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GOOD ADMINISTRATION IN EU LAW AND THE
EUROPEAN CODE OF GOOD ADMINISTRATIVE BEHAVIOUR

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Abstract

The Code of Good Administrative Behaviour has passed fairly unnoticed in academic research on the principle of good administration. However, it is an important source to understand the meaning of this principle and concept in European administrative law, since it encompasses some of its dimensions that tend to be overlooked by the case law of the European Courts and also by European law scholars. Furthermore, contrary to what recent developments let believe – namely, the fact that the Commission refuses to put forth a proposal for a European regulation that would make the provisions of the Code binding – the Code remains relevant to map possible legal developments regarding good administration.

The article explains the reasons and meaning of the link between the Code and Article 41 of the EU Charter of Fundamental Rights, analyses the complexity and uncertainty of the concept “good administration”, characterises its different legal and non-legal facets highlighting the interconnections between them. In addition, it demonstrates how these different layers are reflected in the Code, underlines the Code’s links with previous EU law developments, its added legal value and the functions it currently performs, considering also the different paths through which further legal, binding developments could derive from the Code¹.

Keywords

Good administration; Charter of Fundamental Rights; European Ombudsman; European law

¹ This paper will be published in the *Revue Française d'Administration Publique*.

Introduction

The European Code of Good Administrative Behaviour (henceforth, the Code) was proposed by the European Ombudsman in 1999 to the European institutions, bodies and agencies. It was intended as a blueprint for the adoption of their own codes of conduct, which would contribute to improve standards of good administration as well as the relationship between the European administration and the public.² The approval by the European Parliament in 2001 enhanced its political legitimacy, and the association with Article 41 of the EU Charter of Fundamental Rights pointed the way to the Code's possible constitutional relevance.³ Later, in the introduction to the user-friendly version of the Code, the Ombudsman highlighted this link thus: "the Code is intended to explain in more detail what the Charter's right to good administration should mean in practice".⁴

Given the uncertain meaning of good administration and the open-endedness of Article 41 of the Charter, as well as bearing in mind that, if the Charter becomes indeed legally binding, legal developments in this matter may follow, the purpose of this article is three-fold. Firstly, it questions the meaning of associating the Code to Article 41, not only highlighting the reasons for this connection but also considering the connotations of good administration as a subjective right (sections 1 and 2). Secondly, it attempts at systematising the different ramifications of the concept of good administration that are present in the case law (and, inherently, in Article 41 of the Charter) and in the Ombudsman's decisions. To the extent that these are revealed by the Code, it argues that the latter contributes to clarifying the meaning of good administration in EU law (sections 2 and 3). Thirdly, it provides an account of the current functions of the Code and it highlights its possible contribution to the development of European administrative law (section 4).

1. The Code, the Charter and a "European Administrative Law": Intertwined Histories

Originally, the Code had three main goals. It intended to concretise the rules and principles against which the Ombudsman could assess cases of maladministration, provide a guide for the staff of Community institutions and bodies regarding their relationships with the public, as well as to inform citizens about "their rights and the standards of administration they may expect".⁵ Early on, the Code also became associated to the right to good administration enshrined in Article 41 of the EU Charter of

² Draft recommendation to the European institutions, bodies and agencies in the own initiative inquiry OI/1/98/OV, 13 September 1999, points 1.1 to 1.3.

³ Resolution A5-0245/2001, on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (C5-0438/2000 - 2000/2212 (COS), 6 September 2001; see modification 2.

⁴ Article 41 of the Charter enumerates in a non-exhaustive manner the following rights and duties as part of the right to good administration: the right to have one's affairs handled impartially, fairly and within a reasonable time (paragraph 1), the right to be heard, to access one's file and the duty of the administration to give reasons for its decisions (paragraph 2), as well as non-contractual liability of the EU (paragraph 3) and language rights (paragraph 4).

⁵ The European Ombudsman Annual Report (EO AR) 1998, pp. 18-19. Foreword by the European Ombudsman to the European Code of Good Administrative Behaviour, p. 4 (on-line version published in September 2005). All the annual reports, decisions, draft recommendations, speeches and other documents from the European Ombudsman quoted in this article are available at <http://www.ombudsman.europa.eu>. The content of the Code includes procedural rights and duties (e.g. right to fair and impartial treatment, right to be heard, access to file, duty to state reasons), substantive rights (e.g. data protection), general principles of European administrative law (e.g. proportionality) and rules of ethical behaviour and good administrative service (e.g. courtesy). See section 3 below.

Fundamental Rights.⁶ The Ombudsman himself, in his speech before the Convention responsible for the drafting of the Charter (henceforth, the Convention), suggested the insertion of the right to good administration in this document where it “should be stated at the level of principle”.⁷

The decision to adopt the Charter had been taken in the Cologne European Council in June 1999 and, arguably, the European Ombudsman saw here an opportunity to strengthen the relevance of the relationships between the European administration and the public.⁸ More pragmatically, the association between the right and the Code could be an additional argument to compel the institutions and bodies to comply with the Ombudsman’s recommendations on the adoption of codes of good administrative behaviour. In fact, at the time of his speech before the Convention, the Ombudsman’s endeavours regarding the adoption of codes of good administrative behaviour by the European institutions and bodies were still found waiting. By March 2000, the Commission had approved a draft code that, in the Ombudsman’s view, did not comply with his recommendations; the Council and the European Parliament had been receptive to the Ombudsman’s initiative but had failed to comply with these recommendations; and only two agencies had followed the Ombudsman’s recommendations on this matter.⁹

Given these circumstances, in addition to his proposal of including a right to good administration in the Charter, the Ombudsman also saw fit to change his strategy: the rules of administrative behaviour should be adopted under the form of a European administrative law, a regulation.¹⁰ In his speech before the Convention, the Ombudsman reinforced this recommendation, stressing that “to put the principle [of good administration] into practice, it would be necessary to enact a regulation on good administrative behaviour and another on access to information and to documents”.¹¹ Even though the Ombudsman had since the beginning pleaded that the single European institutions and bodies would adopt a binding act containing their rules on good administrative behaviour, this was supposed to be a decision adopted by each institution.¹² In other words, these legal acts would be acts of the institutions regulating their own functioning (the equivalent to rules of procedure, with limited external effects),¹³ not a law explicating the content of a fundamental right. In this sense, the change of strategy also meant a change in the political relevance of the Code. This should become the blueprint for the formal codification of the European administrative rules relevant for the concretisation of a fundamental right.

