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Ulrich Stelkens/Agne Andrijauskaite

Added Value of the Council of Europe to Administrative Law: The Development of Pan-European General Principles of Good Administration by the Council of Europe and their Impact on the Administrative Law of its Member States

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Contents

Abstract

Although the Council of Europe has been working in the area of administrative law for decades, the body of pan-European general principles of good administration developed by this organisation remains mostly uncharted. This paper attempts to help fill this academic gap by examining the scope and content of the pan-European principles of administrative law stemming from the Council of Europe, with a special emphasis on the principle of good administration. In doing so, the sources of administrative law of the Council of Europe are considered together with the mechanisms by which they penetrate and permeate domestic legal systems. This paper concludes that the work done by the Council of Europe in the administrative field has contributed to a process of harmonisation in its Member States' domestic law, but that the exact scope thereof has yet to be uncovered and requires further research.

I. Introduction*

Are there general European principles of administrative law? How can they be identified and by whom? Are these principles identical to the concept of good administration? Should these principles be codified into legally binding 'Administrative Procedure Acts' or into more flexible 'Codes of good administrative behaviour' and other forms of commitments (see *infra* II (5)) – or should they be left unwritten? All these highly topical questions are abundantly discussed. However – apart from recent discussions in France, which led to the adoption of the *Code des relations entre le public et l'administration*[1] – these questions are today mostly analysed only in the context of the European Union (hereafter 'EU'), especially since the entry into force of the Treaty of Lisbon. With this treaty, not only does the right to good administration, enshrined in Article 41 of the Charter of Fundamental Rights of the EU (hereafter 'CFR'), have legally binding status, but also secondary legislation for good administration now has a new legal basis (Article 298 of the Treaty on the Functioning of the European Union [hereafter 'TFEU']). [2] This gave an impetus to an ambitious venture aimed at bringing together the currently scattered and fragmented rules of EU administrative law. In fact, since 2009, the Research Network on EU Administrative Law (ReNEUAL), a network of legal scholars from

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1 Ordonnance n°2015-1341 of October 23, 2015 relating to the legislative part of the Code between the public and the administration. For more on this Code and its adoption see the dossier in "Le Code des relations entre le public et l'administration", (2016) *rfda*, pp. 15 – 73; furthermore B. Delaunay/P. Idoux/ S. Saunier, "Un an de droit de procedure administrative", (2017) *Droit Administratif*, pp. 22 – 30; M. Vialettes/C. Barrois de Sarigny, "Questions autour d'une codification", (2015) *AJDA*, pp. 2420 – 2425.

2 "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 […] the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end".

different EU Member States, has been working on developing a set of model rules, ones which are hoped to eventually mature into a legally binding EU code of administrative procedure applicable to European institutions, agencies, and other bodies.[3]

Recently, new life has been breathed into the codification efforts for the rules on EU administrative procedures by the European Parliament (hereafter 'EP'), which passed a resolution for an open, efficient, and independent EU administration on 9 June 2016.[4] This resolution invites the Commission to consider the annexed proposal for a regulation. This proposal is based on the same motivation as the previous work done by the EP's Committee on Legal Affairs, which led to the adoption of a landmark resolution on 15 January 2013.[5] The proposal focuses on the rules governing the adoption of individual administrative acts by the Union's administration and includes many ideas put forward in ReNEUAL's Book III, which covers single case decision-making in this regard.[6] The proposal also reflects many suggestions offered by four members of the ReNEUAL Steering Committee as set out in the study

3 More information about the work of the Research Network on EU Administrative Law (ReNEUAL) and its Model Rules on EU Administrative Procedure, published in 2014, can be accessed at: http://www.reneual.eu/.

4 European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0279+0+DOC+XML+V0//EN.

5 An explanatory memorandum is available at: http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2016/01-28/1083272EN.pdf.

6 See table summarising similarities and differences in: J. P. Schneider, "Einzelfallentscheidungsverfahren als Gegenstand von Buch III des ReNEUAL-Musterentwurfs", in: J. P. Schneider/K. Rennert/N. Marsch (eds), *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht* (Munich: C. H. Beck, 2016), pp. 129 – 142 (pp. 140 et seq).

requested by the EP's Committee on Legal Affairs.[7] Nonetheless, the Commission has so far remained resistant to the efforts of the EP.[8]

Whereas the existence of general principles of administrative law and of good administration and the (consequential) need to codify them are widely discussed within the EU, the same topic remains overlooked in regard to the Council of Europe (hereafter 'CoE'). This is surprising because the EU and the CoE are closely intertwined institutionally, as well as substantively (see *infra* III (5)). The CoE currently has 47 Member States, including all former Eastern bloc countries (excluding Belarus, but including Russia),[9] with the population totalling more than 800 million people. Hence, its territorial scope is "truly pan-European"[10] and, therefore, European law – including European Administrative Law – clearly goes beyond EU law. In fact, the CoE has been actively engaged in administrative matters even since the 1970s and has managed to promulgate a "package of good administration"[11] – above all in form of recommendations of the Committee of Ministers of the CoE (see *infra* II (4)) – reflecting the common European heritage on the matter. Actually, the CoE has managed to establish itself as a

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7 D. U. Galetta/C.H. Hoffman/O. Mir/J. Ziller, "The context and legal elements of a Proposal for a Regulation on the Administrative Procedure of the European Union's institutions, bodies, offices and agencies", 2015, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536487/IPOL_STU(2016)536487_EN.pdf.

8 See more on the reaction of the Commission in: J. P. Schneider/K. Rennert/N. Marsch (eds), *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht – Tagungsband* (Munich: C. H. Beck, 2016), pp. 301 et seq.; for further reasons of this resistance see W. Mölls, "Die Perspektive der Europäischen Kommission: derzeitiger Stand und Herausforderungen", in: J. P. Schneider/K. Rennert/N. Marsch (eds), *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht – Tagungsband* (Munich: C. H. Beck, 2016), pp. 48 – 55.

9 Due to the Crimean crisis the Parliamentary Assembly of the CoE has suspended Russia's voting rights: Resolution 1990 [2014] 10 April 2014; prolonged by Resolution 2034 [2015] 28 January 2015.

10 H. Keller/A. Stone Sweet, *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008), p. 5.

11 J. Wakefield, *The Right to Good Administration* (New York: Kluwer Law International, 2007), p. 63.

facilitator of democracy and rule of law[12] ever since Portugal (1976) and Spain (1977) joined the CoE, but especially from 1989 onwards. Ever since, the CoE has continued to work in the realm of administrative law, influencing its Member States and guiding transition countries after the fall of the Berlin Wall in reforming their public sectors. Furthermore, especially since the 2000s the European Court of Human Rights (hereafter 'ECtHR') has been developing a line of detailed jurisprudence deducing general principles of administrative law and good administration from the European Convention of Human Rights (hereafter 'ECHR') – (see *infra* II (2)). Nevertheless, the existing literature still merely (if at all[13]) enunciates the case law of the ECHR

12 See G. M. Palmieri, "L'internationalisation du droit public: La contribution du Conseil de l'Europe", (2006) 18 *European Review of Public Law*, pp. 51 – 84; G. de Vel/T. Markert, "Importance and Weaknesses of the Council of Europe Conventions and of the Recommendations addressed by the Committee of Ministers to Member States", in: B. Haller et al. (eds), *Law in Greater Europe* (New York: Kluwer Law International, 2000), pp. 345 – 353.

13 For example, no reference to the pan-European general principles of good administration developed within the CoE – not even with respect to the general principles of European Union law and the right to good administration – can be found in the following textbooks concerning European or EU Administrative Law: M. P. Chiti, *Diritto Amministrativo Europeo* (Milano: Giuffrè, 2011); P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2nd edition, 2012); T. von Danwitz, *Europäisches Verwaltungsrecht* (Berlin: Springer, 2008); C. Harlow/P. Leino/G. della Cananea (eds), *Research Handbook on EU Administrative Law* (Cheltenham: Edward Elgar 2017); H. C. H. Hofmann/G. C. Rowe/A. H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011); J. H. Jans/R. de Lange/S. Prechal/R. J. G. M. Widdershoven, *Europeanisation of Public Law* (Groningen: Europa Law Publishing, 2nd edition, 2015); J. P. Terhechte (ed.), *Verwaltungsrecht der Europäischen Union* (Baden-Baden: Nomos, 2011). However, since its 2nd edition, the textbook edited by J. B. Auby/J. Dutheil de la Rochère, *Traité de droit administratif européen* (Brussels: Bruylant, 2nd edition, 2014) contains an article by U. Stelkens entitled "Vers la reconnaissance de principe généraux paneuropéens du droit administratif dans l'Europe des 47?", pp. 713 – 740.

on the matter[14] and briefly describes the relevant CoE recommendations,[15] while failing to make a connection between these two (and other) sources of pan-European general principles of good administration within the framework of the CoE.[16]

This paper seeks to fill the academic lacuna by exploring how the principle of good administration manifests itself within the framework of the CoE and what elements it entails. To this end, as a first step, we want to turn to the sources from which pan-European general principles of good administration can be derived. This will also allow us to map the extent to which these principles have been developed, which degree of concretization they have reached, and how far they have spread concerning the classical and modern topics of administrative law. Subsequently we will discuss the (possible) relevance of this material – and its added value – for the national administrative law of the CoE Member States. This part of our paper serves, above all, to outline a research agenda going forward. Admittedly it acts also as a kind of 'commercial' for our research project entitled 'The Development of Pan-European General Principles of Good Administration by the Council of Europe and their impact on the administrative law of its Member States', which is being conducted at the German University of Administrative Science Speyer and the Research Institute for Public

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14 See, e.g., P. Wachsmann, "Les normes régissant le comportement de l'administration selon la jurisprudence de la Cour européenne des droits de l'homme", (2010) *AJDA*, pp. 2138 – 2146; J. F. Flauss, "L'apport de la jurisprudence de la Cour Européenne des Droits de l'Homme en matière de démocratie administrative", (2011) *RFAP*, pp. 49 – 58.

15 See, e. g., K. D. Classen, *Gute Verwaltung im Recht der Europäischen Union* (Berlin: Duncker & Humblot, 2008), pp. 206 et seq.; P. Gerber, "Recommendation CM/Rec(2007)7 on good administration – general presentation", in: Council of Europe (ed.), *In Pursuit of Good Administration – European Conference Warsaw, 29 – 30 November 2007* (DA/ba/Conf (2007) 4 e), 2008, pp. 3 – 9; E. Chevalier, *Bonne administration et Union européenne* (Brussels: Bruylant, 2014), pp. 127 et seq.; G. M. Palmieri, "L'internationalisation du droit public: La contribution du Conseil de l'Europe", (2006) 18 *European Review of Public Law*, pp. 51 – 84 (pp. 75 et seq.); J. Wakefield, *The Right to Good Administration* (New York: Kluwer Law International, 2007), pp. 59 et seq.

16 A specific chapter on 'administrative law' is also missing, in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017).

Administration Speyer with the financing of the German Research Foundation (*Deutsche Forschungsgemeinschaft*).[17]

II. Sources of Pan-European General Principles of Good Administration

The examination of the pan-European general principles of good administration must start with the Statute of the CoE (1), which lays down the constitutional foundations underpinning the organisation and serves as a framework for the European Convention on Human Rights (2), the other 'CoE conventions' (3), the recommendations adopted by the Committee of Ministers of the CoE (4), and finally the recommendations, resolutions, opinions and reports adopted by the Parliamentary Assembly and other institutions of the CoE (5).

1. The Statute of the Council of Europe

a) Founded in the aftermath of the Second World War the main aim of the CoE was to ensure peace on the European continent. This was to be attained by safeguarding core pan-European values – human rights, democracy, and the rule of law. Put differently, the CoE seeks to preserve peace by promoting 'democratic security', a term put forward in the CoE's Vienna Summit of the Council of Europe of 9 October 1993[18] and which encapsulates the idea that democracies rarely, if ever, wage war against one another. This *raison d'être* of the CoE is reflected in Article 1 (a) of the Statute of the Council of Europe (hereafter 'SCoE'). Specifically, this article declares the objective of uniting the CoE members more closely in order to attain the dual aim[19] of safeguarding the democratic ideals and principles that are their common heritage, and promoting their economic and social progress. Article 1 (b) SCoE further states that this aim shall be pursued through the organs of the CoE by discussing questions of common concern and

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17 See http://gepris.dfg.de/gepris/projekt/274964159.

18 M. Niemivuo, "Good Administration and the Council of Europe", (2008) 14 *European Public Law*, pp. 545 – 563 (p. 545).

19 F. Benoît-Rohmer/H. Klebes, *Council of Europe Law. Towards a pan-European legal area* (Strasbourg: Council of Europe Publishing, 2005), p. 20.

by reaching agreements and taking common action in economic, social, cultural, scientific, legal, and administrative matters, including for the maintenance and further realisation of human rights and fundamental freedoms. The broad wording of these provisions shows that the CoE is not bound by a principle of 'conferral' akin to that of Article 5 (1) of the Treaty of the European Union (hereafter 'TEU'). This means that the competences of the CoE – in contrast to the competences of the EU – are not exhaustively enumerated in a definitive (even if broad) list but encompass any governmental and intergovernmental activity,[20] except for the matters relating to national defence, which according to Article 1 (d) SCoE remain explicitly outside the purview of the CoE. Article 1 (b) SCoE, for its part, lays down the means for pursuing this aim. It is to be achieved by discussions, by concluding agreements, and undertaking common action in economic, social, cultural, scientific, legal, and administrative matters and for the maintenance and further realisation of human rights and fundamental freedoms. Therefore, the instruments and tools of the CoE to implement these tasks are relatively weak. The CoE seems to be merely an institutionalized platform for collaboration between its Member States with its power restricted to making proposals, as seen in the Article 15 SCoE.

b) Pursuant to Article 15 (a) SCoE one of the main instruments of the CoE is the preparation and negotiation of international conventions falling within its scope. The result of these negotiations must subsequently be adopted by a decision of the Committee of Ministers and the convention is then opened to signature by the Member States. However, these conventions are not legal acts of the CoE in the strict sense, but 'normal' international conventions binding only upon the Member States which have signed it.[21] So far, more than 200

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20 This aspect of the 'principle of conferral' is more explicit in the German version of Article 5 (1) TEU speaking of a "Prinzip der begrenzten Einzelermächtigung" stressing therefore the 'enumerative' character of the competences of the EU as a rule (in contrast to conferrals in the form of sweeping clauses).

21 See H. J. Bartsch, "The Acceptance of Recommendations and Conventions within the Council of Europe", in: *Le rôle de la volonté dans les actes juridiques – études à la mémoire du professeur Alfred Rieg* (Brussels: Bruylant, 2000), pp. 91 – 99 (pp. 91 et seq.); F. Benoît-Rohmer/H. Klebes, *Council of Europe Law. Towards a pan-European legal area* (Strasbourg: Council of Europe Publishing, 2005), pp. 97 et seq.; M. Wittinger, *Der*

conventions have been prepared and negotiated within the CoE. However, none of these conventions is as important and far-reaching as the European Convention on Human Rights (hereafter 'ECHR, Convention') and the Protocols thereto. All conventions prepared and negotiated within the CoE, their explanatory reports, the status of signatures and ratifications, the declarations and reservations made by the Member States, as well as the notifications issued by the Treaty Office since 2005, are available on the website of the Treaty Office of the CoE.[22]

c) Article 15 (b) SCoE refers to the second instrument available to the CoE to perform its task: the recommendations of the Committee of Ministers to the governments of its members which have been formally adopted as 'Resolutions' until 1979 and thereafter as 'Recommendations'.[23] In principle, these recommendations are not binding on the

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Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte" (Baden-Baden: Nomos, 2005), pp. 180 et seq.

22 http://www.coe.int/en/web/conventions/full-list.

23 For a detailed discussion on recommendations see M. Ailincai, "Le suivi du respect de la soft law au sein du Conseil de l'Europe", (2012) 7 *SIPE*, pp. 84 – 103; H. J. Bartsch, "The Acceptance of Recommendations and Conventions within the Council of Europe", in: *Le rôle de la volonté dans les actes juridiques – études à la mémoire du professeur Alfred Rieg* (Brussels: Bruylant, 2000), pp. 91 – 99; H. Jung, "Die Empfehlungen des Ministerkomitees des Europarates – zugleich ein Beitrag zur europäischen Rechtsquellenlehre", in: J. Bröhmer et al. (eds), *Internationale Gemeinschaft und Menschenrecht – Festschrift für Georg Ress* (Cologne: Carl Heymanns Verlag, 2005), pp. 519 – 526; G. M. Palmieri, "L'internationalisation du droit public: La contribution du Conseil de l'Europe", (2006) 18 *European Review of Public Law*, pp. 51 – 84; J. Polakiewicz, "Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe", in: R. Wolfrum/R. Röben (eds), *Developments of International Law in Treaty Making* (Berlin: Springer, 2005), pp. 245 – 290; J. Polakiewicz, "Finalités et fonctions de la soft law européenne – L'expérience du Conseil d'Europe", (2012) 7 *SIPE*, pp. 167 – 195; R. Uerpmann-Wittzack, "Rechtsfortbildung durch Europaratsrecht", in: M. Breuer et al. (eds), *Der Staat im Recht – Festschrift für Eckart Klein* (Berlin: Duncker & Humblot, 2013), pp. 939 – 951; G. de Vel/T. Markert, "Importance and Weaknesses of the Council of Europe Conventions and of the Recommendations addressed by the Committee of Ministers to Member States", in: B. Haller et al. (eds), *Law in Greater Europe* (New York: Kluwer Law International, 2000), pp. 345 – 353; M. Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (Baden-Baden: Nomos, 2005), pp. 202 et seq.

Member States. However, Member States have to report on their implementation to the Committee of Ministers. Therefore, despite their non-binding character, recommendations are not entirely irrelevant to the Member States, especially because Article 15 (b) SCoE explicitly confers on the Committee of Ministers the right to request that the Governments of Member States inform it of the action taken by them with regard to such recommendations. The recommendations vary in scope, but tend to have the same structure: a concise text of the resolution is usually followed by an annex, which, for its part, is explained by an explanatory memorandum.[24] By means of a resolution, Member States are encouraged to take necessary measures in order to align their domestic law with the standards enshrined therein. Laying such standards down in an annex is supposed to facilitate this task for the Member States. Sometimes annexes of these recommendations are also accompanied by a preamble, which specifies their scope of application. Unfortunately, these recommendations have never been collected in a sort of 'Official Journal' of the CoE, instead circulating for years often only as (bad) copies of typewritten originals. Today, however, all recommendations and resolutions of the Committee of Ministers (typically) including the preparatory documents and explanatory memorandums can be found on its website.[25]

d) Besides the instruments provided for in Article 15 SCoE, other institutions and organs of the CoE have also developed a 'standard-setting' activity in the name and on behalf of the CoE. This concerns above all the activity of the Parliamentary Assembly of the CoE. Following the 'original spirit' of the SCoE, this Assembly is conceived of as a mere 'consultant' for the Committee of Ministers which should address its "conclusions in the form of recommendations, to the Committee of Ministers" (Article 22 SCoE). However, today these recommendations – often called resolutions – are also clearly aimed at

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24 The explanatory memorandums of the recommendations can (often) be found as 'related' documents together with the recommendations on the website of the Committee of Ministers: http://www.coe.int/en/web/cm/documents. Those of the older recommendations on administrative law can also be found in Council of Europe (ed.), *The Administration and You – A Handbook* (Strasbourg: Council of Europe Publishing, 1997).

25 http://www.coe.int/en/web/cm/documents.

having an external effect and visibility.[26] In fact, some recommendations of the Parliamentary Assembly are directly addressed to the governments of the CoE Member States (see for an example *infra* II (5) (b)). Additionally, they are sometimes also addressed, at least indirectly, to the public through their criticism of the Committee of Ministers for weak standards or inaction in certain fields.[27]

e) Similar to the above are the 'recommendations', 'opinions', 'reports' and other documents elaborated and adopted by those institutions of the CoE which have been set up following Article 17 SCoE. According to this article, the Committee of Ministers may set up "*advisory and technical committees or commissions for such specific purposes as it may deem desirable*". On this basis the CoE and its Member States have built up several institutions within its organisational framework that the CoE's website considers to be part of the "Administrative entities" of the CoE[28] and which are acting on its behalf. In practice, these institutions are (mostly) based on so-called '*statutory resolutions*' (of the Committee Ministers)[29] and so-called '*partial agreements*'.[30] Especially relevant for the current research

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26 M. Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats", (2015) *Europarecht*, pp. 148 – 169 (p. 156); R. Uerpmann-Wittzack, "Rechtsfortbildung durch Europaratsrecht", in: M. Breuer et al. (eds), *Der Staat im Recht – Festschrift für Eckart Klein* (Berlin: Duncker & Humblot, 2013), pp. 939 – 951 (p. 941); M. Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (Baden-Baden: Nomos, 2005), pp. 142 et seq.

27 See P. Leach, "The Parliamentary Assembly of the Council of Europe", in: S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 166 – 211 (para 7.62 et seq.).

28 See the headline of http://www.coe.int/en/web/portal/organisation.

29 On '*statutory resolutions*' see C. Walter, "Interpretation and Amendments of the Founding Treaty", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 23 – 39 (para 2.28 et seq.); M. Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (Baden-Baden: Nomos, 2005), pp. 47 et seq., pp. 74 et seq.

30 On '*partial agreements*' see C. Walter, "Interpretation and Amendments of the Founding Treaty", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 23 – 39 (para 2.31 et seq.); M. Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (Baden-Baden: Nomos, 2005), pp. 60 et seq.

project are the European Commission of Democracy through Law ('Venice Commission'), the Congress of Local and Regional Authorities, the Group of States against Corruption (GRECO), and the Commissioner for Human Rights (see *infra* II (5) (c))

f) Finally, Article 3 SCoE stipulates a clear obligation of the Member States: every member of the CoE must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council.[31] The furtherance of the principle of the rule of law has become the principal objective of the CoE,[32] as demonstrated by the issuance of a 2008 report on the core elements of the principle of the rule of law and the potential of the CoE in their promotion[33]. This report was approved by the Council of Europe Conference of Ministers of Justice in June 2009[34] and later complimented by the Venice Commission[35] (see *infra* II (5) (c)), which included also a checklist to evaluate the state of the rule of law.[36] This initiative and these reports show clearly that the organs of the CoE have become increasingly aware that all the conventions, recommendations,

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31 Not only is the wording of Article 3 SCoE of a peremptory nature, but Article 8 SCoE links a sanction thereto: "any member of the CoE, which seriously violates this Article, may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7".

