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Alexander Balthasar*

Foreword to the ELI-SIG Papers

In June 2017 and in June 2018, the then newly formed 'Administrative Law Study and Interest Group' of the European Law Institute (ELI) met in Budapest, at Andrássy University, for two conferences. The main idea was – as it is in general the remit of ELI – to meet colleagues from all parts of Europe (several local universities, AUB, ELTE and CEU, included) and to discuss in such an inspiring climate matters of common interest. Whereas the first conference had a somewhat general focus (starting with 'generalia and fundamentalia' and then tackling such a classical topic as 'the right to good administration' as well as various fields of 'administration in action', ranging from mutual recognition to the impact of independent agencies, from access to documents to environmental law and to such a burning issue as migration, the second one centred on the Commission's White Paper on the Future of Europe [COM(2017) 2025 of 1 March 2017] and its possible impact on administrative law.

Moreover, the conferences gave the opportunity to visit the Kúria (2017) and the Hungarian Constitutional Court (2018) and thus to make direct contact with the presidents of these courts, Péter Darák and Tamás Sulyok, respectively. On the other hand, we also had, as a participant in the second conference, a member of the European Political Strategy Center of the European Commission and thus actually first-hand information on the most recent ideas and developments in our field.

Whereas it is, therefore, quite true that the principal purpose of these two conferences was to build bridges and to exchange thoughts, I am very grateful that vice dean Pál Sonnevend of the ELTE Law Faculty – in his capacity as co-organiser of these conferences – offered the additional opportunity to publish a fully-fledged written version of the presentation in this journal. You will therefore find four contributions assembled in this issue – some more are still in the pipeline.

I do hope that you will enjoy reading and I would be glad if you could be motivated by this to join ELI in general and our group in particular – our Europe needs scientific cooperation and enhanced mutual understanding, perhaps today even more than in former decades.

Alexander Balthasar

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Alexander Balthasar*

Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law?**

I 'Alternative to What' and Why Do We Need It at All?

The term 'ADR' seems to have been coined, some decades ago, in the context of *US private law court proceedings;*[1] hence, it originally reflects the *dissatisfaction* of US society of that time (judges included) with *this type* of proceedings;[2] however, the concept also spread over to other parts of the world and also to other fields of law,[3] such as *administrative* law, the

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** This paper was originally presented in English at a conference held at the Masaryk University Brno in April 2016 and subsequently published in Czech (Alternativní řešení sporů ve správním právu – významný krok vpřed pro větší spokojenost občanů, nebo trojský kůň pro právni stát?) in Soňa Skulová, Lukáš Potěsil et al. (eds), *Prostředky ochrany subjektivních práv ve veřejné správě – jejich systém a efektivnost* (Beck 2017), 419 ff.

1 Cf Carrie Menkel-Meadow, Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal' in Regulating Dispute Resolution, in Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger, Carrie Menkel-Meadow (eds), *ADR and Access to Justice at the Crossroads* (Hart 2013, Oxford), 419ff, 422; Elena Nosyreva, 'Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation' Annual survey of International & Comparative Law 2001, 7ff, 8f. See now the definition given in Sec 651 (a) of the US Code as amended by the Alternative Dispute Resolution Act of 1998: '… an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration…'

2 See Menkel-Meadow (n 1) 422. Nevertheless, the essence of ADR seems to be deeply rooted not only in US history, but already in mediaeval English common law tradition, see Michael McManus, Brianna Silverstein, 'Brief History of Alternative Dispute Resolution in the United States' (2011) 1 (3) Cadmus 100-105; cf also Nosyreva (n 1) 11, cf, however, also infra n 10 for the impact of *Canon Law* on the development of arbitration in England.

3 With regard to *penal paw* it seems that one has to distinguish between
(i) the classical 'plea bargaining' which developed already in the early 19th century in the US and has gained nowadays overwhelming importance there (cf. George Fisher, *Plea Bargaining's Triumph. A History of Plea Bargaining in America* (SUP 2003, Stanford), but also Paul Craig Roberts, 'Die nackte Haut zum Kadi tragen' <https://www.freitag.de/autoren/der-freitag/die-nackte-haut-zum-kadi-tragen> accessed 2 April 2019.
(ii) forms of genuine 'ADR' like the 'Tatausgleich' (paragraph 204 of the Austrian Penal Law Procedures Act [StPO]) which developed much later than (i).

topic on which we now focus.[4] *This finding, however, far from being obvious, causes bewilderment in two respects:*

(i) Isn't *'access to court'* one of the essential features of the 'rule of law', and, therefore, enshrined in all our high-ranking human/fundamental rights documents – at the global and continental level (Article 8 UDHR; Article 14 ICCPR; Article 6 ECHR; Article 47 EUCFR)?

So: if there are any shortcomings in existing procedural law or practice – *why* not thinking of amending the shortcomings *within* the court's procedure rather than seeking an external alternative?[5]

(ii) Even seeking for 'alternatives' to court proceedings could be justified with regard to US private law court proceedings, is there sufficient commonalty to seek 'alternatives' with regard to *European administrative* law proceedings as well?

