

DIRECTORATE-GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**THE IMPORTANCE OF KEEPING
IT SIMPLE: REFLECTIONS ON A
LAW ON ADMINISTRATIVE
PROCEDURE FOR
EU INSTITUTIONS**

NOTE



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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

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procedure for EU institutions**

NOTE

Abstract

The author insists on the need to approve within a short period of time an EU Regulation on the formalities and actions that must be met by any administrative procedures of the European institutions. She provides examples drawn from the history of relevant Spanish legislation and makes proposals for the basic content of a new EU regulation, which would set out the rights of the interested parties in the procedures, as well as other provisions regarding the legal regime for administrative actions.

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Years of meetings, studies, reports and conferences have built on the ideas for regulating domestic or internal administrative procedures in the European institutions. There are already dozens of specific regulations covering EU bodies; these regulations set out the actions and formalities to be respected in order to make a specific decision. It is unnecessary to outline the significant existing sectoral legislation, which I presume is already known. Nevertheless, the desire to set out some basic standards in a single text has given rise to studies and reports, committees and groups, as well as meetings and congresses for decades.

That is also the purpose of this meeting: i.e. to discuss the perspectives of EU administrative law on the basis of the Working document drafted by the EU Administrative Law Working Group set up by the Committee on Legal Affairs (hereinafter the 'Working Document'). I think that the document is very commendable. It provides a comprehensive view of the current situation of EU procedures and makes some recommendations for future actions. This apparently modest Working Document may be used as a launching pad for overcoming eventual obstacles towards adopting an EU regulation on the administrative procedures of the EU institutions.

1. THE URGENT NEED FOR AN EU LAW ON ADMINISTRATIVE PROCEDURE

During all these years, many have underlined the advantages of having a provision that would set out the essential formalities which should be satisfied by any EU decision. This paper outlines some of the advantages of codifying the administrative procedures (page 27), including the possibility of exporting the model to third countries. A provision which sets out the essential formalities to be satisfied by any EU institution before adopting a decision leads to increased legal certainty. With respect to the numerous provisions, special formalities, specific regulations, interpretations adapted to a case, singularities that multiply, etc., the fact that there are common well-known milestones facilitates legal certainty and, therefore, enhances citizens' trust, which is necessary in times of crisis. Likewise, coherent actions by the EU institutions would also be beneficial.

On the other hand, if the current situation is maintained, with the projection of an increasing complexity of new procedures without a common core and with the European institutions maintaining their own rules without conforming to a uniform behaviour, it is likely that such a situation will complicate further the European actions and generate greater distance from citizens. That attitude could lead the European institutions to continue with the unfinished Kafka novel, *The Castle*.

Is there a need to insist any further on the urgency of drafting a new law on procedures?

In these times of serious economic, institutional and political crisis, the EU institutions, and more generally the EU administration, must take coherent action that can be understood and is easily predictable in terms of formalities, so that European citizens realise that there is a stable core of administrative proceedings.

2. SUFFICIENT AUTHORISATION

Article 298 of the Treaty on the Functioning of the European Union has been subject to considerable analysis. For current purposes, there have been many debates on whether or not this provision may provide the basis for a general regulation for administrative procedure, since it only highlights the indispensable role of an “*open, efficient and independent*” European administration. At this stage of the construction of public law theory, I think that this debate is futile, since every administrative action necessarily follows some kind of pattern, and respects the corresponding formalities, whether or not they have been “formalised”. That is what we should be able to distinguish: whether or not the procedure has been formalised. I will deal with this later on. But there is always some kind of “procedure”. As the Spanish poet Antonio Machado said, “*Traveller, the path is your tracks/ And nothing more/ Traveller, there is no path/ The path is made by walking*”.

Therefore, I will go on to the next section without any legal doubts about the existence of a legal basis for approving a Regulation of the European Parliament and of the Council that lays down an internal or domestic administrative procedure for the institutions.

3. KNOWING WHAT WE WANT AND WHAT WE CAN DO

With regard to the options summarised in the Working Document (page 27), I will disregard the first option, i.e. “not doing anything”. I fully reject this, since a standstill means that complications and disorder will go on and get worse. With regard to the other options, I will provide some nuances.

