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The Principles of Administrative Procedure and the EU Courts: an Evolution in Progress?

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Abstract

EU case law often focuses on the breach of administrative procedure principles protecting individuals: participation and respect for the rights of the defence, statement of reasons, protection of legitimate expectations, sound administration, equal treatment, proportionality and respect for a reasonable time.

Perhaps it is possible to discern an evolutionary path. Initially, there was a quite lenient approach towards the administrative authorities when assessing the general principles, which showed an effort to protect the authorities' freedom of choice, for reasons of effectiveness of the European legal system. Presently, an accrued attention for private rights is noticeable, even if this trend is clear in certain fields, while in others the individual's positions still seem rather weak. We could infer that the protection tools for individual situations are part of a growing process, so the result is not always the same, as only some principles have produced strong individual rights.

1 Introduction

The case law on action for annulment brought against EU administrative decisions often focuses on the breach of administrative procedure principles protecting individuals: participation and respect for the rights of the defence, statement of reasons, protection of legitimate expectations, sound administration, equal treatment, proportionality and respect for reasonable time. Many of these principles, as is well known, are now set out in art. 41 of the Charter of fundamental rights of the European Union.

Perhaps it is possible to discern an evolutionary path. Initially, there was a lenient approach towards the EU institutions when assessing the general principles, which showed an effort to protect the authorities' freedom of choice, for reasons of effectiveness of the European legal system. Presently, an accrued attention for private rights is noticeable, even if this trend is particularly clear in certain fields, while in others the individual's positions still seem rather weak. We could infer that the tools for protecting individuals are in a growing process, so the result is not always the same, as only some principles (participation, respect for the rights of the defence and statement of reasons, partially protection of legitimate expectations) have produced strong individual rights.

From the methodological point of view, I must clarify two preliminary elements.

The first element concerns the "area" of the case law that I am going to examine. It almost only regards the application of the principles by the EU institutions. This topic is particularly interesting, because the authorities and the principles that they apply are a direct expression of the same legal system. But of course, in light of art. 51.1 of the Charter of fundamental rights of the European Union, the principles are also binding for national administrative procedures carried out in the scope of Union law. And, in fact, the Court of justice has constantly and clearly held the obligation for the national institutions to respect the same principles of administrative procedure too.[1]

The second element regards the possible distinction between two different 'families' of principles. Some of them may be considered as 'strictly' procedural principles, because they are able to influence administrative action, regardless of the evaluation of its concrete result: participation and respect for the rights of the defence, respect for a reasonable time, at least partially statement of reasons. Others, instead, actually are 'substantive' principles, because they regard the substance of the measure: protection of legitimate expectations, equal treatment, proportionality. Although the two groups of principles do not make up a perfectly homogeneous whole, the European courts refer to all of them as to the 'administrative procedure principles', without further explanations or classifications. That is the reason why I also decided to refer to them in the same way and to analyse them all together.

2 Participation and Respect for the Rights of the Defence

[1] In recent case law, see, for instance: Case C-349/07, *Sopropé* [2008] ECR I-10369; Case C-158/06, *ROM-projecten* [2007] ECR I-5103; Case C-453/00, *Kuhne & Heitz NV c. Prodoctshap voor Pluimvee en Eieren* [2004] ECR I-837. Among the scholars, see, for example: H.C.H. Hoffman & A. Turk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Cheltenham 2009); J. Barnes (ed.), *Transforming Administrative procedure* (Sevilla 2008); J.H. Jans (ed.), *Europeanisation of Public Law* (Groningen 2007) 112; A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law* (Oxford 2006); A. Stone Sweet, *The Judicial Construction of Europe* (Oxford 2004) 22.

2.1 The Content of the Right and its Relationship with the Principle of Legality

The right of participation in the administrative procedure[2] is protected in the EU legal system as an expression of the rights of the defence, which 'requires that any person who may be adversely affected by a decision be in a position in which he may effectively make his views known, at least with regards to the evidence on which the Commission has based its decision'.[3] The unfavourable decision could also have the effect of eliminating a previous advantage: as happened in a case concerning measures aiming at recovering taxes which a private party had been unlawfully exempted from.[4]

The right of participation is described as an instrument at the citizens' disposal for obtaining information and expressing their point of view only from the perspective of the adoption of unfavourable decisions:[5] 'a person's right to a hearing before adoption of an act concerning that person arises only when

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2 Among the scholars, see, for example: P. Craig, *EU Administrative Law* (Oxford 2006) 314; L. Azoulay, 'The Court of Justice and the Administrative Governance', *European Law Journal* [2001] 425; P. Craig & G. de Burca, *EU Law. Text, Cases and Materials* (Oxford 2008); R.H. Lauwaars, *Rights of Defence in Competition Cases*, D.M. Curtin, T. Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of H.G. Schermers*, (Dordrecht 1994) vol. II, 497; J.M. Joshua, 'The Right to Be Heard in EEC Competition Procedures' [1991] *Fordham Intern. Law Journal* 16; H.P. Nehl, 'Principles of Administrative Procedure' [1999] *Maastricht Journal of European and Comparative Law* 545; A. Pliakos, *Les droits de la défense and le droit communautaire de la concurrence* (Bruxelles 1987) 40.

3 See: Case T-46/00, *Kvitsjoen A/S* v. *Commission* [2000] ECR II-3713; Case T-205/99, *Hyper S.r.l.* v. *Commission*, [2002] ECR II-3141. In general terms, see also, for instance: Case 32/62, *Maurice Alvis* v. *Council* [1963] ECR 101; Case 26/63, *Pistoj* v. *Commission* [1964] ECR 341; Case 80/63, *Degreef* v. *Commission* [1964] ECR 391; Case 35/67, *Van Eick* [1968] ECR 329; Case 17/74, *Transocean Marine Paint Association* v. *Commission* [1974]ECR 1063; Case 121/76, *Moli* v. *Commission* [1977] ECR 971.

4 See, for instance, Case T–134/03 and o., *Common Market Fertilizers S.A. and o.* v. *Commission* [2005] ECR II-3923.

5 The link between the risk to be adverserly affected by an administrative decision and the right to be heard by the authority is often clearly indicated in case law. For instance, see: Case T-218/95, *Azienda Agricola 'Le Canne' S.R.L.* v. *Commission* [1997] ECR II-2055; Case T-72/97, *Proderec - Formaçao and Desinvovimento de Recursos Humanos, A.C.E.* v. *Commission* [1998] ECR II-2847; Case T-180/96 and o. *Mediocurso - Estabelecimento de ensini particolar L.d.a.* v. *Commission* [1998] ECR II-3477; Case T-50/96, *Primex Produkte Import-Export GmbH, Interporc Im. und Export GmbH* v. *Commission* [1998] *ECR* II-3773; Case T-159/94 and o. *Ajinomoto Co. Inc. and The Nutasweet Company* v. *Council* [1997] ECR II-2461; Case T-147/97, *Champion Stationery Mfg Co. Ltd., Sun Kwong Metal Manufacturer Co. Ltd and U.S. Ring Binder Corporation* v. *Council* [1998] ECR II-4137; Case T-88/98, *Kundan Industries Ltd and Tata International Ltd* v. *Council*, [2002] ECR II-4897. See also, for example: Case 17/74, *Transocean Marine Paint Association* v. *Commission*; Case 100/80 and o., *Musique diffusion française and o.* v. *Commission* [1983] ECR 1825; Case 322/81, *N.V. Nederlandsche Banden-Industrie Michelin* v. *Commission* [1983] ECR 3461; Case 264/82, *Timex Corporation* v. *Council and Commission* [1985] ECR 849; Case 46/87 and o., *Hoechst A.G.* v. *Commission*, [1989] ECR 2859.

the Commission contemplates the imposition of a penalty or the adoption of a measure likely to have an adverse effect on that person's legal position'.[6]

The right is now set out in art. 41.2[7] of the Charter of fundamental rights of the European Union. In light of this general provision, the opportunity for the courts to protect the individual rights of the defence, even if the specific EU rules in force do not contain any reference to it, is evident. Indeed, at times[8] the Court of justice has done so in the past[9]: at least from the nineties of the 20th century onwards,[10] the court did not actually break the basic principle of legality. Instead, the court, when it was necessary to protect fundamental rights (like the rights of the defence) aimed at applying a 'principle level' legality, which is surely stronger than the 'specific rules level' one. The former may and must prevail over the latter. Besides, the '*praeter legem*' protection of the principle of participation in administrative procedure demonstrates that the European courts are now careful to defend individual interests, especially when the citizen is adversely affected by an administrative decision.

2.2 Rules and Exceptions

In general, the private parties can check that the relevant facts in the case have been described in the correct way by the institution and that the contents of the documents used to adopt the final decision are true and complete.[11]

Notwithstanding this, for almost thirty years the Court of justice held that the Commission's choice to deny or limit individual participation because of the characteristics of the specific case had to be respected.[12] In following years, on the contrary, the courts gave more and more importance to the general

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6 Case C-48/96, *Windpark Groothusen Gmbh & Co.* v. *Commission* [1998] ECR I-2873.

7 See also art. 16 of the European Code of good administrative behaviour (Right to be heard and to make statements).

8 For the opposite, see, for instance, Case T–134/03 and o., *Common Market Fertilizers S.A. and o.* v. *Commission*.

9 See, for instance: Case C-462/98 P, *Mediocurso* v. *Commission* [2000] ECR I-7183; Case T-392/02, *Solvay Pharmaceuticals B.V.* v. *Council* [2003] ECR II-4555; Case C-287/02, *Spain* v. *Commission* [2005] ECR I-5093; Case C-28/05, *Dokter, Maatschap Van den Top, W. Boekhout* v. *Minister van Landbouw, Natuur en Voedselkwaliteit* [2006] ECR I-5431.

10 See, for instance, Case C-135/92, *Fiskano A.B.* v. *Commission* [1994] ECR I-2885.

11 See, for example: Case 136/79, *National Panasonic (U.K.) Limited* v. *Commission*, [1980] ECR 2033; Case T-186/97 and o. *Kaufring A.G. and o.* v. *Commission* [2001] ECR II-1337; Case T-446/05 *Amann & Söhne GmbH and Co. KG and o.* v. *Commission*, http://www.curia.europa.eu.

12 For instance, see Case 45/69, *Boehringer Mannheim GmbH* v. *Commission* [1970] ECR 769; Case 41/69 *A.C.F. Chemiefarma* v. *Commission* [1970] ECR 661; Case 48/69 *Imperial Chemical Industries* v. *Commission* [1972] ECR 619.

principle of participation[13] and started to constantly annul the administrative decisions that didn't respect the rights of the defence.[14]

A 'weak side' of the legal protection of the right concerns the adoption of favourable administrative decisions. In this hypotesis, in fact, the right of participation in the procedure is recognised only when the private parties own (potentially useful) informations, which the EU institution may gain only by them.[15] In this perspective, their right to participate in the procedure works as a sort of public interest protection tool.[16]

The reason for the 'two speed' legal effect of the right may be understood if one thinks about its legal basis, which concerns, as alrealdy indicated, the protection of the right of the defence against measures adversely affecting individuals. So, in the majority of judgements it was held that the principle of procedural participation could only produce binding effects for defence of private parties if the administrative decision could cause the loss of advantages and not just deny a favourable measure demanded by the individual.[17] This is still the settled case law.[18]

But, as a scholar carefully pointed out,[19] this rule is at times broadly interpreted. As happened in a case where the general principle of protection of the rights of the defence was held to be binding in favour of private parties whose interest was obtaining an exemption to the prohibition of agreements restricting competition.[20] In this case, as it is clear, the private party had not contested an unfavourable measure, but he had not obtained a favourable decision by the authority. The General court held that an individual had a right to participate in the administrative procedure for the remission of import duties, which he or she was involved in, because it appeared as the only instrument of defence

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13 P. Craig, *EU Administrative Law*, 316.

14 The 'rigorous' line was clearly held for the first time in Case 85/76, *Hoffmann-La Roche* v. *Commission* [1979] ECR 461.

15 See Case C-269/90 *Technische Universität München* v. *Hauptzollamt München-Mitte* [1991] ECR I-5469.

16 On this topic, among the scholars, see, for instance, D.U. Galetta, *Transparency and Administrative Governance in European Law*, M.P. Chiti (ed.), *General Principles of Administrative Action* (Bologna 2006) 170; E. Schmidt-Assman, *Das Allgemeine Verwaltungsrecht als Ordnungsidee* (Berlin 1998) 290 s.; G. Marcou, 'Le concepts du droits fondamentaux de la Communautè èconomique europèenne' [1983] *Rev. int. dir. comp.*, 694; V. Korah, 'The Rights of the Defence in Administrative Proceedings under Community Law' [1980] *Current Legal Problems*, 73.

17 See, for instance, Case 294/81 *Control Data Belgium N.V. S.A.* v. *Commission* [1983] ECR 911 and Case 98/83 and o., *Van Gend & Loos N.V. ed Expeditiebedrijf Wim Bosman B.V.* v. *Commission* [1984] ECR 3763.

18 See, for example: Case T-218/95 *Azienda Agricola 'Le Canne' S.R.L.* v. *Commission*; Case T-72/97 *Proderec - Formaçao and Desinvovimento de Recursos Humanos, A.C.E.* v. *Commission*; Case T-180/96 and o., *Mediocurso - Estabelecimento de ensini particolar L.d.a.* v. *Commission*; Case T-50/96 *Primex Produkte Import-Export GmbH, Interporc Im. und Export GmbH* v. *Commission*.

19 P. Craig, *EU Administrative Law*, 314.

20 See Case 17/74, *Transocean Marine Paint Association* v. *Commission*.

against a particularly strong discretionary power of the competent institution.[21] It is possible to find out an effort to protect private rights, by applying the principle in a partially different way from the one wich was used in the previous case law: not to avoid direct damages produced by a negative administrative decision, but to avoid the refusal of a desired favourable decision.

