THE RIGHT TO SOUND ADMINISTRATION IN THE EUROPEAN UNION. THEORETICAL AND PRACTICAL ASPECTS. ELEMENTS OF CASE LAW

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Abstract

In the activity of adopting legal acts through which any entity endowed with decision-making powers carries out in order to achieve its objectives, there are inherently moments when it is necessary to make choices, and identify legal solutions to the problems raised by the development of both economic and social areas of life. However, these decisions, whether legislative or administrative, have consequences for the subjects of law on which the effects of the acts adopted extend.

Due to their nature, the positive consequences are not the object of our analysis. However, on one hand, the limitation of the negative consequences to what is strictly necessary in order to achieve the set goals and, on the other hand, the need for the action of those respective institutions to meet the expectations of the legal subjects concerned, are aspects that have always been of interest for the institutions, courts, relevant doctrine and addressees alike.

From this preoccupation, inherently present at the level of the EU, was born the initial jurisprudential consecration, followed by that at the level of primary law, of the right to a good administration and the doctrinal comments that accompany it. These are the perspectives that we will consider in our study that will follow the development of good administration at the level of the EU, from the jurisprudential consecration of this right, which occurred shortly after the establishment of the European Communities, through its inclusion in the Charter of Rights Fundamentals of the European Union (initially in the absence of binding legal force), until the current situation, in which the principle in question is part of the Charter that acquired, following the entry into force of the Treaty of Lisbon, the legal force of the sources of primary law of the EU.

It is also important to mention that we will refer exclusively to this activity (and the right associated with it, that of good administration) throughout our study, and not to the broader concept of governance, of which we can consider the activity of administration to be only a part.

Keywords: *EU, good administration, the European Ombudsman, the Code of Good Administrative Behavior, EU Court of Justice's jurisprudence.*

1. Introduction

As we stated in the abstract of our research, any institutional activity, whether it is embodied in *legislative* acts (according to the terminology used by the TFEU [1]) or legal acts with the force of law (in the terminology of the internal law of Romania) or in *delegated* or *implementing* acts (in the sense of the same Treaty [2]) or in *administrative* acts (in the Romanian legal order), this institutional activity implies the exercise of the margin of appreciation or the discretionary power of the institutions to decide on the appropriateness of the legal solutions contained in an act in order to solve a problem generated by the socio-political-economic realities of the entity that represents, governs, administers, etc. or whose institutional framework they belong to. However, these decisions are almost never neutral. In fact, their neutrality can be considered a pure abstraction, since, in real life, administrative or legislative solutions have as a fundamental feature the fact that they always leave the impression that they do not correspond to the expectations of at least some recipients and, in many situations, they affect some rights, freedoms or interests of them, even if the infringement in question is justified by the institution that adopted them, by reference to the general interest.

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[1] See art. 289 para. (3) TFEU, C-326, 26/10/2012, pp. 0001-0390.

[2] See art. 290 para. (1)-(3) and art. 291 para. (1)-(4) TFEU.

What the recipients of the mentioned legal acts must and, in general, want to pursue is not to avoid these touches altogether, such a desire could be considered utopian, but to benefit from an institutional framework in which their expectations from the institutions that make it up, (expectations) materialized in the observance of some general principles, in the safeguarding of some rights and freedoms, etc. (the concrete details may differ depending on the specific features of each legal system and each cultural area in particular, taking into account the fact that "the accelerated opening of the world economy that followed the end of the Cold War and the collapse of the communist bloc was accompanied of an unprecedented mobility of law"[3]) to be realized. In other words, to benefit, among other things, from the right to *good administration*. But the actual content of this right needs to be defined by the action of the courts and institutions of each legal order, including the European one.

We will deal with its content in the legal order of the EU in the present study, however, before this stage we want to make a series of brief references to an umbrella concept that we consider relevant for our study, namely that of the decision-making process.

2. The concept of *decision-making process*. General aspects

Analyzing the concept of the decision-making process, we refer, for the beginning, to the statements of the doctrinaire David Plunkett, according to whom „social planning is indispensable for the existence of any contemporary society, given the complexity of the social relations that underlie its functioning. This planning materializes, however, through legal norms”[4]. In other words, the approach by which legal norms are created represents the essence of the social planning process, the essence in which the interest in those mechanisms by which the mentioned norms are built has its origins.

Being an expression of social planning activity, the adoption of legal norms or, in other words, social planning through normative activity creates and modifies norms that have the role of representing common standards of behavior regulating social activities through general policies accessible to the public.

Within the normative activity, some people occupy certain positions. One of the most important features of these offices is that the prerogatives associated with them do not depend on the identity of the people who occupy them. Therefore, functions tend to be relatively stable, and the identities of those who exercise them not only may vary, but frequent changes are generally to be expected. David Plunkett[5] uses the term master plan to refer to the organization or regulation of the planning activity, respectively to „the norms according to which the institutions involved in the planning process exercise their powers, norms intended especially for the participants in this process, and not for the recipients of the norms adopted by them”[6], however, we can compare this concept with that of:

- an *international agreement*, if such an agreement establishes the rules according to which an international organization operates (*Basic Constitutional Charter*, in the expression of the Court of Justice), if we refer to aspects related to the legal order of the Communities, initially, and after that of the European Union
- or of the *Constitution*, if the analysis is within the state legal order.

These fundamental rules, of the *master - plan* type, are distinguished, among others, by the fact that they „regulate procedures that allow the institutions that participate in the exercise of power to do something even in the absence of the express intention of the people who compose them”[7]. This suggests that the rules that regulate the functioning of institutions influence the behavior of the people who compose them, which refers to the principle of the superiority of institutions, according to the general interests they represent.

We conclude by stating that norming represents „that activity exercised jointly by a plurality of agents, formalized, institutionalized, mandatory and self-confirming of social planning, features that are also influencing the institutions that carry this norming out”[8].

[3] M.F. Popa*, Tipologiile juridice între pragmatism și ciocnirea civilizațiilor*, in Revista de Drept Public no. 1/2016, Universul Juridic Publishing House, pp. 58-67.

[4] D. Plunkett*, The Planning Theory of Law I: The Nature of Legal Institutions*, Philosophy Compass magazine no. 8/2 (2013), pp. 149-158.

