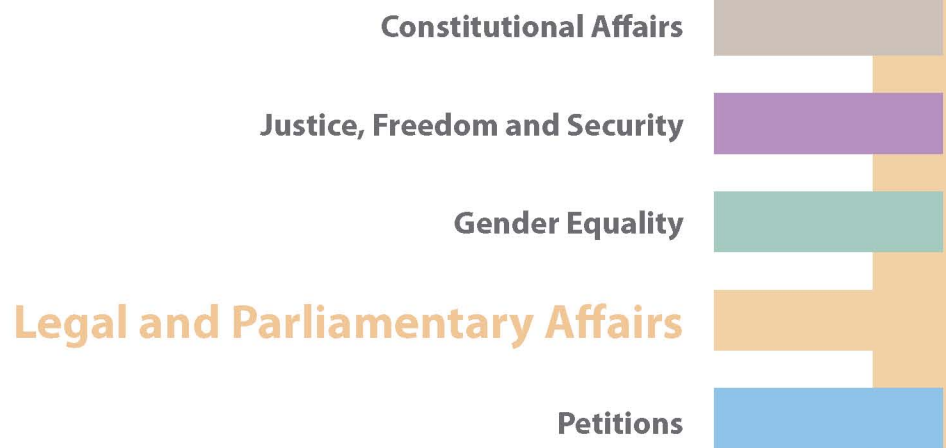


DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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



**Towards an EU Regulation on
Administrative Procedure?**

STUDY



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

LEGAL AFFAIRS

Towards an EU Regulation on Administrative Procedure?

STUDY

Abstract

This paper will address four main issues in a concise manner:

- The features of the European Administrative Law
- The constitutional basis of the European Administrative Law now provided by the Lisbon Treaty, and their major consequences
- The possibility of an European legislation framework of the administrative procedure
- The limitations of the current European system of legal guarantees facing the development of European Administrative Law

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INTRODUCTION

In my academic and professional experience, I have been studying the subject of European Administrative Law from different positions: a) at the University of Firenze, as Professor of Administrative Law; as President of the higher degree course in European Studies; *ad personam* Jean Monnet Chair of European Administrative Law; b) as author of books and many essays on the matter; co-editor of the Italian Journal of European Community Public Law; member of several editorial boards of European Law Journals; c) as President, since 2004, of the Italian Institute of Administrative Sciences; d) as coordinator of several European researches; member of the European Centre of Public Law. At the moment, I am directing a new European research on the administrative procedure law in the EU, in the perspective of a possible European legislation on the matter.

This paper will address four main issues in a concise manner:

- The features of the European Administrative Law
- The constitutional basis of the European Administrative Law now provided by the Lisbon Treaty, and their major consequences
- The possibility of an European legislation framework of the administrative procedure
- The limitations of the current European system of legal guarantees facing the development of European Administrative Law

1. THE FEATURES OF THE EUROPEAN ADMINISTRATIVE LAW

For a long time the majority view was that there was no European Community Administrative Law.

The main reasons were as follows:

- a) administrative law has traditionally been connected with the State. Since the European Community is a legal order that differs from the State, the public law of the Community can only be of constitutional nature, not administrative;
- b) the Treaty establishing the European Community did not provide a Community direct administration, nor considered the administrative problem;
- c) as a rule, the European Community implemented its policies through the national administrations, according to the "indirect administration" model.

These arguments were not convincing and have proved false in the progress of European integration.

Legal systems other than the State can also have their own administrative law, as demonstrated by the international organizations (especially the ones of latest generation, such as the WTO). In recent years, there is even an emergence of a global administrative law, with quite original features in respect to the traditional one.

The EC Treaty of Rome did not consider explicitly the subject of public administration and of its law, mainly to avoid disputes about the character (federal or not) of the Community; but, equally, like the previous ECSC Treaty, it gave implicitly much space to such administration; the language used is also revelatory: the Commission is called "administration with a mission", etc. The Court of Justice made clear very early the core importance of an administrative relationship of the Community with the European citizens. This is one of main implications of the famous *Van Gend & Loos* judgment in 1963 (case 26/62), when the Court stated that the subjects of the European Community were not only States, but also their citizens.

The model of indirect administration has always coexisted with major matters of Community direct administration, as in the field of competition. In addition, the European integration progress has increased significantly the number and quality of cases of direct administration of the Community and, more importantly, the emergence of the model called "co-administration" or "integrated administration", characterised by a joint execution by the Community and its Member States.

