Journal of Liberty and International Affairs | **Vol. 3, No. 3, 2018 | eISSN 1857-9760**
Published online by the Institute for Research and European Studies at www.e-jlia.com



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Peer review method: Double-Blind
Date of acceptance: January 16, 2018
Date of publication: February 24, 2018
Review article
UDC 35.076/,077(4-672ЕУ)

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Abstracting

THE SCOPE OF APPLICATION OF THE CHARTER'S RIGHT TO GOOD ADMINISTRATION OF THE EUROPEAN UNION

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Abstract

Article 41 of the Charter for Fundamental Rights of the EU guarantees the right to good administration as a fundamental right of the EU citizens. It seems from the wording that Article 41 applies only to the institutions, bodies and agencies of the Union, without mentioning the Member States. This gives it a narrower scope than that given in Article 51.1 concerning the scope of the Charter as a whole. This paper discusses the question of applicability of the right to good administration regarding the implications of Article 41 in this respect. The doubt that stems from this is whether the content of 51.1 prevails or, on the contrary, it must be ignored and taken as reference the particular provision in Article 41.

Keywords: good administration, Article 41, Charter of Fundamental Rights, European Union, fundamental rights

INTRODUCTION

The right of good administration is one of the fundamental rights of the EU citizens, guaranteed with article 41 of the Charter of Fundamental Rights of the EU which became legally binding with the entering into force of the Lisbon Treaty. As a written, legally binding subjective fundamental right, the right to good administration has become a "cardinal element of the Union's body of 'primary', that is 'constitutional' rules'" (Groussot and Pech 2010, 2). This right as it is defined in the Charter applies only to cases where an institution, body of agency of the EU is involved (De Luque 2003, 25) and includes several rights: impartiality and fairness, acting within a reasonable time, right to be heard, right to access to his or her file, the obligation of the administration to give reasons for its decisions, right to make good any damage, right to communicate to the institutions of the EU to any of the languages of the Treaties. While Article 41 of the Charter, limits the scope of this Article only to institutions and bodies of the EU with no mention of the Member States, Article 51.1 of the Charter of Fundamental Rights of the European Union,

states that the Charter is binding not only to the institutions and bodies of the Union, but as well as to the Member States when they apply EU law. Therefore the scope of Article 41 of the Charter it seems to be defined as being narrower than that of the Charter as a whole (Article 51 of the Charter).

I can conclude that together with the general delimitation of the scope of application carried out by Article 51.1 of the Charter, some of its precepts determine the scope of application of the rights they regulate. The problems come when the one and the other do not coincide (Isaac 2010, 116).

This paper discusses and examines the question concerning the scope of the right to good administration of Article 41 *vis-a-vis* the scope of the Charter as a whole given in Article 51.1. The paper concludes that the wording of Article 41 of the Charter in fact limits the scope of application of the right to good administration to the institutions and bodies of the EU. However, as the Professor Isaac have noted, this does not preclude the applicability of a general principle of good administration, as established by the European Court of Justice, to Member States.

ARTICLE 51 OF THE EU CHARTER: THE SCOPE

Article 51 of the Charter contains provisions concerning the general scope of the Charter. According to what is stated in this Article, the provisions of the Chapter 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 (Article 51.1). This means that national authorities must respect such rights when they act within the scope or field of Union law (Groussot, Pech and Pétursson 2012, 135). When, on the other hand, they act on the basis of national law, outside the scope or field of Union law, they are not under any such obligation (Groussot, Pech and Pétursson 2012, 147).

However in the legal doctrine it is considered that Article 51.1 contains one of the most confusing and obscure clauses of the entire Charter. Namely, it is clear that the fundamental rights enshrined in the European Union are applicable to - and in - the Member States. The thing that is not so evident is which conditions should be met in order to identify that there is an "implementation" of the EU Law.