In general, the right of participation in administrative procedures may be limited in emergency situations, when public interest so requires and the proportionality criteria are respected.[22]

Besides, at times, even when it was demonstrated that the rights of the defence had been breached and there were no exceptional circumstances justifying the breach, the courts did not annul the administrative decision if it was concluded that the breach of the principle had not any influence on the contents of the measure.[23] But it so happened – very seldom – just if the authority had no discretionary power at all.[24]

2.3 The Participation in Administrative Procedures: Right or Duty?

Lastly, one could ask if the private party's participation in the procedure may represent a sort of condition for his or her application to the courts for annulment of the administrative decision to be accepted. In other words, when a private party did not participate in the administrative procedure, may he or she successfully set out pleas which he or she could have also set out to the competent institution before the measure was adopted?

In some cases, the General court held that an applicant who had participated in a procedure cannot rely to the courts on factual arguments of which he or she had not informed the competent institution during the administrative

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21 See, for instance, Case T-329/00 *Bonn Fleisch Ex - und Import* v. *Commission* [2003] ECR II-287.

22 For instance, the general interest to protection of public health is considered, at this purpose, particularly strong. See Case C–62/90, *Commission* v. *Germany* [1992] ECR I-2575 and Case C-28/05 *Dokter, Maatschap Van den Top, W. Boekhout* v. *Minister van Landbouw, Natuur en Voedselkwaliteit*.

23 See Case T-237/00 *Patrick Reynolds* v. *Parliament* [2005] ECR P.I., I-A-385 and ECR II-1731 and Case T-290/97 *Mehibas Dordtselaan* v. *Commission* [2000] ECR II-15. Among the scholars, see V. Korah, *The Rights of the Defence in Administrative Proceedings under Community Law* 73.

24 See, a contrario, Case T-310/01 *Schneider Electric* v. *Commission* [2002] ECR II-4071. It was held, in particular, that if the applicant was given an opportunity to submit its observations, 'the Commission could have reconsidered its position or, on the contrary, have provided further evidence in support of its proposition, so that the Decision might have been different in any event'; that is why the measure was 'vitiated by an infringement of the rights of defence' (456.-462.).

procedure.[25] So, there is a sort of 'duty' to participate to the administrative procedure, to be allowed to use before the courts the facts that the private knew by the beginning. It must be pointed out that all these cases concern competition law, which, as is well known, is a field where the courts are particularly careful in granting the full implementation of the European rules in force.

However, it may be interesting to underline that, even in this field, in recent case law there is one important exception to the rule, when the individual was not able to participate for a reason beyond him or her control[26] In these cases, the attention to the private rights of the defence is confirmed.

3 Statement of Reasons

3.1 The Content of Reasons and their Completeness

The EU administration has a general[27] duty to give reasons for measures that adversely affect an individual.[28]

This principle is closely connected to the protection of the rights of the defence. In fact, the period for bringing an action may begin to run when the applicant has acquired precise knowledge not only of the content of the administrative decision, but also of the reasons that it is based on.[29] So, it was held that the statement of reasons must be expressed in the text of the administrative decision; a failure to notify the measure to the person concerned together with

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25 See Case T-111/01 and o. *Saxonia Edelmetalle GmbH and ZE.M.A.G. GmbH* v. *Commission* [2005] ECR II-1579; Case C-449/98 P *I.E.C.C.* v. *Commission* [2001] ECR I-3875; Case 15/76 and o. *France* v. *Commission* [1979] ECR 321.

26 See Case T-111/01 and o., *Saxonia Edelmetalle GmbH and ZE.M.A.G. GmbH* v. *Commission*.

27 P. Craig, *EU Administrative Law*, 126 and 143; F. Schockweiler 'La motivation des décisions individuelles en droit communautaire et en droit national' [1989] *Cahiers de Droit Européen*, 3; D. Ritleng, *Motivation*, A. Barav, C. Philip (eds.), *Dictionnaire juridique des Communautés Européennes* (Paris 1993) 693; D.U. Galetta, *Transparency and Administrative Governance in European Law*, 171.

28 See art. 41, 2. (c) of the Charter of fundamental rights of European Union, art. 296 of the Treaty on the functioning of the European Union and art. 18 of the European Code of good administrative behaviour (Duty to state the grounds of decisions).

29 See, for example: Case C-18/57, *Nold Kg* v. *High Authority* [1959] ECR 89; Case 24/62 *Germany* v. *Commission* [1963] ECR 131; Case 191/82 *Fediol* v. *Commission* [1983] ECR 2913; Case 264/82, *Timex Corporation* v. *Council and Commission*; Case T-46/98 and o. *C.C.R.E.* v. *Commission* [2000] ECR II-167; Case T-80/00 *Associação Comercial de Aveiro* v. *Commission* [2002] ECR II-2465; Case T-199/99 *Sgaravatti Mediterranea S.R.L.* v. *Commission* [2002] ECR II-3731; Case T-141/99, and o. Vela S.r.l. and Tecnagrind S.L. and o. v. Commission [2002] ECR II-4547; Case T-228/99 and o. *Westdeutsche Landesbank Girozentrale and o.* v. *Commission* [2003] ECR II-435; Case T-137/01 Stadtsportverband Neuss e.V. v. Commission [2003] ECR II-3103; Case T-346/02 and o. *Cableuropa and o.* v. *Commission* [2003] ECR II-4251.

the reasons on which it is based may not be remedied by the private party learning of the reasons during the proceedings before the courts.[30]

The authority has to show all the facts, laws and considerations that have led it to adopt the measure, even if the private parties indicated them during the administrative procedure. However, it is not necessary to mention and discuss all the factual and legal issues raised by each party during the procedure,[31] as some reasons may be implied if the decision as a whole is clear and the rights of the defence have been respected.[32]

It was held that reasons have to be proper to the measure and that they must disclose in a clear and unequivocal manner the reasoning followed by the authority, in such a way to enable also the European judicature to properly comprehend it and to exercise its power of review as to the legality of the decision.[33]

The completeness of the statement of reasons has to be checked by the courts bearing the context of the case in mind: legal rules governing the matter in question, previous practice, and the interests of the addressees of the measure.[34] So, reasons may be stated in a very short and simple manner, especially

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30 See: Case T-93/02 *Confédération nationale du Crédit mutuel* v. *Commission* [2005] ECR II-143.; Case T-613/97 *U.F.EX, D.H.L. International S.A., Federal express international (France) S.N.C. and CRIE S.A.* v. *Commission* [2006] ECR II-1531; Case C-189/02 P and o. *Dansk Rørindustri and o.* v. *Commission* [2005] ECR I-5425.

31 See, for instance: Case 209/78 and o. *Heintz van Landewyck sàrl and o.* v. *Commission* [1980] ECR 3125; Case T-5/97 *Industrie des poudres sphériques* v. *Commission* [2000] ECR II-3755; Case T-319/99 *F.E.N.I.N.* v. *Commission* [2003] *ECR* II-357; Case T-272/02 *Comune di Napoli* v. *Commission* [2005] ECR II-1849; Case T-107/03 *Regione Marche* v. *Commission* http://www.curia.europa.eu; Case T-225/04 *Italy* v. *Commission* http//:www.curia.europa.eu; Case T-217/02 *Ter Lembeek International N.V.* v. *Commission* [2006] ECR II-4483; Case T-155/04 *SELEX Sistemi Integrati S.p.A.* v. *Commission* [2006] ECR II-4797.

32 See: Case T-304/06 *Paul Reber GmbH & Co. K.G.* v. *OHIM* [2008] ECR II-1927; Case C–204/00 P and o. *Aalborg Portland A/S and o.* v. *Commission* [2004] ECR I-123; Case C-3/06 P *Groupe Danone* v. *Commission* [2007] ECR I-1331.

33 See, for instance: Case T-162/06 *Kronoply GmbH & Co. KG.* v. *Commission* [2009] ECR II-1; Case T–134/03 and o. *Common Market Fertilizers S.A. and o.* v. *Commission*; Case T-109/01 *Fleuren Compost* v. *Commission* [2004] ECR II-127; Case T-141/99 and o. *Vela S.r.l. and Tecnagrind S.L. and o.* v. *Commission*; Case T-15/99 *Brugg Rohrsysteme GmbH* v. *Commission* [2002] ECR II-1613; Case T-388/00 *Institut für Lernsysteme GmbH* v. *OHIM - E.L.S.* [2002] ECR II-4301; Case C-17/99 *France* v. *Commission* [2001] ECR I-2481; Case C-310/99 *Italy* v. *Commission* [2002] ECR I-2289; Case C-5/01 *Belgium* v. *Commission* [2002] ECR I-11991; Case 76/00 P *Petrotub and Republica* v. *Council* [2003] ECR I-79; Case T-124/02 and o. *Sunrider Corporation* v. *OHIM* [2004] ECR II-1149; Case T-129/04 *Develey Holding GmbH & Co. Beteiligungs K.G.* v. *OHIM* [2006] ECR II- 811; Case T-317/05 *Kustom Musical Amplification Inc.* v. *OHIM* [2007] ECR II-427; Case C–341/06 P and o. *Chronopost SA and o.* v. *UFEX and o.* [2008] ECR I-4777. Similarly, Case 41/69 *A.C.F. Chemiefarma* v. *Commission* and Case 296/82 and o. *Netherlands and Leeuwarder Papierwarenfabriek* v. *Commission* [1985] ECR 809.

34 See, for example: Case 2/56, *Geitling* v. *High Authority* [1957] ECR 9; Case 240/82 and o. *Stichting Sigarettenindustrie and o.* v. *Commission* [1985] ECR 3831; Case C-15/00 *Commission* v. *B.E.I.* [2003] ECR I-7281; Case T-10/99 *Vicente Nuñez* v. *Commission* [2000] ECR P.I., I-A-47 and II-203; Case T-206/00 *Hult* v. *Commission* [2002] ECR P.I., I-A-19 and II-81; Case T-231/99 *Joynson* v. *Commission* [2002] ECR II-2085; Case T-171/02 *Regione Autonoma della Sardegna* v. *Commission* [2005] ECR II-2123; Case T-213/01 and o. *Österreichische Postsparkasse A.G. and o.* v. *Commission* [2006] ECR II-1601; Case T-613/97 *U.F.EX., D.H.L. International S.A., Federal*

when there is full convergence of the position of the different parties.[35] Matters which are manifestly irrelevant or insignificant or plainly of secondary importance must not be examined.[36]

More generally speaking, the operative part of a decision may be totally understood only in the light of the statement of its reasons, which represent an indivisible whole.[37]

An administrative measure is automatically annulled if there are no expressed reasons at all.[38] In this case, it is not necessary to check if the lack of reasons has also led to substantial damage to an individual's interest.[39] According to case law, a reference to a separate document does not breach the obligation, at least if the separate document is annexed to the administrative decision and they have both been communicated to the private party.[40] The right of the individual to know why the measure has been adopted is constantly protected. The citizen must be in a position that allows him or her to understand exactly the reasons of the administrative decision; to this end, all the elements of the case must be considered, but just a formal – substantially inadequate or inconsistent – statement of reasons is not enough.

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express international (France) S.N.C. and CRIE S.A. v. *Commission*; Case T-155/04 *SELEX Sistemi Integrati S.p.A.* v. *Commission*; Case C–182/03 and o. *Belgium and Forum 187* v. *Commission* [2006] ECR I-5479.

35 See Case 55/69 *Cassella Farbwerke Mainkur* v. *Commission* [1972] ECR 887; Case T-613/97 *U.F.EX., D.H.L. International S.A., Federal express international (France) S.N.C. and CRIE S.A.* v. *Commission*; Case T-379/04 *J* v. *Commission* http//:www.curia.europa.eu; Case T-351/02 *Deutsche Bahn A.G.* v. *Commission* [2006] ECR II-1047; Case T-282/02 *Cementbouw Handel & Industrie B.V.* v. *Commission* [2006] ECR II-319; Case T-249/04 *Philippe Combescot* v. *Commission* http://www.curia.europa.eu.

36 See so: Case T-613/97 *U.F.EX., D.H.L. International S.A., Federal express international (France) S.N.C. and CRIE S.A.* v. *Commission*; Case T-59/02 *Archer Daniels Midland Co.* v. *Commission* [2006] ECR II-3627; Case C-510/06 P *Archer Daniels Midland Co.* v. *Commission* http://curia.europa.eu; Case T-210/02 *British Aggregates Association* v. *Commission* [2006] ECR II-2789; Case T-239/04 and o. *Italy and Brandt Italia S.P.A.* v. *Commission* [2007] ECR II-3265.

37 See, for example: Case T-93/02 *Confédération nationale du Crédit mutuel* v. *Commission*; Case T-613/97, *U.F.EX., D.H.L. International S.A., Federal express international (France) S.N.C. and CRIE S.A.* v. *Commission* [2006] ECR II-1531; Case 40/73 and o. *Suiker Unie and o.* v. *Commission* [1975] ECR 1663; Case 107/82 *A.E.G.* v. *Commission* [1983] ECR 3151.

38 See, for instance: Case T-95/03 *Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and o.* v. *Commission* [2006] ECR II-4739; Case T-155/04 *SELEX Sistemi Integrati S.p.A.* v. *Commission*; Case T-303/02 *Westfalen Gassen Nederland B.V.* v. *Commission* [2006] ECR II-4567; Case T-168/01 *GlaxoSmithKline Services Unlimited* v. *Commission* [2006] ECR II-2969; Case T-176/01 *Ferriere Nord S.p.A.* v. *Commission* [2004] ECR II-3931; Case T-13/99 Pfizer Animal Health S.A. v. Council [2002] ECR II-3305; Case C-17/99 France v. Commission; Case C–114/00 Spain v. Commission [2002] ECR I-7657.