What is more, the term of 'ADR in *Administrative* Law' seems to be *ambiguous:*

When looking into the US Administrative Dispute Resolutions Act of 1996,[6] we see that the means mentioned there ('any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombudsman, or any combination thereof')[7] are meant already as an *alternative to 'administrative proceedings'* which 'have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes'.[8]

Apparently, however, 'ADR' may also be understood in a narrower sense, focusing not primarily on 'alternatives' to the proceedings led by an administrative authority, but rather *to*

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[4] Cf the Recommendation of the Committee of Ministers of the *Council of Europe* Rec (2001)9 on alternatives to litigation between administrative authorities and private parties and, apart from Nosyreva (n 1), Aldo Sandulli, 'L'arbitrato nel codice del processo amministrativo' (2013) 2 Giornale di diritto amministrativo and the contributions assembled in Dacian Dragos, Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014), parte pro toto, the following literature: Polonca Kovač, 'Mediation and Settlement in Administrative Matters in Slovenia' (2010) 10 (3) Hrvatska Javna Uprava 743ff; Salvija Kavalnė, 'Mediation in Disputes between Public Authorities and Private Parties: Comparative Aspects' (2011) 18 (1) Jurisprudencija 251ff; Gatis Litvins, 'Alternative Methods of Judicial Protection and Dispute Resolution in Administrative Law' (2013) spec edn, 1 European Scientific Journal 371ff; Gregory Garde, 'Alternative Dispute Resolutions – Can it work for Administrative Law' (of 26. 2. 2014, <http://www.austlii.edu.au/au/journals/VicJSchol/2014/2.pdf> accessed 2 April 2019). Just for clarification: for the purpose of this presentation, neither Investor-State Disputes nor relationships between public bodies are considered to be covered by the term 'administrative law' and are therefore left aside.

[5] One answer could, of course, be that communication between human rights lawyers and practitioners of procedural law is suboptimal, to the extent that, in the view of the judicial review remains a *dream* whereas the latter have come to consider it rather as a nightmare, a *trauma*…

[6] Pub. Law 104–320; below: ADRA.

[7] § 571 (3) of the US Code, as amended by the ADRA of 1996. Note the slight differences between this definition and that applied for private law procedures (cf supra n 1).

[8] Section 2 (2) of the ADRA of 1996.

the proceedings of an administrative law court and, thus, also considering 'administrative appeals', besides 'mediation' and 'ombudsman', as part of 'ADR'.[9]

In order to assess the need for 'ADR' in 'Administrative Law' properly, covering *both* meanings we have, therefore,

(i) to look first at the role *courts* play in *private* law, taking also into account divergences between Anglo-Saxon and European (continental) tradition;

(ii) it is only afterwards that we are able to assess whether the reasons that are valid to justify 'alternatives' in private law may also be invoked in the field of administrative law, the structure of which, as is well-known, cannot be fully equated to that of private law. In addition, we will also have to deal with alternatives to the proceedings of an administrative *authority of first instance.*

II ADR and the General Role of Courts in Private Law

1 The Fundamental Principles: Subsidiarity and Judicial Self-restraint

Acting in the sphere of private law is, with only a few limitations, acting by virtue of one's *private autonomy;* hence,

(i) the *settling of disputes* between the parties concerned also remains, at least in principle, within their ambit of private autonomy, still following the overarching paradigm of private law, i.e. the *model of contract.* The State and its courts have come into play mainly only in a *subsidiary* manner, i.e. if the parties did not find a peaceful way to solve their dispute among themselves, due to the progressive prohibition of taking the (enforcement of the) law into one's own hands.

(ii) at least in the original concept, the main focus of state courts in private law cases was just to provide an *formal alternative to a private feud, not* so much to establish *material 'justice'* by 'investigating the real facts' (i.e. 'the truth'), nor a specific care whether each party was likewise capable of making use of its procedural rights in a sufficiently effective manner.

2 The Mitigations of the Original Judicial Self-restraint in Continental Law

It has to be said, however that, at least *on the European continent,* this original concept has already undergone successive and considerable changes (at least mitigations) for *centuries* with regard to the procedural role of the *court:*

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[9] See for such an understanding (i) Dacian Dragos, Bogdana Neamtu, 'From the Editors: The Story of a Comparative Interdisciplinary Research Project' in (n 4) V; (ii) Brian J Preston, 'The Use of Alternative Dispute Resolution in Administrative Disputes. A Paper presented to the Symposium on Guarantee of the Right to Access to the Administrative Jurisdiction' on the Occasion of the 10th Anniversary of the Supreme Administrative Court of Thailand' (9. 3. 2011; available under: <http://www.lec.justice.nsw.gov.au/Documents/preston_use%20of%20alternative%20dispute%20resolution%20in%20administrative%20disputes.pdf> accessed 2 April 2019), referring to the Australian use of the term.

Already since medieval times, we notice the influence of the ecclesiastical ('canonical') procedure (building on the *'cognitio extra ordinem'* and the *'cognitio summaria'* of the ancient Roman Empire), where the duty of the judge to investigate *ex officio* was strengthened and the time-consuming formalism was significantly reduced.[10]

With regard to the public interest (both in speedier proceedings and in substance), some issues of private law were subsequently conferred to *administrative* authorities, at least for a *provisional judgement;* as a consequence, the principles of administrative proceedings (in particular: a reasonable investigation of 'the truth' *ex officio*) started to apply to these private law cases as well.[11]

Closely related to these issues are those matters (mainly in the field of family law)[12] where a non-contested procedure has to be applied by private law courts.

Finally, with regard to Austria, I would like to mention that we had an in-depth reform of private law proceedings at the end of 19th century,[13] which aimed to reduce most of the inherited formalism[14] and which, therefore, could in turn serve as a model for the (still much simpler) codification of our general administrative proceedings some 25 years later[15] (and nowadays it is exactly this codification which governs, only slightly adapted, the proceedings of our recently established administrative courts, too[16]).

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[10] Cf e.g. Olivier Descamps, aux origines de la procédure sommaire: *Remarques sur la constitution Saepe contingit,* and David von Mayenburg, Die Rolle des kanonischen Rechts bei der Entwicklung des officium iudicis als rechtliche Handhabe in Untertanenkonflikten, both in Yves Mausen, Orazio Condorelli, Franck Roumy, Mathias Schmoeckel (eds), *Der Einfluss der Kanonistik auf die europäische Rechtskultur* Bd. 4. Prozessrecht (Böhlau 2014, Köln – Weimar – Wien) 45ff, and 113ff, in particular until p. 126. In contrast, Canon Law in *England* did not so much influence procedures *in* court but *arbitration* as the major *alternative,* see Anthony Musson, 'The Influence of the Canon Law on the Administration of Justice in Late Medieval England,' in the same volume, 325ff, in particular 326–334.

