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Bucura C. Mihaescu Evans

The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system

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To Christopher and Catalina

Foreword

Good administration is a central constitutional notion of the European Union. Constantly evolving, it had been developed by the Court of Justice of the European Union since the very early case law under the European Coal and Steel Community in the 1950ies. A general principle of EU law, it is also partially codified in Article 41 of the Charter of Fundamental Rights of the European Union, which is a most innovative feature of EU fundamental right protection.

This book on the «The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system» addresses the very essence of these fundamental questions for EU law and policy. It was defended as a PhD thesis at the University of Luxembourg in December 2014. The book is marked by its high quality, methodological clarity, accessibility and the innovative dimension of the topic. The book is based on tremendous body of knowledge acquired through detailed study of the case law in combination with an analysis of the legal literature from various jurisdictions. This leads to a critical evaluation of major issues arising from the still dynamically evolving right to good administration within Europe's de-central system of administration.

The book thereby highlights the importance and vast potential of this right and has the great merit of assessing the right to good administration in its diverse facets, touching upon its different historic, contextual and linguistic developments. It also provides an in-depth assessment of the various sub-components of the right to good administration, such as the right to be heard or the right of access to the file – to name but a few.

The book has the great merit to highlights the (problematic) protection of the right to good administration in the EU integrated administrative system, where decisions are often taken in composite procedures with input from various interlocutors from both national and EU levels, each using different procedural rules.

The study convincingly puts forward some concrete proposals in order to overcome such problematic gaps in protection. It shows that the author is a skilled legal researcher who is equally informed by experience of observation from within of the workings of the Court of Justice of the European Union. Overall, this book is to be recommended due to its great qual-

ities in advancing the knowledge in EU law whilst linking its field of study with matters relating to legal theory and public law in general.

Herwig C. H. Hofmann
Professor of European and Transnational Public Law,
University of Luxembourg

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Summary Contents

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Abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights of the European Union
CJ	Court of Justice
CJEU	Court of Justice of the European Union
CST	Civil Service Tribunal
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ECB	European Central Bank
EIB	European Investment Bank
EP	European Parliament
EU	European Union
GC	General Court
GPL	General Principles of EU Law
MS	Member States
OLAF	European Anti-Fraud Office
TEC	Treaty of the European Community
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

"To include [the right to good administration] in the Charter could have a broad impact (…) helping to make the 21st century the "century of good administration""[1]

1 The European Ombudsman Jacob Söderman solemnly argued that a right to good administration should be inserted in the Charter of Fundamental Rights of the European Union – Jacob Söderman, 'Speech of the European Ombudsman – Public Hearing on the draft Charter of Fundamental Rights of the European Union, Preliminary remarks' (Brussels, Belgium, February 2000), available on <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/355/html.bookmark>.

Introduction

This assertion, as audacious as it may seem, highlights the reality of a modern Administration of the European Union (hereafter the "EU" or the "Union") which is more and more concerned with the protection of "third generation rights" such as the right to good administration. If a while ago the relevance of such a right/principle might have been easily denied[2], good administration has in time increasingly come to the forefront, up to a point that it is now considered even in the context of imperative considerations such as the fight against terrorism[3]. The *Kadi* saga brings to light that the EU Courts are ready to ensure individuals' procedural rights, inter alia, the principles of good administration, even at the expense of a likely diplomatic issue between the Union and the International Community[4].

The utmost importance of the right to good administration is further highlighted by the multiple initiatives which have been taken – at both national and European levels – in the continuous search to strengthen the procedural protection of individuals in their relations with the administration.

Firstly, the overview of the national administrative and legal systems highlights that a vast majority of the EU Member States have explicitly (Finland, Netherlands, Belgium, Estonia) or implicitly (France, Romania, Germany, Denmark, Austria, Spain, Italy etc)[5] recognized the principle of good administration in their respective domestic orders, either by codify-

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2 See e.g. Joined Cases 33/79 and 75/79 *Kuhner v Commission* [1980] ECR 1677, para. 25.

3 This assertion is made in relation to the "Kadi" saga – See Joined Cases C-584/10 P, C-593/10 Pand C-595/10 P *Commission and Others v Kadi* (CJEU, 18 July 2013) and all the *Kadi* case-law preceding it.

4 See Case T-85/09 *Kadi v Commission* [2010] ECR II-5177, paras 113-126.

5 For an in-depth assessment of the various national legal orders as regards their "explicit" or "implicit" recognition of the principles of good administration, see Julie Dupont-Lassale, *Le Principe de Bonne Administration en Droit de l'Union Européenne* (Bruylant 2013), (also PhD Thesis – University Paris II- Pnthéon Assas, 2008), pp. 1-677, at pp. 65-80.

ing it in Administrative Procedural Acts or by providing for its protection in constitutional provisions[6].

Secondly, although there is no explicit reference to the right to good administration in the European Convention of Human Rights (hereafter the "ECHR" or the "Convention"), the ECtHR and especially the Council of Europe have been active in seeking to reinforce the procedural protection of the individual in administrative proceedings[7]. One of the first legal documents explicitly dealing with the underlying principles of good administration was the 1977 Resolution of the Council of Europe "On the Protection of the Individuals in Relation to the Acts of the Administrative Authorities[8]". Since then, various Recommendations[9] and other instruments such as a Handbook on good administration[10] have been adopted. Furthermore, many conferences have been organized at the initiative of the Council of Europe on this particular topic[11] and even a Project Group on Administrative Law (CJ-DA) has seen the light[12].

Finally, at the EU level, multiple steps have been taken by the various players in order to strengthen the legal framework of good administration and thereby set out the procedural principles which are considered to be of

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6 See e.g. Section 21 of the Constitution of Finland of 11 June 1999. For further details, see the comparative study carried out by the Swedish Statskontoret, *Principles of Good Administration in the Member States of the European Union* (Stockholm: Statskontoret, 2005) available at <http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf>, pp. 1-119.

7 See e.g. Matti Niemivuo, Good Administration and the Council of Europe (2008) 14 European Public Law, pp. 545-563.

8 Resolution 77(31) of the Council of Europe, 'On the Protection of the Individuals in Relation to the Acts of the Administrative Authorities' (28 September 1977).

9 See e.g. Recommendation R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities (11 March 1980) and Recommendation CM/Rec (2007)7 of the Committee of Ministers to member states on good administration (20 June 2007).

10 Council of Europe, *The Administration and You. A Handbook* (Strasbourg, Council of Europe Publishing 1996).

11 E.g., Conference 'The Right to Good Administration' (Warsaw, 4 and 5 December 2003); Conference 'Pursuit of Good Administration' (Vilnius, 27-28 October 2005).

12 CJ-DA is responsible for carrying out the legal activities of the Council of Europe in the field of administrative law and justice. For further details as regards the CJ-DA's work on good administration, see Recommendation CM/Rec (2007)7, which added – in Appendix – a Code of good administration.

primary importance for the protection of individuals in the EU Administrative Space.

The notion of good administration has gained significance in the EU legal order especially due to the decisions of the EU Courts; the synonymous concepts of "good"[13], "sound"[14] or "proper"[15] administration have been referred to by the Union judge since its very first decisions in administrative matters[16]. As such, the declaration of the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union (hereafter the "CFR" or the "Charter") constitutes in reality the culmination of an evolutionary process which dates back several decades.

