



EUROPEAN RISK FORUM – COMMUNICATION 10

**LAW OF ADMINISTRATIVE PROCEDURES – OBSERVATIONS ON THE
EUROPEAN COMMISSION’S RESPONSE TO THE EUROPEAN PARLIAMENT
RESOLUTION**

August 2013

European Risk Forum

The European Risk Forum (ERF) is an expert-led and not-for-profit think tank with the aim of promoting high quality risk assessment and risk management decisions by the EU institutions, and raising the awareness of the risk management issues at EU-level.

In order to achieve this, the Forum applies the expertise of a well-established network of experts to 'horizontal', cross-sectoral issues. In particular, it addresses regulatory decision-making structures, tools and processes, as well as the risks and benefits of new and emerging technologies, of climate change, and of lifestyle choices.

The Forum believes that:

- High quality risk management decisions should take place within a structured framework that emphasises a rigorous and comprehensive understanding of the need for public policy action (risk assessment), and a transparent assessment of the workability, effectiveness, cost, benefits, and legitimacy of different policy options (risk management).
- Risk management decision-making processes should ensure that outcomes are capable of meeting agreed social objectives in a proportionate manner;
- Risk management decisions should minimise negative, unintended consequences (such as new, unintended risks, economic losses, reduced personal freedoms, or restrictions on consumer choice);
- The way in which risk management decisions are made should be structured, consistent, non-discriminatory, predictable, open, transparent, evidence-based, legitimate, accountable, and, over time, subject to review.

Achieving these goals is, the Forum believes, likely to require extensive use of evidence (especially science); rigorous definition of policy objectives; clear and comprehensive description and assessment of problems and their underlying causes; realistic understanding of the costs and benefits of policy options; and, extensive consultation.

The Forum works with all of the EU's institutions to promote ideas and debate. Original research is produced and is made widely available to opinion-formers and policy-makers at EU-level. As an expert group, the Forum brings together multiple sources of evidence (such as the experience of practitioners and policy-makers; non-EU good practices; and academic research) to assess issues and to identify new ideas. Indeed, direct engagement with opinion-formers and policy-makers, using an extensive programme of conferences, lunches, and roundtables, is a feature of the Forum's work.

The ERF is supported principally by the private sector. The ERF does not seek to promote any specific set of values, ideologies, or interests. Instead it considers high quality risk assessment and risk management decisions as being in the public interest. An advisory group of leading academics supports the ERF's work.

1. INTRODUCTION

In response to an Own Initiative report supported by the Committee on Legal Affairs, the European Parliament has passed a resolution calling for the European Commission to bring forward an EU-level Law of Administrative Procedure (LAP).

The inspiration for the LAP is Article 298 of the Lisbon Treaty. This provides the legal basis for a law to ensure good administration. The JURI committee of the EP set up a working group to examine the existing situation and concluded that citizens were disadvantaged when dealing with the EU's institutions because of a lack of enforceable rights. It did not, however, conclude that there was evidence of maladministration.

The EP has adopted a resolution urging the European Commission to bring forward an LAP, using Article 298 as the legal basis. The EP concluded that existing codes of practice and other forms of soft law were not adequate to ensure minimum standards of good administration. The resolution emphasised the need for a law which set out sound, legally-binding principles with wide application.

Extensive academic research underpinned the EP's conclusions. An overwhelming majority of MEPs supported the proposals in the plenary session, recognising the need to strengthen legitimacy and trust in governance in an era of growing euro-scepticism in Member States.

The EP's resolution requests the Commission to develop an LAP that sets out minimum standards for due process and principles of good administration. One of the goals of the LAP should be, the EP argues, the clarification of the role of the European Court in ensuring that the EU's institutions meet minimum standards of good administration and due process.

The Commission has responded to this request, setting out its analysis of the resolution, its response to the requests, and its proposed actions. A committee of the European Parliament reviewed the Commission's comments during June 2013.

This note comments on some of the issues raised by the Commission in its response to the resolution of the European Parliament. It also makes a number of recommendations.

2. COMMISSION RESPONSE

At this stage, the European Commission does not propose to bring forward a legislative proposal. Instead, it proposes to undertake a stock-taking exercise. It implies in its response, moreover, that any new law would need to be justified by evidence of maladministration.