The legal analyzes show uncertainty (Eeckhout 2002, 969), disagreements (Fenger 2004, 105-113) and different opinions (Craig 2006, 502) regarding the interpretation of the words "implementation of the EU law". Even after the Charter became legally binding, there are still different views among academics in this regard. There are also a great number of studies which analyze the position of the European Court of Justice -ECJ (De Lique, op.cit, 33-34, Garcia 2002, 154). There are numerous occasions in which the ECJ has had the opportunity to decide on this issue since the 80s, when the Court has adopted the first sentences in relation to this issue (Isaac op.cit, 109). In an attempt to systematize, it can be affirmed that there are two different jurisprudential lines in terms of the extent and scope of the implementation of the Charter's provisions by the member states. The first of these (and the older) could be qualified as a narrow interpretation, and the second (the later as regards the date) can be qualified as a broad interpretation and defends the duty of the Member States to respect fundamental rights when their action falls within the scope of application of the EU law.

In line with the narrow interpretation, in the ECJ's judgment from 13 July 1989 (Case C-5/88) it was said that when the Member States implement Community rules, they must, as far as possible, apply those rules in accordance with their requirements (§19). Restrictions may be imposed on the exercise of those rights, provided that "those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights" (§18). This narrow interpretation is followed by the judgment of 24 March 1994 in the case C-2/92 (§16), the judgment of 13 April 2000 in the case C-292/97 (§§ 37, 45 and 58), the judgment of 10 July 2003 in the joint cases C-20/00 and 64/00 (§§ 68 and 88) and judgment of 3 May 2005 in the joint cases C-387/02, 391/02 and 403/02 (§§ 69). The Judgment of the ECJ of 27 June 2006, Case C-540/03 (§§ 104 and 105) deserves special mention because it is the first in which the Court has applied the Charter of Fundamental Rights of the European Union to resolve the dispute brought before the ECJ. The second jurisprudential line (also called "broad interpretation") has its origin in the Judgment of the ECJ of 18 July 1991 (Case C-260/89). According to the findings in this judgment when an internal action carried out by the national authorities falls within the scope of application of Union law, it must be interpreted in accordance with the fundamental rights recognized by the Union, and in accordance with the criteria that are set by the ECJ (§ 42 and 43). This jurisprudential line has been seconded in many judgments delivered by the ECJ.

Finally, the Judgment of 13 March 13 2007 (Case C-432/05) is the second judgment in which the ECJ has invoked the Charter of Fundamental Rights of the European Union. In this judgment the Court mentions the right guaranteed in Article 47 of the Charter, in relation to a matter in which, narrowly speaking, the application of any rule of Union law was not at stake. This jurisprudence is currently prevailing over the narrow approach explained above[1].

The latest step in the evolution of this provision with regard to the relationship between national and EU law is made in the Åkerberg court decision (C-617/10, 2013). Firsty, the Court supports a broad interpretation of Article 51.1, which, in the ECJ's view, "confirms the Court's case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union" (C-617/10, Åkerberg, para 18). In this case the Court denies, with reference to the Explanatory Note on Article 51 (Explanations, 2007), that it leads to a restriction on the application of its previous case-law on fundamental rights. The Court emphasized that according to those explanations, "the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law" (Explanations, 2007). The Court declared that fundamental rights guaranteed in the legal order of the EU are applicable in all situations governed by EU law. Thus, "if national legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures" (C-617/10, Åkerberg, para 19). Furthermore, the Court holds that:

[1] For a more recent example, see the Judgment of 23 September, 2008, Case C-427/06.

> Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter (C-617/10, Åkerberg, para 21).

In the next chapter I will examine the scope of the right to good administration as defined in Article 41. Given the conclusion in Åkerberg that the provisions of the Charter of Fundamental Rights of the EU are applicable to Member States when national measures fall within the scope of EU law, one would assume that this is also true of the right to good administration as stated in the same Charter (Kristjánsdóttir 2013, 244). The wording of Article 41, however, suggests otherwise.

