The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case

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Charter of Fundamental Rights of the EU – Multiple sources of fundamental rights in the EU legal system – Non-hierarchical, pluralistic understanding of their interrelationship – Case study: the right to good administration – Difficulties in defining the scope of the right to good administration under the Charter and that of the right to good administration as a general principle of EU law – Adoption of a pluralistic understanding of the EU fundamental rights' sources allows for a clarification and improved understanding of the individual's rights in the EU legal system

Introduction

Of the possible sources of fundamental rights in the EU legal order, Article 6 TEU lists three: the Charter of Fundamental Rights of the European Union under Article 6(1) TEU, which 'shall have the same legal value as the Treaties'; the European Convention on Human Rights (ECHR), to which Article 6(2) TEU provides for a legal basis for the EU accession; and fundamental rights as general principles of law under Article 6(3) TEU. Additionally, the fundamental freedoms arising in the context of the TFEU are, in practice, treated as rights with equal status to a fundamental right in the EU legal order.[1] This plurality of sources of rights raises questions as to the relationship between them in case of conflict. In the following article we focus on one practically relevant but theoretically under-

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[1] Case C-36/02 *Omega* [2004] *ECR* I-9609; Case C-112/*00 Schmidberger* [2003] *ECR* I-5659; Case C-341/05 *Laval* [2007] *ECR* I-11767; Case C-438/05 *Viking* [2007] *ECR* I-10779.

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developed sub-aspect of this problem: The relation between fundamental rights defined in the Charter and those arising as general principles of EU law (Article 6(1) and (3) TEU).[2] We discuss in the first part the relationship of these two sources of law and whether, in particular, one of the sources should be subsidiary to the other. The second part of this article looks at these questions by means of the test case of the right to good administration. Good administration is a telling example for the real-life relevance of the general questions raised in this article since the material, personal and institutional scope of the right in Article 41 CFR is defined in a significantly more limited way than the general principle of good administration such as it has been developed in the case-law of the EU courts. We argue that a pluralistic understanding of the relationship between the various sources of fundamental rights has the potential to help preserving the dynamic nature of the EU law and contributes to the protection of the individuals' fundamental rights in view of the challenges and complexities of the on-going EU integration.

The Charter and fundamental rights as general principles

The relationship between different sources of EU fundamental rights has only partially been addressed in primary law. Articles 52(3) and 53 CFR cover the relation between the CFR and the ECHR but not between the CFR and the general principles of law under Article 6(3) TEU. That existing Treaty has left this question very much to the Court of Justice of the European Union (CJEU).[3] The first cases decided since the entry into binding force of the Charter do not yet indicate that the EU courts have developed a clear position on whether the Charter is to merely become the EU courts' point of departure when dealing with the protection of fundamental rights or whether it is to become at least for the rights formulated

[2] Much more has been written about the relationship between fundamental rights of the Union and fundamental freedoms. *See* e.g.: T. Georgopoulos, 'Libertés fondamentales communautaires et droits fondamentaux européens: le conflit n'aura pas lieu', 6 *Petites affiches* (2004) p. 10-14; M.K. Bulterman and H.R. Kranenborg, 'What if Rules on Free Movement and Human Rights Collide? About Laser Games and Human Dignity: The Omega Case', 31 *E.L.Rev.* (2006) p. 93-101; A. Alemanno, 'À la recherché d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur: Quelques réflexions à propos des arrêts « Schmidberger » and « Omega »', 4 *Revue du Droit de l'Union Européenne* (2004) p. 709-751. For a more general approach, *see*: H. Oberdorff, *Droits de l'homme et libertés fondamentales*, Lextenso (éds) (Paris 2011) p. 1-619.

[3] The question of the relation of the sources of fundamental rights in the EU legal order is not merely academic. It is, for example, also decisive for analysing the relevance of the so called 'opt-out' of parts of the Charter by the United Kingdom, Poland and the Czech Republic. Since the opt-out is explicitly related to specific parts of the Charter, the question remains whether the rights in the CFR to which the opt out refers, are nevertheless applicable as general principles of EU law.

therein a more or less exclusive source, eliminating for these the relevance of general principles of law. Prior to the entry into force of the Treaty of Lisbon, for example in *Volker and Markus Schecke*, the Court (Grand Chamber) held that a fundamental rights issue had to be assessed 'in the light of the provisions of the Charter'[4] thereby treating the Charter as 'the reference standard'[5] for the Union in ensuring respect for fundamental rights.

The post-Lisbon case-law of the CJEU to date does not yet seem to indicate a clear preference for any possible solution to the problem. Specifically with regard to the right to effective judicial protection, both the General Court (GC) and the Court of Justice (CJ) have used as a starting point of analysis the rights arising from general principles of law. In *Winner Wetten,* for instance, the CJ, following the Opinion of AG Bot, stated that '(…) according to settled case-law, the principle of effective judicial protection is a general principle of Union law (…) which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.'[6] Similarly in *AJD Tuna,* it stated that Article 47 CFR was merely 'the reaffirmation of the principle of effective judicial protection, which is a general principle of Community law stemming from the constitutional traditions common to the Member States.'[7] The GC in *Fulmen*, similarly, while analysing the applicant's complaint regarding the infringement of his right to effective judicial protection, first referred to the right to effective judicial protection as general principle of law before mentioning that it has also been enshrined in Article 47 of the Charter.[8]

In other cases, a parallel application of the different sources seems to be preferred by the Union judge, listing different sources of a legal principle in the CFR and the ECHR by way of example. The case *Interseroh* of March 2012 illustrates this approach. The Court, after having referred to the Charter's Articles providing for the rights concerned in that case, namely Articles 15(1), 16 and 17 CFR, emphasised that: '[m]oreover, according to settled case-law, both the right to property and the freedom to pursue a trade or business are general principles of European

[4] Joined Case C-92/09 and C-93/09, *Volker and Markus Schecke* [2010] *ECR* I-nyr of 9 Nov. 2010, para. 46. This case-law was rendered a few weeks before the Charter acquired binding legal force through the entry into force of the Lisbon Treaty on 1 Dec. 2009.

[5] D. Simon, 'Ordre juridique de l'Union européenne. Droits fondamentaux. Transparence et vie privée', 21 *Revue Europe* (2011) p. 12: '[…] la Grande chambre se place d'emblée sur le terrain de l'article 6, paragraphe 1 TUE pour *privilégier comme norme de référence la Charte de droits fondamentaux* […]' (emphasis added).

[6] Case C-409/06 *Winner Wetten* [2010] I-nyr, para. 58; *see also* Opinion of the AG Bot in C-409/06 *Winner Wetten* [2010] I-nyr, para. 104.

[7] C-221/09 *AJD Tuna* [2011] *ECR* I-nyr of 17 March 2011, para. 54 with reference to Case C-432/05 *Unibet* [2007] *ECR* I-2271, para. 37, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351, para. 335.

[8] Joined Cases T-439/10 and T-440/10 *Fulmen* [2012] *ECR* II-nyr of 21 March 2012, para. 87.

Union law.'[9] Thereby the Court not only linked the CFR rights to the pre-existing case-law of the Court but also explained that these rights had the character of general principles of law.[10] Other formulations which might be read as acknowledging a plurality of sources have recently been used in, for example the case *Chakroun*[11] and the case *Salahadin Abdulla*,[12] indicating that a right arises 'in particular', 'notamment' or 'insbesondere' in the Charter. Such formulations point specifically at one source, generally the Charter, but take care not to exclude other possible sources of rights, such as general principles of EU law.[13] The General Court (GC) in *Slovak Telekom* v. *Commission*[14] has adopted a similar line of reasoning with regard to the right to good administration not only stated for in Article 41 CFR, but also protected as principle in the EU judicature's case-law.[15] Overall, absent any hard case in which a clear decision would have been indispensable, the general trend of the courts has been to use the Charter less as an exclusive source of fundamental rights and more as either a point of departure for an analysis or as one of several possible sources of rights.

[9] Case C-1/11 *Interseroh* [2012] *ECR* I-nyr of 29 March 2012, para. 43. The Court referred to the following cases: Case C-280/93 *Germany* v. *Council* [1994] *ECR* I-4973, para. 78; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] *ECR* I-7411, para. 68; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] *ECR* I-6451, para. 126; and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] *ECR* I-10423, para. 87.

[10] In the same vein, AG Bot in his Opinion in Case C-277/11 *MM* [2012] *ECR* nyr of 26 April 2012, para. 32 and in his Case C-83/11 *Rahman* [2012] *ECR* I-nyr of 27 March 2012, paras. 70 and 71 concerning the level of protection flowing from the obligation to respect the right to private and family life, after having stated that the right in issue was enshrined in Art. 7 CFR, further emphasised, in a subsequent paragraph, that '[t]he Court has recognised the fundamental right to family life as forming part of the general principles of EU law.' The AG made reference to Case C-127/08 *Metock* [2008] *ECR* I-6241, para. 62; Case C-256/11 *Dereci* [2011] *ECR* I-nyr of 15 Nov. 2011, para. 70.

[11] Case C-578/08 *Chakroun* [2010] *ECR* I-1839, para. 44.

[12] Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] *ECR* I-1493, para. 54.

[13] *See also* the formulations in, e.g., Council Directive 2003/86/EC of 22 Sept. 2003 on the right to family reunification *OJ* [2003] L 251/12, para. 2 of the Preamble.

[14] Case T-458/09 and T-171/10 *Slovak Telekom* v. *Commission* [2012] *ECR* II-nyr of 22 March 2012.

[15] Case T-458/09 and T-171/10 *Slovak Telekom* v. *Commission* [2012] *ECR* II-nyr, paras. 67-68 with reference to Case: C-269/90 *TU München* [1991] *ECR* I-5469, para. 14; Case T-44/90 *La Cinq* v. *Commission* [1992] *ECR* II-1, para. 86; and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v. *Commission* [2003] *ECR* II-3275, para. 404.

Establishing pluralism or a hierarchy of sources of fundamental rights in the EU legal order?

