INCIDENTAL PRINCIPLES IN EUROPEAN LEGISLATION. THE PRINCIPLE OF MOTIVATION

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Liana-Teodora PASCARIU¹

Abstract

The status of the general principles of administrative law derives, at the European Union level, mainly from the case-law of the Court of Justice of the European Union, as well as from the practice of international law. This paper seeks to identify the principles deduced from the Community Court, with particular application to the principle of motivation.

Keywords:

european law, general principles, motivation.

JEL Classification: K10, K33

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INTRODUCTION

The interpretation of European Union law is the attribute of the Court of Justice of the Union, deriving from the need to fill legislative gaps, and has been an important source of the formation of the principles of European administrative law. Some authors (B. J. Boulois, 1983) distinguish between principles that are inherent to all legal systems, general principles common to law in the Member States and principles deducted from the nature of the Communities. Other authors, however, systemize the principles into four groups: trust and predictability, openness and transparency, accountability, efficiency and effectiveness.

Certainly, at the level of the European Member States, these principles are included in one way or another in national law, procedures or other regulations.

GENERAL PRINCIPLES OF EUROPEAN LAW

Any analysis of the principles of administrative law must start from their very own legal legitimacy, or in other words, from their authenticity, residing in the capacity to form themselves as autonomous sources of law. The distinction is important because if the principles are respected as a consequence of their inclusion in internal normative acts, we speak of the written source consisting of the legal regulation itself and not of a distinct source as an independent source of law.

Thus, several theories of determining the content of general principles have been issued, based on a minimal theory (J. Schwarze, 2009), according to which the general principles of law apply only if they have a valid statute within the internal law. Of course, in this sense, the role of European Union law is almost inexistent, the only source being in fact the internal law itself.

The opposite theory, to which we agree (I. Alexandru, 2008) stipulates that Union law must incorporate the general administrative principles and, more than that, even the normative provisions in the Member States, capable of offering the greatest protection to the individual. The theory of consensus is also debatable; according to this theory, the principles become applicable if in a particular instance there are similarities between the incident laws of the Member States, without shading the degree of overlapping. Finally, the theory of the evaluative comparison of rights is best reflected in the CJEU jurisprudence, based on the comparative analysis.
of the solutions offered in the laws of the states, after a judiciary reference to the binomial citizen’s interest - administrative reason.

Among the principles outlined in doctrine and jurisprudence, we will focus on the principle of openness and transparency, with a special emphasis on the derived principle of motivation.

While openness implies the ability of the administration to accept suggestions, proposals or views coming from outside, transparency is related to the degree of closeness to citizens. In the legal literature (Mădălina Voican, 2006) the principle also appears as the principle of citizen consulting with a complex content that can be synthesized in several actions: information (ex officio and on request), consultation (public debates, public hearings, referendum), and active participation (legislative initiative and partnerships).

According to other authors (Victor Bădoiu, Alina Sandu and Daniela Prisăcariu), the principle is indissolubly linked to the public policy cycle that goes through six stages: identifying the issue, putting it on the political agenda, formulating the public policy framework, adopting a public policy, policy evaluation, the ultimate goal being to determine its effectiveness.

It was stated (Luisiana Dobrescu, 2013) that the general principles of European law are those unwritten rules of the European Union, which were born after the process of interpreting European law, especially the treaty as a primary source. The interpretation attribute is due to the CJUE within its competencies.

Certainly, the general principles of law recognized by the Court, which are applicable in many branches of law, are different and cover a broad sphere of protection for the individual or the community: equal treatment, non-discrimination, right to a fair trial, defense, proportionality, good governance.

Regarding this latter principle, enshrined in art. 41 of the EU Charter of Fundamental Rights, if we analyze the definition in paragraph 1, we will find that the European legislator relates to impartial, fair and reasonable treatment of institutions, bodies and offices, agencies of the Union.

Furthermore, the enumeration in paragraph 1 attests that the right to good administration includes, on the one hand, the right of every person to be heard before taking any individual measure that might prejudice him, the right of any person to access to its own file, respecting the legitimate interests of confidentiality and professional and commercial secrecy and, on the other hand, the obligation of the administration to motivate its decisions.
THE PRINCIPLE OF MOTIVATION

Motivation as a principle derives consequently from the right to good administration, or, in other words, it is a component of it. Motivation is a principle that goes beyond the administrative acts, as well as the judgments, as well as the administrative-judicial acts. At both administrative and judicial level, the principle stems from the need for the public authority or the court to indicate all the factual and legal reasons that led to the adoption of the act or pronouncement of that solution. From this perspective, we can say that most of the principles listed above are related to the motivation component, to a greater or lesser extent.

