



EUROPEAN RISK FORUM – POLICY NOTE 26

BENEFITS OF AN EU LAW ON ADMINISTRATIVE PROCEDURE

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1. INTRODUCTION AND BACKGROUND

Binding rules setting out the procedures by which generally applicable regulations are made are a fundamental part of most developed jurisdictions. However, the European Union (EU) has evolved quickly into a major rule-maker in many areas of product regulation without such a general law on administrative procedure. This ERF note argues that there is an acute need for a Law on Administrative Procedure (LAP) at EU level, and the Lisbon Treaty provides its legal base in Article 298. Indeed, 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 LAP.

Action is needed to enhance the legitimacy of decisions at EU level and to make the regulatory process more transparent, predictable and robust. Greater regulatory effectiveness depends on more transparency and participation by all key stakeholders.

Considerable progress has been made by the Barroso Commission under the Smart Regulation programme, but the work needs to be completed.

An EU LAP would be responsive and complementary to many key EU initiatives, including on enhanced competitiveness and smart regulation.

The ERF has identified the following general principles that should form the basis of an EU LAP:

- Introduce into EU law a LAP that enshrines the four key principles of good administration: transparency and consistency; public participation; public record; and accountability;
- For each of the key principles of good administration establish clear procedural standards that bind the EU institutions;
- Binding standards should include public notice and comment procedures and public consultation requirements;
- Ensure that all EU institutions and bodies involved in the preparation, adoption, implementation and repeal of implementing or delegated legislation are included within the scope of the EU LAP;
- Require the Secretariat-General of each EU institution and body to establish internal enforcement procedures; and
- Mandate the EU Ombudsman to provide annual performance reports regarding the implementation of the EU LAP with potential recommendations for possible corrective actions to the European Parliament.

Some key objectives would 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. All inputs to decision-making, whether from government, citizens or entities affected, should, moreover, be collected together and included in a public record (*i.e.*, one that is available for review by any member of the public,

preferably electronically). Furthermore, decision-making processes and procedures, including opportunities and timetables for public participation, should be easily available, set out clearly in a way that it is understandable, and applied consistently across administrative activities.

- **Public participation** – citizens and affected entities should have a meaningful opportunity to comment on all proposed rules and regulations. This should not be constrained artificially through the use of information technologies (there should not, for instance, be limits on the length or content of comments) and should use formal notice and comment procedures, along with public hearings and consultations where appropriate.
- **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.

Management of risk by the EU provides an important insight into the impact of the administrative state on citizens and businesses. The EU's institutions, along with governments in most other modern economies, have progressively expanded their responsibilities for managing the potential harms and maximising the possible benefits from technologies and lifestyle choices. These responsibilities now encompass issues such as product safety, food safety, pharmaceuticals, chemicals, consumer goods, environmental protection, public health, occupational health and safety, and consumer protection.

Meeting these policy objectives has significantly expanded the scale and nature of the administrative state at EU-level. This has occurred because of the legal and institutional strategies that the EU's institutions have used to manage risks. Specifically:

- Legislators have made increasing use of direct, centralised risk management processes, focusing on making decisions at EU-level rather than in Member States;
- Secondary legislation has become increasingly complex and ambitious, as policy-makers have sought to manage the usage of materials throughout the economy, to reduce low frequency risks, and to pursue ambitious social goals alongside risk reduction;
- New legislation, such as recent rules to manage risks posed by the usage of chemicals, biocides and crop protection products, requires very large number of regulatory decisions, as substances are dealt with on a case-by-case basis;

- New risk assessment agencies play a role in rule-making and regulation. Risk assessment agencies issue guidelines, a form of soft law, defining the technical requirements that businesses must meet. Because these often embed assumptions about social acceptance of risk, this is frequently a form of ‘disguised’ rule-making. Alongside this, agencies advise the European Commission about the safety of materials or products on a case-by-case basis, forming part of the regulatory process;
- Administrative guidelines, setting out process standards for regulatory decision-making, issued by the European Commission have not resolved fully the weaknesses and gaps in the decision-making processes used by the EU to manage risk; and
- Judicial review by the EU courts has not created a framework of procedural standards to match the growth in the power of the administrative state at EU-level.

The JURI committee of the European Parliament (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 then 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 general 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 EU courts in ensuring that the EU’s institutions meet minimum standards of good administration and due process.

The Commission’s response proposing a “stock-taking” exercise is a small first step. However, any suggestion that the new law on administrative procedure would need to be justified by evidence of maladministration fails to understand the positive value of this improvement.

2. BENEFITS FOR STAKEHOLDERS

Three main groups of stakeholders would benefit from a high quality LAP:

- Citizens
- EU Institutions
- Industry

2.1. ADDED VALUE FOR CITIZENS

Citizens lose out if complex risk management laws are designed and implemented poorly. Decisions that are not of high quality often fail to deliver social goals or may generate rules where the cost of regulation exceeds its benefits or there are substantial negative unintended consequences. These shortcomings lead to “regulatory failure”, limiting the socio-economic benefits of public policy.