[11] Cf, with regard to Austria, already *Maria Theresia's* decision of 30. 1. 1751 [see Alexander Balthasar, Die unabhängigen Verwaltungssenate. Verwaltungsbehörden und/oder Verwaltungsgerichte? (Manz 2000, Wien) 71, fn 301]. Cf further Article 118 (3) of the Austrian Federal Constitution (B-VG) where the *municipalities* are conferred with the task of establishing 'öffentliche Einrichtungen zur außergerichtlichen Vermittlung von Streitigkeiten' (public bodies for the settlement of disputes outside the courts). In contrast, the most recent Austrian Federal Act on ADR (Federal Law Gazette – BGBl I 2015/105, implementing Directive 2013/11/EU) is considered to be part of private law.

[12] These issues seem to have formed part (at least in Austria before 1848), of the competences of feudal landlords [see Balthasar (n 11) 71, fn 300].

[13] Imperial Law Gazette – RGBl 1895/113.

[14] See e.g. Walter Rechberger, 'Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa' (2008) 25 Ritsumeikan Law Review 101ff.

[15] BGBl 1925/273ff.

[16] Cf in particular paragraph 17 of the Verwaltungsgerichtsverfahrensgesetz, – VwGVG, BGBl I 2013/33 and paragraph 62 of the Verwaltungsgerichtshofgesetz – VwGG, BGBl 1985 (current version).

3 Remaining Reasons for Seeking Other 'Alternatives'

While the subsequent reforms just mentioned may have decreased the need on the continent to look for ADR in the field of private law, it is nevertheless – to the extent that 'private autonomy' is allowed to rule private law cases – still perfectly legitimate for the parties to *agree conjointly* on *tailor-made dispute resolution tools* (mainly to arbitration, but also to mediation), allowing the autonomous selection

- of appropriate judges[17]
- of the applicable law (substantive as well as procedural)
- of the legal effects of the ruling.

The main drawback (at least of genuine arbitration) is, however, that significant *imbalances between the parties* concerned are very likely to affect the quality of the result directly, so that external supervision by state courts will be needed at least to ensure that the fundamental conjoint agreement was actually concluded by both sides in a sufficiently voluntary manner.[18]

III ADR and Administrative Law

1 The Vertical Relationship

a) The fundamental principle: judicial review of the legality of administrative acts

It is quite obvious that the role of a *court* acting in the field of *administrative* law is quite *different* to that in *private* law, due to the fact that the role of an administrative *authority* differs substantially from that of a *private party:*

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[17] There might be many reasons to prefer an autonomous selection of judges:
(i) As to *quality,* most state jurisdiction systems provide three or even more stages of courts, the most qualified judges being found only at the top of the hierarchy; in addition, specific knowledge is not always available within the deciding court of a sufficient quality. Parties could therefore agree to nominate a panel of top judges already at first instance but this would reduce the options for appeal.
(ii) As to *quantity:* more often than not a considerable backlog of cases impedes speedy decisions to incoming cases. A court of arbitration appointed by the parties concerned may start to deal with the case without any delay.
(iii) As to *balance of composition,* while the composition of a state court chamber is up to court organisation and, in all events, limited to judges appointed in that specific state, an arbitration panel may be composed of judges of different nationalities, thus reflecting better, in particular with regard to international cases, the complexity of the case; in addition, also other balances (gender, religion, …) might be considered as felt appropriate.

[18] Cf in this regard in particular the quite recent judgements of German civil law courts (of first instance and at the appeals stage) in the *Pechstein* case, where a previous judgement rendered by the Court of Arbitration for Sport (CAS) was considered void for want of free consent of the athlete (see interim judgement of the Appeals Court Munich of 15. 1. 2015 – U 1110 / 14 Kart).

At least to the extent that an administrative authority is bound by the *principle of legality,*[19] it may still be allowed *some discretion*, but it *lacks* the full amount of *private autonomy*.[20]

Hence, given the overarching paradigm of administrative law being the *decision imposed unilaterally* by the administrative authority on the parties concerned,[21] according to 'the law'[22], neither the principle of 'subsidiarity' nor the principle of 'judicial self-restraint' can – with regard to the role of the administrative court – have the same meaning as in the field of private law;[23] rather, the scope of application of both principles is, by the very nature of fact, substantially reduced, because the yardstick of the *judicial review* ('the law') is *not at the parties' disposal.*

b) The remaining field of application of ADR with regard to administrative courts/authorities I: mediation or arbitration

It is, therefore, hard to see how – with regard to a dispute between the administrative authority and the parties concerned[24] – tools such as mediation or arbitration could play a major role as an alternative to the formal proceedings of the authority/the court – as long as 'the law' as the ultimate yardstick is to be preserved.[25]

However:

– 'Mediation' can be most welcome with regard to *improving communication,* in particular by providing 'translation' in both directions, thus helping to convince the authority, as well as

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[19] Note that this principle has been inserted in the horizontal provision of the EUCFR containing the limitations for fundamental rights (Article 52 [1]: 'any limitation … must be provided for by law'), following the model of the ECHR (cf Articles 5 [1], 8 [2], 9 [2], 10 [2], 11 [2]; cf also Articles 2 [1], 6 [1], 7 [1] conv cit).

[20] This limitation is nowadays considered also to apply when a public body acts within the framework of private law, cf Alexander Balthasar, 'Wer ist künftig zur Sicherung der Gesetzmäßigkeit der gesamten öffentlichen Verwaltung berufen?' (2014) 22 (1) JRP 38 ff, 61, and the (Austrian) case-law and references cited there in fn 202.

