

The Right to Be Heard in the European Union – Case Law of the Court of Justice of the European Union

Pranvera Beqiraj (Mihani)

Faculty of Political Sciences and Law, "Aleksander Moisiu" University, Durres

pranvera85@gmail.com

Abstract

The right to be heard as a fundamental right within the European legal order was included in the right to good administration in the Charter of Fundamental Rights of the European Union and imposes that every person has the right to be heard before any individual measure which would affect him or her adversely is taken. However, the Court of Justice of the European Union has a consolidated jurisprudence regarding the right to be heard which has already recognized it as a general principle and fundamental right. This paper will analyze this case law, which determine the nature of the decision-making process where this right must be applied, the nature of the decision taken and the way the interests of the person concerned are affected. For this purpose different decisions of the Court of Justice of the European Union are taken under study.

Keywords: right to be heard, jurisprudence, decision, principle

1. Introduction

Any system of the administrative law will have access points or gateways, which determine who can get into the system. There are two crucial access points in any legal regime. There will be procedural rules determining who is entitled to be heard or intervene before the initial decision is made, or who is entitled to be considered before a legislative-type norm is enacted.¹

Within the context of the European Union (EU) law, the need to respect the right to be heard has been recently codified and, arguably, reinforced in the Charter of Fundamental Rights² (the Charter). The Charter, which with entry into force of the Treaty of Lisbon acquired the same legal status as the Treaties, includes as part of the right to good administration the right to be heard. Article 41 thereof, in the second paragraph states that: "every person has the right to be heard, before any individual measure which would affect him or her adversely is taken.

It may appear the Charter goes beyond the existing case law, to the extent that it seems to eliminate the requirement for it to apply of 'having a proceeding initiated against a person'. The only condition in Article 41, appears to be that 'an individual measure could affect [that person] adversely'.³

However, the Court of Justice of the European Union (the Court) in its case law has consistently supported the application of the right to be heard to the decisions with individual character and recognized the right to be heard as a general principle of Community law, regardless of whether it is sanctioned (or not) in the provisions of a treaty, regulation, directive or decision.⁴

2. The content of the requirement to hear the addressee

The authorities of the EU must respect the general principles of EU law, part of which is the right to be heard.

1 Craig, P. (2006). *EU Administrative Law*, pg. 313

2 Durand, S. Williams, K. (2005). *The practical impact of the exercise of the right to be heard: A special focus on the effect of Oral Hearings and the role of the Hearing Officers*, Competition Policy Newsletter, Number 2, pg. 1

3 *Ibid*, pg. 1

4 Curtin, (1992). *Constitutionalism in the European Community: The right to Fair Procedures in Administrative Law*, in J. O'Reilly (ed). *Human Rights and Constitutional Law, essays in Honour of Brian Walsh* (1992), pg. 293 (cited in Craig, P. (2006). *EU Administrative Law*, pg. 314)

Before an act adversely affecting a person is adopted, the addressee of the act or interested third parties must be heard by the institution, body office or agency concerned. ¹ That obligation is prescribed either by the Treaties ² or by secondary Union law ³ or arises out of the general legal principles that a person whose interest are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. ⁴ This obligation is an essential procedural requirement. ⁵ The person concerned must be informed in time ⁶ effectively ⁷ and personally ⁸ of all the information in file which might be useful for his or her defense ⁹. ¹⁰

Thus, the EU authorities firstly have the obligation to make the case known to the person concerned and secondly the obligation to give that person the opportunity to submit his comments on the decision of the relevant authority.

But, the Community Courts in their decisions, have made a clear distinction between the right to be heard in the process of an individual decision and that of the adoption of a norm with legislative nature. In the second case, as it will be explained below, the right to be heard is straitened only in the context of participation or consultation.

3. The case law of the Court

The Court has already a consolidated jurisprudence regarding the right to be heard. The right to be heard has often been under consideration in cases which relate to the administrative powers of the Commission in competition law. The main regulations and directives in certain sectors where the administration is in the competence of the EU institutions contain provisions on the right to be heard.

The Court, since its early jurisprudence, has stated that the respect for the right to be heard may be started by the Court itself. ¹¹

"The Court has held that it may of its own motion consider the question of infringement of essential procedural requirements (see judgments in Case 1/54 France v High Authority [1954] ECR 1, in Case 2/54 Italy v High Authority [1954] ECR 37 and in Case 18/57 M v High Authority [1959] ECR 41)"

In the case *Transocean Marine Paint* ¹² the Court refers to the right to be heard of the person whose interests are significantly affected by a decision taken by an authority of European Community as a *general rule* and that the rules on the right to be heard provided by the regulations in the field of competition law are an expression of the recognition of this rule.

"It is clear, however, both from the nature and objective of the procedure for hearings, ... that this Regulation, ... applies the general rule that persons whose interests are perceptibly affected by a decision, taken by a public authority must be given the opportunity to make their point of view known."