Taking things further, the Commission's response hints that even if such evidence were to be found, then greater transparency alone might be sufficient to resolve any problems, because of the extensive array of existing principles and rules which already govern the Commission's administrative practices.

Whilst no explicit rationale is provided by the Commission to support these views, they may reflect two potential concerns of senior officials:

- More litigation in the EU courts, slowing down or defeating the process of regulating; and,
- Limits on the discretion of the EU's executive function to take actions it deems necessary to achieve the objectives of the Treaty.

3. OBSERVATIONS

3.1. COMMISSION RESPONSE AND CONCERNS

As part of a dialogue with the EU institutions aimed at developing wider support for the LAP and recognising the potential concerns of officials, it is useful to highlight the following points

- The primary purpose of a LAP is improved decision-making. It is not being advocated by the European Parliament because of evidence of maladministration, nor does support for it suggest that employees of the institutions are bad people or doing a bad job, or that they are not committed to acting in the public interest.
- A LAP does not impede the efficiency of the operation of government. Rather, it improves the functioning of the administration of government because rights of citizens are protected, triggering innovation and higher quality decision-making by regulators. The main cause of inefficient government is poor quality secondary legislation: too ambitious, too prescriptive, over ambitious, poorly drafted.
- A LAP places pressure on regulators to improve decision-making processes, thereby reducing litigation and delay. Trust and legitimacy are also enhanced. There is no acceptable trade-off between 'efficiency' of administration and the right of citizens to be governed well. Without the recognition that governments are the servants of citizens and hence require consent for all of their actions, then public policy lacks legitimacy. Consent cannot be assumed; it must be continuously refreshed.
- A LAP can help address widespread euro-scepticism in Europe, as well as make EU decision-making respond better to the expectations of citizens. This is an opportunity to enhance the accountability and legitimacy of the EU's institutions, by taking action to reform a well-established governance weakness.
- A further stock-taking exercise, as proposed by the Commission, is likely to be long and inconclusive. Moreover, if it is to produce meaningful evidence, it needs to be set within a wider context that compares existing rules, principles, and guidance with the primary purpose of an LAP.
- A working group, reporting to the EP Committee on Legal Affairs, has already undertaken a comprehensive stock-taking exercise for the European Parliament.

In the light of this, it is difficult to see, at this stage, what additional substantive outcomes a new process will deliver. (Appendix A summarises the findings of the group.)

- In its longer-term response to the Parliament, the Commission should respond positively to opportunities to enhance the accountability and predictability of decision-making, and to place its authority as the guardian of the Treaty and the EU's regulator on an even stronger legal basis.
- A LAP would not erode the Commission's "right of initiative". Rather, it would enhance the quality of decision-making when substantive legislation is implemented. It would, however, play a part in limiting administrative discretion and unpredictability during this phase of the policy cycle. By doing this, a LAP would support the overall goals of the Commission's Smart Regulation agenda and the European Union's desire to stimulate innovation.
- Transparency is critical. Citizens must know the basis of decision-making by governments. However, in the light of the scale and nature of the weaknesses identified by the EP Working Group, internal efforts, including technological improvements, by the EU's institutions to create greater transparency are unlikely deliver any substantive improvement in the quality of public administration or of decision-making. Access to information and other principles of good administration depend primarily on procedural, legally enforceable requirements.
- As it stands, the EP's resolution seeks to establish minimum standards of good administration, even when procedural guarantees exist. This could lead to such standards being set at a very low level. An alternative and more desirable approach is set out general standards from which any departure must be justified. Any departures should, moreover, be capable of being justified in front of the EU Court. This approach should, if adopted, facilitate the creation of higher general standards. The Commission should champion such an approach.
- Rights of citizens to good administration should receive equal treatment, regardless of how EU-law is implemented. This is not currently the case. Most Member States have adopted national LAPs. These have achieved a number of goals, including making executive action more efficient by ensuring horizontal consistency in implementation processes. A further benefit is that it makes the overall legal system simpler and more transparent for citizens.
- Evidence from the USA, where the Administrative Procedures Act has been in force for more than 50 years, suggests that a EU-level LAP is unlikely to increase litigation. In contrast, the US experience suggests that the most important driver of litigation is poorly drafted, over-prescriptive primary legislation.
- In the current circumstances, when the EU faces a crisis of credibility and legitimacy, the EU's institutions must demonstrate a willingness to change and to establish modern governance laws and standards. It is inappropriate, at this time, to appear to defend existing practices. Indeed, the EU institutions should not be seen by citizens, businesses, and opinion-formers as hostile to change or supportive of old-fashioned, closed, and opaque decision-making processes.

