3.2 Between Supremacy and Autonomy – Applying the Principle of Good Administration in the Member States

Jane Reichel*

3.2.1 INTRODUCTION

Good administration is a concept that has attracted growing attention in recent years.1 What is entailed by the concept, however, is still not clear. It can be defined

* Doctor of law at the department of law University of Stockholm.
1. This article is based on my doctoral thesis presented in the University of Stockholm in September 2006, Reichel, Jane, God förvaltning i EU och i Sverige, Stockholm, June, 2006. My warmest thanks to John Parkinson, Laura Carlson and Mauro Zamboni for their help with this English version.

broadly, encompassing democratic ideals in the form of a just and efficient administration, implementing rules of democratic polity for the good of society.\footnote{See opinion of Mr. Advocate General Sir Gordon Slynn in case 64/82 Tradax v Commission ECR 1984, p. 1359, at p. 1385-6 and the analysis in Kanska, Towards Administrative Human Rights in the EU, p. 323.} Interpreted in this way, the legal substance of the principle is still vague. The principle can also be described more narrowly, as a concept encompassing administrative procedural rules governing the relationship between the individual and public authorities in individual matters.\footnote{See Millett, Lord, \textit{The Right to Good Administration in European Law}, Public law, summer 2002, p. 309–322, p. 318 and Bradley, A.W., \textit{Administrative Justice: A developing Human Right}, [1995] European Public Law, p. 347–369, p. 351.} Between these two interpretations of the principle, there are many possible variations. This article will focus on the general principle of good administration as developed by the European Community Courts, where it is understood as being closer to the latter, narrower description. The EU principle of good administration is thus interpreted as containing administrative procedural tools for individuals to invoke in their contacts with EU institutions handling matters concerning them. The aim of this article is to analyse the content and function of the principle of good administration at the two levels in the EU: the European level and the Member State level. The question posed is whether Member States are obligated to interpret and give effect to the principle of good administration in the same way as the European Community Courts are at the European level. In other words, is there an ongoing development towards a common administrative order within the EU?

In the first section of the article, the content and function of the principle of good administration at the European level will be analysed. Three parts of the comprehensive principle will be discussed more closely, the principle of due diligence, the principle of right to be heard and the principle of a right to a reasoned decision. The second section will deal with the doctrine of procedural autonomy, and its limits. In the third section, the application of general principles of Community law in the Member States will be analysed, with a special emphasis on the question of what standards of protection the Member States are obligated to uphold. In the fourth section, the question of the three first sections will be joined; what content and function should the principle of good administration have within the administrative procedural order of the Member States? The article ends with some reflections on the future of the principle of good administration in the EU.

\section*{3.2.2 THE GENERAL PRINCIPLE OF GOOD ADMINISTRATION}

To begin with, it is clear that general principles play an important role in the body of administrative law in the EU. There is no common administrative code for the administrative organs at the European level. There are scattered rules within the EC
Treaty, for example Article 253 EC on the duty to give reasoned decisions, and there is secondary legislation that lays down administrative procedural rules, at times detailed, for specific fields, such as regulation 1/2003 on the application of competition law. The main source of law on administrative procedure in general in fact is the body of general principles of law. One of the very first cases in which the European Court of Justice developed such a general principle, the Algera case in 1958, concerned the administrative problem of the possibility for an institution to withdraw a decision. The European Court of Justice held that this was an administrative problem known to all Member States, but for which the EC Treaty did not contain any solution, and continued:

Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the Member Countries.

Today, the European Court of Justice has developed a fairly firm body of law on administrative procedure in general, and regarding procedures that may be connected to the principle of good administration in particular as discussed in more detail below.

3.2.2.1 The Content of the Principle of Good Administration in EU Law

There is no set definition of the principle of good administration in EU law. The concept has been used by both the Court of First Instance and the European Court of Justice on several occasions, but the case law still lacks a coherent form. The principle plays a prominent role also in the work of the EU ombudsman. This has led some authors, for example Takis Tridimas, to conclude that the principle of good administration has not made an impact as an independent ground for review in itself. Others, like Koen Lenaerts, have found that good administration can be

7. According to article 2 of the European Ombudsman Statute (OJ L 113, 4.5.1994, p.15) the Ombudsman shall uncover practices of maladministration in the activities of the Community institutions, that is, the opposite to good administration. The interpretation of the principle by the Ombudsman has so far had little influence on the general principle of good administration developed by the Community Courts, (See for example T-193/04 Tillack v Commission ECR 2006, p. II-3995 para. 128. Further, the Member State administrations fall outside the mandate of the EU-ombudsman. The work of the EU-ombudsman will therefore not be analysed in this article.
described as an umbrella principle, an overarching notion, encompassing various legal concepts that overlap with procedural fundamental rights.\(^9\)

Article 41 of the Charter of Fundamental Rights can be used as a starting point for an analysis of the principle of good administration. This article defines good administration as follows:

> 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.

According to the next paragraph, this includes more specific administrative procedural rights, namely a right to be heard, a right of access to files and an obligation for the administration to give reasons for its decisions. According to paragraph 3, lack of good administration may constitute grounds for damages. Lastly, paragraph 4 states that Union citizens may address EU institutions in any of the official languages.

The Charter itself does not, at least not yet, have legal force. With the new Treaty of Lisbon, the Charter will have the same legal value as the Treaties.\(^10\) If and when the Treaty will be ratified is still uncertain, but until then, the right to good administration as interpreted in the Charter is relevant only in so far as it is reflected in the case law of the European Courts.\(^11\) This is also one of the intentions of the Charter, to codify the case law of the European courts and thereby make the rights and principles more visible to Union citizens. According to the explanations given by the Presidium, ‘Article 41 is based on the existence of a Community subject to the rule of law whose characteristics were developed in the case law which enshrined inter alia the principle of good administration’.\(^12\)

Conversely, Article 41 of the Charter can also be used to give structure to the case law of the European courts. Three principles are examined here more closely, the principle of due diligence, the right to be heard and the duty to give reasoned decisions. The principle of due diligence can be deducted from the first paragraph, laying down a general rule of conduct for public authorities: to handle cases impartially, fairly and within reasonable time. The principle of a right to be heard and the principle of a right to a reasoned opinion are included in the second paragraph of Article 41.

These three parts of the concept of good administration aim to strengthen the position of private parties in different ways, in his or her relations with Community institutions. Through the principle of due diligence and the right to be heard, private parties are given a tool to influence the basis for the

---

10. See Article 6 of the Treaty of Lisbon.
11. The European Court of Justice has now, at last, referred to the Charter in its case law, See case C-432/05 Unibet v Justitiekanslern ECR 2007, p. I-2271, para. 37. The Court held that the Charter reaffirms the case law of the Court.
institution’s decision. Through the duty to give reasons, the private party can force the institution to explain clearly on what grounds it has based its decision. A common objective of the umbrella-principle of good administration may be defined as promoting transparency, legal certainty and predictability within administrative procedures.

