EUROPEAN RISK FORUM – POLICY NOTE 21

AN EU-LEVEL LAW OF ADMINISTRATIVE PROCEDURES

November 2012

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 practioners 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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EXECUTIVE SUMMARY

As part of general administrative law, a Law of Administrative Procedures (LAP) is an essential institutional feature of modern, democratic governments. It enshrines in law the principles of good administration: transparency and consistency; public participation; public record (ensuring that decisions are based on information set out in public); and accountability. 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.

A well-designed 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. Judicial review mechanisms are also strengthened, contributing to greater accountability in decision-making.

A working group of MEPs reporting to the Committee on Legal Affairs has proposed the introduction of a single general EU administrative law based on Article 298 of the Lisbon Treaty. The EU LAP should be binding on all of the Union's institutions, bodies, and agencies, and should provide improved and more effective decision-making, as well as a minimum safety net of guarantees to citizens and businesses in all their direct dealings with the EU's institutions.

The ERF welcomes these developments and has identified a series of additional ideas that could help develop the general principles to be included in 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, within the EU law, clear and legally-binding, procedural standards;
- Ensure that the EU-level LAP includes clear judicial review standards;
- Establish an accountable and transparent system for selecting which rule-making and adjudication decisions that implement secondary legislation will not adhere to the standards of good administration set out in the EU-level LAP;
- Ensure that all EU institutions and bodies involved in the preparation, adoption, implementation and repeal of secondary legislation are included within the scope of the EU-level LAP;
- Require the Secretariat-General of each EU institution and body to establish internal enforcement procedures;
- 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;

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1. BACKGROUND

Since the end of the Second World War the role of government has changed fundamentally. In most OECD countries, governments have assumed responsibility for managing major economic and social problems, responding to the concerns and desires of citizens and stakeholders. In many instances, the achievement of these policy goals requires extensive primary legislation combined with complex implementation processes. This approach encompasses the management of potential harms posed by technologies or lifestyle choices.

To meet these new, demanding requirements, an "administrative state" has emerged, taking countless decisions on a daily basis, so as to achieve over-arching, complex social or economic goals. Many of these technical, implementation decisions involve rule-making or adjudications that affect the opportunities and freedoms of citizens and businesses, and thus the ultimate success of the underlying social and economic policy[1]. Within this context, the executive function of government frequently acts as the legislator/regulator, judiciary or decision-making, sometime confusing the traditional separation of powers designed to protect citizens from poor quality or arbitrary decision-making. Accountability and the quality of decision-making may suffer when decision-makers are separated from the stakeholders most affected by their decisions, which also weakens the democratic process.

New forms of administrative law, combined with more rigorous review, have emerged to improve the quality and accountability of decision-making, and to govern the administrative state. One of the most important is a Law of Administrative Procedure (LAP)[2].

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.

[1] Within the context of the management of potential harms posed by technologies, rule-making decisions encompass technical standards, positive lists, guidelines, and other similar provisions that affect multiple substances or materials or uses. In contrast, adjudication decisions involve specific materials or substances and include decisions such as usage restrictions, bans, hazard classifications, and labelling.

[2] The most well-known example is the Administrative Procedure Act in the USA. Passed in 1946 as a response to the expansion of the Federal government in the 1930s needed to implement the New Deal, the act governs the way in which Federal agencies propose and establish regulations, and the way in which they make adjudication decisions. It requires agencies to the keep the public informed; to provide for public participation in rule-making; and to establish uniform standards for rule-making and adjudications. The scope of judicial review of adjudications is also defined. The act remains in force.

A well-designed Law of Administrative Procedures enshrines in law the principles of good administration[3]. 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. 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 adjudications. 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 the use formal notice and comment procedures, along with public hearings where appropriate.

- **Public record** – administrative decisions should be based solely on the information set out in the publicly available record[4]. 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[5].

- **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

[3] In many jurisdictions, requirements to meet these standards are strengthened further through so-called Freedom of Information Acts (FOIAs) or equivalents.

[4] Whilst this is a general rule, some exceptions may be necessary where decisions are based on commercially confidential information, as is the case for EU competition law, for instance.