32 M. Wittinger, Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte" (Baden-Baden: Nomos, 2005), p. 436.

33 The Council of Europe and the rule of law – an overview, CM(2008)170, dated 21 November, 2008; see on this and the following M. Breuer, "Establishing Common Standards and Securing the Rule of Law", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 639 – 670 (para 28.06 et seq.); for earlier efforts to elaborate a 'rule of law' concept within the CoE see E. O. Wennerström, *The Rule of Law and the European Union* (Uppsala: Iustus, 2007), pp. 28 et seq.

34 Resolution N°3 on Council of Europe action to promote the rule of law (29th Council of Europe Conference of Ministers of Justice in Tromsø, June 2009).

35 Venice Commission, Report on the Rule of Law, CDL-AD(2011)003rev of 4 April 2011.

36 See also K. Nicolaidis/R. Kleinfeld, *Rethinking Europe's "Rule of Law" and Enlargement Agenda*, Sigma Paper No. 49 (Paris: OECD Publishing, 2012), pp. 36 et seq.

and other documents of the CoE are interdependent and should consistently follow a coherent concept.[37]

2. The European Convention on Human Rights and the Case Law of the European Court of Human Rights

a) The ECHR not only forms an indispensable part of the 'legal toolkit' of the CoE; it has become the 'second pillar' of the CoE[38] and 'a constitutional document' of European public law.[39] Actually, the willingness to ratify the ECHR is a precondition for any country wanting to accede to the organization.[40] According the ECtHR, the ECHR creates individual rights which are real, not merely illusory or theoretical.[41] In

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37 More sceptically see M. Breuer, "Establishing Common Standards and Securing the Rule of Law", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 639 – 670 (para 28.67 et seq.).

38 See, e.g., *Austria v Italy* (788/60) January 11, 1961 ECtHR: "the purpose of the High Contracting Parties in concluding the Convention was […] to realise the aims and ideals of the CoE, as expressed in its Statute, and to establish a common public order of the free democracies of Europe […]". More sceptical of the 'intensity' of the link between CoE and ECHR: C. Walter, "Interpretation and Amendments of the Founding Treaty", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 23 – 39 (para 2.17 et seq.).

39 *Loizidou v Turkey* (15318/89) March 23, 1995 ECtHR at [75]; *Al-Skeini and Others v the United Kingdom* (55721/07) 7 July, 2011 ECtHR at [141]. For further discussion, see H. Keller and D. Kühne, "Zur Verfassungsgerichtsbarkeit des Europäischen Gerichtshofs für Menschenrechte", (2016) 76 ZaöRV, pp. 245 – 307 (pp. 255 et seq.); G. Ress, "Das Grundgesetz im Rahmen des europäischen Menschenrechtsschutzes", in: K. Stern (ed.), *60 Jahre Grundgesetz: Das Grundgesetz für die Bundesrepublik Deutschland im Europäischen Verfassungsverbund* (Munich: C.H. Beck, 2010), pp. 177 – 206 (pp. 198 et seq.).

40 See M. Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (Baden-Baden: Nomos, 2005), pp. 315 et seq.; G. M. Palmieri, "L'internationalisation du droit public: La contribution du Conseil de l'Europe", (2006) 18 *European Review of Public Law*, pp. 51 – 84 (pp. 64 et seq.).

41 As expressed in *Airey v Ireland* case: "The Convention was designed to safeguard the individual in a real and practical way as regards those areas

the interpretation of the ECtHR, which has a hermeneutic monopoly on the Convention (Article 32 and 55 ECHR),[42] the ECHR is also a living instrument. Although the judgments of the ECtHR are not binding *erga omnes* (Article 46 ECHR),[43] they have an 'orientation effect' or, put differently, a normative power over non-parties to the decision: Member States that want to prevent future disputes had best take into account judgments adopted against other States. Some scholars even argue that in certain cases a State could breach its duty to fulfil its treaty obligations in good faith if it fails to take into account the judgments rendered against other States.[44] Furthermore, the ECtHR itself has explicitly stated that domestic courts should interpret domestic law in conformity with the Convention.[45] In this regard, the ECtHR has highlighted that its function is not only to decide those cases brought before it, but also, more generally, to elucidate, safeguard, and develop the rules instituted by the Convention, thereby contributing to the

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with which it deals", see *Airey v Ireland* (62889/73) October 9, 1979 ECtHR at [24] – [26].

42 S. Mückl, "Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte", (2005) 44 *Der Staat*, pp. 403 – 431 (pp. 418 et seq.).

43 See more on the scope of binding effect and the duty of Member States to execute judgments: K. Grabarczyk, M. Afroukh and A. Schahmaneche, "Le contrôle de l'exécution des arrêts de la Cour européenne des droits de l'homme. Aspects européens : acteurs politiques et acteurs juridictionnels" (2014) *rfda*, pp. 935 – 945; H. J. Cremer, "Rechtskraft und Bindungswirkung von Urteilen des EGMR / Problematik der Zulässigkeit einer Zweitbeschwerde an den EGMR nach Urteilsumsetzung durch Wiederaufnahme / Verein gegen Tierfabriken gegen Schweiz", (2012) 39 *EuGRZ*, pp. 493 – 506; F. Kirchhof, "Freiheit und Sicherheit in Deutschland und Europa", in: W. Durner, F.J. Peine and F. Shirvani (eds), *Festschrift für Hans-Jürgen Papier zum 70. Geburtstag* (Berlin: Duncker & Humblot, 2013), pp. 333 – 344. See also *Broniowsky v Poland* (31443/96) June 22, 2004 ECtHR (GC) at [188] et seq.; *Verein gegen Tierfabriken v Switzerland* (32772/02) June 30, 2009 ECtHR at [89]; *Öcalan v Turkey* (5980/07) July 6, 2010 ECtHR; *Kallweit v Germany* (17792/07) January 13, 2011 ECtHR at [78]; *Kafkaris v Cyprus* (9644/09) June 21, 2011 ECtHR at [73] et seq.; *Kronenfeldner v Germany* (21906/09) January 19, 2012 ECtHR at [97] et seq.

44 A. Caligiuri/N. Napoletano, "The Application of the ECHR in the domestic systems", (2010) *Italian Yearbook of International Law*, pp. 125 – 159 (pp. 154 et seq.).

45 See *Lelas v Croatia* (55555/08) May 20, 2010 ECtHR at [76].

States' observance of the commitments undertaken by them as Contracting Parties.[46] Thus, it is safe to conclude that the legal protection introduced by the ECHR contributes to a process of harmonisation of the Member States' domestic law – at least so far as the ECHR is concerned.[47] This harmonisation will be even further strengthened once Protocol No. 16 to the ECHR,[48] which introduces the possibility for the highest national courts to ask the ECtHR for an advisory opinion, comes into force. Although only advisory in nature, these opinions will be "analogous in [their] effect to interpretative elements set out by the Court in judgments and decisions".[49]

b) Regarding administrative matters, the ECtHR did not shy away from developing a substantive body of interpretative elements. It must be admitted, though, that the Court was reluctant to recognize the principle of good administration as a part of the ECHR for quite some time. The ECtHR, for its part, did not distinguish it from the Article 6 (1) ECHR. The European Commission of Human Rights even explicitly stressed on several occasions that the principle of 'fair' procedure as

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46 See *Rantsev v Cyprus and Russia* (25965/04) January 7, 2010 ECtHR at [197]; *Centre for Legal Resources on behalf of Valentin Cãmpenau v Romania* (47848/08) July 17, 2014 ECtHR at [105]; See also J. Marchand, "Prévention et dissuasion dans la jurisprudence de la Cour européenne des droits de l'homme" (2014) *rfda*, pp. 1149 – 1157.

47 See S. Mirate, "The ECrtHR Case Law as a Tool for Harmonization of Domestic Administrative Laws in Europe", (2012) 5 *REALaw*, pp. 47 – 60; G. M. Palmieri, "L'internationalisation du droit public: La contribution du Conseil de l'Europe", (2006) 18 *European Review of Public Law*, pp. 51 – 84 (pp. 56 et seq.); F. Sudre, "Existe-t-il un ordre public européen?", in: P. Tavernier (ed.), *Quelle Europe pour les Droits de l'Homme?* (Brussels: Bruylant, 1996), pp. 38 – 80 (pp. 49 et seq.); for further discussion, see K. Rohleder, *Grundrechtsschutz im europäischen Mehrebenen-System* (Baden-Baden: Nomos, 2009), pp. 161 et seq.

48 Council of Europe Treaty Series No. 214; see also J. Gundel, "Erfolgsmodell Vorabentscheidungsverfahren? Die neue Vorlage zum EGMR nach dem 16. Protokoll zur EMRK und ihr Verhältnis zum EU-Rechtsschutzsystem", (2015) *Europarecht*, pp. 609 – 624; M. Ludwigs, "Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR", (2014) 41 *EuGRZ*, pp. 273 – 285 (pp. 284 et seq.).

49 See Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, http://www.echr.coe.int/documents/protocol_16_explanatory_report_eng.pdf, para. 27.

enshrined in Article 6 (1) ECHR does not apply to administrative procedures but only to procedures before courts.[50] However, since the case *Beyeler*[51] of 2000, the ECtHR has specified an increasing number of requirements that administrations have to respect if they implement a law which may – in principle – constitute a justified interference with the qualified rights granted in Articles 8 – 11 of the ECHR or property rights.[52] In *Beyeler* the ECtHR stressed that "*where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency*"[53] or they otherwise risk violating the ECHR. In *Moskal*[54] the Court labelled this principle explicitly as a 'principle of good governance' and highlighted that "*it is desirable that public authorities act with the utmost scrupulousness, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other property rights*".[55] Even though this principle has until now been explicitly applied only in situations involving interferences with the right to property within the meaning of Article 1 of Protocol No. 1 to

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50 See *X v. Denmark* (1329/62), May 7, 1962, European Commission of Human Rights (Collection of Decisions of the European Commission of Human Rights 9 [1963], pp. 28 – 33 [p. 33]); *X v. Germany* (2942/66), April 8, 1967, European Commission of Human Rights (Collection of Decisions of the European Commission of Human Rights 23 [1967], pp. 51 – 65 [p. 62]); *X v. Germany* (4304/69), October 5, 1970, European Commission of Human Rights (Collection of Decisions of the European Commission of Human Rights 36 [1971], pp. 76 – 78 [p. 78]). See on this J. Schwarze, "Der Beitrag des Europarates zur Entwicklung von Rechtsschutz und Verwaltungsverfahren im Verwaltungsrecht", (1993) 20 *EuGRZ*, pp. 377 – 384 (pp. 377 et seq.).

51 See *Beyeler v Italy* (33202/96) January 5, 2000 ECtHR.

52 See *Church of Scientology Moscow v Russia* (18147/02) April 5, 2007 ECtHR at [87] et seq.; *Megadat.com SRL v Moldova* (21151/04) July 8, 2008; for further discussion see P. Wachsmann, "Les normes régissant le comportement de l'administration selon la jurisprudence de la Cour européenne des droits de l'homme", (2010) *AJDA*, pp. 2138 – 2146; J. F. Flauss, "L'apport de la jurisprudence de la Cour Européenne des Droits de l'Homme en matière de démocratie administrative", (2011) *RFAP*, pp. 49 – 58 (pp. 55 et seq.); O. Gabarda, "Vers la généralisation de la motivation obligatoire des actes administratifs?", (2012) *rfda*, pp. 61 – 70.

53 See *Beyeler v Italy* case (note 51) at [120].

54 See *Moskal v Poland* (10373/05) September 15, 2009 ECtHR.

55 See *Moskal v Poland* case (note 54) at [51].

the ECHR, the Court has emphasized that its reach extends to interferences with "*all the rights of the ECHR, including the right to property*".[56] This is also reflected in the case law, which emphasizes the importance of the procedural side of Article 8 ECHR and thus establishes the right to a fair administrative procedure.[57] Hence, the 'principle of good governance' can be seen as a conceptual framework[58] capable of encompassing principles of good administration, which were formulated in older cases even without their direct reference thereto.[59]

c) To date, the 'principle of good governance' and its precise scope in the case law of the ECtHR have not yet been fully defined and most likely will always remain in flux.[60] However, this does not prevent us

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56 See (emphasis added) *Rysovskyy v Ukraine* (29979/04) October 20, 2011 ECtHR at [70]; *Pyrantienė v Lithuania* (45092/07) November 12, 2013 ECtHR at [55]; *Albergas and Arlauskas v Lithuania* (17978/05) May 27, 2014 ECtHR at [63]; *Berger-Krall and Others v Slovenia* (14717/04) June 12, 2014 ECtHR at [198]; *Digrytė Klibavičienė v Lithuania* (34911/06) October 21, 2014 ECtHR at [33]; *Noreikienė and Noreika v Lithuania* (17285/08) November 24, 2015 ECtHR at [34]; *Paukštis v Lithuania* (17467/07) November 24, 2015 ECtHR at [74], [84]; *Tunaitis v Lithuania* (42927/08) November 24, 2015 ECtHR at [37].

57 See *W v the United Kingdom* (9749/82) July 8, 1987 ECtHR at [62]; *McMichael v the United Kingdom* (16424/90) February 24, 1995 ECtHR at [87] et seq.; *Buckley v the United Kingdom* (20348/92) September 29, 1996 ECtHR at [76]; *Chapman v the United Kingdom* (27238/95) January 18, 2001 ECtHR at [92]; *Hatton and Others v the United Kingdom* (36022/97) July 8, 2003 ECtHR at [99], [103]; *Taşkın and Others v Turkey* (46117/99) November 10, 2004 ECtHR at [118] et seq.; *Dubetska and Others v Ukraine* (30499/03) February 10, 2011 ECtHR at [142]; *Flamenbaum and Others v France* (3675/04) 13 December, 2012 ECtHR at [137].

58 See P. Wachsmann, "Les normes régissant le comportement de l'administration selon la jurisprudence de la Cour européenne des droits de l'homme", (2010) *AJDA*, pp. 2138 – 2146; J. F. Flauss, "L'apport de la jurisprudence de la Cour Européenne des Droits de l'Homme en matière de démocratie administrative", (2011) *RFAP*, pp. 49 – 58 (pp. 55 et seq.); O. Gabarda, "Vers la généralisation de la motivation obligatoire des actes administratifs?", (2012) *rfda*, pp. 61 – 71.

59 See, e.g., *Rysovskyy v Ukraine* case (note 56) at [71]; *Pyrantienė v Lithuania* case (note 56) at [59] et seq.; *Digrytė Klibavičienė v Lithuania* case (note 56) at [33].

60 In the words of H. P. Nehl: "good administration, it seems, is a deliberately chosen indeterminate legal notion […] often used to denote a standard of

from discerning certain components of this emerging principle that the Court has developed in a piecemeal fashion. The existing case law of the ECtHR allows the identification of the following rules that form part of the concept of good governance:

– Administrative procedure should be organised in a transparent and clear manner in order to minimize the risk of mistakes and foster legal certainty;[61]

– The length of the administrative procedure should not amount to a *de facto* decision[62] and it should be carried out in a consistent manner in order not to leave individuals in legal uncertainty for indefinite periods of time;[63]

– Unfavourable administrative measures should only be adopted after adequate assessment of the relevant facts;[64]

– The competent administrative authorities should provide the applicants with the opportunity to present their case and to adduce

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practice of any modern democratic system committed to the rule of law", see H. P. Nehl, *Administrative Procedure in EC Law* (Oxford: Hart Publishing, 1999), p. 17. See more on the principle of good administration as an open-ended source of rights and obligations in K. Kanska, "Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights", (2004) 10 *European Law Journal*, pp. 296 – 326. For further discussion, see T. Fortsakis, "Principles Governing Good Administration", (2005) 11 *European Public Law*, pp. 207 – 217 (pp. 216 et seq.), claiming that the principle of good administration has a "*fuzzy form*".

61 See *Digrytė Klibavičienė v Lithuania* case (note 56) at [33].

62 See *W. v The United Kingdom* case (note 57) at [65].

63 See *Sporrong and Lönnroth v Sweden* (7151/75 and 7152/75) July 25, 2002 ECtHR at [77] et seq.; *Sovtransavto Holding v Ukraine* (48533/99) July 25, 2002 ECtHR at [97] et seq.; *Dadouch v Malta* (38816/07) July 20, 2010 ECtHR at [58]; *Rysovskyy v Ukraine* case (note 56) at [75] et seq.; *Digrytė Klibavičienė v Lithuania* case (note 56) at [40]; *Paukštis v Lithuania* case (note 56) at [84].

64 See *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* (46626/99) February 2, 2005 ECtHR at [49]; *Church of Scientology Moscow v Russia* case (note 52) at [87]; *Alekseyev v Russia* (4916/07) October 21, 2010 ECtHR at [85].

any evidence in support of their case.[65] However, the urgency of the situation at issue may allow deviation from this rule;[66]

– The competent administrative authorities should leave the applicant sufficient time for consulting the files and the documents relevant for their case;[67]

– The competent administrative authorities should give reasons for decisions that affect individual rights[68]. This obligation shall include the duty to cite a legal basis for such decisions;[69]

– A governmental decision-making process concerning complex issues of environmental and economic policy, such as planning decisions concerning 'big' infrastructure projects (airports, streets, plants), must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be assessed and evaluated in advance and a fair balance between the various conflicting interests at stake can be established;[70]

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65 See *Chapman v The United Kingdom* case (note 57) at [106] et seq.; *Megadat.com SRL v Moldova* case (note 52) at [73]; *Lombardi Vallauri v Italy* (39128/05) October 20, 2009 ECtHR at [45].

66 See *K. and T. v Finland* (25702/94) July 12, 2001 ECtHR at [166].

67 See *McMichael v The United Kingdom* case (note 57) at [87] et seq.; *K.A. v Finland* (27751/95) January 14, 2003 ECtHR at [105]; *Yukos v Russia* case (14902/04) July 31, 2014 ECtHR at [536] et seq. The Court found in this case that a delay of only a few days was insufficient time for the consultation of the 43,000 pages composing the applicant's file.

68 See *Church of Scientology Moscow v Russia* (note 52) at [91]; *Mirolubovs v Lithuania* (798/05) September 15, 2009 ECtHR at [87]; *Alekseyev v Russia* case (note 64) at [85].

69 See *Frizen v Russia* (58254/00) March 24, 2005 ECtHR at [34]; *Adzhigovich v Russia* (23202/05) October 8, 2009 ECtHR at [32], [34].

70 See *Hatton and Others v The United Kingdom* case (note 57) at [128]; *Taşkın and Others v Turkey* (46114/99) November 10, 2004 ECtHR at [118] et seq.; *Giacomelli v Italy* (59909/00) November 2, 2006 ECtHR at [82] et seq.; *Dubetska and Others v Ukraine* case (note 57) at [143] et seq.; *Flamenbaum and Others v France* (3675/04) December 13, 2012 ECtHR at [137] et seq. and at [155] et seq.; *Eckenbrecht and Ruhmer v Germany* (25330/10) June 10, 2014 ECtHR at [36]; Case *Traube v Germany* (28711/10) September 9, 2014 ECtHR at [28] et seq.

– The principle of legal certainty imposes limits on the withdrawal of illegal administrative acts, especially when such acts grant individual rights; administrative procedures that confer benefits on *bona fides* individuals as their final outcome also should not be reviewed without new findings; the risk of any mistake made by the State authority on its part must be borne by the State[71] and not be repaired at the expense of *bona fides* individuals and/or inflict a disproportionate burden upon them;[72] individuals concerned also should not bear individual and excessive burden when balancing between the common good and private rights is required;[73]

– By subsequently declaring administrative contracts that grant proprietary rights to the individual within the meaning of Article 1 of Protocol No. 1 to the ECHR (for example, the ones assigning state land to the individual) unlawful and not providing adequate compensation thereof, the State risks placing a disproportionate burden on the 'ordinary citizens' due to errors committed by public authorities of which the citizen was justifiably unaware;[74]

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71 See, concerning criminal matters, *Radchikov v Russia* (65582/01) May 24, 2007 ECtHR at [49] et seq.; For a general view see *Gashi v Croatia* (32457/05) December 13, 2007 ECtHR at [40]; *Lelas v Croatia* case (note 45) at [74]; *Trgo v Croatia* (35298/04) June 11, 2009 ECtHR at [67].

72 See *Pincová and Pinc v the Czech Republic* (36548/97) November 5, 2002 ECtHR at [57] et seq.; *Toşcuţă and Others v Romania* (36900/03) November 25, 2008 ECtHR at [70] et seq.; *Rysovskyy v Ukraine* case (note 56) at [70]; *Žáková v the Czech Republic* (2000/09) October 3, 2013 ECtHR at [93]; Case *Noreikienė and Noreika v Lithuania* case (note 56) at [29]; *Tunaitis v Lithuania* case (note 56) at [32]; *Trgo v Croatia* case (note 71) at [67].

73 See *Moskal v Poland* case (note 54) at [44], [64], [82] et seq.; *Bigaeva v Greece* (26713/05) May 28, 2009 ECtHR at [32] et seq.; *Rysovskyy v Ukraine* case (note 56) at [71]; *Albergas and Arlauskas v Lithuania* case (note 56) at [58] et seq. Individuals cannot entertain legitimate expectations if they are aware that the benefit derived from an administrative decision is subject to judicial review, see, e.g., *Pine Valley Developments Ltd and Others v Ireland* (12742/87) November 29, 1991 ECtHR at [80] et seq. Also, no legitimate expectations arise if individuals know that administrative decisions granting certain benefits are of a temporary (renewable) nature, see e.g., *Brosset-Triboulet and Others v France* (34078/02) March 29, 2010 ECtHR at [80] et seq.

74 See *Stretch v the United Kingdom* (44277/98) June 24, 2003 ECtHR at [37] et seq.; *Gashi v Croatia* (32457/05) December 13, 2007 ECtHR at [38] et

- Administrative contracts that grant proprietary rights to the individual within the meaning of Article 1 of Protocol No. 1 to the ECHR may only be lawfully terminated against the wishes of the private contracting party provided the State deems such contracts to be prejudicial to the common interest and pays adequate compensation as determined, and is legally enforceable, by an arbitration award or court judgment;[75]
- The redress of administrative errors must not come at the expense of *bona fides* third parties by disproportionately interfering with their rights;[76]
- Situations that are unlawful yet were tolerated by relevant authorities for many years should not be changed 'overnight';[77]
- Administrative authorities should not undermine laws that have been enacted or their implementation: it is solely for the legislature to change any laws deemed no longer politically desirable;[78] the principle of legal certainty also excludes the possibility for public authorities to call into question decisions adopted by the courts;[79]
- An individual acting in good faith is, in principle, entitled to rely on statements made by state or public officials who appear to have

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seq.; *Pyrantienė v Lithuania* (note 56) at [49] et seq.; *Albergas and Arlauskas v Lithuania* case (note 56) at [58] et seq.; *Digrytė Klibavičienė v Lithuania* case (note 56) at [33] et seq.; *Noreikienė and Noreika v Lithuania* case (note 56) at [33] et seq.; *Tunaitis v Lithuania* case (note 56) at [37] et seq.; *Žilinskienė v Lithuania* (57675/09) December 1, 2015 ECtHR at [45] et seq.