On one hand, the document refers to codification. A full compilation where everything or nearly everything is included would be a dream-come-true for many jurists. This would continue with the tradition that dates back to the Sumerians, the Twelve Tables and the Codex Justinianus, which triumphed in the 18th and 19th centuries, and other model Codes, which were milestones in the history of Law. For jurists in charge of consolidating all EU administrative law provisions this would be a very appealing task. However, it would take many years in order to achieve a single body of law regarding the course of action for European institutions.

More particularly, there are a number of drawbacks in the codification option. In addition to the long time it would take to deal with this colossal task, some European bodies and agencies might be tempted to highlight their unique features, in order to be excluded from the scope of application of a general code. Furthermore, we have to acknowledge that the sources of Law have exploded in recent decades. We are shrouded in an expansive big bang of regulations and provisions which can only be tidied up in a minimum way in order to avoid incoherence. Moreover, that code would soon be taken over by new specific regulations. Rapid proliferation of specialised rules is characteristic of this day and age.

Therefore, as Montaigne said in Essay I, Chapter XXIII, “*better to make the laws do what they can when they cannot do what they would*”.

Even so, I believe that the option of codification is feasible. That is to say, the objective should be to draft a law that sets out, as a minimum, the legal principles for administrative procedures and the basic guarantees for citizens. This option is referred to in the Working Document under the proposal for a Landenburger "Gesamtkodifikation", which seems more feasible. This idea is linked with the option analysed in the Working Document, of fostering a general law that sets out classical principles and citizens' rights, compared to the attempt to draft a very detailed law, which would be an unattainable objective.

Therefore, I believe that, from now on, the actions must be aimed at drafting a "code" or a simple general regulation that is applicable to all European institutions and to all administrative procedures. This is an apparently modest action, but one which is actually feasible.

However, before making recommendations on the content of the envisaged EU regulation (hereinafter, the 'Regulation'), I would like to highlight some of the legal issues that the professors of public Law deal with for didactic purposes in Law Schools.

4. WHAT CONCEPTS SHOULD BE REMEMBERED AND SOME HISTORY

Many criteria are used to classify administrative procedures: general, common, special, two-phase, triangular, etc. I believe that it is interesting to remember the following: a "common or standard" procedure represents the general way in which authorities may adopt a decision. Procedures other than "common or standard" include "standard formalities", i.e. requirements which provide minimum guarantees for citizens in all cases. This enables us to differentiate between the "formalised" and "non-formalised" procedures. With regard to the former ones, the legislator has set out specific steps that must be taken by an administrative body, e.g., the exact formalities that must be performed, in which order, at what time, and for how long, etc. Conversely, when a specific procedural channel has not been laid down, the procedure is not formalised and, consequently, the administrative body must carry out its activity based on the "standard" formalities set out in the general law on administrative procedure.

That simple structure was in force in the Spanish legal system for many years and also in some other European legal systems. But I will now focus on Spanish law because its regulations on administrative procedures date back to the 19th century.

The Law on the Bases for Administrative Procedures dated 19 October 1889 is, to my knowledge the first to have ever been adopted. That piece of law was mainly carried out by a University of León professor, Gumersindo Azcárate, who defended academic freedom and was subsequently expelled from the University in 1875.

This 19th century law tried to combine the multiple purposes and the various activities of administrations and bodies in a single procedural channel. The 1889 law established a common base for all the government ministries on various matters, such as: registering entries, carrying out reports, providing the principle of the right to a hearing, drafting resolution proposals, and establishing deadline extensions, the duration of the procedures and their expiry, as well as the various appeals and claims, the liabilities of civil servants, etc. Based on that law, each Ministry had to draft its own regulation on administrative procedures within a maximum of six months. Those regulations were drafted and approved.

Many were very heterogeneous. When studying them, the doctrine shows that there were many excesses and that, in some cases, citizens' guarantees were different depending on the applicable regulation, deadlines were different in each Ministry, etc.. Basically, there were such diverse procedures that the initial idea of certain uniformity was thwarted.

As a result, a reform of the Law on Administrative Procedures was required. In the 1950s, despite the oppression and repression of the dictatorship, a body of administrative laws was approved; these laws constitute milestones in the history of Public Law: the Law on Compulsory Purchase Orders (1954), the Land Law (1956), the Law on the Contentious-Administrative Jurisdiction (1956), the Law on the Legal Regime (1957), the Law on Administrative Procedures (1958), the Law on Autonomous State Entities (1958), etc.

The new Law on Administrative Procedures of 1958 adopted a clever approach when dealing with the dilemma of combining the general and common administrative procedures with so many subjects, singularities and diversities of administrative action. The statement of purpose of that Law recalled that the 19th century law had given rise to "*a heterogeneous group of provisions, in conflict with the guidelines that had governed the enactment of that Law*" and, consequently, "*the Law had therefore fled from the rigid formal system of a unitary procedure that had all the integrated actions as stages of same and, consequently, did not regulate the start, arrangement, instruction and end as mandatory stages or moments of a procedure, but as types of actions that could or could not be carried out in each case, depending on the nature and requirements of the procedure in question. In that way, preclusion, the cornerstone for formal legal procedures, was reduced to a minimum, providing the administrative procedures with the agility and efficiency required of a modern Administration*".

The aim was to have a general and universally applicable regulation. Consequently, a Law which had to be observed by all the administrative bodies and agencies was enacted: it was a simple and clear regulation, it had mandatory provisions in order to safeguard citizens' interests (e.g. maximum resolution deadline, what would happen if there was no explicit decision, ways of appeal against the decisions, etc.) and, above all, it was sufficiently flexible, notably with regard to the description of the steps required prior to an administrative decision.

I believe that, during the years when that 1958 law was in force in Spain, there was some procedural clarity in administrative action. It is true that subsequently enacted specific laws formalised administrative procedures, but my impression is that they respect the provisions of the 1958 law. An example: when that law was repealed in 1992, it was necessary to adapt the existing procedures to the new regulation. There were more than 1,800 procedures applicable to the State Administration alone! Despite that excessive amount of procedures, any public law professor or lawyer could provide a rough answer based on the basic regime with regard to the maximum resolution deadlines, what administrative silence meant, what type of regime there was for the administrative remedies etc. That has now disappeared with the big bang generated by the 1992 Law. It is now difficult for a professor or lawyer to automatically answer what procedures are applicable, what the maximum resolution deadline is, what happens if there is no express decision, etc.

But let us return to what the European institutions can learn from the Spanish experience of the mid-20th century.

5. IN FAVOUR OF A REGULATION ON ADMINISTRATIVE PROCEDURES

I believe that the 1958 Spanish regulations on administrative procedures can be an inspiring model. Based on the experience of Spanish public law, my view is that it is more effective to enact a legal instrument that is binding and directly applicable.

Sometimes it is good to follow certain national traditions and to plagiarise good solutions. I propose therefore an EU regulation that deals with the essential formalities of the administrative procedures of EU institutions. A clear and simple regulation is required, in order to guarantee legal certainty.

I will hereinafter develop the conclusions that Professor MEP Sosa Wagner and I formulated on the occasion of last April's Workshop in León, organised by the European Parliament and hosted by the University of Leon at the occasion of a Legal Affairs Committee delegation.

We insisted on applying what we call the "Monnet method", i.e. advancing towards a specific objective that can be attained in a short space of time. We must immediately foster actions to draft a Regulation on the basic mandatory principles to govern the action of EU administration. Article 298 of the Treaty on the Functioning of the European Union and article 41 of the Community Charter of Fundamental Rights provide the legal basis for such action.

The Regulation could be structured in three chapters. The first one would set out the scope of application, a list of principles for administrative actions, the rights of citizens, companies and entities that participate in the procedures, etc. The second chapter would specify the standard formalities that the EU institutions would observe in administrative procedures. The third chapter would contain the general features of the legal regime, such as nullity, and pecuniary and disciplinary liability. Let us now reflect on those factors.

Firstly, the scope of application of the Regulation must cover all EU institutions, organs, offices and bodies without exception. We have to put an end to heterogeneous treatment, especially that of the numerous EU agencies. Without denying their specialisation, their actions and formalities for adopting decisions must not be so differentiated. Without challenging the legal basis for approving their own rules of functioning, it is important that such agencies observe formalities that are predictable by all citizens.

