

# The problem with the scope of application of the fundamental right to good administration as it was established at the Union's level, and mentioned within the case law of the Constitutional Court of Romania

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## **Abstract**

*The purpose of this paper is to analyze the ways through which the right to good administration – a general principle of EU law but also a fundamental rights expressly mentioned within article 41 of the EU Charter – was invoked in front of the Constitutional Court, while wishing not only to underline the existing difference in relation to the scope of application but also to point out the ways in which such a difference was first established and developed by the Court of Justice of the European Union.*

**Keywords:** *the fundamental right to good administration, Constitutional Court of Romania, Court of Justice of the European Union, Charter of Fundamental Rights of the European Union, constitutional review*

## **Introduction**

The right to good administration is a fundamental right established at the EU level and applicable at the national level within the field of EU law. This fundamental right was established in the 1980s through praetorian action, namely through the interpretative activity of the Court of Justice.

The coming into force of the Charter of Fundamental Rights of the European Union ('EU Charter') mentioned the right to good administration within the content of its article 41. Such a written foundation provided also a limitation in relation to the scope of application as article 41 of the EU Charter specifies that the right to good administration is opposable only in relation to institutions, bodies, offices and agencies of the Union, and thus not covering within its normative field the administrative authorities of the EU Member States. There was therefore the need for the Court of Justice's intervention in order to establish that in cases involving national administrative authorities, - and after the entering into force of the EU Charter, the national courts will have to apply not the fundamental right to good administration, but the general principle of good administration. Even so, in front of the Constitutional Court of Romania, the parties

ignored such a difference, requesting, in an erroneous manner, still the application of article 41 of the EU Charter.

Having in mind the need to discuss the problem in relation to the scope of application of the right to good administration, we shall point out the coming into being of this right at the Union's level (I) in order to further underline the incident case law of the Constitutional Court (II). Short conclusions will follow.

### **Section I: Good administration – a fundamental right at the EU level**

In this first section we shall describe the normative content of the right to good administration together with the additional interpretive case-law of the Court of Justice (I.1) while underlining, afterwards, the fundamental difference between the right to good administration and the principle of good administration, taking into account the way in which those two were to be relied on in front of the national courts (I.2).

#### *I.1. The right to good administration and its normative content*

Article 41 of the EU Charter is called “Right to good administration” and stipulates within the content of its four paragraphs – the following components – rights and guarantees:

- the right of any person 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 right of any person to have made good any damage caused by the EU institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States
- the right to write to the institutions of the Union in one of the languages of the Treaties and the additional right to receive an answer in the same language

The right to have your personal affairs handled impartially, fairly and within a reasonable time contains expressly the following additional rights [1]:

- the right to be heard, before any individual measure which would affect you adversely is taken
- the right to have access to your file while respecting the legitimate interests of confidentiality and of professional and business secrecy

- the right that any administrative decision is being motivated and the correlative obligation of giving reasons

As it concerns the case law of the Court of Justice and the foundations of the right to good administration through praetorian ways [2], the Explanation in relation to the article 41 of the Charter [3] point out the fact that “[a]rticle 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law [4] which enshrined inter alia good administration as a general principle of law” but that also “[t]he wording for that right [to good administration] in the first two paragraphs results from the case-law [5] and the wording regarding the obligation to give reasons comes from Article 296 of the Treaty on the Functioning of the European Union”.

Thus, it can be observed that before being expressly inserted as a fundamental right within the written content of the EU Charter, “the bouquet of rights” that form the right to good administration was first “connected” and consolidated through praetorian ways, being first proclaimed as a fundamental general principle of EU law and therefore especially opposable to the Member States’ administrative authorities.

As it concerns the main referring decision of the Court of Justice in relation to the right to good administration, the mentioned case law differs depending on the specific right invoked – part of the “bouquet of rights” that form the right to good administration – the oldest case being *Heylens* from 1987, where the Court of Justice established the obligation of the administrative authorities to tell and show in front of the courts – where the legality control was to be carried out – the reasons based on which the contested administrative act was adopted [6].

Consequently, from the substantial point of view, the right to good administration is born from the general principle of good administration, having therefore same normative content.

### *1.2. The difference between the fundamental right of good administration and the good administration as a general principle – the scope of application*

The Court of Justice had on many occasions the possibility to underline the difference between the right to good administration contained within article 51 of the EU Charter and the general principle of good administration as a general principle of EU

law, and thus underlining that the provisions of article 41 are not opposable to the Member States and, implicitly, to the administrative authorities of those Member States.

Therefore, in *Cicala* [7] the Court established that article 41(2) of the Charter is not applicable to the EU Member States. This ratio decidendi was then confirmed in cases such as *YS and others* [8] or *Boudjlida* [9].