Besides the EU Courts, various initiatives for protecting the right to good administration have been taken by the legislator – including the constitutional legislator – of the Union. Indeed, some Treaty dispositions explicitly provide for certain procedural rights which have been usually protected by the EU Courts under the "umbrella"[17] of the principle of good administration and which are now enshrined in Article 41 CFR[18]. Similarly, several pieces of sector-specific or subject-specific secondary legislation further provide for the need to respect the principle of good administration[19]. A more detailed codification in the form of an EU Administrative law is currently under discussion[20].

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13 See e.g. Case 32/62 *Alvis* [1963] ECR 49, para 1A.

14 See e.g. Joined Cases 1-57 and 14-57 *Société des usines à tubes de la Sarre* [1957] ECR 105, para 113.

15 See e.g.Case C-255/90 P *Burban* [1992] ECR I-2253, paras 7 and 12.

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

17 The word "umbrella" is employed in legal literature in order to describe how disparate rules are clustered together. See e.g. Theodore Fortsakis, 'Principles Governing Good Administration' (2005) 11 European Public law, pp. 207-217, at p. 211. Some other authors qualify good administration as a "matrix" principle – See e.g. Nicolas Marty, 'La Notion de Bonne Administration: À la Confluence des Droits Européens et du Droit Administratif Français' (PhD thesis, University of Montpellier 2007), pp. 1-691, at p. 321 et seq.

18 E.g., Article 24(4) TFEU provides for language rights (Article 41(5) CFR); Article 296(2) TFEU provides for the right to have a reasoned decision (Article 41(2)(c) CFR).

19 See e.g. Articles 7 and 8 of the European Parliament and Council Regulation (EC) 1331/2008 of 16 December 2008 establishing a common authorization procedure for food additives, food enzymes and food flavourings [2008] OJ L 354.

20 See European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union

Last but not least, the contribution of the European Ombudsman should also be recalled in so far as not only has it been very active in assessing cases of maladministration[21], but it has also taken important initiatives in clarifying the meaning of good administration in the EU legal order by drafting a European Code of Good Administrative Behaviour[22]. Following the example of the European Ombudsman, multiple Codes of Good Administration have been adopted by the institutions and bodies of the Union, with the aim of ensuring individuals' protection vis-à-vis the administration[23]. Very importantly, the insertion of the right to good administration in the Charter is partly due to the European Ombudsman's suggestion to codify therein "a fundamental right to an open, accountable and service-minded administration"[24].

All these various initiatives, together with the abundant case-law relating to good administration and the lively academic debate about its contours highlight the real importance of this principle in the EU legal order.

1. Aims of the present study

The right to good administration as it stands today is both a general principle of EU law (hereafter GPL) and a fundamental right codified in the Charter of Fundamental Rights of the EU.

(2012/2024(INI)). See also ReNEUAL, 'Working Document: State of Play and Future Prospects for the EU Administrative Law (19 October 2011), pp. 1-39 and more generally the ReNEUAL's Books, available on: < http://reneual.eu/>.

21 See e.g., Jacob Söderman, 'Good Administration: a Fundamental Right' (2004) Justice and Home Affairs in the EU, pp.113-119; Nikiforos Diamandouros, 'La Contribution du Médiateur Européen à une Bonne Administration au Plan Européen', in *Vers un Modèle Européen de la Fonction Publique? (*Neuvième Journée d'Etudes du Pôle Européen Jean Monnet, Bruylant 2011), pp. 271-279.

22 For an in-depth analysis of the GA Code, see Joana Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour' (2009) 9 EUI Working Papers Law, pp. 1-13.

23 See e.g. the 'Code of Good Administrative Behaviour for Staff of the European Commission and their Relations with the Public' [2000] OJ L 267/20 and the'Guide to the obligations of officials and other servants of the European Parliament' (Code of conduct) [2000] OJ C 97, 1.

24 Statement available on <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/355/html.bookmark>.

The present contribution provides the case study of good administration at the confluence of these two vectors of protection and highlights that there are instances where, even in relation to what might appear to be the same right, there are overlaps and sometimes clear differences as regards its content and level of protection according to its interpretation as a GPL or a CFR right. This study points out that the divergences stemming from the interplay of these two fundamental rights' sources may, in certain instances, take the form of actual or potential conflicts, giving rise to inevitable "gaps" in protection. This makes the insurance of individuals' rights dependent on the level of protection conferred by the source which is held to prevail, leading therefore to many inconsistencies and deficiencies from the standpoint of the rule of law.

Having been conducted within a context marked by the entry into force of the Lisbon Treaty which – by giving binding legal force to the CFR, added a supplementary layer to the already existing "symphony of sources"[25] – this study is a contribution to the debate on the difficult coexistence of the multiple sources of fundamental rights in the EU legal system. The reality of this coexistence gives rise to a large number of questions: How should one order the plurality of sources of law?" How do the various layers of protection interact? What is the relation between them in case of conflict? Are there instances where the outcome of a case is likely to be different depending on the invocation of a certain source of law rather than another; in other words, are there any existing or potential "gaps" in protection? If so, how may such gaps be filled up? Which source is to be relied on in priority, is there a hierarchy among them? Which would be the impact of such a hierarchical order of review with regard to individuals' protection? Is there any room in the EU legal order for an alternative model of review, capable of supplementing the hierarchical approach? Which alternative model would be the most suited in order to confer an adequate and coherent protection of individuals' fundamental rights?

Assessed with regards to the more particular example of the right to good administration, these interrogations frame the main question of this study: Does the codification of the right to good administration in Article

25 Expression employed by Laurence Bourgorgue-Larsen, 'Le Destin Judiciaire Strasbourgeois de la Charte des Droits Fondamentaux de l'Union Européenne : Vices et Vertus du Cosmopolitisme Normatif' in *Chemin de l'Europe: Mélanges en l'Honneur de Jean Paul Jacqué* (Dalloz 2010), pp. 145-175.

41 CFR usurp the broader protection provided by the EU Courts under the GPL status of the notion? In other words, may the general principle of good administration take over where the scope of protection of the Charter's right to good administration ends?

The present contribution will highlight that the scope of protection of the right to good administration and of the various procedural rights codified under its "umbrella" in Article 41 CFR is defined in a significantly more restricted manner than their protection as general principles of EU law, being therefore likely to lead to multiple "gaps" in protection. Having in view the important practical need to ensure a "consistent" compliance with individuals' fundamental rights – inter alia the right to good administration -, this study will argue for a dynamic approach of interpretation of sources, for a "pluralistic" – as opposed to a "hierarchical" – understanding of the relationship between the various layers of protection in the EU legal order, which will be called the "lexical order of review"[26]. This approach – which implies a continuing reliance on the GPL vector of protection – is the best suited to confirm the seriousness of the EU commitment to fundamental rights.

Besides this main purpose of assessing the principles of good administration at the confluence of their various sources, the present study further seeks to put forward the real interest and vast potential of the right to good administration in the EU legal order and especially in the context of "composite" administrative proceedings[27]. With this objective in mind, the general introductory part of this study will be devoted to the analysis of the recognition, development, content and scope of application of the general principle of good administration. Such an overview is indispensable in order to highlight the real potential of this principle.