75 See *Stran Greek Refineries and Stratis Andreadis v Greece* (13427/87) December 12, 1994 ECtHR at [72] et seq.

76 See *Pincová and Pinc v the Czech Republic* case (note 72) at [57] et seq.; *Toşcuţă and Others v Romania* (36900/03) November 25, 2008 at [36] et seq.; *Rysovskyy v Ukraine* case (note 56) at [70] et seq.; *Žáková v the Czech Republic* (2000/09) October 3, 2013 ECtHR at [93]; *Noreikienė and Noreika v Lithuania* case (note 56) at [29] et seq.; *Tunaitis v Lithuania* case (note 56) at [32] et seq.; see also *Trgo v Croatia* (note 71) at [67].

77 See *Öneryıldız v Turkey* (48939/99) November 20, 2004 ECtHR at [128] et seq.

78 See *Broniowsky v Poland* case (note 43) at [184].

79 See *Iatridis v Greece* (31107/96) March 25, 1996 ECtHR at [58]; *Brumărescu v Romania* (28342/95) July 25, 2005 ECtHR at [61]; *Sovtransavto Holding v Ukraine* case (note 63) at [71] et seq.; *Radchikov v Russia* case (note 71) at [42] et seq.

the requisite authority to do so; it should not be incumbent on an individual to ensure that the state authorities are adhering to their own internal rules and procedures;[80]

– The payment of State debts cannot be delayed unjustifiably long and thus be reduced in value, even if it leads to substantial budgetary problems;[81] generally private law domain privileges (such as favourable interest), which are not essential means of ensuring proper functioning of administrative authorities, are not granted to the State;[82]

– Shifting a state function to separate legal entities under private law does not absolve the State from liability under the ECHR for its acts and omissions so long as there is an institutional and operational dependence between the State and the new entities;[83]

– Article 10 (1), second sentence, ECHR grants the right to access information held by public bodies, which is of common interest, to (especially) media companies and non-governmental organisations.[84] However, the right to receive information cannot be construed as imposing on a State any positive obligations to

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80 See *Lelas v Croatia* (note 45) at [74] et seq.

81 See *Almeida Garrett, Mascarenhas Falcão and Others v Portugal* (29813/96 and 30229/96) January 11, 2000 ECtHR at [54] et seq.; see also T. Trentinaglia, "Gebietskörperschaften im Haftungsverbund im Lichte der Rechtsprechung des EGMR", (2016) 43 *EuGRZ*, pp. 253 – 263.

82 See *Meïdanis v Greece* (33977/08) June 22, 2004 ECtHR at [30].

83 See *Mykhaylenky and Others v Ukraine* (35091/02) November 30, 2004 ECtHR at [44] et seq.; *Cooperativa Agricola Slobozia-Hanesei v Moldova* (39745/02) April 3, 2007 ECtHR at [17] et seq.; *Yershova v Russia* (1387/04) April 8, 2010 ECtHR at [54] et seq.; *Ališić and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* (60642/08) July 16, 2014 ECtHR at [114] et seq.

84 See the list of criteria relevant for recognizing the right of access to State-held information in *Magyar Helsinki Bizottság v Hungary* (18030/11) November 8, 2016 ECtHR (GC) at [157] – [170], see also *Társaság a Szabadságjogokért v Hungary* (37374/05) April 14, 2009 at [35] et seq.; *Friedrich Weber v Germany* (70287/11) January 6, 2015 ECtHR at [25]; see also B. Wegener. "Aktuelle Fragen der Umweltinformationsfreiheit", (2015) *NVwZ*, pp. 609 – 616 (pp. 610 et seq.); S. Wirtz/S. Brink, "Die verfassungsrechtliche Verankerung der Informationszugangsfreiheit", (2015) *NVwZ*, pp. 1166 – 1173 (pp. 1171 et seq.).

proactively collect and disseminate information on its own[85], particularly when a considerable amount of work is involved;[86]

– A Member State found to have violated the Convention must repair the harm and provide for *restitutio in integrum* to the greatest extent. This obligation can imply the duty to reopen an administrative procedure.[87]

As can be seen from these jurisprudential precepts, which are in no way exhaustive since 'good administration' is – as already mentioned – an open-ended legal concept, the principle's sub-elements vary greatly in their scope and application. They seem to fall broadly into two camps: either imposing obligations – positive as well as negative ones – on public authorities as to how administrative procedures ought to be carried out, or entailing individual guarantees. Admittedly, the dividing line between these two categories is fuzzy, with substantive and procedural aspects overlapping. For instance, the duty to provide reasons for decisions that affect individual rights may be understood as fostering the principle of lawfulness on the part of administration as well as offering legal protection for the individual. Furthermore, the ECtHR seems to be including relatively novel rights, such as the right to receive information of public interest,[88] under the umbrella of the principle of good administration.

d) In addition to the case law on the 'principle of good governance', some further intrinsic components of the *concept of legality of administration* may be deduced from the case law of the ECtHR. This legal notion in the case law of the ECtHR encompasses the principle of legal reservation, which demands a legal basis for interference by a

85 See Guerra and Others v Italy (116/1996/735/932) February 19, 1998 ECtHR at [53]; Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v Austria (39534/07) November 28, 2013 ECtHR at [41].

86 See *Friedrich Weber v Germany* case (note 84) at [25].

87 See *Verein gegen Tierfabriken v Switzerland* case (note 43) at [85] et seq.

88 Even though access to information is not a self-standing right and, according to the very recent case law of the ECHR, there are conditions attached to its exercise; see *Magyar Helsinki Bizottság v Hungary* case (note 84) at [149] et seq.

public authority, as defined in Articles 8 – 11 ECHR,[89] but is also autonomously known as the 'principle of lawfulness'.[90] In order to be considered lawful, any interference with the Convention's rights by a public authority needs to be based on a general provision enacted in domestic law. If the requirement of lawfulness is not met in the first place, it becomes irrelevant whether the interference would have been justifiable on substantive grounds.[91] Such legal provisions have to be foreseeable for the persons concerned. The foreseeability requirement formally presupposes that the applicable provisions of domestic law are accessible to the persons concerned, in that they have been officially published, and – substantively – that their scope is sufficiently precise,[92]

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89 See *July and SARL Libération v France* (20893/03) February 14, 2008 ECtHR at [50] et seq.; *Leela Förderkreis E.V. and Others v Germany* (58911/00) November 6, 2008 ECtHR at [85] et seq.; *Dogru v France* (27058/05) December 4, 2008 ECtHR at [49] et seq.; *Iordachi and Others v Moldova* (25198/02) February 10, 2009 ECtHR at [37] et seq.; *Uzun v Germany* (35623/05) September 2, 2010 ECtHR at [60] et seq.; *Ruspoli Morenes v Spain* (28979/07) June 28, 2011 ECtHR at [32] et seq.; *Jehovah's Witnesses v France* (8916/05) June 30, 2011 ECtHR at [66] et seq.; *Michaud v France* (12323/11) December 6, 2012 ECtHR at [94] et seq.; *Mateescu v Romania* (1944/10) January 14, 2014 ECtHR at [28] et seq.; *Konovalova v Russia* (37873/04) October 9, 2014 ECtHR at [41] et seq.

90 See *Iatridis v Greece* case (note 79) at [83]; *Baklanov v Russia* (68443/01) June 9, 2005 ECtHR at [39] et seq.; *Apostolidi and Others v Turkey* (45628/99) March 27, 2007 ECtHR at [70]; *Nacaryan and Deryan v Turkey* (19557/02 and 27904/02) January 8, 2008 ECtHR at [26] et seq.; *Sun v Russia* (31004/02) February 5, 2009 ECtHR at [26] et seq.; *Adzhigovich v Russia* (note 69) at [28] et seq.; *Lelas v Croatia* case (note 45) at [76].

91 See *Iatridis v Greece* case (note 79) at [58]; *Baklanov v Russia* case (note 90) at [39]; *Frizen v Russia* case (note 69) at [33].

92 See more on the definition of 'law' within the meaning of the ECHR and its functions in E. Carpano, *État de droit et droits européens* (Paris: L'Harmattan, 2005), pp. 321 et seq. and pp. 345 et seq.; T. Marauhn/K. Merhof, "Kapitel 7 Grundrechtseingriff und -schranken", in: O. Dörr/R. Grote/T. Marauhn (eds), *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Tübingen: Mohr Siebeck, 2nd edition, 2013), pp. 366 – 416 (Kap. 7 para. 23 et seq.); F. Matscher, "Der Gesetzesbegriff der EMRK", in: *Der Rechtstaat in der Krise. Festschrift Edwin Loebenstein zum 80. Geburtstag* (Vienna: Manz, 1991), pp. 104 – 118 (pp. 107 et seq.); H. Rieckhoff, *Vorbehalt des Gesetzes im Europarecht* (Tübingen: Mohr Siebeck, 2007), pp.

also as interpreted by domestic courts.[93] This reflects the rule-of-law[94] rather than the democratic[95] rationale underlying the principle.[96]

e) Furthermore, ECtHR has developed a body of case law around the exercise of administrative discretion.[97] It requires *inter alia* that in cases where adjudicatory bodies resolve disputes over 'civil rights and obligations', which in the wide meaning of Article 6 (1) ECHR can be understood to include some 'classical' administrative law matters,[98] proceedings before them shall be subject to subsequent control by a judicial body that has 'full' jurisdiction in relation to both factual and legal matters.[99] The scope of judicial review of administrative decisions is sufficient for the purposes of Article 6 ECHR if it assesses whether the evaluation of the subject-matter was appropriate and whether any errors committed have been rectified. Article 6 ECHR does not give authority to another level to substitute its opinion.[100] The scope of review is especially limited in cases involving (the exercise of)

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144 et seq.; R. Weiß, *Das Gesetz im Sinne der europäischen Menschenrechtskonvention* (Berlin: Duncker & Humblot, 1996), pp. 108 et seq.

93 See *Lelas v Croatia* case (note 45) at [76].

94 See *Sun v Russia* case (note 90) at [32].

95 See *Former King of Greece and Others v Greece* (25701/94) November 23, 2000 ECtHR.

96 E. Carpano, *État de droit et droits européens* (Paris: L'Harmattan, 2005), pp. 321 et seq.; U. Stelkens, "Rechtsetzungen der europäischen und nationalen Verwaltungen", (2012) 71 *VVDStRL*, pp. 369 – 417 (pp. 376 et seq.).

97 See summary of relevant cases in *Sigma Radio Television Ltd v Cyprus* (32181/04 and 35122/05) July 21, 2011 ECtHR at [147] et seq.

98 See S. Mirate, "The ECrtHR Case Law as a Tool for Harmonization of Domestic Administrative Laws in Europe", (2012) 5 *REALaw*, pp. 47 – 60 (p. 49).

99 See *Le Compte, Van Leuven and De Meyere v Belgium* (6878/75 and 7238/75) June 23, 1981 ECtHR at [50]; Case *Sporrong and Lönnroth v Sweden* case (note 63) at [86]; Case *Terra Woningen B.V. v the Netherlands* (20641/92) December 17, 1996 ECtHR at [52] et seq.; *I.D. v Bulgaria* (43578/98) April 28, 2005 ECtHR at [46] et seq.; Case *Capital Bank AD v Bulgaria* (49429/99) November 24, 2005 ECtHR at [99], [113] et seq.; Case *Tsfayo v the United Kingdom* (60860/00) November 14, 2006 ECtHR at [40] et seq.

100 See *Bryan v the United Kingdom* (19178/91) November 22, 1995 ECtHR at [44] et seq.; *Crompton v the United Kingdom* (42509/05) October 27, 2009 ECtHR at [78] et seq.; Case *Fazia Ali v the United Kingdom* (40378/10) October 20, 2015 ECtHR at [77] et seq.

administrative discretion that require professional knowledge or experience,[101] such as in the sphere of planning,[102] environmental matters,[103] regulation of economic activities,[104] as well as the appointment of public officials.[105] The limited scope of jurisdiction in such cases must be compensated for by affording procedural safeguards for individuals (including ones concerning factual findings by quasi-judicial organs).[106] However, the exercise of administrative discretion that entails adverse effects on individuals without any standards provided by law is not allowed.[107] More stringent requirements also apply to administrative procedures that fall under the criminal limb of

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101 See *Tsfayo v the United Kingdom* case (note 98) at [46].

102 See *Zumtobel v Austria* (12235/86) September 21, 1993 ECtHR at [32]; *Bryan v the United Kingdom* case (note 99) at [47]; *Müller and Others v Austria* (26507/95) November 23, 1999 ECtHR; *Chapman v The United Kingdom* case (note 57) at [124].

103 See *Alatulkkila and Others v Finland* (33538/96) July 28, 2005 ECtHR at [52].

104 See *Kingsley v the United Kingdom* (35605/97) May 28, 2002 ECtHR at [32] (gambling law); *Sigma Radio Television Ltd v Cyprus* case (note 96) at [161] (media law); Case *Galina Kostova v Bulgaria* (36181/05) November 12, 2013 ECtHR at [62] et seq. (appointment of insolvency practitioner).

105 See *Tsanova-Gecheva v Bulgaria* (43800/12) September 15, 2015 ECtHR at [96] et seq.

106 See *Bryan v the United Kingdom* case (note 99) at [46]; *Buckley v the United Kingdom* case (note 57) at [75]; *Müller and Others v Austria* case (note 101); *Capital Bank AD v Bulgaria* case (note 98) at [113] et seq; *Tsanova-Gecheva v Bulgaria* case (note 104) at [96] et seq.; *Sigma Radio Television Ltd v Cyprus* case (note 96) at [149], [162]; *Fazia Ali v the United Kingdom* case (note 99) at [78] et seq.

107 See *Obermeier v Austria* (11761/85) June 28, 1990 ECtHR at [70]; *Fischer v Austria* (16922/90) April 26, 1995 ECtHR at [34].

Article 6 (1) ECHR.[108] In such cases, the scope of review should not be limited to the points of law but should also include factual issues.[109]

f) Despite the dynamic evolution of the case law of the ECtHR concerning 'general' administrative matters, its full potential has not yet been reached. In this regard it is worthwhile to note that further elements of the 'principle of good governance' can be extracted from the relevant recommendations (see *infra* II (4)) and international conventions concluded within the framework of the CoE (see *infra* II (3)). The Court, as can be seen from its case-law, is in general employing these international acts as tools to give concrete expression to the Convention's norms when interpreting them.[110] Thus, the law of the CoE is understood as a uniform body of law for the purposes of interpreting the Convention. This method of interpretation was elucidated in more detail in the landmark *Demír and Baykara* case.[111] In this case the ECtHR made clear that it can take into account international conventions and recommendations adopted by all international organisations, not just the CoE, when interpreting the norms of the ECHR. Recently, the ECtHR confirmed this method of interpretation in its Grand Chamber judgment in *Magyar Helsinki Bizottság v Hungary* case where the question arose whether Article 10 ECHR encompasses a right of access to state-held information or documents. Not being able to derive a conclusive answer to this question from the wording of Article 10 ECHR or *travaux préparatoires*

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108 See more about criminal penalties within the meaning of Article 6 (1) ECHR, which encompass disciplinary measures, tax surcharges, and other administrative action, in S. Mirate "The ECrtHR Case Law as a Tool for Harmonization of Domestic Administrative Laws in Europe", (2012) 5 *REALaw*, pp. 47 – 60 (p. 49); D. Harris/M. O'Boyle/E. Bates/C. Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2014), pp. 373 – 376.

109 See *Gradinger v Austria* (15963/90) October 23, 1995 ECtHR at [46]; *Steininger v Austria* (21539/07) April 17, 2012 ECtHR at [52] et seq.

110 See for analysis of the case law D. M. Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats", (2015) *Europarecht*, pp. 148 – 169 (pp. 157 et seq.); J. Polakiewicz, "Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe", in: R. Wolfrum/R. Röben (eds), *Developments of International Law in Treaty Making* (Berlin: Springer, 2005), pp. 245 – 290 (pp. 271 et seq.).

111 See *Demír and Baykara v Turkey* (34503/97) November 12, 2008 ECtHR (GC) at [128].

of the ECHR, the ECtHR, among other things, turned to the Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents (see *supra* II (4)) and to the CoE Convention on Access to Official Documents of 18 June 2009 (see *supra* II (3) (e)),[112] which were interpreted to "*denote a continuous evolution [...] or a definite trend towards the recognition of the State's obligation to provide access to public information*".[113] Such a method of 'globalized' interpretation of the ECHR has of course been criticized;[114] nevertheless, as the above-mentioned example of the

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112 Even though The Council of Europe Convention on Access to Official Documents had been ratified by only seven member States; see dissenting opinion of Judge Spano joined by judge Kjølbro, for a critique.

113 See *Magyar Helsinki Bizottság v Hungary* case (note 84) at [145].

114 See on the further development of this 'global' approach to interpretation of the ECHR and the criticism expressed in this regard: J. Andriantsimbazovina, "Quelques considerations sur la jurisprudence de la cour européenne des droits de l'homme de 2007 à 2011", (2011) 47 *Cahiers de droit européen*, pp. 676 – 811 (pp. 781 et seq.); S. van Drooghenbroeck, "Les frontières du droit et le temps juridique: la Cour européenne des droits de l'homme repousse les limites", (2009) *RTDH*, pp. 811 – 849; J. F. Flauss, "Actualité de la Convention européenne des droits de l'homme (septembre 2008 – février 2009)", (2009) *AJDA*, pp. 872 – 885; J. F. Flauss, "Actualité de la Convention européenne des droits de l'homme" (septembre 2009 – février 2010), (2010) *AJDA*, pp. 997 – 1009; J. F. Flauss, "L'effectivité et l'efficacité de la soft law européenne dans la jurisprudence de la Cour européenne des droits de l'homme", (2012) 7 *SIPE*, pp. 332 – 363; G. Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer", (2010) *European Journal of International Law*, pp. 509 – 541 (pp. 521 et seq.); J. Polakiewicz, "Finalités et fonctions de la soft law européenne – L'expérience du Conseil d'Europe", (2012) 7 *SIPE*, pp. 167 – 195 (pp. 180 et seq.); A. Seifert, "Recht auf Kollektivverhandlungen und Streikrecht für Beamte", (2009) *KritV*, pp. 357 – 377 (pp. 362 et seq.); F. Tulkens and S. van Drooghenbroeck, "Le *soft law* des droits de l'homme est-il vraiment si *soft*? Les développements de la pratique interprétative récente de la Cour européenne des droits de l'homme", in: *Liber Amicorum Michel Mahieu* (Brussels: Larcier, 2008), pp. 505 – 526 (pp. 512 et seq.); R. Uerpmann-Wittzack, "Rechtsfortbildung durch Europaratsrecht", in: M. Breuer et al. (eds), *Der Staat im Recht – Festschrift für Eckart Klein* (Berlin: Duncker & Humblot, 2013), pp. 939 – 951 (pp. 942 et seq.); P. Wachsmann, "Réflexions sur l'interprétation 'globalisante' de la Convention européenne des droits de l'homme", in: *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa* (Paris: Dalloz, 2011), pp. 667 – 676.

recent case-law of the ECtHR illustrates, there is no indication that ECtHR will be more circumspect in this regard in the future.

3. Other Conventions within the Meaning of Article 15 (a) SCoE

a) Another source of pan-European general principles of good administration deserves to be highlighted – the more than 200 existing conventions prepared and concluded on the basis of Article 15 (a) SCoE (see *infra* II (1) (b)). Yet only a few of these conventions have been ratified by all CoE Member States. Moreover, none of them provides for judicial enforceability by an international court such as the ECtHR. Therefore, oversight of the Member States' implementation of these conventions normally (only) falls to the Committee of Ministers[115] unless the respective CoE convention entrusts another institution or organ of the CoE with this task. However, as established in the aforementioned *Demír and Baykara* case (see *supra* II (2) (f)), the ECtHR is, among other things, using these conventions as tools to give concrete expression to the Convention norms whilst interpreting them, regardless of whether the State at issue has ratified them or not.[116]

b) Alongside the further realization of human rights and fundamental freedoms (e.g., through the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment),[117] these conventions regulate a wide range of issues, thus making use of the broad competence entrusted to the Council. More precisely, regarding administrative matters, further international conventions of the CoE

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115 See M. Wittinger, Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte" (Baden-Baden: Nomos, 2005), pp. 189 et seq.

116 "Common international or domestic law standards of European states reflect a reality […] that the Court cannot disregard […]" (*Demír and Baykara* case (note 110), para. 76). If there is an international consensus on the subject matter, it becomes irrelevant if the respondent State has ratified or otherwise adhered to such international acts.

117 Council of Europe Treaty Series No. 126. For an overview of the impact of this convention see M. Breuer, "Impact of the Council of Europe on National Legal Systems", in: S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 801 – 873 (para 36.125 et seq.).

concern social rights (e.g., European Social Charter[118] and its revised version[119]),[120] the free movement of persons (European Convention on Establishment[121]), the protection of minorities,[122] biomedical questions,[123] the protection of environment[124] and animals,[125] as well as cross-border cooperation rules, including the ones concerning cross-border co-operation between territorial communities and administrative authorities,[126] calculation of time-limits,[127] transmission of applications

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118 Council of Europe Treaty Series No. 035.

119 Council of Europe Treaty Series No. 163.

120 See on these Charters O. Dörr, "European Social Charter", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 507 – 541.

121 Council of Europe Treaty Series No. 019.

122 See European Charter for Regional or Minority Languages (Council of Europe Treaty Series No. 147) and Framework Convention for the Protection of National Minorities (Council of Europe Treaty Series No. 157). For an overview on the content and the impact of these conventions see S. Oeter "Conventions on the Protection of national Minorities", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 542 – 571.

123 See, e.g., the Convention on Human Rights and Biomedicine (Council of Europe Treaty Series No. 164) and its additional protocols; for an overview see R. Uerpmann-Wittzak, "Convention on Human Rights and Biomedicine", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 572 – 588.

124 See, e.g., the European Landscape Convention (Council of Europe Treaty Series No. 176) and the Protocol amending the European Landscape Convention (Council of Europe Treaty Series No. 219).

