

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs	
Justice, Freedom and Security	
Gender Equality	
Legal and Parliamentary Affairs	
Petitions	

**ALTERNATIVES IN
DRAFTING AN EU
ADMINISTRATIVE
PROCEDURE LAW**

NOTE



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

LEGAL AFFAIRS

Alternatives in Drafting an EU Administrative Procedure Law

NOTE

Abstract

This note is based upon the work accomplished by the Working Group on EU Administrative Law of the Committee on Legal Affairs of the European Parliament. Having been invited to consider the Working Document drafted by the Group with critical observations and conclusions, the author wishes to acknowledge the excellent quality and usefulness of the Document, which gives a very accurate description of the State of Play in matters of EU administrative procedure law and makes clear and accurate recommendations. This note aims at highlighting those aspects where there are different options for in drafting an Administrative Procedure Law for EU institutions, bodies, offices and agencies, while indicating and giving reasons to the author's preferred solutions.

This document was requested by the European Parliament's Committee on Legal Affairs.

AUTHOR

Professor Jacques Ziller, Università degli Studi di Pavia

RESPONSIBLE ADMINISTRATOR

Danai PAPADOPOULOU
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: danai.papadopoulou@europarl.europa.eu

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-citizens@europarl.europa.eu

Manuscript completed in November 2011.
© European Parliament, Brussels, 2011.

This document is available on the Internet at:
<http://www.europarl.europa.eu/studies>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

CONTENTS	3
EXECUTIVE SUMMARY	5
1. PREMISES	7
1.1. The work of the European Parliament Working Group on Administrative Law	7
1.2. Vocabulary: An EU Administrative Procedure Law	7
1.3. Art. 298 TFEU	9
2. SCOPE OF AN EU ADMINISTRATIVE PROCEDURE LAW	10
2.1. Institutional scope	10
2.2. Policy Scope	10
2.3. Material scope	11
3. FORM OF AN EU ADMINISTRATIVE PROCEDURE LAW	12
3.1. Legal Instrument	12
3.2. Degree of Detail	13
3.3. One Act or Several Acts?	13
4. COORDINATION WITH EXISTING AND FUTURE SECTORIAL OR PARTIAL CODIFICATION	15
5. METHOD OF CODIFICATION	16
5.1. ‘Codification à droit constant’, ‘innovative codification’, ‘statements and restatements’	16
5.2. Including the European Parliament and Stakeholders at the Drafting Stage, Not Only at the Preparatory Stage	17

LIST OF ABBREVIATIONS

- APA** Administrative Procedure Act
- Charter** European Union Charter of fundamental rights
- ECJ** European Court of Justice
- EU** European Union
- TEU** Treaty on the European Union
- TFEU** Treaty on the Functioning of the European Union
- UK** United Kingdom
- US** United States
- USA** United States of America
- WGAL** Working Group on EU Administrative Law

EXECUTIVE SUMMARY

Background

This note is based upon the work accomplished by the Working Group on EU Administrative Law (WGAL) of the Committee on Legal Affairs of the European Parliament. The note refers to the Working Document "State of Play and Future Prospects for EU Administrative Law" (WD-State of Play) in the version of 19 October 2011. Having been invited to consider the Working Document with critical observations and conclusions, the author wishes to acknowledge the excellent quality and usefulness of the Document, which gives a very accurate description of the State of Play in matters of EU administrative procedure law and makes clear and accurate recommendations.

Aim

- The aim of this note is to illustrate alternatives that are to be considered in establishing an EU Administrative Procedure Law, as a binding general set of rules of administrative procedure for EU institutions, bodies, offices and agencies which is to be based upon art. 298 TFEU.
- As a possible alternative to an EU Administrative Procedure Law, soft law instruments would miss the purpose of providing for sufficient homogeneity across institutions, bodies, offices and agencies and establishing default rules to fill the gaps in existing and future sector specific regulations. An EU Administrative Procedure Law should be applicable to all institutions, bodies, offices and agencies. There seems to be no reason to exclude any policy field of the scope of an Administrative Procedure Law. Such a law should cover not only single decision making but also rule-making (the use of regulatory powers) as well as the adoption and management of contracts and agreements, and all the issues linked with information management.
- The appropriate legally binding instrument for an EU Administrative Procedure Law would be a regulation adopted in accordance with the ordinary legislative procedure, on the basis of art. 298 TFEU.
- One single instrument applicable across the range of issues would be preferable to different instruments for administrative decision making, rule making and contract. The most difficult issue with respect to the drafting of such a regulation concerns the degree of detail into which it needs to go.
- It is extremely important that the general Administrative Procedure Law contains the necessary clauses for coordination with other and future existing partial codification.
- Taking into account the sector-specific and issue-specific fragmentation of existing EU legislation and case-law and the gaps to be filled in existing law, a codification of EU Administrative Procedure Law makes only sense if undertaken as 'innovative codification', not as 'codification *à droit constant*'.
- In order to increase the legitimacy of an EU Administrative Procedure Law, Members of the European Parliament have a primary role to play along the entire pre-legislative and legislative process, starting with the preparation of a future instrument, not only in their capacity of co-legislator, but also in their primary role in ensuring accountability of EU institutions, bodies, offices and agencies. The European Ombudsman should also be involved along the entire process.

