



EU LAW OF ADMINISTRATIVE PROCEDURES – MEETING THE CHALLENGE OF “BETTER REGULATION” –

HIGHLIGHTS NOTE 05

LAW OF ADMINISTRATIVE PROCEDURES

A Law of Administrative Procedures (LAP) sets out the procedures regulators must follow when they write the rules and make the administrative decisions that implement laws in the real world.

It is an essential institutional feature of democratic government. It places legally enforceable limits on the way in which governments exercise their administrative powers, particularly the rule-making and other similar 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 officials and the stakeholders 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** – Affected citizens and entities should have a meaningful opportunity to comment on all proposed rules and adjudications;

- **Public record** – Administrative decisions should be exclusively based on the information set out in the publicly available record. This should include all comments submitted by affected citizens and entities, along with all other information the government relies upon and the response of the government to public comments. (This should not, however, undermine or override or replace restrictions protecting the disclosure of justified confidential business information.)

- **Accountability** – Persons and entities to which a measure is of direct and individual concern should have the right to seek impartial and accountable conflict resolution, including independent administrative and judicial review of decisions, in accordance with the Treaties, to ensure that correct procedures have been followed, that decisions are substantially in accordance with authorising legislation, that decisions have been rationally based on the publicly available record, 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, delivering higher quality decisions and reducing the risk of regulatory failure.

BETTER ADMINISTRATION AND THE IMPLEMENTATION OF EU LAWS

Over the last twenty years, there has been a major increase in direct regulation of the affairs of citizens and businesses by the EU's institutions, most notably in policy areas such as competition law, supervision of

financial markets, internal and external trade, and management of risks posed by technologies and lifestyle choices.

Direct legal instruments (such as EU Regulations) have been preferred to EU Directives to define legislative requirements. **Implementation has been centralised as well.** New institutions have been created and new forms of rule-making have been devised – for instance the mechanisms set out in articles 290 and 291 TFEU (the so-called Delegated and Implementing Acts). Administrative processes, most notably substantive guidance, also play a major role in implementing secondary legislation.

Taken together, **these legislative, institutional, regulatory, and administrative changes have created a new, more direct form of government at EU-level. Many of the new implementing processes, however, do not meet modern regulatory management standards.** There are governance failures too. Citizens and businesses lack procedural rights when dealing with the EU institutions: a protection that is widely available in the EU's Member States. Widely-accepted standards of good administration are not guaranteed. Indeed, some opinion-formers and academics note that the imbalance of power between the state and the governed, which is already recognised in many Member States, has become significant at EU-level – not least because of gaps in the framework of EU administrative law. It is argued that the lack of enforceable process standards places the quality and consistency of EU administrative decisions at risk, as well as undermining trust, consent, and legitimacy.

Against this background, the ERF has identified a series of **structural weaknesses in the current process of making implementation decisions:**

- **Continued barriers to meaningful input by the public** – These include inadequate public notice of consultation opportunities, and the use of web-based commenting procedures that limit the length and detail of comments;
- **Absence of formal “public dockets”** – where the information relied upon by decision-makers is collected and is available for public review;
- **Undisclosed information** – Decision-makers may rely on information that is not made available to the public and hence is not subject to public review and comment;
- **Undefined information quality standards** – Decision-makers may rely on input from “experts” whose appointment is not subject to consistent, clear standards or review, and whose input is often not subject to formal public review and comment;

- **Limited response obligation** – Decision-makers are not obliged to systematically explain the legal and factual bases of their decisions, including responding to comments made by the public; and

- **Limited judicial review** – The ability of EU courts to meaningfully review such decisions is severely constrained 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.

ERF OBSERVATIONS

There is an acute need for adopting and enforcing a fully-fledged LAP at EU level. This is dictated by the evolution of the Union into a major rule-maker in many areas of public policy, reflecting its legislative competences and the increased use of centralised decision-making processes. Such an evolution has occurred without the introduction of legal protections to clarify and protect the rights of citizens and businesses when EU institutions take actions that affect them directly. Legislators have become aware of this and work by the European Parliament has identified major flaws in the relationship between the EU's institutions and citizens of the Member States, including businesses. There is a lack of enforceable rights. ERF research in the field of risk regulation reinforces this.

Adoption of an LAP would help overcome these problems, providing major benefits for citizens, institutions and businesses. If well designed, it would enhance standards of governance, combat scepticism in the future of the EU, and strengthen incentives for businesses to invest and to innovate. An effective EU-level LAP should include within its scope all of the major regulatory mechanisms used by the EU institutions, agencies and bodies to implement secondary legislation.

The adoption of a LAP 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. Existing judicial review mechanisms are also strengthened, contributing to greater accountability in decision-making.

A EU LAP would be the cornerstone for “Better Administration” across the EU institutions – the necessary completion of their Better Regulation Strategy.

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