[5] *Ibidem*.

[6] *Ibidem*.

[7] *Ibidem*.

[8] *Ibidem*.

In a subsequent research, the same David Plunkett expresses in a more concrete way what, in his view, represents the role of legal norms in the activity of social planning, this being an „organization of social relations within a given community[9].

As one of the most important authors in the specialized literature, Hans Kelsen, states, „the fact that the norms that make up a legal order derive from a fundamental norm is demonstrated by the fact that the specific norms are created in accordance with the rules established by the fundamental norm"[10].

However, „a distinction must be made between the act by which the norm is created and the norm created by that act. In other words, for example, the law as an act of Parliament is different from the norms contained in the respective law. The act by which the norm is created exists in time and space, it is the effect of certain causes, according to the law of causality. Its existence is a natural fact. On the other hand, taking into account the fact that the norm is not a fact, but a consequence of a fact, its existence is different from the existence of that fact".[11]

A consequence that we consider natural of the above thesis is that the existence of the norm „is given by its validity. But the validity of a legal order (and, also, of a set of norms) is given by a historical act such as a first Constitution, whose existence is validated by another norm"[12], usually of an extrajudicial nature, in our opinion.

We come, at this stage, to the definition of the actual activity of legislation. This, according to the author I. Bogdanovskaia, „represents the process through which the idea underlying a law is transformed into a law"[13].

According to the opinion of the quoted author, which we retain in our approach, the legislative activity „comprises, more or less, the following stages: the elaboration of a project or a legislative proposal, by the authorized institution, possibly in collaboration with the social partners, expert groups etc.; the adoption of the law in question, after going through certain stages specific to each legal order and, finally, publication in an official journal, since most legal orders do not admit the existence of legal effects of an unpublished act, except, of course, for acts subject to communication"[14].

As far as the EU is concerned, we consider that the planning activity we referred to above is carried out in this case as well, but we cannot talk about a general planning activity, over the entire spectrum of social relations, but about an activity of planning aimed at achieving certain objectives (stipulated in art. 3 TEU), within certain competences, according to certain procedures and in compliance with certain principles.

In order to achieve these objectives, art. 288 TFEU provides that „for the exercise of the powers of the Union, the institutions adopt r*egulations, directives, decisions, recommendations and opinions*"[15]. The adoption of some of these legal acts can be considered similar to a national legislative process both by the way it is carried out (in the case of the ordinary legislative procedure, the Parliament and the Council acting as a genuine bicameral legislature[16]), as well as by the content of the adopted acts (among which the regulation and the decision benefit from direct applicability).

However, in our opinion, we cannot consider that there is an overlapping relationship between the legislative process, in the national sense of this term, and what, for the purposes of this study, we understand by the decision-making process.

Thus, the Union currently knows the existence of two types of legislative procedures. The first is represented by the ordinary legislative procedure. According to art. 289 TFEU, this „consists of the joint adoption by the European Parliament and the Council of a regulation, a directive or a decision, on the proposal of the Commission"[17].

The second type is represented by special legislative procedures. As mentioned in the same article, para. (2), „in the specific cases provided for in the treaties, the adoption of a regulation, a directive or a decision by the European Parliament with the participation of the Council or by the Council with the participation of the

[9] D. Plunkett, *The Planning Theory of Law II: The Nature of Legal Norms*, Philosophy Compass magazine no. 8/2 (2013), pp. 159-169.
[10] H. Kelsen, *General Theory of Law and State*, The Lawbook Exchange Ltd., Clark, New Jersey, 2007, p. 115.
[11] H. Kelsen, *On the Basic Norm*, California Law Review, vol. 47, issue 1, March 1959, p. 215.
[12] *Ibidem*.
[13] I. Bogdanovskaia*, The Legislative Bodies in Law-making Process*, f.a., extracted from *www.nato.int.*, accessed on 11.05. 2019, 19:00.
[14] *Ibidem*.
[15] Art. 238 TFEU.
[16] See A. Fuerea*, Legislativul Uniunii Europene între unicameralism și bicameralism,* in Dreptul no. 7/2017, pp. 187-200.
[17] Art. 289 para. (1) TFEU.

European Parliament constitutes a special legislative procedure"[18]. Next, art. 289 also provides that „legal acts adopted through legislative procedure constitute legislative acts"[19].

Also, decisions, when they are adopted through a legislative procedure, are considered legislative acts, in the sense given to this term by the legal order of the EU, even if, having individual applicability, the decision, for example, may not fall within the notion of law as it is known by the internal law of the member states, where it represents an act of general applicability.

Moreover, the Union does not only adopt legislative acts. A variety of other acts are adopted by its institutions in accordance with procedures laid down in the Treaties, although the acts in question do not fall into this category. For example, art. 290 provides that „a legislative act can delegate to the Commission the power to adopt non-legislative acts with a general scope of application, which complete or modify certain non-essential elements of the legislative act"[20].

In addition, art. 291 specifies that „if unitary conditions are necessary for the implementation of legally binding acts of the Union, these acts give the Commission powers of execution (...)"[21].

In other words, the above examples illustrate two categories of acts (delegated and implementing) which, within the EU legal order, are not considered legislative acts, although, if we were to compare them with similar acts in the legal orders internal, could be compared to some acts having legal nature, such as government ordinances or emergency government ordinances, respectively with administrative acts, such as Government Decisions or Ministerial Orders, intended to implement laws.

Union institutions also adopt acts aimed at implementing the objectives of the Common Foreign and Security Policy (CFSP), which cannot be considered legislative acts, nor can they be assimilated to laws or acts with the legal force of law in domestic law. In the same vein, the institutions of the Union adopt acts, such as decisions authorizing the opening of negotiations for the conclusion of international agreements, decisions to conclude agreements, acts within the procedure for appointing members of certain institutions, etc. We highlight the existence of applicable procedures within each individual institution, enshrined by acts of secondary law, with respect to which the acts of the respective institutions are adopted and which, according to the applicable procedures, become acts of the Union such as those analyzed above.