3.2. LAW OF ADMINISTRATIVE PROCEDURES – NATURE AND PURPOSE

A Law of Administrative Procedures (LAP) is a general law on executive law-making: a law setting out how laws should be made. It covers legislative and non-legislative acts. At its simplest, a LAP sets out the procedures on how regulators write the rules that implement laws in the real world.

There is a growing need for a LAP at EU-level. In the face of growing scepticism about the value of the EU institutions, action is needed to enhance the legitimacy of decisions and to make the regulatory process more predictable and robust. At the same time, the EU regulatory ‘machine’ faces new challenges and pressures, as it seeks to implement highly complex legislation. Greater regulatory effectiveness depends on more transparency and participation. And, finally, the legal framework is now in place because the Lisbon Treaty and the Charter of Fundamental Rights provide the basis for a LAP.

A LAP is an essential institutional feature of modern, democratic and effective governments. It places legally enforceable limits on the way in which governments exercise their administrative powers, particularly the rule-making and enforcement decisions taken by the executive function to implement complex laws. It clarifies and protects the rights of citizens and businesses when governments take actions that affect them directly, establishing clear procedural due process and strengthening judicial review. In doing so, it improves the relationship between decision-makers and administrators and the stakeholders that they serve, thereby enhancing the quality of decision-making and increasing the likelihood that legislative objectives will be achieved.

A well-designed Law of Administrative Procedures enshrines in law the principles of good administration. These include:

- **Transparency and consistency** – citizens and entities affected by administrative decisions should know what actions are planned and when they are to be undertaken, so that they can provide input to officials and participate meaningfully early on in the decision-making process.
- **Public participation** – citizens and affected entities should have a meaningful opportunity to comment on all proposed rules and adjudications.
- **Public record** – administrative decisions should be based solely on the information set out in the publicly available record. This should include all comments submitted by citizens, affected entities, along with all other information the government relies upon and the response of the government to public comments. Decisions should not rely on information that is not available for public comment and public comments should not be ignored.
- **Accountability** – citizens and affected entities that have submitted comments should have the right to seek impartial and accountable conflict resolution, including independent administrative and judicial review of decisions to ensure that correct procedures have been followed, that decisions are substantially in accordance with authorising legislations, that decisions have been rationally based on the publicly available record (ensuring that governments cannot justify

decisions based on the views of experts or other inputs not subject to public comment), and that comments from the public have been taken into account.

Good administration, anchored in a properly implemented LAP, increases the predictability, transparency, effectiveness, and legitimacy of government decisions. It ensures that a systematic and consistent approach is taken to decision-making, ensuring higher quality decisions and reducing the risk of regulatory failure. The adoption of a LAP encompassing the EU's institutions and bodies is also likely to sustain the introduction and embedding of regulatory tools, such as strategic planning and programming; minimum standards for public consultation; as well as ex ante and ex post impact assessments. Judicial review mechanisms are also strengthened, contributing to greater accountability in decision-making.

Some of the structural weaknesses of the existing approach to implementing substantive legislation are included as Appendix B.

4. LAP – WIDER BENEFITS FOR THE EU

A LAP, if properly designed and implemented, would complement the “Smart Regulation” strategy, improving the consistency, predictability, and quality of regulatory decisions.