Once this incorrect approach has been abandoned, the European administrative law has been firmly established and developed into a fundamental branch of Union law, recognised in the Treaties, in the secondary legislation and in the jurisprudence of the European courts.

In accordance with the principle of primacy of European law over national laws, Union administrative law affects the States' administrative laws in all their parts: organisation, procedure, finance, guarantees. With other legal techniques, European law becomes part of an integrated administrative law (a mix of European and national sources), especially visible in the case of the "composed" administrative procedures. This is not a unilateral influence, top-down, but a circular motion, which also national laws are actively involved in. The best known case is the judicial creation of "general principles of Community law", in which the Court of Justice has extensively used the principles of administrative law of Member States.

At the present state of EU Law, the principal features of European administrative law are:

- a) It is a law with a specific *constitutional basis* in the existing TEU and TFEU. The point is analysed in the second paragraph of this Paper;
- b) It is a law where *fundamental rights* have a particular importance, as demonstrated by the provisions of the Charter of Fundamental Rights of the EU dedicated to the "citizenship", and the relevance given to the rights under the ECHR;
- c) It is a law that is *integrated* in an original way with the national administrative laws; without eliminating their special characteristics, which are part of the cultural and institutional identities of each Member State, that the Union must respect (art. 4, para. 2, TEU);
- d) It is a *judge made law*; a law that, as national administrative laws, has been largely developed by the case law of the European judges;

- e) It is still a *special* branch of law, because it is based on principles and rules different from ordinary ones, to ensure the effective implementation of public policies.

Despite the clear growing importance of the European administration (services, offices, bodies, agencies) and its special law, the overall framework of public administration in EU Member States is still diverse. The national legal cultures and the various institutional experiences that have characterised European States still exercise a great importance. This state of affairs should not be considered a limit for the Union, but a richness (in line with the general recognition of the richness of its cultural diversity, art. 3, para. 3, TEU) which comes from the past, but which is also an opportunity for the future.

The *administrative pluralism* of the Member States is the basis for an active relationship with the EU, vertically, and, between them, horizontally, in their frequent administrative interactions. The Lisbon Treaty rightly provides that the Union's new legislative competences on administrative cooperation cannot lead to a harmonisation of national administrative laws (art. 197 TEU). The administrative pluralism must, of course, be overridden by general principles of EU law and remain as a "*euro-compatible pluralism*".

This is the key interpretation that I am suggesting for the future initiatives of the European Parliament on European administrative law: to intervene only when necessary and as appropriate, both in order to respect the principles of subsidiarity and proportionality that govern the exercise of the powers of the Union, and not to freeze the positive administrative dialogue between the Union and the States.

2. THE LISBON TREATY AND THE NEW CONSTITUTIONAL BASIS OF EUROPEAN ADMINISTRATIVE LAW

The Treaty of Lisbon provides for important novelties with regard to public administration and its law; in particular:

- a) the new Union's competence to carry out "actions to support, coordinate or supplement" the actions of the Member States for public administration (art. 2, para. 5, and art. 6 TFUE);

- b) the principle that "effective administrative implementation" of EU law by Member States is essential for the proper functioning of the Union, and therefore is considered "a matter of common interest" (art. 197 TFEU);
- c) the explicit recognition of the Union's direct own administration (institutions, bodies, offices, agencies) and the prediction of some guiding principles for it (openness, efficiency, independence: art. 298 TFEU);
- d) the recognition of the Charter of Fundamental Rights (CFR) as an act with the same legal value as the Treaties (art. 6 TEU), including the part on "administrative citizenship" (Title V, art. 41 and ff.) in which new rights, such as the right to a good administration, are recognised.

It is discussed whether the new competence of the Union to "support and supplement" the Member States through administrative cooperation (other areas where the EU can intervene with this competence are: human health, industry, culture, education and training, etc., art. 6 TFEU) is innovative, or already implicitly present in the TEC system as a competence "inherent" to the integrated administration system of the Union.

My assessment is that the Lisbon provision will have a new and significant impact on our issues. In fact, the EU "support and supplement" competence gives to the European institutions the legal basis for European interventions through "acts which are legally binding" (art. 6, para. 5, TFEU), subject only to the prohibition of "any harmonisation" of the legislation of Member States.

