Towards an Administrative Procedure of the European Union: Issues and Prospects

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Abstract: This article aims at identifying European administrative law principles by mapping the proposal of the European Parliament and assessing the existing principles in the European Union's rules and jurisprudence. The first section analyses the difficulties to pass from the well-known sectoral procedures to a common procedural framework. It shows, on the one hand, how fragmented is the administrative EU law, and on the other hand, that European Commission tends to support it by derailing the Parliament's proposal. The second section, is mapping the administrative law principles through an inventory of the Treaties, the Charter, the soft law and the jurisprudence. The last section proposes an assessment of the draft Regulation on the administrative procedure of European Union. The main outcome is that, without the Commission's involvement the process of making a common administrative procedure for European Union cannot take place.

Keywords: sectoral procedures; rights and duties; administrative law principles

1. Introduction

Legal doctrine and European Union practice are constantly preoccupied to systematise and simplify the administrative law in a context characterized by the redundancy of normative texts, but unfortunately this concern has not found support at the decision-maker's level. The limits of administrative procedure are given by the regulatory technique of administrative law – more often the European Union acts include both positive rules and procedural rules. Although the administrative law is a highly mobile branch of law has to promptly adapt to the accelerated dynamics of economics and social changes which characterizes the contemporary society. Likewise it has to deal with the continuous movements of the European Union.

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Therefore, we consider a priority of the European Union to adopt rules of procedure relatively general (for all EU entities) and to remove the chaos created by the disjointed multitude of existing norms. Only through them we can eliminate the lack of consistency and clarity, and introduce a uniform terminology corroborating rules, concepts and specific legal administrative procedures. It will stabilize the decision making process of European's administration and will build procedural principles, usually recognised in the jurisprudence of European Union Court of Justice.

2. Fluctuating between Sectoral Procedures and One Common Administrative Procedure

By guaranteeing protection of the parties and European Union's interest in the sense of legal certainty and predictability, the enactment of administrative procedures is the first precondition for an efficient administrative decision-making of European's administration.

European administrative law evolved from non-written general principles common to the constitutional (administrative) traditions of the Member States to core principles of the European administrative law which include proportionality, legal certainty, protection of fundamental rights, non-discrimination, fair administrative procedure and efficient judicial review. All of them are standards of a modern administrative law common to those of the Member States. Principles are not absolute in their content, but they are a value base for the proportional behaviour of EU institutions and differ with each individual case. Despite the national states common endeavour to remove the administrative barriers, fundamental and modern administrative law principles have to be effective and equivalent in EU law.

In 1925 Austria adopted the first code on administrative procedure which was preceded by the Spanish attempt to codify (October, 1889, known as the Azcárate Law after the MP who proposed it). Because the Law was so general and imprecise it was replaced by the Law on Administrative Procedures of 17 July 1958, which is still in force as amended. 40th years ago Germany adopted a similar code and was followed by other countries (Hungary (1957), Poland (1960), Denmark (1986), Italy (1990), Portugal (1991), Netherlands (1994). Moreover, starting with the 1st of January 2017 a new code of the relations between the public and administration will enact in France. European Union cannot lags behind the Member States, although it played a leading role in establishing the administrative principles of the European

Administrative Space (EAS) since the first constitutive Treaty (1951, ECSC, Paris). (Ziller, 2016, p. 3)

The fact is that Union administrative law is fragmented. Only a few areas of the Union's administrative activities are subject to a systematic approach and there are many gaps and uncertainties. The Charter of Fundamental Rights of the European Union (the Charter) in article 41 enshrines the right to good administration and also sets out in its content certain principles and rights: the principles of fairness, impartiality and timeliness, the right to be heard before a negative decision is adopted, the right to have access to one's file, the duty to provide reasons, the right to be compensated for damages caused by the Union's institutions, and language rights. Moreover, based on article 298 TFEU the institutions, bodies, offices and agencies of the Union have the support of an open, efficient and independent administration.

Therefore, European Parliament in its legislative initiative resolution from 15th of January 2013 called European Commission for a regulation establishing a common EU administrative procedure for all institutions, bodies and agencies. The new regulation had to codify the relation of all EU entities with the public and aim to guaranty the right to good administration. The future administrative procedure have to be applicable as a *de minimis rule* if specific norms are not enforced or as a *lex generalis* across the board of all Union's administrative procedures (Panizza, 2015).