Openness, transparency, proximity to the citizen, good administration and, last but not least, proportionality and subsidiarity also imply the principle of motivation. As emphasized in the doctrine (Dana Apostol Tofan, 2006), motivation is an essential element in forming the conviction of citizens about the legality and the desirability of an administrative act, the principle being seen as a guarantee of optimal choice by the public administration.

It is clear that the motivation must concern both facts and law matters in the present case, but the question is to determine to what extent the administration can fulfill this obligation: formally, rigidly, briefly, or elaborately, exhaustively? What are the limits of motivation?

An attempt to answer this question is based on the analysis of the CJEU case law. In one case, the Court points out that the Treaty of Lisbon, in its Protocol on the application of the principles of subsidiarity and proportionality, states that the Court of Justice, when reviewing the legality of legislative acts, is competent to rule on actions on the infringement of the principle of subsidiarity, and the observance of that principle is among the circumstances subject to the obligation to motivation. In Case C-84/94 (European Court Reports 1996 I-05755), it is noted that if a contested measure described clearly the essential objective pursued by the institution, it would be pointless to require a specific motivation for each of the technical options made by it.

In another case (Judgment of November 26, 1975 - Groupement des Fabricants de papiers PEINTS de Belgique and Others v Commission of the European Communities, Case 73-74), the Court examines the extent of the motivation, considering that the solution can be even more reasoned if the case is similar to the previous ones in which the matter was dealt with extensively, the principle is also adopted by the Romanian constitutional
judge, as can be seen from the analysis of the decisions of the Constitutional Court of Romania, especially the ones that reject the exceptions of unconstitutionality, referring to previous decisions, without any further motivation. However, I consider that this technique cannot be extended to the motivation of judgments, since the court must give reasons for the judgment in every similar or identical case.

In fact, in Romania, the principle of motivating judgments is a basic principle of judicial activity, the High Court stating in a case that the judge of the first instance, in order to determine correctly the legal relation inferred to the court, must evaluate the entire evidence material to which the parties referred, not just examine from the point of view of the legal provisions in the matter whether the evidence in the file turn out to be the evidence put forward by the appellant, a fact which is equivalent to the factual lack of judicial review of the merits of the case, which is detrimental to the right to a fair trial as enshrined in art. 6 of the ECHR (Decision No 3338/2011).

In the case of Albina v. Romania (ECHR Judgment of April 28, 2005), the Court points out that the notion of a fair trial implies that an internal court that has merely motivated its judgment has nevertheless actually examined the essential issues which have been subjected to it, and not just resumed the conclusions of a lower court (a conclusion which also emerges from previous judgments, Helle v. Finland, judgment of December 19, 1997, Reports of Judgments and Decisions 1997 - VIII, p. 2930, paragraph 60).

In the present case, it is stated that the mere fact that the Court of Appeal recalled the decisions taken in this case by the lower courts and the arguments on which they were founded could not exempt it from the obligation to examine the issues raised on appeal by applicant (paragraph 16). That would have been justified since the lower courts whose judgments had been summed up by the Court of Appeal had reached radically different conclusions, so that the Court of Appeal was in turn called upon to decide and give a final and irrevocable judgment. In those circumstances, the Court was unable to endorse the Government's argument that the reasons for which the Court of Appeal dismissed the applicant's appeal were contained in the judgment of September 8, 1999, on the whole (paragraph 28).

Also at European level, Opinion no. 11/2008 of the European Judicial Council's Advisory Council attests that the motivation allows not only a better understanding and acceptance of the judgment by the judge,

but it is especially a guarantee against arbitrariness. The quality of the judgment depends mainly on the quality of motivation, a good motivation being an imperious necessity that cannot be neglected in favor of celerity. A good motivation requires the judge to have the time to prepare the judgment. It also shows that the extent depends on the various grounds which a party may raise in court, and by laws, customs and doctrinal principles and practices for writing different decisions in different states. Finally, in order to meet the requirements of the fair trial, motivation should point out that the judge has really examined the essential issues that have been presented to him.

I mentioned briefly the principles that interfere with the principle of motivation, but the principle of proportionality, which is invoked especially in the situation of the prevalence of a right in the face of another right, or in the analysis of the binomial public interest - private interest. The principle of proportionality cannot be weighed efficiently if the administrative or judicial measure is not motivated, in order to verify the degree of the restrictiveness of the measure.

**CONCLUSIONS**

Motivation is one of the most important principles stated and developed in national and European law, being a standard of qualitative administrative and judicial act. The general principles of law, including the one outlined, could also be developed through their recognition by the Court of Justice of the European Union, especially in the case of the shortcomings in the primary and secondary legislation, which required the identification of legal grounds applied to the analyzed cases.

It remains the duty of the States as well as of the entire Union to ensure that there are sufficient legal mechanisms to contribute to the respect of the principle of motivation, which is essential for the protection of the individual's rights but also of the community on the whole.

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