⁶ Article 41 of the Charter enumerates in a non-exhaustive manner the following rights and duties as part of the right to good administration: the right to have one’s affairs handled impartially, fairly and within a reasonable time (paragraph 1), the right to be heard, to access one’s file and the duty of the administration to give reasons for its decisions (paragraph 2), as well as non-contractual liability of the EU (paragraph 3) and language rights (paragraph 4).

⁷ Speech of the European Ombudsman - Public Hearing on the Draft Charter of Fundamental Rights of the European Union, Brussels, 2 February 2000; EO AR 2001, p. 19.

⁸ Cf. Speech *cit.*, note above. The context of the time was favourable to such an initiative. In the aftermath of the Santer Commission, the “First Report of the Committee of Independent Experts on allegations regarding fraud, mismanagement and nepotism in the European Commission” (15 March 1999) highlighted that the common core of minimum standards of proper behaviour in the exercise of public office entailed rules of “openness to the public” - point 1.5.4. (available at <http://www.europarl.europa.eu/experts/pdf/reporten.pdf>).

⁹ The European Agency for the Evaluation of Medicinal Products and the Translation Centre for the Bodies of the European Union. See Special Report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/1/98/OV), of April 2000, part B (responses to the Ombudsman’s Draft Recommendation) and part C (analysis of the responses). On the codes later adopted by the institutions, see note 43 below.

¹⁰ *Idem*, part D, conclusion and recommendations n.º 4 to 9. The European Parliament’s view that such rules should apply equally to all institutions and bodies weighted on the Ombudsman’s choice (conclusion n.º 1).

¹¹ Speech, *cit.*, note 7.

¹² Draft recommendation, *cit.* (note 2), recommendation n.º 3.

¹³ See below note 63.

The European Parliament took heed of the Ombudsman's recommendation. In the resolution by which it endorsed the Code proposed by the Ombudsman. It both expressly associated the Code to the right to good administration as a citizen's right (recognised to "every person"), and urged the European Commission to submit a proposal for a regulation based on Article 308 of the EC Treaty containing a Code of Good Administrative Behaviour.¹⁴ The expectations regarding the possible approval of such a regulation increased with the insertion in the Constitutional Treaty of Article III-389 (reproduced by Article 254a of the Treaty on the Functioning of the European Union).¹⁵ However, they were recently subdued by a declaration of the Commission's representative on occasion of the presentation of the Ombudsman's Annual Report to the European Parliament, whereby the Commission indicated that it had no intention of setting forth a proposal to transform the Code into a regulation.¹⁶

This hindered the political significance of the Code, as well as its influence on the institutions, which already tend to follow their own standards of good administrative behaviour that are not always coincident with the terms of the Code.¹⁷ Nevertheless, the Code remains a valuable source to understand the meaning of good administration in EU law and to perceive possible future developments in this matter. This will be demonstrated in sections 3 and 4. Before, it will be argued that the Code should not be read as explicating the content of Article 41 of the Charter.

2. Good Administration: Right, Principles or Standard? Grappling the Meaning of a Concept

Before being proclaimed as a fundamental right, good administration had been recognised by the European Courts as a general principle of law.¹⁸ Different scholars have underlined the uncertain and ambiguous meaning of this principle. In particular, they have highlighted that, as a rule, it is not treated autonomously in the Courts' case law, rather it is often used in association with other principles, rights and duties to withdraw specific legal consequences from their combined use.¹⁹ One may sustain, on the basis of the case law, that the core of the principle is the duty of careful and impartial examination of the factual and legal circumstances of each case.²⁰

The novelty of Article 41 consisted of raising good administration "to a general category under which may be subsumed a whole set of subjective rights intended to limit arbitrary administrative conducts in the Union".²¹ However, the meaning of good administration as a right remained obscure. Article 41

¹⁴ See, modifications 1, 2, 4 and point 1 of Resolution A5-0245/2001, *cit.* (note 3). On the genesis of the latter suggestion, see European Ombudsman EO AR 2001, p. 19.

¹⁵ EO AR 2003, p. 28.

¹⁶ Intervention of Mr Piebalgs in the plenary debate on 23 October 2008, <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20081023&secondRef=ITEM-004&language=EN>. I am grateful to Peter Bonnor for pointing this out to me.

¹⁷ See below note 43 and page 2.

¹⁸ See the Explanations relating to the Charter of Fundamental Rights (now in OJ C 303/17, 14.12.2007). The expression "European Courts" is used in this article to refer to the European Court of Justice and the Court of First Instance of the European Communities.

¹⁹ H. P. Nehl (1999), *Principles of Administrative Procedure in EC law*, Oxford: Hart Publishing, pp. 15-20, 27-37; D. Simon (2006), "Le principe de 'bonne administration' ou la 'bonne gouvernance' concrète" in *Le droit de l'Union européenne en principes. Liber Amicorum en l'honneur de Jean Raux*, Editions Apogée: Rennes, pp. 155-176, at p. 165; F. T. Banfi (2007), "Il diritto ad una buona amministrazione", in M. Chiti e G. Greco (eds.), *Trattato di diritto amministrativo*, Tomo I, 2th ed., Milano: Giuffrè, pp. 49-86, at pp. 49-50.

²⁰ L. Azoulay (2007), "Le principe de bonne administration", in J.-B. Auby, J. Dutheil de La Rochère (eds.), *Droit Administratif Européen*, Bruxelles: Bruylant, pp. 493-518, 496-511. H. Hofmann (2007), "Good administration in the EU law – a fundamental right?", *Bulletin des Droits de l'Homme*, n. 13, pp. 44-52, at p. 48.

²¹ Azoulay, *op. cit.*, p. 504. On this, see also K. Kaňska (2004) "Towards administrative human rights in the EU. Impact of the Charter of Fundamental Rights", *European Law Journal*, Vol. 10, n. 3, pp. 296-326, at p. 300; J. Dutheil de la

clustered under its general heading a few procedural rights and duties. The reasons why these and not others were selected to form the core of this right of persons dealing with European institutions and bodies seem to be more pragmatic than normative. Following the spirit of the Charter, they correspond to rules that were either settled by the Courts' case law, defined in the Treaty (such as the duty to state reasons and non-contractual liability rules) or are part of the founding procedural principles of the Community (rules on the use of language).²² The added value, in terms of their respective content, of clustering each of these rights and duties around a right to good administration is uncertain, apart from the obvious intention of inherently establishing them as public subjective rights of a fundamental nature.²³ In other words, the meaning of the "umbrella right", as it is often designated, remained unclear.