This contribution further seeks to supply an answer to those who still question the need of a right to good administration in the EU legal order[28]. In this regard, without denying that the right to good administration does

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26 For further details, see Section B. here-after on "An alternative approach: the "lexical order of review", at pp. 49-55.

27 For further details in this regard, see section 3 below: "Good administration within EU "composite" administrative proceedings", at pp. 85-104.

28 See e.g., Rhita Bousta, 'Who Said There is a "Right to Good Administration"? : A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union', European public law. Vol. 19 (2013), Issue 3, pp. 481-488 and Peter Bonnor, 'The Right to Good Administration' (2006) 182 Deutsche hochschule fur verwaltungswissenschaften, pp. 71-93, at p. 76.

not have an independent judicial life of its own – but merely exists via its sub-components which are now listed in Article 41 CFR – this study will demonstrate that the gathering of those principles under the "umbrella" of the right to good administration is likely to have vast potential for the protection of individuals in the EU administrative space.

First, the present contribution suggests that by assimilating individuals' rights during the administrative procedures to those enjoyed in judicial proceedings, the right to good administration leads to a sort of "judicialisation" of the administration[29], being capable of ensuring procedural justice, public administrative adherence to the rule of law and sound outcomes for administrative procedures. It is commonly agreed in this regard that adequate protection of procedural rights at the administrative level may have a positive impact for both individuals and the good functioning of the EU system as a whole; as prevention is better than cure, so good administration is better than remedies for bad administration[30]. In this vein, although a remedy is normally available at the judicial level, on multiple occasions, the solution arrives too late to prevent harmful consequences for the individual concerned. Such a risk may be "prevented" by a proper protection of individuals' rights at the administrative level. On the other hand, the achievement of sound administrative decisions in which individuals' procedural rights are complied with may necessarily have a positive impact in terms of the proper functioning of the EU judicial apparatus in that it is likely to significantly decrease the workload of the EU Courts. In this way, the principle of good administration may be useful for the good administration of justice[31].

Second, this study will demonstrate that since the landmark *TUM* decision[32], the right to good administration has established a "bridge" between

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29 This assertion implies that the procedural rights protected in judicial proceedings should also be observed at the adminnistartive level.

30 See the Committee of Justice, Patrick Neill, 'Administrative Justice: Some Necessary Reforms' (1988), at pp. 7-8.

31 Various terminological confusions are visible within the jurisprudence, when referring to the respective principles of good administration and good administration of justice – See e.g. Case T-148/89 *Tréfilunion SA v Commission* [1995] ECR II-1063, para 142; Case F-96/08 *Cerafogli v European Central Bank* (CST, 28 October 2010), paras 49-50.

32 Of particular relevance in this respect is the landmark *TUM* decision – see Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469, paras 13 and 14.

the discretionary powers of the EU administrative authorities and the protection of individuals in administrative proceedings. The principle of good administration appears to act as a counterweight to the discretionary powers of the administrative players in that it induces the latter, when adopting decisions within their important powers of appraisal, to take the rights of individuals into account. In this way, both the "objective" and "subjective" rationales of the principle of good administration – namely the efficiency and rationality of the administration, on the one hand and individuals' procedural protection, on the other hand, – are concomitantly complied with[33].

Third, this contribution further seeks to highlight the potentiality of the right to good administration to fill the "gaps" of individual protection and to solve problems of legitimacy in the reality of the dynamically developing EU "integrated" administrative system – also known as "composite" administrative procedures – where decisions are taken with inputs from both national and EU administrative authorities, each using different procedural rules. The present study will illustrate that the "composite" nature of the right to good administration, by the strength stemming from the interaction of its sub-elements renders this "umbrella" right capable of ensuring the protection of individuals' procedural rights within such "composite" administrative procedures[34]. Consequently, the right to good administration may be held to constitute the key element of the integrated administrative system, the individual's "ticket"[35] for the protection of his procedural rights in the context of multi-level proceedings.

Finally, this study will highlight that the right to good administration has vast potential in becoming a "trust-enhancing principle"[36] and in bringing citizens closer to the EU institutions[37]. Indeed, by placing the in-

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33 For further details, see sub-section a. "Good administration at the confluence of its "subjective" and "objective" facets", at pp. 106-111.

34 For further detais in this regard, see Section 3. "Good administration within EU "composite" administrative proceedings", at pp. 85-104

35 Expression borrowed from Ivan Koprić, 'Anamarijaand Musa and Goranka Lalić Novak, 'Good Administration as a Ticket to the European Administrative Space' (2011) 61 Zbornik Pravnogfakulteta U Zagreb, pp. 1515-1560.

36 Koen Lenaerts, 'In the Union We Trust: Trust-Enhancing Principles of Community Law' (2004) 41 Common Market Law Review, pp. 317-343, at p. 343.

37 It is important to note in this regard that one of the core tasks of the Convention who established the Charter was to bring citizens closer to the European instititutions.

dividual at the center of preoccupations of the EU administration, by seeking to ensure the fairness of the administration and the corresponding adequate procedural protection of individuals, the right to good administration is likely to become a key element in ensuring citizens' trust in the EU institutions and in improving the latters' legitimacy[38]. It is probably this "trust" rationale of the right to good administration which has determined the enhanced procedural protection of "interested third parties" in certain administrative proceedings[39]. Indeed, in some instances, the EU Courts overstepped the formal conception of the strict standing rules[40], in order to give primacy to the procedural protection of interested third parties[41]. It is therefore not excluded that in the long run, the right to good administration become the privileged instrument for the protection of interested third parties in administrative proceedings[42].

2. *Approach of the thesis. Methods and sources*

As outlined above, the present contribution sets out with the aim of offering an overarching approach to the importance and the vast potential of the right to good administration in the EU administrative space. It also provides an instructive case study for illustrating the necessity to establish a particular order of review of the multiple fundamental rights' sources, which may be capable of overriding the "gaps" stemming from the interaction of the various layers of protection.

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38 See e.g. Päivi Leino-Sandberg, 'Enforcing Citizens' Right to Good Administration: Time for Action' (2012) European Added Value Assessment Research Paper 4/2012, available on <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/eav_lawofadminprocedure_/EAV_LawofAdminprocedure_EN.pdf> accessed 13 May 2014, pp. I-1 – I-46, at pp. I-40 – I-41 and I-43.

39 See e.g. Case T-167/94 *Nölle v Council and Commission* [1995] ECR II-2589; Case T-198/01 R *Technische Glaswerke Illmenau GmbH v Commission* [2002] ECR II-2153.

40 See e.g. Case C-198/91 *Cook v Commission* [1993] ECR I-2487; Case C-225/91 *Matra v Commission* [1993] ECR I-3203; Case C-83/09 *Commission v Kronoply and Kronotex* [2011] ECR I-4441.

41 Some further details in this regard will be given in the following section d. "Good administration: a tool for protecting interested third parties in administrative proceedings?", at pp. 121-128.

42 For further details in this regard, see section d. "Good administration: a tool for protecting interested third parties in administrative proceedings?", at pp. 121-128.

