) 31, any individual measure or decision which is taken in the exercise of public authority and which is of such nature as directly to affect the rights, liberties or interests of persons whether physical or legal.

The Resolution No. R 77 (31) provides the right to be heard as its first guarantee. According to this provision, the person concerned may put forward facts and arguments and, in appropriate cases, call evidence. This will be taken in to account by the administrative authority in respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests. In appropriate cases the person concerned

[302] J. Ponce Solé, 'Good administration and European public law (2002) 14 *REDP* 1503 at p. 1522; C. H. Hofmann 'Good administration in EU law – a fundamental right?' *Bull.dr.h.* 13 (2007) 44 at p. 44.

is informed of these rights in due time and in a manner appropriate to the case, . The legal text is followed by an explanatory memorandum, which includes general considerations as well as comments in the annex. According to the explanatory memorandum the underlying idea of the resolution is to achieve a high degree of fairness in the relations between the administration and the individual. Thus, the right to be heard provides that the person concerned is given an opportunity to be heard during the administrative procedure: He may put forward facts and arguments and call evidence, where appropriate.

Further fundamental recommendations to create a common minimum standard of reference in European administrative procedure are the Recommendation of 11 March 1980 No. R (80) 2 'Concerning the Exercise of Discretionary Powers by Administrative Authorities' and the Recommendation of 25 November 1981 No. R (81) 19 of the Committee of Minister to Member States 'on the Access to Information Held by Public Authorities'. According to its comments in the appendix, the Recommendation No. R (80) 2 draws the obligations placed on administrative authorities when they are exercising discretionary powers. Their purpose is to ensure that the latitude conferred by legislation is exercised in a just and fair manner and not abused or used in an arbitrary way. The preamble recalls the general principles governing the protection of the individual in relation to the acts of administrative authorities as set out in Resolution No. R (77) 31. Thus, the right to be heard of Resolution No. R (77) 31 applies in proceedings when using discretionary powers as well.

Another contribution to the creation of a common minimum standard of administrative procedure constitutes the Recommendation of 19 September 1987 No. R (87) 16 of the Committee of Ministers to Member States 'on Administrative Procedures affecting a large Number of Persons'. It is the aim of this recommendation to provide a fair and effective protection in administrative procedure also for a large number of persons. For this purpose, the recommendation has pointed to the general principles laid down in Resolution No. R (77) 31 as well as to the relevant principles included in Recommendation No. R (80) 2. By this means, the principle of the right to be heard also applies to administrative procedures affecting a large number of persons.

All of these resolutions and recommendations do not directly bind the Member States of the Council of Europe. However, they do document the common opinion of the Member States concerning what is necessary for the protection of their citizens and concerning fairness in administrative procedure. Those non legally binding resolutions and recommendations being *soft law* serve as a source of interpretation of rights and therefore can by consulted by the ECJ when establishing general principles. Advocate General *Warner* referred to the right to be heard in administrative procedure as laid down in

Resolution Nr. R (77) 31 and how to reconcile it with the need for efficient administration.[303]

5.3.3. OECD documents

By including the right to good administration in the Charter of Fundamental Rights in 2002, its principles became part of an international declaration of human rights for the first time. Its underlying principle of 'good governance' had already been an essential part of regulations of the Council of Europe as well as of the Organisation of Economic Co-Operation and Development (OECD).

According to Article 1 of the Convention of the Organisation for Economic Cooperation and Development,[304] the aims of the Organisation shall be to promote policies designed to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy. The OECD's mandate also covers questions of public governance.

The 1987's report *Administration as Service, the Public as a Client*[305] already dealt with the relationship between administration and the public at an early stage. It poses the question why relations between the public and the public service were problematic and considers possible approaches to making things better. The approach was pragmatic; the report intended to stimulate ideas for improvement in practice and was addressed to practitioners in public service.[306]

Special attention should be paid to the Recommendation on Improving Ethical Conduct in the Public Service, adopted by the OECD Council on 23 April 1998.[307] The Recommendation is based on a set of twelve principles for managing ethics in the public service agreed to in the public management committee to help Member countries to review their ethic management systems. They intend to establish ethical standards for public service which should be clear and reflected in the legal framework and also demand that the decision-making process should be transparent.

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[303] Opinion of Advocate General Warner, Case 13/77 *NTN Toyo Bearing* [1979] 1185 (1262).

[304] Available online at the OECD's website http://www.oecd.org/document/7/0,3746,en_2649_201185_1915847_1_1_1_1,00.html (date viewed April 5th 2012).

[305] Available online at the OECD's website http://www.oecd.org/dataoecd/59/36/1910557.pdf (date viewed April 5th 2012).

[306] Page 3 of the report, available online at the OECD's website http://www.oecd.org/dataoecd/59/36/1910557.pdf (date viewed April 5th 2012).

[307] Available online at the OECD's website http://www.oecd.org/dataoecd/60/13/1899138.pdf (date viewed April 5th 2012).

Those principles became acknowledged by the European Ombudsman, who recommended on basis of this and other recommendations his proposal for a Code of Good Administrative Behaviour in which the citizen's rights against the administration became concretised on basis of these ethical guidelines. The European Ombudsman refers explicitly to this recommendation in his special report concerning the own-initiative inquiry about the proposal for the Code.[308]

OECD's documents thus influence as *soft law* the development of Union's administrative procedural rules. In form of reports and recommendations the OECD had a decisive impact on the development of the public's administration ethical conduct against citizens. These became as source of interpretation of rights part of the general principles and finally part of written primary law in terms of Article 41 CFR.