[21] Due to the principle of legality applying to all kinds of State action, the vertical paradigm *prevails even in* prima facie *horizontal relationships* such as public law contracts between the State (represented by an authority) and an subordinate individual; the more so, the stricter the legality principle is construed. That is the main reason that the form of administrative contracts flourishes more in Germany than in Austria, cf Harald Eberhard, *Der verwaltungsrechtliche Vertrag. Ein Beitrag zur Handlungsformenlehre* (Springer 2005, Wien – New York) 130.

[22] Following on from the previous footnote, this proposition applies too when the form of the 'decision' is a 'contract' (of public or of private law); that is why Article IV-7 (1) of the 'ReNEUAL Model Rules on EU Administrative Procedure' <http://www.reneual.eu/> states that most provisions on single-case-decision making should apply *'mutatis mutandis'* also for concluding contracts.

[23] Up to now, not even elements of veritable *'plea bargaining'*, well-known in US penal law (see supra n 3) seem to have been introduced in administrative law (maybe with the exception of tax law, where agreements between the tax authority and the tax payer are very conceivable).

[24] See, however, for the horizontal relationship infra lit C.

[25] This assessment seems to be backed by the Rec(2001)9 (which remains rather vague and general with regard to the possible 'scope of alternative means', cf point I/2 of the Appendix), as well as by most of the doctrine cited supra in n 4.

the parties concerned, already at an early stage of the proceedings that a *specific interpretation* of the law will, most probably, be the most reasonable from all perspectives.[26]

– While it seems rather strange that an administrative authority should be allowed to escape from the ordinary judicial review by an agreement concluded by itself with the parties concerned[27], the *legislator* could very well *offer alternatives* – as does indeed the Austrian Federal Constitution, in principle, when enabling the legislator to provide judicial review against administrative decisions by private law courts rather than by the newly established administrative courts.[28] With the code of private law procedure in turn allowing state courts' jurisdiction to be replaced by arbitration (even by courts of arbitration based outside the State's territory), one could indeed wonder whether the legislation now enables a complaint against an Austrian administrative authority to be lodged even at a foreign court of arbitration.[29]

c) The remaining field of application of ADR with regard to administrative courts/authorities II: qualified mediation, including ombudsmen

As the French term for 'ombudsman' – *'médiateur'* – shows 'mediation' in the meaning just outlined above (in subsection 2) can, in principle, also be performed by an ombudsman (general or specialised). Ombudsmen are particularly qualified to enhance public confidence in the proper performance of the duties of administrative authorities (and, in principle, also of courts).[30]

Some Ombudsmen – among them the EU Ombudsman and the Dutch Ombudsman – show a remarkable interest in developing an *additional set of norms* besides the positive

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[26] In a way this has always been the task of *advocates;* unfortunately, however, experience shows that many advocates have a tendency to aggravate and prolong the conflict instead of contributing to find a reasonable solution already at an early stage. That seems to be why the British system still upholds the separation of tasks between 'solicitors' (chosen by the parties) and 'barristers' (who have the exclusive privilege of communicating directly with the court).

[27] Apparently, however, exactly this option seems to have been inserted quite recently into the Italian Code of administrative procedures (cf its Article 12 as amended by Decreto legislativo, 15/11/2011 n° 195, G.U. 23/11/2011); the efficacy of this new provision is, however, stll very limited, cf Sandulli (n 4) 205ff. Cf also, with regard to Germany, Kaspar Möller, *Echte Schiedsgerichtsbarkeit im Verwaltungsrecht. Eine Studie zu Rechtsrahmen und Kontrolle nichtstaatlicher Streitentscheidung im Verwaltungsrecht* (Duncker & Humblot 2014, Berlin), in particular 134ff.

[28] Article 94 (2) B-VG.

[29] Cf paragraph 17 (4) of the Federal Anti-Doping Act, explicitly allowing the athlete to contest decisions of the national Anti-Doping Tribunal (which might be considered as an administrative tribunal!) before the CAS.

[30] Note that the Swedish Parliamentary Ombudsman (the model from which all other European ombudsmen stem) is in a way a general supervisory authority, ensuring that the law (made by Parliament) is observed as diligently by administrative authorities (needed because central government as well as regional executives lack the competence to interfere in individual cases led by – in this regard – independent administrative authorities) as by the courts.

legislation related to the concept of 'Good Governance/Good Administration'.[31] From a 'rule of law' perspective, such an approach is most justified when it would turn out that this 'additional set of norms' is, in essence, derived from *general principles of law* (such as the principle of proportionality, principle of equal treatment, respect for human dignity, fair trial, etc.), which indeed rank at the top of the hierarchy of law but had been neglected by the specific positive legislation. In this case, ombudsmen might *supplement constitutional courts* in particular where they still are missing.

d) The remaining field of application of ADR with regard to administrative courts/authorities III: contesting general administrative norms?

Individual administrative decisions are, more often than not, based not only on ordinary legislation made and passed by Parliament but also on administrative acts of general application, in which the parties of the individual proceedings had not been involved. When it turns out during the individual proceedings that the parties object more to the norm of general application than the individual decision based on it, there should be appropriate legal remedies available to deal with such complaints; if not, it is not only highly probable but also justified from the 'rule of law' aspect that parties seek to disregard that norm of general application they considered to be 'unjust' – even by invoking ADR tools of whatever kind.

2 Administrative Appeals

Appeals to an administrative authority may be considered as an alternative to judicial review if 'ADR' is understood in a narrow sense (see supra section I).