The draft Regulation is not intended to applied to the administrations of the Member States and to the legislative procedures, judicial proceedings or procedures for the adoption of delegated acts, implementing acts or non-legislative acts based directly on the Treaties. Similarly, the draft Regulation does not in any way, want to replace Union's law there are already rules of administrative procedure. (Ziller, 2016, p. 4)

But, even the doctrine and the Parliament called for a draft Regulation, the Barrosso Commission refrained. The new Commission, after Commissioner Timmermans committed, in his hearing in the Parliament in October 2014, to examine the possibility, in May 2016 declaired that "remains open to an EU administrative law". The European Parliament adopted in June 2016 a Resolution for an open, efficient and independent EU administration and asked the Commission to present a legislative proposal to be included in the 2017's programme. A proposal for a Regulation was drafted with the Resolution by a working group of the Legal Affairs Committee (JURI), set up in 2013, and contained a set of administrative rights and obligations which the Parliament wanted to see in place.

Unfortunately the Commission's answer, given in October, 2016, was that: "at this stage, is not convinced that the benefits of using a legislative instrument that would codify administrative law would outweigh the costs … codification is likely to lead to problems of delimitation between the general and specific rules – not making legislation any clearer or litigation any easier for citizens and businesses affected" … and so, the Commission "should continue to address concrete problems where they arise, analyse the root causes and then take the sort of action that is needed".

Moreover, the Commission pretended that this new regulation will removes the flexibility required to adapt to particular needs. In its text analysis the Parliament failed to identify which are the gaps and inconsistencies in current law, and why this horizontal legislative solution is needed. The drafted Regulation, in the Commission's opinion, does not provides any legal mechanism to ensure delimitation between the general and the specific rules and also suggests that a case-by-case analysis would continue to apply. In addition, one more pertinent argument was that is difficult to identify administrative activities of the institutions and bodies that would be subject to the new rules."

By the end of the year 2016, the new draft Regulation on the Administrative Procedure of the European Union's institutions, bodies, offices and agencies was derailed by the European Commission.

3. The Redundancy of the European Union's Administrative Law Principles

For European Union administration purpose it is therefore primarily necessary to recall the sources of general principles of EU administrative procedural law before trying to indicate what form should they take in the EU normative system.

Rules and/or principles of EU law that focus on administrative procedures or relevant for administrative procedure are embedded in hard core of EU law, more specifically in:

- the European Union Treaties: art. 2 TEU on the rule of law; art. 5 (4) TEU principle of proportionality and Protocol 2; art. 296 (2) TFEU which states the obligation of the reason giving; art. 11 and 15(3) TFEU stipulates the principle of transparency (former the publicity); art. 1 and 10 TEU and 298 TFEU embeds the principle of openness and participatory democracy; art. 340 TFEU non-contractual liability;

- the Charter of Fundamental Rights of European Union: art. 8 on protection of personal data; art. 20 on equality in front of the law; art. 21 on non-discrimination; art. 41 on the right to good administration (for which the European Ombudsman designed a Code which was approved by the European Parliament in 2001); art. 42 the right to access documents; art. 43 on the European Ombudsman; art. 47 on the right to an effective remedy and to a fair trial; art. 48 on presumption of innocence and the right of defence; art. 52(1) on the principle of legality; art. 41(1) on the duty of care; art. 41 (2)(a)(b) the right to a fair hearing; art. 47 the right to an effective remedy.

Principles which are equally of particular relevance for administrative procedure are stated in the soft law instruments especially in code of conducts, in guidelines, communications etc. (e.g. Regulation no. 31 (EEC), 11 (EAEC), on the staff regulations of officials and the conditions of employment of other servants of the european economic community and the european atomic energy community, Code of conduct for Commissioners, European Commission Code of good administrative behaviour – relations with the public). Also, some rules are contained in EU international agreements such as the Aarhus Convention on access to information, public participation in decision-making and access to justice in environment matters which establishes the right to participate in environmental decision-making and the right to review procedures.