Secondly, the Regulation must be approved as a benchmark regulation for every administrative action of institutions and other bodies, as described above. It must be binding and mandatory. It must be directly applicable and take precedence over the other procedural rules. Therefore, I have dispelled the doubts in the Working Document about whether to enact a general regulation or a sectoral regulation on a specific subject (section four of the Recommendations, page 30). All the existing and new regulations must conform to the new Regulation. The Regulation proposed will have a mandatory general part, such as compliance with the legal principles and respect for the rights of the interested parties, as well as another part on eventually specific administrative formalities of each EU body. Consequently, the existing procedures must be adapted within a transitional period which should not be longer than one year.

That general chapter should also include the legal principles that must be complied with by all public actions and administrative procedures. A list must compile all the principles that

already appear in the Treaties (legality, proportionality, etc.) and those that have been consolidated in the case-law of the Court of Justice of the European Union (e.g. the principle of legitimate expectations and good faith). The Working Document contains many of those principles but some, missing ones should also be included. I refer to the classic principles laid down in many European procedural laws. On the one hand, I have not seen the principles of procedural speed and economy in the Treaties. I believe that those basic principles should regulate administrative action in order to provide a certain pace (a “quick” pace, not a “walking” or weary pace). On the other hand, there is the principle of institutional loyalty aiming to facilitate cooperation and collaboration among administrative bodies.

Fourthly, the Regulation should set out the basic rights of the citizens, companies, bodies or states that participate in a procedure. The Working Document already lists many of those rights enshrined in the case-law of the Court of Justice of the European Union and the European Code of Good Administrative Behaviour of the European Ombudsman”. However, we have to make a distinction between the administrative action guidelines and the specific rights of interested parties in administrative procedures. Those rights, such as the right to access documentation, receive an answer in the official language, receive a decision within a reasonable time, have a hearing, receive a reasoned resolution, file claims and complaints, etc., have to be laid down in the proposed Regulation.

That is what the first chapter of the Regulation should include.

As I have stated, the second chapter could lay down the legal regime for the “standard” formalities which would make up administrative procedures: how to start a procedure; the type of review procedures and remedies available; the regime for the reports of other competent bodies; the length of a lawsuit before an administrative judge; the proposed resolution; the formalities for a hearing by the interested parties; the regime for notifying a decision; the applicable claims and appeals, etc.

A considerable advance in providing clarity to all the citizens and companies that interact with the European institutions would be for the Regulation to establish a maximum resolution period that is applicable horizontally. That period might only be extended in specific complex cases.

The Regulation should also include a third chapter. The latter should list definitions of basic elements of all formalities, such as cases of nullity of the decision adopted; the review procedures with regard to procedural legality; as well as the regime for disciplinary liability of the EU institutions or other bodies failing to comply with the right to “good administration” (Art. 41 of the Charter).

Lastly, we also believe that it is important that the Regulation lays down transitional measures. It is necessary that the Regulation provides for a short transitional period. One year should be sufficient. After that year the Regulation would be automatically and directly applicable. Pending procedures will not be affected by the Regulation provided that they are closed within one year of the *vacatio legis* envisaged. Otherwise, they must comply with the Regulation.

A last important consideration concerns the wording. Efforts must be made to ensure that the future Regulation is brief, concise and very clear. The language used must not require any interpretation, i.e. *in claris non fit interpretatio*.

The Regulation must, of course, be translated in all the official languages of Member States. On this point, I insist on the special care that must be taken in this task. As Ortega y Gasset often said, *"there is no more humble task than translation but at the same time it is one of the most exorbitant ones"*. Translation must be good and the language must not be "simplified".

Therefore, I insist on the importance of wording, which should take account of the legal terminology, legal concepts and Charters of Rights of Member States. Just to give an example, a year ago, when I began to prepare the conference held in León, I was surprised that the procedures of the European institutions were considered to be "direct". The term was actually used in the sense of EU institutions' "own" procedures; their "own" procedures are not the same as their "direct" procedures. That is what I am criticising. The legal terminology that already exists in the Member States' legal systems should be used.

To conclude, after setting out my opinion on the Working Document, I would like to congratulate Members of the EU Administrative Law Working Group on the results of their work and on the relevant recommendations. The European Parliament, and notably the Legal Affairs Committee, should act right now. I will end by remembering Goethe, who insisted that *"knowing is not enough, we must apply; willing is not enough, we must do"*.

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