The debate in academia on this question has been so far mainly influenced by arguments which, on one hand, are predominantly concerned with the systematic coherence and transparency of EU law and, on the other hand, appear to be concerned with the promotion of a 'constitutional identity' in the EU. Several authors, however, appear to argue in favour of what might be called a 'hierarchic' understanding placing the Charter as the primary source of rights in the Union. Fundamental rights protected as general principles in this view are held to be only subsidiary sources of protection,[16] applicable as fillers of otherwise intolerable gaps 'as a sort of safety net for cases where the Charter is silent.'[17] This approach would result in an exclusive application of one or another source of rights to any given situation – either rights arising from the Charter or from general principles of law. Such understanding would appear to run counter to an understanding of several overlapping complementary sources applicable in parallel to any given situation. Some proponents of a hierarchic position argue that if the Charter did not take precedence over the general principles of EU law, the legal system would run the risk of lacking transparency, since positive law would increasingly be replaced by judge-made law and a parallel structure of protection of fundamental rights might appear;[18] this would risk bypassing the intention of the constitutional legislator. Crucial to any such argument, however, is the definition of a 'gap' in protection. Under which conditions could a codified fundamental right be filled by subsidiary reference to a general principle of law? If a fundamental right is formulated in the Charter with a more narrow scope of protection than the courts have granted under the protection of general principles of EU law, the question would subsequently arise as to the consequences thereof. Could general principles of EU law be used to expand the right or fill the gap?[19] When arguing such a position of

[16] V. Skouris, Working Group II 'Intégration de la Charte/adhésion à la CEDH' (2002), <http://european-convention.eu.int/docs/wd2/3063.pfd>, visited 31 March 2012: 'Mon sentiment est, que, à partir du moment où la CE/l'UE se dotera d'un catalogue contraignant de droits fondamentaux, il ne faudra plus recourir aux principes généraux du droit (et, par conséquent, aux traditions constitutionnelles communes et à la CEDH) en tant que source parallèle ou, pour ainsi dire, 'concurrente et équivalente' en matière de droits fondamentaux, mais seulement en tant que *source subsidiaire et complémentaire*. Ainsi la Cour devrait recourir aux principes généraux du droit uniquement pour combler les éventuelles lacunes du texte de la Charte […].'

[17] S. Prechal, 'Competence Creep and General Principles of Law', 3 *Review of European Administrative Law* (2010) p. 5-22, at p. 21. For a more recent contribution, *see* S. Prechal et al., 'The Principle of Attributed Powers and the 'Scope of EU Law', in L. Besselink et al. (eds.), *The Eclipse of the Legality Principle in the European Union* (Kluwer, The Hague 2011) p. 213-247.

[18] C. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon, Mohr Siebeck* (Tübingen 2010) p. 322.

[19] In this vein, *see* the Opinion of AG Trstenjak in Case C-282/10 Dominguez [2011] *ECR* nyr of 8 Sept. 2011, paras. 131-132, where she held that 'the possibility of further develop fundamental

hierarchy, the answer to such questions will depend on several factors. One is the intention of the constitutional legislator. Is the narrow formulation intended to be a limitation of a specific right? Is it an explicit limitation of the powers the Union had previously enjoyed? Or, is the narrow formulation flowing from the wording of the Charter to be interpreted only as a 'partial clarification' of a certain right, which does not exclude the continuous application of the unwritten general principles of law to questions which are not subject to the partial codification of that right into the CFR? In this context, the frame of reference according to which it is to be decided whether the Charter offers sufficient protection also needs to be defined. It would appear that a 'gap' in protection of rights under the CFR could only be defined by reference to a comparative benchmark, notably, the general principles of law as referred to in Article 6(3) TEU. Only by referring to the larger scope of protection of the fundamental rights as general principles of law is it possible to review the Charter as to whether it 'sufficiently' protects the rights of citizens or leaves gaps which are to be filled by application of general principles of law.[20] This is where, in our view, the problem of logic of a hierarchical, exclusive approach lies: Even when following the logic of the hierarchical view, a parallel analysis of the definition of the fundamental rights as established by the Charter, on the one hand, and the fundamental rights protected as general principles of law, on the other hand, is a requirement to establish the gap. Differences in view exist as to whether in the scope of application of the Charter, the latter should remain the exclusive source or merely one amongst many.

Another potential problem of the approach towards establishing a 'hierarchy of sources' of fundamental rights,[21] is that it has difficulties explaining the presence

rights that derive from general principles affording greater protection than the fundamental rights in the Charter cannot be ruled out.'

[20] J.-M. Sauvé and N. Polge, 'Les principes généraux du droit en droit interne et en droit communautaire. Leçons croisées pour un avenir commun?', in A. Pedone (eds.), *Mélanges en l'honneur de Philippe Manin. L'Union européenne: Union de droit, Union des droits*, (Paris 2010) p. 727-750, at p. 743. The authors indicated that the EU judge just like the French Administrative Judge should carry on referring to general principles of law beyond written sources in so far as: 'les vertus reconnues aux principes généraux du droit, en particulier leur souplesse de consécration comme d'application et leur capacité à étendre la protection des individus au-delà des prévisions écrites, devraient conduire la Cour de justice des Communautés européenne à continuer de recourir à cette technique.' It is not by accident that the Vice-President of the highest Administrative Court in France, the 'Conseil d'État' would be particularly aware of these necessities, such as the discussion of the differences between the protection of rights under Art. 41 CFR and the general principle of good administration show in the second part of this article.

[21] *See* e.g.: A. Berramdane, 'Considérations sur les perspectives de protection des droits fondamentaux dans l'Union européenne', 3 *Revue du Droit de l'Union Européenne* (2009) p. 441-459 at p. 445, e.g., argues that 'Les droits fondamentaux issus de la Charte et d'autres dispositions des traités ont rang « constitutionnel », ceux ayant leur sources d'inspiration la CEDH et les traditions constitutionnelles ont *seulement* valeur de principes généraux [ ].'

of rights defined in the CFR only by way of example. As AG Maduro, for example, recalled in his opinion in *max.mobile,* there are some rights which are so broadly defined that their content as subjective individual rights becomes sufficiently precise only in the case of concretisation of the right(s) at issue in clearly defined sub-categories or in legislation.[22] This category of broadly formulated fundamental rights in the EU legal order, includes for example the rights to 'human dignity' (Article 1 CFR) and to 'good administration' (Article 41 CFR) as well as the right to an effective judicial remedy before a tribunal (Article 47 CFR). These 'umbrella' rights or principles have in common that their capacity to confer subjective rights on individuals depends on the concretisation of their content. Such concretisation can take place either in the Treaty provisions or by secondary legislation establishing a clearer contour of the rights protected and their limitations.[23] The formulation of the right to good administration in Article 41 CFR illustrates this concept by way of a non-exhaustive list of examples. The formulation 'this right includes' shows that the list of sub-principles giving subjective rights to individuals can also be developed in the context of general principles of law in the case-law of the courts.[24] Consequently, a right which is itself defined by a mixture of, in part, written sub-concepts and, in part, unwritten general principles of law, could be regarded as a powerful example to emphasise the need of accepting a pluralism of sources in the sense of a non-hierarchical relation between rights possibly formulated in the Charter and rights as general principles of EU law.

However, the wider debate on the nature of rights conferred by Treaty provisions in the Charter and by general principles of law, often rests on – occasionally unstated – conceptual premises of the nature of written versus unwritten sources of rights: Positively formulated rights in a Charter are often understood to be more precise than unwritten general principles of law.[25] The argument is that for the

[22] Opinion of AG Poiares Maduro in Case C-141/02 P *Commission* v. *T-Mobile Austria GmbH* [2005] *ECR* I-1283, para. 54: 'The Court (…) has not been satisfied with the existence of *vaguely defined procedural rights* in order to recognise a right to bring proceedings. The Court generally requires the rights invoked in support of an action to be sufficiently "precise". That is the case where the individual rights arise from a regulation or can be derived directly from provisions of the Treaty (…).'

[23] P. Delvolvé, 'The Right to Good Administration', European Conference organized by the Council of Europe in collaboration with the Ministry of the Interior and of Public Administration of Poland and the Office of the Ombudsman of Poland, Warsaw, 4-5 Dec. 2003: 'Placing the administration under the rule of law, however necessary that may be, cannot be invoked by every individual as a requirement concerning him or her personally regardless of his or her own situation: in order to justify a legal challenge, one must be able to invoke, if not violation of an acquired right, at least a personal interest.'

[24] The following discussion of the concept of good administration will illustrate this point further.

[25] *See* e.g., a recent example: M. de Mol, Case Note – 'Kückückdevici: Mangold Revisited', 6 *European Constitutional Law Review* (2010) p. 293-308, at p. 301 without further references sup-

solution of a specific case, a more precise rule should be given precedence over a more abstract general principle and the latter would only be used merely as an interpretative tool for the positively formulated right.[26] In this view, the courts should yield to the (constitutional) legislature's decision to define a right in a specific manner.[27] Although it appears in itself theoretically sound, in our view the main problem with this concept is that reality does not always comply with theory. In view of the reality of the formulation of rights in the Charter, it appears difficult to claim that the rights enumerated in the CFR are always more concretely formulated than the rights arising as general principles of law in the case-law of the courts. Some quite precisely defined rights have been recognised as general principles of law, such as the protection of legitimate expectations or the non-retroactivity of criminal sanctions, to name just a few.[28] These should be interpreted to have the effect of granting subjective individual rights as well as functioning as organisational principles of the legal system.[29] On the other hand, broadly formulated concepts and rights which require further precision (such as, e.g., the freedom to conduct a business under Article 16 CFR) or umbrella rights are often less precisely formulated than rights respected as General Principles of EU law, which are applied to specify these general notions within the Charter. The Court of Justice therefore, in our view rightfully, recently explicitly acknowledged this with regard to the individual's right to an effective remedy before a tribunal.[30]

porting this specific definition of general principles of law claims that 'general principles are abstract in the sense that they point in the direction of a certain direction rather than giving concrete rules of law. Besides that they are unwritten and unpublished (…). Arguably, general principles need to be expressed in legislation before they can apply with regard to private individuals.'

[26] *See*, e.g., J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Mohr Siebeck, Tübingen 1956) p. 51 understanding principles not as legal orders *per se* but rather as reasons, criteria and justification of a norm, K. Larenz, *Richtiges Recht, Grundzüge einer Rechtsethik* (Beck Verlag, München 1979) p. 23; R.A. Posner, *Law and Legal Theory in England and America* (Oxford University Press, Oxford 1996) p. 1-134 at p. 17: 'Principles and Rules are related hierarchically rather than coordinately. Rules mediate between principles and action. They translate principles for directives for action.'