The assessment of these issues is based on a comparative analysis of the content and the "institutional", "personal" and "material" scopes of protection of the right to good administration and its sub-components, such as they are protected as GPL and as CFR rights respectively.

The general principles of EU law and the Charter constitute the two main sources this work relies on. The analysis of the EU Courts' case-law on the protection of the right to good administration under these two respective statuses provides the main pillar of the present contribution. The assessment of the right to good administration as a GPL implies a comparative study of the various EU national legal orders. Although this contribution is not intended as a work of comparative law, it finds it valuable to resort to already existing comparative analyses which are relevant for the subject-matter of the present study[43]. Occasional references are also made to one or another national legal system. It is important to note in this regard that there is no clear-cut selection of the sources of national law brought before; they are determined either by the linguistic capacities of the author or by the existing literature in a widespread language. Furthermore, multiple references are made to the European Court of Human Rights (hereafter the "ECtHR" or the "Strasbourg Court") jurisprudence and to the Council of Europe's various good administration related instruments. The important contribution of the European Ombudsman to the development of the right to good administration is also relied on.

Last but not least, certain constitutional and secondary legislations' (either generally applicable legislation or sector-specific/subject-specific secondary laws) provisions on procedural rights will be considered on an ad hoc basis. This assessment will highlight that various "gaps" are likely to stem from the current (fragmented) framework of EU administrative procedure. Indeed, there are important differences in protection as regards certain administrative rights – such as the righ of access to the file and the right of access to documents – when they are interpreted at the confluence of the various secondary legislations which provide for their protection; the EU Courts are sometimes faced with the daunting task of studying the

43 Of particular importance in this regard is the comparative study carried out by the Swedish Statskontoret, *Principles of Good Administration in the Member States of the European Union* (Stockholm: Statskontoret, 2005) available at <http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf>, pp. 1-119.

articulations between these pieces of legislation[44]. The current situation is unsatisfactory and the fluctuating approach which is sometimes taken by the EU Courts generates uncertainty, which will most probably have the negative consequence of increasing litigation.

3. *Existing literature on the principle of good administration. Delimitation and input of the present contribution*

Although the principle of good administration in the Court of Justice's discourse is almost as old as the Court itself[45], the legal doctrine has shown an initial disinterest in dealing with this issue[46]. This has now changed and multiple writings have recently been devoted to this long-standing idea of good administration[47].

The study of such a complex concept as "good administration" – which is an "open-ended" term with diverse applications – needs to be circumscribed within a limited framework in order to be able to give added value. As such, delimiting the purview of the present contribution in relation to previous studies undertaken on this subject-matter is useful in order to highlight the input of the present work.

Such as stated earlier in this study, good administration has two facets: an "objective" one which basically seeks to ensure the quality and efficiency of the administration and a "subjective" rationale which is con-

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44 For further details in this regard, see Sub-section (3) "Interrelation between the right of access to documents and the right of access to the file", at pp. 210-232.

45 The first mentions of the principle of good administration were made in 1957 – See Joined Cases 1-57 and 14-57 *Société des usines à tubes de la Sarre* [1957] ERT 105, para 113 and Joined Cases 7/56, 3/57 to 7/57 *Algera* [1957] ECR 0039.

46 The first assessments of this notion had been undertaken, in 1999, by Hanns Peter Nehl in *Principles of Administrative Procedure in EC Law* (Oxford, Hart Publishing 1999), pp. 1-214.

47 The interest in the notion has been generated especially by its insertion in the Charter. Since the adoption of the CFR, multiple legal writings have been devoted to the assessment of this particular concept. For a recent assessment of this right,see Paul Craig, 'Article 41', in (Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward eds) *The EU Charter of Fundamental Rights: A Commentary* (Oxford and Portland, Oregon, Hart Publishing 2014), pp. 1069-1098.

cerned with the protection of individuals in administrative proceedings[48]. In other words, good administration is seen as both a "structural principle"[49] governing the proper functioning of the administration and a "subjective right" of individuals.

This dichotomy of functions of good administration gave rise to two main groups of legal writings.

On the one hand, one strand of literature focused on the "objective" dimension of the notion. For instance, N. Marty devoted his thesis to the interpretation of good administration as a "matrix"[50] or a "director" principle[51] which tends to induce the administrative action within a "quality" perspective[52], in which the "efficiency" rationale is held to have a pivotal importance[53]. However, the author did not exclude the "subjective" nature of the principle that he envisaged as a theoretically possible qualification[54]. A more stringent approach in this latter regard was taken by R. Bousta in her thesis on «Essai sur la notion de bonne administration en droit public»; she concluded to the complete absence of a subjective right to good administration. As such, she merely assessed this notion in its

48 Some authors distinguish between the « instrumental » and the « dignitary » rationales of the notion – See e.g. Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, Hart Publishing 1999), pp. 1-214, at pp. 167-168.

49 See e.g. Herwig C. H. Hofmann and Bucura C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of Law: Good Administration as the Test-Case' (2013) 9/1 European Constitutional Law Review, pp. 73-101, pp. 88-96.

50 See e.g. Wanda Yeng-Seng, 'Le Médiateur Européen, Artisan du Développement du Droit à une Bonne Administration' (2004) 58 Revue Universelle des Droits de l'Homme, pp. 527-552, at p. 530.

51 See Nicolas Marty, 'La Notion de Bonne Administration: À la Confluence des Droits Européens et du Droit Administratif Français' (PhD thesis, University of Montpellier 2007), pp. 1-691, at p. 342 et seq.

52 See e.g. Case T-210/01 *General Electric Company v Commission* [2005] ECR II-5575, para 720.

53 See e.g. Päivi Leino-Sandberg, 'Enforcing Citizens' Right to Good Administration: Time for Action' (2012) European Added Value Assessment Research Paper 4/2012, available on <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/eav_lawofadminprocedure_/EAV_LawofAdminprocedure_EN.pdf> accessed 13 May 2014, pp. I-1 – I-46, at p. I-41.

54 Nicolas Marty, 'La Notion de Bonne Administration: À la Confluence des Droits Européens et du Droit Administratif Français' (PhD thesis, University of Montpellier 2007), pp. 1-691, at pp. 447-496.

"objective" facet, as a standard of the good functioning of the administration[55].

Furthermore, the "objective" dimension of the principle – which promotes the "quality" of the administrative decision-making as the «noyau dur de la bonne administration» – constituted the focus of the doctoral research of J. P. Solé[56]. More recently, E. Chevalier further undertook an assessment of good administration in an "objective" perspective, by analyzing it as a tool to ensure the necessary cooperation between the various players involved in "composite" administrative procedures, in order to ensure the "efficiency" of implementation of EU law in the European administrative space[57].