THE SCOPE OF APPLICATION OF ARTICLE 41: THE RIGHT TO GOOD ADMINISTRATION

It seems that what was already said above is not so clear when I speak about the scope of application of the fundamental right to good administration guaranteed in Article 41 of the Charter. There is an apparent discrepancy between the *lex generalis*, which is concretized as I have already seen in the first chapter, in Article 51.1, and the provision concerning the right to good administration, in Article 41 (*lex specialis*) which begins as follows: "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union" (Article 41.1).

If one carefully reads paragraph 1 of this Article it will be very easy to identify that what makes the right to good administration particular and different from what is stated in Article 51.1 of the Charter, is the definition of the scope of this specific right. As already explained in the introduction, this provision states the right of every person to have his or her affairs handled in a certain way by the institutions and bodies of the Union and it does not mention Member States. Its scope therefore seems to be defined as being narrower than that of the Charter as a whole (Article 51.1. of the Charter).

Does the Article 41 constitute an exception of the general rule established in the case-law and embodied in Article 51.1 of the Charter? The wording is clear but still there are some doubts as regards the real implication of this limitation of the right to good administration, among the legal experts in this field.

The wording of this Article has led many experts to understand that the components of the right to good administration are internal rights of the Union and do not reach the Member States. This has been considered by *Linde Paniagua* who said that this right can only be exercised autonomously before the Union (before the institutions, bodies and organs of the Union, the Ombudsman or the European Parliament), but never by the European citizens in the Member States. Article 41 contains rights in the internal scope of the Union, which do not affect the competence relations between the Union and the Member States (Paniagua 2008, 32-33).

Similarly, *Dutheil de la Rochére*, states that the obligations deriving from Article 41 are targeting only the institutions, bodies and organs of the Union. The author points out that the difference with the other rights is that Article 41 does not apply to the Member

States when they implement EU law. The rationale for this exclusion is to disregard Member States of having to consider the principles of good administration in purely national procedures, even when EU law should be applied. However, she also points out that this limitation may not be practical and recalls that the tendency of the ECJ is to impose common standards on Member States when they apply EU law (Dutheil de la Rochére 2008, 170). Similar views hold Mir Puigpelat (Mir Puigpelat 2010, 150-151). Other authors enforce the distinction between the right to good administration and the principles of good administration, concerning the limits of protection they offer. Therefore, they consider that the Article 41 of the Charter is applicable only to the activity of the institutions and bodies of the European Union, and constitutes an exception to the general provision as regards the scope of application given in Article 51 of the Charter. In their opinion, the European Courts are driving force for constant approximation of the concept of good administration also as a general principle of European Union Law, and that allow those general principles of EU law to be invoked by the Member States when acting in application of EU law. This does not mean, however, that the Member States should accept the principle of good administration as generator by individual rights enabling them, for example, to claim damages. Therefore, when the Member States implement EU law or act within the scope of application, will be obliged by the ECJ jurisprudence concerning the application of general principles (Hofmann *et al*. 2011, 203-204).

The opinions that defend the extension of the scope of application of the right to good administration to the national authorities when they implement EU law are also not missing. This argument is based on the fact that, according to the principle of indirect enforcement, there are many issues that the community institutions assign to the national administrations due to their decentralized management, and as a result of that tt the administrations of the Member States apply the EU law on a daily basis (Ferreiro 2015, 146). Those views lead towards rejecting the thesis that the provisions concerning the right to good administration of the Charter constitute an exception of the general provision enshrined in Article 51.1., even though the Article 41 does not mention the Member States and their obligation to guarantee the right to good administration. From this viewpoint, Martin Delgado pointed out that if the rights enshrined in Article 41 are to be met by the European institutions, this will not going to be within the spirit of the Charter, and big discrepancies will be made in the application of this right by the EU institutions and by the administration of the Member States.