3.2.2.1.1 The Principle of Due Diligence

The principle of due diligence has been applied by Community courts in a wide range of situations and under varying forms. The name of the principle has also varied. The obligations incumbent on the institutions discussed here have been labelled as due diligence, principle of care, and principle of good, proper, or sound administration. Its core can be described as a procedural tool for private parties to ensure that Community institutions handle the affairs of individuals with care, by giving individuals a right to influence the basis for the public authority’s decisions both as to how the matter is handled and how the substantive aspects are assessed and weighed by the institutions. In two cases establishing the principle of due diligence in the early 1990s, TU München and Nölle, the European Court of Justice held that the institutions have a duty to examine carefully and impartially all the relevant aspects of the individual cases and to give special attention to aspects that speak for private parties. The field of application of the principle of due diligence can thus be divided into two types of situations. Firstly, from the demand to examine carefully and impartially all the relevant aspects, follows a duty for the institutions to handle matters diligently and to carefully follow any procedures laid down in secondary legislation or as general principles. Secondly, to give special attention to aspects that speak for private parties includes a duty to use the principle of due diligence as a counterweight to the discretionary powers of the institutions in the decision-making process itself.

When applied in the first manner, the principle of due diligence functions as a standard for the good behaviour of institutions. In the Fresh Marine Company-case, the Commission received a report from a Norwegian salmon company in an anti-dumping matter that contained some unclear figures. The Commission proceeded by unilaterally changing the figures, with the result that the Norwegian company appeared to have transgressed the anti-dumping agreement. It was later shown

17. See case C-29/05 P Office for Harmonisation in the Internal Market v Kaul AG ECR 2007, p. I-2213 para. 47.
that the changes made by the Commission were inaccurate. The Court of First Instance held that there was a duty of diligence incumbent upon the Commission and that the error committed by the Commission was such that it ‘would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence’.

The European Court of Justice, in plenum, came to the same conclusion regarding the action of the Commission, even though the Court of Justice did not explicitly refer to the principle of due diligence.

Similarly, Community institutions must be careful to observe and fulfil more general duties laid down in secondary legislation, so that mistakes and substandard practises of the institutions will not adversely affect private parties in individual matters. The Court of First Instance in several cases has applied the principle of due diligence to customs cases, where the Commission has an obligation to monitor trade between the EU and third countries. In the Eyckeler & Malt-case regarding the import of Hilton beef from Argentina, the Court of First Instance found that the Commission had failed in its obligation, leading to a breach of Article 211 EC and of the principle of good administration. In the area of Community trade mark law, the European Court of Justice held equally in the Bayer-case that the principle of sound administration, as it was referred to, together with the principle of legal certainty, implied a duty to uphold time-limits and procedural rules in such a way as to ensure the proper conduct and effectiveness of proceedings. A third example can be taken from the area of classification and control of foodstuffs, veterinary and medical matters, where the Commission enjoys a role as a legislator. Here, the Court of First Instance has applied the principle of due diligence or good administration as a standard in liability cases, CEVA Santé Animale and Monsanto Company.

In the both cases, the European Court of Justice, in plenum, overturned the verdicts of the Court of First Instance. In Ceva Santé Animale, the European Court of Justice did not review the principle of sound administration in itself, but held that that Court of First Instance had erred when it had not established what scope of discretion the Commission enjoyed.

In Monsanto Company, the European Court of Justice referred to the principle of due diligence being applied in this context is the case T-231/97 New Europe Consulting v Commission ECR 2003, p. 9189, paras. 163–165.

A further example of the principle of due diligence being applied in this context is the case T-178/98 Fresh Marine Company v Commission ECR 2000, p. II-3331, paras 81–82.

Similarly, Community institutions must be careful to observe and fulfil more general duties laid down in secondary legislation, so that mistakes and substandard practises of the institutions will not adversely affect private parties in individual matters. The Court of First Instance in several cases has applied the principle of due diligence to customs cases, where the Commission has an obligation to monitor trade between the EU and third countries. In the Eyckeler & Malt-case regarding the import of Hilton beef from Argentina, the Court of First Instance found that the Commission had failed in its obligation, leading to a breach of Article 211 EC and of the principle of good administration. In the area of Community trade mark law, the European Court of Justice held equally in the Bayer-case that the principle of sound administration, as it was referred to, together with the principle of legal certainty, implied a duty to uphold time-limits and procedural rules in such a way as to ensure the proper conduct and effectiveness of proceedings. A third example can be taken from the area of classification and control of foodstuffs, veterinary and medical matters, where the Commission enjoys a role as a legislator. Here, the Court of First Instance has applied the principle of due diligence or good administration as a standard in liability cases, CEVA Santé Animale and Monsanto Company.

In the both cases, the European Court of Justice, in plenum, overturned the verdicts of the Court of First Instance. In Ceva Santé Animale, the European Court of Justice did not review the principle of sound administration in itself, but held that that Court of First Instance had erred when it had not established what scope of discretion the Commission enjoyed.

In Monsanto Company, the European Court of Justice referred to the principle of due diligence being applied in this context is the case T-231/97 New Europe Consulting v Commission ECR 2003, p. 9189, paras. 163–165.

A further example of the principle of due diligence being applied in this context is the case T-178/98 Fresh Marine Company v Commission ECR 2000, p. II-3331, paras 81–82.


See case T-13/99 Pfizer Animal Health v Council ECR 2002, p. II-3305, where the Court of First Instance in a similar type of question in an action for annulment applied the principle of due diligence as a counterweight to the discretion of the Commission in scientific matters.


See case T-13/99 Pfizer Animal Health v Council ECR 2002, p. II-3305, where the Court of First Instance in a similar type of question in an action for annulment applied the principle of due diligence as a counterweight to the discretion of the Commission in scientific matters.
sound administration and the duty of care, but found, in contrast to the Court of first Instance, that the Commission was not in breach of the principle. The European Court of Justice performed a more individualised test of the principle, as described below, balancing the interest of the private parties concerned against the interest of the Commission. The European Court thus held that in the present case, Monsanto Company had not established, or even sought to establish, that the decision at issue was adopted in disregard of the principle of sound administration and the duty of care. 26 In what circumstances the principle is to be understood as a standard or as an individual guarantee does not seem to be clear at all.

When the principle of due diligence is applied in the second manner as described above, the principle functions as a counterweight to the discretionary powers of the institutions. The principle gives the private party a tool to influence the substantive outcome of the decision-making procedure, by enabling the party to give input to the basis of the decision and to how it should be assessed. In this form, the principle of due diligence is a procedural rule with a close connection to the substantive evaluation of the case, as the duty to investigate carefully necessarily will be closely connected to the interpretation of the legal question at stake. Substantively irrelevant circumstances need not to be investigated as carefully. 27 The principle of due diligence can further be used as a supplementary tool to other procedural guarantees, such as the right to be heard, in order to ensure that Community institutions give appropriate attention to the arguments put forward by private parties. This may be useful for private parties who do not enjoy a formal standing in the administrative procedure, such as third parties. This application of the principle was described by Advocate General Poiares Maduro, in max.mobil: 28

In the case-law, these safeguards are understood as a means, first, of laying down limits to the Commission’s discretionary power and, second, of protecting third parties whose interests are affected but who have no procedural protection equal to that of persons to whom decisions are addressed. Advocate General Maduro referred to Schlüsselverlag J.S. Moser 29 and Sytraval, 30 two cases in which the European Court of Justice found that the views put forward by private (third) parties should have prompted the Commission to take those considerations into account in its decision-making. Another case where the principle of due diligence was applied in this connection, is TU-München, 31 as

27. See case T-44/90 La Cinq v Commission ECR 1992, p. II-1, para. 94, where the Court of First Instance stated that the Commission failure to fulfil its obligation to take account of all the relevant facts in the case amounted to a manifest error of appraisal and not a in procedural error, which would have been more logical. See further case T-7/92 Asia Motor France v Commission ECR 1993, p. II-669, para. 37.
28. See opinion of Mr Advocate General Poiares Maduro in case C-141/02 P max.mobil (T-Mobile Austria) ECR 2005, p. I-1283, para. 81.
31. See case C-269/90 TU München.
mentioned above. The common ground in these cases is the interpretation of the private parties’ legitimate interest in having a decisive influence over the institutions decision-making, especially in cases where the Community institution has a wide power of appraisal or where complex economic or technical issues are at stake.

