The Right of Access to Its Own File

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Abstract: The right of access to its own file represents a principle of administrative law as defined in the legislation and jurisprudence of the European Union which constitutes a guarantee of the right to defence. Generally, in matters of access to files, the Court of Justice of the European Union was quite cautious. It was decided in the case of Consten & Grundig v Commission [1966] that they have no right of access to Commission records, only the case of Hercules Chemicals since 1991 the Court of First Instance ruled that the access to documents and "accusing and non-accusing" the person of the applicant must be respected by the institutions of the Union. After this point, the jurisprudence has been constant, while guaranteeing the protection of the right of accessing its own file. However, not all European Union institutions documents may be available to the public. On the possibility of the Commission to bring to the attention the parties of its internal documents, the Court made it clear that this is allowed only if exceptional circumstances of the case require so, given that there are strong grounds for believing to be provided by the parties. Also, regarding access to documents held by public authorities, the Court ruled that access to these documents can be justifiably limited in the case of grounds relating to the protection of public or private interest. As regards the institutions covered by the access to its file, it should motivate its decision. The present research aims not only at analysing the legislation in matters of access to its own file, but also experiencing such requests for access. It will be highlighted in the case-law of the Court of Justice of the European Union that the institution is limited to just a simple examination of the information, without having the decision motivated by an interest or reason.

Keywords: access to file; case-law; Court of Justice of the European Union; European Union; principle of administrative law

1. Introduction

At the moment of constituting the European Communities the legislation in the field was not well regulated, but we can say that currently there are milestones in terms of the access principle to file. However, the jurisprudence of the Court is

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what seems to be better received at the level of European administration, despite the constant efforts for enactment.

Regarding the existing administrative law at the level of Member States, both legislation and ECJ jurisprudence impose an increased rigor at their level. Procedural principles seem to interfere much better on the sectoral line. The slogan of the new "model" administration became "the state in the service of citizens". In order to accomplish this goal it was necessary a radicalization, i.e. transforming mentalities, abolishing the old principles that subjugated the citizen, at least at enunciation level.

2. The Content of the Right of Accessing Files

According to the content of article 41 of the EU Charter of Fundamental Rights[1] any person, in its relations with EU institutions, bodies, offices and agencies must be part of an impartial, fair treatment and within a reasonable time. If the administration does not respect these rights, the citizen is entitled to compensation by the EU institutions. According to the same document, *the right to good administration* includes the right of everyone to be heard, before taking any individual measure which would affect him; the right of every person to have access to its file, while respecting the legitimate interests of confidentiality and of professional and commercial secrecy i.e. the obligation of the administration to motivate the decisions.

Good administration defines the way the institutions function, encouraging *the more efficient protection of such fundamental rights* such as *the right to defense, file access, publication of documents and reasoning documents.* (Renucci, 2009, p. 788)

3. Access to File According to the European Vision

A first corollary of a *more democratic administration* was that of transparency. *The principle of transparency* is a fundamental right and it requires for decisions to *be made in a transparent way and closer to the citizen*.

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:RO:PDF, Accessed on 1st June, 2014.

The new slogan became one of bringing the administration closer to the citizen, the inclusion of this principle was easily achieved within the contents of the existing national laws, due to the incidence of transposing the European directives.

Since 1977[1] there were defined the fundamental principles that should guide the administrative procedures, so it is recommended for the member states' governments of the Council of Europe to take into account these principles, which today are found covered in *the Code of good administrative behavior* or in the content of the *Charter of fundamental rights of the European Union*, under the title of the principles of good administration and, in particular, in the case law of the ECJ.

Within the administrative proceedings there were defined fundamental principles that ensured the protection of persons, legal or physical entities, regarding any individual action or decisions taken in the exercise of public authority, such as the *right to a hearing* before the administrative authority, *access to information, the right to be assisted or represented for free* in the administrative proceedings; *indicating the appeal procedure and deadlines* to act against the unlawful administrative act.