Until the entry in force of the Treaty of Lisbon, the institutions were acting with *ad hoc* acts (regulations and directives on specific matters) and with acts of soft law; apart from the general principles developed by the European Court of Justice or established in the Treaties. The future "binding measures" will represent the European parameter to direct administrative action in the Member States, and consequently evaluate their effectiveness, even without providing a full and uniform discipline. It is therefore a major expansion of the powers of the Union over the previous situation.

This assessment is confirmed by the specific provision devoted to the "administrative cooperation" (art. 197 TFEU). The "binding acts" that the institutions may adopt under this "support competence" are specified here as regulations adopted by the European Parliament and the Council under the ordinary legislative procedure. Although future

regulations may not lead to full harmonisation of national laws in this matter, as said, it is clear that for the first time the Union has the power to legislate with its own rules governing the administrative activity of the Member States, activities which, not by chance, are now defined as "matter of common interest" (art. 197 TFEU, last para.).

The provision on the EU direct administration (art. 298 TFEU) is also new because: a) it is the first time that the Treaties expressly recognise the existence of an administration that is proper to the EU (this article and many others of TFEU speak of EU "institutions, offices, bodies, agencies" of administrative nature); b) it establishes some fundamental principles for administrative action, such as openness, efficacy and independence; c) it establishes the type of EU legislative act (regulation) and the legislative procedure to be used (the ordinary one, in co-decision by the European Parliament and the Council).

The reference to the administration of the Union brings to an end the debate on the existence of organs and public bodies of the European Union, taking finally note of a highly articulated administrative structure, formed by direct organs of the Union (directions, offices, services, executive agencies), by bodies with their own legal personality (Eurostat etc.), and by bodies which, albeit linked to the Union, are the core of sectorial networks that include national administrations (it is the case of most of the European agencies, such as the European Environment Agency).

The principles on which the EU administration should be based are not only those expressly set out in the first paragraph of article 298 TFEU. The Union must also comply with all the general principles - partly provided for in other sections of the Treaties, such as the principle of proportionality; partly established by case law, as the principle of legitimate expectation - which had been hitherto regarded as binding on the Member States' administrations. They will therefore constitute real general principles, as they will have to be respected by both the Union and Member States administrations.

The rules provided to ensure these objectives will be given, as said, by regulations approved by Parliament and the Council under the ordinary legislative procedure. It should be clarified that this is not a new legal basis for EU rules, as in the case already considered of the competence of support to Member States. In fact, European legislation already includes regulations and directives establishing rules on how the EU and its administrative activity are organised. But, so far, there are only sectorial rules (e.g. in competition law),

or broader rules which are nevertheless tied to a specific matter (e.g. the EU Financial Regulation). Therefore, art. 298, second para. TFEU, on the one hand, should provide the legal basis for the adoption of Union legislation, in order to regulate the activity of EU administration; on the other hand, it indicates to the EU institutions the opportunity to discuss the general rules which are necessary to ensure compliance with the principles set out above. We will see later whether this provision can be the basis for a possible European law on administrative procedure.

The third innovation of the Lisbon Treaty is, as anticipated, the final qualification of the Charter of Fundamental Rights as an act with legal status equal to the Treaties one (art. 6 TFEU).

We know that the Charter, "proclaimed" in Nice in 2000, has exerted a relevant influence as "inspiring source" for the judges of Luxembourg and the EU institutions, as well as for national courts. However, the failure to define its precise legal status had prevented it from producing its full effect. The Charter is a major development in the EU progress to a full recognition of human rights, but is also specifically relevant for the public administration and the "citizenship" rights (arts. 39-46). Consider, for example, the provision of art. 41 CFR on the right to a good administration.

Among the main consequences of the full legal force of the Charter is the justiciability of the "rights" which are now recognised either to citizens or to all persons; and the corresponding obligations for EU institutions, bodies, offices and agencies and Member States to observe the "principles" of the Charter. The distinction between rights and principles is important, as pointed out in the "explanations" given by the Presidium of the Convention which has prepared the Charter; because only the individual rights of citizens or persons may be subject to action in the courts of the Union and, when applicable, in their national courts. In this way, the activities of public administration are subject to an even more penetrating judicial review. But in the light of the Treaty provisions on direct action in the courts of the Union, the "new rights" under the Charter are likely to remain without any concrete effect. In fact, the private individuals' standing to sue is still very limited, despite the improvements in the new wording of art. 263 TFEU (ex art. 230 TEC). The point will be later seen in detail.