3.2.2.1.2 The Principle of a Right to be Heard

The right to be heard in administrative proceedings was developed by the European Court of Justice in its very early case law as an independent general principle. In a staff case in 1962, Alvis, the European Court of Justice held that according to a generally accepted principle of administrative law in force in the Member States, the administrations of these states must allow their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them. This rule, which the European Court of Justice found to a part of ‘sound justice and good administration’, was to be followed by the Community institutions. In Transocean Marine Paint from 1974, the right to be heard was introduced as a general principle of administrative procedure.32

The right to be heard in Community law is ensured to private parties that in some way are affected by a measure taken by a Community institution, and first and foremost to those who are adversely affected. The typical situation is where an institution initiates proceedings of some kind against a private party, involving sanctions, fines and or penalty payments. The decision does not necessarily have to be addressed to a party for that party to be considered targeted. Third parties that might lose a benefit through the Community measure may also be ‘targeted’.33 It is more questionable whether there is a right to be heard in a situation where a private party turns to the institution in order to apply for a benefit. In Windpark Grothusen, a company had applied for financial support for an energy project administered by the Commission, together with 700 other applicants. When the application was denied, the company maintained that they had not been given a right to be heard. Both the Court of First Instance and the European Court of Justice found that the company did not have such right, as the company had not been adversely affected in the way understood by case law.34 On the other hand, in TU München mentioned above in the context of the principle of due diligence, the party in the case, a university, was considered to have a right to be heard in regards to an application of exemption of import duties.35 In TU München, the ground for promoting administrative procedural guarantees for the private party was the fact that the Commission had a wide power of appraisal in deciding the matter and that the importing university could be an important source of information, since they were

35. See case C-269/90 TU München, para. 25.
the ones with the best knowledge regarding the imported goods. In my view, there is no convincing distinction between the two cases, since the very same conditions could probably be met in the Windpark Grothusen. Instead, the difference between the cases seems to be one of procedural economy. It would have been too costly and time consuming for the Commission to hear all applicants. There seems therefore to be a need for the European Community Courts to develop convincing exceptions from the right to be heard, for example in cases where there are many applicants or in cases where there is a need for prompt action.

Regarding the content of the right to be heard, the European Court of Justice has stated that the right is satisfied when the private parties concerned have 'been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the commission to support its claim'. This formula contains both formal and substantive conditions. The application of the conditions may vary according to the circumstances of the case, where measures leading to sanctions against the individual presuppose a stricter view. First, it is for the Community institutions to make sure that the private party has been given an opportunity to make known his or her views, and has had a reasonable period of time to do so. Secondly, the private party must be able to access all information that the Community institution will take into account in its decision-making, including observations submitted by third parties. It is not enough that the Community institutions have held an informal discussion regarding the issue with the private party. If there are parts of the documentation that are covered by obligations of professional secrecy, the Community institution must be careful to let the targeted party receive the appropriate information in some form.

3.2.2.1.3 The Principle of a Right to a Reasoned Decision

The duty of Community institutions to give grounds for their decisions is laid down in the Treaty, Article 253 EC. This duty has been elaborated in the case law of the European Community Courts into an important administrative procedural rule with

---

36. This explanation has been put forward by Tridimas, The general principles of EU law, p. 382.  
37. Exceptions from a general right to be heard are common in the Member States, often laid down in statutory law, See Statskontoret 2005:4 Rules and Principles of Good Administration in the Member States of the European Union, p. 36.  
38. See case 85/76 Hoffmann-La Roche v Commission ECR 1979, p. 461, para. 11.  
39. There are, however, examples in case law where a private party has contacted the Community institution on its own motion, which has been considered to be sufficient to fulfil the right to be heard. The Court of First Instance found that even though the party did not at the time bring up any legal arguments, nothing prevented it from doing so, See T-260/94 Air Inter, paras. 65–67.  
40. See for an illustrative example, case C-462/98 P Mediocrisfuno v Commission ECR 2000, p. 7183, para. 42.  
42. See case T-42/96 Eyckeler & Malt, para. 87.  
the aim of safeguarding transparency in the Community decision-making process. In one of its early cases, Germany v Commission, the European Court of Justice identified three addressees of the principle.44 Firstly, the principle guarantees the private parties concerned an insight into how the Community institution handled their affairs, which is helpful when having to defend their rights before the Courts in an appeal. Secondly, it gives the Court a better opportunity to review the decision and exercise its supervisory function. Thirdly, it gives the interested public an opportunity to ascertain how the Community institutions make use of the decision-making powers conferred upon it by the Treaty. In the legal scholarship, it has further been suggested that the duty of giving reasoned decisions will have a self-regulating effect, since it forces the institutions to deliver a credible and objectively conclusive explanation of how they came to their decision.45

The principle of a right to a reasoned decision differs from the two principles discussed above insofar as it does not obligate the institutions to take any particular investigative measure or otherwise do something to better the position of the private parties. Instead, the reasoning gives an account of what the institution has done under the course of its investigation and what conclusion it has drawn from it. This is especially important where the institutions have been granted a margin of discretion by the Community legislator to decide on specific aspects of a case.46 In such cases, institutions are not just mechanically implementing the will of the legislator, but have a margin to apply their own policy when taking decisions. There is therefore a connection between the substantive evaluation made by an institution in its decision-making and the duty to give a reason for the decision, but the two aspects must nevertheless be dealt with separately. An institution may have taken a substantively correct decision, without given a satisfactory reasoning for it, or conversely, taken an incorrect decision, but with a fully detailed reasoning on how the institution came to this result. In the latter case, the duty of reasoning may be fulfilled, but the decision can still be invalid on substantive grounds. The reasoning may in this connection be used as an authoritative source of information for any court reviewing the decision.47

In reality it is often difficult to separate the substantive review of a decision from the review of the procedural question of whether the duty to reason decisions has been fulfilled,48 not in the least due to the fact that the Courts allow the requirements for a fully reasoned decision to vary according to the circumstances in the individual

---

47. See Schwarze, European Administrative Law, pp. 1402.
In France v Commission, the European Court of Justice held that the procedural rule of giving a reasoned decision is to be evaluated as follows:49

. . . the requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.

The European Court of Justice further held that it is not necessary in the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.50 In effect, this means that what is a satisfactory reasoning in one case, may be too little in the next, depending on the context, the knowledge and interest of parties concerned and the measure at hand.