Consequently, the fundamental right to good administration contained within article 41 of the EU Charter is to be considered an exception to the general provisions contained in article 51(1) of the EU Charter because the normative content of article 41 – in contrast with all the other rights and principles contained within the Charter – it is not applicable to Member States when implementing EU law, but only to the EU's institutions, organs and agencies.[10]

Such a difference in relation to the field of application is devoiding of relevance the reliance in front of the national courts on article 41 of the EU Charter, at least in those cases in which the claimant understands to oppose this right to good administration to the national administrative authorities. Nevertheless, and in order to obtain the same legal effect like the reliance on article 41 of the Charter, any person has the possibility to rely on the variety of fundamental rights that form the components of the principle of good administration, such as the right to be listened by a public authority – as this right is not only a part of the right of defense – an autonomous general principle of EU law-, but also an integrated part of the principle of good administration – general principle of EU law.[11] Exempli gratia, the Advocate general Mengozzi has mentioned, within the field of public procurement, the fact that the obligation on the administrative authorities of the member states to hear the potential buyer must be recognized as a right irrespective of the fact that article 41 of the Charter is or not applicable, and this based on the autonomous reason conferred by the existence of the right to good administration as a general principle of EU law.[12]

Furthermore, the difference in relation to the scope of application is also underlined by the French Gouvernement in *Boudjlida* by mentioning the fact that although Mr. *Boudjlida* could not rely on the provisions of article 41 of the EU Charter “observance of the right to be heard is required not only of the EU institutions, by virtue of Article 41 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.”[13]

For all the above, the intermediary conclusion is that every time a claimant will wish to rely on a fundamental right – part of the good administration principle, he shall be able to rely on the same rights in front of the national courts, but not based on article 41 of the EU Charter, but on article 6(3) TEU that is to be read together with the Court of Justice’s interpretative case law and, eventually, with the different provisions of EU secondary law sending to the same principle of good administration.[14]

We shall now point out the way in which the Constitutional Court of Romania has noticed this difference, ensuring therefore a “silent” and indirect transposition of the Court of Justice’s case law in relation to the scope of application of article 41 of the EU Charter.

## **Section II: The case law of the Constitutional Court in relation to the scope of application**

Article 41 of the EU Charter was for the first time mentioned in front of the Constitutional Court back in 2012 in a case that provided the decision no. 590/2012 [15] and concerned a case sent by the Criminal Division of the Supreme Court of Romania. The national legal provisions at issue were the ones establishing the communication procedure when a criminal case is demanded to be relocated, the Constitutional Court having the opportunity to observe that, on the other hand, the pending case in front of the Supreme Court was in relation to an appeal on points of law formulated against a criminal decision belonging to a court of appeal. As a consequence, the Constitutional Court escapes from analyzing the issue of constitutionality in relation to article 41 of the Charter, declaring therefore the action for constitutional review as inadmissible in totum.

In 2013, article 41 of the Charter was again to be relied on in front of the Constitutional Court of Romania. In Decision no.12/2013 [16], the Constitutional Court pointed out that although the author of the constitutional complaint could demand to the Constitutional Court to operate a constitutional review in which it should integrate also the provisions of the EU Charter and this based on article 148 of the Constitution [17], however, article 41 is inapplicable in the case at hand “because in conformity with the

provisions of article 41 of the Charter, the right to good administration is to be considered the right of any person – European Union’s citizen – to have their affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.”(Emphasis added). Therefore, the Constitutional Court underlined that “the right to good administration, as it is stipulated by the Charter, can only be relied on within a legal dispute between the citizens of the European Union and the institutions, bodies, offices and agencies of the Union, in relation with the activity of the latter ones” [18](emphasis added). The same ratio was restated in Decision No 394/2013 [19] but in relation to the constitutionality review of certain provisions belonging to OUG No 51/2008 (Ordonanță de Urgență) in relation to the procurement of legal aid in civil matters. Also in this case, the Constitutionat Court reinstated the fact that article 41 of the EU Charter is inapplicable in cases such as those, the arguments relying on article 41 becoming de facto inadmissible ones.

In 2014, article 41 of the EU Charter was no longer to be relied on in front of the Constitutional Court. In addition, the authors of constitutional complaints did not choose to invoke, alternatively, the EU general principle of good administration - like it was also mentioned in the Court of Justice's preliminary rulings.

In consequence, because of the confusion in relation to the scope of application of article 41 of the EU Charter, the Constitutional Court of Romania did not have the occasion to give a ruling in relation to the application of the right to good administration as a general principle of EU law within a constitutional review [20] although, on the other hand, the Court of Justice not only has “authorized” the national ordinary courts to nullify any administrative decision or act belonging to the national administrative authorities that would run counter to the general principle of good administration, but it also acted ex officio, replacing in preliminary ruling cases, the eventual erroneous reliance on article 41 of the EU Charter with the analogous EU general principle of good administration.

### **Conclusions:**

If in the first section of this paper we could observe the difference between the scope of application of the general principle of good administration vis à vis the fundamental right to good administration, in the second part we underlined the fact that

the Constitutional Court of Romania refuses to apply article 41 of the EU Charter outside its specific scope of application and that, in the same time, it does not replace it *ex officio* with the analogous general principle of good administration, - the claimants failing to observe also this specificity in application.