Poor quality rule-making creates governance failures as well, because the right of citizens to be governed well is not respected. This erodes confidence in government, undermines legitimacy, and generates uncertainty, powerlessness and distrust.

A high quality LAP helps overcome these problems: it facilitates better decision-making, limiting the extent of "regulatory failure" and hence increasing the socio-economic benefits of public policy (jobs, wealth, security, safety, choice, quality of life); and it ensures better participation and governance.

Indeed, 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 European Union’s institutions, especially in times of crisis when trust in public authorities is critical.

2.2. ADDED VALUE FOR THE EU INSTITUTIONS

Today, the European Union, and its institutions, faces a crisis of consent, and hence of legitimacy. In part this is a consequence of long-term, widely perceived governance weaknesses, often described as the "democratic deficit".

A high quality LAP, anchored in the recognition of the need to reform, to ensure consent, and to govern well, provides an opportunity to start tackling these wider problems. It does this in three ways: it recognises the need for reform (too often the EU's institutions have appeared to outsiders to be resistant to change); it compensates for the "democratic deficit" by building transparency and accountability, and by strengthening the rule of law; and finally, it complements existing reform initiatives within the EU institutions, helping to accelerate other governance changes.

Indeed, the European Commission is committed to delivering improvements in governance and economic competitiveness, in part through implementation of its “Smart Regulation” strategy. Over the last decade, this approach has delivered major improvements in regulatory management, including the recent introduction of ex post evaluation of legislative and regulatory decisions. An EU-level LAP, if properly designed and implemented, would complement the “Smart Regulation” strategy, improving the consistency, predictability, and quality of regulatory decisions. In many ways, the EU LAP is a natural continuation of this agenda, encompassing the entire administrative and regulatory framework at EU-level.

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. Indeed, a majority of the provisions of an EU LAP have already been set out in the Commission’s modus operandi;

- 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 help the EU institutions achieve agreed societal goals more effectively and efficiently. whilst at the same time limiting the negative impact of disproportionate or poor regulatory decisions, including actions designed to limit potential harms;
- It would improve the overall organisation of risk assessment at EU level, bringing together all existing procedures and standards under the overall framework of good administrative principles. In turn, this would promote excellence in the collection, assessment, and use of scientific and other evidence;
- It would improve the quality of risk management decisions, one of the EU's largest, most important, and most demanding policy areas, and one where high quality regulatory decisions are essential if society's needs and expectations are to be met;
- It would facilitate the communication of risks and strengthen the role of widely-accepted, high quality science in decision-making, especially when regulators must respond to social concerns and perceived threats. The LAP would, for instance, encourage greater use of risk-based approaches to the management of threats, as well as helping regulators explain more fully risk-risk and health-health trade-offs;
- 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.

2.3. ADDED VALUE FOR BUSINESS

On too many occasions the implementation of complex risk management rules at EU-Level creates significant problems for businesses, triggering adverse economic impacts for Europe, its competitiveness, and its citizens.

A lack of understanding of the needs of business, politicisation of decision-making, opacity, disproportionate or unjustified use of precaution, administrative discretion and "regulatory capture" by interest groups erodes the quality of rule-making, makes implementation unpredictable, and creates risk aversion. Taken together, these characteristics of the EU's approach to implementing risk management laws limit returns from existing investments, undermine incentives to innovate, and weaken the attractiveness of the EU as a location for investment.

A high quality LAP should reduce these problems significantly. It ensures that the needs of business are properly understood. It requires decisions to be based on law rather than the changing opinions of officials. It limits the scope for opacity, politicisation, and administrative discretion; and it requires decisions to be properly informed, to be based on evidence, and to be rational and consistent.

Specifically, businesses will benefit from a high quality EU-level LAP in four ways:

- **Better quality rules** – reduce unjustified loss of well-established products and markets and limit stigmatisation, protecting existing investments, demand and margins. Downstream businesses in complex value chains will also benefit because a more predictable availability of materials will provide more opportunities for incremental innovation;
- **Increased certainty** – reduce the capitalised cost of investments in innovation and enhance projected returns from existing assets, making Europe more attractive for capital allocation decisions;
- **Greater proportionality** – limit the disproportionate or unjustified use of precaution, strengthening social acceptance of risk and creating powerful incentives to invest in innovation; and
- **Lower regulatory costs** – expenditures needed to meet standards and to demonstrate safety, quality or efficacy will be more rational, evidence-based and derived from well-accepted science, leading to lower capitalised costs for innovation decisions, less 'defensive' R&D', and greater retention of safe, well-established substances and technologies.

Over time, such improvements in the impact of regulatory decision-making on businesses will make the EU a more attractive location for investment, innovation, risk-taking, and economic development and growth.

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This Policy Note was written by Richard Meads, the European Risk Forum's Rapporteur. However, the views and opinions expressed in this paper do not necessarily reflect or state those of the European Risk Forum or its members.

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); and
- 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 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.

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