125 See, e.g., the European Convention for the Protection of Animals kept for Farming Purposes (Council of Europe Treaty Series No. 87), European Convention for the Protection of Animals for Slaughter (Council of Europe Treaty Series No. 102), European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (Council of Europe Treaty Series No. 123), European Convention for the Protection of Pet Animals (Council of Europe Treaty Series No. 125).

126 European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (Council of Europe Treaty Series No. 106).

127 See European Convention on the Calculation of Time-Limits (Council of Europe Treaty Series No. 076).

for legal aid,[128] mutual assistance with regard to the service of documents relating to administrative matters,[129] and obtaining abroad of information and evidence in administrative matters.[130]

c) However, as can be seen from this enumeration even if these CoE conventions cover a wide range of policy fields and even if the signature and ratification of a given convention by a given State may give rise to greater reforms in the domestic legal order, their potential impact on the domestic administrative law in general may be limited mainly to specific branches of special administrative law (environmental law, social law, etc.) or very specific problems (cross-border cooperation, protection of minorities). Only a few CoE conventions may have a deeper impact on the 'core' of the administrative law of the Member States that regulate transversal issues of relevance for (nearly) every administration of a given State.

d) Part of these CoE conventions are the European Charter of Local Self-Government of 15 October 1985[131] and its Additional Protocol on the rights to participate in the affairs of a local authority of 16 November 2009.[132] These are the only CoE conventions dealing with the Member States' internal (administrative) organisation, specifically by fostering administrative deconcentration including questions of citizen's participation.[133] The European Charter of Local Self-Government is one

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128 See European Agreement on the Transmission of Applications for Legal Aid (Council of Europe Treaty Series No. 092).

129 See European Convention on the Service Abroad of Documents relating to Administrative Matters (Council of Europe Treaty Series No. 094).

130 See European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (Council of Europe Treaty Series No. 100).

131 Council of Europe Treaty Series No. 122.

132 Council of Europe Treaty Series No. 207.

133 See on the development, the content, and the purpose of the Charter B. Schaffarzik, "Congress of Local and Regional Authorities", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 269 – 295 (para 10.53 et seq.); B. Schaffarzik, *Handbuch der Europäischen Charta der kommunalen Selbstverwaltung* (Stuttgart: Boorberg, 2002), pp. 23 ff.; F. Durand, "Le 30e anniversaire de la Charte européenne de l'autonomie locale", (2015) *AJDA*, pp. 2312 – 2320; R. Hertzog, "La France et la charte européenne de l'autonomie locale", (2016) *AJDA*, pp. 1551 – 1559; F.-L. Knemeyer (ed.), *Die Europäische Charta der kommunalen Selbstverwaltung* (Baden-Baden: Nomos, 1989); K. Meyer,

of the rare CoE conventions which is signed and ratified by all Member States of the CoE – though it can be considered as a sort of late bloomer because one had to wait until the turn of the century for the Charter to be ratified, e.g. by Ireland (2002), Belgium (2004), Switzerland (2005), and France (2007). The implementation of the European Charter of Local Self-Government is monitored quite intensively by the CoE Congress of Local and Regional Authortities (see *infra* II (5) (c)).

e) In addition, the aforementioned (see *supra* II (2) (f)) CoE Convention on Access to Official Documents of 18 June 2009[134] deserves special mention as one of the CoE conventions with the potential for a broader impact on the core structures of national administrations. It is the first binding international legal instrument that recognizes a general right of access to official documents held by public authorities. According to the Preamble of its Explanatory Report, it is meant to foster transparency of public authorities as a key feature of good governance and as an indicator of whether or not a society is genuinely democratic and pluralist[135]. However, as of this writing it has not yet entered into force, with only nine Member States having ratified it to date. According to Article 16 (3) of the Convention ten ratifications are necessary.

f) Finally, the much older Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981[136] and its Additional Protocol regarding supervisory authorities

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Gemeindeautonomie im Wandel (Nordersted: Books on Demand, 2011), pp. 77 et seq.; C.L. Popescu, "Les requêtes devant le Conseil de l'Europe alléguant des violations de la Charte européenne de l'autonomie locale", (2008) *AJDA*, pp. 2429 – 2431; M. W. Schneider, *Kommunaler Einfluß in Europa* (Frankfurt am Main: Peter Lang, 2003), pp. 273 et seq.

134 Council of Europe Treaty Series No. 205.

135 See more in F. Edel, "La Convention du Conseil de l'Europe sur l'accès aux documents publics: premier traité consacrant un droit général d'accès aux documents administratifs", (2011) *rfda*, pp. 59 – 78; F. Schoch, "Das Übereinkommen des Europarates über den Zugang zu amtlichen Dokumenten", in: M. Wittinger/R. Wendt/G. Ress (eds), *Verfassung – Völkerrecht – Kulturgüterschutz: Festschrift für Wilfried Fiedler* (Berlin: Duncker & Humblot), pp. 657 – 673 (pp. 665 et seq.); K. Janssen, *The Availability of Spatial and Environmental Data in the European Union* (New York: Kluwer Law International 2010), pp. 237 et seq.

136 Council of Europe Treaty Series No. 108.

and trans-border data flows of 8 November 2011[137] have to be mentioned as further CoE conventions with the potential to have a broader impact on domestic administrative law. However, the standards of these conventions do not address most challenges resulting from the use of new information and communication technologies. Therefore, it is widely believed that this convention needs to be modernized,[138] among other things by synchronizing it with the EU's General Data Protection Regulation (EU) 2016/679[139] – a regulation which clearly overshadows the relevance of CoE conventions on data protection at least for the Member States of the EU.

4. The Recommendations of the Committee of Ministers of the CoE

a) Apart from these three issues – local self-government, data protection, and freedom of information – the CoE has refrained from harmonizing the core structures of administrative law of its Member States through developing conventions. Recommendations issued on the basis of Article 15 (b) SCoE (see *infra* II (1) (c)) are considered to be more promising tools for this purpose.[140] Therefore, among these recommendations other important sources of pan-European general principles of good administration can be found. Despite their *soft law* nature they should not be overlooked.[141] Following again from the

137 Council of Europe Treaty Series No. 181.

138 See on the modernisation work of the CoE concerning the Convention on Data Protection: http://www.coe.int/en/web/data-protection/modernisation-convention108.

139 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

140 M. Wittinger, Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte" (Baden-Baden: Nomos, 2005), pp. 204 et seq.

141 In international law the orthodox division between 'hard law' and 'soft law' should generally be not overstated. Due to the lack of developed enforcement machinery it is possible for the soft law rules, despite their lack of bindingness, to enjoy even higher level of acceptance or implementation. See more about the 'blurred lines' between binding and non-binding instruments, in: M.

previously mentioned *Demír and Baykara* formula (see *supra* II (2) (f)), these recommendations are deemed to represent the common fundamental convictions of the Member States of the CoE concerning core elements of administrative law. Such recommendations aim to harmonise European rules protecting individual *vis-à-vis* public authorities; yet they offer much more than common minimal standards.[142]

b) The standard-setting activities in administrative matters through recommendations of the Committee of Ministers started in 1970 when the Committee on Legal Co-operation in Europe highlighted the necessity for action to protect the individual *vis-à-vis* acts of administrative authorities on the European level and founded the Project Group on Administrative Law (CJ-DA).[143] The rationale behind this proposition was the fact that while various national and international instruments codified the rules intended to protect persons accused of criminal offences or involved in civil disputes, no rules were spelled out in administrative matters even though the implications (caused) for the individual in this field were sometimes even greater.[144] As a result, in 1977 the Committee of Ministers adopted Resolution (77) 31 on the protection of the individual in relation to acts of

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Breuer, "Impact of the Council of Europe on National Legal Systems", in: S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 801 – 873 (para 36.12 et seq.).

142 F. Benoît-Rohmer/H. Klebes, *Council of Europe Law. Towards a pan-European legal area* (Strasbourg: Council of Europe Publishing, 2005), pp. 127 et seq.

143 The intergovernmental committee of experts – the Project Group on Administrative Law (CJ-DA) – was established in 1970, but dissolved in 2007 for financial reasons. Its work in the field of administrative law and justice is now declared to be a "completed work" by the European Committee on Legal Co-operation (CDCJ) – see: http://www.coe.int/en/web/cdcj/completed-work/standard-setting/administrative-law.

144 P. Leuprecht, "The contribution of the Council of Europe to reinforcing the position of the individual in administrative proceedings", in: Secretariat General of the Council of Europe in co-operation with the Spanish "Defensor del pueblo" (eds), *Round Table with European Ombudsmen* (H/Omb (85) 5), 1985, pp. 1 – 9 (pp. 1 et seq.).

administrative authorities,[145] which had been prepared by the CJ-DA and set out the basis for further cooperation among the Member States in the field of administrative matters.[146] Its preamble echoed the idea that recommendations are capable of expressing the broad consensus[147] on a concrete matter: "*in spite of the differences [...] there is a broad consensus concerning the fundamental principles which should guide the administrative procedures [...]*". Thus, Resolution (77) 31 codified five of these principles: the right to be heard, access to information, assistance and representation, statement of reasons, and indication of remedies. These and further principles that are considered to be of primary importance for the protection of the individual against the administration are detailed in a manual published in 1997 by the CoE,[148] intended to be of use to legislators, judges, ombudsmen, administrators, lawyers, and interested members of the public in all European States.

c) Since then, an array of other recommendations have been prepared by the CJ-DA and adopted by the Committee of Ministers. For the purposes of this paper, the following recommendations are worthy of special attention:

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145 For more details see K. Berchtold, "Über die Rechtsharmonisierung des Verwaltungsrechts im Europarat", in: W. Hummer/G. Wagner (eds), *Österreich im Europarat 1956-1986: Bilanz einer 30jährigen Mitgliedschaft* (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1988), pp. 399 – 410 (pp. 404 et seq.); K. D. Classen, *Gute Verwaltung im Recht der Europäischen Union* (Berlin: Duncker & Humblot, 2008), pp. 206 et seq.; P. Leuprecht, "The contribution of the Council of Europe to reinforcing the position of the individual in administrative proceedings", in: Secretariat General of the Council of Europe in co-operation with the Spanish "Defensor del pueblo" (eds), *Round Table with European Ombudsmen* (H/Omb (85) 5), 1985, pp. 1 – 9 (pp. 6 et seq.).

146 P. Leuprecht, "The contribution of the Council of Europe to reinforcing the position of the individual in administrative proceedings", in: Secretariat General of the Council of Europe in co-operation with the Spanish "Defensor del pueblo" (eds), *Round Table with European Ombudsmen* (H/Omb (85) 5), 1985, pp. 1 – 9 (p. 7).

147 U. Stelkens, "Vers la reconnaissance de principes généraux paneuropéens du droit administratif dans l'Europe des 47?", in: J. B. Auby/J. Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Brussels: Bruylant, 2014), pp. 713 – 740 (pp. 714 et seq.).

148 Council of Europe (ed.), *The Administration and You – A Handbook* (Strasbourg: Council of Europe Publishing, 1997).

- Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities;[149]
- Recommendation No. R (81) 19 on access to information held by public authorities,[150] which has been revised (but not replaced) by Recommendation Rec(2002) 2 on access to official documents;[151]
- Recommendation No. R (84) 15 relating to public liability;
- Recommendation No R (85) 13 on the institution of the ombudsman (see *infra* II (5) (b));
- Recommendation No. R (87) 16 on administrative procedures affecting a large number of persons;[152]
- Recommendation No. R (89) 8 on provisional court protection in administrative matters;

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149 See K. Berchtold, "Über die Rechtsharmonisierung des Verwaltungsrechts im Europarat", in: W. Hummer/G. Wagner (eds), *Österreich im Europarat 1956-1986: Bilanz einer 30jährigen Mitgliedschaft* (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1988), pp. 399 – 410 (pp. 409 et seq.); K. D. Classen, *Gute Verwaltung im Recht der Europäischen Union* (Berlin: Duncker & Humblot, 2008), pp. 214 et seq.; H. Jellinek, "Ermessensausübung durch Verwaltungsbehörden" (1981) *ZRP*, pp. 68 – 70; P. Leuprecht, "The contribution of the Council of Europe to reinforcing the position of the individual in administrative proceedings", in: Secretariat General of the Council of Europe in co-operation with the Spanish "Defensor del pueblo" (eds), *Round Table with European Ombudsmen* (H/Omb (85) 5), 1985, pp. 1 – 9 (pp. 7 et seq.); J. Wakefield, *The Right to Good Administration* (New York: Kluwer Law International, 2007), pp. 60 et seq.

150 See K. Berchtold, "Über die Rechtsharmonisierung des Verwaltungsrechts im Europarat", in: W. Hummer/G. Wagner (eds), *Österreich im Europarat 1956-1986: Bilanz einer 30jährigen Mitgliedschaft* (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1988), pp. 399 – 410 (pp. 408 et seq.); K. Janssen, *The Availability of Spatial and Environmental Data in the European Union* (New York: Kluwer Law International 2010), pp. 235 et seq.; E. Chevalier, *Bonne administration et Union européenne* (Brussels: Bruylant, 2014), p. 135; K. D. Classen, *Gute Verwaltung im Recht der Europäischen Union* (Berlin: Duncker & Humblot, 2008), pp. 215 et seq.

151 See on Recommendation Rec(2002)2: K. Janssen, *The Availability of Spatial and Environmental Data in the European Union* (New York: Kluwer Law International, 2010), pp. 236 et seq.

152 See K. D. Classen, *Gute Verwaltung im Recht der Europäischen Union* (Berlin: Duncker & Humblot, 2008), pp. 216 et seq.

- Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies;
- Recommendation No. R (91) 1 on administrative sanctions;
- Recommendation No. R (93) 7 on privatisation of public undertakings and activities;[153]
- Recommendation No. R (97) 7 on local public services and the rights of their users;[154]
- Recommendation No. R (2000) 6 on the status of public officials in Europe;[155]
- Recommendation No. R (2000) 10 on codes of conduct for public officials (see *infra* III (2) (a));
- Recommendation Rec(2001) 9 on alternatives to litigation between administrative authorities and private parties;[156]
- Recommendation Rec(2003) 16 on the execution of administrative and judicial decisions in the field of administrative law;
- Recommendation Rec(2004) 20 on judicial review of administrative acts;[157]

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153 See U. Stelkens, "Europäische Rechtsakte als 'Fundgruben' für allgemeine Grundsätze des deutschen Verwaltungsverfahrensrechts" (2004) *ZEuS*, pp. 129 – 164 (pp. 135 et seq.).

154 See K. D. Classen, *Gute Verwaltung im Recht der Europäischen Union* (Berlin: Duncker & Humblot, 2008), pp. 217.

155 See E. Chevalier, *Bonne administration et Union européenne* (Brussels: Bruylant, 2014), p. 136; K. D. Classen, *Gute Verwaltung im Recht der Europäischen Union* (Berlin: Duncker & Humblot, 2008), p. 217. Recommendation No. R (2000) 6 was preceded by a quite comprehensive report of the CJ-DA: Council of Europe (ed.), *The Status of Public Officials in Europe* (Strasbourg: Council of Europe Publishing, 1999).

156 Recommendation Rec(2001) 9 was preceded by a 'Mulitlateral Conference in Lisbon (31 May – 2 June 1999) organized by the CJ-DA. Its proceedings are published in Council of Europe (ed.), *Alternatives to Litigation between Administrative Authorities and Private Parties: Conciliation, Mediation and Arbitration* (Strasbourg: Council of Europe Publishing, 2000).

157 See J. R. Albariño/S. Galera, "European regional tradition – the Council of Europe", in: S. Galera (ed.), *Judicial Review* (Strasbourg: Council of Europe Publishing, 2010), pp. 173 – 208 (pp. 192 et seq.). Recommendation

– Recommendation CM/Rec(2007)7 on good administration (see *infra* II (4) (d) and II (5) (b)).

As can be seen even from the titles of these recommendations, their scope encompasses not only the classical fields of administrative law but extends into service-orientated administration, government liability law, and public services law. They resemble a textbook on general administrative law of continental systems rather than a compilation of judicial standards that are typical for Anglo-Saxon legal systems. However, one important 'chapter' of such a compilation is missing: there are no CoE recommendations explicitly dealing with public procurement issues. In this regard, it is above all the OECD that has developed 'best practice' instruments, such as the OECD Recommendation of the Council on Public Procurement (2015)[158] or its 'Public Procurement Toolbox',[159] which were at least originally primarily conceived as tools for fighting corruption through transparency.

d) Amongst all the recommendations of the Committee of Ministers of the CoE, Recommendation CM/Rec(2007)7 on good administration[160] adopted in 2007 deserves a closer look for the purposes of this paper. This recommendation, which drew inspiration from the European Code of Good Administrative Behaviour of 2001 (see *infra* II (5) (b)), was intended to bring previously disparate standards of good

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Rec(2004) 20 was preceded by a 'Multilateral Seminar in Madrid (13 – 15 November 1997 organized by the CJ-DA. Its proceedings are published in Council of Europe (ed.), *Judicial control of administrative acts* (Strasbourg: Council of Europe Publishing, 1997).

158 Available at: http://www.oecd.org/gov/ethics/OECD-Recommendation-on-Public-Procurement.pdf.

159 Available at: http://www.oecd.org/governance/procurement/toolbox/.

160 See more on the content of this recommendation in E. Chevalier, *Bonne administration et Union européenne* (Brussels: Bruylant, 2014), pp. 141 et seq.; P. Gerber, "Recommendation CM/Rec(2007)7 on good administration – general presentation", in: Council of Europe (ed.), *In Pursuit of Good Administration – European Conference Warsaw, 29 – 30 November 2007* (DA/ba/Conf (2007) 4 *e*), 2008, pp. 3 – 9 (pp. 5 et seq.); G.M. Palmieri, "L'internationalisation du droit public: La contribution du Conseil de l'Europe", (2006) 18 *European Review of Public Law*, pp. 51 – 84 (pp. 75 et seq.); M. C. Runavot, "La 'bonne administration': consolidation d'un droit sous influence européenne", (2010) *rfda*, pp. 395 – 403.

administration together[161] and to promote the concept of good administration by encouraging Member States to "*adopt, as appropriate, the standards set out in the model code [...] assuring their effective implementation*".[162] Recommendation CM/Rec(2007)7 thus differs from other CoE recommendations in terms of structure and it lacks an explanatory memorandum as well. Since the provisions of the model code were formulated in a sufficiently clear standard-setting manner, no further commenting was deemed necessary by the drafters. Overall, the model code is divided into three sections on general principles, rules governing administrative decisions (see *infra* II (4) (f)), and appeals. They all lay down a range of requirements of administrative law. However, it is left to the Member States to assess how to include these standards in their domestic law: whether by adapting their legislation or practices accordingly or by enacting the whole text found therein.[163]

e) Indeed, what makes all recommendations of the CoE in administrative matters interesting is the fact that they all could be used as a 'model code': they are formulated like statutory laws, they are sufficiently clear to be applied directly, and they quite often refer directly or indirectly to each other. This is true above all concerning the 'older recommendations'. For example, No. 10 of the 'Explanatory Memorandum' of the Resolution No. (77) 31[164] stresses that this resolution uses the term 'administrative act' to define the scope of application of the procedural rights whose protection shall be strengthened by this Resolution. In order to avoid difficulties of

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161 Recommendation No. R (80) concerning the exercise of discretionary powers by administrative authorities and Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities were primary sources drawn upon. All the further sources are named in the preamble of Recommendation CM/Rec(2007)7 on Good Administration.

162 P. Gerber, "Recommendation CM/Rec(2007)7 on good administration – general presentation", in: Council of Europe (ed.), *In Pursuit of Good Administration – European Conference Warsaw, 29 – 30 November 2007* (DA/ba/Conf (2007) 4 *e*), 2008, pp. 3 – 9 (p. 3).

163 P. Gerber, "Recommendation CM/Rec(2007)7 on good administration – general presentation", in: Council of Europe (ed.), *In Pursuit of Good Administration – European Conference Warsaw, 29 – 30 November 2007* (DA/ba/Conf (2007) 4 *e*), 2008, pp. 3 – 9 (p. 4).

164 See Final activity report of the European Committee of Legal-Cooperation of 3 August 1977 (CM(77)173-add2.

terminology, this resolution therefore offers an autonomous definition of the term 'administrative act'. In fact, this is done in the first sentence of the introductory note of this resolution – "*The following principles apply to the protection of persons, whether physical or legal, in administrative procedures with regard to any individual measures or decisions which are taken in the exercise of public authority and which are of such nature as directly to affect their rights, liberties or interests (administrative acts)*". Appendix I No. 2 of Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities provides a cross-reference to this definition in its own definition of an 'administrative act' as "*any individual measure or decision which is taken in the exercise of public authority and which is of such nature as directly to affect the rights, liberties or persons whether physical or legal*".[165] This definition is also referred to in the introduction of Recommendation No. R (89) 8 on provisional court protection in administrative matters, as well as in No. 4 of the General Consideration of the Explanatory Memorandum concerning Recommendation No. R (91) 1 on administrative sanctions. It is interesting to note that due to this definition of the term 'administrative act' the scope of these recommendations refers not only to *single case decisions with legally binding effect*, but also *physical acts* directly affecting rights, such as 'direct force' applied by the police,

165 Para. 10 of the Explanatory Memorandum of the Resolution No. (77) 31 gives additional information concerning the meaning of the term 'administrative act'. This definition should be read "*in conjunction with the introductory phrase which states that the principles apply only in administrative procedures*". This was meant to indicate that judicial procedures, investigations of criminal offences with a view to their prosecution to a court, and legislative procedures are not considered as administrative acts. The reference to 'individual measures or decisions' includes those which apply to a number of specific persons but is meant to exclude measures and decisions of general application. Moreover, the resolution applies only to acts of such nature as to affect rights, liberties, or interests directly and therefore is not applied to persons who are only indirectly affected.

administrative warnings[166] or recommendations.[167] In addition, even the decision not to conclude a public contract could be considered as an 'administrative act' according to these older recommendations, which would allow one to deduce some minimal standards from these recommendations for public procurement matters and other competitive award procedures.

f) However, the newer recommendations in administrative matters correlate with each other to a lesser degree than the older ones. For example, the consistent use of the term 'administrative act' has been abandoned by the Recommendation Rec(2004) 20 on judicial review of administrative acts. This recommendation defines the term 'administrative act' as either "*legal acts – both individual and normative – and physical acts taken in the exercise of public authority, which may affect the rights or interests of natural or legal persons*" or "*situations of refusal to act or an omission to do so in cases where the administrative authority is under an obligation to implement a procedure following a request*". This explicitly includes not only *physical acts* directly affecting rights, but also *administrative rule-making*. The French version makes it even clearer that the scope of Recommendation Rec(2004) 20 differs from the scope of the older recommendations by using '*acte de l'administration*' in Recommendation Rec(2004) 20 instead of the term '*acte administratif*' as had been used in the older recommendations. Conversely, Recommendation CM/Rec(2007)7 on good administration uses the term 'administrative decisions' (in French: '*actes administratifs*') to define (only) the scope of its Section II. Article 11

166 Following *Leela Förderkreis E.V. and Others v Germany* (58911/00) November 6, 2008 ECtHR at [84] a public warning of the practices of certain religious associations "may have had negative consequences for them. Without ascertaining the exact extent and nature of such consequences, the Court proceeds on the assumption that the Government's statements in issue constituted an interference with the applicant associations' right to manifest their religion or belief, as guaranteed by Article 9 § 1 of the Convention".