J. Dupont-Lassale also dealt with the "objective" facet of good administration in her thesis on «Le Principe de Bonne Administration en Droit de l'Union Européenne», but this was only one among the multiple aspects of the topic that she addressed. Indeed, the author made a very interesting general overview of good administration, by analyzing it in all its aspects. She qualified and assessed this notion as both a "principle" conferring subjective rights upon individuals and as a "concept" framing the administrative action[58]. Within this latter perspective, good administration was not only interpreted in its common sense "objective" meaning which implies the battle for quality and efficiency of the administration, but also within its "managerial" function[59] involving the good functioning of the institutions[60] and the proper management of their staff[61]. The author outlined that the notion's "managerial" aspect also concerns other important issues,

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55 Rhita Bousta, *Essai sur la Notion de Bonne administration en Droit Public* (Paris, L'Harmattan 2010), (also PhD thesis – University Paris 1 Panthéon-Sorbonne, 2009), pp. 1-566, at pp. 268-280 and pp. 288-305.

56 Julio Ponce Solé, 'Good Administration and European Public Law: The Fight for Quality in the Field of Administrative Decisions' (2002) 14 Revue Européenne de Droit Public, pp. 1503-1544.

57 Emilie Chevalier, *Bonne Administration et Union Européenne* (Administrative Law Collection 16, Bruxelles, Bruylant 2014), (also PhD thesis – University Limoges, 2010), pp. 1-536, at p. 475.

58 See Julie Dupont-Lassale, *Le Principe de Bonne Administration en Droit de l'Union Européenne* (Bruylant 2013), (also PhD Thesis – University Paris II-Panthéon Assas, 2008), pp. 1-677, at pp. 17-201 and pp. 201 et seq.

59 Ibid, at pp. 260-311.

60 Ibid, at pp. 260-264.

61 Ibid, at pp. 265-272.

such as the good administration of the EU budget[62]; she further emphasized the importance of good administration for the establishment of a policy on the fight against fraud[63]. J. Dupont-Lassale took a step further within the "objective" assessment of the notion by seeking to shed some light on the interrelation between the principles of good administration and good governance[64]. Such a comparative assessment of these two concepts is not without interest if one bears in mind that, in spite of their different legal nature – good administration being a legal principle, whereas good governance is a political, ideological concept[65] – the overlapping content[66] of the two notions gives rise to a grey zone of interaction between them which is likely to create a certain degree of confusion[67].

With this body of literature as a backdrop, another school of legal writings endorsed the view that the insertion of the principle of good administration in the Charter elevated it to the status of a "fundamental right"[68], "a genuine right to good administration"[69] or an "administrative human right"[70] which confers subjective rights on individuals. Some authors asserted in this regard that the codification of the procedural rights and principles listed in Article 41 CFR entails the particularity that their character

62 Ibid, at pp. 275-284.
63 Ibid, , at pp. 284-303.
64 Ibid, at pp. 526 et seq.
65 Ibid, at pp. 540-546. See also Daniel Gadbin, 'Les Principes de "Bonne Gouvernance Européenne"', in *Mélanges en Hommage à Guy Isaac : 50 Ans de Droit Communautaire*, (Toulouse, PUSS 2004), pp. 589-614, at p. 613.
66 For further details on the content of the "good governance" notion, see e.g. the European Governance White Paper of the Commission, COM (2001) 428 final (25 July 2001) and Gerrit H. Addink, *Good Governance: Concept and Context* (Oxford University Press 2014), pp. 1-177.
67 For instance, M. Chiti examined, under the title "Are there Universal Principles of Good Governance?", the various principles outlined under the "umbrella" of the right to good administration – See Mario P. Chiti, 'Are There Universal Principles of Good Governance?' (1995) 1 European Public Law, pp. 241-258.
68 See e.g. Herwig H. C. Hofmann, 'Good Administration in EU Law – A Fundamental Right?' (2007) 13 Bulletin des Droits de l'Homme, pp. 44-52.
69 See e.g.Julio Ponce Solé, 'Good Administration and European Public Law: The Fight for Quality in the Field of Administrative Decisions' (2002) 14 Revue Européenne de Droit Public, pp. 1503-1544, at p. 1523.
70 See e.g. Anthony W. Bradley, 'Administrative Justice: A Developing Human Right?' (1995) 3 European public law, pp. 347- 369.

as subjective rights of individuals is recognized[71]. The fact that the CFR did not place the principle of good administration in terms of objective legality in the public interest, but in the language of subjective public rights is commonly seen as "innovative"[72]. It is in this perspective that the right to good administration is seen as a "novel"[73], "modern"[74] right, being "new"[75] in its formulation as a subjective right of individuals although it is not in its existence[76].

The approach adopted in the present study brings it closer to this second strand of literature, although a more nuanced path is taken. The following assessment of the "content" of the right to good administration will highlight that it confers subjective rights on individuals only when it constitutes the expression of specific rights which have been developed by the EU Courts under the "umbrella" of good administration and which, one might add, correspond roughly to those listed in Article 41 CFR[77].

The in-depth assessment of the interrelation between the right to good administration and its various sub-components – analyzed within a comparative perspective as both GPL and CFR rights – constitutes one of the

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71 See e.g. Jacqueline Dutheil de la Rochère, 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration' in Arnull, Eeckhout and Tridimas (eds), *Continuity and Change in EU law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008), pp. 157-171, at p. 168.

72 See e.g. Klara Kańska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights' (2004) 10 European Law Journal, pp. 296-326, at p. 300.

73 See e.g. Peter Bonnor, 'The Right to Good Administration' (2006) 182 Deutsche hochschule fur verwaltungswissenschaften, pp. 71-93, at p. 74.

74 See e.g. Laurence Burgorgue-Larsen, 'La Charte des Droits Fondamentaux Expliquée au Citoyen' (2000) 4 Revue des Affaires Européennes, pp. 398-409, at p. 402.

75 Some authors mistakenly argued that the right to good administration is a « new » right – See e.g. Annie Gruber, 'La Charte des Droits Fondamentaux de l'Union Européenne: un Message Clair Hautement Symbolique' (2001) 15 Petites Affiches, pp. 4-17, at pp. 12-13.

76 See the Commission's Communication of 13 September 2000 on the Charter of Fundamental Rights of the European Union, COM (2000) 559 final, Brussels.

77 For further details, see Section B. "Content of the right to good administration in the EU legal order", at pp. 64 et seq.

key contributions of the present study[78]. It also determines the structure of the thesis.

4. Outline of the thesis

This thesis is made up of a general introduction (background) to good adminsitartion (Part 1) and a part dealing with the "substance" of this right (Part 2).

The Background Part provides a general preliminary assessment of good administration in the EU legal order. It constitutes a sort of broad introduction to this principle, which is indispensable for a better understanding of the topic as a whole. It first highlights the problematic aspects stemming from the confluence of the various sources of fundamental rights in the EU legal order (I), before demonstrating that the right to good administration provides an instructive case study for illustrating the necessity of a pluralistic approach to the interpretation of these various sources (II). An in-depth analysis of the development (A), content (B) and scope of application (C) of the right to good administration as a GPL and as a Charter's right will be carried out. Within this assessment, important issues – such as the input of the right to good administration to the "judicialisation" of the administration (II-1), its capacity of counterweighting the discretionary powers of the administration (II-2) and its protection in the context of "composite" administrative proceedings (II-3) – will be dealt with.