Thus the Regulation No 99/63/EEC of the Commission states that the Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them, ¹³ and that in its decision the Commission shall deal only with those objections raised against undertakings and associations of undertakings in respect of which they

1 Case 17/74, *Transocean Marine Paint V Commission*, (1974)

2 See, e.g. Art. 108 (2) Treaty on the Functioning of the EU; Art. 41(2) of the Charter

3 See, e.g. Art. 27 of Regulation No. 1/2003, Art. 6 (7) of Regulation No. 1225/2009 (antidumping); Art. 18 of Regulation No. 139/2004 (control of concretations)

4 Case 17/74 (ECJ), *Transocean Marine Paint V Commission*, (1974)

5 Case 31/69 (ECJ), *Commission v Italy*, (1970)

6 Case 55/69 (ECJ), *Casella v Commission*, (1972)

7 Joined Cases 56 and 58/64 (ECJ), *Consten and Grundig v Commission*, (1964); Case T-7/89 *Hercules Chemicals v Commission*, (1991)

8 Case 76/99 (ECJ), *P ARBED v Commission*, (2003)

9 CFI, Case T-36/91, *ICI v Commission*, (1995)

10 Lenaerts, K. Masellis, I. Gutman, K. (2014) *EU procedural law*, pg 301

11 Case 291/89 (ECJ), *Interhotel v Commission*, (1991); Case 367/95 (ECJ), *Commission v Sytraval and Brink's France*, (1998)

12 Case 17/74 (ECJ), *Transocean Marine Paint v Commission*, (1974)

13 Article 2

have been afforded the opportunity of making known their view. ¹

The Court reiterated the principle in the case *Hoffmann-La Roche*, ² on the request of the applicant that the contested decision mention is made of certain documents which were not discussed or even mentioned during the hearing of the parties and the contested decision is based on information which has not been brought to its knowledge and which it cannot check because the Commission, relying upon its duty to observe the principle of professional secrecy, refuses to notify that information to the applicant in so far as the undertakings from which it was acquired are opposed to its being so notified.

But this time the Court imposed a restrictive condition: the right to be heard would be recognized as a fundamental principle of Community law in the decisions that determine sanctions:

"Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings. Article 19 (1) of Council Regulation No 17 obliges the Commission, before taking a decision in connexion with fines, to give the persons concerned the opportunity of putting forward their point of view with regard to the complaints made against them."

However, in *Netherlands and Others v Commission*, ³ as in other cases in general, ⁴ the Court has recognized the right to be heard even when sanctions are not imposed. But, in this case it is required that the decision caused adverse effects to the interests of the applicant:

"As regards the plea in law relating to an infringement of the rights of the defence in the case of the Kingdom of the Netherlands, it must be stressed that the Court has consistently held that respect for the rights of the defence, in all proceedings which are initiated against a person and which are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any specific rules"

Also, The Court has stated that the right to be heard should be guaranteed even *in the absence of any specific legal provisions* or when they do not take it into consideration. This statement was unequivocally renewed in *Air Inter SA kundër Komisionit* ⁵ where the Court rejected the Commission's argument based on the absence of a specific provision in the legislation in question.

"As regards the procedure initiated under Article 8(3) of the Regulation, which led to the adoption of the contested decision, it is settled law that respect for the rights of the defence, in all proceedings which are initiated against a person and which are liable to culminate in a measure adversely affecting that person, is a fundamental principle of Community law which must be guaranteed even in the absence of any specific rules (see, for example, the judgment in Netherlands and Others v Commission, paragraph 44)".

That principle requires that the person concerned must be placed in a position in which he can effectively make known his view of the matters on the basis of which the Commission adopted its measure. ⁶

In so far as the Commission claims that the judgment in *Netherlands and Others v Commission* — given in the context of Article 90(3) of the Treaty — is irrelevant to the present case because the procedure at issue is laid down by specific rules excluding the participation of the air carriers who may be affected, it must be observed that the application of the fundamental principle of the rights of defence cannot be excluded or restricted by any legislative provision. Respect for that principle must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle.

1 Article 4

2 Case 85/76 (ECJ), *Hoffmann-La Roche v Commission*, (1979)

3 Case 66/90 (ECJ), *Netherlands and Others v Commission* (1992)

4 See also Case 50/96 (ECJ) *Primex Produkte Import-Export GmbH v Commission*, (1998); Case 48/90 Case 135/92 *Fiskano v Commission*, (1994), Case 450/93 (ECJ), *Lisrestal v Commission*, (1994), etc.

5 Case 260/94 (ECJ), *Air Inter SA v Commission*, (1997)

6 See also *Fiskano v Commission*, paragraph 40

In the above cases, the Court recognized the right to be heard as a fundamental principle of Community law, in *Al-Jubail*¹ this right was also recognized as part of the fundamental rights:

“According to the well-established case-law of the Court ... fundamental rights form an integral part of the general principles of law, whose observance is ensured by the Court. Consequently, it is necessary when interpreting Article 7(4) of the basic regulation to take account in particular of the requirements stemming from the right to a fair hearing, a principle whose fundamental character has been stressed on numerous occasions in the case-law of the Court ...”