The Code, in a way, further complicated the terminological and conceptual framework of good administration. While claiming to explicate the content of the right to good administration, it displays an eclectic set of rules embracing principles that have an independent life from good administration (like proportionality or non-discrimination) and rules that were previously unknown to lawyers less attentive to the Ombudsman's interventions (such as the duty to be service-minded, correct and courteous). In fact, the Code mirrors the double scope of the Ombudsman's power of control, covering both a legality review and a control over non-legal aspects of the administrative action.²⁴ At the same time, it unfolds the specificity of the term good administration, as is argued next.

Good administration is a complex, multifaceted concept. One may sustain that it characterises a model of administration which purports to pursue properly and efficiently the public interest while being respectful of the rights and interests of the persons with whom it relates, as well as to be at the service of the community in a way that fosters trust and acceptance for administrative actions. In this sense, good administration has an important programmatic meaning, which is present when the Courts find that compliance with certain rules, principles or rights are "in conformity with the interests of good administration", "[meet] the requirements of good administration", or, more restrictively, are "in the interests of sound administration of the fundamental rules of the Treaty".²⁵ Now, the fulfilment of these purposes of good administration requires a combination of legal and non-legal rules. This has been pointed out by Advocate General Slynn in his often quoted opinion in *Tradax* and has been corroborated by the Courts, for example, when they consider that regrettable conduct is liable to breach the principle of good administration but does not vitiate the legality of a decision (*ABB Asea Brown Boveri*) or that rules directed at ensuring good administration do not necessarily constitute procedural guarantees on which individuals may rely (*Aseprofar and Edisa*).²⁶

On this basis, one may characterise good administration as being composed of different interconnected layers. Firstly, it comprises procedural guarantees that are primarily directed at protecting the substantive rights of the persons dealing with the European administration, whose infringement is

(Contd.) _____

Rochère (2008), "The EU Charter of Fundamental Rights, not binding but influential: the example of good administration", in A. Arnall, P. Eckhout and T. Tridimas (eds.), *Continuity and change in EU law. Essays in honour of Sir Francis Jacobs*, Oxford: Oxford University Press, pp. 157-171, at p. 168; Banfi, *op. cit.*, pp. 52-53.

²² Namely Article 2 of Regulation n.º 1/58 determining the languages to be used by the European Economic Community (OJ L 17/385, 6.10.1958). Generally on this point, Dutheil de la Rochère, *op. cit.* p. 167.

²³ On the significance of good administration being considered a fundamental right, see Azoulay, *loc. and op. ult. cit.*

²⁴ P. Craig (2006), *EU Administrative Law*, Oxford: OUP, pp. 852-3. On this, see 'Legality and good administration: is there a difference?', Speech by the European Ombudsman, P. Nikiforos Diamandouros, at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking Good Administration in the European Union', Strasbourg, 15 October 2007.

²⁵ Case C-41/00 P, *Interpoc v Commission* [2003] ECR I-2125, para. 48; Case T-277/03, *Vlachaki v Commission* [2005] ECR I-A-57, para. 64; Joined Cases T-254/00, T-270/00, T-277/00, *Hôtel Cipriani v Commission* [2008] nyr., para. 210.

²⁶ Opinion of Advocate General Slynn in Case 64/82, *Tradax v Commission* [1984] ECR 1385-6; Case T-31/99, *ABB Asea Brown Boveri Ltd v Commission* [2002] ECR II-1881, para. 104; Case T-247/04, *Aseprofar and Edifa v Commission* [2005] ECR II-3449, para. 56.

capable of giving rise to a legal action and may ultimately lead to the annulment of the vitiated act or to a compensation for damages. This is the common denominator of Article 41 of the Charter, which, to the extent that it coins good administration as a public subjective right, arguably delimits the segments of good administration that can primarily be perceived as such. Secondly, good administration encompasses legal rules that structure the exercise of the administrative function primarily by reference to the objective interests of a proper application of the Treaty rules and to the definition of the public interest (e.g. the duty of careful and impartial examination to the extent that it has a broader scope than the handling of personal affairs). These rules also function as procedural guarantees, but their primary function is to structure the exercise of discretionary power in line with the correct pursuance of the public interest in each case and to ensure control over acts of the administration.²⁷ Non-legal rules form the third layer of good administration. They define standards of conduct directed at ensuring the proper functioning of the administrative services delivered to the public, both ensuring and demonstrating their efficiency and quality. Naturally, this segment of good administration is mostly displayed by the Ombudsman's interventions. Indeed, he has consistently held that "principles of good administration [require] Community institutions and bodies not only to respect their legal obligations but also to be service-minded and ensure that members of the public are properly treated and enjoy their rights fully".²⁸ Also the Courts endorse this view.²⁹ Recently, the multifaceted nature of good administration has been re-affirmed in *Dynamiki*. Here the Court considered that quick responses to requests in the absence of a legal obligation to do so "demonstrate a level of diligence characteristic of good administration". Moreover, it held that non compliance with the (legal) *duty* to act within a reasonable time meant, in the circumstances of the case, that the Commission had breached its duty of diligence and good administration; however, this infringement did not "restrict the applicant's ability to assert its rights before the Court" and hence should not entail the annulment of the decision.³⁰

To a certain extent, this three-layered systematisation reflects the distinction between the subjective and objective functions of procedural rules – protection of subjective substantive rights and pursuance of the public interest. While it is noteworthy that many of such rules serve both purposes,³¹ this distinction is relevant in EU law and it has been enhanced by the Charter. Indeed, the CFI has held that the principle of good administration does not confer rights on individuals, except where "it constitutes the expression of specific rights" such as the ones cited in Article 41.³² Moreover, the right to good administration tends to be identified with the procedural guarantees enshrined in Article 41, both by the CFI and by the Advocate Generals (in the absence of ECJ judgments referring to this right).³³ A

²⁷ Case C-269/90, *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469, para. 13 and 14.

²⁸ EO AR 2005, p. 39; EO AR 2006, p. 37; EO AR 2007, p. 31. See Speech, *cit.*, note 24, in particular parts 3 and 4.

²⁹ See, in particular, *ABB Asea Brown Boveri, cit.* (note 26).

³⁰ Case T-59/05, *Evropaiki Dynamiki v Commission* [2008] nyr, para. 150, 156 and 159.