[5] In decisions involving scientific issues, governments should establish generally applicable criteria for ensuring that scientific evidence is of high quality. Only scientific evidence that meets such standards should be relied upon to support implementation decisions, and failure to meet these standards should be a basis for judicial review.

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.

At EU-level no equivalent horizontal, procedural legal framework is in existence today. However, this may be in the process of changing, as a result of provisions included in the Lisbon Treaty and new initiatives being taken by the European Parliament.

2. EU INSTITUTIONS AND GOOD ADMINISTRATION

2.1. GROWTH OF THE ADMINISTRATIVE STATE AT EU-LEVEL

Over the last twenty years there has been a major increase in direct administration and regulation by the EU's institutions, most notably in policy areas such as competition law, supervision of financial markets and related institutions, internal and external trade, and management of harms posed by technologies and lifestyle choices. There has been, for example, a major growth in the use of direct legal instruments (such as Regulations) rather than structuring and co-ordination of Member State legislation through EU Directives. This has increased the scale and extent of the direct impact of decisions by the EU's institutions on citizens and businesses.

Moreover, 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.

Moreover, to deliver policy goals in these new areas of focus for the EU, new institutions have been created and new forms of rule-making have been devised, expanding the scale of the "administrative state" at EU-level and further strengthening the need for reform.

A multiplicity of agencies have been set up on a case-by-case basis over the years responding to different policy needs. There has been no commonly agreed definition for the decentralised (also called European Regulatory Agencies) agencies. The Commission has suggested to classify the agencies according to their primary tasks[6]:

- Agencies adopting individual decisions which are legally binding on third parties: CPVO, EASA, ECHA, EMA and OHIM;

- Agencies providing direct assistance to the Commission and, where necessary, to the Member States, in the form of technical or scientific advice and/or inspection reports: ECDC, EFSA, EMA, EMSA, EFSA, and ERA;

- Agencies in charge of operational activities: EAR, GSA, CFCA, FRONTEX, EUROJUST, EUROPOL and CEPOL;

[6] See http://europa.eu/agencies/documents/fiche_1_sent_to_ep_cons_2010-12-15.pdf

Agencies responsible for gathering, analysing and forwarding objective, reliable and easy-to-understand information/networking: CEDEFOP, EUROFOUND, EEA, EFSA, ETF, EMCCDA, EU-OSHA, ENISA, ECDC, FRA and EIGE

In view of the heterogenic rules governing the agencies, lack of agreed definitions, etc. the three institutions (The Council, The Commission and the European Parliament) adopted in July 2012 a comprehensive set of guiding principles[7] intended to make the agencies more coherent, effective and accountable.

Alongside these institutional changes, implementing mechanisms provide the formal means whereby technical rules and adjudications can be placed into law, achieving the policy goals set out in secondary legislation.

As part of the institutional reforms introduced by the Lisbon Treaty, new mechanisms for making implementing decisions have been introduced which, without reform, are unlikely to meet modern regulatory management standards. These new mechanisms, set out in articles 290 and 291 of the Treaty (the so-called Delegated and Implementing Acts), replace the previous comitology process.

Whilst comitology has played a major role in building the single market and in allowing the EU to respond rapidly and flexibly to technological process, the process has a number of major structural weaknesses. Problems include a lack transparency, predictability, and expertise (within Standing Committees), as well as politicisation by the Member States. Comitology decisions lie, moreover, outside the scope of the Commission's requirements for impact analysis, use of evidence, and consultation[8]. None of the major weaknesses in process standards have been rectified in the new legal provisions or associated administrative guidance.

Finally, decisions by the EU courts have not yet established a complete and consistent set of enforceable procedural rights for citizens and businesses when dealing directly with the EU's institutions. Judicial review has not built an adequate alternative to a new administrative law. In some areas, such as access to documents and the procedures to be followed when making anti-trust and competition law decisions, EU case law has placed limits on the way in which the EU's institutions make decisions. In many other instances, however, the courts have tended to protect the discretion of the executive function rather than impose general procedural standards[9].