[27] S. Prechal, 'Competence Creep and General Principles of Law', 3 *Review of European Administrative Law* (2010) p. 5-22, at p. 21.

[28] *See*, e.g., Case 112/80 *Dürbeck* [1981] *ECR* 1095, para. 48; Case 316/86 *Hauptzollamt Hamburg-Jonas* v. *Krücken* [1988] *ECR* 2213, para. 22; Case 81/72 *Commission* v. *Council* [1973] *ECR* 575, para. 13.

[29] *See* for example D. Simon, 'Y a-t-il des principes généraux du droit communautaire?', 14 *Droits* (1991) p. 73-86 at p. 78-79 who describes how structural principles and subjective individual rights may be part of general principles of law and may be balanced against each other in cases of conflict. But: *see* above in the discussion on transparency of the legal system that this concept does not seem to be uncontested.

[30] The latter is merely 'the reaffirmation of the principle of effective judicial protection, which is a general principle of Community law stemming from the constitutional traditions common to the Member States.' *See*: C-221/09 *AJD Tuna* [2011] *ECR* I-nyr of 17 March 2011, para. 54 with

Second, the fact that Article 6 TEU makes no reference to the fundamental freedoms enshrined in the TFEU can also be understood as an intention of the constitutional legislator to confer on the EU courts the power to act as the arbiter between the different and – on occasion – competing or overlapping sources of fundamental rights. Technically speaking, all fundamental rights in the Union, irrespective of their source, function as legal 'principles'. The latter do not mutually exclude each other; instead, they require comparison and balancing, with the objective of maximisation of their respective scopes of applicability.[31] In this view and having regard to the existing case-law of the courts, all different possible sources of fundamental rights and fundamental freedoms in the EU have to be taken into account in such a balancing exercise designed to maximise the possible applicability of each single right. Not giving precedence to the visible rights enshrined in the Charter, some fear, would undermine the contribution of the Charter to an emerging constitutional identity of the Union.[32] This argument results from hopes of the emergence of pride in the European constitutional values in the form of a veritable '*Verfassungspatriotismus*'. In our view, the pluralism of sources should not in itself be seen as detrimental to the transparency of the legal system of the EU. Neither the Charter's intelligibility nor its accessibility are reduced by a parallel existence and applicability of written rights and of unwritten general principles of law.[33] Moreover, the constitutional identity of the Union, also post-Lisbon, remains dynamic and merges different legal traditions by mutual cross-fertilisation of concepts and ideas. The inclusion of the Charter into primary law was not designed to jettison 'one of the truly original features of the pre-Charter constitution', which was the ability to draw on the constitutional traditions of the member states.[34] Article 6(3) TEU ensures the future of a flexible integration of

reference to Case C-432/05 *Unibet* [2007] *ECR* I-2271, para. 37, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351, para. 335.

[31] The discussion and distinction on this can be traced back to legal theory as represented by authors such as: C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (Duncker und Humblot, Berlin 1969) p. 46, 55; R. Dworkin, *Taking Rights Seriously*, (Cambridge University Press, Cambridge 1977), p. 22-26 and 77: 'The difference between legal principles and rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. A principle (...) states a reason that argues in one direction, but does not necessitate a particular decision. Principles have a dimension that rules do not: the dimension of weight or importance'; R. Alexy, 'Zum Begriff des Rechtsprinzips', in: *Argumentation und Hermeneutik in der Jurisprudenz, Rechtstheorie* (1979) Beiheft 1, p. 63; T. Schilling, *Rang und Geltung von Normen in gestuften Rechtsordnungen* (Duncker und Humblot, Berlin 1994), p. 85.

[32] W. Berka, *Die Kodifikation der Europäischen Grundrechte: Grundrechtsschutz durch den Reformvertrag von Lissabon* (LexisNexis, Wien 2009) p. 28.

[33] Case C-36/02 *Omega* [2004] *ECR* I-9609; Case C-112/*00 Schmidberger* [2003] *ECR* I-5659; Case C-341/05 *Laval* [2007] *ECR* I-11767; Case C-438/05 *Viking* [2007] *ECR* I-10779.

[34] J.H.H. Weiler, 'A Constitution for Europe? Some Hard Choices', in G. Bermann and C. Pistor (eds.), *Law and Governance in an Enlarged European Union* (Oxford and Portland 2004), p. 39-59 at p. 55.

the member states' legal sources in the construction of a joint legal system on the European level.[35] Not surprisingly, therefore, the debates in the Convention explicitly acknowledged that the enumeration of fundamental rights in the CFR cannot be regarded as final in terms of exhaustiveness, but will be over time reinterpreted in view of the evolution of the society and the questions arising before the EU courts. The Charter, in this sense, does not mark an entirely new start in the application of fundamental rights in the Union.[36] Instead, it is designed to be a document which makes transparent the *acquis*, developed over decades of case-law, 'by making those rights more visible in a Charter.'[37]

How does a pluralistic approach work in reality?

For all practical purposes, therefore, the sources of fundamental rights listed in Article 6 TEU should be understood as being in a non-hierarchical, complementary relationship. However, this pluralistic understanding does not exclude that the Court, in reviewing a specific case, could apply to the list of sources contained in Article 6 TEU what might be referred to as a lexical reading.[38] Under this, the analysis of a case would begin by first looking at a fundamental freedom such as provided for in the TFEU and the fundamental rights applicable in the case, as they arise in the first place from the Charter, and next reviewing the rights as arising from general principles of EU law.[39] Doing so respects the notion of institutional balance (Article 13(2) TEU),[40] and reflects the fact that courts are, on the other hand, required to ensure that the legislator, including the constitutional

[35] H.M. Wolfgang, 'Anhang zu Artikel 6', in C.O. Lenz and K.-D. Borchardt, *EU-Verträge*, 5th edn. (Cologne, Bundesanzeiger 2012) para. 11.

[36] This is occasionally claimed in the doctrinal discussion, *see*, e.g., C. L. Thomas, 'Zum Verhältnis zwischen Grundrechtecharta und allgemeinen Grundsätzen', *Europarecht* (2011) p. 715-735 at p. 733.

[37] Preamble of the Charter of Fundamental Rights of the European Union.

[38] *See* J. Rawls, 'Justice as Fairness', 67 *Philosophical Review* (1958) p. 164-194 who suggests a common-sense approach to ranking different principles of justice in a '*lexical order*' which indicates reviewing one after another so that 'one higher in the list is to be satisfied before the next is applied.

[39] For this reason also, a case report of the CJEU will, at the outset, list the positive law taken into account in the case in issue.

[40] *See*, e.g., Opinion of AG Kokott in Case C-321/05 *Kofoed* [2007] *ECR* I-5795, para. 67 stating that parties should not be able to directly rely on general principles of EU law where the principle is formulated in a concrete manner in a directive. The AG considered that since the content of general principles is much 'less clear and precise', there would be a danger that the harmonization objective of the Directive in issue would be undermined and the legal certainty which it seeks to achieve would be jeopardized. The general principle could nonetheless be used as criteria to review the legality of the directive.

legislator, complies with the general principles of EU law.[41] This lexical ordering of sources should not, however, be misunderstood as acknowledging some sort of hierarchy of sources of fundamental rights in the EU legal order. It aims more at acknowledging the co-existence of the various fundamental rights' sources with the final aim of providing a high level of protection of individuals' rights. An example of this approach has been given by AG Bot in *MM*.[42] In analyzing the right to be heard, he first turned to the right to good administration, the observance of which 'is required not only of the EU institutions, by virtue of Article 41(2)(a) of the Charter'. He then turned to the general principle of good administration, by finding that 'because it constitutes a general principle of EU law', the authorities of each of the Member States are bound by the obligation to grant a fair hearing when they adopt decisions falling within the scope of EU law, even when the applicable legislation does not expressly provide for such a procedural requirement.'[43]

Case study: good administration

In this second part of the article, we will put the results of the normative-theoretical considerations in the first part to the test of a case study. The real-life relevance of the question of the relation between rights as formulated in the Charter and general principles of law will be studied by using the example of the right to good administration as defined in Article 41 CFR and the general principle of good administration as it has been developed in the case-law over time. It appears that there are considerable differences between good administration as a fundamental right defined in Article 41 CFR and as a general principle of law acknowledged by the case-law of the EU courts.

[41] K. Lenaerts and Gutiérrez-Fons, 'The Constitutional Allocutions of Powers and General Principles of EU Law', 47 *CMLRev* (2010) p. 1629-1669, at p. 1629-1630: 'Horizontally, as a source of "primary law", general principles may limit the discretion enjoyed by the EU legislature. When giving expression to a general principle, the EU legislature must respect the essential content of that general principle. Otherwise, the resulting legislation could be declared void. Thus, the application of general principles may result in setting aside the choices favoured by the legislature at either national or supranational level.' Maybe the most prominent example in this regard is the recognition of the 'rule of law' as general principle in *Les Verts*. Case 294/83 *Les Verts* [1986] *ECR* 1339, para. 23. For a more recent example, *see* the Opinion of AG Cruz Villalón in Case C-336/09 P *Poland* v. *Commission* [2011] *ECR* I-nyr. The AG used the principle of the 'rule of law' to supplement explicit primary law provisions in order to ensure compatibility of the EU legal system with basic standards of commonly shared constitutional values in the Union.

[42] Opinion of AG Bot in Case C-277/11 *MM* [2012] *ECR* nyr of 26 April 2012.

[43] Opinion of AG Bot in Case C-277/11 *MM* [2012] *ECR* nyr of 26 April 2012, para. 32. The Court has not yet taken a decision. A similar approach had been taken by AG Sharpston in her Opinion rendered in Case C-450/06 *Varec* v. *Etat belge* [2008] *ECR* I-581, para. 43.