- Of utmost importance is the inclusion of the different representatives of 'the public' (including small businesses, individuals, practicing lawyers, etc.) and officials having front line experience of dealing with the public. Their consultation should not be limited to the preparatory stage of a proposal for a regulation: a mechanism for the review of drafts should be devised to ensure the input of these stakeholders, at the drafting stage and further on, as well as interested experts from practice and academia.

1. PREMISES

KEY ELEMENTS

This note is based upon the work accomplished by the Working Group on EU Administrative Law of the Committee on Legal Affairs. The expression 'Administrative Procedure Law' is best fit to communicate about a binding general codification of administrative procedure for EU institutions, bodies, offices and agencies which is to be based upon art. 298 TFEU.

1.1. The work of the European Parliament Working Group on Administrative Law

This note is based upon the work accomplished by the Working Group on EU Administrative Law (WGAL) of the Committee on Legal Affairs (JURI). The note refers to the Working Document "State of Play and Future Prospects for EU Administrative Law" (hereinafter 'the Working Document') in the version of 19 October 2011.

Having been invited to consider the Working Document with critical observations and conclusions, the author wishes to acknowledge the excellent quality and usefulness of the Document, which gives a very accurate description of the State of Play in matters of EU administrative procedure law and makes clear and accurate recommendations. This note aims at highlighting those aspects where there are different options for the EU Legislator while indicating and giving reasons to the author's preferred solutions.

This note is a continuation of previous work done by the same author for the WGAL¹. It also builds upon the notes prepared by other experts for the same Working Group, as well as on other work undertaken in different context by the author².

1.2. Vocabulary: An EU Administrative Procedure Law

The Working Document uses expressions like 'administrative law' or 'law of administrative procedure'. This choice is to be supported for its simplicity, as long as it is understood as referring to a legislative act on administrative procedure. The expression 'Administrative Procedure Law', which is suggested here, would be rendered in French by *Loi sur la procédure administrative*, in German by *Verwaltungsverfahrensgesetz*, in Italian by *Legge sul procedimento amministrativo* or in Spanish by *Ley de procedimiento administrativo*, for instance. This is the standard vocabulary used for codifications of administrative procedure in European continental countries.

¹ Ziller, Jacques, *Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law*, October 2010; Ziller, Jacques, *Is a law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects*, March 2011.

² See amongst others Ziller, Jacques, *Die Entwicklung des Verwaltungsverfahrenrechts in Frankreich* in Hill Hermann, Sommermann Karl-Peter und Stelkens, Ulrich (Hersg.), *Das Verwaltungsverfahrensgesetz im europäischen Kontext*, forthcoming, p. 141-154.

As an equivalent in the English language, the expression Administrative Procedure Act (APA) is often used, but it normally refers to the APA which has been adopted at federal level in the USA in 1946 and has had a very important impact on the entire development of US Federal administrative law, and quite some impact at State level. There is no equivalent piece of legislation in the United Kingdom or Ireland.

The use of the terms 'Law', or *loi*, *Gesetz*, *legge*, *ley* is legitimate for an EU instrument adopted in accordance with the ordinary legislative procedure, especially if one considers that it is building on fundamental rights, such as the right to good administration (art. 41 Charter) the right of access to documents (art. 42 Charter) and the right to an effective remedy and to a fair trial (art. 47 Charter). Indeed, as recalled by art. 52 (1) Charter³, formulating the conditions in which fundamental rights apply is a prerogative of the Legislator (this is known as *Gesetzesvorbehalt* in German legal thinking, *riserva di legge* in Italian law).