39 For example, see: Case T-228/99 and o. *Westdeutsche Landesbank Girozentrale and o.* v. *Commission*; Case T-251/00 *Lagardère S.C.A. and Canal +* v. *Commission* [2002] ECR II-4825; Case T-388/00, *Institut für Lernsysteme GmbH* v. *OHIM - E.L.S.*; Case T-323/99 *I.N.M.A. S.p.A. and o.* v. *Commission* [2002] ECR II-545; Case T-206/99 *Métropole Télévision S.A.* v. *Commission*.

40 See, for instance, Case T-65/96 *Kish Glass* v. *Commission* [2000] ECR II-1885 and Case T-137/01 *Stadtsportverband Neuss e.V.* v. *Commission*.

3.2 Statement of Reasons and Power of Appraisal

Of course, the right to have a statement of reasons for private parties is of more fundamental importance when the European institutions have a discretionary power of appraisal.[41]

The specific circumstances of the case are particularly important when it seems different from any other case and the decision sets a precedent for a complex question or it goes further than previous cases. In this case, the authority must be particularly careful when giving reasons and it has to explain its approach in a more diligent and precise way.[42]

On the contrary, the duty to give reasons is 'weaker' when the measure is very important for the implementation of the EU legal system and so the need to contrast its infringements by the individuals is particularly strong in the public interest. This happens, for example, in case law regarding breaches of competition rules, where the courts accept less precise statements of reasons with reference to the calculation method applied.[43]

Besides, according to case law, the summary nature of the statement of reasons may be an inevitable consequence of the large number of decisions which the competent institution must take in a short period of time.[44]

The effort to protect the freedom of choice of the EU institutions, therefore, may be very important. Despite this, also in particularly complex cases the efforts do not mean that the courts hold a measure, which was adopted without any statement of reasons, to be a legal decision.

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41 For instance, see Case T-613/97 *U.F.EX., D.H.L. International S.A., Federal express international (France) S.N.C. and CRIE S.A.* v. *Commission*; and Case T-413/03 *Shandong Reipu Biochemicals Co. Ltd* v. *Council* [2006] ECR II-2243.

42 See, for example: Case 142/84 and o. *B.A.T. and Reynolds* [1987] ECR 4487; Case T-613/97 *U.F.E.X., D.H.L. International S.A., Federal express international (France) S.N.C. and CRIE. S.A.* v. *Commission*; Case T–64/02 *Dr Hans Heubach GmbH & Co. K.G.* v. *Commission* [2005] ECR II-5137; Case T-304/02 *Hoek Loos N.V.* v. *Commission* [2006] ECR II-1887; Case T-340/03 *France Télécom S.A.* v. *Commission* [2007] ECR II-107.

43 See, for instance: Case T-279/02 Degussa A.G. v. Commission [2006] ECR II-897; Case T-23/99 L.R. A.F. 1998 v. Commission [2002] ECR II-1705; Case T–191/98 and o. *Atlantic Container Line A.B. and o.* v. *Commission* [2003] ECR II-3275; Case T–116/04 *Wieland-Werke AG* v. *Commission* [2009] ECR II-1087; Case C-189/02 P and o. *Dansk Rørindustri and o.* v. *Commission*; Case C-238/99 P and o. *Limburgse Vinyl Maatschappij and o.* [2002] ECR I-8375; Case T-236/01 and o. *Tokai Carbon and o.* v. *Commission* [2004] ECR I-1181; Case T–64/02, *Dr Hans Heubach GmbH & Co. K.G.* v. *Commission*; Case T-68/04 *S.G.L. Carbon A.G.* v. *Commission* [2008] ECR II-2511.

44 See so, for example, Case T-333/00, *Rougemarine S.A.R.L.* v. *Commission* [2002] ECR II-2983 and Case C-213/87, *Gemeente Amsterdam and Stichting Vrouwenvakschool voor Informatica Amsterdam (V.I.A.)* v. *Commission*.

4 Protection of Legitimate Expectations

4.1 General Observations

The protection of legitimate expectations certainly forms part, as a general principle, of the EU administrative legal order.[45] According to the Court of justice, it 'is the corollary of the principle of legal certainty, which requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by the Community law remain foreseeable'.[46]

It must be pointed out that the principle must not be relied upon by private parties who should realise that they are going to be adversely affected by a decision: in particular, this was held by the courts when the applicant was an undertaking who had clearly breached European competition law.[47] Case law has been particularly 'severe' on traders. According to the courts, in fact, prudent and discriminating traders are not protected by the principle if they could (or, maybe better, if they should) have foreseen the adoption of a measure likely to adversely affect their interests.[48]

In case law, the principle is treated as a whole. Indeed, in light of relevant case law, it is possible to make a distinction between four kinds of protected expectations: the interest of individuals to maintain the legal effects of a favourable measure, the interest of the addressee of specific assurances by a European institution to have those assurances respected, the interest to have self-binding

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45 Among the scholars, see for instance P. Craig, *EU Administrative Law*, 614, J. Schwarze, *European Administrative Law* (London 1992) 949, and J.-B. Auby & D. Dero-Bugny, *Les principes de sécurité juridique et de confiance légitime*, J.-B. Auby & J. Dutheil de la Rochère (eds.), *Droit administratif européen* (Bruxelles 2007) 484. In recent case law, see, for example: Case T-199/99 *Sgaravatti Mediterranea S.R.L.* v. *Commission*; Case C-376/02 *Goed Wonen* [2005] ECR I-3445; Case C-336/00 *Austria* v. *Martin Huber* [2002] ECR I-7699; Case T-141/99 and o. *Vela S.R.L. and Tecnagrind S.L. and o.* v. *Commission*; Case T-273/01 *Innova Privat-Akademie* v. *Commission* [2003] ECR II-1093; Case T-107/03 *Regione Marche* v. *Commission*; Case T-213/01 and o. *Österreichische Postsparkasse A.G. and o.* v. *Commission*. See also mCase 212/80-217/80, *Salumi and o.*, [1981] ECR 2735; Case 21/81 *Bout* [1982] ECR 381; Case C 289/81, *Mavrides* v. *Parliament*, [1983]ECR 1731.

46 See so Case C-63/93 *Duff and o.*, [1996] ECR I-569. See also, for instance, Case 117/83 *Könecke* v. *Balm* [1984] ECR 3291 and Case 325/85 *Irland* v. *Commission* [1987] ECR 5041.

47 See, for example, Case 67/84 *Sideradria* v. *Commission* [1985] ECR 3983 and Case C–96/89 *Commission* v. *Netherlands* [1991] ECR I-2461.

48 See, for instance: Case 83/76 and o. *Bayerische H.N.L. Vermehrungsbetriebe GmbH & Co. K.G. and o.* v. *Council and Commission* [1978] ECR 1209; Case 267/82 *Développement and Clemessy* v. *Commission* [1986] ECR 1907; Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products Lopik* v. *Commission* [1987] ECR 1155. More recently, see: Case C-182/03 and o. *Belgium and Forum 187* v. *Commission*; Case T-216/05 *Mebrom N.V.* v. *Commission* [2007] ECR II-1507; Case T-333/03 *Masdar (U.K.) Ltd* v. *Commission* [2006] *ECR* II-4377.

rules adopted by an administrative authority respected and, finally, the interest to obtain the respect by the competent institutions of practices followed in previous similar cases. It is interesting to see whether in case law the same (growing) attention to the private rights, which has been indicated with reference to the protection of the rights of the defence and of the right to obtain decisions with clear statement of reasons, has been paid or not.

4.2 The Withdrawal of Administrative Favourable Measures

With reference to the first kind of legitimate expectations, it has to be pointed out that 'under Community law, [...] an administrative measure, even if it may be irregular, is presumed to be valid, until it has been properly repealed or withdrawn by the institution which adopted it'.[49]

However, the European institutions have a general power[50] to retroactively withdraw[51] their illegal decisions within a reasonable time.[52] On the contrary, lawful administrative decisions may not normally be eliminated when they create advantages for private parties[53].

Some recent judgments concern illegal state aid. Both the Court of justice[54] and the General court[55] held that the private parties who received aid may not have the legitimate expectation that it was lawful, unless it had been granted in compliance with the procedure set out in the European Treaties. In fact, a diligent businessman (or businesswoman) must normally be able to determine

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49 See so Case 15/85 *Consorzio Cooperative d'Abruzzo* v. *Commission* [1987] ECR 1005.

50 See, for example: Case 7/56 and o. *Algera and o.* v. *Common Assembly* [1957] ECR 81; Case 54/77 *Anton Herpels* v. *Commission* [1978] ECR 585; Case T-227/95 *AssiDomän Kraft Products A.B.* v. *Commission* [1997] ECR II-1185; Case T-66/96 and o. *Mellet* v. *Court of justice* [1998] ECR P.I. I-A-449 and II-1305.

51 See, for example: Case 42/59 and o. *S.N.U.P.A.T.* v. *High Authority* [1961] ECR 103; Case 111/63 *Lemmerz-Werke* v. *High Authority* [1965] ECR 972; Case 14/81 *Alpha Steel* v. *Commission* [1982] ECR 749; Case 15/85 *Consorzio Cooperative d'Abruzzo* v. *Commission*; Case 344/85 *Ferriere San Carlo* v. *Commission* [1987] ECR 4435; Case 223/85, *R.S.V.* v. *Commission* [1987] ECR 4617; more recently Case C-500/99 P *Conserve Italia* v. *Commission* [2002] ECR I-867.

52 See, for instance, Case 7/56 and o. *Algera and o.* v. *Common Assembly* and recently Case T-25/04 *Gonzâlez y Diez S.A.* v. *Commission* [2007] ECR II-3121.

53 See: Case 7/56 and o. *Algera and o.* v. *Common Assembly*; Case 42/59 and 49/59 *S.N.U.P.A.T.* v. *High Authority*; Case C-159/82 *Verli-Wallace* v. *Commission* [1983] ECR 2711.

54 See, for example: Case C-183/02 P and o. *Demesa and Territorio Histórico de Álava* v. *Commission* [2004] ECR I-10609; Case C-148/04 *Unicredito Italiano S.p.A.* v. *Agenzie delle entrate* [2005] ECR I-11137; Case C-346/03 and o. *Atzeni and o.* v. *Regione autonoma della Sardegna* [2006] ECR I-1875; Case C–408/04 P *Commission* v. *Salzgitter* [2008] ECR I-2767; Case C-334/07 P *Commission* v. *Freistaat Sachsen* [2008] ECR I-9465.

55 For example, see: Case T-129/96 *Preussag Stahl* v. *Commission* [1998] ECR II-609; Case T-158/96 *Acciaierie di Bolzano* v. *Commission* [1999] ECR II-3927; Case T-126/96 and o. *B.F.M. and E.F.I.M.* v. *Commission* [1998] ECR II-3437; Case T-239/04 and o. *Italy and Brandt Italia S.P.A.* v. *Commission*.

whether the correct procedure has been followed or not and, if not, the private party may rely on exceptional circumstances, which may have legitimately caused him or her to assume that the aid was lawful.[56] In my opinion, according to this case law, private parties are required to pay attention at a level that is too high, in particular because they are expected to check the validity of the competent national authorities' action, which the individuals are often not able to do.

Lastly, it must be pointed out that the beneficiary of a favourable measure cannot have any legitimate expectations when the decision adopted contained obvious and evident mistakes.[57] The same rule applies[58] when the action of the competent institution, which adopted the favourable measure, was clearly wrongful[59] and, *a fortiori*, when the beneficiary of the decision contributed to its illegality.[60]

So, in general private legitimate expectations are protected when the individual does not want a lawful measure producing advantages to be eliminated by the authority; they are not protected when the decision is unlawful and, in this sense (especially in the field of competition law), private parties are required to be particularly careful.

4.3 The Expressed Assurances by the Competent Institution

The second kind of protected expectations concern people who have received expressed assurances by a European authority.

The assurances must be precise, unconditional and consistent, they must originate from authorised and reliable sources[61] clearly indicated to the person concerned by a EU authority and they must comply with the applicable rules.[62]

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56 See, for instance, Case C-183/91 *Commission* v. *Greece* [1993] ECR I-3131 and Case T-298/97 and o. *Alzetta, Masotti S.R.L. and o.* v. *Commission* [2000] ECR II-2319.

57 For such a case, see, for example, Case C-248/89 *Cargill* v. *Commission* [1991] ECR I-2987.

58 P. Craig, *EU Administrative Law cit.*, 17.

59 See, for example, Case 316/86 *Hauptzollamt Hamburg-Jonas* v. *Krücken* [1988] ECR 2213 and Case 54/77 *Anton Herpels* v. *Commission*.

60 For example, see: Case C-500/99 P *Conserve Italia* v. *Commission*; Case T-199/99 *Sgaravatti Mediterranea S.R.L.* v. *Commission*; Case T-347/03 *Eugénio Branco* v. *Commission* [2005] ECR II-2555; Case T-180/01 *Euroagri* v. *Commission* [2004] ECR II-369; less recently, Case 67/84 *Sideradria* v. *Commission*.

61 Such is not considered, for instance, an informal meeting among the Commissione and the private parties involved in an administrative procedure. See so Case T-333/03 *Masdar (U.K.) Ltd* v. *Commission*.