Background to good administration

The notion of good administration in the legal system of the EU is still evolving. It is perhaps best understood as a framework concept on the basis of the rule of law and principles of procedural justice which draws together a range of rights, rules and principles guiding administrative procedures with the aim of ensuring procedural justice, public administrative adherence to the rule of law, and sound outcomes for administrative procedures. Notions of 'good',[44] 'sound',[45] or 'proper'[46] administration have been referred to by the EU courts since their very first decisions in administrative matters.[47] The origins of specific procedural principles aimed at ensuring satisfactory outcomes of decision-making reach back into the public law of the member states, particularly concerned with ensuring procedural fairness through rules and principles for administrative procedures.[48] Many aspects of the principle of good administration are linked to the requirements of information management by the administrative authorities. These include the 'duty of care' requiring full and impartial investigation of a fact set prior to decision-making including, where necessary, the use of scientific evidence and the obligation of adequate reasoning of a decision. Other information related aspects of the right to good administration concern defence rights of individuals and more general public rights of access to documents.[49] The development of the principles of good

[44] Case 32/62 *Alvis* [1963] *ECR* 49, para. 1A; Joined Cases 56 and 58/64 *Consten and Grundig* v. *Commission* [1966] *ECR* 299.

[45] The first mention of the principle of *sound administration* has been made in relation to the requirement to process an application within a *reasonable time* in the Joined Cases 1-57 and 14-57 *Société des usines à tubes de la Sarre* [1957] *ERT* 105, para. 113.

[46] Case C-255/90 P *Burban* [1992] *ECR* I-2253, paras. 7 and 12; Case T-167/94 *Nölle* v. *Council and Commission* [1995] *ECR* II-2589, para. 53.

[47] Joined Cases 7/56, 3/57 to 7/57 *Algera* [1957] *ECR* 0039; Case 64/82 *Tradax* v. *Commission* [1984] *ECR* 1359.

[48] *See*, e.g., the comparative study by the Swedish Statskontoret, *Principles of Good Administration in the Member States of the European Union* (Stockholm, Statskontoret 2005), available at <www.statskontoret.se/upload/Publikationer/2005/200504.pdf>, visited 31 Mars 2012. On the European level, one of the first documents explicitly dealing with the underlying principles of good administration was a 1977 Resolution of the Council of Europe: Resolution 77(31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities. (Adopted by the Committee of Ministers on 28 Sept. 1977 at the 275th meeting of the Ministers' Deputies) containing five fundamental principles: the right to be heard; the right of access to information; the right to assistance and representation; the obligation to provide reasons for decisions; and finally the obligation to notify affected parties of remedies available against an act of the administration. The Resolution did not however use the term 'good administration.'

[49] H.P. Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, Hart 1999) p. 1-214 at p. 27-37; L. Azoulaï, 'Le principe de bonne administration', in J.-B. Auby and J.Duteil de la Rochère (eds.) *Droit administratif européen* (Bruylant, Bruxelles 2007) p. 493-518, p. 489 ; H.C.H. Hofmann, 'Good Administration in EU Law – A Fundamental Right?', 13 *Bulletin des Droits de l'Homme* (2007) p. at 44-52.

administration is directly related to the system of judicial review in the CJEU and the role afforded therein to the pleas of the parties. Nehl has rightly observed that the dynamism of the principle of good administration arises *inter alia* from its interaction with the particularities of the system of judicial review in the EU, which to a large degree is based on the binding nature of the applicant's pleas. The courts, feeling 'generally bound to give an express response' to applicants' pleas entices litigants to take up the judges' response to former pleas in future litigation.[50] As a direct consequence a dialogue evolves, with lawyers from various legal traditions and pleading legal concepts in different languages leading to an unavoidably open-endedness of legal concepts developed by the case-law. Good administration,[51] therefore, has also been described as an 'obligation',[52] a 'duty',[53] a 'rule',[54] a 'requirement',[55] a 'reason',[56] a 'measure',[57] a 'guarantee',[58] an 'interest' (in the French version '*un souci de bonne administration*'),[59] a 'principle',[60] as well as a 'general principle' of EU law,[61] prior to being formulated additionally as a fundamental right in the Charter.

The CFR is innovative and conservative at the same time when it comes to the notion of good administration. It is innovative, in so far as it is one of the first European and even international charters of fundamental rights explicitly recognis-

[50] H.P. Nehl, 'Good Administration as Procedural Right and/or General Principle?', in H.C.H Hofmann and A.H. Türk (eds.), *Legal Challenges in EU Administrative Law* (Cheltenham, Elgar 2009) p. 322-351 at p. 338.

[51] In several cases, the infringements protected under the notion of good administration were either not sufficient enough or did not bear on the outcome of decisions-making and thus did not lead to the annulment of the decision of the Commission: Case T- 62/98 *Volkswagen* v. *Commission* [2000] *ECR* II-2707, paras. 279-283; C-338/00 P *Volkswagen* v. *Commission* [2003] *ECR* I-9189, paras. 163-165; Case T-308/94 *Cascades SA* v. *Commission* [1998] *ECR* II-925, para. 61; Case C-476/08 P *Evropaïki Dynamiki* v. *Commission* [2009] *ECR* I-207, paras. 33-35.

[52] Case T-62/98 *Volkswagen AG* v. *Commission* [2000] *ECR* II-2707, para. 245 and para. 279.

[53] Case T-62/98 *Volkswagen AG* v. *Commission* [2000] *ECR* II-2707, para. 281; Case T-36/06 *Bundesverband deutscher Banken* v. *Commission* [2010] *ECR* II-537, para. 126; Case T-30/03 RENV. *3F* v. *Commission* [2011] *ECR* II-nyr, paras. 53 and 54.

[54] Case 13-69 *van Eick* v. *Commission* [1970] *ECR* 3, para. 4; Opinion of AG Fennelly in Case C-213/99 *de Andrade* v. *Director da Alfândega de Leixões* [2000] *ECR* I-11083, para. 34.

[55] Case C-266/97 P *VBA* v. *VGB e.a* [2000] *ECR* I-2135, para. 71; Case C-362/09 P, *Athinaïki Techniki* v. *Commission* [2010] *ECR*I-nyr, para. 70.

[56] Case C-39/97 *Kabushiki Kaisha* v. *Metro-Goldwyn-Mayer Inc.* [1998] *ECR* I-5507, para. 21.

[57] Case C-354/87 *Weddel & Co. BV* v. *Commission* [1990] *ECR* I-3847, para. 2 of the Summary.

[58] Case T-436/09 *Dufour* v. *ECB* [2011] *ECR* II-nyr of 26 Oct. 2011, para. 30.

[59] Case T-60/05 *UFEX e.a.* v. *Commission* [2007] *ECR* II-3397, paras. 66, 67 and 78.

[60] Case C-83/91 *Tetra Pak International* v. *Commission* [1994] *ECR* II-755, paras. 24-31.

[61] Joined Cases 33/79 and 75/79 *Kuhner* v. *Commission* [1980] *ECR* 1677, para. 25 (here, the Court explains that good administration is, by contrast to the more specific rights of defence, 'only' a general principle of law); Case T-54/99 *max.mobil* [2002] *ECR* II-313, para. 48. *See also* Case T-198/01 R *Technische Glaswerke Illmenau GmbH* v. *Commission*[2002] *ECR* II-2153, para. 85 and Case T-211/02 *Tideland Signal* v. *Commission* [2002] *ECR* II-3781, para. 37.

ing good administration as containing subjective procedural rights.[62] The content of Article 41 CFR is inspired by the case-law of the CJEU in its approach to ensuring that the demands of the rule of law in administrative procedures are met.[63] The right to good administration was also one of the first rights enumerated in the Charter to be cited in the case-law of the EU courts in terms of subjective rights of individuals prior to the entry into force of the Treaty of Lisbon conferring binding legal force to the CFR.[64] On the other hand, when compared with the case-law of the CJEU on the principle of good administration, the formulation of Article 41 CFR appears limited in its material, institutional and personal scope. Therefore, the interpretation of a right under the Charter as opposed to granting the same right as a general principle of law established in the case-law of the EU courts has the potential to change the outcome of a case. The position taken by the EU courts will be decisive for the future development of the notion of good administration.

Material scope of protection: are all aspects of administrative activities covered?

The material scope of protection (*ratione materiae*) of good administration is considerably different according to whether one analyses it in the perspective of the right to good administration under Article 41 CFR or whether one looks at the general principle of good administration as understood by the EU courts within the case-law. The wording of Article 41 CFR indicates that the material scope of protection of good administration is intended to cover 'single case decision-making', which in the literature is also occasionally referred to via the American term

[62] Originally published as the Charter of Fundamental Rights of the European Union proclaimed on 7 Dec. 2000, *OJ* [2000]C 364/1. Also, in the wake of the CFR's initial proclamation in 2000, the European Parliament adopted a resolution on 6 Sept. 2001 approving a Code of Good Administrative Behaviour, with the goal of ensuring the protection of individuals *vis-à-vis* the administration. In its 27 articles the Code sets out the obligations of the European 'institutions and their officials...in their relations with the public' (Art. 1 of the European Code of Good Administrative Behaviour). It is intended to flesh out the concept of good administration contained in Art. 41 CFR and to translate into a more detailed guide for administrative practice. *See*: K. Kańska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', 10 *ELJ* (2004) p. 296-326 at p. 307; J. Martinez Soria, 'Die Kodizes für gute Verwaltungspraxis – ein Beitrag zur Kodifikation des Verwaltungsverfahrensrechts der EG', *EuR* (2001) p. 682-705.

[63] The Explanations to the text of the Charter prepared by the Presidium of the Convention confirm this approach by stating that 'Article 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined *inter alia* good administration as a general principle of law.'