Coming from a country that just abolished its longstanding tradition of administrative appeals (completed by access to one single Administrative Court of highest quality), due to constant and reiterated pressure from Western Europe[32] where the mantra for decades had been to facilitate access to court, I am least prepared to deny the advantages of administrative remedies which have to be exhausted before a complaint to a court may be lodged, in particular:

– Availability of specialised knowledge of a high level
– Uniformity of application of the law[33]
– Affordability for the private parties concerned

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[31] For the EU Ombudsman, see his European Code of Good Administrative Behaviour ex 2001, even now exceeding what some years later had been enshrined at primary law level in Article 41 EUCFR; for the Dutch concept cf Philip Langbroek, Milan Remac, Paulien Willemsen, 'The Dutch System of Dispute Resolution in Administrative Law' in Dragos, Neamtu (n 4) 113ff, 132f ('mainly an ethical category').

[32] See in more detail Friederike Bundschuh-Rieseneder, Alexander Balthasar, 'Administrative Justice in Austria in the Stage of Transition: From Administrative Appeals to Administrative Courts or the Final Stage of 'Tribunalization' of Administrative Disputes' in Dragos, Neamtu (n 4) 209ff.

[33] This is a fundamental requirement of the principle of equal treatment, which can, by the very nature of fact, not be fulfilled to the same extent when jurisdiction is conferred upon a multitude of independent judges (see, e.g., Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Springer 2008, Wien – New York).

These advantages have, however, to be outweighed against the advantages of prompt access to a court, in particular:

– Independence of the judge from political influence
– Qualification to refer to the CJEU.

3 The Horizontal Relationship

When we remember that administrative law has assumed considerable tasks belonging originally and in substance to private law (see supra section II 2), it is, at least in principle, perfectly conceivable to reverse that development. Consequently, administrative law would then require, as a precondition for administrative authority starting the core assessment from a purely public interest perspective**,** that all the private parties concerned had mutually agreed on the private law points related to the public law issue.

With regard to only these private law parts 'embedded' in the administrative law case, it would then be also perfectly conceivable to apply again the full range of private law instruments – and, among them, mediation or arbitration as well, in the full meaning of these terms – to these parts of 'Administrative Law'[34].

IV Evaluation

When we try now, after that *tour d'horizon,* to sum up, we might find that things didn't change much compared with the first, provisional assessment we started from in section 1:

ADR is indeed deeply rooted in the context of private law, and the use we can make of it in the context of administrative law as well is most appropriate when the specific structure resembles private law most closely (III 1 b and III 3).

We did, however, also find that the term 'ADR' may serve merely as an indicator of deficiencies of quite a different kind, be they of the quality of legal protection provided by administrative courts compared with the traditional efficacy of administrative supervisory authorities (III 2), or related to countries that still lack a detailed system for constitutional complaints (III 1 c and d).

My personal conclusion is, therefore, a rather sceptical one: let us resist the attempt to cure the alleged shortcomings of the implementation of administrative law by a simple transposition of well-sounding concepts of quite a different origin instead of finding tailor-made solutions for what we should really consider, after a sober and thorough analysis, to be serious deficiencies.

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[34] Cf, however, that the Austrian General Administrative Procedures Code (AVG) has always contained a provision that, in a public hearing, the authority should find a fair settlement of any dispute between private parties [paragraph 43 (5), formerly (6): 'Stehen einander zwei oder mehrere Parteien mit einander widersprechenden Ansprüchen gegenüber, so *hat der Verhandlungsleiter auf das Zustandekommen eines Ausgleichs dieser Ansprüche mit den öffentlichen und den von anderen Beteiligten geltend gemachten Interessen hinzuwirken*'].

Marc Clement*

Breach of the Right to Good Administration: So What?

The right to good administration is now enshrined in Article 41[1] of the Charter of Fundamental Rights of the European Union. It is undisputable that this right is not limited to EU institutions but covers all aspects of the European Union law: as regard the institutions, Article 41 is directly applicable to them[2] and as regard the application of EU law by Member States, the general principle of good administration is equivalent in substance to the content of article 41.[3]

As a consequence, a reference to a standard for administrative action and production of administrative decisions is clearly set by the CJEU. We would like to examine the concrete effect of these standards as regard the consequences that the national and EU courts have to draw in the event of a breach of these requirements. We submit that, according to CJEU case-law, a breach of right to good administration doesn't lead to automatic annulment of the decision that was challenged and that this position may lead to substantial legal difficulties of interpretation for national courts.

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1 Article 41 of EU Charter of Fundamental Rights: '
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
– the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
– the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.'

2 See for instance C-141/12 and C-372/12, 17 July 2014 YS paragraph 67: 'It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, the judgment in *Cicala,* C-482/10, EU:C:2011:868, paragraph 28). Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application.'

3 See same case paragraph 68: 'It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in *HN,* C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.'

I No Automatic Annulment of Decision in the Event of Breach of the Right to Good Administration

In several recent decisions, the CJEU stated clearly that the breach of one of the various rights composing the right to good administration in the administrative procedure does not automatically makes the decision itself illegal:

> C-383/13 10 September 2013 *G. and R.*
>
> 40 To make such a finding of unlawfulness, the national court must – where it considers that a procedural irregularity affecting the right to be heard has occurred – assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.
>
> C-129/13 3 July 2014 *Kamino International Logistics BV*
>
> 79 According to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different.

The approach of the CJEU is a pragmatic one: the right to good administration is a procedural right and a breach would only have an effect if it has a direct consequence on the outcome. This is a pure teleological reasoning, which is a legal technique of interpretation which is very frequently used by the EU Court.