The use of an expression such as administrative procedure 'code' should be avoided, due to the lack of common understanding of the word 'code' in legal terms throughout Europe. In the context of public administration, a 'code' is usually a non-binding instrument in Ireland and the UK; in countries with a Latin language it would probably be perceived as relating to a binding instrument, but not always necessarily so, as there are also codes of ethics etc.; in the German language, 'code' is usually rendered by *Gesetzbuch* or *Ordnung* when it relates to a binding instrument. Furthermore, there are undoubtedly certain prejudices against codification – not only in so called *common law* countries like Ireland or the UK – which are often triggered by the use of the word 'code'.

Formally speaking, the envisaged legislative instrument could not be called anything but "Regulation" on administrative procedure for the EU institutions, bodies, offices and agencies. The expression "Administrative Procedure Law" is meant to be used in communication with a wider public, in order to underline the legislative character of the instrument.

³ "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

1.3. Art. 298 TFEU

As proposed by the Working Group on EU Administrative Law, an EU Administrative Procedure Law has an appropriate legal basis in art. 298 TFEU⁴. Art. 298 (2) is an innovation of the Lisbon Treaty. The EC treaty only contained a legal basis - taken over in art. 336 TFEU⁵, which extended the ordinary legislative procedure to their adoption - for the adoption of Staff Regulations and Conditions of Employment of EC officials and other servants.

An EU Administrative Procedure Law would be an excellent means to give content to the provision of art. 298 (1) which underlines the characteristics which the European administration should have, i.e. openness, efficiency and independence.

The establishment of a new legal basis in art. 298 (2) might have no effect if it were not used for such an instrument of a general nature, as there are other specific legal bases in the treaties for the adoption of acts guaranteeing openness, efficiency and independence, both in different policy sectors and on a horizontal basis: one may think among others of art. 15 (3) TFEU⁶ for openness (Provisions having general application), art. 322 TFEU⁷ (Financial provisions) for efficiency, or art. 336 TFEU⁸ (General and final provisions) for independence.

There seems to be no doubt that art. 298 TFEU might be used to regulate the procedure to be followed by the Union's institutions, bodies, offices and agencies. Whether and to what extent it could also serve for a general law on administrative procedures applying not only to direct administration (i.e. to the actions of EU institutions, bodies, offices and agencies) but also to shared administration (i.e. to the implementation of EU policies not only by its own institutions, bodies, offices and agencies but also by Member States' authorities) is debatable (the issue has been dealt with in previous work for the WGAL⁹ and will be very briefly addressed under section 2 of this note).

⁴ "1. 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.

"2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end."

⁵ "The European Parliament and the Council shall, acting by means of regulations in accordance with the ordinary legislative procedure and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union."

⁶ [...] "General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure. [...]."

⁷ "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:

"(a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts;

"(b) rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers.

"2. The Council, acting on a proposal from the Commission and after consulting the European Parliament and the Court of Auditors, shall determine the methods and procedure whereby the budget revenue provided under the arrangements relating to the Union's own resources shall be made available to the Commission, and determine the measures to be applied, if need be, to meet cash requirements".

⁸ "The European Parliament and the Council shall, acting by means of regulations in accordance with the ordinary legislative procedure and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union".

⁹ See note 1.

2. SCOPE OF AN EU ADMINISTRATIVE PROCEDURE LAW

KEY ELEMENTS

An EU Administrative Procedure Law should be applicable to all institutions, bodies, offices and agencies. There seems to be no reason to exclude any policy field from the scope of an Administrative Procedure Law. Such a law should include not only single decision-making but also rule-making (the use of regulatory powers), as well as the adoption and management of contracts and agreements, and all the issues linked with information management.

The purpose of an EU Administrative Procedure Law would be, as rightly set out by the Working Document¹⁰ "to make EU administrative procedures more coherent and provide more legal certainty and minimum guarantees for citizens and economic operators". Such a purpose should guide the scope to be given to such an instrument.

2.1. Institutional scope

In order to be useful, the Administrative Procedure Law should be applicable to all institutions, bodies, offices and agencies. As such a law should contribute to a good and efficient administration; its scope should correspond to the remit of the European Ombudsman's powers of investigation, of which no EU structure is exempted. The law should therefore include a definition of its institutional scope that would be as broad as possible, within the limits of the principle of conferral, obviously.