³¹ Azoulay, *op. cit.*, pp. 507-508.

³² Case T-193/04, *Hans-Martin Tillack v Commission* [2006] ECR II-3995, para. 127; Case T-128/05, *Société de Plantations de Mbanga SA (SPM) v Council and Commission* [2008] nyr., para. 127.

³³ E.g. Case T-378/02 R, *Technische Glaswerke Ilmenau v Commission* [2003] ECR I-2921 para. 65. Opinion of AG Kokott delivered on 22 January 2009, Case C-75/08, *Christopher Mellor v Secretary of State for Communities and Local Government*, nyr, para. 24 (duty to give reasons); Opinion of AG Ruiz-Jarabo Colomer delivered on 27 November 2007, Joined Cases C-147/06 and C-148/06, *SECAP v Comune di Torino and Santorso v Comune di Torino*, nyr., para. 50 (right to be heard); Opinion of AG Sharpston, delivered on 25 October 2007, Case C-450/06, *Varec v Belgium*, nyr (access to file in respect of business secrets); Opinion of AG Mengozzi delivered on 16 November 2006, Case C-523/04, *Commission v Netherlands* [2007] ECR, I-3267, para. 59, note 36 (reasonable time limit for decision-making); Opinion of AG Poirares Maduro delivered on 21 October 2004, Case C-141/02 P, *Commission v T-Mobile Austria GmbH* [2005] ECR I-1283, para. 56, to deny that an individual right of action may derive from the duty of diligent and impartial examination.

similar stance is followed by the Ombudsman.³⁴ Significantly, in procedures where the complainants have invoked the right to good administration associating it with rules other than those of Article 41, the Ombudsman has preferred to refer in his decision to the principle of good administration;³⁵ in one case the Ombudsman invoked, in the same complaint, the right to good administration regarding the pleas that concern any of the rights envisaged in Article 41, but mentioned the principle of good administration when referring to other rules.³⁶ This seems to indicate that not all rules that may be subsumed under the principle of good administration are likely to be considered part of a right to good administration, since the possibility that they might be considered public subjective rights, thereby grounding individual legal claims, is either remote or undesired. Consequently, focusing on good administration from the perspective of public subjective rights has introduced a partition in the concept of good administration between a stricter legal meaning of good administration and a broader meaning of the term. The latter is usually associated to the principle of good administration, which comprises legal and non-legal rules. While the perception of which rules may be conceived as procedural subjective rights may change over time, for now these seem to be limited to those listed in Article 41.

It is noteworthy that some of the rules of good administration cut across different layers. Access to information, for example, can be considered to be a procedural right – access to file, enshrined in Article 41 (2) first indent; right of access to documents under Article 255 EC and Regulation n.º 1049/2001 – or a non-legal rule – if the information requested is not covered by this regulation nor by the rules applicable to access the files, but its availability is nonetheless regarded to favour the purported model of administration (this is reflected in Article 22 of the Code).

Arguably, the distinctive feature of good administration lies in the combination and partial overlap between legality and aspects of good administration that stand beyond legality. Specific rules of good administrative behaviour may emerge from this intertwinement, which indirectly allow to strengthen the guarantees of the persons in contact with the European administration in the matters that stray beyond the realm of the Courts' jurisdiction. This has been emphasised by the Ombudsman in a recent speech, where he highlighted the relevance of surpassing an assessment of the legality of the administrative action.³⁷ The Code of Good Administrative Behaviour expresses well the different ramifications of good administration and points out some of the rules that might derive from this interplay. In this sense, it is misplaced to consider the Code as explicating the right to good administration envisaged in Article 41 of the Charter.

3. The Code's Rules and the Different Layers of Good Administration

These different layers of good administration are reflected in the Code's content. First, this includes a codification of general principles of European administrative law (legality, non-discrimination, proportionality, absence of abuse of power, respect for legitimate expectations, transparency).³⁸

³⁴ Decision on complaint 1999/2007/FOR against the Office for Harmonisation in the Internal Market, 26 June 2008, point 2.6 (right to be heard); Decision on complaint 3502/2004/GG against the European Commission, 8 April 2008, point 4.3 (duty to act within a reasonable time); Decision on complaint 821/2003/JMA against the European Parliament, 22 September 2004, point 1.4 (duty to state reasons); Decision on complaint 1349/2003/JMA against the European Commission, 7 June 2004, point 1.3 (duty to state reasons); Decision on complaint 1100/2001/GG against the European Commission, 5 March 2002, points 2.3, 2.4 and conclusion (duty to act within a reasonable time).

³⁵ Decision on complaint 258/2007/(MNZ)RT against the European Commission, 10 December 2007, point 2.4 (failure to reply in due course and to apologise); Decision on complaint 3398/2005/ELB against the European Commission, 29 December 2006, point 3.4 (consistency);

³⁶ Decision on complaint 1200/2003/OV against the Council of the European Union, 19 December 2003, points 2.6 (right to be heard), 4.3 (duty to reply) and conclusions, where this duality is plainly assumed.

³⁷ Cf. Speech cit., above, note 24 in particular parts 3 and 4.

³⁸ Articles 4 to 7 and 10 (2). The provisions on transparency essentially refers to the regulation on access to documents (Article 23) and to the publicity of the code itself (Article 25).

Second, it restates procedural and substantive rights and duties which result from express rules of Community law. Some of these are fundamental rights enshrined in the Charter (data protection, the right to complain to the European Ombudsman).³⁹ Some correspond to the rights listed in Article 41 (the right to have his or her affairs handled impartially, fairly and within a reasonable time; the right to be heard and to make statements; the duty to state reasons; language rights).⁴⁰ Others correspond roughly to long-standing primary rules of European law, even though in the Code they are drafted in more detail that places a stronger emphasis on procedural protection (notification of decisions).⁴¹ A third layer embraces rules of administrative practice which are directed by the idea of providing a good service to the public and in principle do not form judicially enforceable rights or rules (the duty to advise the public on the handling of cases, to act courteously, to acknowledge the receipt of a letter or complaint and provide information on who is dealing with the matter, to transfer a file to the competent services, to indicate the possibilities of appeal, as well as rules on how to handle requests for information and on keeping records).⁴²

The codes of the European institutions and bodies which have followed the adoption of the Code also contain general principles of law, rights and non-legal rules, even though in quite a few cases their provisions are drafted in different terms and often these codes are not as comprehensive as the one suggested by the Ombudsman.⁴³

General Principles, Procedural and Substantive Rules

Two aspects should be underlined with regard to the two first layers just mentioned. First, the inclusion in the Code of general principles of EU law and of procedural and substantive rules which have been previously stated in other sources has a specific purpose. They strengthen the idea purported by the Ombudsman since the beginning of the office's existence that assessing cases of maladministration – the term which according to Article 195 EC defines the mandate of the Ombudsman – includes reviewing whether institutions have acted lawfully.⁴⁴ It is noteworthy that when the Ombudsman started his own initiative inquiry into the existence and public availability of codes of good administrative behaviour of the European institutions and bodies (November 1998), and later when he proposed the Code as a draft recommendation (July 1999), this understanding of the concept of maladministration had been contested by the Commission in two complaint procedures examined by the Ombudsman.⁴⁵ Restating that standards of administrative behaviour comprise the

³⁹ Articles 8 and 43 of the Charter.