[64] *See*, e.g., Case T-54/99 *max.mobil* [2002] *ECR* II-313, para. 48; Case T-198/01 R *Technische Glaswerke Illmenau GmbH* v. *Commission* [2002] *ECR* II-2153, para. 85.

of 'adjudication'. This assumption specifically arises from the examples which Article 41(2) CFR gives in order to illustrate the nature of good administration. The latter 'include' the right of an individual to be heard before the administration takes an 'individual measure which would affect him or her adversely', access of a person to 'his or her' (specific) file, and the obligation to give reasons for administrative decisions – as opposed to the broader obligation of stating reasons in all 'legal acts' of the Union under Article 296 paragraph 1 TFEU.[65]

By contrast, the principles of good administration as flowing from the EU courts' case-law cover a broader material scope applying also to executive 'rule-making' in the form of the creation of non-legislative acts with abstract-general content. Therefore, the right to good administration, when understood as a general principle of EU law is not limited to single case decision-making. The CJEU has repeatedly and without further discussion applied the principle of good administration as criteria for the legality of acts of non-legislative rule-making in the context of an action for annulment brought by individuals. One example is international (association) agreements, the enforcement of which is also reviewed in the light of the principle of good administration.[66] This was the approach taken, for example, by the Court in *Alliance for Natural Health*[67] as well as in *Monsanto* in which the Court reviewed a Commission's decision on the inclusion of a phar-

[65] J. Ziller, 'Is a Law of Administrative Procedure for the Union Institutions Necessary?', 3-4 *Rivista italiana di diritto pubblico comunitario* (2011) p. 699-725, at p. 718 however notes that 'nothing impedes applying Art. 41 of the Charter on the right to good administration also to rule making, including to consultation procedures by the Commission.' For an opposite approach, *see* the CJ in Case C-221/09 *AJD Tuna Ltd* [2011] *ECR* nyr of 17 March 2011, para. 49, where the Court stated that Art. 41 CFR does not cover the process of enacting measures of general application and the GC in a recent line of civil service cases, e.g., Case T-135/05 *Crampoli* v. *Commission* [2006] *ECR* II-A-2-1527, paras. 149 and 150; Joint Cases T-98/92 and T-99/92 *Di Marzio and Lebedef* v. *Commission* [1994] *ECR* II-541, para. 58; Case T-65/92 *Arauxo-Dumay* v. *Commission* [1993] *ECR* II-597, para. 37; Case T-46/90 *Devillez and Others* v. *European Parliament* [1993] *ECR* II-699, para. 37 in which it held that the Council when establishing acts of abstract general nature was not subject to the obligations under Art. 41 CFR and that their violation could therefore not lead to the annulment of an act.

[66] Opinion of AG Trstenjak in Case C-204/07 P *C.A.S. SpA* v. *Commission* [2008] *ECR* I-6135, para. 146; Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97, T-217/97, T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring e.a.* v. *Commission* [2001] *ECR* II-1337, para. 257.

[67] In that case, AG Geelhoud had requested the annulment of a Commission directive *inter alia* for breach of the principle of sound administration (Joined Case C-154/04 and C-155/04 *Alliance for Natural Health* [2005] *ECR* I-6451, Opinion AG Geelhoud, para. 111). Although the Court did not follow the AG's Opinion, it reviewed the legality of the directive under the criteria of that principle (Joined Case C-154/04 and C-155/04 *Alliance for Natural Health* [2005] *ECR* I-6451, para. 82): 'It is none the less the responsibility of the Commission, by virtue of the implementing powers conferred on it by Directive 2002/46 concerning, inter alia, the way the procedure is operated, to adopt and make accessible to interested parties, in accordance with the principle of sound

macologically active substance into a Regulation's annex – a power delegated by the legislator to the Commission and which was to be pursued by application of a regulatory committee (comitology) procedure. 'Such a decision', the Court held, must 'be adopted by the Commission pursuant to the principle of sound administration and the duty of care.'[68]

Personal scope of protection: good administration – a structural principle or an individuals' subjective right?

The personal scope of protection of the right to good administration differs considerably depending on whether it is analysed as a fundamental right enumerated in the CFR or as a fundamental right protected as general principle of EU law. In this context, one of the essential questions is whether good administration is a structural principle of the Union defined in objective terms seeking to ensure the administrative efficiency or whether and under which conditions it grants subjective rights to individuals. One of the innovative aspects of the Charter is to explicitly acknowledge, in Article 41 CFR, good administration in the language of subjective human rights.[69] Different opinions exist, however, as to precisely which

administration, the measures necessary to ensure generally that the consultation stage with the European Food Safety Authority is carried out transparently and within a reasonable time.'

[68] C-248/99 P *Monsanto* [2002] *ECR* I-1, paras. 91-93. However, the Court did not annul the Commission's contested act on that basis, since it concluded that the appellant had not established that the decision at issue was not actually, in that specific case, adopted in disregard of the principle of sound administration and the duty of care. para. 93 of the judgment indicates that the principle of sound administration would be a criteria an individual plaintiff can invoke as reason for the illegality of a regulatory act adopted by the Commission. It reads that: 'In the present case, Monsanto Company has not established (…) that, in the light of the circumstances prevailing, the decision at issue was adopted in disregard of the principle of sound administration and the duty of care.' This approach of the courts is reflected in legislative acts delegating powers to the Commission in order to adopt regulatory acts. For example, Regulation 1331/2008 establishing a common authorization procedure for food additives, food enzymes and food flavourings, states at paras. 7 and 8, that a common Community assessment and authorization procedure should be established and that 'This common procedure must be founded on the principles of good administration and legal certainty and must be implemented in compliance with those principles.' EP and Council Regulation (EC) 1331/2008 of 16 Dec. 2008establishing a common authorisation procedure for food additives, food enzymes and food flavourings, *OJ* [2008] L 354/1.

[69] J. Dutheil de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: The Example of Good Administration', in Arnull et al. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, Oxford 2008) p. 157-171, at p. 168; D. Simon, 'Le principe de «bonne administration» ou la «bonne gouvernance» concrète, in Editions Apogée (ed.), *Le droit de l'Union européenne en principes : liber amicorum en l'honneur de Jean Raux* (Rennes 2006) p. 155-176; M.-C. Runavot: 'La «bonne administration»: consolidation d'un droit sous influence européenne', 2 *RFDA* (2010) p. 395-403 at p. 396: 'le droit à une bonne administration présente de vertus globalisantes, voire fédératrices, propres à pallier la carence d'une

elements of good administration covered by Article 41 CFR confer subjective rights to individuals and which should be regarded as merely structural or 'objective' principles. These discussions take place against the background of Article 52(5) CFR, which establishes specific rules in situations where the Charter merely contains 'principles' which shall 'be judicially cognisable only' in view of 'legislative and executive acts' by the EU or member states; these are opposed to 'rights and freedoms' under Article 52(1) CFR, recognised by the Charter, which require a legal act of the EU or the member states not for their recognition but for their limitation.[70] This distinction removes the category of 'principles' from the scope of subjective individual rights having direct effect.[71] This question arises in the context of both notions of good administration – the rights in Article 41 CFR as well as the good administration recognised as a general principle of EU law in the case-law of the courts – being formulated as 'umbrella' concepts. Good administration is, in other words, a 'non-autonomous right' insofar as it is, like the rule or law, defined by its component parts only. Understanding the details of protection, however, is complicated by the fact that EU law 'is not very principled when it comes to the use of the term principle.'[72]

Regarding good administration as a fundamental right arising from general principles in cases such as *Kuhner* or more recently *Area Cova,* the Court had, for example, distinguished the 'general principle' of good administration from the more specific rights of defence. The Court held that only the latter were capable

codification d'ensemble des règles de procédure administrative. La formule s'annonce donc de plus dynamiques pour le droit administratif en général.'

[70] *Dominguez* appears to be the only case to date at the occasion on which the Court was invited to ascertain whether the provision in issue was a 'right' or a 'principle' for the purposes of Arts. 51(1) and 52(5) CFR. *See* especially the Opinion of AG Trstenjak delivered on 8 Sept. 2011 in Case C-282/10 *Dominguez* [2012] *ECR* I-nyr, paras. 75-79. The Explanations to Art. 52(5) CFR state that the distinction between 'rights' and 'principles' is based on the notion that subjective rights shall be respected, whereas principles shall be observed. Principles may be implemented through legislative or executive acts; accordingly, they become significant for the courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Members States authorities. The distinction formulated in Art. 52 CFR, however, explicitly applies only to the fundamental rights in the context of Art. 6(1) TEU and not to those arising from Art. 6(3) CFR.

[71] The effect of the distinction between 'rights' and 'principles' in reality distinguishes between the 'subjective' and 'objective' rights – *see* T. von Danwitz, General Report of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a., available on <www.juradmin.eu/fr/colloquiums/colloq_fr_23.html>.

[72] Sascha Prechal, in an oral response to a talk by Herwig C.H. Hofmann, during the conference on 'The Protection of Fundamental Rights in the EU: Future Challenges', at the Centre for European Law, University of Luxembourg, 22 Oct. 2012.

of conferring subjective rights on individuals.[73] More recently in *SPM*, the Court stated that the right to good administration confers subjective rights on individuals when it constitutes the expression of specific rights such as, *inter alia,* the right of an individual to have his or her affairs handled impartially, fairly and within a reasonable time or his or her right to be heard.[74] These definitions are in line with the concept of good administration as an umbrella principle, which in itself is an objective principle only, and grants specific subjective rights through its component principles.

However, ambiguities persist on the conditions under which subjective rights could arise from sub-components of the right to good administration in the EU legal order. For example, AG Poiares Maduro, in his Opinion in *max.mobil*, attempted to differentiate the sub-components of good administration according to their respective 'objective' or 'subjective' functions. In his view, the obligation of diligent and impartial examination established by case-law had an objective scope, being carried out by reference to the general interest of sound administration and the proper application of the rules of the Treaty. He reached this view by comparison with the rights which might be conferred on interested parties to intervene directly in a procedure concerning them, such as the right to be heard and the right of access to the file. Unlike those rights, in his view, the obligation to diligent and impartial investigation could not create a subjective right. In the same vein, Nehl argues in favour of distinguishing between 'the right to be heard and the right to access to the file' which 'clearly emphasize the protective function, whereas the principle of care and the duty to state reasons' merely constitute 'process standards' 'ensuring the rationality of the procedure's final outcome.'[75]

Probably the most prominent case of this kind to date is *Tillack* – a case on accusations of bribery made against an investigative journalist by the EU's anti-fraud unit, OLAF.[76] In the context of a damages' claim brought by the journalist

[73] Joined cases 33/79 and 75/79 *Kuhner* v. *Commission* [1980] *ECR* 1677, para. 25. This is the case in which the Court, for the first time, refers to good administration as a general principle of EU law; it finds nevertheless that subjective individual rights arise only from its specific manifestations, namely the rights of defence. Case T-196/99 *Area Cova* v. *Council and Commission* [2001] *ECR* II-3597, para. 43. In the same vein, Case C-64/82 *Tradax* v. *Commission* [1984] *ECR* 1359, Opinion AG Slynn, p. 1385.