The second Part of the thesis is divided into six chapters respectively dealing with the "substance" – the various procedural principles enlisted in Article 41 CFR – of the right to good administration (Part 2). The first chapter will focus on the right of every person to be heard before any individual measure which would affect him or her adversely is taken (I). Then, the right of access to the file will be addressed. Within this particular assessment, a step further will be taken which consists in analyzing the interrelation between the right of access to the file codified in Article 41 CFR and the right of access to documents for the purposes of Article 42 CFR; the more general interlink between the right of access to documents and good administration will also be considered (II). The other chapters of this

78 See Part 2 of the thesis on "The Substance of the Right to Good Administration", at pp. 15 et seq.

Part of the thesis will be devoted to the individuals' right to require administrative bodies to give reasons for their decisions (III), before addressing the right to determine the language to be used (IV) and the right to claim damages (V). Finally, this study will end up with the assessment of the individual's right to have his or her affairs handled impartially, fairly and within a reasonable time, which is associated with the "principle of care" sub-component of good administration (VI)[79].

The analysis of each of these procedural rights will be carried out by keeping track of the following parameters: a brief introduction of the recognition and development of these various procedural rights in the EU legal order; their respective interrelation with the right to good administration; the consequences (most often the limitations) stemming from the codification of these principles under the "umbrella" of the right to good administration in Article 41 CFR in comparison with their protection provided by the EU Courts under the GPL status – this assessment will focus on the "personal", "material" and "institutional" scope of protection; finally, an analysis of these sub-components of good administration within the context of "composite" administrative proceedings will be undertaken.

79 For further details as regards the parameters which will be applied for the assessment of these various rights, see the introduction of the thesis, at pp. 32-33.

Part 1. Background to the General Principle of Good Administration

The plurality of fundamental rights' sources raises questions as to the relationship between them in case of conflict. The following assessment will be devoted to the relation between fundamental rights such as they are defined in the Charter and such as they have been protected by the EU Courts under the status of GPL (I), before looking at these questions by means of the test case of the right to good administration (II).

I. Problematic aspects stemming from the confluence of the various sources of fundamental rights

A. The (problematic) coexistence of fundamental rights protected as both GPL and CFR rights

The issue concerning the plurality of fundamental rights' sources in the EU legal order has gained in interest[80] but also in complexity since the entry into force of the Lisbon Treaty. By giving binding legal force to the CFR, the new Treaty has added a supplementary layer to the already existing mosaic of sources.

Article 6 TEU lists three of the various possible sources of fundamental rights in the EU legal order[81]: the Charter of Fundamental Rights of the European Union which, under Article 6(1) TEU "shall have the same legal value as the Treaties". Article 6(2) TEU provides for a legal basis for the

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80 This question was explicitly raised by the XXV FIDE Congress on 'The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions', Tallinn 2012).

81 Article 6 TEU should be seen as a non-exhaustive list of sources of fundamental rights in the EU legal order. For an in-depth assessment of the other actual or potential sources of fundamental rights in the EU legal order, see Bucura C. Mihaescu-Evans, 'The "gaps" in protection stemming from the (problematic) coexistence of fundamental rights' sources in the EU legal order' (upcoming publication in *Cahiers de droit européen*).

EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, implying therefore a continuing reliance on this Convention as a source of law in the EU legal order[82]. Finally, Article 6(3) TEU recalls the common protection of fundamental rights as general principles of law such as they arise from the ECHR and the common traditions of the Member States' respective legal orders.

This disposition is sometimes criticized as being poorly drafted[83], partly because of this persisting reference to GPL which, in some authors' view, has become "obsolete"[84] since the entry into force of the Charter – which is commonly considered as the "Bill of rights"[85] of the EU. This line of argument is implicitly criticized by the present contribution, whose aim is to emphasize the imperative need of a continuing reliance on GPL. This is important not only in order to meet the present day standards of protection of fundamental rights[86], but also to avoid otherwise unacceptable "gaps" in the protection of individuals' rights[87]. Continuing reliance on GPL is all the more indispensable in the context of the EU dynamic integrated administrative system, which is characterized by a "free movement of rights"[88] from one level (EU and national) to another. In this respect, the

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82 The ECHR has commonly been protected in the EU legal order via the vector of GPL.

83 For a critical assessment of this Treaty provision, see Jean-Claude Bonichot, 'Des Rayons et des Ombres: les Paradoxes de l'Article 6 du Traité sur l'Union Européenne', in *La Conscience des Droits: Mélanges en l'Honneur de Jean-Paul Costa* (Dalloz 2011), pp. 49-65.

84 See e.g. Frédéric Sudre, 'Le Renforcement des Droits de l'Homme au sein de l'Union Européenne' in Joël Rideau (dir), *De la Communauté de Droit à l'Union de Droit: Continuités et Avatars Européens* (L.G.D.J. 2000), pp. 207-230, at pp. 218-222 and Louis Dubouis, 'Les Principes Généraux, un Instrument Périmé de Protection des Droits Fondamentaux?' in *Les Mutations Contemporaines du Droit Public: Mélanges en l'Honneur de Benoît Jeanneau* (Paris, Dalloz 2002), pp. 77-90.

85 – See e.g. Koen Lenaerts and Eddy de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 Common Market Law Review, pp. 273-300.

86 The Preamble of the CFR itself implies such an idea in its 4th Intend.

87 For further details in this regard, see Bucura C. Mihaescu-Evans, 'The "gaps" in protection stemming from the (problematic) coexistence of fundamental rights' sources in the EU legal order' (upcoming publication in *Cahiers de droit européen*).

88 See e.g. Abdelkhaleq Berramdane, 'Considérations sur les Perspectives de Protection des Droits Fondamentaux dans l'Union Européenne' (2009) 3 Revue du Droit de l'Union Européenne, 441-459, at p. 447.

general principles of law constitute the privileged instrument for interactive exchange, merging different legal traditions by mutual crossfertilisation of concepts and ideas[89]. The constructive dialogue between the EU Courts and their national counterparts in the development of GPL "guarantees ideological continuity between the two levels of governance[90]" constituting the main intrinsic link between them. From this standpoint, GPL are not only seen as a safeguard for individuals' rights, but constitute a necessity, an indispensable tool for the EU in order to carry on accommodating eventual new national principles[91]. As such, "the co-existence of the Charter and a provision referring to additional rights inspired by the Member States' traditions and the main European instruments of Human Rights protection arguably matches well with the constitutional structure of the Union, which derives a double legitimacy from its citizens and its Member States and their constitutional traditions"[92]. Therefore, and in line with the argument put forward by K. Lenaerts and J. Gutiérrez-Fons: "The very *raison d'être* of the Union calls upon the ECJ [now the CJEU] to assume its responsibility for "finding" the law (…) by fashioning general principles of EU law"[93].

For all these reasons, it would be erroneous to advocate that the CFR constitutes the exclusive source of fundamental rights in the EU legal order, eliminating or usurping – either in general or at least for the rights formulated therein – the relevance of GPL.

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89 A similar opinion was expressed by Denys Simon, 'Les Principes en Droit Communautaire' in S. Caudal (dir) *Les Principes en Droit* (Paris, Economica 2008), pp. 287-304, at p. 302.

90 Takis Tridimas, *The General Principles of EU Law* (Oxford, Oxford University Press, 2nd ed. 2006) pp.1-591, at p. 302.