62 See, for instance: Case T-199/01 *G* v. *Commission* [2002] ECR I-A-207 and II-1085; Case T-347/03, *Eugénio Branco* v. *Commission*; Case T-282/02 *Cementbouw Handel & Industrie B.V.* v. *Commission*; Case T-195/05 *Deloitte Business Advisory N.V.* v. *Commission* [2007] ECR II-871; Case T-354/04 *Gaetano Petralia* v. *Commission* http://www.curia.europa.eu; Case T-74/07 *Germany* v. *Commission* [2009] ECR II-107; Case T-145/06 *Omya AG* v. *Commission* [2009] ECR II-145; Case C-443/07 P *Isabel Clara Centeno Mediavilla and o.* v. *Commission and Council* [2008] ECR I-10945; Case T-533/93 *Bouma* v. *Council and Commission* [2001] ECR II-203; Case T-73/94 *Beusmans* v. *Council and Commission* [2001] ECR II-223; Case C-162/01 P and o. *Bouma*

The concept of 'assurance' is normally used in a strict and narrow sense.[63]

In general, indeed, it was held that the communication of the assurances to the individual must not follow specific rules. So, at times the judgements took into consideration the fact that letters or fax messages sent by a European institution may create legitimate expectations for the addressee.[64]

However, the assurances must always be expressed: silence from a European authority is never enough to create legitimate expectations.[65] In this regard, it may be interesting to point out that the institutions have no duties to inform a private party involved in a procedure that he or she has made a mistake when interpreting the applicable rules. In fact, at times the courts held that, even if the institution was fully aware of the mistake, the silence kept in that regard cannot be considered as an assurance capable of creating legitimate expectations.[66]

A fortiori, the principle of the protection of legitimate expectations may not be relied upon by people who have committed a manifest infringement of the rules in force. So if the competent institution did not clearly inform them that their conduct was illegal it does not represent an assurance.[67]

In general, we could say that the legitimate expectations born from expressed assurances by European institutions are normally protected, but the courts interpret the concept of assurance in a restrictive way. This is just the beginning of an evolutionary path. As it was held that when expressing the assurances the institution need not follow specific rules, we could infer that there is a chance for the development in the near future of growing attention for the interests of individuals who act lawfully and properly.

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and Beusmans v. *Council and Commission* [2004] ECR I-4509; Case T-199/94 *Gosch* v. *Commission* [2002] ECR II-391; Case T-373/94 *R.W. Werners* v. *Council and Commission* [2006] ECR II-4631; Case T-500/04 *Commission* v. *I.I.C. GmbH* [2007] ECR II-1443.

63 See: Case C-506/03 *Germany* v. *Commission* http//:curia.europa.eu; Case C-182/03 and o. *Belgium and Forum 187* v. *Commission*; Case C-213/06 P *A.E.R.* v. *Georgios Karatzoglou* [2007] ECR I-6733; Case T-65/04 *Nuova Gela Sviluppo Soc. Cons. pa* v. *Commission* http://www.curia.europa.eu; Case T-304/01 *Julia Abad Pérez and o.* v. *Council and Commission*, [2006] ECR II-4857; Case T-59/02 *Archer Daniels Midland Co.* v. *Commission*; Case T-220/00 *Cheil Jedang* v. *Commission* [2003] ECR II-2473.

64 See, for example: Case T-333/03 *Masdar (U.K.) Ltd* v. *Commission* and Case C-144/82 *Detti* v. *Court of jiustice* [1983] ECR 2421.

65 See so, for instance, Case T-213/01 and o. *Österreichische Postsparkasse A.G. and o.* v. *Commission*.

66 See so, for instance, Case T-107/03 *Regione Marche* v. *Commission*.

67 See so, for instance, Case C-65/02 P and o. *ThyssenKrupp Stainless GmbH and ThyssenKrupp Acciai speciali Terni S.p.A.* v. *Commission* [2005] ECR I-6773.

4.4 The Self-binding Rules Adopted by the European Institutions

The third relevant field for the implementation of the principle of protection of legitimate expectations regards the legal effects of self-binding rules adopted by the EU administrations.

It was held that an institution may not degress from guidelines that it has imposed upon itself for the exercise of its discretionary powers, when the self-binding rules are compatible with the ones contained in the Treaties.[68]

Case law often concerns the Commission's Guidelines on the method of setting fines imposed due to an infringement of the competition rules.[69] The courts[70] held that these guidelines may not be regarded as rules of law, which the administration is always bound to observe. Nevertheless, they are rules of practice, from which the Commission may not depart in specific cases without giving reasons, which must be connected to the particular circumstances of the case.[71] Of course, the possibility to depart from the guidelines is broader (or, maybe better, the duty to give reasons is 'weaker', as already noticed in general terms) when the competent authority has strong discretionary powers.[72] However, if it departs from the guidelines without giving reasons, it acts in breach of the general principles of European administrative law, such as equal treatment[73] and protection of legitimate expectations.

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68 See, for example, Case T–7/89 *Hercules Chemicals* v. *Commission* [1991] ECR II-1711, Case T-214/95 *Vlaamse Gewest* v. *Commission* and Case T-17/03 *Schmitz-Gotha Fahrzeugwerke GmbH* v. *Commission* [2006] ECR II-1139.

69 Guidelines on the method of setting fines imposed pursuant to Artcle 15 (2) of Regulation no 17 and of Article 65 of the ECSC Treaty, OJ 1998, C9, 3.

70 See, for instance: Case 73/74 *Fabricants de papiers peints* v. *Commission* [1975] ECR 1491; Case C-189/02 P, and o. *Dansk Rørindustri and o.* v. *Commission*; Case T-59/02, *Archer Daniels Midland Co.* v. *Commission*; Case T-329/01 *Archer Daniels Midland* v. *Commission* [2006] ECR II-3255; Case C-167/04 P, *J.C.B. Service* v. *Commission* [2006] ECR I-8935; Case T-17/03 *Schmitz-Gotha Fahrzeugwerke GmbH* v. *Commission* [2006] ECR II-1139; Case T-374/04, *Germany* v. *Commission*, [2007] ECR II-4431.

71 See: Case T-44/00, *Mannesmannröhren-Werke A.G.* v. *Commission* [2004] ECR II-2223; Case C-196/99 P, *Aristrain* v. *Commission* [2003] ECR I-11005; Case C-189/02 P and o., *Dansk Rørindustri* v. *Commission*; Case C-397/03 P, *Archer Daniels Midland et Archer Daniels Midland Ingredients* v. *Commission* [2006] ECR I-4429; Case T-23/99, *L.R. A.F. 1998* v. *Commission*; Case T-15/99 *Brugg Rohrsysteme GmbH* v. *Commission*; Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v. *Commission*; Case T-15/02 *B.A.S.F. A.G.* v. *Commission* [2006] ECR II-497; Case T-279/02, *Degussa A.G.* v. *Commission*; Case T-59/02 *Archer Daniels Midland Co.* v. *Commission*.

72 See, for example, Case T-415/03 *Cofradía de pescadores de San Pedro de Bermeo* v. *Council* [2005] ECR II-4355 and Case 100/80 and o. *Musique diffusion française and o.* v. *Commission*.

73 Infra, 5.2.

At times, case law has also regarded the so called 'Leniency Notice',[74] where the Commission defined the circumstances in which private parties cooperating with it during an investigation into a cartel may be exempted from the fine or granted reductions. It was held that the notice is able to produce legitimate expectations on which the undertakings can rely when disclosing the existence of cartels[75]. In those cases, the Commission is normally obliged to comply with it.

So, normally the adoption of self-binding rules by a European institution may produce legitimate expectations for the individuals; however, the guidelines do not strictly bind the authority and no general principle is breached if a measure whose content departs from the guideline gives clear reasons.

4.5 The Constant Application of Previous Practice

Last but not least, the fourth aspect of the implementation of the principle of protection of legitimate expectations regards the respect for administrative practice.

It must be pointed out that a legally relevant practice cannot arise from one case alone; moreover, the fact that a European institution acted in a certain manner in its previous decisions does not itself compel the authority to do so while adopting the subsequent measures.[76]

Once more, this is true, *a fortiori*, if the authority has a strong discretionary power. As has often happened, for instance, in the field of the imposition of fines due to an infringement of competition rules. In this case, the courts usually pointed out that the content of the measure must be decided on in the light of the characteristics of each situation.[77] So, even if in the past the Commission had imposed fines of a certain level for certain types of infringement, it was not estopped in the present case from raising that level and from applying new calculation methods. The decision to raise was not unlawful if the 'new'

74 It is the Commission's notice on the non-imposition or reduction of fines in cartel cases, OJ 1996, C207, 4.

75 See, for instance: Case T-322/01 *Roquette Frères S.A.* v. *Commission* [2006] ECR II-3137; Case T-26/02 *Daiichi Pharmaceutical Co. Ltd* v. *Commission* [2006] ECR II-713; Case T-15/02 *B.A.S.F. A.G.* v. *Commission*; Case T-48/00 *Corus U.K.* v. *Commission* [2004] ECR II-2325; Case T-9/99 *H.F.B. and o.* v. *Commission* [2002] ECR II-1487.

76 See so, for instance, Case T-329/01 *Archer Daniels Midland Co.* v. *Commission*, Case T-44/00 *Mannesmannröhren-Werke A.G.* v. *Commission* and Case C-196/99 P *Aristrain* v. *Commission* [2003] ECR I-11005.

77 See, for example: Case C-189/02 P and o., *Dansk Rørindustri and o.* v. *Commission*; Case C–238/99 P and o. *Limburgse Vinyl Maatschappij N.C. (L.V.M.) and o.* v. *Commission*.

size of the fines stayed within the limits indicated by the rules in force[78] and if it was necessary to ensure the implementation of the European competition policy, which requires that the Commission may at any time adjust the size of fines.[79]

In conclusion, one could say that, notwithstanding the case law on the duty of the European institutions not to depart from their own constant practices was described as a possible expression of the principle of the protection of legitimate expectations, in reality very seldom do the private parties obtain the annulment of an administrative decision for such a plea. Because of the existence of a strong discretionary power, only the breach of the necessity of giving reasons for the content of a measure different from the previous and similar ones could lead the court to annul the decision.

5 Sound Administration

5.1 The 'meaning' and the Legal Basis of Sound Administration

In case law, the principle of sound administration[80] was often indicated as a general parameter of public action.[81] However, it must be pointed

78 See, for instance: Case T–23/99 *L.R. A.F. 1998* v. *Commission*; Case C-189/02 P and o. *Dansk Rørindustri and o.* v. *Commission*; Case C-76/06 P *Britannia Alloys & Chemicals Ltd* v. *Commission* [2007] ECR I-4405.

79 See so Case C-189/02 P and o. *Dansk Rørindustri and o.* v. *Commission.*

80 Among the scholars, see, for instance: J.A. Usher, 'The CE Good Administration of European Community Law' [1985] *Current Legal Problems*, 269; A. Tomas Mallen, *El derecho fundamental a una buena administracion* (Madrid, 2004); L. Azoulai, 'Le principe de bonne administration', J.-B. Auby, J. Dutheil de la Rochère (eds.), *Droit administratif européen*, 493; P. Craig, *EU Administrative Law*, 278 s.; A.J. Gil Ibañez, *Administrative Supervision & Enforcement of EC Law: Powers, Procedures and Limits* (Oxford - Portland 1999) 182 and 189; E. Schmidt-Assmann in: J. Barnes (ed.), *Innovación y reforma en el derecho administrativo* (Sevilla 2006) 116; A. Pecheul, 'La Charte des droits fondamentaux de l'Union européenne' [2001] *Revue de droit français*, 688; D.U. Galetta, *Transparency and Administrative Governance in European Law*, 155; J. Monar, 'Reforming European Union Governance. A Perspective for the Next Two Decades' [2000] *Dir. pubbl. comp. eur.*, 868; N. Maccormick, 'A Comment on the Governance Paper', http://www.jeanmonnetprogram.org/papers/01/012501.html; J.L. Quermonne, 'L'Union européenne entre 'Gouvernance' et 'Gouvernment' ' [2002] Dir. pubbl. comp. eur., 510; K.A. Armstrong, 'Rediscovering Civil Society: the European Union and the White Paper on Governance' [2002] European Law Journal, 113; Idem, 'Civil Society and the White Paper. Bridging or Jumping the Gaps?', http://www.jeanmonnetprogram.org; M. Wind, 'The Commission White Paper. Bridging the Gap Between the Governed and the Governing?', http://www.jeanmonnetprogram.org.

81 See, for instance: Case T-147/94 *Krupp Hoesch* v. *Commission* [1999] ECR II-603; Case T-19/95 *Adia Interim* v. *Commission* [1996] ECR II-321; Case T-39/92 and o. *Groupement des des cartes bancaires 'C.B.' and Europay International S.A.* v. *Commission* [1994] ECR II-49; Case T-29/92

out that it (or, better, its possible breach in the case) almost never was used as an 'independent' parameter to check whether an administrative measure should be annulled; on the contrary it was frequently referenced to other principles, especially to the protection of legitimate expectations[82] and to the principle of legality.[83] At times, it was even held that it does not, in itself, confer rights upon individuals, except when it is the expression of other specific rights, such as the right to have affairs handled fairly, impartially and within a reasonable time, the right to be heard during an administrative procedure and the right to have reasons given for decisions.[84] This is quite interesting, as indeed the principle of sound administration seems to be a sort of 'reinforcement' instrument of its own corollaries. Art. 41 of the Charter of fundamental rights of the European Union demonstrates this in the text, where all the corollaries are set out, but the rule of law, as a whole, is expressly dedicated to the (so called by the legislator) 'principle of good administration'.

So, the principle of sound administration, which compels the institutions to assure a fair and complete inquiry in any procedure,[85] concerns the respect for the rights of the defence and the duty to forward all the relevant information to the interested parties.[86] The European courts, even if the competent authority had a strong discretionary power,[87] must ensure that all the relevant elements have been taken into consideration in a 'reasonable' measure.

In the judgements on action for annulment regarding EU administrative decisions, the fairness criterion is applied to the action of the authority, not to the behaviour of the specific officials. In one case, the applicant, a private party in a procedure on the infringement of competition law, complained that a member of the team responsible, within the Commission, for dealing with the case had expressed his views using a quotation casting discredit on the applicant's activities, with bad behaviour and language. But such remarks, according to the General court, were not enough to cast doubt on the degree of care and

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R S.P.O. and o. v. *Commission* [1992] ECR II-2161; Case T-79/89 and o. *B.A.S.F. and o.* v. *Commission* [1992] ECR II-315; Case T-54/99, *Max. Mobil* v. *Commission* [2002] ECR II-313.