[74] Case C-39/09 P *SPM* v. *Council and Commission* [2010] *ECR* I-38, paras. 65-66. *See also* Case T-128/05, *SPM* v. *Council and Commission* [2008] *ECR* II-260, para. 127.

[75] H.-P. Nehl: 'Good Administration as Procedural Right and/or General Principle?', in *Legal Challenges in EU Administrative law. Towards an Integrated Administration* (Edward Elgar Publishing 2009) p. 322-351 at p. 349.

[76] The Commission's anti-fraud office (OLAF) had accused Tillack, an investigative journalist who was working at the time in Brussels, of bribery of its officials. In seeking to defend his rights, Tillack first turned to the European Ombudsman, who, in a well-researched and strongly worded report, accused OLAF of serious maladministration. Tillack then also brought an action for annul-

against the EU, the GC found that the (umbrella) principle of good administration 'does not, *in itself*, confer rights upon individuals.'[77] It held that subjective rights may arise from the principle of sound administration only insofar as it 'constitutes the expression of specific rights such 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.'[78] At first sight, when taken literally, this formula seems to indicate that the right to good administration would confer subjective rights on individuals exclusively in the context of those concepts explicitly listed in Article 41 CFR, leaving no space for subjective individual rights arising from other associated general principles of law. Such a reading of the *Tillack*-formula would thus impose a quite far reaching limitation regarding the personal scope of protection of rights under good administration and incidentally would also have implicit far reaching consequences for the relation between the different sources of fundamental rights listed in Articles 6 TEU. Nonetheless, it would appear to us that such a far-reaching interpretation of the *Tillack*-formula does not do justice to the intentions of the Court. When read in context, it appears that the Court in *Tillack* repeatedly insisted on the fact that the mere 'classification as an "act of maladministration" by the Ombudsman does not mean, in itself, that OLAF's conduct constitutes a sufficiently serious breach of a rule of law within the meaning of the case-law.'[79] The focus seemed to be on the differentiation between claims of maladministration made by the Ombudsman, on one hand, and the rights to good administration, on the other. Seen in this light, the focus was less on the differentiation between rights under Article 41 CFR and rights arising as general principles of law. Other pre-Lisbon cases support this understanding of subjective individual rights arising from the principle of good administration. They combine the general evocation of the principle of good administration with the more specific duty of a full and impartial investigation of the facts prior to decision-making (duty of care),[80] or the right to a fair

ment combined with an action for damages against the activity of OLAF before the GC (then the Court of First Instance). *See*: Case T-193/04 *Tillack* v. *Commission* [2006] *ECR* II-3995. *See* further Order of the President of the GC in Case T-193/04 R *Tillack* v. *Commission* [2004] *ECR* II-3575, paras. 38-46; Order of the President of the Court in Case C-521/04 P(R) *Tillack* v. *Commission* [2005] *ECR* I-3103, para. 32. The action for annulment was inadmissible. The forwarding of information from OLAF to national prosecutors was not a reviewable act under EU law, since the final decision as to whether opening investigations remained with the national authorities.

[77] Emphasis added.

[78] Case T-193/04 *Tillack* v. *Commission* [2006] *ECR* II-3995, para. 127 with reference to Case T-196/99 *Area Cova and Others* v. *Council and Commission* [2001] *ECR* II-3597, para. 43.

[79] Case T-193/04 *Tillack* v. *Commission* [2006] *ECR* II-3995, paras. 116 and 128.

[80] E.g., Case 417/85 *Maurissen* v. *Court of Auditors* [1987] *ECR* 551, para. 12; Case T-7/01 *Pyres* v. *Commission* [2003] *ECR* II-239, para. 87; Case T-11/03 *Afari* v. *ECB* [2004] *ECR* II-267, para. 42; Case F-107/05 *Toth* v. *Commission* of 30 Sept. 2010, paras. 85-88.

hearing.[81] Such claims are in some cases summarized under the heading of the principle of good or sound administration and used as basis for awarding damages to a party.[82] In other cases, the claims are explicitly based on the duty of care, which, although not explicitly listed in Article 41 CFR, is generally understood as a key component of good administration and has also been explicitly acknowledged as conferring subjective rights on which the individuals could rely against the administration.[83] Most importantly, the formulation the GC had adopted in *Tillack* appears to have been repealed in the later cases. In *Franchet and Byk*[84] for instance, the GC held that the principle of sound or good administration could give rise to subjective individual rights on the basis of rights and principles not explicitly enumerated in the list of Article 41 CFR. The plaintiffs, Franchet and Byk, successfully relied on the principle of sound administration as implying a requirement for OLAF to maintain the confidential nature of an investigation prior to the establishment of any wrongdoing.[85] Therefore, despite the fact that a 'right to confidentiality' was not explicitly listed in Article 41 CFR, the GC held that by virtue of the principle of sound administration, 'the administration must avoid giving the press information concerning disciplinary proceedings which might damage the official concerned.'[86] Consequently, the Commission was ordered to pay damages for a breach, by OLAF, of the obligation to maintain the confidentiality of investigations.

Possible explanations for this development might be, on the one hand, that in order to reach such a conclusion, the GC implicitly made use of the verb 'including'[87] employed in the formulation of article 41 CFR, which provides for a non-exhaustive list of rights and principles to be added under the umbrella notion of good administration. On the other hand, one may suggest that in reaching such a conclusion, the GC merely referred to the general principle of good administra-

[81] E.g., Case T-231/97 *NEC and Brown* v. *Commission* [1999] *ECR* II-2403, paras. 42-45.

[82] Case T-231/97 *NEC and Brown* v. *Commission* [1999] *ECR* II-2403, para. 39: 'In particular, the principle of sound administration requires the Commission to balance the interests in question and in particular those of individuals. In the present case, observance of that principle required the Commission to conduct an inquiry into the alleged irregularities committed by NEC and the effects that its conduct might have on the image of the undertaking.'

[83] Case T-167/94 *Nölle* v. *Council and Commission* [1995] *ECR* II-2589, paras. 69 and 76.

[84] In this case, some internal audits of Eurostat had revealed possible irregularities in financial management. OLAF opened a number of investigations and sent to the Luxembourg and French judicial authorities files relating to investigations implicating individual wrongdoing warranting criminal investigations. Mr Franchet and the Mr Byk contested the fact that they had not been informed or heard before the files concerning them were forwarded to the national judicial authorities as well as the fact that OLAF had supplied the press with confidential personal information about them.

[85] Case T-48/05 *Franchet and Byk* v. *Commission* [2008] *ECR* II-1585, paras. 217, 218 and 304.

[86] Case T-48/05 *Franchet and Byk* v. *Commission* [2008] *ECR* II-1585, para. 214.

[87] In the French version the adverb '*notamment*' appears slightly more limited.

tion as flowing from previous case-law and not to the right to good administration as stated in the Charter. This latter explanation is all the more plausible insofar as the Court's wording in the present case merely referred to the 'principle of sound administration'[88] and the 'interests of sound administration' and not to the 'right' to good administration as such.[89] In this, *Franchet and Byk* also is an example of applied pluralism of sources of fundamental rights in the EU legal order. Such a reading of the possibilities of subjective individual rights arising from the notion of good administration also appears to be in compliance with a pragmatic reading of the second sentence of Article 52(5) CFR, which finds that principles 'shall be judicially cognisable only in the interpretation of [legislative and executive] acts and in the ruling on their legality.' The reason for the distinction between rights/freedoms in Article 52(1) and principles in 52(5) CFR is that the latter merely constitute programmatic objectives which have to or might be implemented,[90] being therefore incapable to confer subjective rights on individuals.[91] While the umbrella notion of good administration is a principle under the concept of 52(5) CFR, the sub-concepts may be rights or freedoms under Article 52(1) CFR. Its umbrella notion is made concrete by the constitutional legislature in Article 41 CFR, by the ordinary legislature in specific legislation and by courts applying general principles of EU law.

The identification of subjective individual rights, in this view, is not the result of any abstract dogmatic classification. Instead subjective rights, as has always been acknowledged since the early case-law of the Court of Justice, could be identified by the simple question as to whether the definition of the principle or its sub-

[88] Case T-48/05 *Franchet and Byk* v. *Commission* [2008] *ECR* II-1585, para. 214.

[89] Case T-48/05 *Franchet and Byk* v. *Commission* [2008] *ECR* II-1585, para. 217. *See* for a similar result also the earlier case Case C-428/05 *Laub* v. *Hauptzollamt Hamburg-Jonas* [2007] *ECR* I-5069, para. 25.

[90] *See* Koen Lenaerts, 'La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne', 21(82) *Revue trimestrielle des droits de l'homme* (2010) p. 217-236, at p. 223 where it was stated that: les principes ne contiennent que des objectifs «programmatiques» qui «peuvent» être mis en œuvre.'