The right to access his or her file is a principle which represents a real guarantee of *the right to defense*. Thus, within administrative proceedings, the person concerned has the possibility to apply, to make his/her views known on the elements adduced against him/her by the Union's institution. In this way, both parties benefit from equal treatment regarding the right of defense. This implies in advance the right of access to documents held by the Union's administration. We can talk about an institution's obligation to respect the right of access of a legal entity, only if the person concerned has made a request in this regard, as there is no right for automatic access to documents of an institution.[2]

[1] Resolution (77)/31 on the protection of individuals in relation to the acts of administrative authorities, adopted by the Committee of Ministers on 09.28.1977 at the 275th meeting of the Ministers' Deputies.
[2] TPICE, Decision of 6th February 2007, CAS/Commission, Case T-23/03, Rep. 2007-1/2, p. II-291, point 2.

4. Access to File According to the Member States

Obviously, the existing practice is very different even within countries with tradition of the European Communities, without being necessarily a very broad regulation at the legislative level of this principle. For example, in Germany, *the right of hearing* became applicable within the administrative courts, even if this principle is found in disparate laws, not being transposed directly into the German administrative procedure (Schwarze, 2009, p. 1321). In Spain, the recipients of administrative decisions have no right of access to documents. (Schwarze, 2009, pp. 1315-1316, 1321, 1341-1342; Fromont & Fromont, 2006, pp. 216-219)

In Italy, the recipients of administrative decisions are directly endorsed, having ensured the right to participate in the decision making process.

What it is ***specific for the British law is that it provides to the citizen procedural rights such as the right to receive contradictory and orality*** of the debate, *to have witnesses, to be able to take interviews, the right to legal counseling, the right to defend themselves against all accusations in law and fact.* (Schwarze, 2009, pp. 1341-1342; Fromont & Fromont, 2006, pp. 216-219)

It seems that the British law protects not only the recipients of the decision made unfavorably, but also the ones outside the case, but directly involved.

In France, those directly involved *have the right to be heard* and they do not benefit from the right to access documents. (Schwarze, 2009, pp. 1315-1316, 1321, 1341-1342; Fromont & Fromont, 2006, pp. 216-219)

However, the right to be heard, as ruled under the German law is a model worthy of taking it into account, as reflected in the jurisprudence of the ECJ. This can be seen in the analysis of the jurisprudence's Court and the interaction with other principles that establish the rights and the legitimate interests of the citizen.

The European Court of Human Rights upheld within the constant jurisprudence that any limitation of a particular fundamental right must be based on a *reasonable relationship of proportionality between the used means and the aim pursued*. In this respect, the legislator benefits from an appreciation liberty of the report

between the consequences that will occur for an individual task and the measures to be taken for the general interest.[1]

The court[2] ruled that access to these documents can be restricted if there are legitimate reasons to protect the public or private interests, but with the obligation to give reasons for the made decision. Equally, there should be fulfilled the conditions related to the need f*or transparency and access to documents of the Union*. The restrictions on access to documents are made on the basis of proportionality principle.

Regarding the interaction with the *principle of proportionality*, still the German law has supremacy in terms of mode of regulation, implementation and dissemination of this principle by the EU and by the component Member States (UK, Italy). Under the German law, *the principle of proportionality* is recognized as a general principle of German administrative law and public law, being disseminated as a principle of the rule of law.

In general, within the Member States, the principle of proportionality is found in few countries, mentioned under this form of rule, which is an analogue of the principle of reasonableness, that is a reasonable relationship between the purpose and means (United Kingdom), of the balance between costs and benefits or between public and private interests (France).

5. Conclusions

The way in which citizens interact in their relation with the administration and the State concerned establishes the administrative tradition of the State and it shows how democratic that administration is. To the extent that the citizen is the main beneficiary of the public services, it should be guaranteed both legally and practically multiple ways *to participate, to be informed and to express* their opinion on the policies adopted by the local or central administration.

[1] Decision J.A.PYE(Oxford) Ltd. & J.A.PYE (Oxford) Land Ltd. c. UK of 30 August 2007, Recueil des arrêts et decisions/ Reports of Judgments and Decisions, §55, 75 i C.J.C.E., Directory Court of Justice and Court of First Instance, Part I, Ed. CURIA, Luxemburg, 2008-8/9A, pp. I-6507, point 360.
[2] TPICE, Decision of 27 November 2007, Pitsiorlas/Council BCE, Connected cases T-3/00 and T-337/04, Rep. 2007-11/12, p. II-4781, point 3.

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*** http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:RO:PDF, Accessed on 1st June, 2014.