It should be noticed that, in the C-129/13 judgment, the right to be heard, which is an element of the right to good administration, is explicitly linked with the rights of the defence. More precisely, the right to be heard is fully considered to be part of the rights of the defence[4] and the CJEU logically refers not only to Article 41 of the Charter but also to Article 47 and 48 of the Charter, which cover all aspects of the right to fair trial. Articles 47 and 48 are the equivalent of Article 6 and Article 13 of the European Charter of Human Rights. Therefore, given the importance of the rights of the defence, one could be surprised to see that the breach of these rights is of so little consequence. If a right is to be considered as a fundamental right, it would logically lead to the annulment of the decision in the case of breaching this right without further discussions. However, it does not seem to be so automatically. In other words,

[4] C-249/13 11 December 2014, Boudjlida, paragraph 31: 'The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (the judgments in Kamino International Logistics, EU:C:2014:2041, paragraph 29, and Mukarubega, EU:C:2014:2336, paragraph 43).'

does this mean that a breach of a fundamental right is not always severe enough to lead to illegality of a decision that is adopted in violation of this right?

Indeed, the position of the CJEU does not appear to be based on a general consensus and has led to different views from the Advocates General.[5] The reasoning that is opposed to the CJEU case-law is based on the question that, if the right to good administration is part of the fundamental rights and in particular is to be included in the rights of the defence, how is it possible to bargain with this fundamental right?

At this stage, an ambiguity is to be clarified. The CJEU makes a substantial difference between administrative procedure and judicial procedure. If the right to good administration is to be included in the more general set of the rights of the defence, it does not mean that the rights of defence are automatically violated in the event of breach of these rights during the administrative procedure. This could be interpreted as referring to the fact that, during the judicial procedure, the rights of the defence could potentially compensate the breach during the administrative procedure. This means that the right of the defence is to be evaluated globally, from the administrative procedure leading to a decision to the final judicial decision. A mere breach of one step in the administrative procedure does not contaminate the whole procedure if some further steps could compensate the breach. Or, to put it in different words, the lack of contradictory debates during the administrative phase has no effect on the outcome of the judicial procedure as long as the judicial procedure is based on contradictory exchanges between parties.

This differentiation between administrative and judicial procedure is most likely to be a crucial argument in favour of mitigating the effects of flaws in administrative procedures, taking into account that national procedures could be more stringent that the minimum standards proposed at EU level. It should also be stressed that, at first glance, the judge evaluates the legality of the administrative decision and does not prolong, at the judicial stage, the administrative action. It should however be acknowledged that, on this point, administrative justice cultures in Europe probably differ widely and the separation between administrative and judicial action is not always so strict. For instance, in Sweden, first instance courts are delivering environmental consent for industrial plants and are indeed on this specific point playing the role of administrator. In this specific case, there is indeed no clear border line between pure administrative procedure and judicial procedure but this situation is an exception. Countries with autonomous administrative jurisdictions (France, Germany, Italy, Sweden etc.) have historically justified the development of administrative justice by the need for specific procedures when the State's authority is involved. It is understandable that, in this context, the judicial procedure can accommodate a capacity to preserve the public

[5] See for instance Advocate General M. Wathelet in C-383/13 G. and R.: 'I propose therefore that the Court should answer the question referred to the effect that infringement by the national administrative authority of the general principle of respect for the rights of the defence (in the present case, of the right to be heard, as provided for in Article 41(2)(a) of the Charter) (...) means that the measure must be annulled and that the person concerned must be released immediately (...).'

general interest by avoiding pure procedural annulments of administrative decisions. All these cultural differences are highly important and a detailed evaluation would require an in-depth analysis of each national legal system. For the purpose of our demonstration, it suffices to note that there is no Chinese wall between administrative and judicial procedures in Europe.

However, it should also be taken into account that the arguments in favour of differentiated treatments of public authorities are less and less tolerated by citizens.

Another aspect related to the development of this flexible EU case-law is its impact with regard to decisions taken by national authorities on the basis of EU law. In this context, national courts are generally in charge of applying EU law in combination with national procedural rules, as EU law provides in most cases a framework with some possibilities of adaptation to the national context. The case-law of the CJEU states a clear position as regard an infringement of procedural rights: it does not necessary lead to the annulment of a decision. However, this clear position may also be combined with another clear option of the CJEU case-law: the Court also states explicitly that the exact effect of a breach of procedural rules is to be governed by national law as long as the effectiveness principle is not affected.[6] This approach developed in C-129/13 preliminary reference creates an additional ambiguity. What does the effectiveness of EU law mean? One could consider that the effectiveness of EU law lies in material law – such as ensuring the effectiveness of competition rules or avoiding state-aid. One could also see effectiveness as preserving the rule of law the fundamental rights and principles, such as the rights of the defence.

The CJEU approach of the breach of right to good administration is therefore not straightforward and the way to combine national and European procedural case-law is only the first issue to tackle for its implementation.

II A Pragmatic Approach Which Leads to Serious Difficulties

A serious problem in the implementation of EU case-law lies in the burden of proof. It is well-established that rules governing burden of proof are crucial in determining the outcome of a case. The current case-law of the CJEU tends to rely only on the teleological argument: would the decision be different if administrative procedural rights had not been broken? However, it is clear that, depending on who has to demonstrate the absence of effect on the administrative decision, the balance between the parties is completely different. The CJEU rightly excludes to imposing on the complainant the need to prove that the decision would have been different without the breach. Obviously, demanding that complainant prove the effect would not make sense, since the administration could always argue that, being the one who took the decision, it is certain that the decision was not affected by the breach!

[6] C-129/13 3 July 2014 Kamino International Logistics BV paragraph 77: 'None the less, while the Member States may allow the exercise of the rights of the defence under the same rules as those governing internal situations, those rules must comply with European Union law and, in particular, must not undermine the effectiveness of the Customs Code (G and R, EU:C:2013:533, paragraph 36).'

C-141/08 1 October 2005 *Foshan Shunde Yongjian Housewares & Hardwares Co. Ltd* paragraph 94

> Moreover, according to the case law of the Court of Justice, the appellant cannot be required to show that the Commission's decision would have been different in content but *simply that such a possibility cannot be totally ruled out,* since it would have been better able to defend itself had there been no procedural error (see *Thyssen Stahl v Commission,* paragraph 31 and the case law cited).