⁴⁰ One may consider that Articles 8 (impartiality and independence), 9 (objectivity) and 11 (fairness) re-state dimensions of impartial and fair treatment; Article 17 relates to the right to have one's affairs treated within a reasonable time; the other rights and duties are stated in Articles 16, 18 and 13, respectively.

⁴¹ Article 20 (1) of the Code and Article 254 (3) EC.

⁴² Articles 10 (3), 12, 14, 15, 19, 22, 24, respectively.

⁴³ There are in fact considerable differences between the Code suggested by the Ombudsman, the guide adopted by the European Parliament, the code of the Commission and the one enacted by the Secretary-General of the Council. Cf. Guide to the obligations of officials and other servants of the European Parliament. Code of Conduct (OJ C 97/1, 5.4.2000); Annex to the Commission Decision of 17 October 2000, amending its rules of procedure (OJ L 267/64, 20.10.2000); Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 25 June 2001 on a code of good administrative behaviour for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public, Part III (OJ C 189/1, 5.7.2001). It should be noted that some agencies took the Commission's code as a model for their own codes and not the one suggested by the Ombudsman (e.g. Decision n.º ADM-00-37 of the President of the Office [for the Harmonisation of the Internal Market] of 9 July 2001 on the adoption of a Code of Good Administrative Behaviour, available at <http://oami.europa.eu/en/office/aspects/decisions/adm-00-37.htm>).

⁴⁴ See EO AR 1995, pp. 8-9; EO AR 1997, pp. 22-27.

⁴⁵ Decision on complaint 449/96/20.02.96/HKC/PD against the European Commission (EO AR 1998, pp. 46-48) and Decision on complaint Q5/98/IJH – OI/3/99/IJH, against the European Commission (EO AR 1999, pp. 17-19).

abidance to legal rules and principles was not only coherent with the Ombudsman's understanding of maladministration, but, since the Code was meant to influence codes of conduct adopted by the EU institutions and bodies, this would also reinforce this stance. It effectively did, even though not all these principles and rules are reproduced in all codes.

Secondly, although almost all rules of the first and the second group correspond to European rules and principles stated previously elsewhere – in particular in the Courts' case law – the provisions of the Code are not always a mere re-statement. To begin with, most of the rules of the Code are drafted in terms of duties of the officials and not of the institutions to which they belong.⁴⁶ This cannot mean that the latter are not bound by them: this would not only be illogical, but also counter what is expressly defined in Article 1 of the Code.⁴⁷ Nor can it mean, as one could be led to believe, that the Code thereby transposes those rules to the internal activity of the European administration and hence regulates the relationships between the officials and the institutions.⁴⁸ Rather, this may be seen as inducing a sense of ownership for the decisions that each official makes and the actions that they take in their relationships with the public, that will be reflected in the decisions and actions of the institutions to which they belong. At the same time, this ties in with Article 3 (1) of the Code, according to which, as a rule, the principles it defines apply to all relations of the institutions or bodies with the public. In this sense, the emphasis on the officials as the subjects of most of the Code's rules underlines that the standards of good administrative practice defined by the Code ought to apply not only to the procedures that lead to the adoption of formal acts by the institutions, but “to the activity of administrations in general”, including for example, the diffusion of information regarding the institutions' activities.⁴⁹

In addition, some of the provisions of the Code establish rules which further the content of the previous legally established guarantees recognised to persons in their dealings with the European administration. This is namely the case of the right to be heard. As formulated in the Code, the rights of the defence – and hence also the right to be heard – are recognised where “the rights or interests of individuals are *involved*”, while in the Courts' case law the right to be heard is recognised to persons *adversely affected* by a decision.⁵⁰ Moreover, this right ought to be ensured to “every member of the public” in cases where a decision affects “his rights or interests”.⁵¹ Additionally, according to the Code, the rights of the defence are to be ensured “*at every stage* in the decision-making procedure”, which presupposes that the interested persons are able to follow quasi-permanently the decision-making procedure. This departs from some case law regarding complex procedures in which the Court has admitted that, even though a part of the procedure is developed before the Commission, the latter

⁴⁶ “Officials” include the servants to which the Staff Regulations apply, as well as other servants of the European Communities (Article 2 (1) (2) and (4) (b) of the Code). Following what is defined in the Code (Article (4) (a)), “institutions” in this text will refer to both institutions and bodies.

⁴⁷ “In their relations with the public, the Institutions and their officials shall respect the principles which are laid down in this Code”. The express reference to the Institutions in this Article resulted from one of the amendments made by the European Parliament to the draft proposed by the Ombudsman (see Resolution A5-0245/2001, *cit.*, note 14).

⁴⁸ Article 3 (2) of the Code.

⁴⁹ See Draft recommendation to the European Anti-Fraud Office (OLAF) in complaint 1840/2002/GG, 18 June 2003, point 1.5. This case has been summarised in the EO AR 2003, pp. 173-5.

⁵⁰ Article 16 (1) of the Code. Noting also the wider formulation of the Charter, Kańska, *op. cit.*, p. 318. This provision refers to the rights of the defence, but given the title of the article, it is likely that the use of this term can be understood as a synecdoche. Among many other examples, see Case C-135/92, *Fiskano v Commission* ECR [1994] I-2885, para. 39 and, more recently, Case T-170/06, *Alrosa Company Ltd v Commission*, ECR [2007] II-2601, para. 91. A broader jurisprudential formulation of the right to be heard originates in *Transocean* – it is recognised to “a person whose interests are perceptibly affected” (Case 17/74, *Transocean Marine Paint Association v Commission*, ECR [1974] 1063, para. 15) – but it has been less influential in the case law, as is evidenced by the formulation of 41 (2), first indent of the Charter.