We also find it useful to mention the category of normative acts, mentioned by the EU Treaties, without being defined, however. Consequently, it was up to the Luxembourg court to make the necessary clarifications, in the context of the clarifications regarding the owners and the object of the annulment action. Thus, according to the decision of the Court no. T-18/10, *normative acts* are represented by *any act with general applicability, with the exception of legislative acts*[22], so non-legislative acts with general application (for example, delegated regulations that do not require enforcement measures, enforcement regulations, general binding acts adopted by the European Central Bank or general acts of the European Parliament or Council, EU bodies, offices, agencies, which are intended to produce legal effects vis-à-vis third parties).

Among the acts mentioned above, by their content, the decisions (as legislative acts or not), the delegated acts, the implementing acts, as well as some acts in the field of CFSP, together with the acts adopted by the bodies, offices and agencies of the Union through which carry out their duties and produce binding legal effects towards third parties represent as many expressions of the administration activity carried out at the level of the Union, activity which, in the view of specialized literature, essentially represents the action „through which the law is executed or public services are offered, within the limits of the law"[23].

We will refer exclusively to this activity (and the right associated with it, that of ***good administration***) throughout our study, and *not to the broader concept of 'governance*,'' of which we can consider the activity of administration to be a part.

[18] Art. 289 para. (2) TFEU.

[19] Art. 289 para. (3) TFEU.

[20] Art. 290 para. (1) TFEU.

[21] Art. 291 para. (2) TFEU.

[22] We remind you that legislative acts (see art. 289 para. 3 TFEU), according to the amendments made by the Treaty of Lisbon, are those acts resulting either from the ordinary co-legislative procedure, which takes place either between the Parliament and the Council, or within special legislative procedures. This definition currently in force is different from the one provided by the historical CJEU jurisprudence which, in dec. no. 16/62, *Confédérations des Producteurs des Fruits et Légumes & Others v. CONS*, states that *legislative acts are any measure that is formulated in general and abstract terms.* In other words, non-legislative acts are of two types: delegated acts and implementing acts. The Treaty of Lisbon thus codified the hierarchy already existing in practice within the secondary EU law sources.

[23] V. Vedinaș*, Drept administrativ*, 5th ed., Universul Juridic Publishing House, Bucharest, 2009, p. 9.

Therefore, the activities of adopting the specified acts are affected by the provisions of primary law and jurisprudential findings regarding the right to good administration (a right which, for example, is not found, in the ECHR, one of the sources of inspiration for the EU Charter). But what does this right represent, how and when was it established?

3. The right to good administration. Establishment and jurisprudential development

Concerns regarding the establishment of jurisprudential coordinates for the protection of the rights of individuals against possible abuses by the administration have existed almost since the beginning of the existence of the Communities.

For example, in the *Algera*[24] *case*, the Court ruled that „it follows, from a study of comparative law, that in the legal systems of the member states, an act or an administrative measure that confers rights on a person cannot, in principle, be revoked, if it meets the condition of legality, because, in this case, the need to safeguard the legal certainty of the created situation prevails over the interests that determined the revocation of the respective act or measure, a fact also valid for the act of appointing an official"[25].

In the joint cases *Kuhner v. COM*[26], the Court established, perhaps for the first time, this right, stating „the existence of a general principle of good administration, having the effect that when an entity with administrative powers adopts acts or decisions, even legal ones, which cause significant damage affected persons, they must give the persons concerned the opportunity to express their views, except where there are serious reasons to omit this, but, further, it also decided that an act by which the applicant is given the opportunity to retain all the advantages of his rank and position does not fall within the scope of those for whom the above obligation is applicable"[27].

In another case from the same jurisprudential line, the Court ruled that, „in accordance with the principle of good administration, the Commission should periodically publish information regarding the main data considered for setting CIF prices (acronym for Cost, Insurance and Freight/Cost, insurance and transport) for certain grains, and that this obligation does not, however, include an obligation to respond to individual requests regarding the field in question"[28].

Another jurisprudential line from which we will quote further is very interesting, in which the Court admitted the possibility that „the principle of good administration confers rights on individuals, when it established that a special consequence of it is that, when an authority adopts a act or makes a decision regarding the situation of an official, it must take into account all the factors that could influence the adoption of that act or the taking of that decision and, in this process, take into account not only the interests of the respective entity, but also those of the affected officials, in what the Court categorized as a balance of mutual rights and obligations between entities and their employees, established by the acts regarding the staff status of the respective structures"[29].

In terms of proving the violation of such a right, a simple report of the European Ombudsman is not sufficient evidence, as the CJEU ruled in the Tillack judgment[30], where it is stated that the fact of „the classification of an act as one that violates the principle of good administration by the Ombudsman does not mean, in itself, that an OLAF conduct constitutes a sufficient violation of the rule of law, and, through the institution of the Ombudsman, the Treaties only conferred on citizens an alternative remedy to an action before the community courts, to defend one's own interests, which cannot, however, have the same force as the respective actions"[31].

In another case, the Court of Justice identified sources of the right to good administration both in the constitutional traditions of the member states and in the Charter, before its consecration at the level of primary law, which constitutes either a new expression of pluralism the sources of fundamental rights, or a new

[24] CJEU dec. of 12.07.1957, C-7/56 and C-3/57-C-7/57, *Dinecke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v. Joint Assembly of the European Coal and Steel Community*, EU:C:1957:7.

[25] *Ibidem*.

[26] CJEU dec. of 28.05.1980, 33/79 and75/79, *Richard Kuhner v. COM*, EU:C:1980:139, point 25.

[27] *Ibidem*.

[28] CJEU dec. of 15.03.1984, 64/82, *Tradax Graanhandel BV v. COM*, EU:C:1984:106, point 22.

[29] CJEU dec. of 04.02.1987, 417/85, *Henri Maurissen v. The Court of Auditors*, EU:C:1987:61, point 12.

[30] Court of First Instance, dec. of 04.10.2006, T-193/04, *Hans-Martin Tillack v. COM*, EU:T:2006:292, point 128.

[31] *Ibidem*.

assimilation of the Charter, before the Treaty of Lisbon, with the general principles of law recognized by the member states.

More precisely, the Court decided that the submission of sufficient diligence and the impartial treatment of requests are associated with the right to good administration (this time, in the wording „sound administration", but the Romanian language does not differentiate between „good administration" and „sound administration" from the English language, so we will not differentiate either), which represents one of the general principles respected by states governed by law and is common to the constitutional traditions of the member states[32], being also provided for in art. 41 of the Charter.