But what does it mean 'that such a possibility cannot be totally ruled out'? Taken literally, the expression leads to an impossible proof for the administration. It would only save the administrative decisions in cases where the breach is 'external' to the decision process itself or where the appellant does not indicate what information he would be able to provide to the administration. However, one should also emphasise that the wording of the Court stresses the procedural aspect by referring to the capacity for the person to defend themselves. In practice, an appellant just claiming that, by not being heard in the administrative procedure, was not in a position to try to convince the administration would potentially fall under this category.[7] This is equivalent to the hearing in courts: one can never exclude that, by pleading, the judges could change their minds!

There is obviously a remaining tension between the teleological approach, which only looks at the result of the process, and an approach that highlights the role of the procedure: the CJEU case-law does not completely forget procedure. The C-141/08 case is an illustration of this tension. One can consider that at least there is an obligation for the appellant to demonstrate that he had some arguments to present. This could be seen as dialectic reasoning in the evidential process: the appellant has to provide some indications that the hearing would be a serious opportunity to defend the case. This first step would establish a presumption of usefulness for the hearing and the administration would have to react and oppose this presumption.

However, at this stage, these observations are not fully supported by the limited case-law of the CJEU on the topic and one should only conclude that there is still a need from clarification from the Court of Justice.

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[7] See in particular the interesting discussion of the role of oral hearings in the opinion of Advocate General Wahl under case C-154/14 P.: '79. In my view, there is a difference between considering whether a party might have been able to better defend itself, on the one hand, had it been given access to the entire case file and, on the other hand, had it been granted an in camera hearing. While the significance of unlawfully withheld documents can be appraised ex post, (39) that of an in camera hearing cannot: it is impossible to be entirely certain of what actually takes place during such meetings. There is also nothing to prevent a party from submitting other relevant confidential information to the Commission during such a meeting that has not been alluded to beforehand. Hence, if there is a right to an in camera hearing before the Commission, and if an oral hearing is held only once – as in the case under consideration – then the party who was entitled yet deprived thereof, cannot be considered to have been heard at all. (40) In the interest of justice being seen to done, I am thoroughly unconvinced by the idea of validating a pre-emptive reasoning denying an in camera hearing because it could not possibly have helped that party.'

III Access to Justice and Individual Decision

More generally, the issue of access to the Court of Justice for individual decisions remains difficult. The Treaty on the Functioning of the EU in its Article 263 states that:

> 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of *direct and individual concern* to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

This wording is similar to that stated in the initial Treaty (1957) as regard individual decisions. The Lisbon Treaty has however released the condition of 'individual concern' for actions against regulatory acts. As regard administrative decisions, standing is granted only in the case of an act addressed to the person or that the act has a direct and individual effect on the person.

The EU case-law has very often referred to this condition of 'direct and individual concern' for not granting access to the Court to individuals.[8] The so-called *Plaumann* test reads the notion of individual concern in a relatively narrow way by imposing specific qualities on the applicant. Moreover, despite several attempts from many applicants, the *Plaumann* case-law has been regularly recalled by the Court, including in very recent decisions.[9]

It should be noted that this case-law is far from being easily mastered by national courts needless to say that it is complex for applicants to understand as well. For instance, a Dutch Council of State preliminary reference in 2014 reads as follows:

> (1) Must the fourth paragraph of Article 263 TFEU be interpreted as meaning that operators of installations to which, as from the beginning of 2013, the emissions-trading rules laid down in Directive 2003/87 have been applicable, with the exception of operators of the installations referred to in Article 10a(3) of that directive and of newcomers, could undoubtedly have brought an action before the General Court seeking the annulment of Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined by that decision?

This preliminary reference highlights a very technical but very important point. It is well-known that the EU court system is not limited to EU Courts but includes national judges. National judges are recognised as main instruments for the implementation of EU law. It is clear that the development of EU law in virtually all domains of law leads to the need to control its application efficiently. National judges are therefore essential components in the design of

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[8] In judgment of 15 July 1963 *Plaumann*/Commission, 25/62 the Court interprets strictly the conditions for admissibility of a case as they are stated in the Treaty: 'persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'

[9] See for instance the opinion of Advocate General Kokott 12 November 2015 for joined cases C-191/14 and C-192/14

a comprehensive EU judicial system. The key procedural element of this dialogue between national Court and the EU Courts is the preliminary rulings mechanism.

However, an applicant does not have the choice of filing a case in the EU General Court or at national level. Action in national courts would only be admissible if no access to the EU General Court is granted.[10] The test is based on the evaluation of the absence of doubt that the applicant could challenge the decision in EU courts. In the absence of doubt, the national court should declare the application inadmissible. This absence of doubt criterion is not extremely easy to manage precisely due to the fact that the *Plaumann* test creates uncertainty as regard the admissibility: the rule seems to be 'no access to EU Courts,' with an exception in very specific cases where the decision at stake would have a side effect which was not foreseen at the time of the adoption of the act, as was the case, for instance, in the *Cordorniu* decision.[11]

This complexity leads to difficulties in the context of hybrid decisions, i.e. decisions which are a combination of national and EU decisions. For instance, decisions related to reimbursement of EU funds may find their source in a decision from the European Commission to invite the Member State to demand reimbursement of funding granted to a project, for instance in the case of ineligibility of expenses. In this hypothesis, the crucial question for challenging the decision of the Member States is to determine if there was some autonomy for the national authority[12] and if the European Commission decision could have been challenged in EU Courts. The case-law of the EU Court tends to deny the possibility to challenge the decision of the European Commission, considering it as a preparatory act and not as a full decision.[13] The EU case-law also does not easily recognise a direct effect of the decision of the European Commission, as it does not exclude a possibility for Member States to compensate the loss of the recipient of funds.[14]