Finally, the Treaty of Lisbon brings some real novelties on public administration and its law, confirming also from this point of view its originality. The biggest innovation is the provision

for an EU legislative action to support Member States in the effective implementation of the European law, under art. 6 TEU and art. 197 TFEU. As more fully explained in the following paragraph, I believe that these future interventions - potentially very intrusive, since they can also "complete" State action - should be light, taking into account the administrative pluralism that characterises the legal systems of Member States.

3. ABOUT THE POSSIBILITY OF EU RULES ON ADMINISTRATIVE PROCEDURE

To answer this question it is necessary to recall some key features of the debate prior to the Treaty of Lisbon.

In the tradition of Community law, one of the basic principles governing relations between the Community and Member States was the procedural autonomy of Member States. The procedural autonomy was understood in the broadest sense, including not only administrative procedures, but also the judicial ones; and it was also linked to other similar principles such as the autonomy in modelling their public organisation.

According to the principle of procedural autonomy, the Member States have been free to legislate on administrative procedure in the wake of their administrative traditions, while complying, of course, the principles of EU law. However, the principle of procedural autonomy has long now been scaled down by several factors: a) the constant affirmation in the Court of Justice case law, over the last thirty years, that this principle is not absolute, but valid only as long as there is not a Union act. It is therefore a "limited" autonomy, waiting for a possible act of the Union, of which the Court implicitly recognises the legitimacy; b) the fact that Member States legislation is subject to the Commission's and, subsequently, the Court's scrutiny about the compatibility of national legislation with EU principles; c) the assertion of "general principles" – as judge-made law binding on Member States – of special interest for administrative action; and the subsequent consolidation of a part of them in the Treaties; d) the progressive widening of the scope of EU regulations and directives establishing rules on administrative action. So far, these acts govern specific matters (*ad hoc* normative acts), but they often also contain general rules whose impacts are not just limited to the specific areas for which they are made; e) the increase in the number of "composed procedures": these are procedures taking place partly at European

level, partly in one or more Member States, inevitably in accordance with rules provided by the Union.

The national rules of administrative procedure remain very different, despite this progressive Europeanisation. There are three main administrative law models to be found in the Member States: a) systematic and detailed rules of procedure, with "code" and voluminous acts - the typical case is Germany; b) administrative law made up of general principles, with acts of limited size, as in Italy - but these models tend to disappear, overwhelmed by detailed and extensive statutes; c) administrative law that regards only some parts of the procedure - for example access to documents, participation, hearings - without a framework legislation, as in France and the United Kingdom (the latter being less prescriptive than the former). In addition to these models, wide variety of situations can still be observed in the Member States, especially in States which have recently joined the Union.

Because of this lack of homogeneity in national administrative law regimes, there have been proposals that either called for an EU legislative intervention to regulate the national administrative procedures, or else pointed towards an EU framework legislation for such procedures and the "composed" procedures. This would mean legislation that could apply as a key benchmark for the procedural rules of the Member States.

Before the Lisbon Treaty, the debate on the first point has been restricted to academic circles, as in primary Community law (the Treaties), the administrative law subject was missing, as explained. This has not prevented the adoption of sectorial regulations and directives with rules of procedure having a potential general impact.

The second proposal has often been considered inappropriate, not only because of the principle of procedural autonomy (present only in traditional thinking), but also in view of the lack of a clear legal basis for an EU legislative intervention about the administrative action of Member States. However, against such reasoning, one could bear witness the legal acts and directives which have been adopted at EU level with relevance for national procedures and, especially, for composed procedures.

The debate has gained new strength and perspectives with the latest innovations provided in the TFEU, examined above. Shortly, it is now certain that the new legal basis for EU

regulations in the field, may also cover the administrative action of Member States, excluding only the full harmonisation of national laws. It remains an open question whether such intervention is appropriate and/or limited, given the lasting diversity of national rules and, above all, of the European administrative cultures.

My assessment on the appropriateness of a Union legislation in the field of administrative procedure is, in principle, a positive one, but subject to certain conditions, depending on the responses to be given to the following questions:

Is eventual European legislation: a) necessary; b) useful; and, if so, c) what should be its scope?

European legislation is *not necessary*, at this stage of the European integration process. The administrative procedure has already many rules in the Treaties, the secondary law, the case-law. By combining the general principles with the rules defined by other sources of law, it is self-evident that the EU administration is fully subject to the Rule of Law.

European law on administrative procedure, although not required, is useful both for the Union public administration and for European citizens. It would put an order to the massive legislative body which, albeit without a clear legal basis, has been adopted by the institutions and contributes to the objective of good governance. Above all, it would be useful to build an effective European citizenship, giving clear indications on the procedural rights and on the opportunities offered by the procedure.