Such a broad scope would not impede each of the EU administrative structures to have complementary regulations adapted to their role, taking into account the density of their relationships with the public. The EU Administrative Procedure Law should include an appropriate clause clarifying its relationship with the relevant complementary regulations, which would be similar to the relationship between a legislative act and a delegated act according to art. 290 TFEU.

2.2. Policy Scope

There seems to be no reason to exclude any policy field from the scope of an Administrative Procedure Law.

There will probably be some interrogation about the inclusion or not of the common foreign and security policy. However, the specificity of that field would be better dealt with by a specific clause allowing for adaptations - if necessary - than by the exclusion of an entire policy field.

¹⁰ Recommendations, point 6.

2.3. Material scope

As explained in more detail in a previous note, codification of administrative procedure should include not only administrative decision-making (technically speaking, the expressions 'single decision making', or 'adjudication' are used by specialists in English administrative law language - administrative acts or decisions in most continental languages) but also rule-making (the use of regulatory powers), as well as the adoption and management of contracts and agreements, and all the issues linked with information management.

Most of the EU law principles and rules of administrative procedure that have been developed by the ECJ and are reiterated in art. 41 of the Charter on the right to good administration apply mainly to single decision-making or 'adjudication', i.e. to unilateral decisions affecting single interests of individuals, groups or businesses. The same is true of the European Ombudsman's European Code of Good Administrative Behaviour and of the relevant internal regulations of the EU Institutions. It would be wrong however, to deduct from this statement that an EU law of administrative procedure for single decision-making could be a mere codification of existing case-law and sector specific legislation. Choices have to be made between sometimes conflicting solutions of different sector-specific legislations, and a number of gaps also have to be filled.

There are a number of reasons to include rule-making (the use of regulatory powers) in an attempt to codify EU administrative procedure. Rule-making is a particularly important activity of the Commission and also of other EU institutions, bodies, offices and agencies in quantitative terms. Arts. 290 TFEU on delegated acts and 291 TFEU on implementing acts set a very specific Treaty framework to EU rule-making. Rule-making involves in very many cases not only the Commission or Council as holder of the executive function, but also other EU bodies, offices and agencies, and the Parliament as delegating institution, if one is to take the view that delegated acts belong to rule-making. Furthermore, there is a very important component of composite proceedings in EU rule-making: even if an EU Administrative Procedure Law only aims at regulating direct administration, it has to ensure compatibility with Member States' laws and regulation on administrative procedure when they are implementing Union law. Rule-making is a sector where the lack of coherence between different sector specific legislation and the scarcity of general principles in the case law of the ECJ calls for an effort in clarifying, restating and stating principles.

Contracts and agreements of EU institutions, bodies, offices and agencies are not limited to providing them with infrastructures, supplies and services: they have become a major tool of policy implementation in many important sectors such as research and technological development, development aid, judicial cooperation in civil matters, as well as in criminal matters and police cooperation, and more generally in the fields of supporting, coordinating and supplementing actions of the Union. Beyond the aspects of administrative procedure which apply to the award phase, there are numerous problems in the phase of contract management where there is a need for general principles of EU laws. There are often discrepancies between the rules applicable to such contracts, depending on where and by whom they have been concluded; furthermore, national law usually does not take into account the need for protecting the interests of all contracting parties.

Information management is central to a growing number of networks which involve EU institutions, bodies, offices and agencies on the one side, Member States' authorities, interests groups and NGO's on the other. Even if in many cases such networks do not formally participate in a procedure that may lead to the adoption of a decision, regulatory act or agreement, the information they provide to institutions, bodies, offices and agencies is a central factor in decision-making.

3. FORM OF AN EU ADMINISTRATIVE PROCEDURE LAW

KEY ELEMENTS

The appropriate legally binding instrument for an EU Administrative Procedure Law would be a regulation adopted in accordance with the ordinary legislative procedure, on the basis of art. 298 TFEU. The more difficult issue is that of the degree of detail into which a law on administrative procedure needs to go. There are at least four reasons that push towards one single instrument applicable across the range of issues to be dealt with.

This note does not discuss the possible use of soft law instead of a legally binding instrument, because a soft law instrument would not meet two of the main purposes to keep in mind in dealing with the issues of EU administrative procedure law: 1) the discrepancies between sector specific or purpose specific regulations, and 2) the lacunae in existing and future regulations, which need to be filled in a way that ensures legal security.