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[10] See for a recent decision C-663/13 5 March 2015 *Banco Privado Português and Massa Insolvente do Banco Privado Português* paragraph 28: 'In this respect, it must be recalled that, in its judgment in *TWD Textilwerke Deggendorf* (EU:C:1994:90, paragraph 17), the Court held that it is not possible for a recipient of State aid forming the subject-matter of a Commission decision which is directly addressed solely to the Member State of that recipient, who could undoubtedly have challenged that decision and who allowed the mandatory time-limit laid down in this regard in the sixth paragraph of Article 263 TFEU to pass, effectively to call into question the lawfulness of that decision before the national courts (see, also, judgments in *Nachi Europe,* C-239/99, EU:C:2001:101, paragraph 30, and in *Lucchini,* C-119/05, EU:C:2007:434, paragraph 55). The Court has taken the view that to find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumes, by virtue of the principle of legal certainty, once the time-limit laid down for bringing proceedings has passed (judgment in *Nachi Europe,* EU:C:2001:101, paragraph 30 and the case-law cited).'

[11] C-309/89 18 May 1994 *Codorniu SA*.

[12] According to EU case-law, no autonomy is to be granted to national authorities in this context, see arrêt C-383/06 13 March 2008 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening.*

[13] See for instance T-314/04 et T414/04 14 December 2006 *Germany v Commission* or T-29/03 13 July 2004 Comunidad Autónoma de Andalucía c. Commission.

[14] C-417/04 P 2 May 2006 *Regione Siciliana c*/Commission.

To sum up, it is far from being obvious that there is 'undoubtedly' a possibility to challenge the decision of EU institutions at EU level. This mechanism works like a trap for claimants: if they choose the EU Court path they risk being inadmissible, even in cases where *prima facie* they could are not obviously not excluded from the provisions of Article 263, and if they choose the national courts path, the courts could oppose the fact that they have not challenged the European decision.[15]

The narrow admissibility criteria of the *Plaumann* test is therefore a key factor, seriously mitigating the capacity to challenge EU decisions that have huge consequences for European citizens and companies. It should be mentioned that the Aarhus Convention Compliance Committee has explicitly indicated that this admissibility policy is not in compliance with the provisions of the Aarhus Convention.[16] The difficult discussions between the EU institutions and NGOs should be a good opportunity to reconsider access to EU justice for citizens.

This situation is most likely one of the factors explaining the lack of coherence and clarity in the EU case-law: combined with the complexity of each case, the number of cases brought to courts related to these situations, is not high enough. The contrast is huge between the very well developed case-law at national level as regard procedural rules with scarcity of these at CJEU level.

IV A Way Forward?

It could be seen as presumptuous to call for a change in the EU case-law. However, if one would take the right to good administration seriously, access to justice and judicial review of the EU administrative decision are key dimensions of the rule of law. It is not satisfactory that the main way to enforce good administrative behaviour by EU institutions is the action of the EU Ombudsman. As a matter of fact, the office of the European Ombudsman is today playing the central role for EU administrative decision review. Recommendations of the Ombudsman are not without effect and its decisions include all aspects of a case, such as financial compensation or implementation of EU Courts' decisions.

However, the Ombudsman would in any case not be able to restore legality: its role is to play the role of a mediator in order to find a friendly solution. In the complex situations which were identified above, such as reimbursement of EU funding, the ombudsman would have limited impact.

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15 See French Council of State decision 23 July 2014 Commune de Vendranges n°364466: 'Considering that it follows from the case-law of the Court of Justice of the European Union that a decision of the European Commission asking a Member State to recover Community aid unduly granted is binding on the authorities and the national courts when its validity was not disputed within the time-limits before the Union's courts by the aid recipient.' In this recent decision, the French Council of State do not discuss the potential limits of admissibility that the recipient may face.

16 See ACCC/C/2008/32 part I and part II on the website of the Aarhus Convention.

There is obviously a need to reassess the access to justice and judicial review of EU administrative decisions in the light of the substantial development of EU law. Similar standards are to be applied at national level and EU level as regard judicial review[17] and it is not possible to maintain confusion as regard the admissibility of application in EU courts.

It is also crucial to clarify the exact standards to be applied as regard breaches of rights to good administration. The current case-law of the CJEU tends to emphasise the teleological approach. It is fully understandable from a pragmatic point of view and one should avoid developing procedural complexity, which could paralyse administrative action. This is partially the approach taken in French administrative law with the famous *Danthony* case[18]. However, this case-law combines the teleological approach and an identification of procedural guarantees, which are preserved whatever the teleological approach would give. One can already see a step in this direction in the ECJ case-law with the *Altrip* case,[19] where a reference to protection of guarantees is explicitly provided. It remains to be seen if the *Altrip* case is to be understood as specifically targeting environmental law issues or is of a more general nature.

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17 It should be stressed that the CJEU is very demanding as regard access to justice in the context of Aarhus Convention in the context of Member States duties see C-240/09 8 March 2011 *Lesoochranárske zoskupenie VLK* paragraph 49: 'Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.'

18 French Council of State 23 December 2011 Danthony n°335033: 'Whereas these provisions regarding irregularities committed when an organisation is consulted, state a rule which takes inspiration from the principle according to which, although administrative measures must be taken according to the forms and in compliance with the procedures laid down by the laws and the regulations, an error affecting the course of a prior administrative procedure, followed on a mandatory or optional basis, the decision taken is only considered illegal if the evidence proves that it was likely, in this case, to have an influence on the decision taken or that it deprived the interested parties of a safeguard; whereas the application of this principle is not excluded in the case that a mandatory procedure has been overlooked, provided that such an omission does not result in the competence of the author of the measure being affected;' (translation as provided by the French Council of State website).

19 C-72/12 7 novembre 2013 Gemeinde Altrip: 'Subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.'

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