3.2.2.2 The Function of the Principle of Good Administration in Judicial Review – Standard or Individual Right?

What then is the function of the principle of good administration in a review performed by the European Community Courts? Is it a standard of good practise for the institutions to apply or is it a legally enforceable right for private parties to invoke in their contacts with the institutions? As shown above, the case law of the European Courts is not fully consistent and cases including both interpretations may be found. The standard version of the principle occurs most frequently in cases dealing with the principle of due diligence, on the obligation to follow procedures and tasks laid down in secondary legislation, for example as seen in the cases of Eyckeler & Malt and Bayer.51 In other cases, the right to a diligent handling of one’s matters (TU München, New Europe Consulting),52 the right to be heard (Fiskano, Mediocruso)53 and the right to a reasoned decision (Sytraval)54 have been used as independent grounds for review by the Courts, where the transgression of the principle either invalidates the decision as such, or constitutes a ground for a claim of damages by the private party.55 This dual function of the principle was described by the Court of First Instance in Tillack:56

The principle of sound administration, does not, in itself, confer rights upon individuals, except where it constitutes the expression of specific rights such

51. See T-42/96 Eyckeler & Malt, C-29/05 P Bayer AG and T-112/97 Monsanto Company.
52. See case C-269/90 TU München, paras 28–29 and T-231/97 New Europe Consulting, paras 45 and 68.
54. See C-367/95 P Sytraval, para. 78.
55. Regarding the principle of good administration as a ground for damages, See case C-338/00 P Volkswagen v Commission ECR 2003, p. 9189, para. 165.
as the right to have affairs handled impartially, fairly and within a reasonable
time, the right to be heard, the right to have access to files, or the obligation to
give reasons for decisions, for the purposes of Article 41 of the Charter of
fundamental rights of the European Union, proclaimed on 7 December 2000 in

In Tillack, no such specific right was at hand, and the principle of sound admin-
istration could therefore not constitute grounds for damages.

The treatment of a procedural rule as a legally enforceable individual right is not
entirely without problems. A procedural rule is not an end in itself, but a means to an
end, a means to grant a substantive right or to avoid a sanction. The object of the right
to be heard is not to safeguard the interests of individuals to chat with public officials,
but to afford individuals an opportunity to explain why, according to their view, they
should be granted a right or protected from a sanction. If too much weight is put on
upholding the procedural rules as such, and leaving the substantive issues untouched
by court control, there is a risk that the legal protections will become hollow. On the
other hand, in cases where institutions and public authorities function in a role as
experts and deal with complex issues of economic or technical characters, or where
the legislator has granted the institutions a margin of discretion to assess certain
aspects, it is questionable whether it is wise to let a court consisting of only jurists
perform an intrusive review, allowing them to substitute their own assessment for
that of the experts. In these circumstances, the principle of good administration may
be used as a balancing tool for the court, with which the need for a limited court
review may be weighed against the interest of a review of the substance. The Com-
munity Courts may thus focus on how the institutions have handled a matter for-
mally, and the review of process rights may be used to facilitate a substantive
review.57 Jürgen Schwarze has described the review as follows:58

As a sort of counterbalance to administrative discretion, the Community
Courts ensure a strict observance of procedural safeguards for the individual,
enterprise or institution affected by the administrative decision. Nowadays the
concession of a margin of discretion and of assessment seems only justifiable
if discretion is exercised under strict observance of procedural guarantees.

The principle of good administration, according to this interpretation, is not a
traditional legal right, which may be enforced and secured through litigation,

57. See Craig, EU administrative law, p. 479. See further Tiili & Vanhamme, the ‘Power of
Appraisal’ (pouvoir d’appréciation) of the Commission of the European Communities vis-a-vis
the Powers of Judicial Review of the Communities’ Court of Justice and Court of First Instance,
p. 898, Nehl, Principles of administrative procedure in EC law, p. 104–105, Shapiro, The Insti-
tutionalization of European Administrative Space, pp. 110, See further Kadelbach, Stefan,
European Administrative Law and the Law of a Europeanized Administration, Joerges &
Dehousse (red), Good Governance in Europe’s Integrated Market, Oxford University Press,
Oxford, 2002, pp. 189 and Hettne, Jörgen, Gemenskapsdomstolarnas rättsskond och allmänna
58. See Schwarze, Jürgen, Judicial Review of European Administrative Procedure, Public law
2004, Spring, p. 146–166, p. 156.
but rather a safeguard or a guarantee for the protection of individuals and a tool for court control. The interpretation of procedural rules as individual rights is however not unknown, for example in the right to an effective remedy before a court as found in Article 6 of the European Convention of Human Rights. The principle of good administration in itself does not fall under the Convention, but the Council of Europe has previously enacted non-binding resolutions within the area and has recently adopted a recommendation on a model code of good administration. In legal scholarship, it has been suggested that the EU principle of good administration should be developed in the direction of article 6 of the European Convention.

If one turns to the drafting of the principle of good administration in the Charter of Fundamental Rights, it becomes clear already from the heading of Article 41, ‘a right to a good administration’ that the principle is defined as an individual right. This differs from other non-legally binding codes of conduct within the Community, such as the Commission’s Code of Good Administrative Behaviour. The code starts by declaring that the duty of the Commission is to serve the Community interest and, in so doing, the public interest. The code further defines the concept of good administration as a standard that is to guide the Commission in its daily work. From the viewpoint of the Commission, this interpretation of good administration may be more practical. If and when the Charter does become legally binding, this may give further fuel to the interpretation presented in Article 41.

3.2.3 THE DOCTRINE OF PROCEDURAL AUTONOMY

One of the most prominent features of Community law is its capability of taking over and setting aside the national law of the Member States, if and when the national law interferes with the effective and uniform application of Community law. According to the doctrine of direct effect and supremacy, the Member States

59. See further Lilovska, Dimitrina, The right to good administration in the case-law of the European Court of Human Rights, proceedings from the European Conference on The right to good administration, organised by the Council of Europe in collaboration with the Ministry of the Interior and of Public Administration of Poland land the Office of the ‘Ombudsman of Poland, Warsaw, 4–5 December 2003, pp. 109–119.

60. See for example resolution (77) 31 Protection of the Individual in relation to the acts of administrative authorities adopted by the Committee of Ministers of the Council of Europe on 28 September 1977 at the 275th meeting of the Ministers’ Deputies and Recommendation Rec(2004)20 on judicial review of administrative acts adopted by the Committee of Ministers of the Council of Europe on 15 december 2004 at the 909th meeting of the Ministers’ Deputies.

61. Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration (Adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers’ Deputies).


must implement and apply Community law in accordance with the will and purposes of the autonomous Community legislator, as interpreted by the Community Courts. But how and by whom the Member States implements and applies Community law are questions for the Member States to decide. The European Court of Justice found in two cases in the second half of the 1970:s, *Rewe* and *Comet*, that in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts having jurisdiction in Community matters and to lay down the procedural rules governing these actions.64 This doctrine is commonly referred to as the procedural autonomy of the Member States.65

3.2.3.1 THE DISTINCTION BETWEEN SUBSTANTIVE AND PROCEDURAL LAW

The doctrine of procedural autonomy is based on the presumption that it is possible to distinguish between matters of substantive law and matters of procedural law. Several authors have compared the relationship between Community law and national law with the Roman maxim *ubi jus ibi remedium*, indicating the distinction between rights and remedies, where rights are granted by EU law and remedies are provided by the Member States.66 In a multi-layer legal system as Community law, where different Member States have different understandings of even very basic procedural concepts, such as what is a right and what may be considered a remedy, the division will evidently lead to an uneven application of law.67