[91] This distinction between 'rights' and 'principles' seems to have followed the Spanish example, having regard that in the latter legal system, principles cannot normally constitute an independent ground for claiming subjective rights; they first have to be implemented in legislation; some principles may nevertheless have direct effect provided that they are formulated 'unconditionally'. For further details, *see* the Spanish Report submitted to the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a., available on <www.juradmin.eu/fr/colloquiums/colloq_fr_23.html>. *See also* Jean Paul Jacqué, 'Les droits fondamentaux dans le traité de Lisbonne', *L'Observateur de Bruxelles* (2010), dossier spécial: Le traité de Lisbonne, p. 17-20, at p. 18, where the author held that: 'Un particulier ne pourrait se prévaloir directement d'un principe puisque celui-ci ne créerait pas de droits subjectif à son profit.' *See also*, Jean Paul Jacqué, 'Le traité de Lisbonne. Une vue cavalière', 3 *Revue trimestrielle de droit européen* (2008) p. 439-483 at p. 448.

component is sufficiently precise or with other words, 'clear and unconditional.'[92] Where that is not the case, the principle requires specification. This has been the requirement of the courts regarding general principles of law and is now also codified in Article 52(5) CFR.[93] This approach should, in our view, guide the definition of whether good administration is a subjective right of individuals or whether it merely is an objective principle – irrespective of whether a specific sub-notion of good administration is explicitly referred to in Article 41 CFR or not. Using the question of whether a right or principle is sufficiently 'clear and unconditional' as to be capable of directly conferring rights on individuals or not saves searching for difficult-to-define notions of legislative intention in creating a right. Also, it avoids understanding the subjective and objective nature of a right as mutually exclusive. Instead, it opens the view that subjective and objective components of a legal principle might be two sides of the same coin. Where a subjective right exists, an objective obligation might arise from that, but also an objective

[92] Using the terminology of 'clear and unconditional' we would deliberately evoke the case-law on the possibilities of direct effect of EU law granting individuals rights enforceable *vis-à-vis* member states even when the relevant obligations were initially formulated to bind the member state towards the Union or were simply defined in negative terms as the obligation of a member state not to undertake a certain measure: *See*, e.g., the famous and path breaking case C-26/62 *Van Gend en Loos* [1963] *ECR* 1, paras. 10, 12, 13 which stated that 'rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way.' 'The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation.' This produces 'direct effects in the relationship between the Member States and their subjects.' The 'direct effect' notion stated for in *Van Gend en Loos* implies, in reality, the 'ability' of a legal norm to create by itself rights and obligations that the individuals may enforce before their respective national courts. A legal norm such as a fundamental right for instance will therefore be 'able' to create such rights and obligations in as much as it is 'clear, sufficiently precise and unconditional' (In some cases, the Court added a supplementary condition, namely that the legal norm also be 'complete'. *See* Case 271/82 *Auer* c *Ministère Public* [1983] *ECR* 2727, para. 16; *see also* Case 5/83 *Criminal proceedings* v. *Rienks* [1983] *ECR* 4233, para. 8). In this vein, the EU courts have, on several occasions, referred to these conditions, while seeking to imply a subjective right in the context of a 'legitimate expectation', Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T/252/01 *Tokai Carbon e.a.* v. *Commission* [2004] *ECR* II-1181, para. 152 : the Court stated that infringement of the principle of legitimate expectations may be pleaded if the applicant has been given *precise, unconditional and consistent assurances*, from authorised, reliable sources, by the administration. *See also* Case F-82/09 *Nolin* v. *Commission* [2010] *ECR* nyr of 1 Dec. 2010, paras. 74-75.

[93] K. Lenaerts, 'La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne', 21 *Revue trimestrielle des droits de l'homme* (2010) p. 217-236, at p. 223: 'Cette distinction, cardinale [entre droits et principes], façonnera indéniablement la portée des dispositions de la Charte ( ). Elle ne saurait toutefois remettre en cause l'acquis de l'Union ( ). Bien au contraire, elle en renforcera les fondements.' Cases on fundamental rights as general principles of EU law regarding umbrella principles such as for example the rule of law, follow this approach. They break down the umbrella notion into sub-components such as the principle of the protection of legitimate expectations. Subjective individual rights arise only in the context of the sub-principle.

obligation of the administration might result, when clear and unconditional, in a subjective right of an individual.

The 'subjective/objective' rationales of the good administration notion seem therefore to be interlinked, flowing respectively from one another. The 'subjective' right to good administration implies, in reality, an 'objective' meaning. It is essentially construed as the reflection of the obligations imposed on the administration to act in a certain way. In this sense, the 'subjective' right to good administration is recognized in terms of structural objective obligations. *A contrario*, the administration's 'obligation' would also be an individual's 'right'. As a result of this analysis, the 'subjective' and 'objective' rationales of the right to good administration are, in reality, corresponding rights.[94]

On the basis of the approach to distinguish subjective rights which are characterized by their 'clear and unconditional' content and objective principles which arise as obligations of the administration only due to their lack of clarity or conditionality (i.e., relying on further acts or sub-principles to make them appear sufficiently clear and unconditional) we might differ from these opinions. The obligation of diligent and impartial investigation in the form of the Court's interpretation of the duty of care is interpreted as the obligation to undertake a full and impartial assessment of all relevant facts of the case prior to taking a decision. This is an obligation which in our view is sufficiently clear and precise to be interpreted also to contain a right of an individual to claim such investigation. This approach is in line with the the Court, which found in the leading case on the duty of care as a sub-component of the general principle of good administration that there are elements of the principle of good administration which, although having an 'objective' nature, also confer 'subjective' rights on individuals.

Good administration, as public law in general, has therefore two facets. It is a general structural principle seeking to ensure the efficiency of the administration, as well as a notion capable of rendering subjective rights on individuals. This underlines the dual purpose of public law and of the notion of good administration consisting in maintaining efficient decision-making on the part of the administration whilst equally providing individuals with the possibility of defending themselves against encroachments into their rights.[95] In that context, a virtuous

[94] In the same vein, *see also* Case C-540/03 *PE* v. *Council* [2006] *ECR* I-5769, para. 60, where it was stated that the contested legislation imposed on the member states 'precise positive obligations, with corresponding clearly defined individual rights.' In the *Nölle* cases for example (Case C-16/90, *Eugen Nölle* v. *Hauptzollamt Bremen-Freihafen* [1991] *ECR* I-5163, paras. 30-32; Case T-167/94 *Nölle* v. *Council and Commission* [1995] *ECR* II-2589, 73-76) the Court and the General Court found that the principle of the duty of care forms the basis of subjective rights on which individuals may rely against the administration.

[95] This truism is also recalled by L. Azoulaï, 'Le principe de bonne administration', in J.-B. Auby and J. Duteil de la Rochère (eds.) *Droit administratif européen* (Bruylant, Bruxelles 2007) p. 493-

circle could evolve. Normatively speaking, procedural rights of individuals should be used as tools for safeguarding good administrative practices by the executive institutions and bodies, leading more often than not to good outcomes.[96] Protecting the individuals' rights in this context would therefore be synonymous with ensuring efficiency of public administration and protecting it against rash, inconsiderate or even unduly biased decisions.

Institutional scope of protection: good administration, the implementation of EU law by the member states and composite procedures

Whilst good administration protected as a general principle of EU law (Article 6(3) TEU) is applicable to all member states' action in the scope of EU law, the institutional scope of the right to good administration under Article 41(1) CFR is limited to 'institutions, bodies, offices and agencies of the Union.'[97] Still more limited are the formulations regarding damages and language rights (Article 41(3), (4) CFR) which speak of 'institutions' and 'servants in the performance of their duties' respectively.[98] Generally, within legal doctrine these differences are glossed over and it is suggested that the entire Article 41 CFR should be applicable to the Union's institutions, bodies, offices and agencies. The institutional scope of the right to good administration in Article 41(1) CFR nonetheless stays below the threshold set by the general provision in Article 51(1) CFR, which binds member

518, at p. 509: 'Cette combinaison reflète, à vrai dire, une tension qui est au Cœur même de tout ordre administratif en voie de constitution et qui découle de la nécessite d'assurer à la fois l'efficacité de l'administration et la protection des droits et intérêts des administres.'

[96] *See*, e.g., Case C-269/90 *TU München* [1991] *ECR* I-5469, paras. 13 and 14: '(…) since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks. However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.'

[97] The Presidium Explanation on Art. 41 CFR suggests that 'the expression "institutions, bodies, offices and agencies" is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation.' Arts. 42 and 43 CFR on access to documents and access to the European Ombudsman use the same formula. Also do Art. 15 TFEU on transparency as well as Art. 298 TFEU creating the legal basis for a regulation on procedures for an open, efficient, and independent European administration.

[98] Art. 340(2) TFEU contains a similarly limited formulation which obliges the Union to make good damages caused by the 'institutions or by its servants in the performance of their duties.'

states to compliance with the rights contained in the Charter 'only when they are implementing Union law.'[99] It also stays below the threshold established by the Court's case-law on general principles of EU applicable to member states when acting within the scope of EU law in line with *ERT* and *Lisrestal* case-law.[100] An interesting case in this regard is *Laub,* where the Court was invited to decide whether a member state, when implementing an EU regulation on the system of export refunds on agricultural products, was bound in its interpretation and the applicable procedures by the principle of good administration. The Court stated that 'this principle precludes *a public administration* from penalising an economic operator acting in good faith for non-compliance with the procedural rules, when this non-compliance arises from the behaviour of the administration itself' – even if this administration is national.[101] While referring to the latter case, AG Kokott stated in her Opinion in *Commission* v. *Spain* that, according to Article 41(1) CFR, public authorities must 'fulfill their obligations within a time-limit in

[99] The issue 'is not just an argument over the scope of application of a given provision of European law but a dispute about the constitutional nature of the Charter as an EU act of law determining the character and features of the entire legal order of the European Union.' (M. Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?, *EUI working paper Law* 2012/22, at p. 1). The scope of application of the Charter has been defined by the CJEU in Grand Chamber in Case C-617/10 *Åkerberg* [2013] *ECR* I-nyr of 26 Feb. 2013, paras. 19-21 interpreting the word 'implementation' in the light of the explanations of the Charter according to which 'the requirement to respect fundamental rights defined in the context of the union is only binding on the member States when they act in the scope of Union law.' It adds 'the applicability of Union law entails applicability of the fundamental rights guaranteed by the Charter.' Various approaches had been discussed in the legal literature. For many see e.g.: J. B. Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: A Fountain of Law or Just an Inkblot?', 4 *Jean Monnet working paper* (2001) p. 1-54 at p. 4; P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', 39 *CMLR* (2002) p. 945-994 at p. 993. *See also*: Opinion of AG Bot in Case C-108/10 *Scattolon* [2011] *ECR* I-nyr, paras. 116-120, where the AG invited the Court to establish that the scope of application of Art. 51(1) CFR should be identical with that of the general principles of EU law as established by the case-law of the Union judge; Opinion of AG Cruz Villalón in Case C-617/10 *Åkerberg* [2012] *ECR* nyr of 12 June 2012, para. 57; Opinion of AG Trstenjak in Case C-245/11 K [2012] *ECR* nyr of 27 June 2012, para. 63. Opinion of AG Kokott in Case C-489/10 *Bonda* [2011] *ECR* nyr of 15 Dec. 2011, para 15.