2.2. EXISTING EU-LEVEL PROCEDURAL STANDARDS

A recent review of the situation at EU-level by a working group of MEPs established that there is no formal, codified law that places legally enforceable limits on the way in the EU institutions make decisions or that establishes procedural due process standards[10]. Instead, it was concluded by the working group that there is an incoherent and

[7] See http://europa.eu/agencies/documents/joint_statement_and_common_approach_2012_en.pdf
[8] These problems are described more fully in: European Risk Forum 'Comitology and the Management of Risk at EU-Level' (Policy Brief 08, 2010)
[9] This issue has been explored more fully in other studies by the European Risk Forum. See for example, ERF 'The Precautionary Principle – Application and Way Forward' (ERF Study 2011)
[10] EP Working Group on EU Administrative Law 'State of Play and Future Prospects for EU Administrative Law' (working document, 2011)

inconsistent approach that fails, as a whole, to provide general procedural rights that can be easily protected or exercised through legal action.

Moreover, it is suggested by other opinion-formers and observers, that 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.

As things stand today, the administrative procedures of the EU institutions are influenced by general principles set out in the Treaties; provisions in the Charter of Fundamental Rights; case law from EU courts; specific ad hoc legislation, such as Regulation 1049/2001 on access to documents; codes of good behaviour (such as the Ombudsman's code); limited judicial remedies; and administrative guidelines, such as standards for consultation, impact assessment, use of the Precautionary Principle, evaluation, and the collection and use of expertise.

Many of these standards were informed by the European Commission's 2001 White Paper on Governance. Whilst they represent a major improvement in regulatory process management and have helped improve the way in which legislative and regulatory decisions are taken, they are soft law requirements and do not provide legally enforceable procedural rights.

There are, in addition, sectoral procedural standards in a number of policy areas. In some cases, such as Competition Law, strong enforceable standards have been created, partly in response to pressure and case law from the EC courts. In other areas,

including decisions by risk assessment agencies, standards are all too often incomplete, inconsistent, and not enforceable.

Amongst some policy-makers and opinion-formers there is a growing recognition that this situation needs to change, and that the legal framework, within which the EU's institutions act, needs to be reformed.

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2.3. TOWARDS INSTITUTIONAL PROGRESS AT EU-LEVEL

In response to these issues, action has been taken by the European Parliament to examine the case for reform. An academic network ('ReNEUAL') has been established to provide expert advice in the field of administrative law, and a working group of MEPs has been set up to look at issues in detail.

The working group, reporting to the Committee on Legal Affairs, has reviewed the current situation and made the following proposals[11]:

- 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.

Proposals are now being developed within the European Parliament to convert these findings and conclusions into legislative ideas. For instance, a further report by the Committee of Legal Affairs sets out a possible motion for a European Parliament Resolution, recommending that the European Commission draw up a Law of Administrative Procedure of the European Union (LAP)[12]. This law should guarantee the right to good administration and should apply to all of the Union's institutions, bodies, offices, and agencies in their relations with the public. The law should, moreover codify the fundamental principles of good administration and should regulate the procedure to

[11] 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)
[12] See the draft report of the EP Committee on Legal Affairs of June 2012 drawn up by Luigi Berlinguer, the committee rapporteur.

be followed by the Union's administration when handling individual cases to which a natural or legal person is a party.

The report goes on to set out a list of possible principles of good administration. These include lawfulness, non-discrimination and equal treatment, proportionality, impartiality, consistency and legitimate expectations, respect for privacy, transparency, efficiency and service.

3. COMMENTS AND IDEAS FROM THE EUROPEAN RISK FORUM

3.1. MANAGEMENT OF RISK AND AN EU LAW OF ADMINISTRATIVE PROCEDURES

Public risk management is one of the most important ways in which the EU's institutions solve problems and meet the expectations of Europe's citizens. It encompasses a range of policy objectives, most notably creating the conditions for economic prosperity by managing risks to trade and investment; protecting workers from the impacts of economic activity; and protecting citizens and the environment from substantive risks.