It therefore is not surprising that there is an interest on the part of the Community for influencing how Member States apply procedural rules in connection with substantive Community law. Giving the doctrine of procedural autonomy a closer look, it is also quite clear that the term autonomy is rather misleading. There

---

64. See case 33/76 *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland* ECR 1976, p. 1989, para. 5, case 45/76 *Comet BV v Produktionsv voor Siergewassen* ECR 1976, p. 2043, para. 15. See further, for example, case C-432/05 *Unibet v Justitiakanslern* ECR 2007, not yet published, para. 39.


is no doubt that Community law does in fact affect national procedural rules in several ways. First, the application of national procedural law is always subsidiary to any Community rule with direct effect, in primary law, such as article 234 EC,68 in secondary law69 or as general principles.70 Secondly, the national procedural rules must always be consistent with the principles of effectiveness and of equivalence, or else the national rules may not be applied in connection to EC law.71 Thirdly, the general principle of loyalty may entail an obligation to interpret national procedural rules in a way that promotes an effective implementation of EC law.72

3.2.3.2 THE SCOPE OF REVIEW BY NATIONAL COURTS

The same criteria can be used to analyse how Community law affects the type of review national courts are to perform when handling cases of substantive Community law. The point of departure is that it is a question for the Member States to decide. In Upjohn, the European Court of Justice held that Community law does not require the Member States to establish a specific procedure for judicial review of national decisions regarding Community law, involving a more extensive review than normally performed by the national court in similar cases. But, the Court continued, any national procedure for judicial review of such decisions must enable the national court to apply the relevant principles and rules of Community law effectively.73 This may mean, under some circumstances, that the national courts indeed will have to perform a deeper review of certain aspects than that which they would normally do under national law. de Burca and Ryall74 have compared Upjohn with cases regarding rules on environmental impact assessment and rules on protection of waters laid down in directives, such as Kraaijiveld and Standley.75 The authors found that when secondary legislation leaves a margin of

68. See regarding the application of Article 234 EC in the Italian constitutional system, 106/77 Amministrazione delle Finanze dello Stato v Simmenthal ECR 1978, p. 629, para. 17.
69. See for example the directives on public procurement, which introduce an entire system of procedural rules within an area of law, Directive 2007/18/EC of the European Parliament and of the Council of 31 March 2009 on the coordination of procedures for the award of public works’ contracts public supply contracts and public services contracts.
73. See case C-120/97 Upjohn v The Licensing Authority established by the Medicines Act 1968 ECR 1999, p. I-223, paras. 35–36.
75. See case C-72/95 Kraaijiveld BV v Gedeputeerde Staten van Zuid-Holland ECR 1996, p. I-5403 and C-293/97 The Queen v Secretary of State for the Environment och Ministry of
discretion for the national authorities to apply the rules of the directives, the European Court of Justice required that this discretion should be firmly controlled by national judicial review to ensure that the rights individuals derive from the directives are protected.\footnote{de Bu\'rca & Ryall, The ECJ and Judicial Review of National Administrative Procedure on the field of EIA, p. 159.}

Even though it is still correct to state, in general terms, that the procedural laws of the Member States have only been affected by EC law to a limited extent, and that national courts and public authorities may in the great majority of cases apply their regular national procedural rules, national courts and authorities must nevertheless be attentive when they enter the field of application of Community law. The procedural rules may have to be applied and reviewed differently in order to give appropriate effect to substantive Community law, or to uphold the level of protection of rights and guarantees set by the European Court of Justice in its general principles of law. This second issue, the application of general principles in the Member States, is discussed in the next section.

3.2.4 THE APPLICATION OF GENERAL PRINCIPLES OF COMMUNITY LAW WITHIN THE MEMBER STATES

It is well established in Community case law, that the Member States are obligated to uphold the general principles of Community law when they act within the sphere of Community law. Not only must the Member States respect and uphold the general principles when they apply rules enacted by the Community legislator,\footnote{for example case 11/70 Internationale Handelsgesellschaft, case 44/79 Hauer v Land Rheinland-Pfalz ECR 1979, p. 3727 and case C-395/00 Cipriani v Ministero delle Finanze ECR 2002, p. I-11877.} but also when they apply nationally enacted rules within the sphere of Community law.\footnote{See 5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft ECR 1989, p. 2609 and C-260/89 Elliniki Radiophonia Tiléorassi (ERT) v Dimotiki Etairia Pliroforissi ECR 1991, p. I-2925.} Both the issue of delineating the area where the Member States are obligated to uphold the general principle 3.2.4.1, and choosing the correct level of protection within this area 3.2.4.2, raises a number of questions.

3.2.4.1 THE FIELD OF APPLICATION OF GENERAL PRINCIPLES WITHIN THE MEMBER STATES

The area in which the obligation to uphold and apply the general principles of Community law, the sphere of Community law, is generally considered to entail
two different legal situations. First, it follows from Wachauf that whenever Member States take action to implement Community law, this national legislation must conform to the general principles. Second, all measures adopted by Member States within the non-harmonised area of free movement in the Treaty must likewise conform to the general principles, as first stated in ERT. In more recent case law, the European Court of Justice has equally held that the upholding of general principles and, to some extent, of national constitutional values, may in themselves constitute a legitimate exception to free movement, within the Treaty exception of public policy.

In practice, it may be a tricky task to distinguish which national measures fall inside the sphere of Community law and therefore trigger the application of the general principles, and which measures fall outside. Both categories, the implementation-situation, exemplified by Wachauf, and the exception-from-free-movement-situation, as in ERT, contain delineation problems.

3.2.4.1 The Wachauf Line of Cases

Regarding the Wachauf-category, it is usually not considered sufficient that national legislation is applied in close connection with a Community rule to draw it within the sphere of Community law, if the national rule did not intend to implement Community law. This follows from cases such as Maurin, Annibaldi and Dahms. On the other hand, it is likewise clear that national procedural rules, which were never intended to implement Community law, can be considered to fall within the sphere of Community law and thus will have to conform to the general principles. The European Court of Justice held in Deutsche Milchkontor that Member States may only apply national procedural rules in the absence of Community law, including its general principles (see above section 3.2.3). In SFI, regarding the

---


80. See case 5/88 Wachauf and case C-200/00 Booker Aquaculture v The Scottish Ministers ECR 2003, p. i-7411.


82. See case C-112/00 Schmidberger v Austria ECR 2003, p. 5659, paras. 71–74.

83. See case C-36/02 Omega v Oberbürgermeisterin der Bundesstadt Bonn ECR 2004, p. 9609, paras. 30–35.

principle of equality and the application of national rules on limitations periods in
the context of Community rules on VAT, the question arose if these rules fell
within the sphere of Community law and therefore had to conform to the general
principles. The European Court of Justice found that this was the case, stating:85

VAT is incontestably a matter governed by Community law. The fact that, in
the absence of Community rules, the Member States are entitled to apply their
own procedural rules, does not alter that finding.

The national procedural law may, as discussed above, in many cases affect the
application of Community law, which may explain why it is found to fall inside the
area where Member States must uphold general principles.86 A comparison can be
made with other cases where national rules enacted altogether separately from
Community law have still been considered to fall within the reach of general
principles because they affect the effective application of Community law and
the securing of fundamental rights, for example Caballero regarding the Spanish
concept of salary87 and K.B. regarding the British right to enter marriage.88 There
seems to be a connection between the interest of safeguarding the effective and
uniform application of Community law (SFI and Caballero) and the upholding of
fundamental rights (K.B.) and the definition of the sphere of Community law.