91 See e.g., Jean Paul Jacqué, 'La Protection des Droits Fondamentaux dans l'Union Européenne Après Lisbonne' (2012) 26 L'Europe des Libertés, Revue d'Actualité Juridique, pp. 2-12, at p. 8.

92 Wolfgang Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon' (2011) 7 European Constitutional Law Review, pp. 64-95, at pp. 64, 66 and 68.

93 Koen Lenaerts and José A. Gutiérrez-Fons, 'The Constitutional Allocations of Powers and General Principles of EU law' (2010) 47 Common Market Law Review, pp. 1629-1669, at p. 1632.

The following analysis will demonstrate that although the CFR may have been intended to be "the reference standard"[94], "the principal basis"[95] for the EU Courts assessment on fundamental rights' related cases, it should rather be considered as merely one of several possible sources of fundamental rights. It may eventually constitute "the point of departure"[96] of an analysis; it may even be interpreted as being the "main tool" of protection of an individual's fundamental rights at the EU level; hese scenari are not problematic as long as the Charter is not sought to become the "exclusive" source of protection of fundamental rights in the EU legal order[97]. Such an interpretation would have dramatic consequences in as much as it would lead to the reduction of the protection attained by the EU Courts under the GPL vector. This was surely not the intention of the Convention in charge of drafting the Charter and therefore such a regressive interpretation should be averted[98].

Consequently, rather than seeking to annihilate the relevance of GPL, the Charter should act as a tool for legitimizing their praetorian construction[99] and as a basis for the development of new GPL[100]. Only such an interpretation is likely to ensure that the Charter is interpreted in light of the

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94 See e.g. the Joint Communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, delivered on 24 January 2011, further to the meeting between the two courts in January 2011, pp. 1-3, at p. 1, available on <www.curia.europa.eu>.

95 See e.g. the Discussion Document of the Court of Justice of the European Union on Certain Aspects of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (5 May 2010), pp. 1-5, at p. 1, available on <www.curia.europa.eu>.

96 See e.g. Case C-1/11 *Interseroh* (CJEU, 29 March 2012), para 43; Case C-83/11 *Rahman* (CJEU, 5 Septembre 2012), Opinion of AG Bot, paras 70 and 71.

97 See e.g.Jean Paul Jacqué in 'Les Droits Fondamentaux dans le Traité de Lisbonne' (2010) 80 L'Observateur de Bruxelles, pp. 17-20, at p. 17 and in 'Le Traité de Lisbonne. Une Vue Cavalière' (2008) 3 Revue Trimestrielle de Droit Européen, pp. 439-483, at pp. 445-446.

98 For further details in this regrad, see Section 2. "Pluralistic approach", at pp. 45-49.

99 For a similar opinion, see Koen Lenaerts, 'La Solidarité ou le Chapitre IV de la Charte des Droits Fondamentaux de l'Union Européenne' (2010) 82 Revue Trimestrielle des Droits de l'Homme, 21e année, pp. 217-236, at p. 234.

100 See Koen Lenaerts and José Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in (Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward eds) The EU Charter of Fundamental Rights: A Commentary (Oxford and Portland, Oregon, Hart Publishing 2014), pp. 1559-1593, at p. 1576 and p. 1592.

constitutional traditions common to the Member States which, one may argue, highlights the constitutional legislator's intention behind the wording of Article 6(3) TEU[101]. In this perspective, a virtuous circle should evolve, according to which the CFR may constitute the legal basis for new GPL, whereas the latter would carry on being an essential vector for the development of the former[102].

For all these reasons, it is legitimate to argue that the inclusion of the CFR in primary law next to a reference to fundamental rights as general principles of EU law was not designed to jettison "one of the truly original features of the pre-Charter constitution" which was the ability to draw on the constitutional traditions of the Member States[103] and which, one may argue, is inherent to the constitutional identity of the Union. Certain authors have anticipated the gap-filling role of GPL with respect to the UK, Polish and Czech "opt-outs"[104]. In this respect, the question of the relation between the sources of fundamental rights in the EU legal order is all the more important. Since the optouts are explicitly related to specific parts of the Charter, the question remains whether the rights in the CFR to which the opt-outs refer are still applicable as general principles of EU law.

A positive answer to this question may be backed up by the fact that reliance on GPL does not need any legal basis or any justification; this is a tool which is inherent to the very concept of law[105], to the judicial func-

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101 See e.g. Melchior Wathelet, 'La Charte des Droits Fondamentaux: un Bon Pas dans une Course qui Reste Longue' (2000) 1-2 Cahiers de Droit Européen, pp. 585-593, at p. 591.

102 For a similar opinion, see Jean-Marc Sauvé and Nicolas Polge, 'Les Principes Généraux du Droit en Droit Interne et en Droit Communautaire. Leçons Croisées pour un Avenir Commun?' (J-C Masclet, H. Ruiz Fabri, C. Boutayeb and S. Rodrigues dir), *L'Union Européenne. Union de Droit, Union des Droits: Mélanges en l'Honneur de Philippe Manin* (Paris, A. Pedone eds 2010), pp. 727-750, at p. 743 and Sylvie Caudal-Sizaret, *Les Principes en Droit* (Paris, Economica 2008), pp. 1-384, at p. 13.

103 Joseph Weiler, 'A Constitution for Europe? Some Hard Choices' in (G. Bermann and C. Pistor eds) *Law and Governance in an Enlarged European Union* (New York, Oxford and Portland 2004), pp. 39-59, at p. 55.

104 See e.g. Jacqueline Dutheil de la Rochère, 'The Protection of Fundamental Rights in the EU: Community of Values with Opt-out?' (2008) 7 European Constitutional Law Network-Series, pp. 119-129, at pp. 127-129.

105 See Rébecca E.Papadopoulou, *Principes Généraux du Droit et Droit Communautaire: Origines et Concrétisation* (Bruxelles, Bruylant 1996), pp. 1-319, at p. 174, at p. 6.

tion[106] and more generally to the good functioning of any legal system[107] on which the presence of a formal, codified source of law such as the CFR may not have any negative impact whatsoever.

Consequently, there are legitimate reasons to believe that the EU Courts will continue to ensure a parallel application of these two vectors of protection[108]. What is more problematic though is how exactly these sources will be reconciled with regards to those rights which are protected as both GPL and Charter rights and for which these two sources provide a different level of protection. In other words, if a fundamental right – such as the right to good administration – is formulated in the Charter with a more narrow scope of protection than the one the EU Courts have granted under the protection of general principles of EU law, the question will arise as to what the consequences of such a limited formulation might be and whether GPL could be used to expand the right or fill the gap[109].

The legal opinions which have been expressed on this matter to date may be divided between two particular strands of literature. On the one hand, there are those who argue in favour of a "hierarchical" approach (1); on the other hand, a "pluralist" interpretation of the various fundamental rights' sources is defended by others (2). The present study goes a step further by advocating a third approach – a "lexical order of review" – which is likely, to a certain extent, to comply with the underlying interests of both the "hierarchical" and "pluralist" views (B).