European legislation would also be *institutionally feasible*, since the "new" regulations have to be adopted under the ordinary legislative procedure, so as to achieve a balance between supra-national interests, as expressed by the European Parliament, and national interests, as expressed by the Council.

Finally, about the *scope* of the possible European legislation it is clear that, although formally limited to the administration of the Union, it would ultimately be the reference for the national rules on the procedure, and the parameter used by the Commission and, where appropriate, by the EU Courts to ensure "effective implementation of Union law" by Member States.

My assessment is, however, entirely negative about the proposals for developing an EU legislation on administrative procedure which would, directly or indirectly, be extended to Member States.

The main reasons justifying this position are:

- a) the possible future European rules of procedure cannot be set out in detail, as this would mean harmonisation of national laws, expressly forbidden by TFEU;
- b) EU law already includes many "general principles" relevant to the action of public administration, of the Union and of the Member States; in the opinion of the Court of Justice, these general principles have constitutional status, even when they were not established in the Treaties;
- c) other sector principles, but always of great importance to the action of public administration, can be provided in special regulations of the Union, as has happened so far with significant effects also on the national authorities;
- d) there are different legal methods, such as the Union reshuffling of the national administrative organisations, that can strengthen the tendency of national administration to be "common administration of the Union" (this is the phenomenon of crisis of the organisational autonomy principle of the Member States; parallel to that of procedural autonomy principle).

To conclude on this subject, I find quite useful a discussion that could lead to a proposal for a discipline of the administrative procedures of the Union; while a proposal for a general instrument on administrative procedure, including Member States procedures, is neither legally founded nor appropriate.

4. THE LIMITS OF THE EXISTING JUDICIAL SYSTEM IN THE LIGHT OF THE NEW EUROPEAN ADMINISTRATIVE LAW

The development of European administrative law makes clear that the Union's judicial system needs a completely revision, despite the many important innovations that have been produced over the past two decades; especially with the Nice Treaty of 2000.

The issue is very complex and can be treated here, after some general considerations, only in reference to the point most worthy of attention: the discipline of direct action against the institutions, bodies and organisms acts.

The provisions concerning European judicial system in the TEC (first version, 1957) were mostly of international law in character, having in mind primarily litigation between institutions and amongst these and the Member States

However, even in the Treaty of Rome there were two absolute novelties differing from the tradition: the possibility for direct action brought by private individuals; the procedure of preliminary reference from the national courts to the Court of Justice.

This special procedure, not known in international law with such a binding character, has been widely used by the national judges, and it gave the Court an opportunity to influence decisively the creation of the Community legal order, as an original order when compared with the States and with the international legal order, entering within the legal system of the Member States, and verifying the compatibility of their legislation with EU law.

On the contrary, the direct action was defined narrowly by the TEC, and interpreted by the Court of Justice in a even more limited way, because it was considered alien to the nature of the Community judicial system. Prior to the Lisbon Treaty, the rules for standing to use this action was given in art. 230 TEC, with the condition that the applicant had a direct and individual interest; conditions interpreted by the Court of Justice with many limits. Actually, the direct action was rare for decades, due to the strong limitations. The current art. 263 TFEU has planned an expansion of the standing of individuals to raise actions also against regulations, but with an ambiguous wording that, it is desirable, should be interpreted by the next jurisprudence in a liberal way. A part this change (subject to the mood of the European judges), the system of judicial guarantees for individuals remains unchanged; while the rights of individuals against public administrations has increased dramatically.

So, a tension has emerged between the rights of individuals against the Union's offices and bodies and the possibility of effective judicial protection, in contrast with the fundamental right to full legal protection provided by Union law (CFR, art. 47) and by the ECHR (art. 6)- which is, as well, a common constitutional heritage of the western Europe.

In short, due to the constitutional position of individuals as subjects of the Union and to the development of European administrative law, an essential part of the existing framework of the European judicial system has become obsolete.

The necessary reforms are, however, feasible only through reforms of the Treaties, not through acts of legislation or case-law. As it has been rightly noted by the Court prior to the change in the Lisbon Treaty, the further opening of the rules of standing cannot be assured by the judges, but only by the Masters of the Treaties.

It is the case, in my opinion, to put this issue on the agenda of the future reforms if we want to prevent a sharp contradiction between the recognition of new "administrative" rights and the limited justiciability of these positions.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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