3.2.4.1.2 The ERT Line of Cases

The ERT line of cases also involves delineation problems, but from a different
aspect. In this area, not all principles seem to have the same field of application.
According to case law on the principle of non-discrimination, it is more or less
sufficient that a Union citizen legally crosses a border to another Member State for
him or her to be able to fall within its field of application. There does not have to be
an economic activity involved.89 The right to non-discrimination will however only
give the same legal protection as the citizens of the host Member State have, and
not more.90 If a person wants to claim a right that the host state does not uphold, not
for its own citizens or for others, the person will have to show the existence of a
cross-border economic activity that puts the person within the field of application
of free movement of goods, workers, services or capital in the Treaty. This is

86. See also case C-62/00 Marks & Spencer v Commissioners of Customs & Excise ECR 2002, p. I-
6325, para. 44 and C-276/01 Steffensen ECR 2003, p. I-3735, para. 71.
88. See case K.B. paras. 33–34.
Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve ECR 2001, p. I-6193,
para. 29 and C-456/02 Trojanvi Centre public d’aide sociale de Bruxelles ECR 2004, p. I-7573,
para. 40.
90. The principle of non-discrimination may however entail a right not to be treated the same as the
citizens of the host state, see C-148/02 Garcia Arello v Belgium ECR 2003 p. I-11613, para 34.
apparent in cases like Carpenter and Orfanopoulos, where the Court of Justice entered into a rather far-reaching discussion on the concept of cross-border trade, in order to afford the private parties in the respective cases the protection of the general principle of a right to family life.  

There also seems to be a connection between the interest of an effective and uniform application of Community law and the interest of upholding fundamental rights, and the interpretation of what is to be included within the sphere of Community law in the *ERT*-category of cases. National measures that affect either of these two factors, will be drawn into the sphere of the application of Community law. In my view, it may therefore be more fruitful to explain the field of application of the general principles of Community law in the Member States through the doctrine of direct effect and supremacy. General principles are thus to be applied within the same area in which Member States are under the obligation to follow Community law and to adjust their national law according to the doctrine of direct effect and supremacy. According to this explanation, the general principles are included in the positive Community rules and function as an extra layer of law that accompanies the Community rules when they enter into the national arena. Just as all rules of national law generally must be applied in accordance with the basic values of the national constitution, all law that is used to give effect to rules of Community law, whether on Community or national level, must be applied in accordance with its general principles. This does not necessarily mean that all general principles will have the same effect within this area. This question is dealt with in the following section.

3.2.4.2 THE EFFECT OF THE GENERAL PRINCIPLES IN NATIONAL LAW – A MAXIMUM OR MINIMUM LEVEL OF PROTECTION?

Principles are in themselves inexact. They seldom give a precise answer to how a legal problem can be resolved, but may rather point in a certain direction and give guidance on how two opposing interests may be balanced against each other, and what level of protection must be guaranteed. This section focuses on how the Member States are to undertake this balancing test, when they apply the general principle of Community law. According to the reasoning presented above, two factors are especially important when determining in what situations Member States are obliged to conform to the general principles; when the application of the general principles serves to enhance an effective and uniform application of Community law, and to secure a minimum degree of protection of fundamental rights within the sphere of Community law. These two overriding ends will also influence what effect general principles will have when applied in the Member States, that is, both in connection to applying Community law directly and in connection to national law within the sphere of Community law. The narrower

---

91. See case C-60/00 Carpenter v Secretary of State for the Home Department ECR 2002, p. I-6279, paras. 28–30 and C-482/01 Orfanopoulos para. 54.
a rule is drafted in Community legislation, the lesser margin of discretion will there be for the Member States to apply a national interpretation of a general principle. If, on the other hand, the Community rule leaves the Member States a broader margin of discretion to adjust the Community rule to national conditions, there will likewise be more room to choose a national level of protection of the general principle, above a minimum level. The effect of the general principles may thus vary between functioning as maximum rules, or as minimum rules, depending on the situation at hand. This is illustrated below by examples.

3.2.4.2.1 General Principles as Maximum Rules

When the Member State directly apply rules enacted by the Community legislator, it follows from the doctrine of direct effect and supremacy, as the European Court of Justice interpreted it in *Internationale Handelsgesellschaft*,91 that Member States may not review Community law on grounds of national law, not even constitutional law. In this situation the general principles function as maximum rules, hindering the Member States from applying a higher level of protection, even if they would have done so in a purely domestic situation. The substantive law of the Treaty itself, a regulation or a directive, as well as the general principle accompanying it, must be applied uniformly throughout the Community. The balancing test is already made by the Community legislator and the Member States may not depart from it. This situation was at hand in *Lindquist*,92 concerning interpretation of the data protection directive.93 A Swedish court asked the European Court of Justice whether it would be permissible to apply a stronger protection of private life than the level of protection afforded in the directive. The European Court of Justice answered this in the negative and explained that all measures taken by the Member States within the scope of the directive must be consistent with its provisions and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private life.94 Further examples may be found in *Hoechst*95 and its follow-up, *Rocquette frères*,96 regarding the question whether the right to privacy in Article 8 of the European Convention of Human Rights could be extended to business premises. It is clear from these cases that the Member States, when they applied Community rules on competition law, were bound to follow the interpretation of the principle of right to privacy presented by the European Court of Justice, and could not afford a higher level of protection.

95. See case C-101/01 Criminal proceedings against Lindqvist, para. 99.
3.2.4.2.2 General Principles as Minimum Rules

When Member States, on the other hand, apply the general principles of Community law to national legislation not explicitly implementing a specific Community rule, Member States have a much wider margin of discretion to interpret and balance the general principles of Community law. In these cases the general principles function as *minimum* rules. This holds true for both categories of cases described above, the *Wachauf* and the *ERT*. In none of the cases related above did there seem to be a problem with national measures upholding a level of protection that was too high. The problem was rather that the Belgian legislation did not afford an equal limitation period for VAT procedures in *SFI*, that British law did not respect the right to marry in *K.B.*, or that British and German law did not afford a high enough level of protection of the right to family life in *Carpenter* and *Orfanopoulos*. Nothing in Community law would hinder these Member States from raising their level of protection, but Community law did prevent them from affording protection below a certain level.

An illustrative example of this may be found in *Grant*.97 In *Grant*, a homosexual worker tried to invoke the right to equal treatment afforded in Article 141 of the EC Treaty against her employer, since the company she worked for would give a certain discount to partners and spouses of their employees only if they were not of the same sex. The European Court of Justice held that Community law did not offer any protection here, for the rights of same sex partners were not protected by the European Convention of Human Rights, nor could they be considered a common tradition of the Member States.98 However, if the United Kingdom had wanted to afford this protection, as at least some of the Member States do, nothing in the general principles of Community law would have prevented it.

3.2.5 IMPLEMENTING GOOD ADMINISTRATION IN THE MEMBER STATES

So far, three aspects have been discussed; the content and function of the principle of good administration at EU level, the doctrine of procedural autonomy of the Member States and the application of general principles in the Member States. In this section, these three aspects will be joined. What content and function should the principle of good administration have within the administrative procedural order of the Member States? The first section analyses when Member States are obligated to apply the principle of good administration to their nationally enacted law, whilst the second section deals with the effect of the principle of good administration, when it reaches the legal order of the Member States through secondary legislation.