Specifically, an EU-level LAP would improve governance in a number of specific ways:

- It would help the Commission consolidate existing regulatory process management standards. Historically these have been set out in rules of procedure and other forms of soft law;
- It would provide the Commission with more robust evidence, arguments and processes to justify regulatory decisions in its dealing with other institutions and public bodies, as well as with stakeholders at the national, EU, and international levels;
- It would provide support for reformers in the Commission as they seek to standardise good administrative practices across all Services; and,
- It would help achieve, amongst all of the EU's institutional actors involved in decision-making, a more coherent, and harmonised approach to the Smart Regulation strategy, ensuring consistent standards of good administration when all EU institutions are involved in making regulatory decisions; and,

Improvements in overall EU governance and administration, and in particular in the area of risk management, will ensure that citizens are better protected from potential harms whilst innovation will be encouraged (through greater predictability in R&D investments and enhanced legal certainty). Over time, this will help enhance the legitimacy and effectiveness of the EU's institutions, especially in times of crisis when trust in public authorities is critical.

5. RECOMMENDATIONS

In place of the existing proposal, it is suggested that the Commission take the following steps:

- Draw up the fundamental principles of an EU-level LAP, embedding the principles of good administration;
- Recognise that a LAP will help to enhance the Commission's legitimacy through improved accountability;
- Begin to look at what type of LAP would be most appropriate, accepting that, although the EU is a distinct legal model, lessons can be learned from other jurisdictions;
- Add the LAP to the Commission work plan, even though this is a long-term project;
- Develop a road map, setting out milestones and a timetable;
- Establish an expert group with the legal services of the other institutions and the ECJ to create an inter-institutional consensus, being prepared to use an unusual approach because of the importance of the topic; and,
- Ensure that any LAP proposal does not create a disproportionate administrative burden, or break the dynamic of EU political and economic integration.

**European Risk Forum
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Richard Meads, the European Risk Forum's Rapporteur, wrote this Communication. However, the views and opinions expressed in this paper do not necessarily reflect or state those of the European Risk Forum or its members.

LAP – KEY FINDINGS OF EP WORKING GROUP

A working group, reporting to the Committee on Legal Affairs, has reviewed the current situation and made the following proposals¹:

- Existing, “soft law” administrative procedures and requirements do not, on their own, sufficiently protect the right of citizens and businesses to good administration;
- Citizens and businesses are faced increasingly with direct action by the EU’s institutions without having corresponding procedural rights and the legal means to challenge them;
- Article 298 of the Lisbon Treaty provides a legal basis for the establishment of a LAP. It requires “open, efficient, and independent European administration” and allows the Parliament and Council to establish provisions to achieve it.
- A single general LAP is required, based on Article 298. It should be binding on all of the Union’s institutions, bodies, and agencies;
- The new law should provide a minimum safety net of guarantees to citizens and businesses in all of their direct dealings with the EU;
- The scope of the law should encompass all policy areas and all types of decisions, including rule-making and adjudications;
- A new law should focus on establishing sound general principles – a ‘horizontal’ framework for good administration; and,
- The law should be drawn up using “innovative codification” whereby existing, dispersed principles are adopted and, where necessary, modified and expanded.

¹ A more extensive description of these findings and recommendations is set out in the report, EP Working Group on EU Administrative Law ‘State of Play and Future Prospects for EU Administrative Law’ (working document, 2011)

EU IMPLEMENTATION DECISIONS – STRUCTURAL WEAKNESSES

The lack of enforceable process standards places the quality and consistency of EU administrative decisions at risk. Specific, structural weaknesses in the process of making implementation decisions at EU-level include:

- Continued barriers to meaningful input by the public in decision-making processes, including inadequate public notice of consultation opportunities, and web-based commenting procedures that limit the length and detail of comments;
- Absence of formal “public dockets” where all of the information relied upon by decision-makers is collected and is available for public review;
- Ability of decision-makers to rely on information that is not made available to the public and hence is not subject to public review and comment;
- Ability of decision-makers to rely on input from “experts” whose appointment is not subject to defined standards or review, and whose input is often not subject to formal public review and comment;
- Limited obligation by decision-makers to explain the legal and factual bases of for their decisions, including responding to comments made by the public;
- Severe constraints on the ability of EC courts to meaningfully review such decisions because there is no clearly defined factual/technical record upon which the public has had an opportunity to comment and on which decision-makers have relied; and,
- Formal ‘standing’ to bring direct actions in EU courts remains limited.