Many principles have been expressly qualified as such first of all by the European Union Court of Justice on the basis of the comparative study of administrative law or from the Constitutional common provisions of the Member States. The recognition of general principles of EU law by the Court took place against the background of profound changes in EU law and policies. (Hofmann, 2014, p. 5) The most important developments, within the Court, in the recent years have been done in the area of the fundamental rights. (Tridimas, 2006, p. 9)

4. The Lack of Flexibility or the Diffuseness of the Administrative Procedure of the European Union

Over the years, the European Union's entities developed an extensive number of sectoral administrative procedures, in the form of both binding provisions and soft law, without necessarily taking into account the overall coherence of the system. This complex variety, resulted in gaps and inconsistencies led the European

Parliament to the drafted Regulation. Taking into account the importance for the citizens, the well-developed administrative procedures of the Member States and the quest of European Union for good administration in the following lines we will present shortly the content of the Parliament's proposal. Even if the number of countries having an administrative procedure codification, tends to increase in the last two centuries, the European Union will not be ready to adopt one in the near future (according to European Commission and not to the legislative bodies – Parliament and Council).

The need to depart from this sector-specific approach and to ensure consistent EU administrative procedures has therefore started to be debated in the academic sector as well as within the EU institutions. In this respect, we will follow how the Parliament managed to accomplish the norms of art. 298 TFEU and to guarantee, in the same time, access to information and access to documents, access to the file, duty of care, data protection, data quality, effective remedy, equal treatment and non-discrimination, fair hearing, fairness, good administration, impartiality, legal certainty, legality, legitimate expectations, participatory democracy, proportionality, reason giving, rule of law, timeliness, and transparency.

The scope of the regulation was reduced *stricto sensu* only to the administrative activities and acts excluding the other European Union procedures and the administration of the Member States. Within its provisions (art. 3) is stated that will fill the gaps and helps interpreting of existing Union secondary law for more coherence. Which means that will be applied without changing anything in the procedure, only it adds more actions to be done by the institutions, bodies, offices and agencies. In art. 4 the proposal defines administrative procedure as the process by which "the Union's administration prepares, adopts and enforces administrative acts".

As well as the other sectoral procedure, the administrative one can be initiated by the administration or by one of the concerned parties (art. 5). In the case of administration's initiative in art. 6 is specified that the competent authority will examine the circumstances, but the provision lacked in establishing who will be the competent authority i.e. the one who adopted the administrative act, the hierarchical one or an independent one. It just defined in art. 4 (e) as the Union's entities "responsible with the administrative procedure". Moreover, according to art. 7 par. 5 if a competent authority considers that is not the responsible one to deal with the issue described in the party's application transmits the application to the competent

authority and announce the party about this. How can we determine if a matter is in the authority's competence or not, JURI did not mention in the draft or in the explanatory memorandum.

Furthermore, starting with art.6 in the draft Regulation a new kind of Union's entity is mentioned "the authority" even art. 4 (b) establishes that the Union's administration means "the administration of the Union's institutions, bodies, offices and agencies". We consider that having as model the national administrative procedures the initiators deprived some terms and concepts by their proper European Union legal understanding.

As it concerns, the elements which must be mentioned in the intimation (decision or application) art. 6 and 7 are providing a list of them in which are included:

- the reference number and the date;
- the description of the main procedural steps;
- the name and contact details of the responsible member of staff;
- the time-limit for the adoption of the administrative act and the consequences of any failure to adopt the administrative act within the time-limit;
- the address of the website (referred to in Article 28), if such a website exists.

Besides, these elements the Union's entity must mention the subject matter and purpose of the procedure, the competent authority, the remedies available; and the interested party must mention the date of receipt of the application.

In order to respect a general principle – the legal certainty, the prescription time-limit to initiate the administrative procedure for Union's entities was set for 10 years after the date of the event. Unfortunately, in the explanatory memorandum the initiator lacked to mention how this time-limit was determined.

Based on the administrative efficiency, in art. 7 it is stipulated that unfounded applications can be rejected as "inadmissible by means of a briefly reasoned acknowledgment of receipt".

In the third chapter, designated to establish the management of the administrative procedure, more than half of the provisions are about the procedural rights (also the subsequent ones) and their correlative duties. In order to enhance their understanding we assemble them in the following table.