As regards other components of the notion of good administration, a decision of the Tribunal[33], this time following the consecration of the Charter at the level of primary law, it stipulates that, "according to the jurisprudence of the Union court regarding the principle of good administration, in cases where the institutions of the Union would have a discretionary power, compliance with the guarantees conferred by the legal order of the Union within administrative procedures is, all the more, of fundamental importance. These guarantees include in particular the obligation of the competent institution to examine, carefully and impartially, all the relevant elements of the case"[34].

4. The right to sound administration in the Charter of Fundamental Rights of the European Union

4.1. Charter of fundamental rights of the European Union. Evolution. Legal status

Developed as a result of the political consensus on the need for such a document, reached on the occasion of the European Council in Cologne, from June 3-4, 1999, "in which it was considered that the stage of the development of the European Union at that time allowed the reunification, in a Charter, of the fundamental rights enshrined until that moment in the EU space, in order to give them greater visibility, in the context of the expansion of the Union's competences through the Treaty of Maastricht and the Treaty of Amsterdam and the expansion of the Union and also to compensate for the democratic deficit of the EU" and proclaimed by the President of the European Commission, the President of the European Parliament and the Council during the work of the European Council in Nice, on December 7, 2000, the Charter of Fundamental Rights of the European Union had, until the entry into force of the Treaty from Lisbon, an insufficiently clearly defined legal status, which the Court of Justice assimilated, in its jurisprudence a, the fundamental principles of law recognized by the member states and compatible with the legal order of the Union.

But this situation came to an end with the entry into force of the aforementioned Treaty, which introduced into the Treaty on the European Union the provision of its new art. 6 para. (1), according to which the Charter has the same legal value as the Treaties, becoming, therefore, part of the EU primary law.

4.2. The right to good administration in the regulation of the Charter

In this older jurisprudential context, which (partially) defined the concept of good administration at the EU level, identified some of its components and specified its legal effects, the Charter of Fundamental Rights enshrined it, taking over, in general terms, the existing jurisprudential solutions, in its art. 41, entitled „The right to good administration", which provides that „every person has the right to benefit, in terms of his problems, from an impartial, fair treatment and within a reasonable time from the institutions, bodies, offices and agencies of the Union"[35]. The same article also includes a non-exhaustive enumeration (as suggested by the use of the wording 'mainly') of the components of this right, when it states that it mainly includes 'the right of every person to be heard before any individual measure is taken which may affect him infringes[,] the right of any person „to access their own file, respecting the legitimate interests related to confidentiality and professional and commercial secrecy [and] the administration's obligation to motivate its decisions"[36]. The same article also enshrines the right of any person „to reparation by the Union of the damages caused by its institutions or agents

[32] Court of First Instance, dec. of 30.01.2002, T-54/99, *Telekommunikation Service GmbH v. COM*, ECLI:EU: T:2002:20, point 48.

[33] Court of First Instance, dec. of 22.03.2012, T-458/09 and T-171/10, *Slovak Telekom a.s. v. COM*, EU:T:2012:145, point 68.

[34] *Ibidem*.

[35] Art. 41 (1) of the Charter of Fundamental Rights of the European Union.

[36] Art. 41 (2) of the Charter of Fundamental Rights of the European Union.

in the exercise of their functions, in accordance with the general principles common to the laws of the member states", as well as the right, having the same beneficiaries, to „address in writing to the institutions of the Union in one of the languages of the treaties and must receive a reply in the same language"[37].

Next, art. 42 of the Charter provides that „any citizen of the Union and any natural or legal person who resides or has its registered office in a member state has the right of access to the documents of the institutions, bodies, offices and agencies of the Union, regardless of the support on which these are located documents". We note that, in the case of this right, the scope of beneficiaries is limited to that of EU citizens, unlike the situations in art. 41, where the recipients of the rights we referred to were „any persons".

Citizens of the Union and natural and legal persons with residence or registered office in one of the member states) benefit from the rights enshrined in art. 43 of the Charter („any citizen of the Union, as well as any natural or legal person residing or registered office in a member state have the right to notify the European Ombudsman regarding cases of maladministration in the activity of institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union in the exercise of its jurisdictional function") and 44 („any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to address petitions to the European Parliament").

We note, in this context, how the right to good administration, as enshrined in art. 41 *et seq.*, in fact, contains a series of other rights, which led the specialized literature, also based on the Court's jurisprudence, to consider it an „umbrella right"[38].

5. The European Code of Good Administrative Conduct

In all this context, of such a vast content of the notion of good administration, „the year 1998 brought a first attempt to codify the theory and practice related to this concept, by proposing the adoption of a European Code of good administrative conduct, belonging to the member of the European Parliament Roy Perry"[39].

As a result of the preparation, by the European Ombudsman, of a draft European Code of good administrative conduct, during September 2001, „the European Parliament approved the [mentioned] Code, which establishes the standards to be respected by the institutions and bodies of the European Union and by their employees in relations with the citizens of the European Union. It details the provisions of the Charter of Fundamental Rights of the European Union, bringing together material and procedural principles that govern actions taken at the level of European institutions and bodies. We find in this document provisions of a principled nature such as: legality, non-discrimination, proportionality, and impartiality of the actions of the officials within the EU institutions, the prohibition of the abuse of power, the independence, equity, kindness and objectivity of the employees of the EU bodies. Procedural rules regarding the receipt, evaluation, and transmission of responses to received requests are mentioned, rules regarding the hearing of persons whose interests may be affected by the decisions of the EU institutions and rules regarding decision-making regarding a request (reasonable term for adopting decisions, the obligation to motivate decisions and indicating the means of appeal of the decisions)"[40].

In turn, „the Treaty establishing a Constitution for Europe [dedicates] a significant space to the provisions relating to public administration and [established] a series of new principles with direct relevance to public administration, especially regarding the allocation of powers between states members and the [Union] (...) and regarding the different types (...)"[41] of legislative acts of the Union, largely taken over with the Treaty of Lisbon.

According to what is mentioned in the Code, it contains „the general principles of good administrative conduct, which apply to all relations between the Institutions and their administrations and the public, unless they fall under specific provisions". In fact, the very scope mentioned in the code confirms our statements related to the relationship between good administration and legislation, according to which it cannot violate the legislation, but it can target more aspects than it includes.