167 U. Stelkens, "Europäische Rechtsakte als 'Fundgruben' für allgemeine Grundsätze des deutschen Verwaltungsverfahrensrechts", (2004) *ZEuS*, pp. 129 – 160 (pp. 134 et seq.).; more restrictive, however, Council of Europe (ed.), *The Administration and You – A Handbook* (Strasbourg: Council of Europe Publishing, 1997), p. 11 (which regards "physical acts" only as the execution of an administrative act being "part of the administrative act" which is executed).

defines them as "*regulatory or non-regulatory decisions taken by public authorities when exercising the prerogatives of public power".* Regulatory decisions *"consist of generally applicable rules*". This means that Section II of this Recommendation also applies to administrative rule-making, but not to physical acts (which are, however, covered by the requirements included in Section I). Even more puzzling is the definition concerning non-regulatory decisions, which "*may be individual or otherwise. Individual decisions are those addressed solely to one or more individuals*". This definition fails to define the characteristics of a decision which is neither individual nor regulatory but 'otherwise'. It seems, however, that 'otherwise decisions' are decisions comparable to the French '*acte administratif d'espèce*' and the German '*Allgemeinverfügung*', but it remains unclear.[168]

5. Recommendations, Resolutions, Guidelines, and Reports Adopted by the Parliamentary Assembly and Other Institutions of the CoE

a) Pan-European General Principles of Good Administration may also be expressed by the 'standard-setting' activity of the Parliamentary Assembly of the CoE (see *supra* II (1) (d)). However, the role of the recommendations of the Parliamentary Assembly of the CoE for discerning pan-European general principles of good administration is different from those instruments of the CoE deriving from Article 15 SCoE: They are in general not formulated as directly applicable '(model) rules' like the recommendations of the Committee of Ministers and most of the CoE Conventions including the ECHR, but serve merely as a sort of concretisation of the principles enshrined in these conventions and recommendations. In this regard, they may have less 'authority' than the 'regular' external acts of the CoE foreseen in Article 15 CoE.

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168 *Pierre Delvolvé*, as the scientific expert of the Working party of the Project Group on Administrative Law which prepared this recommendation, pointed out with regard to the rules governing decisions of Section II, that not exactly the same meaning was attached to administrative decisions in all domestic legal systems, particularly where it came to the concept of 'rule making decisions' as compared to individual decisions". It was also important to point out that there were decisions which were neither regulatory nor individual. See para. 9 of the "Meeting Report" CJ-DA-GT (2006) 3 of the "4th meeting of the CJ-DA-GT" from 10 to 12 July 2006.

However, they may be useful tools to explain and illustrate them – above all if the Committee of Ministers refers to them when elaborating CoE conventions and recommendations in the sense of Article 15 (b) SCoE.

b) Parliamentary Assembly Recommendation 1615 (2003) on the institution of an ombudsman provides a good example for these assumptions. It recalled in the first instance Recommendation No R (85) 13 of the Committee of Ministers on the institution of the ombudsman and developed it further in light of new developments on the EU level: The emergence of the right to good administration in Article 41 CFR and the activities of the EU's European Ombudsman, namely the promotion of the European Code of Good Administrative Behaviour of 2001 (see *infra* III (2) (b)). Therefore, the Parliamentary Assembly addresses itself directly to the Members States of the CoE and "*recommends*" inter alia "*that the governments of Council of Europe member states create at national level (and at regional and local level as appropriate), where it does not already exist, an institution bearing a title similar to that of 'parliamentary (/regional/ local government) ombudsman', preferably by incorporation into the constitution.*"[169] Furthermore, the Parliamentary Assembly recommends "*that the Committee of Ministers encourage member states to implement Recommendation No. R (85) 13, whilst also giving effect to the more detailed provisions of the present recommendation*".[170] In fact, in its reply,[171] adopted on 16 June 2004, the Committee of Ministers "*as requested by the Assembly*" refers to Recommendation No. R (85) 13 of the Committee of Ministers to Member States on the institution of the ombudsman and "*underlines the invitation made to member states to consider extending and strengthening the powers of the Ombudsman to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration.*"

Furthermore, Recommendation 1615 (2003) of the Parliamentary Assembly establishes a link between the institution of an ombudsman

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169 No. 10.1. of the Recommendation 1615 (2003) of the Parliamentary Assembly.

170 No. 11.1. of the Recommendation 1615 (2003) of the Parliamentary Assembly.

171 No. 3 of the Reply adopted by the Committee of Ministers on 16 June 2004 at the 888th meeting of the Ministers' Deputies (CM/AS(2004)Rec1615-final).

and the usefulness of the elaboration of clear standards of good administration in the form of a 'model code of good administration' aiming to serve not only as a 'standard of review' for the ombudsman but also to provide "*guidance, instruction and information to both administrative officials and members of the public in their mutual relations*".[172] Therefore it recommended to the Committee of Ministers to "*draft a single, comprehensive, consolidated model code of good administration, deriving in particular from Committee of Ministers Recommendation No. R (80) 2 and Resolution (77) 31 and the European Code of Good Administrative Behaviour, with the involvement of the appropriate organs of the Council of Europe – in particular the Commissioner for Human Rights and the European Commission for Democracy through Law, as well as the Assembly – and in consultation with the European Ombudsman, thus providing elaboration of the basic right to good administration so as to facilitate its effective implementation in practice*."[173] It was this recommendation which gave the impetus to the Committee of Ministers to adopt Recommendation CM/Rec(2007)7 on good administration (see *supra* II (4) (d)), providing for such a model code in its appendix.

c) The role of the standard setting activities such as 're-commendations', 'opinions', 'reports', and other documents elaborated and adopted by those institutions of the CoE which have been set up following Article 17 SCoE (see *supra* II (1) (e)) is different to the role of the recommendations of the Parliamentary Assembly. This seems most obvious regarding the activities of the Congress of Local and Regional Authorities,[174] the Commissioner for Human Rights,[175] the European

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172 See E. Chevalier, *Bonne administration et Union européenne* (Brussels: Bruylant, 2014), pp. 138 et seq.

173 No. 11.3. of the Recommendation 1615 (2003) of the Parliamentary Assembly.

174 See B. Schaffarzik, "Congress of Local and Regional Authorities", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 269 – 295.

175 See O. Dörr, "Commissioner for Human Rights", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 296 – 313.

Commission of Democracy through Law ('Venice Commission'),[176] and the Group of States against Corruption (GRECO).[177] In spite of their different tasks, these institutions and committees have in common that they were founded to, *inter alia*, monitor or evaluate the respect of standards of 'good administration' and 'good governance' in the Member States of the CoE (or, in case of partial agreements, of those Member States participating). As for the Congress of Local and Regional Authorities, it has already been said that it is competent to monitor the implementation of the European Charter of Local Self-Government (see *supra* II (3) (d)).[178] The European Commissioner of Human Rights has – of course – the mandate to monitor the implementation and respect of human rights in the Member States – *inter alia* by and through the administration (even if good administration does not seem to be the focus of its activities). The activities of the Venice Commission in "rule of law" and "local self-government" matters are, naturally, the most interesting and directly relevant in our context. Lastly, GRECO refers, *inter alia*, to the Recommendation of the Committee of Ministers No. R (2000) 10 on codes of conduct for public officials as a core standard for its evaluation activities. Its activity is therefore of utmost importance

176 See P. van Dijk, "The Venice Commission on Certain Aspects of the Application of the European Convention in Human Rights Ratione Personae", in: Breitenmoser, Stephan et al. (eds), *Human Rights, Democracy and the Rule of Law – Liber Amicorum Luzius Wildhaber* (Zurich/Baden-Baden: Dike/Nomos, 2007), pp. 183 – 202 (pp. 187 et seq.); C. Grabenwarter, "Constitutional Standard-setting and Strengthening of New Democracies", in S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 732 – 746.

177 See W. Rau, "Group of States against corruption (GRECO)", in: S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 444 – 460.

178 See Article 2 (3) of the Statutory Resolution CM/Res(2015)9 relating to the Congress of Local and Regional Authorities of the Council of Europe and the revised Charter appended thereto "The Congress shall prepare on a regular basis country-by-country reports on the situation of local and regional democracy in all member States and in States which have applied to join the Council of Europe, and shall ensure, in particular, that the principles of the European Charter of Local Self-Government are implemented". See on this B. Schaffarzik, "Congress of Local and Regional Authorities", in: S. Schmahl/M. Breuer (eds), *The Council of Europe – Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 269 – 295 (10.44 et seq.).

for the 'civil service elements' and 'anti-corruption-elements' within the notion of good administration.

For their purpose, these four institutions adopt standards for the monitoring or evaluation procedure which gives flesh to more general CoE conventions and recommendations of the Committee of Ministers; thus they can be understood as a concretisation of these conventions and recommendations. An example would be the aforementioned 'rule of law report' and the 'rule of law checklist' of the Venice Commission (see *supra* II (1) (f)). In addition, the results of country specific evaluations or monitoring activities are adopted as 'opinions' and 'reports' or country-specific recommendations. These may be compiled in (annual) general reports which can be seen as reflecting a certain 'case law' on the practice of the institution in question – what may be called 'instiprudence' (institution + jurisprudence – in the style of the coinage 'ombudsprudence' for the practice of the ombudsman).[179]

This reveals why the influence of the standard setting activities and 'instiprudence' of the Congress of Local and Regional Authorities, the Commissioner for Human Rights, the Venice Commission, and GRECO for the development of pan-European general principles of good administration is different than the role of the recommendations of the Parliamentary Assembly. Their authority *vis-à-vis* the Member States seems to be stronger: In participating in these institutions and – above all – in accepting to be monitored and evaluated by them, the Member States submit themselves clearly to the standards of 'review' held by these institutions and accept to be – at least politically – bound by them and the results of their evaluation.[180] Therefore the role of this

179 See for example the collection of the 'instiprudence' of the Venice Commission called 'Compilations of Studies and Opinions' at: http://www.venice.coe.int/WebForms/pages/?p=04_Compilations&lang=EN; see on this W. Hoffmann-Riem, "'Soft Law' und 'Soft Instruments' in der Arbeit der Venedig-Kommission des Europarats", in: M. Bäuerle/P. Dann/A. Wallrabenstein (eds), *Demokratie-Perspektiven – Festschrift für Brun-Otto Bryde* (Tübingen: Mohr Siebeck, 2013), pp. 597 – 630 (p. 603).

180 See – concerning GRECO – W. Rau, "Group of States against corruption (GRECO)", in: S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 444 – 460 (para 21.33); concerning the Venice Commission: W. Hoffmann-Riem, "'Soft Law' und 'Soft Instruments' in der Arbeit der Venedig-Kommission des Europarats", in: M. Bäuerle/P. Dann/A. Wallrabenstein (eds), *Demokratie-Perspektiven –*

'instiprudence' for pan-European general principles of good administration may be comparable to the role of the jurisprudence of the ECtHR as regards their 'orientation effect'.

III. Council-of-Europeanisation of National Law in Administrative Matters: In Search of the Effectiveness of Pan-European General Principles of Administrative Law – A Research Agenda

As emphasized earlier, while at the European Union level the discussions about the need to bring scattered administrative rules together have turned into legislative initiatives, the work of the CoE in administrative matters – in spite of its rich content – remains a relatively under-researched area. Despite having offered guidance to the CoE Member States, especially for the countries in transition, for decades, drawing on a range of sources and showing clear impetus of harmonisation of the Members States' domestic law, the body of administrative law within the CoE, in our view, does not receive enough attention from legal scholarship. It would therefore be worthwhile not only to research and define the scope of this 'coherent whole' of pan-European general principles of good administration based on shared values but to inquire if, by what means, and to what extent it finds its way into the domestic legal systems of the Member States of the CoE. In addition, questions about the precise impact of pan-European general principles of good administration on the domestic legal systems, as well as questions about the possible pitfalls and limitations stemming therefrom, merit attention in order to uncover the significance of the work done by the CoE in the administrative domain, its implications, and further potential.

The aforementioned 'Speyer' project on "The development of pan-European general principles of good administration" aims to fill the research gaps identified above by working in close cooperation with legal experts from various Member States of the CoE (see Annex).[181] In

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Festschrift für Brun-Otto Bryde (Tübingen: Mohr Siebeck, 2013), pp. 597 – 630 (p. 601 et seq.).

181 On the day of writing experts from the following Member States have been invited and accepted to participate: Albania, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia,

the preceding part of this paper the results of the first step of this research have already been presented: It was about 'compiling' the different sources of pan-European general principles of good administration and showing their (potential) added value to the administrative law of their Member States by sketching its richness. The next step will be – above all – to analyse the (potential and actual) impact of pan-European general principles of good administration developed within the framework of the CoE on the national legal orders of its Member States.

This research goes beyond the comparative question of whether these principles are (already) common to the legal orders of the Member States of the CoE. The intended research is above all about the 'legal anchoring' of the 'package of good administration' promulgated by the CoE (including the case law of the ECtHR on the 'principle of good governance') in national law. In other words: It is about the effectiveness of the pan-European general principles of good administration.

The CoE is not conceived of as a supranational organisation.[182] Therefore, 'CoE law' may only have a harmonizing effect on the law of the Member States of the CoE to the extent each of them is willing to adapt its national legal order to 'CoE requirements' by ratifying CoE conventions, by following CoE recommendations, by accepting to be monitored by CoE commissions and institutions and by following their opinions, and – last but not least – by accepting that the national legislator, the national government, as well as the national courts may be guided by the case law of the ECtHR. In the end, it is up to each and every Member State of the CoE to make the 'CoE law' effective by being open to adapting its national law to it. The impact of pan-European general principles of good administration on the Member States can therefore only be measured from the perspective of the

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Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Despite the important role played by the Russian Federation and by Ukraine within the CoE, contributions will not be sought from these countries. This is mainly due to the current political situation.

182 Even if one may discern some supranational elements or characterize at least the ECtHR as a supranational court: M. Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (Baden-Baden: Nomos, 2005), pp. 499 et seq.

domestic law of its Member States (bottom up approach), asking if and how domestic law has been influenced by 'CoE law'. Realistically it is, however, impossible to trace this kind of influence from an 'outside' perspective; it requires the 'insider knowledge' of experts of the respective national administrative law, which explains the important role of the aforementioned cooperation with national legal experts in the 'Speyer' Project.

Depending on the results of the analysis of these experts of 'their' national legal orders different general conclusions may be possible: Either the harmonizing effect of the pan-European general principles of good administration may be negligible because in most States analysed no (potential) impact of these principles can be discerned – which would also mean, that at least in the area of administrative law the CoE is nothing more than a paper tiger producing norms without any effectiveness on the ground. The opposite result would be that in most Member States a true 'openness' to be inspired by pan-European general principles of good administration can be identified. This would imply a great harmonizing effect of these principles and perhaps also indicate a general assumption that national administrative law is in line with these principles if not explicitly – and for good reasons – stipulated otherwise. Finally – and this seems to be the most realistic scenario – one may discover a 'multispeed Europe' where the domestic legal orders of the different Member States are open to being inspired by pan-European general principles of good administration to different degrees, which may also explain (some) of their differences. This would reflect the *dynamic character* of the CoE as an organisation aiming to achieve "*greater unity between its members*" (see Article 1 (a) SCoE). Furthermore, this would allow one to place the different Member States on a 'scale of harmonization' by pan-European general principles of good administration.

During the first workshop of the 'Speyer' project, which took place on 28 and 29 April 2017 in Speyer and served to discuss the concept of the project with the participating legal experts, one main issue was to identify possible 'paths of reception' by which the pan-European general principles of good administration could find their way into national law. In the end five paths were discerned but only four were considered to be worth exploring. These will be elaborated in the following sections.

1. Reception of Pan-European General Principles of Good Administration through the National Legislator

a) The first possible path of reception of pan-European general principles of good administration goes through national legislation: Are there cases in which the ratification of a CoE convention, a specific jurisprudence of the ECtHR, or a recommendation of the Committee of Ministers or another CoE institution caused (reforms to) legislation on administrative law? This is, for example, easily conceivable, given the ratification of CoE Conventions with a general impact on administrative law, such as the European Charter of Local Self-Government of 15 October 1985 (see *supra* II (4) (d)), which may have given rise to a comprehensive adaption of the national municipal law of some Member States. Some decisions of the ECtHR on the 'principle of good governance' (see *supra* II (2) (b) and (c)) may also have caused a reform of existing statutes to avoid (further) conflicts with the ECtHR. However, as already pointed out, it is above all the recommendations of the CoE concerning administrative matters which are in some way designed as 'model rules' to be adopted by the national legislators and which may therefore be specifically intended to be 'transposed' into national law by national legislation.

b) Unfortunately though, no real assessment seems to exist regarding in which countries and in which regard these recommendations really served as a model for national legislation. Most glaringly, there does not seem to be 'open access' to the 'report on the implementation' of these recommendations to the Committee of Ministers as prescribed by the Article 15 (b) SCoE. Nevertheless, a likely early example of such influence is the Luxembourgian grand-ducal regulation on administrative procedures of 8 June 1979.[183] Even though this grand-ducal regulation does not explicitly refer to Resolution 77 (31) of the CoE as its source of inspiration, the latter's influence can be inferred from the close timing and sequence of their adoption and their resemblance in terms of content. To be more specific, the grand-ducal regulation incorporates all five cornerstone principles enunciated by the preceding CoE resolution – the duty to give reasons, assistance and

183 See Règlement grand-ducal du 8 juin 1979 relatif à la procédure à suivre par les administrations relevant de l'Etat et des communes (Memorial [Journal Officiel du Grand-Duché de Luxembourg] A N°54 of 6th July 1979).

representation, access of information, indication of remedies, and the right to be heard.[184] Further indications of such influence can be found not only in older Member States of the CoE, but also in relatively 'new' ones. In Lithuania, for example, *travaux préparatoires* on both the Law on Public Administration (*Viešojo administravimo įstatymas*) and Law on the Proceedings of Administrative Cases (*Administracinių bylų teisenos įstatymas*) explicitly mention and discuss CoE recommendations, where they are relevant, including when a need arises to update legislation already in place. In addition, the explanatory note that accompanies any legislative proposal typically includes a graph called "the conformity [of the proposed legislation] with the Convention", which is to be filled in by the authorities proposing a new or updated piece of legislation. This is done in accordance with Article 9 (4) of Lithuanian Law on Legislative Framework, which *inter alia* requires every draft legal act be assessed for conformity with the Convention and the rulings of the Court.[185] Furthermore, it seems that upon establishing the Estonian Administrative Procedure Act, most of the older Recommendations of the Council of Europe concerning administrative law "have been taken into account".[186]

In contrast we can rule out any influence on German legislation: The German "*Verwaltungsverfahrensgesetz*" (Administrative Procedure Act, hereafter 'VwVfG')[187] was elaborated in the 1960s[188] and finalized in

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184 See respectively Article 6, Article 10, Article 11, Article 12 and 13, Article 13 (2) of the *Règlement grand-ducal*.

185 "Conclusions on the conformity of draft legal acts with [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms and rulings of the European Court of Human Rights shall be provided by institutions authorised by the Government. These conclusions of the institutions authorised by the Government shall also be provided to the entity adopting a legal act"; full text of the Law available in English at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/4125a932084d11e687e0fbad81d55a7c?jfwid=nz8qn8ibr

186 See I. Pilving, "Estonia", in: J.-B. Auby (ed.), *Codification of Administrative Procedure* (Brussels: Bruylant, 2014), pp. 159 – 171 (pp. 164 et seq.).

187 VwVfG in the version of the promulgation of 23 January 2003 (*Bundesgesetzblatt* I 2003, p. 102), most recently amended by the Article 20 of the Law of 18 July 2016 (*Bundesgesetzblatt* I 2016, p. 1679).

188 See on the development of the VwVfG A. Jacquemet-Gauché/U. Stelkens, "Caractères essentiels du droit allemand der la procédure administrative", in: J.-B. Auby/T Perroud (eds), *Droit comparé de la procédure administrative*

1976, i.e. before the first activities of the CoE. The federal government has even stressed in the explanatory memorandum of this act that there has been only minimal influence of foreign legislation on the draft of the VwVfG.[189] This may explain the reluctance of some German scholars to accept that German law could "learn something" from the CoE concerning administrative matters.[190] On the other hand, the near synchronous coincidence of the preparation of the VwVfG in the German federal ministries of interior and justice in the 1970s and their participation in the Committee of Ministers of the CoE may evince that the German discussions on the possibility of codification of administrative procedure and its 'rule of law value' may have influenced the discussions within the CJ-DA while drafting Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities. Even if no real 'evidence' seems to be currently available of such an enhanced influence of German representatives in the drafting of this resolution, it is at least noteworthy that Germany was represented in the European Committee of Legal Cooperation – responsible for the drafting of the resolution – by *Jens Meyer Ladewig* of the Federal Ministry of Justice and *Klaus Leonhardt* of the Federal Ministry of Interior.[191] Both coordinated the preparations of the VwVfG on behalf of their respective ministries.

c) These examples should not give the impression that pan-European general principles of good administration can only be 'transformed' into national law by adopting or changing national administrative procedure acts: In accordance with the wide scope of these principles it may also be worthwhile to look at statutes on judicial

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(Brussels: Bruylant, 2016), pp. 15 – 36 (pp. 19 et seq.).; J.-P. Schneider, "Germany", in: J.-B. Auby (ed.), *Codification of Administrative Procedure* (Brussels: Bruylant, 2014), pp. 203 – 226 (pp. 204 et seq.).

189 See *Bundestags-Drucksachen* (working documents of the German Bundestag which also include the preparatory works of federal acts) N° 7/910, p. 32.

190 D. H. Scheuning, "Europarechtliche Impulse für innovative Ansätze im deutschen Verwaltungsrecht", in: W. Hoffmann-Riem/E. Schmidt-Aßmann (eds), *Innovation und Flexibilität des Verwaltungshandelns* (Baden-Baden: Nomos, 1994), pp. 289 – 354 (p. 291); J. Schwarze, "Der Beitrag des Europarates zur Entwicklung von Rechtsschutz und Verwaltungsverfahren im Verwaltungsrecht", (1993) 20 *EuGRZ*, pp. 377 – 384 (pp. 381 et seq.).