Table 1.1. The procedural rights and their correlative duties

The procedural rights of the party	***The duties of the competent authority***
To be given all the relevant information - art.8 (a).	To investigate careful and impartially by gathering all necessary information to adopt a decision – art. 9, par. 1. To send sufficient information for the party who is going to be heard – art. 14, par. 2. To notify the parties about the administrative acts which affect their rights and interests, as soon as they are adopted – art. 21.
To communicate and to complete all procedural formalities at a distance and by electronic means – art. 8 (b).	To receive submitted application in writing, either on paper or by electronic means – art. 7, par. 2. To promote the provision of updated online information on the existing administrative procedures in an ad-hoc website, wherever possible and reasonable, free of charge – art. 28.
To use any of the language of the Treaties – art. 8 (c).	To receive the application drafted in one of the languages of the treaties – art. 7, par. 2 and to be addressed in the language of the Treaties of the party's choice – art. 8 (c) but with the condition that the languages of the Treaties corresponding to the Member States in which the parties are located – art. 6, par. 5.
To be notified of all procedural steps and decisions that may affect them – art. 8 (d).	To notify the parties about the administrative acts which affect their rights and interests, as soon as they are adopted – art. 21. To give a reasonable time-limit to reply to any request of cooperation, taking into account the length and complexity of the request – art. 10, par. 2 and to remind the right against self-incrimination – par. 3. To give notice to the party subject of the inspection, about the date and starting time of the inspection – art. 12, par. 3. To send a copy of the inspection report to the parties entitled to be present during the inspection – art. 12, par. 5.
To be represented by a lawyer or some other person of their choice – art. 8 (e). To express his or her views in writing or orally with the assistance of a person of their choice – art. 14, par. 3.	To receive applications initiated by a party – art. 7, par. 1. Party's meaning is given in art. 4 (f) - "any natural or legal person whose legal position may be affected by the outcome of an administrative procedure".
To pay only charges that are reasonable and proportionate to the cost of the procedure in question – art. 8 (g).	To offer free of charge access to the online information on rules on administrative procedures – art. 28, par. 2.
To request in writing that a member of staff be excluded from taking part in an administrative procedure on the ground of conflict of interest – art. 13, par. 3.	To hear the member of staff supposed to be in conflict of interest and take the decision (according to art. 13, par. 3) to expel if he or she has, directly or indirectly, a personal interests (any family or financial interest) which impair his or her impartiality – art. 13, par. 1.
To be heard before any individual measures which would adversely affect them is taken – art. 14, par. 1.	To send sufficient information for the party who is going to be heard – art. 14, par. 2.

To have full access to the file if possible, if not an adequate summary of the content of the documents will be given – art. 15.	To keep records of its incoming and outgoing mail, of the documents it receives and of the measures it takes – art. 16, par. 1.
To have the personal data protected – art. 16, par. 2.	To respect the right to data protection – art. 16, par. 2.
To be present during the inspection and to express opinions and ask questions related to the inspections – art. 12, par. 3.	To inform the parties present during the inspection, insofar as possible, about the subject matter and purpose of the inspection, the procedure and rules governing the inspection and the follow-up measures and possible consequences of the inspection – art. 12, par. 4.
To receive the acknowledgement of the receipt of the application within three months – art. 17, par. 3.	To do not open the administrative procedure if the acknowledgement of the receipt of the application was not sent in three months because the application was rejected – art. 17, par. 3. To do not sent acknowledgement of the receipt of the application if successive applications are abusively submitted by the same applicant – art. 7, par. 4.
To receive the administrative act concluding the administrative procedure in a time-limit of three months – art. 17, par. 1. To be informed about the reasons that justify the delay and the expected date of adoption of the administrative act which concludes the administrative procedure – art. 17, par. 2.	To adopt an administrative act and to conclude the administrative procedure in a time-limit of three months (from the date of the notification to initiate the procedure or the acknowledgement of the receipt of the application) – art. 17, par. 1.
To request an administrative review to the hierarchical superior authority, the same authority (if there is no hierarchical one) – art. 20, par. 2. To open a judicial procedure or address a complaint to European Ombudsman, if law permits – art. 20, par. 4.	To describe in the administrative act the procedure to be followed for the submission of a request for administrative review and to indicate the time-limit – art. 20, par. 3.