⁵¹ Article 16 (2) of the Code.

does not necessarily have the duty to ensure the right to be heard.⁵² Furthermore, the boundaries of the rule are open, depending on whether one considers “decisions” to refer to individual decisions, to acts adopted under one of the forms defined in Article 249 EC or, more imprecisely, to any act that might have detrimental effects, in line with the general provision of the Code that determines that its provisions apply to all the relationships between the institutions and the public.⁵³

The duty to provide reasons is another case where the protective scope of the existing rules and the one that the provisions of the Code lets envisage is different. In this case, the Code’s provision restricts the duty’s scope to decisions of the institutions that may have a detrimental effect in the rights and interests of private persons, but, by singling out only this segment of the duty, it takes it one step further: it determines that, where a detailed reasoning is not possible and upon a request of the interested person, the latter is entitled to an individual reasoning.⁵⁴ To the author’s knowledge, the Courts have not gone this far in strengthening the protective role of the duty to give reasons.⁵⁵ In this reading, the Code’s provision should not be considered as being more restrictive than the rule of Article 253 EC but as furthering one of the aspects it embraces, the one that has also been singled out in Article 41 (2), third indent of the Charter.⁵⁶

The different content of some of the rules of the Code when compared to existing law might be an important indication for potential litigants to decide which path of administrative control to follow, depending on the circumstances of their case and bearing in mind the different remedies that can be attained: judicial action or complaint before the Ombudsman. A broader scope or a stronger protective function of the rules of the Code, may be an indication for potential complainants that the Ombudsman’s view on the scope of some procedural guarantees may be more favourable to their interests than the Courts’ stance.

On the contrary, to the extent that the scope of the provisions of the Code coincides with principles and rules previously established in legally binding sources, it is doubtful that their inclusion in the Code has any added legal value other than elucidating which principles may be associated to the principle of good administration.

⁵² Article 16 (1) of the Code. See Case T-346/94, *France-aviation v Commission*, ECR [1995] II-2841, para. 36; Case T-189/02, *Ente per le Ville vesuviane v Commission*, ECR [2007] II-89, para. 91, 93-100 (in this case, regarding the use of structural funds, the Court did not consider whether the person concerned should have been heard directly by the Commission and not only by the Member State concerned).

⁵³ This doubt is unjustified with relation to Article 41 (2), where the reference to “individual measures” in the first indent indicates that the term “decision” in the third indent should have the same meaning. On the ambiguity of the term decision in European law, see A. von Bogdandy *et al.* (2004), “Legal instruments in European Union Law and their reform: a systematic approach and an empirical analysis”, *Yearbook of European Law*, Vol. 23, pp. 91-136, at pp. 101-6.

⁵⁴ Article 18 (1) and (3) of the Code.

⁵⁵ As a rule, the decision-maker is not expected to take into account all the factual and legal elements that were raised by each interested person during the administrative procedure (Case T-49/95, *Van Megen Sports Group BV v Commission*, ECR [1996] II-1799, para. 55; Case T-231/99, *Colin Joynson v Commission*, ECR [2002] II-2085, para. 166; Case C-301/96, *Germany v Commission*, ECR [2003] I-9919, para. 140) and the statement of reasons only needs to “provide [interested persons] with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged” (*Van Megen, cit.*, para. 51). This is intended to avoid or limit the annulment of sound decisions on formal grounds (Koen Lenaerts and Jan Vanhamme, 1997, “Procedural rights of private parties in the Community administrative process”, *Common Market Law Review*, pp. 531-569, at pp. 563-4).

⁵⁶ Clearly, abusive use of this rule should be prevented by analogy with what is provided in Article 14 (3) of the Code: “ (...) [N]o reply need be sent in cases where letters or complaints are abusive because of their excessive number or because of their repetitive or pointless character.”

Rules of Ethical Behaviour and Good Administrative Service

As stated, good administration also comprises rules of ethical behaviour in the exercise of public office as well as duties related to the good functioning of the administrative service, abidance to which stems more from a sense of “culture of service” than from a legal imposition.⁵⁷ Such is clearly the case of the duties of officials to be service-minded, accessible in their relationships with the public or to apologise for errors that affect the rights or interests of a person.⁵⁸

Admittedly, the boundaries between what are legal duties and what are non-legal ethical or service duties may not always be easy to draw. As highlighted above, rules of good administration may share both characteristics, or encompass areas of legality and areas that go beyond legality. At any rate, in European law, the rules of the Code that do not correspond to legal principles or to acknowledged procedural and substantive rights are, in principle, non-binding rules of good administrative practice. They are only enshrined in codes of conduct – the one suggested by the Ombudsman and those adopted by the European institutions and bodies – that are published in the C-series of the Official Journal or merely in the agencies’ websites.

As a rule, these are internal measures that can be considered binding on their authors on the basis of the maxim *patere legem quam ipse fecist*. This is valid for the Code applicable to the staff of the Council as well as to the code of conduct applicable to the staff of the European Parliament. The former, while stating that the Council’s staff *shall* observe the code’s provisions, indicates that compliance is to be ensured internally.⁵⁹ Moreover, the decision adopted by the Secretary General of the Council explicitly excludes that the code’s rules may be intended as creating additional rights: their purpose is merely to facilitate the implementation of rights and obligations stemming from the Treaty and secondary legislation.⁶⁰ The latter, which comprises rules on the general duties and on the service obligations of officials and other servants, expressly rejects its binding nature: it gives “directions of use” and is “intended to provide an ethical frame of reference”.⁶¹

The Commission’s Code is the only one published in the L-series of the Official Journal, it is drafted in terms that ascertain its binding nature,⁶² and it is incorporated, as an annex, in the Commission’s rules of procedure, therefore sharing its binding effects – i.e. these rules can be relied upon by natural and legal persons to the extent that they are intended to ensure the protection of individuals and not only the organisation of the internal functioning of its services in the interests of good administration.⁶³ While the Code proposed by the Ombudsman comprises rules of both types, the Commission’s Code tends to restrict the scope of those rules that could be considered as intended to protect individuals.⁶⁴

⁵⁷ The expression “culture of service” or “service culture” is used in the EO ARs and in the speech *cit.*, note 28.

⁵⁸ Article 12 (1) and (3) of the Code.