---

98. See case C-249/96 Grant, paras. 32 and 34.
Member States are obliged to uphold the general principles of Community law when they give effect to Community law within their respective legal orders. Generally, this covers two categories of legal situation: when Member States apply national rules in connection with positive Community law and when Member States act within the non-harmonised area of free movement (above 3.2.4.1). In these situations, the general principles will generally have the effect of minimum rules, that will only step in and take over national rules if the latter are not able to give effect to Community rules in an appropriate way, or if it does not live up to a minimum standard of protection guaranteed by the European Court of Justice (above 3.2.4.2).

Consequently, Community general principles will in these situations normally not have a very intrusive effect within the legal order of the Member States. The same holds true for the area of administrative procedure, where the Member States further, according to the doctrine of procedural autonomy, may independently enact and apply their own national procedural rules when they give effect to Community law (above 3.2.3).

On the other hand, today there are fairly important differences between the administrative procedural systems of the Member States. Even a limited application of the principle of good administration may have an influence on the legal systems of a Member States. A comparison can be made with another general principle of a procedural character that has had a considerable effect within the Member States, namely the principle of a right to an effective remedy. The interpretation of this right in Community law goes further than the equivalent right within the European Convention of Human rights, Article 6, which only requires Member States of the convention to afford a remedy in matters regarding the protection of civil rights and obligations. According to Community law, Member States must provide for remedies in order for private parties to initiate court review of all national measures that may hinder them from making use of their Community rights. The importance of the right to an effective remedy within Community law can only be understood properly when viewed in the light of the rather special construction of the Community legal order, where rules are enacted at one level and implemented at another, and where the engine of the enforcement process many times has been fuelled by the litigations of private parties.99 There is a strong connection between the interest of an effective and uniform application of Community law, and the weight given to the right to an effective remedy on national level.

This connection may be described as a result of a striving for constitutional efficiency; a desire for an autonomous Community legal order to render its legislative acts effective. The effective implementation of Community law in the past has often been more successful through mechanisms of private enforcement, since implementation through institutional or public channels is dependent on the loyal cooperation of the Member States, which has not always been forthcoming. The classification of the right to an effective remedy as a fundamental right further reinforces its importance.

The Community principle of good administration, defined as a procedural guarantee for individuals, encompassing specific procedural tools such as a right to be heard and a right to a reasoned decision (above 3.2.2.1), may assume the same role within the Member States as the right to an effective remedy. The European Court of Justice can be expected to give special attention to its application within the legal systems of the Member States, if the principle of good administration can function as a vehicle to strengthen private parties’ possibilities to bring about an effective application of their Community rights before national authorities. This function of the principle is apparent in Heylens, concerning the right of free movement of workers, where the right to a reasoned decision was interpreted as connected closely to the right to an effective remedy, and the need to give private parties a tool for enforcing their right to free movement. The European Court of Justice stated:\textsuperscript{100}

Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons upon which its refusal is based, either in the decision itself or in a subsequent communication made at their request.

Compared to the principle of a right to an effective remedy, there are surprisingly few cases in which the European Court of Justice has had to assess the obligation of Member States to uphold the principle of good administration, or portions thereof. The majority of existing cases involved lengthy and cumbersome national administrative procedures that risked becoming obstacles to free trade in different ways.

\textsuperscript{100} See case 222/86 Unecetef v Heylens m.fl. ECR 1987, p. 4097, para. 15.

According to this line of cases, a Member State upholding technical standards that may hinder market access for goods\(^{101}\) or national retail monopolies,\(^{102}\) or requiring prior administrative authorisation,\(^{103}\) must provide an adequate administrative procedure. The procedure must be readily accessible and be able to be completed within a reasonable time. This may include requirements for transparency of the procedure, giving the private party an opportunity to conform themselves to the selection criteria of the national authority, as well as requirements to avoid lengthy procedures. If the procedure leads to a refusal, the decision of refusal must be able to be challenged before the courts. Surprisingly enough, the European Court of Justice does not always explicitly uphold the requirement that all decisions must be reasoned.\(^{104}\) So far, the right to be heard before a national authority has not been reviewed by the European Court of Justice, even though there seems to be a common opinion among scholars that the Court would uphold such a right, should the question arise.\(^{105}\)

These demands on national administrative procedure are set in negative form; Member States may not use non-transparent, costly and burdensome administrative procedures that risk disrupting the functions of the internal market. Thus, it is not possible to extract any positive criteria for how Member States are to handle the matters before them, what rights individuals must be granted to influence the decision-making process, or when a national administrative decision may be deemed adequately reasoned. Perhaps due to the doctrine of procedural autonomy, the European Court of Justice has so far confined itself to declaring that certain national practices are too closed and burdensome and must be changed, and left it to the Member States to decide how.\(^{106}\)

Even though the core of these demands on national administrative procedures has a clear similarity with the principle of good administration as upheld by the Community courts at the EU level, that is promoting transparency, legal certainty and predictability within administrative procedures, there are important differences. There does not seem to be a common interpretation of the principle of good administration at the two levels of Community law.\(^{107}\) An interesting...
question in this connection is what effect Article 41 in the Charter of Fundamental Rights will have, if and when it becomes legally binding. As is well known, Article 51 of the Charter states that the Charter also binds the Member States when implementing Community law. Article 41 according to its wording, however, is directed to the institutions, bodies, offices and agencies of the Union. Whether this excludes the Member States from its field of application, is a question of debate among scholars, and may in the future be another question for the European Court of Justice to resolve.

3.2.5.2 Applying Secondary Legislation Codifying the Principle of Good Administration

Member States have a significantly less margin of discretion, as analysed above in 3.2.4.2, to interpret the general principles of Community law in a national context when they are applied in connection with binding Community law. If a Community act gives directions to a national authority on how to handle a matter, the parties who are, or are not, to be considered as having a right to be heard, or what grounds must be included in the reasoning of a certain type of decision, the Member States must give effect to the rules in the way that the Community legislator intended, as interpreted by the European Court of Justice. The Community rules then function as maximum rules and the Member States cannot give a higher level of protection even if they want to, or, for that matter, a lower level of protection. The question whether the secondary legislation itself upholds an adequate legal protection for the private parties concerned can only be reviewed by the European Court of Justice in accordance with the principles set out in Foto-frost. There are a growing number of Community acts including harmonised rules on administrative procedure for the Member States to apply, not least within the area of the internal market. This may be seen as a codification of the case law presented above (3.2.5.1), whereby the Community legislator in positive terms lays down administrative procedural rules, stipulating how national authorities are to handle matters to ensure transparency, legal certainty and predictability. These notions underpin the secondary legislation on several aspects of the internal

108. See Kanska, Towards Administrative Human Rights in the EU – Impact of the Charter of Fundamental Rights, p. 309 and Lord Millett, The Right to Good Administration in European Law, p. 317, who both interprets Article 41 as only binding the institutions and organs at the EU level. On the other hand, Fenger, Forvaltning & Fællesskab, p. 258 and 350, and Fortsakis, Theodore, Principles Governing Good Administration, p. 207–217, p. 216 both presuppose that Article 41 also binds the Member States.