[100] In this case, the Court of Justice held that the applicants' right to be heard and their right to getting an adequate statement of reasons had been infringed as a consequence of the interlocutor member state's failure in keeping them informed about the Commission's decision to reduce the economic assistance that the latter had initially granted them – Case T-450/93 *Lisrestal* v. *Commission* [1994] *ECR* II-1177; Joined Cases T-186/97 *Kaufring* v. *Commission* [2001] *ECR* 1337, paras. 150-153.

[101] Case C-428/05 *Laub* v. *Hauptzollamt Hamburg-Jonas* [2007] *ECR* I-5069, para. 25. This case concerned the German administration's application of the Regulation No. 3665/87 laying down common detailed rules for the application of the system of export refunds on agricultural products, *OJ* [1987] L 351/1 as amended.

compliance with the principle of good administration *to which the Member States must also have regard when applying Community law*'[102] (emphasis added). Such an interpretation would be in line not only with the EU courts' pre-Lisbon case-law, but also with the reality that some national judges are ready to apply Article 41 of the Charter in their respective legal orders;[103] in certain member states this provision has even been recognized as having direct effect.[104] Although there are legitimate reasons to believe that the EU courts will ensure an extensive interpretation of the institutional scope of the right to good administration, there are also some factors pending towards an opposite conclusion. For instance, the Court in *Cicala* preferred a restrictive interpretation of Article 41 CFR, by stating that this provision was addressed, according to its wording, 'not to the Member States but solely to the EU institutions and bodies.'[105] It therefore confirmed that Article 41 CFR has a more limited scope, linked to implementation of EU law by an EU institution, body, office or agency only.

This analysis leads therefore to the question whether the member states' administrations are compelled, when implementing EU law or when acting within the scope of EU law, to always comply with the EU's principles of good administration. This question is of particular importance in the context of the increasingly prevalent composite procedures in which components of one single administrative

[102] Opinion of AG Kokott in Case C-392/08 *Commission* v. *Spain* [2010] *ECR* I-2537, para. 16. It is interesting to observe that in an Opinion rendered a few month earlier, the same Advocate-General had stated that 'it follows from the very wording of Art. 41(1) of the Charter, just as from Art. 253 EC, that the obligation to give reasons mentioned there applies only to institutions of the Community. It therefore cannot simply be transposed without much ado to bodies of the member states, even when they are implementing Community law' – *see* Opinion of AG Kokott in Case C-75/08 *Mellor* v. *Secretary of State for Communities and Local Government* [2009] *ECR* I-3799, para. 25.

[103] *See*, e.g., Case C-482/10 *Cicala* [2011] *ECR* nyr of 21 Dec. 2011. In this case, the national judge who introduced the preliminary ruling held, at para. 11 of the Order, that it must be considered that the obligation to state reasons referred to in the second paragraph of Art. 296 TFEU and Art. 41(2)(c) of the Charter applies to all of the Italian administration's activities, whether they are exercised in the implementation of EU law or in the context of the administration's own jurisdiction.

[104] *See*, e.g., Decisions No. 2668 of 20 May 2010 and No. 118 of 21 Jan. 2011 of the Romanian High Court of Cassation and Justice, where the latter jurisdiction stated that having regard to the second paragraph of Art. 20 of the Romanian Constitution right to good administration as stated for in Art. 41 CFR is directly applicable in the national legal order as a result of its consecration in the Charter (Art. 20 of the Romanian Constitution states as follows: The rights and fundamental freedoms shall be interpreted in terms of the conventions, pacts and treaties to which Romania is part). Art. 41 CFR also has also been reported to have been given direct effect by courts in Hungary and the Netherlands – *see Newsletter ACA Europe*, No. 27, April 2012, General Report on the Implementation of the Charter of Fundamental Rights of the European Union (Seminar in The Hague on 24 Nov. 2011), p. 1-37 at p. 21, FN 37.

[105] Case C-482/10 *Cicala* [2011] *ECR* nyr of 21 Dec. 2011, para. 28.

procedure are conducted by administrative authorities from different jurisdictions – both from national and European levels each using different procedural rules.[106] Composite procedures reflect the reality of a decentralised EU administration built on the principle of subsidiarity and on trans-jurisdictional cooperation of the administrative authorities in the EU. In the absence of a European code on administrative procedure covering such composite procedures, one of the central challenges to the EU legal system is the protection of individual (procedural) rights. It would appear that the procedural rights and guarantees laid down in Article 41 of the Charter as well as those developed by the EU courts via the vector of the principle of good administration are particularly well suited to fill the gaps of individual protection and to solve problems of legitimacy of composite procedures.[107] In view of this reality of implementation of EU law, it might appear problematic for the member states to be exempted from the application of the right to good administration.[108] This real-life necessity has been recognised with respect to the right to an effective remedy (Article 47 CFR) which is not limited to Union institutions but also applicable to member states when acting in the scope of EU law so therefore also when acting within a composite procedure.[109]

This also shows that the question of whether the sources listed in Article 6 TEU stand to each other in a pluralistic or in a hierarchical relationship is of central importance to the nature and extent of rights afforded to individuals. If one were – for the sake of argument – to interpret the CFR as the primary source of fundamental rights, the general principles of law being applicable only as subsidiary

[106] *See* for further references: H.C.H. Hofmann, 'Decision-Making in EU Administrative Law – The Problem of Composite Procedures', 61 *Admin. L. Rev.* (2009) Special Edition, p. 199-221.

[107] H.P. Nehl, 'Good Administration as Procedural Right and/or General Principle?', in: H.C.H Hofmann and A. H. Türk (eds.), *Legal Challenges in EU Administrative Law* (Cheltenham, Elgar 2009) p. 322-351 at p. 351.

[108] Member states like to insist on the notion of 'institutional and procedural autonomy.' Nevertheless, such autonomy exists only in the absence of an obligations arising under EU law. It is well established since *Rewe* that the application of the national procedural law is subsidiary to *explicit* EU law (Case C-33/76*Rewe-Zentralfinanz* [1976] *ECR* 1989, para. 5). They are also bound by the principles of *equivalence* and *effectiveness* which arise from the obligation of sincere cooperation under Art. 4(3) TEU (Case C-261/95 *Palmisani* [1997] *ECR* I-4025, para. 27; *see also* Case C-453/99 *Courage* [2001] *ECR* I-6297, para. 29) even where they are not obliged to implement EU law, *see*, e.g., Case C-105/03 *Pupino* [2005], *ECR* I-5285, paras. 39-42.

[109] The preparatory documents (*travaux préparatoires*) of the Charter underline the link between the two articles; as such, the initial version of Art. 41 CFR was intitulated: 'Droit à un process équitable et à une bonne gouvernance.' The first post-Lisbon application of the complementarities existing between 'good administration' and 'effective legal protection' provisions has been made by the Court of Justice in *Athinaïki Techniki*. In that judgement, the Court, while not explicitly referring to Arts. 41 and 47 CFR, justified the solution adopted in that case, by making allusion to the 'requirements of good administration and legal certainty and the principle of effective legal protection – *see* Case C-362/09 P *Athinaïki Techniki* v. *Commission* [2010] *ECR* I-nyr, para. 70.

gap fillers, a persisting question would remain to be answered: is the definition of the institutional scope of Article 41 CFR a limitation in constitutional positive law of the EU of the pre-existing more broadly defined right to good administration as general principle of EU law? If one were to argue that the complex drafting history of the wording of Article 41 CFR should lead to the conclusion that the limitation of its institutional scope of application cannot be regarded as an accident but was deliberate, the consequence would be that there would be no 'gap' in protection which could be filled – even if by the nature of implementation, member states are not capable of filling the gap. Such a hierarchical understanding of the sources of rights enlisted in Article 6 TEU might therefore result in an unacceptable and probably also an unintentional limitation of rights of individuals, especially in the context of executive cooperation in the EU through composite procedures. It would appear to us that a complementary and pluralistic understanding should therefore be embraced, leading to recognition and protection of individual rights, irrespective of which constellation of collaboration of national and EU administrative actors is employed for the implementation of an EU policy.

Conclusions and outlook

One of the important achievements of the Treaty of Lisbon has been to include a Charter of Fundamental Rights of the Union as binding primary law. Importantly, this was done without discarding the Union's core values, as an integrative legal system combining influences from sources both national and international. The coexistence of the sources of fundamental rights listed in Article 6 TEU and the fundamental freedoms defined in the TFEU reflects this approach. It results in a complex system designed to protect various types of rights of individuals such as traditional defence rights, rights of democratic participation, social and economic rights as well as innovative procedural rights. Therefore, the Union's legal system continues to be an incubator of innovative legal solutions to new problems of European integration. One example of this dynamism in the field of fundamental rights protection is the development of good administration as a general principle of law and a fundamental right of individuals. The mosaic of sources of fundamental rights allows combining, on one hand, a transparent listing of acquired rights with, on the other hand, the flexibility necessary for further adjusting the protection of rights. This is necessary specifically in the context of a Union based on decentralized implementation of law and intense executive cooperation of actors from the European, national and international levels. Article 6 TEU therefore lists the Charter and the general principles of EU law on an equal footing. Neither the wording of Article 6 TEU nor, as the arguments discussed in this article show,

the teleological, systematic or contextual interpretation of the Treaties argue for adopting a hierarchical approach favouring the Charter over the general principles of law. Instead, a pluralist approach to overlapping and complementary protection by various sources is the preferable option.

Such considerations are, as this article illustrates, not merely of academic interest. The material, personal and institutional scope of protection of the right to good administration under Article 41 CFR is considerably more restrictive than the scope of protection that is in fact offered by the EU courts under the general principle of good administration. The differences between the scope of protection of the right to good administration under Article 41 CFR and the general principle of good administration as developed by the EU courts are an excellent illlustration of the degree to which the fundamental rights grant individual protection may differ according to the source which is taken into account. Since EU law is implemented in a decentralised system by the member states in cooperation with each other and in cooperation with the Union institutions and bodies, reference to the general principles of EU law is not only a possible safeguard of individuals' rights across jurisdictional borders, it is also a necessity, given the dynamic development of the EU system of executive cooperation. Good administration – especially in the absence of an EU general administrative procedure act – therefore provides an instructive case study for illustrating the necessity of a pluralistic approach to the interpretation of the sources of fundamental rights in the EU legal order.