⁵⁹ Cf. Article 3 of the decision and Article 1 of the code (annex to the decision). For full references, see note 43. This obviously applies to all the content of this code – which is considerably shorter than the one proposed by the Ombudsman – but, arguably, it is particularly pertinent with regard to this layer of rules.

⁶⁰ Article 3 of the decision, *cit.*, note 43.

⁶¹ Code, *cit.*, note 43, point 4, p. 3, quoting the second report of the Committee of Independent Experts to support this option.

⁶² See provision on the scope of the code (references on note 43). Cf. the observations of the Ombudsman in the Special Report *cit.*, note 9, Part C, on an earlier draft of this code.

⁶³ Case C-69/89, *Nakajima All Precision Co. Ltd v Council* [1991] ECR I-2069, para. 49 and 50; Joined cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89, *BASF AG and others v Commission* [1992] ECR II-315, para. 78.

⁶⁴ Cf. Article 22 of the Code and Article 4 of the Commission’s Code, as well as Articles 16, 18 and 19 of the Code and Article 3 of the Commission’s Code.

4. The Code's Function and Outlook

The Code has been partially successful in its immediate purpose, given that the Commission, the Council and the Parliament have adopted codes of good administrative behaviour (albeit with differing contents) and many European agencies have used either the Ombudsman's or the Commission's code as a blueprint for their own codes. Its ultimate aim – the adoption of a law defining common rules of conduct for the European institutions and bodies – was however not concretised, nor does it seem that it will be, at least not in a near future. In this context, what is the current relevance of the Code, apart from contributing to clarifying the concept of good administration, as was argued above?

To begin with, to the extent that the Code heralds the Ombudsman's contribution to the respect and furtherance of previously established rules and principles as well as to the establishment of 'new' standards of administrative conduct directed at promoting a culture of service, the Code seems to fulfil some of the original purposes for which it was adopted.⁶⁵ Indeed, it can be a valuable indication to European institutions and bodies as well as to the public on which actions are likely to be sanctioned by the Ombudsman. Complainants do argue on the basis of the Code in their cases before the Ombudsman and the institutions and bodies summoned by him do acknowledge their duties under the Code.⁶⁶ However, a glance at the 'quantitative use' of the Code in the Ombudsman's decisions and draft recommendations seems to indicate that resort to the Code is not necessarily the rule. Between January 2001, the year in which the Ombudsman sent its special report to the Parliament on the adoption of codes of good administrative behaviour, and January 2009, only 320 decisions and 23 draft recommendations mentioned the Code, out of 1319 decisions and 99 draft recommendations issued on cases of maladministration.⁶⁷ Moreover, there are signs that the institutions may accept only the rules of their own codes. For example, the Commission has indicated that, in its view, only its own code is binding upon it, in a case where this would have not made a difference (at stake were rules common to both documents).⁶⁸ Furthermore, it is noteworthy that the Code is not always fully shared by the institutions and bodies. Their own codes of conduct range from reproducing the content of the Code drafted by the Ombudsman and acknowledging it as their main source – this is the case of the codes of a few agencies, although most preferred to reproduce the Commission's code – to omitting quite a few of the rules as well as any reference to the Code.⁶⁹ A sign that the Code as such ranked low in the European institutions' priorities may be the fact that, in December 2008, only two had reported the implementation of the Code, under Article 27.⁷⁰

⁶⁵ Cf. Code, Foreword by the European Ombudsman, on-line version (note 5) p. 4.

⁶⁶ See the complaints quoted, notes 34 to 36.

⁶⁷ This are the results from a search in the database of the Ombudsman's site, using only the terms "maladministration" and "code of good administrative behaviour" as a filter. The results for "maladministration" may be an indication of the total amount of decisions and draft recommendations. The results for "code of good administrative behaviour" do not discriminate if they refer to the Code or to others adopted by the institutions and bodies, nor if they are invoked by complainants or by the Ombudsman. They do, however, give a general indication on the use of the Code.

⁶⁸ Decision on complaint 3398/2005/ELB against the European Commission, 29 December 2006, cf. the complaint and the Commission's observations on the complainant's observations (Part 2).

⁶⁹ An example of the former is the Code of the European Food and Safety Agency (http://www.efsa.europa.eu/EFSA/efsa_locale-1178620753812_1178620791688.htm). The Codes quoted in note 43 are examples of the latter.

⁷⁰ Report presented by Marta Hirsch-Ziemińska, lawyer at the European Ombudsman Office on "The application of the European Code of Good Administrative Behaviour by the European institutions" in the conference "In pursuit of good administration", Council of Europe in co-operation with the Faculty of Law and Administration University of Warsaw, Warsaw, 29-30 November 2007 (http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/conferences/DA-ba-Conf%20_2007_%209%20e%20-%20M.%20Hirsch-Ziembinska.pdf). However, this report gives a different interpretation to this fact: according to the author, the small number of reviews received indicate that "the application of the principles of the Code did not cause difficulties" (p. 9).

Next, the Code indicates rules of good administrative practice that, even if deprived of direct legal content, may become legally relevant insofar as violation of these rules may affect procedural rights recognised by European law.⁷¹

Moreover, from a normative point of view, the Code may sketch possible future developments of European administrative law, in particular with respect to those rules for which the Code and the Ombudsman's decisions are the only source in European law. In fact, the Code draws on administrative laws of Member States – both from national administrative procedure codes or acts and from national guides of administrative practice – as well as on international legal documents.⁷² Arguably, this makes it a privileged source for further normative developments. In particular, on the basis of the principle of good administration, the Court may consider that some of these norms should be legal rules, to the extent that they are shared by some Member States and that, in new political-legal contexts, they may be legally significant to the solution of specific problems arising in EU law.⁷³

In fact, in certain national systems, some of the rules of the third group identified above are binding legal rules. Some are comprised in the duties of information and respectful conduct to which public employees are bound in the exercise of their functions.⁷⁴ These duties, which are considered by law to be inherent to the exercise of a public function, are part of the specific disciplinary status applicable to public employees and are sanctioned through disciplinary action.⁷⁵ In the UK, some of these rules flow from the Civil Service Code, whose terms departments and agencies must incorporate in the conditions of service (e.g. duty to correct errors promptly).⁷⁶ Other administrative duties, such as that of keeping records of mail and documents, or the rules on the transferral of a letter or complaint to the competent services, are general rules of the administrative procedure.⁷⁷ In some systems, other rules of this third layer are drafted in terms of rights or faculties of citizens, which are legally protected by binding acts. Such is the case of the right to receive or to obtain an acknowledgment of receipt,⁷⁸ the right to know

⁷¹ Cf. Case T-157/94, *Enidesa v Commission*, para. 24 and 25, and *Dynamiki*, *cit.* (note) para. 159, *a contrario sensu*.