1. Hierarchical approach

Several voices in the debate have argued in favour of what might be called a "hierarchical" understanding, placing the Charter as the primary source

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106 Without effective resort to GPL, the EU Courts would have inevitably breached one of their inherent functions which is the refusal to deny justice – See e.g. Joined Cases 7/56, 3/57 to 7/57 *Algera* [1957] ECR 39, at pp. 55-56.

107 See e.g., Rébecca E.Papadopoulou, *Principes Généraux du Droit et Droit Communautaire: Origines et Concrétisation* (Bruxelles, Bruylant 1996), pp. 1-319, at p. 174, at p. 7.

108 See e.g. Case C-500/10 *Belvedere Costruzioni* (CJEU, 29 March 2012), para 23; Case T-383/11 *Makhlouf v Council* (GC, 13 Septembre 2013); Case T-77/01 *Diputación Foral de Álava and Others v Commission* [2002] ECR II-81, para 35.

109 See e.g. Case C-282/10 *Dominguez* (CJEU, 24 January 2012), Opinion of AG Trstenjak, paras 131-132.

of rights in the EU[110]. In this view, fundamental rights protected as general principles of law are held to be only subsidiary sources of protection[111], applicable as fillers of otherwise intolerable gaps, "as a sort of safety net for cases where the Charter is silent[112]". In other words, according to this approach, the CFR would have a hierarchical (exclusive) effect in relation to GPL. Accordingly, an eventual more extensive level of protection of a right conferred via the vector of GPL should not take precedence over a more limited scope of application of the same right such as it stems from its codification in the Charter.

This approach would lead to an exclusive application of one or another source of rights to any given situation: the Charter would cover the particular rights listed therein and the GPL would provide protection of any eventual new right which is not inserted in the CFR, leading therefore to the existence of a dual regime of protection in the EU. Therefore, only in the case where there are "gaps" in the Charter – in the sense of a total absence of a right within the body of the CFR – could there be room for further usage of general principles of law. This model of review appears to run counter to an understanding of several overlapping complementary sources applicable in parallel to any given situation.

In seeking to emphasize the relevance of their standpoint, the proponents of the hierarchical approach have put forward various arguments of transparency, constitutional identity, separation of powers, clarity and legal certainty[113].

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110 See e.g. Fabienne Kauff-Gazin, 'Les Droits Fondamentaux dans le Traité de Lisbonne: un Bilan Contrasté' (2008) 7 Europe, 18e année, pp. 37-42, at p. 38 et seq. and Abdelkhaleq Berramdane, 'Considérations sur les Perspectives de Protection des Droits Fondamentaux dans l'Union Européenne' (2009) 3 Revue du Droit de l'Union Européenne, 441-459, at p. 445.

111 See e.g. Vassilios Skouris, 'Intégration de la Charte/Adhésion à la CEDH'' (Working Group II 2002) – available on <http://european-convention.eu.int/docs/wd2/3063.pdf>.

112 Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3 Review of European Administrative Law, pp. 5-22, at p. 21. See also Sacha Prechal, Sybe Alexander de Vries and Hanneke van Eijken, 'The Principle of Attributed Powers and the 'Scope of EU Law', in L. Besselink, F. Pennings and S. Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (The Hague, 75 European Monographs 2011), pp. 213-247.

113 For further details on these variables, see Herwig C. H. Hofmann and Bucura C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Un-

In spite of the indisputable relevance of these variables, an in-depth analysis of this approach gives rise to many inconsistencies from the viewpoint of the rule of law which highlight the problem of logic of such a hierarchical – with exclusive effect – interpretation. First of all, if one sought to establish a frame of reference according to which it is to be decided whether the Charter offers sufficient protection, a comparative benchmark would be needed, which would logically be that of the GPL vector. Only by referring to the larger scope of protection of fundamental rights as general principles of EU law, it is possible to review whether the Charter "sufficiently" protects the rights of citizens. Secondly, some of the Charter's dispositions – inter alia Article 41 CFR – explicitly refer to the general principles common to the laws of the Member States, implying the latter's inherent contribution in the delimitation of the content and scope of application of those rights[114]. Finally, the limits of such a hierarchical approach are also visible when one considers the category of broadly formulated notions such as the "rule of law"[115] or the right to "human dignity"[116] and in respect to the Charter's "open-ended" notions which are best illustrated by the right to good administration. By using the formulation "this right includes", Article 41 CFR highlights that the list of rights inserted therein is not complete and it thereby implicitly suggests that they may further be developed via the vector of GPL[117]. As such, a right which is itself defined, in part, by a mixture of written sub-concepts and in part, unwritten general principles of EU law, is most-likely the best example to stress the limits of the hierarchical approach.

For all these practical reasons, the sources of fundamental rights listed in Article 6 TEU should be construed as being in a non-hierarchical relationship. Instead, a parallel – cumulative – analysis of the definition of fundamental rights as established by the Charter and as protected via the vector of GPL appears to be the appropriate method of interpretation. Such an approach is able to ensure the coherence of fundamental rights' protection in the EU legal order, by avoiding an eventual regression of

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written General Principles of Law: Good Administration as the Test-Case' (2013) 9/1 European Constitutional Law Review, pp. 73-101, at pp. 77-84.

114 See Article 41(3) CFR and Article 49(2) CFR.

115 See Intend 2 of the CFR's Preamble.

116 Article 1 CFR.

117 For further details on this issue, see Section B. "Content of the right to good administration in the EU legal order", at pp. 64 et seq.

rights under the CFR in comparison to their protection under the GPL status – which is likely to give rise to important discrepancies and gaps in protection.

2. Pluralistic approach

The second strand of legal doctrine opts for a pluralist interpretation of the various sources, which implies that they are not mutually exclusive; instead, they require comparison and balancing, with the objective of maximizing their respective scopes of application. This line of argument departs from the premise that the appropriate and coherent protection of individualsshould be at the center of any assessment, taking precedence over all other practical considerations. Such an extensive view is indispensable in the context of a European Union which is governed by the rule of law[118], a Union in which fundamental rights constitute one of the founding values[119] and in which the individual is considered to be at the heart of its activities[120]. In the final count, such as J. Laffranque emphasized, in the context of a complex EU legal word, "it should not be forgotten *the most important – the individual*"[121] (emphasize added).

This idea of placing the protection of individuals at the center of a legal argument and to give them precedence over the flaws stemming from the difficult coexistence of the various fundamental rights' sources in the EU was also put forward by J.-N. da Cunha Rodrigue, who argued that: «L'accumulation de catalogues de droits fondamentaux dans lesquels des droits à contenu identique sont proclamés, avec des nuances de systématisation ou de libellé, incitant à la protection maximale, réclame, en temps de crise, une mise en balance à la lumière de la densité inhérente à chaque droit et d'une *idée fondatrice sur la dignité de la personne humaine en tant que valeur absolue.* Un effort doit être fait pour éliminer les contradictions et ne pas se laisser piéger par les redondances. Autrement il ne serait pas ex-

118 See Intend 2 of the Preamble of TEU; Article 2 TEU; Article 7 TEU; Intend 2 of the Preamble of the Charter.
119 See Article 2 TEU and Article 7 TEU.
120 See Intend 2 of the Charter's Preamble.
121 See Julia Laffranque, Préface to XXV FIDE Congress (Tallinn 2012), at p. XIX.