109. See case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost ECR 1987, p. 4199. An example of this may be found in case C-395/00 Cipriani., para. 54, regarding the right to be heard in an administrative procedure before national authorities in VAT-matters.

market, such as the procurement directives, the directives enacted as part of the ‘New Approach’ to technical harmonisation, and in several sector-specific directives, for example for the telecom markets and for professional qualifications. The Services Directive, enacted in December 2006, also includes rather extensive regulation of national procedural rules. Further, the Commission presented in February 2007 a new proposal for a regulation regarding the mutual recognition of goods in the Member States, including only administrative procedural and institutional rules. There are also procedural rules in the 2004 directive on free movement of Union citizens.

There is a common aim for the above-mentioned Community acts: to open up national administrative procedures within market regulations, making the procedures more easily accessible to enterprises from the entire internal market. This is done by stipulating, in varying forms, that national procedures must be clear, made public in advance and be such as to provide private parties with a guarantee that their matters will be dealt with objectively and impartially. Requirements for fixed time limits are common. Although the procedural rules in the Community acts in most cases are drafted in a rather flexible way, or in form of minimum rules, it is still clear that they strive in a specific direction. Administrative procedural rules are put in the focal point, intended to strengthen the position of the individual and force the national authorities to respond to applications in a harmonised way. The preamble to the Services directive states:

One of the fundamental difficulties faced, in particular by small and medium sized enterprises, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification... Such

112. See Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
116. See Directive 2006/123/EC on services in the internal market.
118. See Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
120. See Article 37 of the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
121. See point 43 of the preamble to the Europaparlamentets och rådets direktiv 2006/123/EG av den 12 december 2006 om tjänster på den inre marknaden.
modernising action [...] is intended to eliminate the delays, costs and dis-
suasive effects which arise, for example, from unnecessary or excessively
complex and burdensome procedures, the duplication of procedures, the
‘red tape’ involved in submitting documents, the arbitrary use of powers by
the competent authorities, indeterminate or excessively long periods before a
response is given, the limited duration of validity of authorisations granted and
disproportionate fees and penalties.

Both the formal handling and the margin of discretion of national authorities may
be controlled through provisions of procedural guarantees in the hands of private
parties, that is, according to the EU interpretation of the principle of good
administration.

3.2.5.3 **The Principle of Good Administration in the Review
of National Courts – Standard or Legally
Enforceable Guarantee?**

It was argued in section 3.2.2.2 above that the principle of good administration in
many circumstances has the quality of being a legally enforceable guarantee for the
protection of individuals. As such, the principle plays an important role in the type
of review performed by the Community courts, especially in cases where the
Community institutions have a wide margin of discretion. In these situations,
the principle of good administration can function as an independent ground for
review, and a transgression of the principle may either render the administrative
decision invalid or constitute a ground for damages for the private party. The
question is whether Community law requires that national courts review the
principle of good administration in the same manner. Must the Member States
follow the interpretation of the principle of good administration as a legally
enforceable procedural guarantee afforded to individuals in their contacts with
authorities, or may they continue to treat administrative procedures as merely a
standard for the authorities, if this is the tradition in the Member State?

According to the doctrine of procedural autonomy, every Member State is to
designate the courts having jurisdiction in Community matters and to lay down the
procedural rules governing these actions. Further, Community law does not
demand that national courts must perform a more extensive review, as long as
the ordinary national review enables the national court to apply the relevant prin-
ciples and rules of Community law effectively. But what does it mean that the
national courts must be able to apply the Community principles effectively? So far,
there are only a few cases from the European Court of Justice that shed any light on
the question when it comes to the principle of good administration. It may be noted
that the European Court of Justice does not require the same level of protection in

122. See case 33/76 Rewe, para. 5.
123. See case C-120/97 Upjohn, para. 35.
the Member States as the Court does at the Community level when it comes to applying the principle as such, without secondary legislation. In *Heylens*,123 as well as *Commission v Belgium*,124 the Court accepted that the reasoning of the decision must not necessarily be included in the actual decision, but may be given afterwards, in another form. This is generally not permitted at the EU level.125 Neither has there been a case where the European Court of Justice has relied on its case law from the EU level, such as *TU München*,126 *Sytraval*127 or *Mediocurso*,128 when it reviews the actions of national authorities.

The question is, then, in a case where there is a verified transgression of the principle of good administration at national level, what effect does this have on the legality of the administrative decision, or on the position of the individual concerned? In a few cases, this is regulated by secondary law. The Services directive gives an illustrative example, with its tacit authorisation-scheme. It is for the Member States to decide on appropriate time limits for authorisation of different services, but the consequences for not upholding the limit are set by the directive – the authorisation will be deemed to have been granted.129 In Member States, where administrative procedures do not function as individually enforceable guaranties, such as in Sweden, this effect can be found rather odd.

If one compares the situation in other fields of law, there are examples where the breach of directly effective Community rules on procedure has been found to invalidate the legal act resulting from the procedure. This was the result of not following the notification procedure laid down in a directive on technical standards, as in *CIA Security*.130 The infringement of rules regarding environmental impact assessment must also, according to case law, be reviewable by national courts.131 However, in *Wells*, when the question arose as to what legal effects an infringement of these rules should have on the administrative decision in the case, the European Court of Justice found this to be a question falling within the procedural autonomy of the Member State.132

### 3.2.6 CONCLUSIONS

The question posed in this article is whether Member States are obligated to interpret and give effect to the principle of good administration in the same way

124. See case 222/86 Heylens, para. 15.
127. See case C-269/90 TU München.
128. See case C-367/95 P Sytraval.
129. See case C-462/98 P Mediocurso.
130. See Article 13.4 of the Directive 2006/123/EC on services in the internal market.
132. See case C-72/95 Kraaijeveld. See further C-293/97 Standley and de Bürca & Ryall, The ECJ and Judicial Review of National Administrative Procedure on the field of EIA.
133. See case C-201/02 Wells, para. 65.
as the European Courts do at the European level. The investigation has included three steps; an analysis of the content of the principle of good administration in EU law (section 3.2.2), and of the concept of procedural autonomy (section 3.2.3) and survey of what effects the general principles will have when applied in the Member States (section 3.2.4) In the final section, the three steps were applied to the general principle of good administration, together with an analysis of secondary legislation regarding the principle.

In summary, the investigation shows that there does not seem to be any outspoken demands on the Member States to interpret and apply the principle of good administration in the same way as at the European level, namely as a legally enforceable guarantee for the protection of individual. Neither are there any clear signs in case law that such a development is on the way. The doctrine of the procedural autonomy of the Member States is still a relevant factor. There is a tendency to harmonize the administrative orders of the Member States through secondary legislation, not least within the area of free movement, but in most cases there is still enough room for the Member States to adjust the EU principles into the national administrative tradition.

However, this will depend on how the European Court of Justice will interpret the secondary legislation enacted under recent years, such as the services directive. If the principle of good administration, when codified in secondary legislation or otherwise, can be found to enhance an effective and uniform application of Community law, or to secure a minimum degree of protection of fundamental rights and guarantees within the sphere of Community law, a development in the direction of a more individualized version of good administration is conceivable. A further argument for this development may be that the EU interpretation of the principle of good administration as a legally enforceable guarantee can be seen as an common denominator among the Member States, and as such it is probably the most solid ground on which to build a common administrative order within the EU. The future will tell.