82 See so, for example, Case T-115/94 *Opel Austria* v. *Council* [1997] ECR II-39.

83 See so, for example, Case T-167/94 *Detlef Nölle* v. *Council and Commission* and Case T-79/89 and o. *B.A.S.F. and o.* v. *Commission* [1992] ECR II-315.

84 See so, for example, Case T-193/04 *Tillack* v. *Commission* [2006] ECR II-3995 and Case T–196/99 *Area Cova and o.* v. *Council and Commission* [2001] ECR II-3597.

85 See, for instance: Case T-74/92 *Ladbroke Racing (Deutcshland) GmbH* v. *Commission* [1995] ECR II-115; Case T-164/94 *Ferchimex* v. *Council* [1995] ECR II-2681; Case T-48/96 *Acme* v. *Council* [1999] ECR II-3089; Case T-413/03 *Shandong Reipu Biochemicals Co. Ltd.* v. *Council*.

86 See, for example, Case T-186/97 and o. *Kaufring A.G. and o.* v. *Commission*, Case T-205/99 *Hyper S.r.l.* v. *Commission* and Case T-23/03 *C.A.S. S.p.A.* v. *Commission* [2007] ECR II-289.

87 See, for example: Case T-164/94 *Ferchimex* v. *Council*; Case T-48/96 *Acme* v. *Council*; Case T-413/03 *Shandong Reipu Biochemicals Co. Ltd.* v. *Council*; Case T-54/99 *Max. Mobil* v. *Commission*; Case T-7/93 *Langnese-Iglo GmbH* v. *Commission* [1995] ECR II-1533; Case C-269/90 *Technische Universität München* v. *Hauptzollamt München-Mitte*.

impartiality with which the Commission conducted the investigation. In fact, the decision had already been adopted, even if it had not already been served on the applicant; moreover, notwithstanding one official infringing the principle of sound administration, the contested measure was adopted not by him alone, but by the whole college of commissioners.[88]

From another point of view, the principle of sound administration does not compel the institutions, as a consequence of the application of the private party, to start a procedure: according to case law, an applicant has no right to obtain a decision by the competent authority. Only in the field of market law[89] was it held that the Commission simply has to explain why the procedure was not started[90] and the applicant may express his or her opinion on it, within a reasonable time.[91]

One could ask if the principle of sound administration could determine whether the European administration has a duty to ensure the adoption of simple procedures. In one case, the private party brought an action before the General court to have a Commission's decision in the field of state aids annulled. He maintained that the Commission had breached the principle of sound administration because, in checking whether the national aid was lawful, it had made an error in its search for the relevant legal basis and, as a consequence, it had started not one, but two different procedures. According to the General court, as the situation was not clear from the beginning of the procedure, the principle had not been breached.[92] In fact, an institution needs to ascertain the legal basis on which to found its decision and, while doing so, it may legally start more than one procedure, even though it is in the private party's interest for the institutions to act in a quick and simple way. This private party's interest is weaker than the public interest to have the Commission efficiently contrasting infringements to the EU legal system. Mere suspicion is enough to start a procedure and the private parties involved in an administrative procedure must tolerate a level of 'uncertainty' in the actions of the competent institution.

However, the courts have also held that the principle of sound administration may compel an authority to cooperate, within certain limits, with the private parties.

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88 See Case T-31/99 *A.B.B. Asea Brown Boveri* v. *Commission* [2002] ECR II-1881.

89 See, for instance: Case 125/78 *GE.M.A.* v. *Commission* [1979] ECR 3173; Case C-449/98 *P I.E.C.C.* v. *Commission*; Case T-24/90 *Automec S.R.L.* v. *Commission* [1992] ECR II-2223; Case T-114/92 *B.E.M.I.M.* v. *Commission* [1995] ECR II-147; Case T-387/94 *Asia Motor France S.A. and o.* v. *Commission* [1996] ECR II-961; Case T-204/03 *Haladijan Frères S.A.* v. *Commission* [2006] ECR II-3779.

90 See, for example, Case T-28/90 *Asia Motor France S.A. and o.* v. *Commission* [1992] ECR II-2285 and Case C-265/97 *P V.B.A.* v. *Florimex and o.* [2000] ECR, I-2061.

91 For instance, see Case T-305/94 and o. *L.V.M. and o.* v. *Commission* [1999] ECR II-931 and Case C-266/97 P, *V.B.A.* [2000] ECR I-2135.

92 See so Case T-176/01 *Ferriere Nord S.p.A.* v. *Commission*.

At times, for example, the General court held that when a private party had asked for specific instruments to be used during an administrative procedure, in the light of the principle of sound administration his or her request must be satisfied, even if, from the point of view of the institution, this may have been more 'expensive' than the ordinary way of action. In one case, an undertaking involved in a procedure for infringement of the competition law had decided to cooperate with the Commission. The cooperation happened by the oral disclosure of information during a formal meeting. In this situation, according to the court, 'the lack of an express provision that minutes be drawn up does not preclude that in a particular case the Commission may be under a duty to make such a record of the statements it receives'. That is why the minutes, 'recording the essential aspects of the assertions made at that meeting, must be drawn up or, at the very least, a sound recording must be made, pursuant to the principle of sound administration, if the undertaking in question so requests at the latest at the beginning of the meeting'.[93]

Another interesting issue concerns the possibility that a European institution, which is competent to adopt an administrative measure, may take into account facts and evidence submitted late by the parties. The Court of justice[94] held that, in principle, sound administration suggests the opposite: in fact, it is consistent with the principle and with 'the need to ensure the proper conduct and effectiveness of proceedings that the parties have an incentive to respect the time–limits imposed on them'; the power of the authority to decide, if necessary, 'to disregard facts and evidence produced by the parties outside the time–limits prescribed should, in itself, have such an incentive effect'. But, according to the court, the principle of sound administration requires that the authority have the power to choose to take into account elements submitted late by the parties. Of course, such an approach is based not only on the protection of the interests of the private parties, but primarily on the public interest in the completeness of the inquiry step of the administrative procedure, which leads to the adoption of appropriate measures. So, the principle of sound administration compels the authorities to treat the same situations equally, but at the same time it allows the competent institution to make exceptions if it is required in the public interest.

Lastly, it may be interesting to point out that, in case law, the principle of sound administration is never expressly related to the use by the European institutions of information concerning private parties. Perhaps, this is because the subject is carefully ruled on in legislation. Nonetheless, in my opinion the principle is the main source of the duty for the authorities to use the data in a proper way, which is often individuated by the courts. For instance, the General

93 See so Case T-15/02 *B.A.S.F. A.G.* v. *Commission.*
94 See so Case C-29/05 *P OHIM* v. *Kaul GmbH and o.*, [2007] ECR I-2213.

court held that, when an institution investigates an infringement of competition law, there must be a connection between the information requested and the infringement under investigation. The criterion of necessity must be assessed according to the purpose of the inquiry, which must be stated in the request for information.[95] So, we could say that a duty for the authority to use only the information which are strictly necessary is a sort of 'second face' of the rule of completeness of the inquiry step of administrative procedures. Similarly, the Commission was held to have a duty to carefully use the owned data in the relationship with the private parties involved in an administrative procedure, with respect to their right to a fair hearing. As it is necessary to provide them with all the information relevant to the defence of their interests without disclosing other parties' businness secrets, the institution, also on its own initiative, must choose the appropriate means of action.[96] Moreover, as has already been seen with reference to the implementation of other principles, the decisions were only annulled when it had been demonstrated that, had the administrative action been 'fair', the measure which had been adopted had had a different content.[97]

In light of the case law, it is not easy to express general observations about the legal strength of the principle of sound administration. We could say that it does not seem to be a 'self executing' principle, as it is used by the courts together with other criteria as a parameter for checking the validity of a measure. At present, it may represent an indirect protection tool for private individuals when it is in their interest to obtain a fair procedure that is compatible with the public interest as part of an efficient administration.

5.2 The Corollaries of Sound Administration: the Principles of Proportionality and Equal Treatment

Two important principles, whose possible breach is often focused on in the actions brought against administrative measures, are the principle of proportionality and the principle of equal treatment. In judgements, they are often taken into account together and they are both corollaries of the principle of sound administration.

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95 See Case T-39/90 *Samenwerkende Elektriciteits-produktiebedrijeven N.V.* v. *Commission* [1991] ECR II-1497.

96 See so, for instance, Case 49/88 *S.A.M.A.D. and o.* v. *Council* [1991] ECR I-3187 and Case 264/82 *Timex Corporation* v. *Council and Commission*.

97 See, for example: Case T-62/98 *Volkswagen* v. *Commission* [2000] ECR II-2707; Case T-9/99 *H.F.B. and o.* v. *Commission*; Case T-15/02 *B.A.S.F. A.G.* v. *Commission*; Case T-279/02 *Degussa A.G.* v. *Commission*; Case 40/73 and o. *Suiker Unie and o.* v. *Commission*; Case C-338/00 *Volkswagen* v. *Commission* [2003] ECR I-9189.

The principle of proportionality[98] (set out in art. 5.4, TEU)[99] requires the action of the EU authorities not to 'exceed what is necessary to achieve the objectives of the Treaties'; it prevents the institutions from imposing prohibitions and limitations on private parties which are not strictly in the public interest.[100] So, proportionality requires a good balance among purposes intended, tools of public action and interests involved in the case.

Of course, the principle of proportionality is connected to the principle of equal treatment, as long as it concerns – not the production of legal rules but – the adoption of individual measures by administrative authorities.[101] The duty of equal treatment also represents a corollary of the general principle of sound administration and it compels the European institutions not to treat comparable situations in different ways or different situations in the same way, unless there is an objective justification for doing so.[102]

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98 Among the scholars, see, for instance: J. Schwarze, 'The Principle of Proportionality and the Principle of Impartiality in European Administrative Law', [2003] *Riv. trim. dir. pubbl.*, 53; N. Emiliou, *The Principle of Proportionality in European Law. A Comparative Study* (London 1996); D.U. Galetta, *Le principe de proportionnalité*, J.-B. Auby & J. Dutheil de la Rochère (eds.), *Droit administratif européen*, 357.

99 See also art. 6 of the European Code of good administrative behaviour (Proportionality).

100 See, for example, in recent case law: Case C-112/05 *Commission* v. *Germany* [2007] ECR I-8995; Case C-45/05 *Maatschap Schonewille-Prins* v. *Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-3997; Case C-384/05 *Johan Piek* v. *Ministerie van Landbouw, Natuurbeheer en Visserij*, [2007] ECR I-291; Case C-380/03 Germany v. *Parliament and Council* [2006] ECR I-11573; Case C-210/00 *Käserei Champignon Hofmeister GmbH & Co. K.G.* v. *Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453; Case C-121/00 *Hahn* [2002] ECR I-9193; Case T-199/99 *Sgaravatti Mediterranea S.R.L.* v. *Commission*; Case T-332/00 and o. *Rica Foods and Free Trade Foods* v. *Commission* [2002] ECR II-4755; Case C-192/05 *K. Tas-Hagen and R.A. Tas* v. *Raadskamer W.U.B.O. van de Pensione en Uitkeringsraad* [2006] ECR I-10451; Case C-282/04 and o. *Commission* v. *Netherlands* [2006] ECR I-9141; Case C-406/04 *De Cuyper* [2006] ECR I-6947; Case C-28/05 *Dokter, Maatschap Van den Top, W. Boekhout* v. *Minister van Landbouw, Natuur en Voedselkwaliteit*; Case C-255/04 *Commission* v. *France* [2006] ECR I-5251; Case C-504/04 *Agrarproduktion Staebelow GmbH* v. *Landrat des Landkreises Bad Doberan* [2006] ECR I-679; Case C-344/04 *The Queen, ex parteI.A.T.A. and E.L.F.A.A.* v. *Department for Transport* [2003] ECR I-403; Case C-453/03 and o., *A.B.N.A. and o.*, [2005] ECR I-10423; Case C-434/02 *Arnold André* [2004] ECR I-11825; Case C-210/03 *Swedish Match* [2004] ECR I-11893; Case C-262/02 *Commission* v. *France* [2004] ECR I-6569; Case C-491/01 *The Queen* v. *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd.*, [2002] ECR I-11453; Case C-503/99 *Commission* v. *Belgium* [2002] ECR I-4809; Case T-154/06 *Italy* v. *Commission* http://www.curia.europa.eu; Case T-65/04 *Nuova Gela Sviluppo Soc. Cons. pa* v. *Commission*; Case T-170/06, *Alrosa Company Ltd* v. *Commission* [2007] ECR II-2601.

101 J. Schwarze, European Administrative Law, 561. See also, for example, A. Dashwood - S. O'Leary (eds.), *The Principle of Equal Treatment in EC Law* (London 1997).