Also, the Court extended the application of the right to be heard not only in decision-making procedures which at the end imposes a sanction, but also for the procedures that lead to the decision, including the investigative procedures.

“Those requirements must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of antidumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them.”

Furthermore, the Court stated that the provisions of the anti-dumping regulations concerning the right to be heard does not provide all the procedural guarantees present in national legal systems and therefore this right could be seen as complementary to these provisions:

“It should be added that, with regard to the right to a fair hearing, any action taken by the Community institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems”.

The precise application of the right to be heard can be difficult where the administration of the particular scheme is divided or shared between the EU and the Member States, as in the context of customs or Structural Fund. In such instances it can be problematic locating the right to be heard at national or Union level or an admixture of the two.²

However in the case *Technische Universität München*,³ the Court found that the requirement to hear the person concerned was not met when the disputed decision was adopted by the Community institution, in this case the Commission because the Court stated that the right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances and, where necessary, on the documents taken into account by the Community institution.

Moreover the Court stressed the importance of the respect by the Community institutions for the rights guaranteed by the Community legal order in administrative procedures, including the right to be heard :

“However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.”

The EU courts have striven to ensure that the right to be heard is properly protected where administration is shared between the EU and Member States. There are nonetheless, as Eckes and Mendes note, continuing difficulties in making sure that the right to be heard is accorded at the appropriate level at which the decision is formed, and takes adequate account of the effects produced by the decision at each level. This difficulty is exemplified by the case law concerning the right to be heard in sanction cases.⁴

The Court in its case law distinguished the application of the right to be heard in the decision-making of acts of individual and direct concern to the person and the right to be heard prior to the adoption of a legislative act or where the measure does not directly effect the applicant. The right to be heard prior to the adoption of a legislative act or where the measure does not directly effect the applicant is reduced in the context of the right to participate or to be consulted. Further more

1 Case 49/88 (ECJ), *Al-Jubail Fertilizer v Council*, (1991)

2 Craig, P. (2006). *EU Administrative Law*, pg. 291

3 Case C-269/90 (ECJ), *Technische Universität München v Commission*, (1991)

4 Craig, P. (2006). *EU Administrative Law*, p.g 292

the Courts insists in its decision that the right to participation or consultation must be expressly laid down in the Treaty provisions or secondary law.

The Court made its viewpoint clear in the *Atlanta*¹ case. The appellant asserts that the Court of First Instance erred in finding that the right to be heard in an administrative procedure affecting a specific person could not be transposed to the context of a legislative process leading, as in the case of Regulation No 404/93, to the adoption of general laws. In the appellant's view, it does not matter to the individual concerned whether his legal situation is affected as a result of an administrative procedure or of a legislative procedure.

Contrary to the applicants argument, The Court decided that the Court of First Instance was correct in its decision and that:

"The right to be heard in an administrative procedure affecting a specific person cannot be transposed to the context of a legislative process leading to the adoption of general laws".

"The case-law referred to by Atlanta relates to particular acts of direct and individual concern to the applicants, whereas, in the case before us, the order of the Court of Justice of 21 June 1993 referred to above held that Regulation No 404/93 was not of direct and individual concern to the applicant. This case-law cannot be extended to apply to the context of a Community legislative procedure culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned."

Also, another claim of the Atlanta petitioner was that the absence of the provisions of the Treaty which foresee legislative consultation procedure does not preclude it from this right. To prove his claim, the petitioner referred to the previous case law of the Court, specifically the case *Al-Jubail*. The court rejected this claim and stated that the jurisprudence regarding the right to be heard referred only individual acts of nature related directly to the applicant and it can not be extended to the legislative procedures. The only obligation that had legislative bodies Community consultation was that envisioned by the Treaty to the case.

Thus, the right of participation in the process of adopting legislative norms exists only if it is provided for in the Treaty or resulting from a specific regulation or directive. This stance of the Court was repeated also in other cases.

4. Conclusions

As above, in connection with the jurisprudence of the Court to the right to be heard, it can be concluded that:

First, the right to be heard constitutes a general principle and a fundamental right within the EU legal order.

Secondly, the judiciary stems from a clear distinction between processes that affect a person in the form of a decision of an individual nature and those of adoption of EU legislative rules or where the applicant is not a party directly affected by the decision-making.

Thirdly, the right to be heard to decisions of an individual nature will be applied if the decisions adversely affect the interest of the applicant, even when sanctions are not imposed and it is guaranteed even in the absence of any specific legal provisions or when they do not take it into account.

Lastly, in the approval of legislative norms, the Court has recognized the right to participation or consultation, respect of which is depended on the fact that it is provided in the provisions of the Treaty, regulations or directives.

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