⁷² Special Report, *cit.* (note 9), Conclusion and recommendation n.º 2, note 9.

⁷³ On the process of reception of legal rules and principles in EU law, see, among others, Pierre Pescatore (1980), « Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres », *Revue internationale de droit comparé*, Vol. 32, n. 2, pp. 337 – 359.

⁷⁴ In Portugal, see Article 3 (6) and (10) of the “Disciplinary status of workers exercising public functions” (Law n.º 58/2008, 9 September, DR [*Diário da República*] I, n.º 174). In the Spanish system the lack of consideration or incorrect behaviour towards the persons in their dealings with the administration may constitute a breach of the duties of public employees (Articles 7, o) and 8, c) of the “Disciplinary regime of State civil servants” – Royal Decree n.º 33/1986, 10 January, BOE [*Boletín Oficial*] n.º 15, still in force after the adoption of Law n.º 7/2007, 12 April, BOE n.º 89; see also the principles of conduct enshrined in Article 54 (1) and (4) of this law). Curiously, being treated “with respect and deference by authorities and officials”, which may be deemed equivalent to being treated courteously, is also a citizen’s right (Article 35 (i) of Law n.º 30/1992, 26 November, BOE n.º 23).

⁷⁵ Specific status of public employees have survived the reforms that civil service went through in many European countries in the past two decades, namely the alignment between civil servants status and private employees’ working contracts (Christoph Demmke, 2004, *European civil services between tradition and reform*, EIPA: Maastricht, p. 95).

⁷⁶ Rule 4.1.5 of the Civil Service Management Code (<http://www.civilservice.gov.uk/iam/codes/csmc/index.asp>) and rule 7 of the Civil Service Code (<http://www.civilservice.gov.uk/iam/codes/cscodex/index.asp>). It should be noted that this Code is directed at ensuring the efficiency and proper conduct of the services; it is not focused on improving the relationships with the public.

⁷⁷ Regarding the former rule, Article 80, Decree-law n.º 442/91, 15 November, DR n.º 263, I-A, amended (Portugal); Article 38, Law n.º 30/1992, *cit.* (Spain). On the latter, Article 34, Decree-law n.º 442/91 (Portugal); Article 20, Law n.º 2000-321, of 12 April 2000 regarding the rights of citizens in their relationships with the administrations, *Journal Officiel* (France); Article 20, Law n.º 30/1992, *cit.* (Spain); Article 6 (1) (e), Law n.º 241, 7 August 1990, *Gazzetta Ufficiale* n.º 192, amended (Italy; albeit referring to the adoption of formal acts).

⁷⁸ Article 19, Law n.º 2000-321, *cit.* (France); Article 70 (3), Law 30/1992, *cit.*; Article 81, Decree-law n.º 442/91, *cit.* (Portugal). Cf. Article 14 (1) of the Code.

which is the service dealing with the matter concerning him or her,⁷⁹ the right to be informed, where necessary, on how to proceed regarding a certain matter.⁸⁰

Finally, the Code may indicate possible paths to further some of the procedural rights enshrined in Article 41 of the Charter, in particular if the Charter does become a binding instrument (if the Lisbon Treaty enters into force) and if, as a result, the Courts will be more willing to resort to this provision and to foster further developments. As mentioned above, the Code's provisions on the right to be heard and the duty to motivate decisions expand the content of these guarantees beyond what is legally envisaged. For now, the provisions of the Code where the protective role of these rights and duties is strengthened can only be taken as non-legal dimensions of these procedural guarantees suggested by the Ombudsman and not necessarily shared by the institutions.⁸¹ Whether they may or, indeed, should pass the "legal filter" is ultimately a choice of the legal actors on whether certain interests should be legally protected and certain conducts are liable to affect them in a socially relevant way, a choice which is taken in the light of the characteristics and needs of the political-legal system. The composite nature of the concept of good administration and its programmatic goals indicate the limits of this possible process of 'legalisation'.

5. Conclusion

The overview on the vicissitudes of the Code and the genesis of the right to good administration proclaimed in the Charter shows that the existence of the latter's Article 41 is closely connected to the adoption of the Code. However, the analysis of the concept of good administration and of the content of the Code has demonstrated that the latter cannot be interpreted as explicating the content of the right to good administration. Whatever its concrete scope may become, Article 41 draws up the boundaries of good administration as a public subjective right and part of the Code's rules can hardly be perceived as serving primarily the protection of the individuals in their dealings with the European administration. Moreover, the Code clarifies the content of good administration to the extent that it highlights the legal and non-legal ramifications of the concept, thereby pointing out its specific trait: the combination and the continuities between its legal and non-legal dimensions. In particular, it recalls that the administration should endeavour to further certain aspects of good administrative practice that stand beyond the strict legal realm. This applies also to non-legal dimensions of legally enforceable procedural guarantees, such as the right to be heard and the duty to state reasons. In this sense, detaching the Code from Article 41 – and hence overlooking their original intertwinement – is an essential step to properly understand the Code's contribution to the development of European administrative law. Indeed, irrespective of the effective achievement of the Code's stated aims – its adoption by the European institutions and its transformation into a binding legal instrument – the Code may indicate possible legal developments of good administration.

⁷⁹ Article 61 (2), Decree-law n.º 442/91 (Portugal); Article 35 (b), Law n.º 30/1992, (Spain); Article 4, Law n.º 2000-321 (France); Article 5 (3), Law n.º 241/1990 (Italy).

⁸⁰ Articles 7 (1) (a) and 61 (2), Decree-law n.º 442/91 (Portugal); Article 35 (g), Law 30/1992 (Spain); Article 10-bis, Law n.º 241/1990 (Italy; restricted to a specific type of procedures).

⁸¹ For example, the Commission's Code departs from the more "activist" stance of the Code regarding the right to be heard: its staff must respect this right, "where Community law provides that interested parties should be heard" (Article 3 of the Commission's Code, *cit.*, note 43, under the heading "listening to all parties with a direct interest"). This formulation is repeated in Article 16 of the Code adopted by the European Chemicals Agency (http://echa.europa.eu/doc/FINAL_MB_11_2008_Code_of_Good_Conduct.pdf).