102 See, for example: Case C-76/06 P *Britannia Alloys & Chemicals Ltd* v. *Commission*; Case C-344/04 *The Queen, ex parte: I.A.T.A. and E.L.F.A.A.* v. *Department for Transport*; Case T-23/99 *L.R. A.F. 1998* v. *Commission*; Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v. *Commission*; Case T-64/02 *Dr Hans Heubach GmbH & Co. K.G.* v. *Commission*; Case T-50/00 *Dalmine S.p.A.* v. *Commission* [2002] ECR I-6677; Case T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v. *Commission*; Case T-44/00 *Mannesmannröhren-Werke A.G.* v. *Commission*; Case T-52/02 *S.N.C.Z.* v. *Commission* [2005] ECR II-5005; Case T-351/02 *Deutsche Bahn A.G.* v. *Commission; Case T-217/02 Ter Lembeek International N.V. v. Commission; Case T-379/04 J v. Commission; Case T-303/02 Westfalen Gassen*

In the implementation of the principle of proportionality by the General court and the Court of justice[103] an evolutionary path is particularly evident. In the first period, the principle of proportionality was just used to grant fundamental rights for private parties.[104] In later judgements it was described as a protection tool for any legal situation[105] and as a general principle of the European legal system.[106] It is settled case law that, when there is a choice between several appropriate measures, the competent institution must adopt the least onerous and the disadvantage caused to the private party must not be disproportioned to the aims pursued.[107]

Equal treatment corresponds to a general principle, too.[108] However, when the applicants base their submissions on the fact that in their case the European administration applied different rules from those applied in previous similar cases, they must demonstrate that the main elements of the previous decisions, which they refer to, are really comparable to the elements of the situation been dealt with then.[109]

As has already been pointed out examining the other principles, the concrete 'strength' of the proportionality and equal treatment criteria is, we could say, inversely proportional to the degree of the discretionary power the competent

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Nederland B.V. v. Commission; Case T-354/04 Gaetano Petralia v. Commission; Case T-125/06 Centro Studi Antonio Manieri S.r.l. v. Council, [2009] ECR II-69.

103 J. Schwarze, *European Administrative Law*, 719

104 See, for instance, Case 11/70, *Internazionale Handelsgesellschaft*, [1970] ECR 1125 and, in more general terms, Case C-8/55 *Fédération Charbonnière de Belgique* v. *High Authority* [1956] ECR 291.

105 See, for instance, Case 280/93 *Germany* v. *Council* [1994] ECR I-4973 and Case 46/87 and o. *Hoechst A.G.* v. *Commission*.

106 See, for instance: Case 114/76 *Bela Mühle* v. *Grows Farm* [1977] ECR 1211; Case 181/84 *Man Sugar* [1985] ECR 2889; Case T-87/98 *International Potash Company* v. *Council* [2000] ECR II-3179; Case T-123/99 *JT's Corporation* v. *Commission* [2000] ECR II-3269; Case C-478/98 *Commission* v. *Belgium* [2000] ECR II-7587; Case C-361/98 Italy v. Commission [2001] ECR I-385; Case C-110/97 *Netherlands* v. *Council* [2001] ECR I-8763.

107 See, for instance: Case T-177/04 *easyJet Airline Co. Ltd* v. *Commission* [2006] ECR II-1931; Case T-211/02 *Tideland Signal* v. *Commission* [2002] ECR II-3781; Case T-2/03 *Verein für Konsumenten-information* v. *Commission* [2005] ECR II-1121; Case C-451/99 A.S.L. [2002] ECR I-3193; Case C-491/01, *The Queen* v. *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd.*; Case C-174/05 *Stichting Zuid-Hollandse Milieufederatie and Stichting Natuur en Milieu* v. *College voor de toelating van bestrijdingsmiddelen* [2006] ECR I-2443; Case C-28/05 *Dokter, Maatschap Van den Top, W. Boekhout* v. *Minister van Landbouw, Natuur en Voedselkwaliteit*. In the ancient case law, see, for instance: Case 8/55 *Fédération charbonnière de Belgique* v. *High Autority*; Case 114/76 *Bela Mühle* v. *Grows Farm*; Case 112/80 *Durbeck* v. *Hauptzollamt Frankfurt a. M.*, [1981] ECR 1095; Case 52/81 *Faust* v. *Commission*, [1982] ECR 3745; Case 15/83 *Denkavit Nederland* [1984] ECR 2171.

108 See, for example: Case T-45/98 and o. *Krupp Thyssen Stainless and Acciai speciali Terni* v. *Commission*; Case T-50/00 *Dalmine S.p.A.* v. *Commission*; Case T-44/00 Mannesmannröhren-Werke A.G. v. Commission; Case T-59/02 *Archer Daniels Midland Co.* v. *Commission*; Case C-167/04 *P J.C.B. Service* v. *Commission*.

109 See, for example, Case T-67/01 *J.C.B. Service* v. *Commission* [2004] ECR II-49 and Case T-59/02 *Archer Daniels Midland Co.* v. *Commission*.

public authority has. When the discretionary power is particularly broad, in fact, the measure adopted is only annuled if it is manifestly inappropriate having regard to the objective pursued: which is an exceptional and very rare situation.

In a recent judgement, for instance, the General court[110] held that the Commission in a very complex case had breached the principle of proportionality. The Commission had ordered the applicant, who was guilty of an infringement of competition law, not only to pay for a fine and to bring an end to the unlawful behaviour, but also to submit a proposal for the establishment of a suitable mechanism assisting the Commission itself in monitoring the private party's compliance with the decision, this included the appointment of an independent monitoring trustee. All the costs concerned with the trustee's activity should have been borne by the applicant. In this regard, it is interesting to point out that the Court held that a European institution has limited discretion when formulating remedies to be imposed to private parties. In fact, the principle of proportionality requires that the burden imposed does not exceed what is appropriate and necessary for the re-establishment of compliance with the rules infringed. The contested costs must be borne by the authority in fulfilling its own enforcement responsibilities.[111]

However, this was an exceptional case, in which the Commission very clearly exceeded its powers. Normally, in case law, when the discretionary power is particularly wide, the principles of proportionality and equal treatment are applied in a way which is flexible enough to allow the institutions to carry out assessments of opportunity, while considering the main characteristics of the facts and the public interest involved.

An important field of implementation concerns, as usual, the imposition by the European Commission on an undertaking of fines for an infringement of competition law.[112] Of course, the size of the fine must be proportional to the gravity of the infringement, which has to be evaluated with regard to a large number of factors, variable according to the particular circumstances of the case.[113] Among these factors, is the duration of the unlawful behaviour, the intensity of the influence that the undertaking was able to exert on the market, the profit derived from the practices and the volume and value of the services concerned.[114] Another important element is the threat that the infringement

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110 See Case T-201/04 *Microsoft Corporation* v. *Commission* [2007] ECR II-3601.

111 See also Case C-241/91 P and o. *R.T.E. and I.T.P.* v. *Commission* [1995] ECR I-743.

112 Among the scholars, see P. Craig, *EU Administrative Law*, 681.

113 See so, for instance: Case T-83/91 *Tetra Pak International S.A.* v. *Commission* [1994] ECR II-755; Case T-229/94 *Deutsche Bahn* v. *Commission* [1997] ECR II-1689; Case T-279/02 *Degussa A.G.* v. *Commission*.

114 See, for example, Case 100/80 and o. *Musique Diffusion française and o.* v. *Commission*, Case C-289/04 *P Showa Denko K.K.* v. *Commission* [2006] ECR I-5859 and Case T-329/01 *Archer Daniels Midland Co.* v. *Commission*. But see also Case C-397/03 P, *Archer Daniels Midland et Archer Daniels Midland Ingredients* v. *Commission*, where it was held that 'Community law contains no general principle that the penalty be proportionate to the undertaking's size on the product market in respect of which the infringement was committed'.

poses to the achievement of the EU objectives and this makes the Commission's power of appraisal relatively high when fixing the size of the fines.[115]

Case law often regarded how the Commission had calculated the size of the fines imposed. In these judgements, the deterring effect that the fines were supposed to have played a primary role. In particular, it was held that, if the level of the fine had been calculated just to negate the illegal profits, it would not have been a proper deterrent. First of all, in fact, the undertakings, when they rationally choose to break the competition rules, make calculations relating to the amount of possible fines and the likelihood of being detected.[116] Moreover, the deterrent effect only relates to future conduct and has to be matched with a punitive purpose. The Commission must take both into consideration, which is why a fine could be imposed even if the private party, who was guilty of an infringement of competition law, had no financial advantage at all as a consequence of the illegal behaviour.[117] So, there is only one rule: all the relevant elements, in themselves, give an approximate indication of the size of the fine, which never can be the result of simple calculations based on total turnover.[118]

Of course, when an infringement has been committed by more than one person, the relative gravity of the behaviour of each participant has to be examined,[119] to understand who was the leader of the group, which, according to the principles of proportionality and equal treatment, has to be punished more severely.[120] Also from this point of view, the Commission's discretionary power is particularly broad. In order to check if the principles of proportionality and equal treatment have been respected, the courts must confine themselves to

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115 See, for instance, Case T–229/94 *Deutsche Bahn* v. *Commission*.

116 See so, for example, Case T-59/02 *Archer Daniels Midland Co*. v. *Commission* and Case T-329/01 *Archer Daniels Midland Co*. v. *Commission*.

117 See so, for instance, Case T-64/02 *Dr Hans Heubach GmbH & Co. K.G*. v. *Commission* and Case T-59/02 *Archer Daniels Midland Co*. v. *Commission*.

118 See, for example: Case 100/80 and o. *Musique Diffusion française and o. v. Commission; Case C-397/03 P, Archer Daniels Midland et Archer Daniels Midland Ingredients v. Commission; Case T-9/99 H.F.B. and o. v. Commission; Case T-59/02 Archer Daniels Midland Co. v. Commission; Case T-73/04 Le Carbone-Lorraine v.* Commission [2008] ECR II-2661.

119 See, for instance: Case 40/73 and. O. *Suiker Unie and o*. v. *Commission*; Case C-204/00 P and o. *Aalborg Portland A/S and o*. v. *Commission*; Case T-16/99 *Lögstör Rör* v. *Commission* [2002] ECR II-1633; Case T-33/02, *Britannia Alloys & Chemicals Ltd* v. *Commission* [2005] ECR II-4973; Case T-15/02 *B.A.S.F. A.G*. v. *Commission*; Case T-330/01 *Akzo Nobel N.V*. v. *Commission* [2006] ECR II-3389; Case T-303/02 *Westfalen Gassen Nederland B.V*. v. *Commission*. For a judgement in which the General court annuled the Commission's decision because wrongly the role played in the infringement by one of the undertakings had been considered too much important in comparison with the others' action, see Case T-322/01 *Roquette Frères S.A*. v. *Commission*.

120 See, for example: Case C-57/02 P *Acerinox* v. *Commission* [2005] ECR I-6689; Case C-289/04 P *Showa Denko K.K*. v. *Commission and o*.; Case T-236/01 and o. *Tokai Carbon and o*. v. *Commission*; Case T-15/02 *B.A.S.F. A.G*. v. *Commission*.

examining the coherence and the reasons given, while they cannot substitute the assessment contained in the administrative measure with their own one.[121]

This is confirmed also when the private parties were given different time limits to prepare their participation acts to the procedure. The courts recognise a power of appraisal of the European institutions in deciding how long the specific terms must be; the same term may be given to various parties to prepare their replies, even if some of them have much more complex contents than the others. If the periods are sufficient to allow all the parties to defend themselves effectively, they must not necessarily be proportionate to the size of the preparatory work required in each individual situation.[122]

However, the courts normally consider the frequent choice made by the Commission of dividing private parties in competition infringements into groups compatible with both the principle of proportionality and the principle of equal treatment. The allocation in the same group of undertakings of different size, in fact, may be reasonable because of other factors, such as the gravity of their infringement.[123] The only limitation to a broad public discretionary power consists of a duty to give reasons for the allocation in groups of the various parties.[124]

A slightly different aspect of the administrative action concerning an infringement of competition law committed by several undertakings concerns the implementation of the principle of equal treatment.

As was already pointed out, in its 'Leniancy Notice' the Commission defined when a private party cooperating with it during an investigation into a cartel may be exempted from the fine or granted reductions. Of course, this only occurs if the undertaking who admits its participation in an infringement cooperates from its own volition giving true and complete information and, as a consequence, the Commission may comprehend with less difficulty what really happened.[125] The principles of proportionality and equal treatment are fully respected if there is no reduction (or a lower reduction) of the fine imposed on other private parties, who simply did not deny the factual allegations put to them by the Commission, without concrete cooperation.[126] Instead, the principle

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121 See, *for instance: Case T–213/00 C.M.A. C.G.M. and o. v. Commission [2003] ECR II-913; Case T-236/01 and o. Tokai Carbon and o. v. Commission; Case T-62/02 Union Pigments A.S. v. Commission [2005] ECR II-5057; Case T-26/02 Daiichi Pharmaceutical Co. Ltd v.* Commission.

122 See, for example, Case T–25/95 and o. *Cimenteries C.B.R. and o.* v. *Commission* and Case T-44/00 *Mannesmannröhren-Werke A.G.* v. *Commission*.

123 See so, for instance, Case T–213/00 *C.M.A. C.G.M. and o.* v. *Commission*.

124 See, for example, Case T–213/00 *C.M.A. C.G.M. and o.* v. *Commissio*n and Case T-18/03 CD-Contact Data GmbH v. Commission [2009] ECR II-1021.

125 See, for instance, Case C-65/02 P and o. *ThyssenKrupp Stainless GmbH and ThyssenKrupp Acciai speciali Terni S.p.A.* v. *Commission* and Case T-48/02 *Brouwerij Haacht N.V.* v. *Commission* [2005] ECR 5259.

126 See, for example, Case C-328/05 P, *S.G.L. Carbon A.G.* v. *Commission* [2007] ECR I-3921 and Case T-340/03 *France Télécom S.A.* v. *Commission*.

of equal treatment obliges the Commission to reduce the fines in the same way to different undertakings, at the same stage of the procedure and in similar circumstances having provided similar information concerning their conduct. So, the mere fact that one of the undertakings answered before the others to the questions posed at the same time by the institution to different private parties may not represent an objective reason to treat it differently.[127]

In case law it is possible to find out, in this regard, a very interesting element. In particular, the duty to treat parties which are in similar situations in the same way is only strictly binding 'inside' the same case. The European courts held that, even if the Commission once decided that a certain kind of conduct deserved a fine of a certain amount, it was not obliged to take the same decision in the following cases. Each case may be decided in the light of its own characteristics.[128] Of course, this confirms, once more, that the Court of justice and the General court use self-restraint when the administrative power is broadly discretionary. But, in my opinion, another observation may be drawn. One could infer, in fact, that – at least when the Commission has to impose fines for an infringement which has been committed by more than one person – the principle of equal treatment has a different legal strength when it is applied 'inside' one case and when it is applied taking various other cases into consideration. In the former situation, to decide how to treat the private parties involved in the same infringement the competent authority must use rational criteria and it may treat the various undertakings in different ways only if their conduct shows different elements. On the contrary, we could say that the 'external' principal of equal treatment is maybe weaker: as each fact has a different context, the Commission is not bound to take similar decisions regarding parties which were in similar situations but were involved in different infringements.

