



Strasbourg, 10 January 2008

DA/ba/Conf (2007) 9 e

IN PURSUIT OF GOOD ADMINISTRATION

European Conference

*organised by the Council of Europe
in co-operation with the Faculty of Law and Administration
University of Warsaw*

Warsaw, 29-30 November 2007

***The application of the
European Code of Good Administrative Behaviour
by the European institutions***

REPORT PRESENTED BY

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I Introduction

The European Code of Good Administrative Behaviour ("the Code") is a non-legally binding instrument, drafted by the European Ombudsman and approved by the European Parliament in its Resolution of 6 September 2001¹. This approval gives a strong legitimacy to the principles contained therein, which can subsequently be considered as applicable to all Community institutions and bodies.

The objective of the Code is two-fold: first, it makes citizens aware of what good administration can be/is and therefore what they should expect from the European Community institutions, thereby creating transparency towards citizens. Second, it makes the institutions aware of how they should behave in order to avoid maladministration, which encourages service-mindedness within their respective administrations.

The Code is frequently called the European Ombudsman's Code. Not only because it was drafted by him, but also because it in fact contains the criteria which the Ombudsman applies when deciding and pointing out non-functioning practices of the institutions.

II The chronology of relevant facts culminating in the adoption of the Code

The Maastricht Treaty established the institution of the Ombudsman with the purpose of combating maladministration in the activities of the Community institutions and bodies.

The Ombudsman's definition of maladministration in his 1997 Annual Report is that "*maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding on it.*" The European Parliament has approved this definition.

The idea for a Code of Good Administrative Behaviour was first proposed by Roy Perry MEP, Rapporteur for the report of the Committee on Petitions on its own activities in 1996-1997. He called for a Code of Good Administrative Behaviour to be established for the Community institutions and bodies. The European Parliament welcomed this idea and stressed that such a Code should be as identical as possible for all European institutions and bodies and indicated that it should be accessible to all European citizens.

On 11 November 1998, the European Ombudsman launched an own initiative inquiry into the existence and public accessibility of a code of conduct concerning the good administrative behaviour of different Community institutions and bodies' officials, when dealing with the public. The Ombudsman asked the institutions whether they would agree to adopt such a Code that would play a valuable role, in two senses: the officials would be informed in a detailed manner of the rules they should respect when dealing with the public and the Code would provide the citizens with information on their rights and standards of good administration.

As none of the institutions or bodies had adopted such a code as envisaged by him, the Ombudsman made draft recommendations in July and September 1999, pointing out that the various institutions should adopt rules on good administration and that for that purpose, they might take guidance from a "model" Code of Good Administrative Behaviour, which had been drafted by the Ombudsman's office. The Ombudsman also recommended that the code

¹ Minutes of the European Parliament session from 3 to 6 September 2001, OJ C 72 E/ 331, 21.3.2002

should only deal with the relations of the officials with the public and not the internal relations of the officials with their respective institutions. Furthermore, the Ombudsman suggested that the rules on good administration should be adopted in the form of a decision and be published in the Official Journal of the European Union. In his reasoning of the draft recommendation, the Ombudsman also referred to the concept of openness in Article 1 of the Treaty on European Union², pointing out that *"a Code which contains the basic principles of GAB for officials when dealing with the public is needed both in order to bring the administration closer to the citizen and to guarantee a better quality of administration"*.

As by 1 March 2000, only two decentralised agencies (EMEA and the Translation Centre for the Bodies of the EU) had formally adopted a Code in the form proposed by the Ombudsman, whereas the others seemed to be close to adopt or presented draft codes with variable form and content, the Ombudsman concluded that it was necessary to consider a different way to achieve rules of good administrative behaviour which apply equally to all Community institutions and bodies in their relations with the public. The next step was thus a Special Report to the EP.