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. Complex secondary legislation requires extensive technical guidance, often an additional from of rule-making, if it is to be implemented effectively;

- 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. The same is true also for services, whether it is transport such as aviation or financial services where a large number of new regulations are emerging;

- New EU bodies, most notably agencies, have been set up by the European Commission to assist the process of implementing new, ambitious risk management rules. Although most of these agencies are primarily involved in risk

assessment, they also 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, if their products or materials or services are to satisfy standards of safety or quality or efficacy. Because this often embeds assumptions about social acceptance of risk or ways to manage potential harms, this is frequently a form of 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 in the decision-making processes used by the EU to manage risk. Significant progress has been made in a number of areas, most notably impact assessment, consultation, and access to documents. However, there are gaps in the scope of the standards (they do not apply fully to implementing processes, including comitology and its replacements, or to agencies or to guidelines), and in their contents. There are, for example, no consolidated standards for the quality of scientific evidence that can be used to inform risk management decisions. Administrative guidance is, moreover, a form of soft law and does not create enforceable procedural rights for citizens and businesses affected by decisions made by the EU.

- Judicial review by the EC courts has not created a framework of procedural standards to match the growth in the power of the administrative state at EU-level. Indeed, when considering the management of harms, the courts have tended to apply a limited review and usually accept the discretion of the executive function, leading, on some occasions to the acceptance of procedural approaches, such as the use of precaution without evidential standards or the use of social concern rather than science to trigger government action, which reduce legal certainty and increase unpredictability.

Management of risk by the EU provides an important insight into the impact of the administrative state on citizens and businesses. It highlights the need for reform of administrative law if regulatory quality is to be improved and the rights of citizens and businesses are to be protected. It also reinforces the importance of ensuring that general principles of good administration establish clear procedures for rule-making and regulation. Using the experience gained by expert bodies, such as stakeholders, think tanks and academia, many of these principles can already be identified.

3.2. SMART REGULATION AND AN EU-LEVEL LAW OF ADMINISTRATIVE PROCEDURES

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. A 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.

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. 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 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 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 (rather than hazard-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; 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.

3.3. RECOMMENDATIONS

The European Risk Forum (ERF) welcomes the conclusions of the EP working group. Alongside the excellent findings put forward by the working group, the ERF has identified a series of additional ideas that could help develop the general principles of good administration to be included in an EU LAP. These ideas build on the experience of the ERF in observing and commenting on the laws, policies, and institutions used to manage risk at EU-level. The ideas include:

- **Introduce into EU law a Law of Administrative Procedures that enshrines the four key principles of good administration** (transparency and consistency; public participation; public record; and accountability). The EU LAP should be inspired by, without uncritically copying, acts adopted in other jurisdictions, reflecting carefully the unique institutional and procedural system of the EU;

- **For each of the key principles of good administration establish, within the EU law, clear legally-binding, procedural standards**[13];

- **Ensure that the EU-level LAP includes clear judicial review standards,** guaranteeing that the principles of good administration can be fully enforced by citizens and affected entities;

- **Establish an accountable and transparent system for determining which rule-making and adjudication decisions that implement secondary legislation will <u>not</u> be required to adhere to the standards of good administration set out in the EU LAP.** As a part of this process, all technical guidance should be assessed to ensure that it is not a disguised form of rule-making or regulation.

- **Ensure that all EU institutions and bodies involved in the preparation, adoption, implementation and repeal of secondary legislation are included within the scope of the EU-level LAP.** Where appropriate this should encompass EU-level agencies as well as technical and other committees involved in the new implementing processes established by the Lisbon Treaty.

[13] The ERF's initial thoughts have been included in the main text of this Background Note and are also included in a separate appendix.

- **Require the Secretariat-General of each EU institution and body to establish internal enforcement procedures,** ensuring compliance with the provisions of the EU-Level LAP.

- **Mandate the EU Ombudsman to provide annual critical performance reports, with indications for possible corrective action, to the European Parliament,** demonstrating compliance and ensuring accountability;

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This background 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.

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Appendix

Principles of Good Administration

As part of general administrative law, a Law of Administrative Procedures is an essential institutional feature of modern, democratic governments. It places legally enforceable limits on the way in which governments exercise administrative powers. 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.

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. 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 adjudications. 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 the use formal notice and comment procedures, along with public hearings 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.