It seems that a literal interpretation of the text of the Charter would give precedence to the special provision (Article 41) against the general rule in Article 51. Many of the authors do not believe, however, that this was the intention of the legislator. Given the specific nature of the rights mentioned in Article 41 - whose effectiveness only manifests within the framework of an administrative procedure and then is when they must be guaranteed - it has led the legislator to consider it difficult, if not impossible, regarding the current stage of the development of the European law, a harmonization of the administrative procedure systems of Member States, which could also enter into collision with the principle of procedural autonomy. If one carefully reads the Explanatory notes on Article 41 it can conclude that the right to good administration is based on a general principle of EU law and that this Article do not has an intention to overrule the ECJ's jurisprudence in this regard. The Explanations make reference to the case-law of the Court as a basis for the provisions in the Charter.

Therefore, the scope of good administration defined in Article 41 also raises questions as regards its conformity with the general principle of good administration (Kristjánsdóttir, 2013, 248). According to de Vries the Charter should not detract from the case-law of the Court and therefore its scope should coincide with that of the general principles of EU law (de Vries 2012, 22). This means that the limitation in Article 41 is not in accordance neither with the general scope of Article 51, nor with the scope of application and significance of the general principles of the EU law as defined in the Treaty of the European Union.

The analysis of the case-law demonstrates that the good administration is applicable to Member States as a general principle of EU law. In the case M.M v. Minister of Justice, Equality and Law Reform (Case-277/11, 2012), a question regarding the applicability of the right to be heard was raised. In his opinion of 26 April 2012, Advocate General Bot said that according to settled case-law, the right to be heard is a general principle of EU law "pertaining, on the one hand, to the right to good administration, laid down in Article 41 of the Charter and, on the other, to observance of the rights of defence and the right to a fair trial enshrined in Articles 47 and 48 of the Charter" (Case-277/11, Opinion of AG Bot, para. 31). Furthermore he states that:

> Observance of that right is required not only of the EU institutions, by virtue of Article 41(2)(a) of the Charter, but also – because it constitutes a general principle of EU law – of the authorities of each of the Member States when they adopt decisions falling within the scope of EU law, even when the applicable legislation does not expressly provide for such a procedural requirement *(Case*-277/11, Opinion of AG Bot, para. 32).

The same as the Advocate General Bot, the ECJ also maintain the applicability of the right to be heard to citizens of Member States based on a general principle of EU law. Namely, in this case the Court confirmed that according to the settled case-law, "the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law" (para. 93 of the Judgment)[2]. In the recent Case C-46/16 of 9 November 2017 the Court holds the same line. No additional comments are necessary to conclude that the right to good administration, despite the literal wording of Article 41 of the Charter, has an effect in practice also on the national administrations and it entails standardization of the procedural guarantees that integrates.

[2] See also: Joined Cases C-411/10 and C-493/10 N.S. and Others, 2011 ECR I-13905, paragraph 77.

CONCLUSION

The analysis carried out in this paper show an existence of a tendency to apply to the national administrations the same requirements that the European administration must fulfill regarding the procedural guarantees related with the administrative activity when it acts within the scope of application of the EU law. The Charter is part of the *Acquis Communautaire* and all public authorities of the EU, including both, the European and those of the Member States, must act in a way that will respect the fundamental rights enshrined at European level.

Considering the above mentioned in Chapter 3, it can be concluded that article 41 responds more to a cautious than imperative formulation. The question is currently reserved to the field of legal dogmatics, waiting for the European Court of Justice, with the legally binding Charter of Fundamental Rights in its hands, to decide on an alleged violation of any of the rights proclaimed in Article 41 by a national administrative authority in application of the EU law. It will be once again the ECJ that will establish the limits of the said formulation in Article 41.

A first step in the application of Article 41 of the Charter, will be to achieve and guarantee full respect of the rights proclaimed in this Article in the administrative procedures carried out by the European administration in the direct application of the EU law, leaving open the door to a future harmonization of the administrative procedural rules of the Member States when they implement EU law. 

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