Another important field concerning the implementation of the principle of proportionality regards the withdrawal of unlawful aid. According to the European courts, the recovery is a logical consequence of the breach of the rules by the private parties (who are obliged to lose the advantage which they had enjoyed and to restore the situation prior to payment of the aid). So, the recovery could never be un-proportional in itself.[129]

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127 See, for instance, Case T-45/98 and o. *Krupp Thyssen Stainless and Acciai speciali Terni* v. *Commission*, Case T-48/98 *Acerinox* v. *Commission* [2001] ECR II-3859 and Case T-59/02 *Archer Daniels Midland Co.* v. *Commission*.

128 See so, for example, Case T-329/01 *Archer Daniels Midland Co.* v. *Commission* and Case T-16/99 *Lögstör Rör* v. *Commission*.

129 See so, for instance: Case C-148/04 *Unicredito Italiano S.p.A.* v. *Agenzia delle Entrate*; Case C-372/97 *Italy* v. *Commission* [2004] ECR I-3679; Case C-310/99 *Italy* v. *Commission*; Case C–114/00 *Spain* v. *Commission*.

The Commission may decide to order a partial recovery, if it is considered enough in the light of the gravity of the unlawful behaviour and its negative effects.[130]

It may be less simple to foresee that, according to the Court of justice, the Commission could request payment of grants which are only partially unlawful. The aim is to efficiently deter fraud. When the aid is just partially unlawful, it could not be completely recovered only if such complete removal of the aid is in itself a breach of the principle of proportionality.[131] The same fine may be imposed on parties who gained different financial advantages from their unlawful behaviour (and even to parties who had no financial advantage at all), if it seems necessary for the European institution to assure the deterrent effect.[132] But it is not easy to understand why the courts make no difference between cases of negligence and cases of an intentional breach of law, as it might be rational to apply harsher fines in response to more 'guilty' action. It was held that the principle of proportionality does not require the withdrawal of financial aids to be possible only if the Commission demonstrates fraudulent intent, because that would represent a silent invitation to break the law.[133]

The withdrawal of unlawful financial assistance does not breach the principle of proportionality even if it is decided a long time after the aid was granted.[134] The same rule applies to the recovery of interest, as the aim is not to allow the private to benefit from the unlawful provision of money.[135] It is evident that, in all these situations, the authority's discretionary power is extremely broad and that private parties have no relevant instruments of defence against it.

Lastly, the principle of proportionality was expressly connected in case law with the proper use by the European institutions of information concerning private parties: which is interesting, because (as has already been pointed out) this never happened in judgements with reference to the principle of sound administration, of which proportionality clearly is a corollary. In particular, it was held that, during an inquiry, the European institution may not oblige a private party to supply information in such a way as to constitute a burden

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130 See so, for example, Case C-240/03 P *Comunità montana della Valnerina* v. *Commission and Italy* [2006] ECR I-731 and Case C-199/03 *Ireland* v. *Commission* [2005] ECR I-8027.

131 See, for instance, Case C-240/03 P *Comunità montana della Valnerina* v. *Commission and Italy*, Case C-500/99 P *Conserve Italia* v. *Commission* and Case C-104/94 *Cereol Italia* v. *Azienda agricola Castello* [1995] ECR I-2983.

132 See so, for example, Case T-64/02 *Dr Hans Heubach GmbH & Co. K.G.* v. *Commission* and Case T–213/00 *C.M.A. C.G.M. and o.* v. *Commission.*

133 See so, for instance, Case C-240/03 P *Comunità montana della Valnerina* v. *Commission and Italy.*

134 See, for example, Case T-158/96 *Acciaierie di Bolzano* v. *Commissio*n, Case T-275/94 *C.B.* v. *Commission* [1995] ECR II-2169 and Case T-298/97 and o. *Alzetta, Masotti S.R.L. and o.*

135 See so, for instance, Case T-158/96 *Acciaierie di Bolzano* v. *Commission* and Case T-298/97 and o. T-23/98 *Alzetta, Masotti S.R.L. and o.* v. *Commission.*

which is disproportionate to the requirements of the inquiry itself.[136] The Commission has a discretionary power to decide if the data that it already has in its possession were exhaustive or not.[137]

In general, we could infer that, in the implementation of the principles of proportionality of administrative action and of equal treatment, the European Courts show a strong effort to protect the power of appraisal of the institutions. The attention for private rights, instead, is still rather weak.

5.3 The Reasonable Lasting of Administrative Procedures

Another corollary of the principle of sound administration compels the European institutions to conclude the administrative procedure within a reasonable time.[138]

According to art. 41 of the Charter of fundamental rights of the European Union, the duty is regularly recognised in judgements[139] (especially in the field of competition law) as an expression of a general principle itself.[140]

It is interesting to remark that no legislative rules indicate when exactly a procedure certainly is too long. Moreover, the Court of justice and the General court never gave specific indications, even if they held that the Commission, which of course may choose how to act during each procedure, must not prolong indefinitely its investigation.[141]

Whether or not the duration of the procedure has been reasonable depends on the particular circumstances of the case and especially on its context, the number and complexity of the stages to be followed by the authority and the

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136 See so, for example, Case T-39/90 *Samenwerkende Elektriciteits-produktiebedrijeven N.V.* v. *Commission* and Case T-145/06 *Omya AG* v. *Commission*.

137 See, for instance, Case 27/88 *Solvay & Cie* v. *Commission* [1989] ECR 3355; Case 374/87 *Orkem S.A., ex C.d.f. Chimie S.A.* v. *Commission* [1989] ECR 3283, Case 5/62 and o. *Società Industriale Acciaierie San Michele and o.* v. *High Authority* [1962] ECR 837.

138 See, for example, Case C-282/95 P *Guérin automobiles* v. *Commission* [1997] ECR I-1503 and Case T-144/02 *Richard J. Eagle and o.* v. *Commission* [2004] ECR II-3381.

139 See, for instance: Case T-67/01 *J.C.B. Service* v. *Commission*; Case T–242/02 *The Sunrider Corp.* v. *OHIM* [2005] ECR II-2793; Case C-238/99 P and o. *Limburgse Vinyl Maatschappij N.C. (L.V.M.) and o.* v. *Commission*; Case T-67/01 *J.C.B. Service* v. *Commission*; Case T–242/02 *The Sunrider Corp.* v. *OHIM*.

140 See, for example: Case C-113/04 P *Technische Unie B.V.* v. *Commission* [2006] ECR I-8831; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v. *Commission* [2006] ECR I-8725; Case C-238/99 P and o. *L.V.M. and o.* v. *Commission*; Case T-125/01 *Marti Peix* v. *Commission* [2003] ECR II-865; Case T-375/05 *Azienda agricola 'Le Canne' S.R.L.* v. *Commission* http://www.curia.europa.eu.

141 See: Case T-176/01 *Ferriere Nord S.p.A.* v. *Commission*; Case C-270/99 P *Z* v. *Parliament* [2001] ECR I-9197; Case T-395/04 *Air One S.p.A.* v. *Commission* [2003] ECR II-1343; Case T-95/03 *Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and Federación Catalana de Estaciones de Servicio* v. *Commission*.

importance of the decision for the parties involved.[142] In this regard, it was held that the institution may decide whether or not it was appropriate to take account of information, which had been sent out of time by the private parties, if that did not have the effect to unduly prolonging the administrative procedure,[143] but this sounds, we could say, like a tautological explanation.

Another interesting element concerns the fact that, to decide whether or not the duration of the procedure had been reasonable, the courts did not take into consideration the procedure as a whole, but its single steps one by one.[144] So, measures adopted after complex and long procedures usually were not annulled, in the light of the prevalent public interest to allow the institutions to take their time to properly evaluate the facts and express their power of appraisal.

At times, in the judgements it was indicated in the conduct of the applicant is an important factor for understanding if the procedure had been unlawfully long.[145] It is interesting to point out, in fact, that in some cases it was held that the particularly long duration of the procedure had also been caused by the constant opposition expressed by the applicant during the procedure itself and so the responsibility for the breach of the principle of the reasonable term was not upon the institution:[146] it is quite strange, we could say, that, in that case, the expression of the right of participation was in concrete seen as a sort of 'unlawful behaviour'.

However, generally speaking an administrative decision is not annulled because of the breach of the principle of a reasonable time. That should not be surprising, as the breach of the principle causes no effects on the content of the measure adopted. So if there are not other breaches, especially of the rights of the defence of the private parties,[147] the measure may survive. In other terms, the courts expressly held that the failure to comply with the principle does not justify automatic annulment of the contested decision, if no personal interests

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142 See so, for example: Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland* v. *Commission* [2009] ECR I-6155; Case T-347/03 *Eugénio Branco* v. *Commission*; Case T-137/01 *Stadtsportverband Neuss e.V.* v. *Commission*; Case T-107/03 *Regione Marche* v. *Commission*; Case T-176/01 *Ferriere Nord S.p.A.* v. *Commission*; Case C-270/99 P *Z* v. *Parliament*; Case T-395/04 *Air One S.p.A.* v. *Commission* [2003] ECR II-1343; Case T-95/03 *Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and Federación Catalana de Estaciones de Servicio* v. *Commission*.

143 See so, for example, Case T-413/03 *Shandong Reipu Biochemicals Co. Ltd* v. *Council* and Case T-132/01 *Euroalliages and o.* v. *Commission* [2003] ECR II-2359.

144 See so Case C-113/04 P *Technische Unie B.V.* v. *Commission* and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v. *Commission*.

145 See so Case C-238/99 P and o. *L.V.M. and o.* v. *Commission*.

146 See Case T-213/01 and o. *Österreichische Postsparkasse A.G. and o.* v. *Commission*.

147 See, for instance: Case C–238/99 P and o. *L.V.M. and o.* v. *Commission*; Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v. *Commission*; Case C-523/04 *Commission* v. *Netherlands* [2007] ECR I-3267; Case C-490/04 *Commission* v. *Germany* [2007] ECR I-6095; Case T-67/01 *J.C.B. Service* v. *Commission*; Case T-145/06 *Omya AG* v. *Commission*.

of the private parties involved have been damaged.[148] In those conditions, the annulment of a measure on the sole ground that it was adopted after more than a reasonable period would merely further delay the adoption of a decision and so would be to the detriment of the applicant.[149]

Lastly, it must be pointed out that each unlawful delay of the action of a European institution is a case of maladministration, which falls within the competence of the European Ombudsman[150] according to art. 228 of the Treaty on the functioning of the European Union.[151] This factor is very important, as it offers a relevant instrument of protection for the private parties, alternative but not less effective (at least, from a broadly 'political' point of view) than the courts judgements.

However, in my opinion, new rules should be adopted at the European level to fix in general how long an administrative procedure is supposed to reasonably last. Of course, the power of the institutions to take account of information, which has been sent to them out of time by the private parties involved in a particularly complex administrative procedure, has to be carefully protected, as it corresponds to the general interest of obtaining proper decisions. It may be useful that the public authorities are allowed to decide to delay the procedure, giving reasons for it and fixing how long the delay will be. Regarding the adoption of unfavourable measures, perhaps it would be better if the competent authority loses its power to adopt the decision when it has clearly and seriously breached the principle of the reasonable time. When the breach is less serious, instead, the effectiveness of the principle could be granted in a different way:

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148 See: Case T-26/99 *Trabisco* v. *Commission* [2001] ECR II-633; Case T-62/99 SO.DI.M.A. v. Commission [2001] ECR II-655; Case T-107/03 *Regione Marche* v. *Commission*; Case T-196/01 *Aristoteleio Panepistimio Thessalonikis* v. *Commission* [2003] ECR II-3987; Case T-213/01 and o. *Österreichische Postsparkasse A.G. and o.* v. *Commission*; Case T-95/03 *Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and Federación Catalana de Estaciones de Servicio* v. *Commission*.

149 See so Case T–242/02 *The Sunrider Corp.* v. *OHIM* and Case T-66/01 *Imperial Chemical Industries Ltd* v. *Commission* http://www.curia.europa.eu.

150 About the European Ombudsman see for example, among the scholars: J. Soderman, 'The Thousand and One Complaints: the European Ombudsman 'En Route'', [1997] *European Public Law*, 351, and Idem, 'What Is Good Administration? The European Ombudsman's Code of Good Administrative Behaviour', speach at the International Seminar *The Ombudsman and the European Union Law*, Bucarest, 21-24 april 2001, www.euro-ombudsman.eu.int; P.G. Bonnor, 'The European Ombudsman: a Novel Source of Soft Law in the European Union', [2000] *European Law Review*, 39; K. Heede, *European Ombudsman Redress and Control at Union Level* (The Hague 2000); J.F. Carmona y Choussat, *El Defensor del pueblo europeo* (Madrid, 2000); P. Magnette, 'Entre cônrole parlementaire et 'état de droit': le rôle politique du médiateur dans l'Union européenne' [2001] *Revue française de science politique*, 933; L. Cominelli, 'An Ombudsman for the Europeans: gradually moving towards effective dispute resolution between citizens and public administrations', L.C. Reif (ed.), *The International Ombudsman Yearbook* (Leiden - Boston 2004); J. Sanchez Lopez, 'El defensor del pueblo europeo' [2005] *Rev. der. const. eur.*, 183; A. Tsadiras, *The Ombudsman*, P. Craig, *EU Administrative Law*, 829.

151 Moreover, see art. 143 of the Charter of fundamental rights of the European Union (European Ombudsman).

for instance, if the measure adopted causes the imposition of fines, the size of the fine could be reduced.

6 Final Observations

6.1 The Importance of Being Principle

In general terms, we could say that, in more 'ancient' judgements, the Court of justice maintained a strict self restraint and, in evaluating the elements of each case, it did not overturn the outcome of discretionary decisions. In more recent judgements instead, the courts tended to increasingly check the correctness of the institution's comprehension of the fact and, in light of the result, they found out whether the administrative procedure principles had been infringed.[152]

Looking in a chronological perspective at the case law on action for annulment regarding a breach of the administrative procedure principles,[153] it is possible to infer that often there are some inconsistencies in terminology. It is not easy to clearly separate neighbouring concepts, such as principle which 'forms part of the Community legal order',[154] 'general principle' used as a synonym for 'fundamental principle of Community law',[155] or, in particular with reference to the *audi alteram partem* principle, 'generally accepted principle of administrative law in force in the Member States',[156] 'general rule'[157] and 'fundamental principle of Community law'.[158]

Of course, the lexical gap probably reflects a sort of physiological gradualness, caused by the attention paid by the courts when they 'choose' the administrative procedure principles – which are not expressly set out in the European rules in force – in light of the legal system of the Member States.[159]

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152 Among the scholars, see so, for instance, P. Craig, *EU Administrative Law*, 429.

153 Among the scholars, see, for example, M. Akehurst, 'The Application of General Principles of Law by the Court of Justice of the European Communities' [1981] *British Yearbook of International Law* 41.

154 See for example, with reference to the principle of protection of legitimate expectations, Case 112/77 *Toepfer* v. *Commission* [1978] ECR 1032.

155 See, for example, Case 810/79 *Ubershaer* [1980] ECR 2764.

156 See so Case 32/62 *Maurice Alvis* v. *Council*.

157 See so Case 17/74 *Transocean Marine Paint Association* v. *Commission*.

158 See so Case 85/76 *Hoffmann-La Roche* v. *Commission*.

159 Among the scholars, see so, for instance, L. Neville Brown & F.G. Jacobs, *The Court of Justice of the European Communities* (London, 1977).

Nowadays, all the principles that have been examined in this paper are described as general principles. But not all of them have the same legally binding strength.

So, the first conclusion that may be drawn regards the lack of substantial uniformity among the different principles protecting individuals. It is not possible to assess their effectiveness as a whole and it is necessary to consider them one by one.

6.2 The Administrative Procedure Principles between the Power of Appraisal of the European Institutions and the Protection of Individual Rights

In case law, a sort of 'two-steps analysis' can be seen. At the first step, the European courts check whether a principle has been breached in the case. At the second step, they verify whether, if the measure was lawful, its content would or could have been seriously different: only in the affirmative do they annul the decision.

As has been seen, the degree of the discretionary power that the institution has in the case is a fundamental factor in all the judgements that have been examined. Indeed, although the mandatory nature of the Treaties is constantly recognized, the substantial elements of each case are almost always the benchmark for the courts. Generally speaking, an administrative measure is not annulled if a breach of a substantial individual interest is not proven.

When a specific European rule has been adopted, the courts 'read' it very carefully, to detect the individual interest which the legislator aimed to protect. Only the holder of that interest may complain before a court for the breach of the principle which inspired the rule. So, the breach is not in itself a sign of illegality, able to justify annulling the contested measure. Rather, the breach of the principle only leads to the annulment of the administrative measure if the applicant demonstrates that the breach also affects his or her individual interest, whose protection is the objective of specific rules.[160]

The implementation of the various principles is not uniform. Some of them (the sound administration principle and its corollaries, but also, even if in a partially different way, the protection of legitimate expectations) have, in fact,

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[160] See, for example, Case T–134/03 and o. *Common Market Fertilizers S.A.* v. *Commission* and Case C–69/89 *Nakajima All Precision Co. Ltd* v. *Council* [1991] ECR I-2069. In both cases, a specific rule had been infringed by the European institution. But the courts held that the breached rule just regarded the action of an administrative board and did not aim at protecting the interests of the private parties concerned in the procedure. So, the applicant could not successfully complain and the contested measure was not annulled, notwithstanding, from a substantial point of view, it was not valid.

more jagged edges than other ones (the principle of participation and respect for the rights of the defence and the duty to state reasons).

The right of private parties to participate in the administrative procedure in which they are involved is never in itself questioned in case law, at times even if the specific rules in force do not contain any reference to it. When it was demonstrated that a private party was not able to participate to an administrative procedure, the final decision was normally annulled, save if it was clear that the measure would in any case have had the same content. Only in the field of competition law did the courts hold that there was a sort of 'duty' on the private party to give the competent authority, during the procedure, all the relevant information concerning the factual elements of the case, so that, if the individual had not acted in that way, he or she could not use the same elements to defend himself or herself before the courts.

Also the duty to give reasons for unfavourable decisions is normally strongly binding and, in fact, an administrative measure affecting a private party is always annuled if it contains no statement of reasons at all. But it was constantly held that the completeness of the reasons given depends on each context. So, the right of the individuals affected by the measure to know its reasons is in general stronger when the competent institution used broad discretionary powers. According to an (partially contradictory) exception to this rule, the right seems much weaker when there is a need for granting the implementation of the EU legal system, especially in fields in which the infringements by the individuals are particularly frequent.

The courts treat both the principle of participation in the administrative procedure and the duty to give reasons with great attention for private rights, whose breach often determines the annulment of the decision. Notwithstanding the fact that the administrative power of appraisal is carefully taken in consideration, one could say that nowadays it suffers strong limits and that it may only prevail in exceptional circumstances, when it is not demonstrated that the private parties' right of the defence (broadly intended) has been breached.

The particular circumstances of the specific cases grow in importance with reference to the implementation of the other principles. In this area, the Court of justice and the General court still show an effort to protect the freedom of choice the EU institutions have.

The lack of any conceptual reference point which may be still and stable in the perspective of the protection of the individual situations is evident, as it was seen, when it is matter for the protection of legitimate expectations, whose legal strength depends on several factual and legal elements.

The same is mostly evident, however, where the implementation of the principle of sound administration and of its corollaries (proportionality, equal treatment and reasonable term of administrative procedures) is concerned. The sound administration principle compels the European institutions to take decisions evaluating all the relevant elements. But it is considered a sort of 'additional' criterion, which may be used by the courts to strengthen their judgements

when they are based upon the analysis of other topics. As was pointed out, in fact, the breach only of the principle of sound administration never caused, in itself, the annulment of a contested decision, which rather was annulled when also other principles had been breached and whether, if the breach had not taken place, the measure would likely have had different content. Similarly, when an administrative decision had breached the principles of proportionality and equal treatment, it was annulled only if it seemed totally irrational. The principle of the reasonable term is, in a certain sense, quite peculiar. In fact, one could notice a sort of contradiction between its formal reconstruction as a general principle of the action of European administration and the complete lack of judgements annulling measures which were adopted after (too) long procedures. However, it has already been pointed out that the delay itself does not produce any consequences on the content of the measure and so its annulment would be completely useless for the applicant.

Lastly, regarding the principle of protection of legitimate expectations, very seldom and almost only in cases of the withdrawal of lawful favourable decisions was the right of the applicant protected by the courts. Even if the relevance of the principle in the European legal system has been growing up during the last decades, the primary effort is still to assure the effectiveness of the discretionary power of the competent institutions.

So, a general 'methodological' rule is that a decision is annulled only if, whether the action of the competent institution would have been lawful, its content would have been different.

6.3 A Growing System of Protection Tools for Individual Situations?

The courts regularly indicate what constitute safeguards, which is particularly useful when the administrative power of discretionary appraisal is broad and far reaching. These guarantees include the duty of the competent institution to carefully and impartially examine all the relevant elements of the case, the respect for the right of participation of private parties and the duty to give adequate reasons for each decision.[161] Besides, in recent years the General court used to check, especially when the case was complex, if the inquiry step of the procedure had been fair and complete.[162]

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161 See, for example: Case T-163/94 and o. *N.T.N. Corporation and Koyo Seiko Co. Ltd* v. *Council* [1995] ECR II-1381; Case T-167/94 *Detlef Nölle* v. *Council and Commission*; Case 164/94 *Ferchimex S.A.* v. *Council*; Case C-269/90 *Technische Universität München* v. *Hauptzollamt München-Mitte*; Case C-294/90 *British Aerospace and o.* v. *Commission* [1992] ECR I-493; Case 188/85 Fediol v. *Commission* [1988] ECR 4193.

162 See, in particular, Case T-342/99 *Aitours* v. *Commission* [2004] ECR II-2585; Case T-310/01 *Schneider Electric* v. *Commission*; Case T-5/02 *Tetra Laval* v. *Commission* [2002] ECR II-4381.

So, even if generally speaking an unfavourable measure may only be annulled when a specific individual interest has been breached, the adherence to the duties to allow participation and to give reasons nowadays offers an effective system of protection tools for private parties before the administrative action. The role of the European courts is at present much more relevant than it used to be,[163] even if, of course, the judgements are strictly connected to the elements of the specific cases and only in this perspective they may be correctly comprehended.[164]

On the other hand, as has already been discussed, the principle of sound administration and its corollaries often do not represent a real limit, in case law, to the expression of the power of discretional appraisal, maybe because they do not yet have a precise legal identity and their infringements are more difficult to discern as well as establishing their relevance to the case. Therefore, the courts are still cautious in implementing them.

In this context, the protection of legitimate expectations is, we could say, 'in the middle'. The principle is binding when it is necessary to protect the holder of a lawful favourable administrative measure, who wants to maintain the decision's legal effect. On the contrary, as it was easy to foresee, there cannot be legitimate expectations regarding unlawful measures. However, it has been pointed out that traders are in a particularly weak position, as, to have a legitimate expectation to the conservation of a favourable administrative decision, they are often requested not only to adhere to the rules, but also to check the legality of the action of the competent authorities. The judgements apply restrictive criteria to check whether a legitimate expectation was born when an institution expressed assurances (which must be precise, unconditional and consistent), when a European authority adopted self-binding rules and when it had already decided in similar cases. In fact, the discretionary power normally allows the administration to change its mind and the only limit concerns the duty to state reasons. Legal certainty is strictly anchored to the effectiveness of the EU legal system and the efficiency of the public action must prevail in the public interest.

But it is necessary to notice that, at least with reference to the 'strong' principles, a new system of protection tools for individual situations is emerging.

At the beginning of its action the Court of justice's main objective was for the European legal system to become an undisputed benchmark for the decisions

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163 Among the scholars, see on this topic, for instance, T. Hartley, *Constitutional Problems of the European Union* (Oxford - Portland 1999) and Idem 'The European Court, Judicial Objectivity and the Constitution of the European Union' [1996] *Law Quaterly Review* 95; H.G. Schermers & D.F. Waelbroeck, *Judicial Protection in the European Communities* (The Hague - London - New York 2001).

164 For an interesting (even if not recent) contribution by a scholar, see J. Mertens de Wilmars 'The Case-Law of the Court of Justice in Relation to the Review of the Legality of Economic Policy' [1982] *Mixed-Economy Systems, Legal Issues of European Integration* 1.

in the Member States. But over the following decades the situation has been changing and the European order has been subject to far reaching changes, which have encouraged it to significantly expand its field of influence. In recent years, when the Court of justice and the General court judge the compatibility of the administrative measure which have been adopted with the procedure principles, they must carefully take into account not only the need for effectiveness of the European legal system, but also the need for justice of the applicants. Of course, the effort to protect the power of appraisal of the institutions is still strong, but it is no more the only objective that the courts pursue. To maintain the credibility of their role, the European courts must choose how to preserve the strength of the general principles (first of all the legal certainty) and at the same time the individual situations. So they can no longer afford to act ('just') as international courts. Wisely managing their role, which often requires a balancing of public and private interests, they must start to act as 'constitutional' courts, which are able to interpret the rules in force in light of the general principles and to guide the authorities' action towards parameters based on respect for the positions of all the parties involved in the procedure.[165]

The recent legislative changes lead, in my opinion, in the same direction. As is well known, in fact, according to art. 298 of the Treaty on the functioning of the European Union, 'in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration' and 'the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end'. In the near future, we could imagine a synergetic relationship between the European legislator and the courts to ensure that the administrative procedure principles protecting individuals are not breached. That perhaps shall allow the courts to progressively assume a more careful attitude also in the application of the principles, which are, at the moment, 'weaker' than the others.

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165 An indirect demonstration seems to be the famous judgement (Case C-402/05 P and o. *Yassin Abdullah Kadi and o.* v. *Council and Commission* [2008] ECR I-6351), concerning indeed not an administrative measure but some European regulations on freezing of private funds for counterterrorism purposes, adopted in the light of a United Nations Security Council Resolution. The Court of justice held that even the obligations imposed by an international agreement 'cannot have the effect of prejudicing the constitutional principles of EC Treaty which include the principle that all Community acts must respect fundamental rights'. What is mostly interesting in this judgement is the idea that, among those fundamental rights, there is 'the need to accord the individual a sufficient measure of procedural justice', which is comprehensive of the duty of the competent authority which adopts a restricting measure to respect the right to be heard and the rights of defence of the private parties and the principle of proportionality between the means employed and the aim sought to be realised. Therefore, the binding effect of the European administrative procedure defending individual positions is becoming stronger than it was in the past. So happens also in fields, such as the implementation of the principle of proportionality, which clearly offered at the beginnning of the evolution of the case law – and still partially offer – a weak protection for private parties.