6. Conclusion – the right to be heard as part of European Administrative Procedure

The right to be heard is one of the most important procedural rights in European administrative procedure. This thesis demonstrated the standards and demands which the sources of Article 6 TEU provide for a fair hearing.

The examination has shown why Article 6 TEU can be described as an 'Article of recognition of human rights' and how the Charter of Fundamental Rights, the European Convention on Human Rights and the general principles ensure a 'triple protection' of human rights under the Treaty of Lisbon and the similarities and differences of the different sources regarding the right to be heard.

The right to be heard as part of the right to good administration of Article 41 CFR can be traced back to the general principle of a good and sound administration as well as to the '*droits de la défence'*, developed by the ECJ. For the person concerned, the right to be heard is the most important right in administrative procedure. It serves as a protection of fundamental rights as well as a clarification of the facts and thus leads to the 'right' decision of the authorities. The right to be heard has to be granted on every level of administrative procedure and includes apart from the right to information mainly the right to give statements. The personal scope of application includes natural and legal persons and also the Member States in a restricted sense. They have the right to be heard regarding

[308] Special Report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/1/98/OV), D. Conclusions and Recommendation, Fn. 9, available at http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/407/html.bookmark (date viewed April 5th 2012).

'his or her affairs'. This not only does apply to the addressees of a measure but requires a 'special link' between the person concerned and the measure to take. The right to be heard can be exercised vis-à-vis to the institutions, bodies, offices and agencies of the Union as well vis-à-vis to the Member States in so far as they indirectly implement Union law by acting directly on the basis of Union law. In the area of indirectly implementing Union law by acting on the basis of national rules the obligation results from the general principles. The right to be heard might be limited or dropped under certain circumstances. In European administrative procedure a cure of procedural errors is only possible during the administrative proceeding and not in the court proceedings. Article 16 of the Code of Good Administrative Behaviour concretises the right to be heard in Article 41 CFR.

Even before the Union's accession to the ECHR, its rights are of high relevance in the course of the general principles. The applicability of Article 6 (1) ECHR in administrative procedure is still contested. However, the thesis demonstrated, that Article 6 ECHR is applicable in certain specific administrative procedure and has to be conceded an indication effect for administrative procedure in general.

Moreover, the right to be heard is part of the general principles of Union law. In this respect, its importance is comparable to the right to be heard of Article 41 CFR or the ones in secondary law. Furthermore, the right to be heard can be derived from the constitutional traditions common to the Member States. In this respect, the ECJ does not only refer to the constitutions themselves but also to national administrative law. International human rights agreements, as well as *soft law* provisions like resolutions of the Council of Europe, provide rights to be heard.

The right to be heard is explicitly guaranteed by regulations in several areas of secondary law. Even though it was not the aim of this thesis to examine these provisions in detail, the areas where the right to be heard has the most important effect and impact are going to be pointed out briefly: One of the most important areas of application is the field of competition law. It has been explicitly provided by secondary legislation since the early days of competition policy.[309] In the area of anti-trust law, the right to be heard can be found in Article 27 regulation No 1/2003.[310] Chapter V of the implementing regulation points out the exercise of the right to be heard of in detail.[311] Further rules occur from the

[309] H. P. Nehl, *Principles of administrative procedure in EC law* (Oxford, 1999), 71; J. Joshua, 'The right to be heard in EEC competition procedures' (1991-1992) 15 *FILJ* 16 at p. 16 et seqq.; C. Kerse, 'Procedures in EC Competition Cases: The Oral Hearing' (1994) *ECLR* 40 at p. 40 et seqq.

[310] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

[311] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ [2004] L 123/18.

decision on the terms of hearing officers,[312] which as well are applicable to the area of merger control. The right to be heard concerning merger control can be found in Article 18 regulation No 139/2004.[313] Another important area of application is the anti-dumping law. It took the ECJ until 1991 to acknowledge that the right to be heard was also applicable to anti-dumping proceedings[314]. Today the right to be heard in anti-dumping proceedings is explicitly granted by Article 5 (10) and Article 6 (4) regulation No 1225/2009.[315]

Further areas are those of Customs Law and the administration of the European Social Fund. State aid procedures are special: For example the rights to be heard are granted in primary law in Article 108 (2) TFEU for the main examination procedures.[316]

This wide branch of application underlines the importance of the right to be heard in every area and on every level of administrative procedure. What is more, the thesis has shown that it has to be granted even if secondary legislation does not provide any written provision.

Looking into the future, a common law of European administrative procedure would be desirable to ensure a consistent standard of procedural rights on the European level. Whereas the Code of Good Administration is a first step to a codification of procedural rules in direct administration, a similar unification in the area of indirect implementation of Union law seems to be even harder to achieve. Due to the procedural autonomy of the Member States, a harmonisation of procedural standards cannot be ordered by the European Union. Different approaches of implementing Union law in the different Member States leads de facto to a fragmentation of technically harmonised Union law. In this respect, a voluntary approximation of law should be promoted and supported from the Member States and the Union. Regarding the right to be heard, all Member States guarantee this right in general, whereas the specific forms of granting still differ. This thesis pointed out that it mainly affects functions of administrative procedure in general as well as the requirements of the forms of action or effects of procedural errors. Ultimately, the pursued objective should be to treat comparable situations in European or national administrative procedure equally regardless of a cross-border element.

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[312] Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ [2001] L 162/21.

[313]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ [2004] L 24/1.

[314] Case C-49/88 *Al-Jubail Fertilizer* [1991] ECR I-3187.

[315] Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ [2009] L 343/51.

[316] The rights of complainants in the preliminary investigation are debatable due to a lack of a procedural guarantee in secondary legislation.

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