191 See 'List of participants' of the "Final activity report of the European Committee of Legal-Cooperation of 3 August 1977 (CM(77)173-add2)".

protection against administrative decisions and on the institution of the ombudsman, on statutes on civil service, statutes on state liability, statutes on freedom of information, statutes on data protection, statutes on municipal law, and similar legislation of a cross-cutting nature being therefore of interest in more than one policy field – and therefore being part of the general administrative law of the Member State in question.

2. Reception of Pan-European General Principles of Good Administration through National 'Codes of Good Administrative Behaviour', 'Codes of Conducts', 'Citizen's Charters', 'Ombudsprudence', and the Practice of Other Independent Accountability Institutions

a) To implement the pan-European general principles of good administration into national law, adopting new and adapting old statutes by the national legislator may not always be necessary. It may be more adequate to rely on (self-)commitments by the administrative bodies concerned in the form of 'codes of good administrative behaviour in relation with the public', 'Citizen's Charters', or 'codes of conduct'. At first sight, these commitments have different functions: A commitment labelled 'code of good administrative behaviour' invokes in general the idea of a commitment regarding the respect of general standards of good administration; thus they have a similar function as an administrative procedure act. A well-known example would be the EU Commission's 'Code of good administrative behaviour for Commission Staff in relation with the public', which was adopted as a Commission Decision on 17 October 2000[192] with the explicit purpose of enabling "*the Commission to meet its obligations of good administrative behaviour and in particular in the dealings that the Commission has with the public"*, for which "*the Commission undertakes to observe the standards of good administrative behaviour set out in this Code and to be guided by these in its daily work*".[193] The

192 2000/633/EC, ECSC, Euratom: Commission Decision of 17 October 2000 amending its Rules of Procedure (Official Journal L 267, 20/10/2000), pp. 63 – 66.

193 See on this Commission's Code J. Mendes, "La bonne administration en droit communautaire et le code européen de bonne conduite administrative", (2009) 131 *Revue française d'administration publique*, pp. 555 – 571 (pp.

use of the term 'Citizen's Charter' refers – of course – to the British Citizen's Charters programme of 1991[194] and suggests, therefore, that the commitment in question relates to the quality of a specific public service and is oriented toward the citizen as a consumer of these services and as a tax payer who should know what kind of service he/she can expect.[195] Finally, the use of the term 'Code of Conduct' implies a commitment to ethical behaviour by the civil servants of the committing authority including rules aimed at avoiding conflicts of interest and corruption and the identification of risks.[196] It is these kind of commitments that are promoted by Recommendation No. R (2000) 10 of the Committee of Ministers on codes of conduct for public officials, which "*recommends that the governments of states promote, subject to national law and the principles of public administration, the adoption of national codes of conducts for public officials based on the model code of conduct for public officials annexed to this Recommendation*".

However, the lines between these different forms of commitment are blurred. A commitment following the model of the Dutch "E-Citizen's Charter" could, e.g., either be understood as a commitment to the quality of electronic public services or as a 'code of good electronic administrative behaviour'.[197] The content of the model code of conduct

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567 et seq.); J. Wakefield, *The Right to Good Administration* (New York: Kluwer Law International, 2007), pp. 46 et seq.

194 See on this I. Byone, *Beyond the Citizen's Charter* (London: IPPR, 1996), pp. 8 et seq.; J. A. Chandler, "Introduction", in: J. A. Chandler (ed.), *The Citizen's Charter* (Aldershot: Dartmouth, 1996), pp. 1 – 6 (pp. 2 et seq.).

195 See K. Kuuttiniemi/P. Virtanen, *Citizen's Charters and Compensation Mechanisms* (Helsinki: Ministry of Finance Finland, 1998), pp. 15 et seq.

196 See D. Hine, "Codes of Conducts for Public Officials in Europe: Common Label, Divergent Purposes", (2005) 8 *International Public Management Journal*, pp. 153 – 174; J. Palidauskaitė/A. Lawton, "Codes of Conduct for Public Servants in Central and East European Countries: Comparative Perspectives", in: G. Jenei et al. (eds), *Challenges for Public Management Reforms* (Budapest: Univ. of Economic Sciences and Public Administration, 2004), pp. 397 – 421.

197 See M. Poelmans, "The e-Citizen Charter as an Instrument to boost e-Government", in: P. and M. Cunningham (eds), *Exploiting the Knowledge Economy* (Amsterdam: IOS, 2006), pp. 531 – 538; M. van Rossum/D. Dreessen, "E-government in the Netherlands", in: P. G. Nixon/V. N. Koutrakou

for public officials enshrined in Recommendation No. R (2000) 10 could to an extent be part of a 'code of a good administrative behaviour', above all concerning its provisions on lawfulness and the use of discretionary powers. Thus, these different forms of administrative commitments are at least partly interchangeable due to the fact that they have in common that a given administrative body commits itself *vis-à-vis* the public to respect certain procedural or material standards and to hold their civil servants responsible for complying with them. An additional commonality is that their status in the national legal orders may be uncertain and ambiguous: In some legal orders they may have no legal effect at all but only political implications.[198] In other legal orders, they may be considered as legally binding because of an assumed quasi-contractual character. Furthermore, it may be that in adopting rules of conduct and announcing – by their publishing – that they will henceforth apply to the cases to which they relate, the administration imposes a limit on the exercise of its aforementioned discretion and cannot depart from those rules under pain of being found, where appropriate, in breach of general principles of law, such as equal treatment or the protection of legitimate expectations.[199] Whatever the answer to the question of their binding character in a given national legal order may be, it is clear that the public and 'official' declaration of 'codes' and 'charters' by the administration will raise the awareness of the civil servants of the rights declared and the need to respect them, in addition to raising the corresponding expectations of the public. Therefore, it is of interest to investigate whether and to which extent Member States of the CoE have used this tools to implement pan-European general principles of good administration.

b) Implementing pan-European general principles of good administration into national law by enhancing their visibility through

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(eds), *E-Government in Europe – Rebooting the state* (Abingdon: Routledge, 2010), pp. 119 – 132 (pp. 127 et seq.).

198 This seems to have been the case concerning the British Citizen's Charters; see I. Byone, *Beyond the Citizen's Charter* (London: IPPR, 1996), pp. 34 et seq.

199 Such an argument underlies, e.g., the jurisprudence of the CJEU on the binding effect of the EU Commission's guidelines in EU competition law, see e.g. Kotnik and Others v Državni zbor Republike Slovenije (C-526/14) July 19, 2016 CJEU at [39] at seq.; O. A. Stefan, "Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance", (2014) 21 *MJ*, pp. 359 – 379 (pp. 371 et seq.).

their publication as a 'code' may also be used as a tool by national ombudspersons and other independent accountability institutions like 'data protection supervisors' or 'freedom of information commissioners'. They could follow the model of the 'European Code of Good Administrative Behaviour' of the (EU's) European Ombudsman,[200] which is, in the end, nothing more than a 'codification' of standards of review used by the European Ombudsman when conducting inquiries into maladministration in the activities of the EU's institutions, bodies, offices, and agencies following Article 228 TFEU. Its intended effects are quite clearly described in its introduction.[201] According to this, the code is "*a vital instrument for putting the principle of good administration into practice. It helps individual citizens to understand and obtain their rights, and promotes the public interest in an open, efficient, and independent European administration. The Code helps citizens to know administrative standards they are entitled to expect from the EU institutions. It also serves as a useful guide for civil servants in their relations with the public [...]*". It goes on to clearly call upon the European Ombudsman to apply the Code when examining whether maladministration has occurred. Therefore, the Code seems to aim at a '*preventive effect*' by recommending that the EU institutions follow its rules voluntarily in order to avoid allegations of maladministration by the EU ombudsman.[202]

This development on the EU level may encourage national ombudsmen and other independent accountability institutions to use a similar approach by formulating and promoting their own 'codes of good administrative behaviour' – perhaps inspired by Recommendation CM/Rec(2007)7 on good administration (see *supra* II (4) (d)). In fact, as already mentioned (see *supra* II (5) (b)), Parliamentary Assembly Recommendation 1615 (2003) on the institution of an ombudsman recognizes, in a manner, the interconnection between the institution of the ombudsman and the necessity of explicit standards of good administration. It therefore also recognizes that the adoption of a 'code

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200 https://www.ombudsman.europa.eu/en/resources/code.faces.

201 See p. 7 of the Code available at: https://www.ombudsman.europa.eu/en/resources/code.faces.

202 J. Mendes, "La bonne administration en droit communautaire et le code européen de bonne conduite administrative", (2009) 131 *Revue française d'administration publique*, pp. 555 – 571 (p. 568).

of good administration' by the national legislator may not be the only way to implement standards of good administration in the national legal order of the Member States of the CoE – even if it seems to be quite clear that the Parliamentary Assembly would prefer the adoption of a clearly legally binding code.

3. Reception of Pan-European General Principles of Good Administration through the Application of the European Convention of Human Rights

a) Pan-European general principles of good administration may also influence or even shape the national administrative law of the CoE Member States through the application of the ECHR by national courts and national administrations without direct 'interference' of the national legislator: the vast majority of the Member States have automatically transposed the ECHR norms through a constitutional rule, which usually assigns supra-legislative status thereto.[203] Thus, the ECHR norms are self-executing[204] and directly enforceable in such domestic legal orders. Member States not taking this route need to take additional steps for implementing the ECHR – either through statutes or judicial decisions. These differences may be attributed to the monist-dualist[205]

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203 Whilst others, like Austria, have even granted constitutional status to the ECHR; see A. Caligiuri/N. Napoletano, "The Application of the ECHR in the domestic systems", (2010) *Italian Yearbook of International Law*, pp. 125 – 159 (pp. 128, 133 et seq.).

204 See more on the distinction between self-executing and non-self-executing norms in: M. Breuer, "Impact of the Council of Europe on National Legal Systems", in: S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 801 – 873 (para 36.20 et seq.).

205 However, these two orthodoxies blend in practice with nominally monist States treating the Convention as alien and dualist countries moving to monist positions. For example, the impact of the ECHR was very limited in the UK prior to its passage of the Human Rights Act of 1998, which enabled the national courts to have a direct recourse thereto (G. Anthony, *UK Public Law and European Law* [Oxford: Hart Publishing, 2002], p. 157). The overall tendency is that the dualist features of many legal systems have given way to a sophisticated monism in relation to the Convention. For a comparative survey see H. Keller/A. Stone Sweet, *A Europe of Rights. The Impact of the*

stance woven into the constitutional fabric of the Member States on how international law and the obligations stemming therefrom relate to domestic laws. However, despite this theoretical schism and independently of the form of incorporation of the ECHR into the national legal systems – be it direct or indirect – non-compliance with the ECHR would mean a breach of the principle of the legality of administration. Furthermore, the ECHR has to be applied in the light of the jurisprudence of the ECtHR due to its 'orientation effect' (see *supra* II (2) (a)). In the *Demír and Baykara* case (see *supra* II (2) (f)) the ECtHR embraced a method of interpretation that allows it to rely on international acts within the meaning of Article 15 SCoE when interpreting the Convention in ambiguous cases. For administrative matters, this means that the said recommendations covering various issues of administrative law can be used as tools through which the 'principle of good governance' deduced from the ECtHR from the ECHR (see *supra* II (2) (b) and (c)) is given an authentic interpretation and a concrete expression.

b) Hence, there seems to be at least a 'theoretical possibility' of reception of pan-European general principles of good administration through the application of the ECHR within the domestic law of the Member States, even though there are of course likely limitation to this process[206]. However, the existence of this possibility does not mean, of course, that this possibility is also (considered to be) put into practice by the national courts. It may even totally lie outside their lines of jurisprudence. Therefore, within the field of general administrative law there are interesting research questions regarding the 'application', 'transposition', or even the more or less 'autonomous' further development of the jurisprudence of the ECtHR by the national courts

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ECHR on National Legal Systems (Oxford: Oxford University Press, 2008), pp. 677, 683 et seq.

206 Admittedly, it is easy to establish a direct link between the Convention and other acts of the CoE regulating relationships between individuals and the administration. Nevertheless, it becomes much more difficult to establish such link when recommendations – such as Recommendation No. R (93) 7 on privatisation of public undertakings and activities and Recommendation No. R (2000) 6 on the status of public officials in Europe – do not directly govern individual relationships *vis-à-vis* the administration. For example, it is hard to claim that a breach of the conditions imposed by Recommendation No. R (93) on privatisation aiming to safeguard public interest constitutes a violation of individual rights granted by the ECHR.

in different Member States: Do national courts refer to the jurisprudence of the ECtHR in their judgments? Do they apply the ECHR 'spontaneously' in appropriate cases or only in cases where 'their' Member State have been held by the ECtHR to have violated the ECHR? How is the jurisprudence of the ECtHR in general received by the national courts, the administration, and 'national' scholars?

In this regard, the French *Conseil d'État* is often mentioned as an example of an 'autonomous' further development by national courts of the case law of the ECtHR[207]. Yet also in Germany there are quite a few cases where national courts referred to the ECHR and the jurisprudence of the ECtHR as a (directly or indirectly) applicable source of law shedding new light on (the interpretation of) national administrative law.[208] Nonetheless, this German case law is quite far from constituting a systematic reception – or even a systematic taking into consideration – of pan-European general principles of good administration. How the situation looks in other Member States is a question greatly in need of further analysis.

4. Direct Application of Pan-European General Principles of Good Administration '*faute de mieux*'

a) At least in theory – though assumingly not in all Member States – there could also be a complementary and more flexible way to 'implement' pan-European general principles of good administration within the domestic legal orders independently from the ECHR and independently from legislative activity. This could be 'labelled' as a '*faute de mieux*' approach, i.e. lacking a better alternative. This '*faute de mieux*' approach could be used by national courts and administrations when domestic legal provisions leave a wide margin of appreciation to the judge and/or the administration or are non-existent on a particular matter. The latter situation can be relevant for all CoE Member States since it is not possible to exhaustively set out all the rights of individuals *vis-à-vis* the administration and other principles pertaining to the notion of good administration in written law. This is

207 See E. Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford: Oxford University Press, 2015), pp. 114 et seq.

208 See, e.g., Federal Administrative Court of Germany (*BVerwG*), Judgment of 16 December, 1999 – Case No. 4 CN 9.98 –.

true even for countries that have full-fledged codes on administrative procedures. Thus, every administrative body and every administrative judge of every CoE Member State is sometimes faced with a situation in which it is unclear whether a particular principle or right, one which is not laid down in domestic law, should be recognized and applied. In the end, this question is left to be answered by the judge deciding on a particular case, who, according to the well-known maxim, cannot refuse to judge in cases where the law is silent, unclear, or insufficient.[209] Moreover, the judge has to justify his decision to embrace or reject the recognition of such principles or rights. Therefore, in many countries the Constitution and the rule of law are often used as sources for deriving such principles or rights.[210] However, doing so is based on nothing more than assumption that a particular right or principle, which is given a constitutional status, in fact exists there.

As covered earlier, the recommendations of the CoE adopted on the basis of Article 15 (b) SCoE are approved by the Committee of Ministers and express standards that reflect the broad European consensus; thus they also are suited to serve as legal sources if the domestic lawmaker opted not to regulate the matter at hand otherwise. This would be an easier, simpler, and more transparent way than trying to base a judicial decision solely on national law that is silent in a particular case. Just as the *Demír and Baykara* formula (see *supra* II (2) (f))[211] enables the ECtHR to use international conventions and recommendations whilst interpreting the ECHR norms in cases of doubt or silence of the law, a '*faute de mieux'* approach can be seen as a functionally equivalent tool for a national judge faced with the same situation. The fact that the previously mentioned recommendations have a soft law character is, for its part, no more problematic in terms of democratic legitimacy than any other judicial development of general principles in *vacatio legis* situations.

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209 Namely – *déni de justice* (refusal of the legal system to solve the dispute) notion, as stipulated in Article 4 of the Civil Code of France.

210 This is, e.g., the case in Germany; U. Stelkens, "Europäische Rechtsakte als 'Fundgruben' für allgemeine Grundsätze des deutschen Verwaltungsverfahrensrechts", (2004) *ZEuS*, pp. 129 – 163.

211 This methodological approach of interpreting the Convention in the light of other international instruments is subjected to criticism (see note 113).

b) This kind of reasoning may be explained by giving another German example: in some German Federal States (*Länder*), including for example Bavaria, no freedom of information act allowing access to information held by public authorities of the Land exists. However, there is also no legislation explicitly excluding freedom of information in these *Länder*. Therefore, the question arises as to whether there is an unwritten right of freedom of information in these *Länder* or if the non-existence of a statutory law guaranteeing such right is a sufficient reason for not recognizing it. Whatever the judge may decide – his or her decision can only be based on general principles: either on a general principle that there is only a right of access to administrative documents if it is explicitly foreseen by statutory law or on a general principle that there is a right of access to administrative documents if it is not explicitly excluded by statutory law and if valuable public interests or interested third parties are not affected.[212] In this situation it may be helpful to take into consideration: (1) the aforementioned Recommendation No. R (81) 19 on access to information held by public authorities and Recommendation Rec(2002) 2 on access to official documents, (2) the CoE Convention on Access to Official Documents of 18 June 2009, and (3) the jurisprudence of the ECtHR with its clear tendency to recognize a right to access information held by public bodies stemming from Article 10 (1), second sentence ECHR.[213] These 'European documents' show a clear tendency towards recognizing a fundamental right to access information held by public bodies, which should *'faute de mieux'* not be ignored when deciding on the existence of such a principle on a national level.[214]

c) In fact, this *'faute de mieux'* approach was employed by the Supreme Administrative Court of Lithuania in its landmark case No. A756-686/2010 (Decision of 8 December 2010),[215] in which the Court was faced with the question of whether domestic migration authorities

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212 See, e.g., Bavarian Administrative Higher Court (*BayVGH*), Judgment of 14 February, 2014 – Case No. 5 ZB 13.1559–.

213 See note 84.

214 See more on this kind of reasoning in S. Wirtz/S. Brink, "Die verfassungsrechtliche Verankerung der Informationszugangsfreiheit", (2015) *NVwZ*, pp. 1166 – 1173.

215 Short presentation of the case in English available at: http://fra.europa.eu/en/caselaw-reference/lithuania-supreme-administrative-court-lithuania-case-no-a756-6862010.

had acted lawfully in withdrawing subsidiary protection given to an asylum seeker without providing him with a possibility to be heard. The right to be heard in a procedure for subsidiary protection was not enshrined in national law. Thus, the Court had to turn to general principles and supranational sources of law in order to resolve a case. Alongside deriving the right to be heard before withdrawing subsidiary protection from domestic constitutional law (namely Article 5 (3) of the Lithuanian Constitution providing that "State institutions shall serve the people") and the CFR, the court singled out the CoE's Recommendation CM/Rec(2007)7 on good administration as a relevant source of legal knowledge. Moreover, in Lithuania the relevance of the CoE's recommendations can be seen from their use in Lithuanian case law without even calling their legal power, i.e. discussing whether such recommendations are legally binding, into question. Standing out in this regard are Case No. A555-3088/2012 (decision of 18 December 2012) of the Supreme Administrative Court of Lithuania, in which the CoE's Recommendation No. R (84) 15 relating to public liability was used in order to define what consists unlawful conduct of a State, and Case No. AS261-1180/2014 (decision of 5 November 2014) of the Supreme Administrative Court of Lithuania, in which the CoE's Recommendation No. R (89) 8 on provisional court protection in administrative matters was relied on in order to elaborate on the suspensive effect of administrative acts.

d) This discussion shows that research on the 'Council-of-Europeanisation' of national administrative law may contribute to comparative research on general principles of administrative law and how they can be detected. Are they recognized as a source of law in any 'continental' legal order and what peculiarities exist in this regard in common law countries? How are these principles 'detected' and 'developed' and by whom? What is the relationship between general principles of administrative law and statutory law and constitutional law in the different national legal orders? The 'Speyer' project will try to make at least a first step toward answering these questions.

5. Indirect Reception of Pan-European General Principles of Good Administration through Implementation of EU Law?

a) During the aforementioned first workshop of the 'Speyer' project, the possible existence of a fifth path of reception of pan-European general principles of good administration into national law was discussed: It was argued, that these 'CoE principles' may have found their way into EU law and may therefore be indirectly transposed by EU Member States (or EU candidates or Non-EU Member States of the European Economic Area) into their respective national administrative law through the implementation of EU law. The existence of this path of reception is at least plausible because the EU and the CoE are closely intertwined institutionally, as well as substantively. Without going into too much detail, it should be recalled here that all Member States of the EU are also Member States of the CoE. Since the 1990s, a (prior) Membership in the CoE is also considered as a condition to become an EU candidate and EU Member State.[216] A further institutional link between the two organizations stems from Article 220 of the TFEU, which *inter alia* states that the Union shall establish all appropriate forms of cooperation with the CoE. This cooperation was fostered in 1987 by an exchange of letters between the Secretary General of the CoE and the President of the Commission of the former European Communities and morphed into a Memorandum of Understanding in 2007[217]. This memorandum strictly points out that "*the Council of Europe will remain the benchmark of human rights, the rule of law and democracy in Europe*". This leads to the first substantial link between EU and CoE: the common standards of democracy and the rule of law serve as the basic values of the EU (Article 2 TEU) as well

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216 S. Schmahl, "The Council of Europe within the system of international organisations", in: S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 874 – 945 (para 37.28).