Source: The Author - based of the provisions contained in the drafted Regulation on the Administrative Procedure of the European Union's institutions, bodies, offices and agencies

As it concerns, the costs that the party must support for initiating an administrative procedure, the draft Regulation did not mention them. It mentioned that free of charge is only the online information. This supports the Commission's opinion that is not sure that the benefits of the proposal will "outweigh the costs".

Apart from this, the proposed provisions establish the discretionary power of the Union administration to carry out inspections on the grounds of necessity to fulfil a duty or achieve an objective under Union's law. Additionally, the legal limits of the inspection, when the party inspected is a Member State authority, are given by the national laws which the inspection have to take into account. This suggests that the national rules, as it concerns the administrative procedural requirements about the admissible evidence in administrative or judicial proceedings, are preeminent to the European Union law principles and rules.

The administrative act which concludes the administrative procedure based on the *ad validitatem* and *ad probationem* conditions have to have the written form and drafted in a clear, simple and understandable manner and have to be signed. Another crucial element for the administrative acts is the duty to state the reasons to which art. 19 was dedicated. The statement of reasons has to be clear and indicate the legal basis, the relevant facts and interests. Because, the administrative law always provides the right of the competent authority to revert to the administrative act, either for correction (of clerical, arithmetic or similar errors) or for rectification or withdrawal of administrative acts, which are beneficial to a party or adversely affect a party, the proposed Regulation also stated the principle of revocability for the European Union administration (art. 22-25). But this right of the competent authority is limited by the obligation to inform the party affected by the action adopted. As it concerns the effect of the withdrawal of administrative act the proposed Regulation distinguishes between those lawful acts that are beneficial to a part and which does not produce retroactive effects (art. 24) and those given, within a reasonable time, in other situations and which has retroactive effect.

Besides the unpropitious comments that we express and which, unfortunately, supports the Commission's decision, a very important administrative milestone will be reached. If European Union adopts the draft Regulation. We will be the witness of the normative consecration of the European administrative space. The EAS core existence is fundamentally supported by the general administrative law principles established in the jurisprudence of the European Union Court of Justice. Those principles have in the proposed provision the normative support of their existence. Herewith, principles such as: access to information, to documents, and to the file, equal treatment and non-discrimination, fair hearing and fairness, impartiality and good administration, legality and legal certainty, legitimate expectations and proportionality, participatory democracy and transparency, rule of law and the statement of reasons of administrative acts, data quality and protection, and

timeliness (JURI Committee analysis, 2015:22) are going to be enunciated not only in Treaties and sectoral rules, but also in an administrative procedure Code of European Union.

5. Instead of Conclusions

An intrinsic challenge for the existence of a code of administrative procedure consists of the reconciliation of the European Parliament with the Commission. The beneficiary of such a Regulation are all European Union's entities and the citizens. Any attempt must cope with the extraordinary procedural complexity of the sectoral procedures. Administrative procedures within the EU are developed by the sectoral affairs, particularly when it comes to individual decision-making. (Asimow and Dunlop, 2009) The absence of standardisation across sectors and the general variety of EU administrative law procedure (Craig, 2006, p. 279) allows a deeply variegated system to which the access of the ignorant public is restricted. Thus, the administrative procedure has more a distinctly *ad hoc* character. (Hofmann & Türk, 2009, p. 357)

The role of the Commission in the process of adopting a regulation which should unite the European Union administrative procedures is ever greater. And that, because in 2016, without Commission's help, the Parliament and Council did not manage to regulate, after more than 3 years of work within the JURI Committee. The administrative procedure must be user-friendly for the parties (natural or legal persons) and efficient for the public interest. The European Union's quest for an administrative procedure solution which stands for more European and less national administrative law will continue and because the European administrative space principles needs it in order to be normatively recognised.

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*** Proposal for a Regulation of the European Parliament and of the Council on the Administrative Procedure of the European Union's institutions, bodies, offices and agencies (PE573.120v01-00).

*** European Commission follow up to the European Parliament resolution for an open, efficient and independent European Union administration, adopted by the Commission on 4 October 2016.