3.1. Legal Instrument

If the EU legislator chooses to adopt a law on administrative procedure with binding effect, there is no issue about the type of instrument, which has to be a regulation adopted in accordance with the ordinary legislative procedure, on the basis of art. 298 TFEU.

One issue for which there are alternative solutions is that of the complementary regulatory instruments that might be needed due to the general character of the rules and principles embedded in the Administrative Procedure Law (see point 3.2.). The question is whether establishing the complementary rules should be left to the internal regulation of each institution, body, office or agency, or if they should be embedded in a delegated regulation. In the case of the Commission and of executive agencies, a delegated act according to art. 290 TFEU would probably be the most appropriate solution. For other bodies, offices or agencies which are independent of the Commission by virtue of their status, a delegated regulation could be seen as resulting in an undue interference in their way of operating. The response therefore is probably to find the right degree of details in the legislative regulation in order to bind the bodies, offices or agencies when they adopt their internal regulations.

Another issue is that of acts without binding effects. The Working Document gives clear indications as to why a binding act is needed in order to meet the purpose of codification (see recommendations 5, 6, 7 and 9 of the Working Document), and on how to deal with the need for complementary plain language documents for the citizen (see recommendation 20 of the Working Document). In order to be clear about what has to be regulated by a binding act and what is better dealt with in non binding documents, it is worthwhile considering a mechanism to ensure that both types of provisions are drafted at the same time.

3.2. Degree of Detail

The more difficult issue is that of the degree of detail into which an Administrative Procedure Law needs to go. National experience in codification of administrative procedure¹¹ indicates that this is a difficult balance to strike.

The Working Document indicates in recommendation 9 that "(t)his general law should apply as a baseline *lex generalis* across the board to all areas of Union activity. It would have the advantage of filling any gaps in the system, with rules applicable by default. Such a law would bring clarity and greater simplicity to the legal situation which, through several decades of case-law, has grown extremely complex. It would give greater legitimacy to the decisions of the Union's administration thereby increasing the citizens' trust in the work of the Union. It would give the European Ombudsman a legally binding tool, as opposed to the current "soft law" codes, to fulfil its mission of fighting instances of maladministration". This statement is correct, but it needs further thinking in the process of a legislative initiative in order to flesh out its details.

If the general Administrative Procedure Law remains too much at the level of general principles, there are two risks:

- First, the margin left for complementary regulation of administrative procedure might be such that the purpose of ensuring homogeneity and clarification will be in the end defeated.
- Second, the officials in institutions, bodies, offices and agencies will probably simply ignore the Administrative Procedure Law and rather use the internal regulation or the guidelines for their application that are issued by their administration; if no such guidelines are issued by the institutions, bodies, offices and agencies, the officials will not find the necessary remedies in the default rules and principles that are formulated in the Administrative Procedure Law.

As a consequence, it would be advisable to formulate the rules and principles in a way that makes them applicable without the need of further guidelines for their application. This in turn includes the risk of going too much into detail. The length of the Administrative Procedure Act should not be considered to be necessarily in inverse proportion to its clarity: very often a short law is far more obscure than a long one, due to the number of its clauses which remain open for diverging interpretation. Nevertheless, the overall length of an Administrative Procedure Act should not be a deterrent for its use by the public and by front-line official. The only way out of these dilemmas is probably an appropriate procedure for the drafting of the general instrument (see section 5).

3.3. One Act or Several Acts?

As explained in more detail in a previous note (see above section 2), codification of administrative procedure should include not only single decision-making but also rule-making (the use of regulatory powers), as well as the adoption and management of contracts and agreements, and all the issues linked with information management.

An alternative option might be to have different instruments for single decision making, for rule-making and for contracts. Indeed, in some countries either the general law on

¹¹ See Ziller, *Is a law of administrative procedure for the Union institutions necessary?*, cit. above, p. 9-14.

administrative procedure does not cover all these fields, or there are different instruments for some of these.