[37] Art. 41 (4) of the Charter of Fundamental Rights of the European Union.

[38] H.C.H. Hofmann, B.C. Mihăescu, *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as a Test Case*, European Constitutional Law Review no. 9/2013, pp. 73-101.

[39] European code of good administrative conduct, Office for Official Publications of the European Communities, Luxemburg, 2005, p. 6.

[40] E. Slabu, *Evoluția conceptului bunei administrări în Uniunea Europeană*, *www.umk.ro*, f.a., f.p.

[41] G.L. Chiric, *Principii ale administrației desprinse din Tratatul instituind o Constituție pentru Europa*, *www.proceedings.univ-danubius.ro*, f.a., f.p.

We observe how the Code explains that „in adopting decisions, the official will ensure that the measures taken are proportionate to the intended purpose and will avoid limiting the rights of citizens or imposing obligations on them, if these limitations or tasks are not in a reasonable relationship with the purpose of the pursued action. [Also,] in adopting decisions, the official (public servant) will respect the correct balance between the interests of private individuals and the interest of the general public"[42]. Therefore, the second principle established by the Code of Good Administration in the EU is that of proportionality, also found in the legislation of the member states.

In art. 7, the Code aims to limit the exercise of the administration's powers to the purpose in which they were conferred by the relevant provisions. In particular, says the Code, „the official [public servant] shall avoid using these powers for purposes which have no legal basis, or which are not justified by any public interest".

From this article we deduce a reiteration of the principle of equality and the concern of combating the abuse of power, even if the actions that would have this character would not be expressly illegal or, even more so, punishable under the criminal law.

The code also provides aspects related to the conduct of the official [public servant] in the administration, such as that he „must show impartiality and independence, and refrain from any arbitrary action that negatively affects the public, as well as from any treatment preferentially granted on the basis of any reasons"[43].

Through these provisions, the Code reiterates some aspects mentioned in the Recommendations of the Council of Europe, but also includes an additional element, namely the fact that the official must not prove biased in any situation, even if it is not generated by a conflict of interests, but, perhaps, of a personal aversion or other unspecified reasons.

Furthermore, the Code establishes that officials „are bound to respect the legitimate and reasonable expectations of the public, according to the way the Institution has acted in the past"[44], and through this we observe a first consecration, in the matter of good administration, of the principle of legitimate expectations (hopes), regarding which there is, moreover, a rich jurisprudence, although this does not only concern the action of the administration.

Art. 11 of the Code stipulates that the union official must act in an impartial, fair and reasonable manner and try to give the public all possible support in solving their problems and will respond in the same manner, as well as promptly, to the correspondence received, phone calls or inquiries in any way, being as courteous as possible in dealing with the public.

According to the Code, „in cases related to the rights or interests of individuals, the official [public servant] will ensure that the right to defense is respected during each stage of the decision-making procedure. Every member of the public shall have the right, in cases where a decision affecting his rights or interests is to be adopted, to submit written notes and, whenever necessary, to present verbal comments prior to the adoption of the decision"[45].

We are, therefore, in the presence of the right to be heard before taking measures that affect the rights of the administrator, but, this time, the Code offers, in addition to the Recommendations, a series of indications regarding the concrete aspects associated with this right, which represents an additional step in its consecration.

Art. 18 includes the administration's obligation to mention the basis of the decisions adopted, which may negatively affect the rights or interests of a private person, with the mention of the grounds on which they are based, clearly indicating the relevant facts and legal basis of the decision. It will also avoid adopting decisions based on summary or vague grounds or that do not contain individual reasoning. This article must be corroborated with the next one, which mentions the fact that „decisions of the institutions, which could negatively affect the rights or interests of a private person, will contain an indication of the existing appeal possibilities for contesting the decision. In particular, it will indicate the nature of the means of appeal, the bodies before which they can be exercised, as well as the deadlines for exercising them"[46].

We mentioned this correlation because the motivation of a decision can be a decisive element in judging a case related to it and, for this reason, its quality is essential for the valorization of the essential rights of the administrator.

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[42] According to art. 6 of the European code of good administrative conduct.
[43] Art. 8 and 9 of the European code of good administrative conduct.
[44] Art. 10 & the following of the European code of good administrative conduct.
[45] *Ibidem*.
[46] *Ibidem*.

In the same vein, art. 20 of the Code stipulates that the official [public servant] will ensure the written notification to the person or persons concerned, immediately after the adoption of the decision, of the decisions that affect their rights or interests.

This provision is also relevant for the exercise of appeals, which would be impossible, sometimes, in the absence of knowledge of the contested fact and, in addition, certain terms related to the actions against administrative acts that bring damage to the administrations must be exercised, to be admissible, within certain terms that run from the date of communication of the act. The code also provides for aspects related to access to documents, which, in turn, have an intrinsic connection with the aspects we referred to. Without stating them expressly, since they are based on provisions from the derivative EU law, and are applicable only to its institutions, we mention their existence and the fact that these rights are enshrined, in general, in the legislation of the member states.

6. The European Ombudsman - 'guardian' of sound administration in the EU[47]

Established by the Maastricht Treaty (1992), the first Ombudsman was elected by Parliament in 1995. Since then, at the beginning of each new term of office of the European Parliament, its members elect a new European Ombudsman for a term of office which coincides with that of the Parliament (5 years) and is renewable. Under a relatively symmetrical procedure, if the European Parliament decides that the Ombudsman no longer fulfils the conditions required for the performance of his or her duties or has committed one or more serious misconduct, it may refer the matter to the Court of Justice which, if it considers Parliament's arguments to be well founded, may dismiss the Ombudsman in plenary session.

Through its powers, the Ombudsman is placed in the same institutional framework in which similar institutions operate at national level, such as the Ombudsman, which can be considered both an element of specificity of the Union (differentiating it from other international organizations) and an element of its statehood.

For example, it is empowered[48] to receive complaints from any EU citizen or any natural or legal person residing or having its registered office in a Member State. The subject of such complaints is conduct by the institutions, bodies, offices or agencies of the Union[49] (with the exception of the Court of Justice acting in its judicial role) which can be characterized as maladministration. Complaints may be made directly or through a Member of the European Parliament. In understanding the concept of maladministration, the content of *the Guide to good administration at Union level* is particularly useful in that it designates the content of good administrative practice, behavior contrary to which constitutes maladministration. The European Ombudsman can also make inquiries *ex officio*.