217 Memorandum of Understanding between the Council of Europe and the European Union, 11 May 2007, available at: http://cor.europa.eu/en/about/interinstitutional/Documents/5fe3aa86-d3c2-4ac2-a39c-c2ea21618ffe.pdf. See more in: See S. Schmahl, "The Council of Europe within the system of international organisations", in: S. Schmahl/M. Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017), pp. 874 – 945 (para 37.34 et seq.).

as the CoE (Article 3 SCoE, see *supra* II (1) (f)), standards which (following the Memorandum of 2007) are to be principally developed and concretized by the CoE and its organs but which also have effect for the EU and the understanding of Article 2 TEU.[218] The second substantial 'connection element' between the CoE and the EU is – of course – the ECHR as transformed into EU law by Article 6 (3) TEU as well as Article 52 (3) and Article 53 CFR. This connection will be even further enhanced if the EU finally follows the mandate to accede to the ECHR deriving from Article 6 (2) TEU.

b) In view of these institutional and substantive links between the EU and the CoE there would be enough 'bridges' to EU law to allow the CoE's pan-European general principles of good administration to get across into EU law.[219] To give an example, nothing would hinder the CJEU from interpreting "*the right to have his or her affairs handled [...] fairly [...] by the institutions, bodies, offices and agencies of the Union*", enshrined in the right to good administration guaranteed by Article 41 (1) CFR, in the light of the CoE principles. They could be used as a concretization of the concept of a 'fair' administrative procedure which is only partly spelled out in Article 41 (2) CFR. Furthermore, the CJEU could interpret the notion of 'local self-government' in Article 4 (2) TEU in the light of the European Charter of Local Self-Government[220] or it could easily refer to Recommendation No. R (84) 15 of the Committee of Ministers of the CoE relating to public

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218 For a similar approach J. Andriantsimbazovina, "Quelques considerations sur la jurisprudence de la cour européenne des droits de l'homme de 2007 à 2011", (2011) 47 *Cahiers de droit européen*, pp. 676 – 811 (pp. 774 et seq.). A. v. Bogdandy/M. Ioannidis, "Systemic Deficiency in the Rule of Law", (2014) 51 *CML Rev.*, pp. 59 – 96 (pp. 68 et seq.); E. Carpano, *État de droit et droits européens* (Paris: L'Harmattan, 2005), pp. 277 et seq.; D. Kochenov/L. Pech/S. Platon, "Ni panacèe, ni gadget: le 'nouveau cadre de l'Union européenne pour renforcer l'État de droit'", (2015) *RTDeur.,* pp. 689 – 715 (pp. 704 et seq.).

219 See for the following U. Stelkens, "Vers la reconnaissance de principes généraux paneuropéens du droit administratif dans l'Europe des 47?", in: J. B. Auby/J. Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Brussels: Bruylant, 2014), pp. 713 – 740 (pp. 737 et seq.).

220 See for such an argument B. Schaffarzik, *Handbuch der Europäischen Charta der kommunalen Selbstverwaltung* (Stuttgart: Boorberg 2002), pp. 619 et seq.

liability as an expression of 'common principles common to the laws of the Member States' in the sense of Article 340 (2) TFEU. Other examples of a possible fertilisation of general principles of EU law in referring to the CoE's pan-European general principles of good administration are easily imaginable. Such a fertilization would not only be of relevance for the institutions, bodies, offices, and agencies of the EU. It would also be of relevance for Member State's administrations when implementing EU law even if Article 41 (1) CFR is not directly applicable to indirect administration: This does not exclude that the right to good administration, enshrined in Article 41 (1) CFR, reflects general principles of EU law applicable also to EU Member States implementing EU law.[221] Therefore, those CoE pan-European general principles of good administration which can be considered as being part of the general principles of EU law would share the binding effect of EU law *vis-à-vis* the EU Member States as well as its supremacy over their national law in cases in which the EU Member States have to respect general principles of EU law when implementing EU law. This situation is similar to other cases in which the EU incorporates international law and international treaties into the internal legal order of the EU so that their provisions are endowed with all the effects of EU law *vis-à-vis* the EU Member States.[222]

c) However, despite its potential, the participants of the 'Speyer project' decided for two reasons not to explore (systematically) this possible 'indirect' path of reception of pan-European general principles of good administration into national law. First, the CJEU, in its *Opinion 2/13* of 18 December 2014 on the draft agreement providing for the accession of the EU to the ECHR, has made quite clear that in the light of the assumed "specific characteristics arising from the very nature of EU law"[223] the former 'openness' of EU law to be inspired by 'CoE law'

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221 Y.S. v Minister voor Immigratie, Integratie en Asiel (C-141/12), July 14, 2014 CJEU at [67] et seq.; Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis (C-166/13) November 5, 2014 CJEU at [44] et seq. ; Boudjlida v Préfet des Pyrénées-Atlantiques (C-249/13) December 11,2014, CJEU at [32] et seq.

222 See on this (using the Aarhus Convention as an example): E. Chiti, "EU administrative law in an international perspective", in: C. Harlow, P. Leino/G. della Cananea (eds), *Research Handbook on EU Administrative Law* (Cheltenham: Edward Elgar, 2017), pp. 545 – 571 (pp. 551 et seq.).

223 Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the

is no longer self-evident. This can – of course be criticized – and has already been criticized by most commentators on this Opinion.[224] In light of the already comprehensive discussion of *Opinion 2/13*, it was felt that a continuation of this discussion in the framework of the 'Speyer project' would not be a priority at this stage.

d) The second reason, why the 'Speyer project' will not explore (systematically) the indirect implementation of pan-European general principles of good administration into national law through implementation of EU law is more general in nature: With the exception of data protection law (see *supra* III (3) (f)) the EU has quite limited competences regarding those areas of administrative law of the Member States targeted by the pan-European general principles of good administration, i.e. national rules on administrative organisation, civil service, and local self-government as well as the national rules on administrative procedure, freedom of information, state liability, and judicial protection in administrative matters (including alternative

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Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties (Opinion 2/13), December 18, 2014, CJEU at [163 et seq.]

224 See e.g. F. Benoît-Rohmer, "L'adhésion à la Convention européenne des droits de l'homme, un travail de Pénélope?", (2015) *RTDeur*. pp. 593 – 611; M. Breuer, "'Wasch mir den Pelz, aber mach mich nicht nass!' – Das zweite Gutachten des EuGH zum EMRK Beitritt der Europäischen Union", (2015) *EuR*, pp 330 – 350; E. Bribosia /A. Weyemberg, "Confiance mutuelle et droits fondamentaux: 'Back to the future'", (2016) 52 *Cahiers de droit européen*, pp. 469 – 521; E. Dubout, "Une question de confiance: Nature juridique de L'Union Européenne et adhesion à la Convention Européenne des droits de l'homme", (2015) 51 *Cahiers de droit européen*, pp. 73 – 112; J. P. Jacqué, "Pride and/or Prejudice? – Les lectures possibles de l'Avis 2/13 de la Cour de Justice", (2015) 51 *Cahiers de droit européenne*, pp. 19 – 45; F. Korenica /D. Doli, "A View on CJEU Opinion 2/213's Unclear Stance on and Dislike of Protocol 16 ECHR", (2016) 22 *EPL*, pp. 269 – 286; I. Pernice "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme est suspendue", (2015) 51 *Cahiers de droit européen*, pp. 47 – 72; E. Spaventa, "A Very Fearful Court? – The Protection of Fundamental Rights in the European Union after Opinion 2/13", (2015) 22 *MJ*, pp. 35 – 56; C. Tomuschat, "Der Streit um die Auslegungshoheit: Die Autonomie der EU als Heiliger Gral", (2015) 42 *EuRGZ*, pp. 133 – 139; B. de Witte/Š. Imamović, "Opinion 2/13 on Accession on the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court", (2015) 49 *E. L. Rev.*, pp. 683 – 705.

dispute resolution and the existence of ombudspersons).[225] Therefore, it is generally acknowledged that – due to the principle of conferral (Art. 5 (1) TEU) – the EU has no general competence to harmonize the laws and regulations of the Member States concerning the aforementioned matters (see Article 197 (2) TFEU). Nevertheless, there is a conflict between this limited power of the EU to legislate on these matters and the general need for an *effective and uniform implementation of EU law* even if it is implemented by the EU Member States. This makes the effective implementation of EU law by the EU Member States and their capacity to do so a matter of common interest of the EU and the Member States (Art. 197 (1) TFEU). All this has led to a quite exhaustive literature on the possibilities and limits of a 'Europeanisation' of national administrative law of the EU Member States, i.e. on the question, whether, how, and to what extent the obligation of the Member States to ensure an *effective* fulfilment of their obligations deriving from EU law (see Article 4 (3) TEU) may justify and lead to a certain convergence of the domestic legal orders concerning administrative law. In this discussion a '*principle of institutional and procedural autonomy of the Member States*' plays an important role, but there are different understandings of the meaning of this principle. Any discussion of a supposed 'indirect' path of reception of pan-European general principles of good administration into national law through implementation of EU law would necessarily also lead through these other discussions and their unresolved results – meaning a significant detour that may even end in an impasse.[226] Thus when exploring whether and to what extent the pan-European general principles of good administration have found their way into the domestic law of the domestic legal orders of the CoE Member States, it seems

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225 It should be recalled that public procurement is an issue not included in the 'package of good administration' provided by the CoE (see *supra* II (4) (c)).

226 See e.g. A. Arnull, "The Principle of Effective Judicial Protection in EU law: An Unruly Horse?", (2011) 36 *E. L. Rev.*, pp. 51 – 70 (pp. 52 et seq.); P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2nd edition, 2012), pp. 703 et seq.; T. von Danwitz, *Europäisches Verwaltungsrecht* (Berlin: Springer, 2008), pp. 302 et seq.; D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Berlin: Springer, 2010), pp. 33 et seq.; R. Mehdi, "Le principe d'autonomie institutionnelle et procédurale et le droit administrative", in: J. B. Auby/J. Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Brussels: Bruylant, 2014), pp. 887 – 936; A. Vincze, "Europäisierung des nationalen Verwaltungsrechts – eine rechtsvergleichende Annäherung", (2017) 77 *ZaöRV*, pp. 235 – 267.

advisable to focus on the direct relationship between the CoE and its Member States and to leave the EU and EU law aside.

IV. An Outlook rather than a Conclusion

This paper argues that there is a rich set of pan-European general principles of good administration developed within the CoE which have at least the potential to be a valuable source of administrative law in the CoE Member States. In the end, this will depend on the effectiveness of these principles attributed to them by the domestic legal orders – a question that needs further research, which will be done by the 'Speyer' project (see *supra* introductory text to III). Should it become apparent that the pan-European general principles of good administration indeed have a certain harmonizing effect on the domestic legal orders of the CoE's Member States, a true inventory and systematization of these principles deriving from the case law of the ECtHR on the 'principle of good governance', the CoE conventions, and recommendations that are relevant to administrative law would be worthwhile. Advancing from this paper, which contented itself with presenting principles in a rather formal way by differentiating between their different sources and the chronology of their recognition or stipulation, it should be possible to create a blueprint – or a common frame of reference – on general administrative law in Europe on the basis of such principles. Such a blueprint may embrace the following elements:

I. Administration as an Organization: Administrative Bodies, Distribution of competences, Local Self-Government

II. Status of Public Officials and Civil Servants

III. Sources of Administrative Law and Legality of Administration

IV. Discretion

V. Legal Certainty and Protection of Legitimate Expectations

VI. Administrative Procedure and Individual Rights

VII. Administrative Sanctions

VIII. (Local) Public Services, the Rights of their Users, and Privatisation of Public Undertakings and Activities

IX. Freedom of Information and Data Protection

X. Judicial Protection, Alternative Dispute Settlement, and Ombudspersons

XI. State Liability

This could be filled in like a textbook, with the different sources of the pan-European general principles of administrative law illustrated with the preparatory works done within the CoE, the case law of the ECtHR on the 'principle of good governance', and the 'instiprudence' of the Congress of Local and Regional Authorities, the Commissioner for Human Rights, the Venice Commission, and GRECO (see *supra* II (5) (c)), but also with 'good' cases from the courts of the CoE's Member States. This would mean that this blueprint may serve above all as *tertium comparationis* and thus make it easier to compare national case law and national legislation in Europe. In the long run it may also serve as a teaching tool for administrative law, at least in those European countries which are either too small or (as a democracy) too young to have an exhaustive case law allowing them to illustrate (the necessity of) those rules concretizing the expectations *vis-à-vis* the modern administration of a State that – pursuant to Article 3 SCoE – "*accepts the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms*". Yet such a blueprint could also give established democracies new impetus to revisit their own systems of administrative law with the eventual aim of reinforcing their standards of good administration, which may have been weakened by recent administrative reforms often triggered or justified by (supposed) austerity pressures. It would therefore be a useful tool for teaching comparative administrative law,[227] for 'measuring' and 'scaling' the 'rule of law impact' of public sector reforms, as well as for research on comparative administrative law in general. However, to fully elaborate such a common frame of reference

227 In fact, one of the present authors drafted such a blueprint for his course 'General Principles of Administrative Law', which is regularly taught at the Ivane Javakhishvili Tbilisi State University within the Master Programme "Public Administration" (organized by the Tbilisi State University in cooperation with the German University of Administrative Sciences Speyer) – see for the course materials: http://www.uni-speyer.de/de/lehrstuehle/stelkens/lehrveranstaltungen/general-principles-of-administrative-law.php.

would be a third step – one not covered by the current 'Speyer' project on 'The Development of Pan-European General Principles of Good Administration by the Council of Europe and their impact on the administrative law of its Member States' but which the project is a necessary step towards.

Annexes

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List of Foreign Abbreviations used in this Paper (concerning especially French and German Journals)

AJDA	Actualité Juridique: Droit Administratif (French law journal)
BayVBl	Bayerische Verwaltungsblätter (German law journal)
DÖV	Die Öffentliche Verwaltung (German law journal)
EuGRZ	Europäische Grundrechte-Zeitschrift (German law journal)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (German law journal)
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (German law journal)
NJW	Neue Juristische Wochenschrift (German law journal)
NVwZ	Neue Zeitschrift für Verwaltungsrecht (German law journal)
rfda	Revue française de droit administratif (French law journal)
RFAP	Revue française d'administration publique (French law journal)
RTDeur.	Revue trimestrielle de droit européen (French law journal)
RTDH	Revue trimestrielle des droits de l'homme (French law journal)
SIPE	*Societas Iuris Publici Europaei* (European Association for Public Law and its Yearbook)
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (Yearbook of the German Association of Public Law Professors)
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (German law journal)
ZEuS	Zeitschrift für Europarechtliche Studien (German law journal)
ZRP	Zeitschrift für Rechtspolitik (German law journal)

Table of Cases

European Commission of Human Rights

X v. Denmark (1329/62), May 7, 1962.

X v. Germany (2942/66), April 8, 1967.

X v. Germany (4304/69), October 5, 1970.

European Court of Human Rights

Adzhigovich v Russia (23202/05) October 8, 2009.

Alatulkkila and Others v Finland (33538/96) July 28, 2005.

Albergas and Arlauskas v Lithuania (17978/05) May 27, 2014.

Alekseyev v Russia (4916/07) October 21, 2010.

Ališić and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia (60642/08) July 16, 2014.

Almeida Garrett, Mascarenhas Falcão and Others v Portugal (29813/96 and 30229/96) January 11, 2000.

Al-Skeini and Others v the United Kingdom (55721/07) 7 July, 2011.

Apostolidi and Others v Turkey (45628/99) March 27, 2007.

Austria v Italy (788/60) January 11, 1961.

Baklanov v Russia (68443/01) June 9, 2005.

Berger-Krall and Others v Slovenia (14717/04) June 12, 2014.

Beyeler v Italy (33202/96) January 5, 2000.

Bigaeva v Greece (26713/05) May 28, 2009.

Broniowsky v Poland (31443/96) June 22, 2004 (GC).

Brosset-Triboulet and Others v France (34078/02) March 29, 2010.

Brumărescu v Romania (28342/95) July 25, 2005.

Bryan v the United Kingdom (19178/91) November 22, 1995.

Buckley v the United Kingdom (20348/92) September 29, 1996.

Capital Bank AD v Bulgaria (49429/99) November 24, 2005.

Centre for Legal Resources on behalf of Valentin Cãmpenau v Romania (47848/08) July 17, 2014.

Chapman v the United Kingdom (27238/95) January 18, 2001.

Church of Scientology Moscow v Russia (18147/02) April 5, 2007.

Cooperativa Agricola Slobozia-Hanesei v Moldova (39745/02) April 3, 2007.

Crompton v the United Kingdom (42509/05) October 27, 2009.

Dadouch v Malta (38816/07) July 20, 2010.

Demír and Baykara v Turkey (34503/97) November 12, 2008 (GC).

Digrytė Klibavičienė v Lithuania (34911/06) October 21, 2014.

Dogru v France (27058/05) December 4, 2008.

Dubetska and Others v Ukraine (30499/03) February 10, 2011.

Eckenbrecht and Ruhmer v Germany (25330/10) June 10, 2014.

Fazia Ali v the United Kingdom (40378/10) October 20, 2015.

Fischer v Austria (16922/90) April 26, 1995.

Flamenbaum and Others v France (3675/04) December 13, 2012.

Former King of Greece and Others v Greece (25701/94) November 23, 2000.

Friedrich Weber v Germany (70287/11) January 6, 2015.

Frizen v Russia (58254/00) March 24, 2005.

Galina Kostova v Bulgaria (36181/05) November 12, 2013.

Gashi v Croatia (32457/05) December 13, 2007.

Giacomelli v Italy (59909/00) November 2, 2006.

Görgülü v Germany (74969/01 and 74969/01) February 26, 2004.

Gradinger v Austria (15963/90) October 23, 1995.

Guerra and Others v Italy (14967/89) February 19, 1998.

Hatton and Others v the United Kingdom (36022/97) July 8, 2003.

I.D. v Bulgaria (43578/98) April 28, 2005.

Iatridis v Greece (31107/96) March 25, 1996.

Iordachi and Others v Moldova (25198/02) February 10, 2009.

Jehovah's Witnesses v France (8916/05) June 30, 2011.

July and SARL Libération v France (20893/03) February 14, 2008.

K. and T. v Finland (25702/94) July 12, 2001.

K.A. v Finland (27751/95) January 14, 2003.

Kafkaris v Cyprus (9644/09) June 21, 2011.

Kallweit v Germany (17792/07) January 13, 2011.

Kingsley v the United Kingdom (35605/97) May 28, 2002.

Konovalova v Russia (37873/04) October 9, 2014.

Kronenfeldner v Germany (21906/09) January 19, 2012.

Le Compte, Van Leuven and De Meyere v Belgium (6878/75 and 7238/75) June 23, 1981.

Leela Förderkreis E.V. and Others v Germany (58911/00) November 6, 2008.

Lelas v Croatia (55555/08) May 20, 2010.

Loizidou v Turkey (15318/89) March 23, 1995.

Lombardi Vallauri v Italy (39128/05) October 20, 2009.

Magyar Helsinki Bizottság v Hungary (18030/11) November 8, 2016 (GC).

Mateescu v Romania (1944/10) January 14, 2014.

McMichael v the United Kingdom (16424/90) February 24, 1995.

Megadat.com SRL v Moldova (21151/04) July 8, 2008.

Meïdanis v Greece (33977/08) June 22, 2004.

Michaud v France (12323/11) December 6, 2012.

Mirolubovs v Lithuania (798/05) September 15, 2009.

Moskal v Poland (10373/05) September 15, 2009.

Müller and Others v Austria (26507/95) November 23, 1999.

Mykhaylenky and Others v Ukraine (35091/02) November 30, 2004.

Nacaryan and Deryan v Turkey (19557/02 and 27904/02) January 8, 2008.

Noreikienė and Noreika v Lithuania (17285/08) November 24, 2015.

Obermeier v Austria (11761/85) June 28, 1990.

Öcalan v Turkey (5980/07) July 6, 2010.

Öneryıldız v Turkey (48939/99) November 20, 2004.

Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v Austria (39534/07) November 28, 2013.

Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania (46626/99) February 2, 2005.

Paukštis v Lithuania (17467/07) November 24, 2015.

Pincová and Pinc v the Czech Republic (36548/97) November 5, 2002.

Pine Valley Developments Ltd and Others v Ireland (12742/87) November 29, 1991.

Pyrantienė v Lithuania (45092/07) November 12, 2013.

Radchikov v Russia (65582/01) May 24, 2007.

Rantsev v Cyprus and Russia (25965/04) January 7, 2010.

Ruspoli Morenes v Spain (28979/07) June 28, 2011.

Rysovskyy v Ukraine (29979/04) October 20, 2011.

Sigma Radio Television Ltd v Cyprus (32181/04 and 35122/05) July 21, 2011.

Sovtransavto Holding v Ukraine (48533/99) July 25, 2002.

Sporrong and Lönnroth v Sweden (7151/75 and 7152/75) July 25, 2002.

Steininger v Austria (21539/07) April 17, 2012.

Stran Greek Refineries and Stratis Andreadis v Greece (13427/87) December 12, 1994.

Stretch v the United Kingdom (44277/98) June 24, 2003.

Sun v Russia (31004/02) February 5, 2009.

Társaság a Szabadságjogokért v Hungary (37374/05) April 14, 2009.

Taşkın and Others v Turkey (46114/99) November 10, 2004.

Terra Woningen B.V. v the Netherlands (20641/92) December 17, 1996.

Toşcuţă and Others v Romania (36900/03) November 25, 2008.

Traube v Germany (28711/10) September 9, 2014.

Trgo v Croatia (35298/04) June 11, 2009.

Tsanova-Gecheva v Bulgaria (43800/12) September 15, 2015.

Tsfayo v the United Kingdom (60860/00) November 14, 2006.

Tunaitis v Lithuania (42927/08) November 24, 2015.

Uzun v Germany (35623/05) September 2, 2010.

Verein gegen Tierfabriken v Switzerland (32772/02) June 30, 2009.

W v the United Kingdom (9749/82) July 8, 1987.

Yershova v Russia (1387/04) April 8, 2010.

Yukos v Russia (14902/04) July 31, 2014.

Žáková v the Czech Republic (2000/09) October 3, 2013.

Žilinskienė v Lithuania (57675/09) December 1, 2015.

Zumtobel v Austria (12235/86) September 21, 1993.

Court of Justice of the European Union

Opinion pursuant to Article 218 (11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties (Opinion 2/13), December 18, 2014.

Boudjlida v Préfet des Pyrénées-Atlantiques (C-249/13) December 11, 2014 [ECLI:EU:C:2014:2431].

Kotnik and Others v Državni zbor Republike Slovenije (C-526/14) July 19, 2016 [ECLI:EU:C:2016:570].

Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis (C-166/13) November 5, 2014 [ECLI:EU:C:2014:2336].

Y.S. v Minister voor Immigratie, Integratie en Asiel (C-141/12) July 14, 2014 [ECLI:EU:C:2014:2081].

National Courts

Federal Administrative Court of Germany (*BVerwG*), Judgment of 16 December, 1999 – Case No. 4 CN 9.98.

Supreme Administrative Court of Lithuania, Decision of 18 December, 2012 – Case No. A555-3088/2012.

Supreme Administrative Court of Lithuania, Decision of 5 November, 2014 – Case No. AS261-1180/2014.

Supreme Administrative Court of Lithuania, Decision of 8 December, 2010 – Case No. A756-686/2010.

Bavarian Administrative Higher Court (*BayVGH*), Judgment of 14 February, 2014 – Case No. 5 ZB 13.1559.

Bibliography*

Ailincai, Mihaela, "Le suivi du respect de la soft law au sein du Conseil de l'Europe", (2012) 7 *SIPE*, pp. 83 – 101.