There are at least four arguments in favour of a single instrument:

- First, many procedures include elements of single decision-making and rule-making, or single decision-making and contracts, or rule-making and contracts: typically the awarding phase of contracts is part of adjudication in conceptual terms, and the application of contracts usually depends to a high degree upon the application of general clauses common to all the contracts of an institution, body, office or agency.
- Second, many of the general principles of administrative procedure should apply across the board, as well to single decision-making, contracts or rule-making. Separate instruments would mean an unnecessary replication of the same clauses in different acts.
- Third, as one of the purposes of a codification of administrative procedure is clarification in a field where there exist a big number of separate instruments, sectoral as well as horizontal ones, a single instrument appears logically better fit for such a purpose.
- Fourth, as experience demonstrates, it is easier for the legislator to take into account the problems of coexistence of sometimes contradictory rules and principles if they are embedded in one single instrument than if they are embedded in separate instruments¹².

¹² A typical example is the coordination of the regulations on access to document and on data protection.

4. COORDINATION WITH EXISTING AND FUTURE SECTORIAL OR PARTIAL CODIFICATION

KEY ELEMENTS

It is extremely important that the general Administrative Procedure Law contains the necessary clauses for coordination with other and future existing partial codification.

The Working Document indicates in recommendation 7 that “ [...] a single general administrative law [...] is needed in order to provide a minimum safety net of guarantees to citizens in their interaction with the EU's administration” and in recommendation 9 that “it would have the advantage of filling any gaps in the system, with rules applicable by default”. These statements, which stem out of the preparatory work done by WGAL, are fully in line with the purpose of an EU Administrative Procedure Law.

It is therefore extremely important that the general Administrative Procedure Law contains the necessary clauses for coordination with other, future and existing, partial codification:

- First there should be very precisely drafted clauses indicating that the general law overrides existing contrary legislative or regulatory provisions and, if needed, the provisions for which there might be transition periods for the adaptation of existing rules.
- Second, as far as future regulation is concerned, there should be a clear clause indicating that deviation from the principles and rules of the general act can only result by express derogation to be inscribed in the future specific acts. There should also be a rule according to which delegated acts and executive acts may not deviate from the basic act, unless such basic act contains an express authorisation to do so.

The importance of these issues is such that they should not be considered as mere technical details, but should be dealt with at drafting stage on the basis of clear guidelines already indicated in a legislative initiative.

5. METHOD OF CODIFICATION

KEY ELEMENTS

Taking into account the sector-specific and issue-specific fragmentation of existing EU legislation and case-law and the gaps to be filled in existing law, a codification of EU law of administrative procedure can only be undertaken as 'innovative codification', not as 'codification *à droit constant*'.

In order to increase the legitimacy of an EU Administrative Procedure Law, Members of the European Parliament have a primary role to play along the entire pre-legislative and legislative process, starting with the preparation of a future instrument, not only in their capacity of co-legislator, but also in their primary role in ensuring accountability of EU institutions, bodies, offices and agencies. The European Ombudsman should also be involved along the entire process.

Of utmost importance is the inclusion of the different representatives of 'the public' (including small businesses, individuals, practicing lawyers, etc.) and officials having front line experience of dealing with the public. Their consultation should not be limited to the preparatory stage of a proposal for a regulation: a mechanism for the review of drafts should be devised to ensure the input of these stakeholders, at the drafting stage and further on, as well as interested experts from practice and academia.

5.1. 'Codification *à droit constant*', 'innovative codification', 'statements and restatements'

Taking into account the sector-specific and issue-specific fragmentation of existing EU legislation and case-law and the gaps to be filled in existing law, a codification of EU law of administrative procedure can only be undertaken as 'innovative codification', not as 'codification *à droit constant*'.

- '*Codification à droit constant*' – a technique which has been especially developed in France over the last three decades – amounts to establishing a legally binding consolidated version of existing legislation. As a technique, it is close to the consolidation technique used in the framework of EU legislation. '*Codification à droit constant*' is mainly a technical endeavour which can be undertaken without involving the Legislator. The latter only formally adopts the text which has been prepared by technicians. The main advantage of this technique is that codification is not dependent upon the work-load of the Legislator, which only formally adopts a text that is not being amended. Therefore '*codification à droit constant*' is a method suited to rapid codification of existing law, when its main purpose is clarification of, and easier access to, law. The main drawback of the method is that it does not allow for changes in legal rules: this is a paradox with important consequences, as the codification exercise itself usually reveals contradictions and gaps in existing law. Furthermore, '*codification à droit constant*' is usually not legally adapted for a codification of case-law.
- 'Innovative codification' is the exercise whereby a new law takes over existing principles which are usually dispersed in different laws and regulations and in the case law of courts, and modifies existing principles and rules if needed, adding new principles or

rules, if necessary. 'Innovative codification' has the advantage that it allows resolving contradictions and filling gaps. Its main drawback is that, in order for the codification to have legally binding value, it needs to be adopted by the legislator, which implies allowing time for the necessary debates and votes. Furthermore, innovative codification may be diverted from its purpose if the different institutions involved in drafting the law of administrative procedure try and use the opportunity to adopt principles and rules that are outside the primary scope of the act.