After receiving complaints from citizens and the natural or legal persons mentioned or after having made a referral ex officio, the Ombudsman shall inform the institution, body, office or agency concerned of the fact that it is the subject of such a complaint. Subsequently, the Ombudsman[50] carries out all those inquiries or investigations which he considers justified in order to clarify the circumstances of the case or cases of maladministration in question and, on the basis of these, draws up a report describing the matters found. He shall be completely independent in the performance of his duties and may not seek or take instructions from any government, institution, body, office or agency.

Concrete examples of cases of maladministration can be found on the Ombudsman's website[51], for example: late payments, contractual disputes, problems with tendering procedures, lack of transparency/refusal of access to documents, unnecessary delays, violations of fundamental rights.

Even if the mediation activity and the personal authority of the Mediator are prerequisites that often lead to the success of his actions, the lack of binding legal force of the above-mentioned report raises, however, the question of the existence of real, effective remedies for the legal subjects affected by maladministration. These remedies are represented by the actions enshrined in the Treaty on the Functioning of the European Union, of which we shall present below the action for failure to act, *i.e.*, in the finding of inaction by the EU's institutional

[47] M.A. Dumitrașcu, *Dreptul Uniunii Europene I - curs universitar*, Universul Juridic Publishing House, Bucharest, 2021, pp. 125-126.

[48] Art. 228 TFEU.

[49] See, for further details, *Activity report of the European Ombudsman* - 2019, *https://www.ombudsman.europa.eu/ro/annual/ro/127393, 2019, accessed on 01.03.2022*.

[50] The terms *Mediator* and *Ombudsman* being, in the terminology of European Union law, interchangeable.

[51] *https://www.ombudsman.europa.eu/cs/publication/ro/27*, accessed on 3.03.2022.

structures, given that inadequate administration often takes the form of an omission which is not in conformity with the EU Treaties.

7. Action for failure to act - an instrument of judicial review to ensure the right to good administration[52]

According to the TFEU, „if, by infringing the provisions of the Treaties, the European Parliament, the European Council, the Council, the Commission or the European Central Bank abstain from acting, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have that infringement established”[53] , provisions applicable not only to the institutions, but also to bodies, offices and agencies which abstain from acting. Any natural or legal person may also, under the same conditions, bring an action before the CJEU for the failure of these passive subjects to address to it anything other than a recommendation or an opinion (given their lack of binding legal effect). The action is admissible, however, only on condition that a prior, pre-litigation procedure is carried out, in which the person who considers that his rights have been infringed is obliged to notify the institution, body, office or agency concerned and, by this notification, to request them to act.

The notice must be clear, precise, and warn the institution that continued inaction will lead to an action for failure to act. The request must also specify in the request the date from which the two-month period begins, within which the institution must put an end to its inaction. The notice can only be addressed to the institution competent to act and obliged to act, and it also sets out the limits within which the future action for failure to act may be brought. If the notified institution adopts a position, any subsequent action before the CJEU is without object.

If the institution, body, office or agency has not stated its position within this two-month period from receipt of the notification (which may include not acting in the way the complainant wishes, if the complainant's claims are considered unfounded, contrary to EU law, inappropriate, etc.), the complainant may initiate the contentious phase of the action by bringing the matter before the CJEU within a further two-month period.

According to the Court's judgment, the institution, body, office or agency whose act has been declared void or whose failure to act has been declared contrary to the Treaties is required to take the measures necessary to comply with the judgment of the CJEU.

As a means of judicial review, therefore, the action for failure to act plays an important role in guaranteeing the exercise of the EU powers conferred on the institutions by the founding Treaties and seeking to oblige the competent institution to act in areas where the institution, body, office or agency in question is competent to adopt acts. Its purpose is to obtain a judgment of the CJEU finding that the institution has acted unlawfully in failing to take a decision.

It follows from the scheme of the provisions of art. 265 TFEU that the Member States and the institutions, with the exception of the courts, have *locus standi* in actions for failure to act as preferred claimants, and natural or legal persons as non-preferred claimants. The consequence of the non-privileged status of the latter is the need to justify an interest, whether direct or indirect, in the issuing of the act in question.

The European Parliament, the European Council, the Council, the Commission, the European Central Bank and the bodies, offices and agencies of the Union shall have *locus standi* within the limits of their respective powers.

The basis for illegality of inaction is violation of the EU Treaties, and (invalid) inaction can concern any type of decision/measure in any area where the EU has competence: EU secondary legislation, EU international agreements, EU legislative proposals, EU budget, etc.

In view of the effects of the EU Court of Justice's judgment in the action for failure to act, we take the view that this is precisely the judicial 'supplement' to the possibility of referring the matter to the Ombudsman, producing binding legal effects which the latter does not possess. At the same time, for the sake of clarity, we would point out that the CJEU's judgment is only intended to establish that the failure in question is not in conformity with the Treaties and does not take the place of the act or measure in question. The competent

[52] M.A. Dumitrașcu, O.M. Salomia, *Dreptul Uniunii Europene II - curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, pg. 105-108.

[53] Art. 265 TFEU.

institution, body, office must exercise the power conferred on it by the Treaties and act in accordance with it by adopting the act or initiating the measure required by the CJEU judgment.

8. Actions for annulment and actions for non-contractual liability as judicial means of ensuring compliance with the right to sound administration

Under the Treaty on the Functioning of the European Union, the Court of Justice has jurisdiction to review „the legality of legislative acts, acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties"[54]. It also exercises the same control of legality over „acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties"[55] .

The review in question is carried out by ruling on actions „brought by a Member State, the European Parliament, the Council or the Commission[56], on grounds of lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers"[57]. The same control is also exercised in the case of actions „brought by the Court of Auditors, the European Central Bank and the Committee of the Regions for the purpose of safeguarding their prerogatives"[58], this last specification making the above-mentioned claimants semi-privileged, given the need to justify the interest of safeguarding their own prerogatives.

Finally, the TFEU also mentions a third hypothesis concerning the bringing of actions for annulment, namely that where natural or legal persons bring „an action against acts addressed to them or which are of direct and individual concern to them, as well as against legislative acts which are of direct concern to them and which do not entail implementing measures"[59], these conditions confer on natural and legal persons the status of non-privileged applicants.

In order to facilitate the exercise of the right of non-privileged claimants to apply to the Court of Justice for a review of the legality of the aforementioned acts, the Treaties have established, for their benefit, the possibility for the constituent acts of Union bodies, offices and agencies „to lay down special conditions and procedures relating to actions brought by natural or legal persons against acts of those bodies, offices or agencies which are intended to produce legal effects vis-à-vis them"[60]. However, in order also to protect the general interest of maintaining the predictability of Union law and the legal certainty of the Union legal order, an action for annulment may be brought only „within two months, as the case may be, of the publication of the act, of its notification to the plaintiff or, failing that, of the date on which the plaintiff became aware of it"[61].

The effect of allowing the action for annulment is to declare the contested act null and void, which leads to its disappearance from the Union's legal order as soon as it is adopted. However, in order to protect certain legitimate interests, the Treaties have also provided for the possibility for the Court to indicate, „if it considers it necessary, which of the effects of the annulled act are to be regarded as irrevocable"[62], which leads to the possibility of maintaining (temporarily) the applicability of some of the effects of the annulled acts.

This legal remedy also applies to acts of the Union institutions, offices and agencies adopted in breach of the right to good administration, in all its aspects, in accordance with long-standing and constant case-law which predates by almost two decades the establishment of this right by primary legislation. For example, in one of the first cases decided by the Court of Justice in this regard, the Court held, with regard to the meaning of the right to sound administration, that it includes the existence of effective judicial review, which must be capable of covering also the legality of the statement of reasons for the contested acts, which generally means that the competent court may require the issuer of the act to communicate to it the statement of reasons in question. This is justified by the fact that, in order to guarantee the exercise of the rights of the defence, potential claimants

[54] Art. 263 TFEU.
[55] Ditto.
[56] The latter being considered, by specialized doctrine, privileged plaintiffs, considering the lack of need to justify an interest when filing the action.
[57] According to art. 263 TFEU.
[58] Ditto.
[59] Ditto.
[60] Ditto.
[61] Ditto.
[62] According to art. 264 TFEU.

must have full knowledge of the relevant facts underlying the adoption of the contested act, since the decision whether or not to challenge the act before the competent court may depend on this knowledge[63].

In the same idea, the right of defence, in the case of a decision to sanction anti-competitive conduct (from which we can extrapolate to other matters) must be exercised from the stage of adoption of the sanctioning decision, and not only at the judicial stage, assuming that the decision in question will be challenged with an action for annulment[64], which only confirms the jurisprudential solution already expressed in the Judgment in Joined Cases 46/87 and 227/88 Hoechst v. European Commission[65], in which the Court also established the general rule on the protection of fundamental rights in the adoption of legal acts by the Union institutions, according to which provisions of Union law may not be interpreted in such a way as to give rise to results which are incompatible with the general principles of Union law and, in particular, with fundamental rights[66].

The obligation to state reasons for legal acts adopted by the Union institutions is also underlined in para. 32 of the Lisrestal judgment[67], based, however, on a legal basis (former art. 190 TEC) in the Fundamental Treaties, in the absence of the current Charter. However, as this is a primary legal basis, now shared by the Charter of Fundamental Rights of the European Union, we consider that this distinction has lost its relevance, and the substance of the Court's findings is now all the more valid. However, a mere inadvertence in the reasoning of a legal act on which a measure adopted pursuant to a regulation is based is not in itself sufficient for the Union to incur non-contractual liability[68], from which we deduce, per a contrario, the applicability of this second legal remedy specified throughout this paragraph, in addition to the action for annulment, in situations other than that excluded by the case-law finding mentioned above.

The constancy and topicality of the Court's case-law on the protection of fundamental rights enshrined in the Charter through the legal remedy of an action for annulment is demonstrated, for example, by a very recent judgment[69], following the fact that „in May 2019, the Republic of Poland brought an action for annulment before the Court, challenging the legality of the preventive measures established by art. 17 para. (4)[70] in relation to (...) the right to freedom of expression, which includes the right to information, laid down in art. 11 of the Charter of Fundamental Rights of the European Union[71]", in which the Court reiterated the need to review the legality of legal acts adopted by the Union institutions in relation to the provisions of the Charter of Fundamental Rights, including the right to good administration.

9. Good governance as a form of loyal cooperation [72]

As the author Marcus Klamert states in his paper[73], „this principle has been a constant element in the various EU treaties", starting with the very first treaty - the Treaty establishing the European Coal and Steel Community (hereafter referred to as the ECSC Treaty). „Its wording has essentially changed very little since the 1950s" and is now governed by art. 4(3) TEU; at the same time, it is pointed out that "What has evolved over the course of the amendments to the founding treaties are the general context and concrete situations in which the obligation of loyal cooperation is placed today" in the treaties governing the EU.

Currently, art. 4 para. (3) TEU[74] defines the principle of loyal cooperation as follows:

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[63] CJEU dec. of 15.10.1987, 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens*, EU:C:1987:442, point 15.

[64] CJEU dec. of 18.10.1989, 374/87, *Orkem v. COM*, EU:C:1989:387, point 33.

[65] CJEU dec. of 21.09.1989, 46/87 and 227/88, *Hoechst AG v. COM*, EU:C:1989:337, passim.

[66] Ditto.

[67] Court of First Instance, dec. of 06.12.1994, T-450/93, *Lisrestal - Organização Gestão de Restaurantes Colectivos Ldª and others v. COM*, EU:T:1994:290.

[68] Court of First Instance, dec. of 18.09.1995, T-167/94, *Detlef Nölle v. CONS & COM*, EU:T:1995:169, point 37.

[69] CJEU dec. of 26.04.2022, -C401/19, *Republic of Poland v. European Parliament and Council of the European Union*, EU:C:2022:297.

[70] From Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, published in OJ L 130 of 17.05.2019, pp. 92-125.

[71] J.P. Quintais, *Between Filters and Fundamental Rights. How the Court of Justice saved Article 17 in C-401/19 - Poland v. Parliament and Council*, VerfBlog, 2022/5/16, *https://verfassungsblog.de/filters-poland/*, 16.05.2022, accessed on 29.12.2022.