On 11 April 2000, the Ombudsman made a Special Report to the European Parliament in this respect. The Ombudsman observed that the European Parliament, in its capacity as the only European institution democratically representing all European citizens, has the possibility to take the initiative for the adoption of such a law, by using the procedure established by Article 192 (2) of the EC Treaty³, and suggested that the Parliament could use this procedure to suggest to the Commission a proposal for a European administrative law in the form of a Regulation binding on all the institutions and bodies. The Ombudsman also pointed out that the legal basis for a Regulation establishing a European administrative law could be Article 308 of the EC Treaty which provides that *"if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures"*.

In the meantime, the process of drafting of the Charter of Fundamental Rights of the EU ended and at the Nice Summit in December 2000, the Charter was proclaimed. This Charter contains the important Article 41 concerning the "right to good administration" which had been included upon the Ombudsman's suggestion. It was the first time in the history of the European Union that, in a positively formulated message, a Community text stated that the Community institutions should apply good administrative behaviour. Article 41 of the Charter states: *"Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union"*. Since Article 41 of the Charter of Fundamental Rights contains merely the principle of good administration, the Code of Good Administrative Behaviour could be considered as containing more detailed rules implementing the general principle that underlies Article 41 of the Charter.

² *"This Treaty marks a new stage in the process of creating an ever closer union among the people of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen"*

³ This article provides that *"the European Parliament may, acting by a majority of its Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty"*.

Subsequently, on 6 September 2001, the European Parliament adopted a Resolution concerning the above mentioned Ombudsman's Special Report. In this Resolution, the European Parliament adopted, with some amendments, the Code of Good Administrative Behaviour that was proposed by the European Ombudsman. When it approved the Code, the European Parliament called on the European Commission to submit a proposal for a regulation containing the Code. The view was that a regulation would emphasise the binding nature of the rules and principles contained therein and apply uniformly to all EU institutions and bodies, thereby promoting transparency and consistency.

Considering that the European Parliament had completed its examination of his Special Report and endorsed his conclusions, the Ombudsman, by decision of 5 February 2002, closed his own initiative inquiry. He also decided to publish the text of the European Code of Good Administrative Behaviour in the form of a citizen friendly brochure, which has also been published on the Ombudsman's website (http://www.ombudsman.europa.eu/glance/pdf/en/glance_en.pdf).

At the present, there are at the EU institutions' level the Code of Good Administrative Behaviour and a number of "individual" codes which the Community institutions, bodies and decentralised agencies have all adopted with various forms and content, and some of which are textually the same as the "European Code of Good Administrative Behaviour" (or the Ombudsman's Code). This is the case for the decentralised agencies.

As regards the Codes adopted by the Commission, Parliament and the Council, there is some heterogeneity in the form and structure of these Codes as compared to the Ombudsman's Code. The same principles are sometimes to be found under different subheadings or in the general provisions at the beginning of the relevant Codes. In addition, they do not cover all the principles contained in the Ombudsman's Code.

The European Parliament for instance has adopted a "*Guide to the obligations of officials and other servants of the European Parliament*"⁴, of which only section III concerns the "Relations with citizens". Sections I and II on the other hand concern general and service obligations which are closer to the rules contained in the Staff Regulations. They therefore rather concern the "horizontal" relations of the staff with their institution. Far from being a Code of Conduct, this text is rather an administrative guide for the officials. Parliament has however not adopted the Ombudsman's Code for its own use, which it approved in its Resolution.

The Commission on the other hand adopted a decision on 17 December 2000, amending its Rules of procedure. The "*Code of GAB for staff of the European Commission in their relations with the public*" is annexed as an enclosure to the decision⁵. It contains 6 sections and a total of 17 points.

As regards the Council, there is a *Decision of the Secretary-General/High Representative of 25 June 2001 on a Code of GAB for the General Secretariat of the Council of the EU and its staff in their professional relations with the public*. The text of the Code itself, which contains 11 Articles, is annexed to the decision.

⁴ OJ 2000 C 97/1.

⁵ OJ 2000 L 267.

Both the Economic and Social Committee and the Committee of the Regions adopted a Code which uses the same text as the "European Code".

There is certainly some confusion arising from the parallel existence of different codes for most EU institutions and bodies and the Ombudsman constantly emphasises the added value of transforming the European Code of Good Administrative Behaviour into a European law, as the European Parliament recommended in its 2001 Resolution referred to above.

III The Content of the Code (general considerations)

The Ombudsman created the rules contained in the Code with a view to them functioning as rules on good administration. As already pointed out, the Code can serve to explain in more detail what the principle underlying the Charter's right to good administration should mean in practice.

The introduction to the Code states that: "*By promoting good administration, the Ombudsman shall help enhance relations between the European Union and its citizens...*"

The Code is written in terms of general principles. It was not intended to establish specific rules of procedure to govern particular fields of activity, but to establish general horizontal principles. The Ombudsman was neither trying to achieve a lowest or highest common denominator, nor trying to put together national experiences but was rather looking for best practices.

The principles contained in this Code are therefore not a new creation by the Ombudsman. On the contrary, the Code can be considered as a document which sets out and explains in a clear and understandable manner the existing principles of good administration, not only to EU citizens but also to EU officials, taking into account, among others, the general principles of administrative law that have been established and further clarified in the case-law of the Court of Justice and the Court of First Instance over the last fifty years.

The European Code of Good Administrative Behaviour consists of 27 Articles.

Article 1 contains the *general provision* that the Institutions and their officials shall respect the principles which are laid down by this Code.

The *personal scope of application* of the Code is laid down in Article 2, which states that the Code applies to all officials and servants to whom the Staff Regulations and the Conditions of Employment apply and that the institutions will take the necessary measures to ensure that it also applies to other persons working for them.

The *material scope of application* of the Code is laid down in Article 3, according to which the Code contains the general principles of good administrative behaviour which apply to all relations of the institutions and their administrations with the public. These principles do not however apply to the internal relations of the officials with their institutions, which are governed by the respective institutions' Staff regulations.

The principle of *lawfulness*, **article 4** (obligation to act according to the law and to apply the rules and procedures laid down in Community law) is the first principle mentioned in the Code, followed by the principle of *absence of discrimination* (**article 5**), the principles of

proportionality (article 6) and *consistency* (article 10), the principle of *absence of abuse of power* (article 7), the principles of *impartiality and independence* (article 8) the principle of *objectivity* (article 9), of *fairness* (article 11), of *courtesy* (article 12), *duty to reply to letters in the language of the citizen* (article 13) , to mention just a few of them. There are also important rules on procedure such as the obligation *to notify all persons concerned of a decision* (article 20), *the obligation to keep registers* (article 24) and *the obligation to document administrative processes* (article 24). Even if obvious, the Ombudsman considered it important to include in his Code that only by keeping a good record of their activities can institutions prove that they have followed a procedure properly. Consequently, only a good record can guarantee the functioning of good administration. Similarly, if a procedure is not documented from the beginning, many rights become ineffective and meaningless.

IV The Application of the Code by the institutions

In order to answer the question concerning how the institutions apply the principles of the Code, reference should be made to the Ombudsman's case law, which largely bases itself on the Code.

In this context, a distinction may be first made between the *two groups of principles* contained in the Code.

Two groups of principles

The first group is composed of substantive principles, considered as the minimum substantial requirements for establishing good administration. These principles relate to the general principles of law found in the case law of European Courts and obviously to the European legislation.

These are: lawfulness (article 4); non discrimination (article 5) and proportionality (article 6).

The fundamental principle is of course the principle of lawfulness, referring to the fundamental value of the rule of law and that conforming to the law is the minimum requirement for any other rights and obligations. The principle of non-discrimination is based on the assumption of equal value being given to all human beings, which is a corner stone in most legal systems. The principle of proportionality is one of the most useful tools to control administrative decisions, especially administrative discretion.

In this group there is also the principle concerning the right to be heard (article 16), or duty to state the grounds of decisions (Article 18) and the principle concerning access to documents which refers directly to the relevant European regulation, (EC) 2049/2001).

The second group is composed of obligations which could be defined as yardsticks of normality for the factual conduct of the institutions.

These obligations do not reflect binding law but, till now, soft law. For instance: the obligation to be service-minded and act with courtesy (article 12), the obligation to give an indication of remedies available to all persons concerned (article 19), the obligation to notify all persons concerned of a decision (article 20), the obligation to provide the information

upon request (Article 22), the obligation to keep registers (article 24), the obligation to document administrative processes (article 24). And last but not least, the obligation to act fairly and reasonably (Article 11).

It is obvious from the case-law that all institutions have to act according to Community law: the institutions must comply with the Treaties and legislation and also with the general principles of law to be found in the case law.

If the Ombudsman is sent complaints in which the substantive (first group) principles have been allegedly violated, his approach is based on the case of law of the Courts but also on his own interpretation of these and other (second group) principles of the Code in the spirit of the culture of service which he constantly requires from the institutions to be applied in their relations with the citizens.

An example that can be used to highlight this concerns a complaint submitted by a Polish complainant, namely the Association of Graduates of the Polish National School of Public Administration against the European Personnel Selection Office (EPSO), concerning discrimination based on language. The Ombudsman found that, in substance, EPSO did not comply with the principle of non-discrimination because it applied different linguistic requirements to citizens from the old and new Member States who were candidates in comparable competitions and was not able to provide a convincing explanation to justify such differential treatment. Following the Ombudsman's critical remarks, EPSO changed its policy and no longer applies different rules to candidates from different Member States.

The Ombudsman's approach means that he always considers unlawfulness to be maladministration, but also that lawfulness does not necessarily mean that no instance of maladministration has occurred. According to the Ombudsman, principles of good administrative behaviour may require the institutions to do more than just avoid acting unlawfully. For example, they should also act reasonably, fairly and be helpful to citizens. This is particularly relevant, where discretionary powers are involved.

For example, the Community law on access to documents (Regulation 1049/2001/) applies to existing documents. There is no legal obligation to create new documents containing information which someone asks for. The Ombudsman's approach set out in the European Code of Good Administrative Behaviour (article 22) states that it is good administration to provide information when requested to do so, unless the institution or body concerned can show that there is a good reason not to do so.

In a similar vein, the Ombudsman takes the view that it is not enough for the institution to merely point out that it acted lawfully and within its discretionary powers. The Ombudsman also requires the institution to explain and justify its actions and answer criticism cogently, a matter which the Ombudsman finds to be the core of accountability.

One example of how the Ombudsman applies the principle of transparency in a way that goes beyond what a complainant could have obtained through judicial proceedings concerns the opening of the Council meetings. Following a complaint from a German MEP, the Ombudsman called on the Council to meet publicly whenever it acts in its legislative capacity because he found it vital for the citizens to understand what is being done in their name in Brussels. As a result, in 2006, the Council agreed to greater transparency in its legislative proceedings.

Another principle for which the institutions are frequently brought to account before the Ombudsman concerns the quality of the information provided by them to European Union citizens. The Ombudsman constantly takes the view that the information provided by the institutions should be as accurate and exhaustive as possible. In one recent case concerning air passenger rights, the Ombudsman called the Commission to correct inaccurate and misleading information contained in leaflets, posters and a video presentation on air passenger rights. This followed complaints made by two airline associations criticising the information provided by the Commission on the rights of travellers to compensation and assistance in the event of denied boarding, cancellation of flights or long delays.

Review

The Code included in its article 27 the possibility for each institution to comment on the Code's rules when applying them in practice (institutions should review their implementation of the Code after two years of operation of the Code and inform the Ombudsman about the results of their reviews.) Given that the Ombudsman received only 2 such reviews, it can be presumed that the application of the principles of the Code did not cause difficulties.

If taking into consideration only the last 3 years of the application of the Code, the Ombudsman issued a considerable number of critical and further remarks, based on the Code, to which the institutions positively replied.

In cases of critical remarks based on the Ombudsman's findings that the principles of the good administration as referred to in the Code were not respected, in their replies to the critical remarks, the institutions accepted: 9 out of 12 in 2004, 11 out of 19 in 2005, 18 out of 46 in 2006 and until now, 2 out of 10 in 2007. The acceptance means that the institutions decided to improve their procedures and /or take concrete action such as sending a letter to a citizen concerned, providing better information on its website or by simply apologising.

As regards the Ombudsman's further remarks, these are usually made when the Ombudsman does not find any instance of maladministration or for some factual reasons considers that it would not be justified for him to follow his inquiry but still feels some suggestion should be made for the institutions to improve their administrative behaviour in the future. Such further remarks used to be quite concrete. In reply to such further remarks, the institutions accepted the Ombudsman's suggestions twice in 2004 (out of 7 FR to which they replied), 7 times in 2005 (out of 9), 21 times in 2006 (out of 45) and 5 times in 2007 (out of 6).

Finally, the institutions accepted a number of the Ombudsman's proposals for friendly solutions or draft recommendations made on the basis of the Ombudsman's finding of maladministration which resulted from the failure by the institutions to respect the principles of good administration as contained in the Code.

The exact statistical data in this respect may be found at the Ombudsman's annual reports.

V Conclusion

Generally speaking, the Code gives the ethical framework for the administration.

In this context, its application by the institutions may be assessed in a positive light. As the former Ombudsman Mr Jacob Söderman stated in a press statement, officials who follow the Code can be sure that they will avoid instances of maladministration. It proved to be true. The institutions have improved a great deal. By continuously referring in his decisions to the Code, the Ombudsman certainly contributed and is still working in this direction, to promote the culture of service within the institutions.

The Commission is naturally the most common target of complaints lodged with the Ombudsman because the citizens have more contact with it than with other institutions in their every day life. The Commission has become more friendly towards citizens on all occasions and more open in contrast to its traditionally closed, outdated, bureaucratic attitude. We certainly still see the conflict between the old culture of administration within the Commission and the Code. However, tradition of a closed administration of the Commission has changed over the last years since the dominant culture now is one that recognises the necessity for good relations with the citizens.

The right to good administration should not be seen as an enforceable right itself. Instead, it represents the collection of rights and duties that together create the right to good administration. It thus needs to be specified in a set of rights and obligations that are more concrete. This was done in the Ombudsman's Code which provides the necessary and concrete specifications for the right of good administration as set out in the Charter of Fundamental Rights.

In a couple of days, on 12 December 2007, the Charter will be solemnly proclaimed at a plenary session of the Parliament by the Presidents of the Parliament, the Council and the Commission and subsequently published in the Official Journal. The proclamation will reflect the Charter's specific nature and increase its visibility. The Treaty of Lisbon, when ratified, will give the Charter its legally binding character and will refer to the above mentioned proclamation.

Article 41 of the Charter is naturally to be seen as a central part of the concept of good administration and that the right of good administration constitutes the fundamental right. In due time, the Court will develop the principles referred to in Article 41.

In the meantime, the Ombudsman's Code, providing a more detailed definition on what the right to good administration involves, is still at the level of general principles applicable across the public administration.

The Code became a perfect instrument of reference in the hands of the Ombudsman. Given that the concept of maladministration (covered by the Ombudsman's mandate) is open, the interpretation by the Ombudsman of the principles of good administration referred to in the Code may be quite extensive. It always aims at helping the citizens in their dealings with the European administration. Finally, it is the Ombudsman's institution which, in the first place, applies the Code.