Andriantsimbazovina, Joël, "Quelques considerations sur la jurisprudence de la cour européenne des droits de l'homme de 2007 à 2011", (2011) 47 *Cahiers de droit européen*, pp. 676 – 811.

Anthony, Gordon, *UK Public Law and European Law* (Oxford: Hart Publishing, 2002).

Arnull, Anthony, "The Principle of Effective Judicial Protection in EU law: An Unruly Horse?", (2011) 36 *E. L. Rev.*, pp. 51 – 70 (pp. 52 et seq.).

Auby, Jean-Bernard (ed.), *Codification of Administrative Procedure* (Brussels: Bruylant, 2014).

Auby, Jean-Bernard/Dutheil de la Rochère, Jacqueline, *Traité de droit administratif européen* (Brussels: Bruylant, 2nd edition, 2014).

Auby, Jean-Bernard/Perroud, Thomas (eds), Droit comparé de la procédure administrative / Comparative Law of Administrative Procedure (Brussels: Bruylant, 2016).

Bartsch, Hans-Jürgen, "The Acceptance of Recommendations and Conventions within the Council of Europe", in: *Le rôle de la volonté dans les actes juridiques – études à la mémoire du professeur Alfred Rieg* (Brussels: Bruylant, 2000), pp. 91 – 99.

Benoît-Rohmer, Florence, "L'adhésion à la Convention européenne des droits de l'homme, un travail de Pénélope?". (2015) *RTDeur*. pp. 593 – 611.

Benoît-Rohmer, Florence/Klebes, Heinrich, *Council of Europe Law. Towards a pan-European legal area* (Strasbourg: Council of Europe Publishing, 2005).

Bjorge, Eirik, Domestic Application of the ECHR: Courts as Faithful Trustees (Oxford: Oxford University Press, 2015).

Bogdandy, Armin von/Ioannidis, Michael, "Systemic Deficiency in the Rule of Law", (2014) 51 *CML Rev.*, pp. 59 – 96.

---

* If more than one article of an edited volume is cited in the text, only the edited volume itself is indicated in this bibliography.

Breuer, Marten, "'Wasch mir den Pelz, aber mach mich nicht nass!' – Das zweite Gutachten des EuGH zum EMRK Beitritt der Europäischen Union", (2015) *EuR*, pp. 330 – 350.

Bribosia, Emanuelle/Weyemberg, Anne, "Confiance mutuelle et droits fondamentaux: 'Back to the future'", (2016) 52 *Cahiers de droit européen*, pp. 469 – 521.

Byone, Ian, *Beyond the Citizen's Charter* (London: IPPR, 1996).

Caligiuri, Andrea/Napoletano, Nicola, "The Application of the ECHR in the Domestic Systems", (2010) *Italian Yearbook of International Law*, pp. 125 – 159.

Carpano, Eric, *État de droit et droits européens* (Paris: L'Harmattan, 2005).

Chandler, J. A. (ed.), *The Citizen's Charter* (Aldershot: Dartmouth, 1996).

Chevalier, Emilie, *Bonne administration et Union européenne* (Brussels: Bruylant, 2014).

Chiti, Mario Pilade, *Diritto Amministrativo Europeo* (Milan: Giuffrè, 2011).

Classen, Kai-Dieter, *Gute Verwaltung im Recht der Europäischen Union* (Berlin: Duncker & Humblot, 2008).

Council of Europe (ed.), *The Administration and You – A Handbook* (Strasbourg: Council of Europe Publishing, 1997).

Council of Europe (ed.), *Judicial Control of Administrative Acts* (Strasbourg: Council of Europe Publishing, 1997).

Council of Europe (ed.), *The Status of Public Officials in Europe* (Strasbourg: Council of Europe Publishing, 1999).

Council of Europe (ed.), Alternatives to Litigation between Administrative Authorities and Private Parties: Conciliation, Mediation and Arbitration (Strasbourg: Council of Europe Publishing, 2000).

Craig, Paul, *EU Administrative Law* (Oxford: Oxford University Press, 2nd edition, 2012).

Cremer, Hans-Joachim, "Rechtskraft und Bindungswirkung von Urteilen des EGMR/ Problematik der Zulässigkeit einer Zweitbe-

schwerde an den EGMR nach Urteilsumsetzung durch Wiederaufnahme / Verein gegen Tierfabriken gegen Schweiz", (2012) 41 *EuGRZ*, pp. 493 – 506.

Danwitz, Thomas von, *Europäisches Verwaltungsrecht* (Berlin: Springer, 2008).

Delaunay, Bénédicte/Idoux, Pascale/Saunier, Sébastien, "Un an de droit de procedure administrative", (2017) *Droit Administratif*, pp. 22 – 30.

Dijk, Peter van, "The Venice Commission on Certain Aspects of the Application of the European Convention in Human Rights Ratione Personae", in: Breitenmoser, Stephan et al. (eds), *Human Rights, Democracy and the Rule of Law – Liber Amicorum Luzius Wildhaber* (Zurich/Baden-Baden: Dike/Nomos, 2007), pp. 183 – 202.

Dörr, Oliver/Grote, Rainer/Marauhn, Thilo (eds), *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Tübingen: Mohr Siebeck, 2nd edition, 2013), pp. 366 – 416.

Drooghenbroeck, Sébastien van, "Les frontières du droit et le temps juridique: la Cour européenne des droits de l'homme repousse les limites", (2009) *RTDH*, pp. 811 – 849.

Dubout, Edouard, "Une question de confiance: Nature juridique de L'Union Européenne et adhesion à la Convention Européenne des droits de l'homme", (2015) 51 *Cahiers de droit européen*, pp. 73 – 112.

Durand, Franck, "Le 30e anniversaire de la Charte européenne de l'autonomie locale", (2015) *AJDA*, pp. 2313 – 2320.

Edel, Frédéric, "La Convention du Conseil de l'Europe sur l'accès aux documents publics: premier traité consacrant un droit général d'accès aux documents administratifs", (2011) *rfda*, pp. 59 – 78.

Flauss, Jean-François, "Actualité de la Convention européenne des droits de l'homme (septembre 2008 – février 2009)", (2009) *AJDA*, pp. 872 – 885.

Flauss, Jean-François, "Actualité de la Convention européenne des droits de l'homme (septembre 2009 – février 2010)", (2010) *AJDA*, pp. 997 – 1009.

Flauss, Jean-François, “L’apport de la jurisprudence de la Cour Européenne des Droits de l’Homme en matière de démocratie administrative”, (2011) *RFAP*, pp. 49 – 58.

Flauss, Jean-François, “L’effectivité et l’efficacité de la soft law européenne dans la jurisprudence de la Cour européenne des droits de l’homme”, (2012) 7 *SIPE*, pp. 332 – 363.

Fortsakis, Theodore, “Principles Governing Good Administration”, (2005) 11 *European Public Law*, pp. 207 – 217.

Gabarda, Olivier, “Vers la généralisation de la motivation obligatoire des actes administratifs?”, (2012) *rfda*, pp. 61 – 70.

Galera, Susana (ed.), Judicial Review: A Comparative Analysis Inside the European Legal System (Strasbourg: Council of Europe Publishing, 2010).

Galetta, Diana Urania, Procedural Autonomy of EU Member States: Paradise Lost? (Berlin: Springer, 2010).

Galetta, Diana Urania/Hoffman, Herwig C.H./Mir, Oriol/Ziller, Jacques, “The context and legal elements of a Proposal for a Regulation on the Administrative Procedure of the European Union's institutions, bodies, offices and agencies”, (2015)[228].

Gerber, Philippe, “Recommendation CM/Rec(2007)7 on good administration – general presentation”, in: Council of Europe (ed.), *In Pursuit of Good Administration – European Conference Warsaw, 29 – 30 November 2007* (DA/ba/Conf (2007) 4 e), (2008), pp. 3 – 9.

Grabarczyk, Katarzyna/Afroukh, Mustapha/Schahmaneche, Aurélia, “Le contrôle de l'exécution des arrêts de la Cour européenne des droits de l'homme. Aspects européens : acteurs politiques et acteurs juridictionnels”, (2014) *rfda*, pp. 935 – 945.

Gundel, Jörg, “Erfolgsmodell Vorabentscheidungsverfahren? Die neue Vorlage zum EGMR nach dem 16. Protokoll zur EMRK und ihr Verhältnis zum EU-Rechtsschutzsystem”, (2015) *Europarecht*, pp. 609 – 624.

228 Available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536487/IPOL_STU(2016)536487_EN.pdf

Harlow, Carol/Leino, Päivi/Cananea, Giacinto della (eds), *Research Handbook on EU Administrative Law* (Cheltenham: Edward Elgar, 2017).

Harris, David/O'Boyle, Michael/Bates, Edward/Buckley, Carla, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2014).

Hertzog, Robert, "La France et la charte européenne de l'autonomie locale", (2016) *AJDA*, pp. 1551 – 1559.

Hine, David "Codes of Conducts for Public Officials in Europe: Common Label, Divergent Purposes", (2005) 8 *International Public Management Journal*, pp. 153 – 174.

Hoffmann-Riem, Wolfgang, " 'Soft Law' und 'Soft Instruments' in der Arbeit der Venedig-Kommission des Europarats", in: Bäuerle, Michael/Dann, Philipp/Wallrabenstein, Astrid (eds), *Demokratie-Perspektiven – Festschrift für Brun-Otto Bryde* (Tübingen: Mohr Siebeck, 2013), pp. 597 – 630.

Hofmann, Herwig/Gerard, Rowe/Türk, Alexander, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011).

Hummer, Waldemar/Wagner, Gerhard (eds), *Österreich im Europarat 1956 – 1986: Bilanz einer 30jährigen Mitgliedschaft* (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1988).

Jacqué, Jean Paul, "Pride and/or Prejudice? – Les lectures possibles de l'avis 2/13 de la Cour de Justice", (2015) 51 *Cahiers de droit européenne*, pp. 19 – 45.

Jans, Jan/de Lange, Roel/Prechal, Sacha/Widdershoven, Rob, *Europeanisation of Public Law*, (Groningen: Europa Law Publishing, 2nd edition, 2015).

Jellinek, Hansjörg, "Ermessensausübung durch Verwaltungsbehörden, Zeitschrift für Rechtspolitik", (1981) *ZRP*, pp. 68 – 70.

Jung, Heike, "Die Empfehlungen des Ministerkomitees des Europarates – zugleich ein Beitrag zur europäischen Rechtsquellenlehre", in: Bröhmer, Jürgen et al. (eds), *Internationale Gemeinschaft und Menschenrecht – Festschrift für Georg Ress* (Cologne: Carl Heymanns Verlag, 2005), pp. 519 – 526.

Kanska, Klara, “Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights”, (2004) 10 *European Law Journal*, pp. 296 – 326.

Keller, Hellen/Kühne, Daniela, “Zur Verfassungsgerichtsbarkeit des Europäischen Gerichtshofs für Menschenrechte”, (2016) 76 *ZaöRV*, pp. 245 – 307.

Keller, Hellen/Stone Sweet, Alec, *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008).

Kirchhof, Ferdinand, “Freiheit und Sicherheit in Deutschland und Europa”, in: Durner, Wolfgang/Peine, Franz-Joseph/Shirvani, Foroud (eds), *Festschrift für Hans-Jürgen Papier zum 70. Geburtstag* (Berlin: Duncker & Humblot, 2013), pp. 333 – 344.

Klocke, Daniel Matthias, “Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats”, (2015) *Europarecht*, pp. 148 – 169.

Knemeyer, Franz-Ludwig (ed.), *Die Europäische Charta der kommunalen Selbstverwaltung*, (Baden-Baden: Nomos, 1989).

Kochenov, Dimitry/Pech, Laurent/Platon, Sébastien, “Ni panacèe, ni gadget: le ‘nouveau cadre de l’Union européenne pour renforcer l’État de droit’”, (2015) *RTDeur*., pp. 689 – 715.

Korenica, Fisnik/Doli, Dren, “A View on CJEU Opinion 2/213’s Unclear Stance on and Dislike of Protocol 16 ECHR”, (2016) 22 *EPL*, pp. 269 – 286.

Kuuttiniemi, Kirsi/Virtanen, Petri, *Citizen’s Charters and Compensation Mechanisms* (Helsinki: Ministry of Finance Finland, 1998).

Letsas, George, “Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer”, (2010) *European Journal of International Law*, pp. 509 – 541.

Leuprecht, Peter, “The contribution of the Council of Europe to reinforcing the position of the individual in administrative proceedings”, in: Secretariat General of the Council of Europe in co-operation with the Spanish “Defensor del pueblo” (eds), *Round Table with European Ombudsmen* (H/Omb (85) 5) (1985), pp. 1 – 9.

Ludwigs, Markus, “Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR”, (2014) 41 *EuGRZ*, pp. 273 – 285.

Marchand, Jennifer, “Prévention et dissuasion dans la jurisprudence de la Cour européenne des droits de l'homme”, (2014) *rfda*, pp. 1149 – 1157.

Matscher, Franz, “Der Gesetzesbegriff der EMRK”, in: *Der Rechtstaat in der Krise. Festschrift Edwin Loebenstein zum 80. Geburtstag* (Vienna: Manz, 1991), pp. 104 – 118.

Mendes, Joana, “La bonne administration en droit communautaire et le code européen de bonne conduite administrative”, (2009) 131 *Revue française d’administration publique*, pp. 555 – 571.

Meyer, Kilian, *Gemeindeautonomie im Wandel* (Norderstedt: Books on Demand, 2011).

Mirate, Silvia, “The ECrtHR Case Law as a Tool for Harmonization of Domestic Administrative Laws in Europe”, (2012) 5 *REALaw*, pp. 47 – 60.

Mückl, Stefan, “Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte”, (2005) 44 *Der Staat*, pp. 403 – 431.

Nehl, Hanns Peter, *Administrative Procedure in EC Law* (Oxford: Hart Publishing, 1999).

Nicolaidis, Kalypso/Kleinfeld, Rachel, *Rethinking Europe’s “Rule of Law” and Enlargement Agenda: The Fundamental Dilemma*, (Paris: OECD Publishing, 2012 - SIGMA Papers, No. 49).

Niemivuo, Matti, “Good Administration and the Council of Europe”, (2008) 14 *European Public Law*, pp. 545 – 563.

Palidauskaitė, Jolanta/Lawton, Alan, “Codes of Conduct for Public Servants in Central and East European Countries: Comparative Perspectives”, in: Jenei, György et al. (eds), *Challenges for Public Management Reforms* (Budapest: University of Economic Sciences and Public Administration, 2004), pp. 397 – 421.

Palmieri, Giovanni Michele, “L’internationalisation du droit public: La contribution du Conseil de l’Europe”, (2006) 18 *European Review of Public Law*, pp. 51 – 84.

Pernice, Ingolf, "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme est suspendue", (2015) 51 *Cahiers de droit européen*, pp. 47 – 72.

Poelmans, Matt, "The e-Citizen Charter as an Instrument to boost e-Government", in: Cunningham, Paul/Cunningham, Miriam (eds), *Exploiting the Knowledge Economy*, (Amsterdam: IOS, 2006), pp. 531 – 538.

Polakiewicz, Jörg, "Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe", in: Wolfrum, Rüdiger/Röben, Volker (eds), *Developments of International Law in Treaty Making* (Berlin: Springer, 2005), pp. 245 – 290.

Polakiewicz, Jörg, "Finalités et fonctions de la soft law européenne – L'expérience du Conseil d'Europe", (2012) 7 *SIPE,* pp. 167 – 195.

Popescu, Corneliu-Liviu, "Les requêtes devant le Conseil de l'Europe alléguant des violations de la Charte européenne de l'autonomie locale", (2008) *AJDA*, pp. 2429 – 2431.

Ress, Georg, "Das Grundgesetz im Rahmen des europäischen Menschenrechtsschutzes", in: Stern, Klaus (ed.), *60 Jahre Grundgesetz: Das Grundgesetz für die Bundesrepublik Deutschland im Europäischen Verfassungsverbund* (Munich: C. H. Beck, 2010), pp. 177 – 206.

Rieckhoff, Henning, *Vorbehalt des Gesetzes im Europarecht* (Tübingen: Mohr Siebeck, 2007).

Rohleder, Kristin, Grundrechtsschutz im europäischen Mehrebenen-System (Baden-Baden: Nomos, 2009).

Rossum, Martin van/Dreessen, Desirée, "E-government in the Netherlands", in: Nixon, Paul G./Koutrakou, Vassiliki N. (eds), *E-Government in Europe – Rebooting the state* (Abingdon: Routledge, 2010), pp. 119 – 132.

Runavot, Marie-Clotilde, "La 'bonne administration': consolidation d'un droit sous influence européenne", (2010) *rfda*, pp. 395 – 403.

Schaffarzik, Bert, Handbuch der Europäischen Charta der kommunalen Selbstverwaltung (Stuttgart: Boorberg, 2002).

Scheuning, Dieter Helmut, "Europarechtliche Impulse für innovative Ansätze im deutschen Verwaltungsrecht", in: Hoffmann-Riem,

Wolfgang/Schmidt-Aßmann, Eberhard (eds), *Innovation und Flexibilität des Verwaltungshandelns* (Baden-Baden: Nomos, 1994), pp. 289 – 354.

Schmahl, Stephanie/Breuer, Marten (eds), *The Council of Europe: Its Laws and Policies* (Oxford: Oxford University Press, 2017).

Schneider, Jens-Peter/Rennert, Klaus/Marsch, Nikolaus (eds), *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht – Tagungsband* (Munich: C. H. Beck, 2016).

Schneider, Matthias Werner, *Kommunaler Einfluß in Europa* (Frankfurt am Main: Peter Lang, 2003).

Schoch, Friedrich, "Das Übereinkommen des Europarates über den Zugang zu amtlichen Dokumenten", in: Wittinger, Michaela/Wendt, Rudolf/Ress, Georg (eds), *Verfassung – Völkerrecht – Kulturgüterschutz: Festschrift für Wilfried Fiedler* (Berlin: Duncker & Humblot, 2011), pp. 657 – 673.

Schwarze, Jürgen, "Der Beitrag des Europarates zur Entwicklung von Rechtsschutz und Verwaltungsverfahren im Verwaltungsrecht", (1993) 20 *EuGRZ*, pp. 377 – 384.

Seifert, Achim, "Recht auf Kollektivverhandlungen und Streikrecht für Beamte", (2009) *KritV*, pp. 357 – 377.

Spaventa, Eleanor, "A Very Fearful Court? – The Protection of Fundamental Rights in the European Union after Opinion 2/13", (2015) 22 *MJ*, pp. 35 – 56.

Stefan, Oana Andreea, "Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance", (2014) 21 *MJ*, pp. 359 – 379.

Stelkens, Ulrich, "Europäische Rechtsakte als 'Fundgruben' für allgemeine Grundsätze des deutschen Verwaltungsverfahrensrechts", (2004) *ZEuS*, pp. 129 – 164.

Stelkens, Ulrich, "Rechtsetzungen der europäischen und nationalen Verwaltungen", (2012) 71 *VVDStRL*, pp. 369 – 417.

Sudre, Frédéric, "Existe-t-il un ordre public européen?", in: Tavernier, Paul (ed.), *Quelle Europe pour les Droits de l'Homme?* (Brussels: Bruylant, 1996), pp. 38 – 80.

Terhechte, Jörg Philipp (ed.), *Verwaltungsrecht der Europäischen Union* (Baden-Baden: Nomos, 2011).

Tomuschat, Christian, “Der Streit um die Auslegungshoheit: Dei Autonomier der EU als Heiliger Gral”, (2015) 42 *EuRGZ*, pp. 133 – 139.

Trentinaglia, Thomas, “Gebietskörperschaften im Haftungsverbund im Lichte der Rechtsprechung des EGMR”, (2016) 43 *EuGRZ*, pp. 253 – 263.

Tulkens, Françoise/van Drooghenbroeck, Sébastien, “Le *soft law* des droits de l’homme est-il vraiment si *soft*? Les développements de la pratique interprétative récente de la Cour européenne des droits de l'homme”, in: *Liber Amicorum Michel Mahieu* (Brussels: Larcier, 2008), pp. 505 – 526.

Uerpmann-Wittzack, Robert, “Rechtsfortbildung durch Europaratsrecht”, in: Breuer, Marten et al. (eds), *Der Staat im Recht – Festschrift für Eckart Klein* (Berlin: Duncker & Humblot, 2013), pp. 939 – 951.

Vel, Guy de/Markert, Thomas, “Importance and Weaknesses of the Council of Europe Conventions and of the Recommendations addressed by the Committee of Ministers to Member States”, in: Haller, Bruno et al. (eds), *Law in Greater Europe – Studies in Honour of Heinrich Klebes* (New York: Kluwer Law International, 2000), pp. 345 – 353.

Vialettes, Maud/Barrois de Sarigny, Cécile, “Questions autour d’une codification”, (2015) *AJDA*, pp. 2421 – 2425.

Vincze, Attila, “Europäisierung des nationalen Verwaltungsrechts – eine rechtsvergleichende Annäherung”, (2017) 77 *ZaöRV*, pp. 235 – 267.

Wachsmann, Patrick, “Les normes régissant le comportement de l’administration selon la jurisprudence de la Cour européenne des droits de l’homme?”, (2010) *AJDA*, pp. 2138 – 2146.

Wachsmann, Patrick, “Réflexions sur l’interprétation ‘globalisante’ de la Convention européenne des droits de l’homme”, in: *La conscience des droits. Mélanges en l’honneur de Jean-Paul Costa* (Paris: Dalloz, 2011), pp. 667 – 676.

Wakefield, Jill, *The Right to Good Administration* (New York: Kluwer Law International, 2007).

Wegener, Bernhard Werner, “Aktuelle Fragen der Umweltinformationsfreiheit”, (2015) *NVwZ*, pp. 609 – 616.

Wennerström, Erik O., *The Rule of Law and the European Union* (Uppsala: Iustus, 2007).

Weiß, Regina, Das Gesetz im Sinne der europäischen Menschenrechtskonvention (Berlin: Duncker & Humblot, 1996).

Wirtz, Sonja/Brink, Stefan, “Die verfassungsrechtliche Verankerung der Informationszugangsfreiheit”, (2015) *NVwZ*, pp. 1166 – 1173.

Witte, Bruno de/Imamović, Šejla, “Opinion 2/13 on Accession on the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court”, (2015) 49 *E. L. Rev.*, pp. 683 – 705.

Wittinger, Michaela, Der Europarat: Die Entwicklung seines Rechts und der “europäischen Verfassungswerte” (Baden-Baden: Nomos, 2005).

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