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[1] *Expressis verbis* mentioned within the content of paragraph 2 of article 41 of the EU Charter.

[2] Legal scholars have claimed that the primary source of the right to good administration is to be found in the case law of the Court of Justice of the European Union (See P. Craig, Article 41 – Right to Good Administration, în S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart/Beck, 2014, at 1071).

- [3] As it is stated in article 6 TEU “The rights, freedoms and principles in the Charter shall be interpreted (...) with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”. In relation with the legal force of the Charter’s Explanations, see also K. Lenaers, *The EU Charter of Fundamental Rights: Scope of Application and Methods of Interpretation*, in V. Kronenberger, M. T. D’Alessio, V. Placco (eds.), *De Rome à Lisbonne: les juridictions de l’Union européenne à la croisée des chemins. Mélanges en l’honneur de Paolo Mengozzi*, Bruxelles, Bruylant, 2013, 107-143, at 142.
- [4] Sending to Court of Justice judgment of 31 March 1992 in Case C-255/90 P *Burban* [1992] ECR I-2253, and Court of First Instance judgments of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* [1999] ECR II-2403.
- [5] Sending to Court of Justice judgment of 15 October 1987 in Case 222/86 *Heylens* [1987] ECR 4097, paragraph 15 of the grounds, judgment of 18 October 1989 in Case 374/87 *Orkem* [1989] ECR 3283, judgment of 21 November 1991 in Case C-269/90 *TU München* [1991] ECR I-5469, and Court of First Instance judgments of 6 December 1994 in Case T-450/93 *Lisrestal* [1994] ECR II-1177, 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589.
- [6] Case 222/86, *Heylens*, Rec. 1987, p. 4097, paragraph 15: Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.
- [7] Judgment in *Cicala*, C 482/10, EU:C:2011:868, paragraph 28.
- [8] Judgment in *YS and Others*, C 141/12 și C 372/12, EU:C:2014:2081, paragraph 67.
- [9] Judgment in *Boudjlida*, C 249/13, EU:C:2014:2431, paragraphs 32 and 33.
- [10] For an opinion that goes even against the case law of the Court of Justice, see the Opinion of the Advocate General Wathelet presented in *Mukarubega* (C 166/13, EU:C:2014:2031, point 56) to which it sends the Advocate General Mengozzi in the Opinion presented in *CO Sociedad de Gestion y Participación and Others* (C-18/14, EU:C:2015:95, footnote 48).
- [11] This type of principle is opposable to the Member State – and consequently to all its authorities – when the case facts fall within the area of EU law.
- [12] Opinion of the Advocate General in C-18/14, EU:C:2015:95, footnote 48, translation not yet available in English on [www.curia.eu](http://www.curia.eu). (last time checked: the 3rd of June 2015).
- [13] Opinion of the Advocate General in *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques* (C-249/13, EU:C:2014:2032, point 26).
- [14] See article 84a(1) Article 84a(1) of Regulation No 1408/71 which establishes that “care stabilește că “The institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time” ((OJ, English Special Edition 1971 (II), p. 416; amended and updated version OJ 1997 L 28, p. 1, as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1.) and by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1)).
- [15] Published in the Official Journal of Romania, part I, no. 436/2012, from 30th June 2012..
- [16] Published in the Official Journal of Romania, part I, no. 114/2013, from 28th of February 2013.
- [17] See also the considerations of principle adopted by the Constitutional Court in relation to the application of the EU Charter within the constitutional review, developed for the first time in decision no. 1.479 from 8th of November 2011, in Official Journal of Romania, part I, no. 59 from 25th of January 2012: “the Charter’s provisions are applicable within the constitutional review as long as it assures, guarantees and develops the constitutional provisions in the field of fundamental rights, in other words, as long as the level of protection is at least the same with the one ensured by the constitutional norms in the realm of fundamental rights”. These general conditions of EU Charter’s application are also analysed in M. Mazilu-Babel, *Aplicarea dispozițiilor Cartei Drepturilor Fundamentale a Uniunii Europene ca norme de valoare constituțională în cadrul controlului de constituționalitate*, RNSJ, 23rd of December 2013, <http://www.juridice.ro/300016/aplicarea-dispozitiilor-cartei-drepturilor-fundamentale-a-uniunii-europene-ca-norme-de-valoare-constitutionalala-in-cadrul-controlului-de-constitutionalitate.html> (last accessed: 3rd of June 2015)
- [18] The English translation belongs to the author.
- [19] Published in Official Journal of Romania, part I, no. 713/2013 from 20th of November 2013.
- [20] As it concerns the general considerations in relation to the applicability of EU law provisions within the Romanian constitutional review, see M. Mazilu-Babel, *Condițiile impuse pentru folosirea unei norme*



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