[72] M.A. Dumitrașcu, O.M. Salomia, *Principiul cooperării loiale - principiu constituțional în dreptul Uniunii Europene*, In Honorem Ioan Muraru - Despre Constituție în Mileniul III, Hamangiu Publishing House, 2019, p. 158-173.

[73] M. Klamert, *The principle of loyalty in EU Law*, Oxford Studies in European Law, Oxford University Press, 2014, p. 9.

[74] D.-A. Bantaș, *Considerations regarding the Choice, by the European institutions, of the legal basis of acts, during the legislative procedures overview of the case law of the Court of Justice of the European Union*, Challenges of the Knowledge Society, 11th-12th May 2018, 12th ed., ISSN 2359-9227 ISSN-L 2068-7796, p. 404.

„(3) In *accordance with the principle of loyal cooperation*[75], *the Union and the Member States shall* ***respect and assist each other*** *in the performance of their* ***tasks*** *under the* ***Treaties****.*

Member States shall adopt any general or specific measure to ensure fulfilment of the obligations arising out of the Treaties *or resulting from* action taken by the institutions of the *Union.*

Member States shall facilitate the *achievement of the Union's* ***tasks*** *and shall* refrain from *any measure which could jeopardise the attainment of the Union's* ***objectives****".*

Another reflection of the principle of loyal cooperation at EU level concerns inter-institutional cooperation and collaboration as regulated by **art. 13 (2) TEU,** according to which *„Each institution shall act within the limits of the powers conferred upon it by the Treaties and in accordance with the procedures, conditions and objectives set out therein. The institutions shall* ***cooperate with each other in good faith.***"

The new article introduced by the Lisbon Treaty underlines the *horizontal* application of the loyalty clause, between the EU institutions[76]. Compared to art. 4(3) TEU, the same wording is used: loyal/synchronous cooperation[77], as well as recalling the principle of *conferral of* competence. In addition, in this context, loyal cooperation refers to another important principle of institutional activity, namely: the principle *of* institutional *balance*[78] (studied alongside the principle *of* institutional *autonomy*[79] and the *attribution of* competences). Loyal cooperation in the relationship between the institutions is particularly important in the context of the various procedures requiring institutional cooperation, such as the legislative procedure or the budgetary procedure, and is practically a way of ensuring good administration at EU level in any type of measure, action, legislative or non-legislative decision that this organisation might adopt.

Although the provision in the TEU refers expressly only to the *institutions*, according to case law, the same principle is of course applicable to the other components of the EU institutional structure (bodies, agencies, offices, etc.).

As we can see from the outline of the content of the two principles - *good administration of European affairs* and *loyal cooperation within the EU* (at the level of its institutional framework and beyond), in our opinion, cannot be conceived without each other; they are two perspectives that not only depend on each other, mutually reinforcing each other, but also ensure both the efficient functioning of the organization, the achievement of its objectives, according to the competences specified in the Treaties, and, at the same time and just as importantly! compliance with the values promoted by the EU Treaties, values which must infuse every type of EU action (including loyalty/trust). Loyal/sincere cooperation is one of the preconditions and prerequisites for good administration, and good administration is the consequence and proof that the institutional structures understand their competences well, and respect them without infringing the limits set by the Treaties, facilitating each other in the fulfilment of their tasks and objectives, in a context characterized by cooperation that favors not only autonomy, but also balance and, why not?, harmony.

10. Conclusions

As the specialized doctrine has expressed it, „the development of international relations between states has been manifested, after the Second World War, by the creation of important associations with a view to achieving common general objectives such as the maintenance of peace and international cooperation or specific objectives of a military, economic-commercial or scientific-cultural nature"[80], to which have been added, almost naturally, those derived from the need to protect fundamental rights, with the enumeration, content and scope specific to each legal order. In line with this practically worldwide trend, «the States of Europe have created a specific international intergovernmental organization with a view to maintaining peace and achieving economic integration which contributes to the „welfare of peoples"»[81], but economic objectives have relatively quickly and

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[75] Codifying case C-2/88, Imm. Zwartveld, 1990 (access to information; loyal cooperation in the relationship between the EC institutions and the member states//COM - Netherlands).

[76] Two established examples of inter-institutional collaboration in which the principle of loyal cooperation and, implicitly, good administration, must be applied refer to the ordinary legislative procedure (art. 294 TFEU) and the budgetary procedure (art. 314 TFEU).

[77] M. Dony, *Droit de l'Union européenne*, septième édition revue et augmentée, Editions de l'Université de Bruxelles, Bruxelles, 2018, p. 231: „The Court is the first to pronounce the rule according to which, within the inter-institutional dialogue, the same mutual obligations of loyal cooperation as those regulating the relations between the Member States and the institutions of the Union are given".

[78] It includes the following concepts: separation of powers between institutions and, at the same time, collaboration between them.

[79] Institutions have their own internal organization regulations, they appoint their own officials, for example.

[80] O.M. Salomia, A. Mihalache, *Principiul egalității statelor membre în cadrul Uniunii Europene*, in Dreptul no. 1/2016, pp. 166-174.

[81] *Ibidem*.

naturally made their political-legal integration. In this context, faced with the fact that, under the major economic expansion, „patrimonial values and the criteria of efficiency and utility tend to diminish in importance or even replace essentially non-patrimonial values, such as social solidarity, civic engagement or equity, affecting the way resources are allocated at the level of society[82]", The Charter of Fundamental Rights of the European Union has come to enshrine rights, principles and values, such as „dignity as a fundamental human right"[83] and, relevant to our study, the right to good administration, already established by the Court of Justice of the EU in an important series of judgments which have enshrined this right in case law and defined its scope and content. Following these developments, supplemented by the European Code of Good Administrative Behavior, a non-binding document drawn up by the European Ombudsman, the EU institutions and citizens benefit from the regulatory, case-law and conceptual framework necessary for an administration that operates in accordance with the expectations of its recipients and with respect for their rights, interests and values.

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[82] M.F. Popa, *Ce nu poate să facă analiza economică în drept - capcane și implicații practice*, in Tribuna Juridică no. 11 (1)/2021.

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