- A non-legally binding type of codification, called 'restatements', is being used in the USA. "*In the United States, the notion of a Restatement of the Law has traditionally signified a consolidation of the principles of [judge-made] law governing a given field with a view to bringing a measurably greater degree of clarity, consistency and simplicity to the law than would otherwise exist – without, however, any pretense that such a consolidation amounts in itself to positive law*"¹³. Both the fact that a big part of the relevant EU law is not judge-made law, and, more importantly, that a number of important gaps in the existing law have to be filled, the ReNEUAL Network, which has been set up by academics with the goal of providing support to endeavours of codification of administrative procedure at EU level, has opted for the formula 'statements and restatements' for its work, which is intended as a support to codification by the legislator¹⁴.

5.2. Including the European Parliament and Stakeholders at the Drafting Stage, Not Only at the Preparatory Stage

As already stated in a previous note by the same author¹⁵, in order to be relevant, coherent, as exhaustive as possible, and compatible with Member States' law on administrative procedure, an EU Administrative Procedure Law needs an important preparatory work with the participation of:

- Practitioners;
- Judges;
- Representatives of addressees and other stake-holders;
- The European Ombudsman;
- The European Data Protection Supervisor;
- Academia: experts in European Administrative Law and in comparative administrative law;
- Last but not least, the European Parliament.

Preparatory work could be supported by statements and restatements and best practice guidelines¹⁶.

In order to increase the legitimacy of an EU Administrative Procedure Law, Members of the European Parliament have a primary role to play along the entire pre-legislative and

¹³ Bermann, George, *A Restatement of European Administrative Law: Problems and Prospects (2009)*, available on <http://www.reneual.eu/>

¹⁴ See *Towards Restatements and Best Practice Guidelines*, cit. above, p. 10.

¹⁵ See Ziller, *Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law*, cit. above.

¹⁶ See Ziller, *Is a law of administrative procedure for the Union institutions necessary?*, cit. above, p. 9-14.

legislative process, starting with the preparation of a future instrument, not only in their capacity of co-legislator, but also in their primary role in ensuring accountability of EU institutions, bodies, offices and agencies. The European Ombudsman should also be involved along the entire process.

One of the consequences of the lack formal right of initiative of the European Parliament in the ordinary legislative procedure is that the Parliament has only a limited influence on the formal preparation of an EU act. In the case of an Administrative Procedure Law it is therefore of particular importance to insist, already at the stage of a legislative initiative, upon the fact that the preparatory work cannot be limited to the internal work of one of the main addressees of such a regulation, i.e. the Commission, regardless of the quality of established procedures.

Of utmost importance is the inclusion of the different representatives of 'the public' (including small businesses, individuals, practicing lawyers, etc.) and officials having front line experience of dealing with the public. Their consultation should not be limited to the preparatory stage of a proposal for a regulation: a mechanism for the review of drafts should be devised to ensure the input of these stakeholders, at the drafting stage and further on, as well as interested experts from practice and academia.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

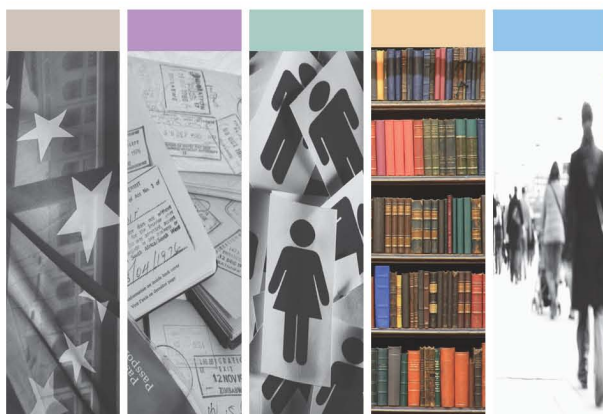
Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu/studies>

PHOTO CREDIT: iStockInternational Inc.



ISBN
doi: