SIGMA

Support for Improvement in Governance and Management

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INTEGRATING NATIONAL ADMINISTRATIONS INTO THE EUROPEAN ADMINISTRATIVE SPACE

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TABLE OF CONTENTS

INTRODUCTION

1. Public administration has always been a domestic affair for EU Member States. At the same time, national public administrations have to implement EU directives and recommendations in such a way that European citizens are able to enjoy the rights granted to them by the EU Treaties, irrespective of the country in which they live; a fact, which on its own could well justify the interest of the EU in ensuring that each national administration has comparable quality and professionalism and therefore in the administrative capacities of their Member States.

2. In addition, EU legislation has a great impact on economic and social conditions in Member states and thus on their economic competitiveness. As national public administrations as well as the judiciary are the guarantors for its implementation, the interest of Member states in public governance of other member states has increased over time. This interest in the administrative capacity and the judiciary is even greater in the EU as regards to future member countries.

3. Given this concern, SIGMA was asked by the European Commission to assess the alignment of public administration in EU Candidate countries of Central and Eastern Europe with principles and standards that prevail among older EU Member States. The focus of the assessments is on horizontal systems of governance, namely policy-making and coordination, civil service and administrative law, public expenditure management, internal financial control systems, public procurement and external audit, as well as the mechanisms that are employed to protect public integrity.

4. Common minimum baselines for horizontal governance systems were developed by Sigma in cooperation with the EC. Against these baselines progress towards general EU standards and the *acquis communautaire* have been assessed by Sigma since 1999. The Sigma assessments are used for the European Commission's Regular Reports.

5. The rationale for the Sigma assessments is the following basic requirements that candidate countries should meet before becoming a Member of the EU. Candidate countries are required:

- to have administrative systems capable of transposing, implementing and enforcing the *acquis in a way that they achieve the set result/outcomes ("obligation de résultat"*);
- to meet the criteria required for EU membership, as adopted by the EU Council, i.e. the Copenhagen and Madrid criteria; and
- to have their progress towards EU accession measured in terms of their "administrative and judicial capacity to apply the *acqui*s".

1. Against what is progress to be assessed?: The principles of the EAS

6. Horizontal governance systems of a candidate country are expected to meet certain requirements that are crucial for the reliable functioning of the entire administration, including in areas of the *acqui*s. However, the lack of general EC legislation applicable in the domains of public administration and governance, along with the disparate administrative arrangements of member states, poses problems for candidate countries as there is no simple or unique model to follow.

7. However, in the course of time, a relatively wide consensus on key criteria which by now can be considered as part of the *acquis communautaire*[1] and can be grouped into the following four categories, with the rule of law in a prominent position:

1. *Rule of law*, i.e. legal certainty and predictability of administrative actions and decisions, which refers to the principle of legality as opposed to arbitrariness in public decision-making and to the need for respect of legitimate expectations of individuals;

2. *Openness and transparency*, aimed at ensuring the sound scrutiny of administrative processes and outcomes and its consistency with pre-established rules;

3. *Accountability* of public administration to other administrative, legislative or judicial authorities, aimed at ensuring compliance with the rule of law;

4. *Efficiency* in the use of public resources and *effectiveness* in accomplishing the policy goals established in legislation and in enforcing legislation.

8. As far as these principles are shared among EU Member States, one can speak of a common "European Administrative Space" (EAS)[2]. The EAS implies a common set of standards for action within public administration, which is defined by national law and enforced through relevant procedures and accountability mechanisms.

9. In most EU Member States the above governance principles are established by the constitution, and transposed through a set of administrative legislation, such as civil servants acts, administrative procedures acts and administrative disputes acts, but also organic budget laws and laws and regulations on financial control systems, internal and external audit, public procurement, etc.

10. Despite the fact that the main constitutional legal texts of the European Union do not provide for a model of public administration some important administrative law principles are already stated in the Treaty of Rome, such as the right to judicial review of administrative decisions issued by EU institutions (article 173) or the obligation to give reasons for EU administrative decisions (article 190). The European Ombudsman proposed a *Code of Good Administrative Behaviour* for EU institutions and bodies, which was adopted by the European Parliament in 2001.

[1] The jurisprudence of the European Court of Justice forms part of the *acquis communautaire*.

[2] A detailed account of these administrative law principles in connection with the European Administrative Space can be found in Sigma Paper no. 27, "European Principles for Public Administration", OECD, Paris, 1998. See also Sigma Paper no. 23, "Preparing Public Administrations for the European Administrative Space", OECD, Paris, 1998. Both publications are available at www.sigmaweb.org.

2. Driving Forces for Convergence – in particular, the role of the European Court of Justice

11. The four liberties embedded in the Treaty of Rome, namely free movement of goods, services, people, and capital, mean that national public administrations of the Member States have to work in a way that renders the implementation of these freedoms effective in all respects.

12. The fact is that, although each Member State has total liberty to decide on the ways and means of achieving the results foreseen in the Treaties, shared means and principles have developed within the Union. This situation is particularly visible in the area of administrative law principles. It is less visible, however, in administrative and organisational arrangements and structures because of the great variety of institutional settings across the various member countries. However, we can identify a number of forces leading to convergence in their public administrations.

a) The legislative activity of EU institutions

13. The legislative activity of European institutions is a major source of common European administrative law, implemented as national law in the EU Member states. This European administrative law is mainly special administrative law and concerns a variety of sectors, however, there is also horizontal legislation, such as legislation governing public procurement or public internal financial control systems.

b) Interaction amongst officials

14. Another source of administrative approximation is the constant interaction among civil servants of Member states and civil servants of the EC fostering a common understanding of how to implement EU policies and regulations at national level and a fruitful exchange on best practices for achieving the intended results. Co-operation and exchange have the effect of creating a certain peer pressure for setting common standards for the attainment of the policy results foreseen in the Treaties and in other EU legislation.

c) Increasing influence of EU legislation on the national legal framework

15. EU law has over the years influence the national legal framework and its implementation even in areas where no EU standards or direct influence exists. This phenomenon occurred due to the fact that it would be very difficult to use, within a given state, different standards and practices for applying original law based on EU obligations. Progressively, national institutions have therefore applied similar standards and practices for legislation from both legal sources (if in fact standards and practices were different before).

d) The role of the European Court of Justice

16. It is the European Court of Justice that plays a predominant role in the development of common administrative law principles within the European Union. In fact, the jurisprudence of the Court is the main source of general, i.e. non-sectoral, administrative law in the Union.

17. Within the EU the national courts have to ensure the implementation of the EU Treaties and secondary legislation. In order to ensure a uniform interpretation, national courts should, if an article in a piece of legislation seems unclear, submit the issue to the European Court of Justice for interpretation by means of the preliminary ruling procedure, foreseen in article 177 of the EC Treaty (now article 234 of the EU Treaty in force). This interpretation role of the court is at the base of the leading role[3] that the Court plays in developing common principles.

[3] The leading role of the European Court of Justice has been criticised by some as excessive judicial activism.

18. In the early years, the European Court of Justice case law was influenced by the legal systems of the initial Member States, in particular by concepts stemming from French administrative law. Yet there has never been a single French influence on the development of EU law, and the growth of EU membership has led to a diversification of the sources of inspiration of the European Court of Justice's legal thinking. This means that the rulings of the Court do not respond specifically to a given national legal background, but that its jurisprudence is rather a composite of influences stemming from virtually all members of the Union. For example, the "administration through law" principle originated in the French *principe de légalité* as well as in the German concept of *Rechtsstaatlichkeit*, which are more or less close to the British concept of the *rule of la*w. It is worth noting that even though these three notions have different national roots, they are nowadays conducive to similar practical effects. The concept of "fair procedure" can be traced back to British and German legal traditions; the principle of proportionality came mainly from the German legal tradition; and so forth.

3. Assessing the approximation of Candidate Countries to the European Administrative Space

19. The EU accession criteria, as defined by the Council of the European Union, with a direct influence over administrative systems may be summarised as follows:

1. Copenhagen 1993: stability of institutions guaranteeing democracy, rule of law and human rights;

2. Madrid 1995: adjustment of administrative and judicial structures so as to be able to transpose EU Law and effectively implement it;

3. Luxembourg 1997: institutions strengthened and improved and made more dependable;

4. Helsinki 1999: obligation of candidate countries to share the values and objectives of the European Union as set out in the Treaties.

20. SIGMA works on the assumption that the public administrations of candidate countries need to reach acceptable standards of reliability, predictability, accountability, transparency, efficiency, and effectiveness in order to meet EU accession requirements.

21. In this context it should be noted that the requirements for joining the Union evolve in line with the development and the progression in the construction of the EU. This means that a candidate country should show at the time of accession a sufficient degree of progress to satisfactorily compare itself with the average level of EU Member States and it should show the capacity to further develop with the same pace as the other members. This is to clarify that the requirements (the level of convergence) of 1986 (when Portugal and Spain joined the EU) changed in 1995 (when Austria, Finland and Sweden joined the Union), and were again different in May 2004 when ten new Member States joined the Union and once again in 2007. The requirements will again be different in the future, when other candidate countries join the European Union.

22. This means that it is not sufficient for a candidate country to reach the current average level of administrative capacity of present EU Member States. It will be necessary for them to reach the future average level of Member States. In other words, a candidate country will have to fill the gap between its current administrative capacity and the average administrative capacity of EU Member states at the point in time when the Candidate country will effectively join the Union. It will not be enough for a candidate country to compare itself with the "worst" country that is already an EU Member. The comparison has to be made between the candidate country and the average of all Member States.

23. Candidate countries have to ensure that their administrations and courts have the capacity to work in, defend, and safeguard the common interests of the European Union resulting from "structural subsidiarity" and from the duty of "loyal co-operation", as laid down in the Treaties and in the jurisprudence of the European Court of Justice. This is the reason why the administrative systems of candidate countries are assessed by scrutinising the extent to which those administrative law principles are applied in practice. This assessment does not only concern the formal legal arrangements, but increasingly the daily practice of public authorities, civil servants and courts. This includes the soundness of policy-making and coordination, reliability of the public administration, accountability of public authorities and civil servants, the impartiality and transparency of administrative decision making and adequate structures and procedures for challenging them through redress and appeal.

4. Public Management and Civil Service Reforms in EU Candidate Countries

24. The reform of public administration in candidate countries has become one of the main EU accession requirements since the EU Summit in Copenhagen in 1993 and Madrid in 1995. The Copenhagen and Madrid criteria call for a professional civil service free of undue politicisation, based on merit and working according to acceptable integrity standards. They require also a clear separation between politics and administration. To achieve professionalism of the civil service there is a need for adequate training strategies and training but also a clear definition of rights and duties and disciplinary arrangements, including incompatibilities and conflict of interest regulations. Finally, sound and transparent structures and decision-making procedures of the whole administration are called for too.

25. The importance given to the day-to-day work of the public administration and its staff has gained further importance over time as the assessment of reform possibilities and capacities of the private sector have shown that a major requirement for a sound market economy is a well functioning public administration which in turn largely depends on the quality of its staff.

26. Civil service reform and the general reform of the public administration cannot be dissociated from each other. It is necessary to address these reforms in parallel, set the right priorities and follow a logical sequencing. However, reforms have to take into account the capacity to really implement them. This will determine the pace of the reforms. Adopting new legislation without enforcement capacity is a phony reform and an incentive to disregard the law and is therefore counterproductive.

27. Linkages between two reform fields, e.g. administrative procedures and administrative justice have to be borne in mind. The same is true for good HRM and performance management which depend for their implementation on good administrative structures and procedures as well as delegation of responsibility. Neglecting these linkages usually leads to a failure of the reform and the frustration for the staff.

28. Accession-driven public administration reform has been largely about building a new legal order for public governance compatible with EU membership. It was understood that legal change was the precondition for changing the rules of the game and building the necessary administrative capacity to cope with the requirements of EU membership. Legal reform as a pre-condition enabling further reform is to a great extent rooted in the administrative traditions of continental Europe. Especially countries in South Eastern Europe share this tradition.

29. Given this common administrative law tradition, one could assume that these countries would be able to adopt quickly the common principles of the EAS. However, administrations and governments show little willingness to accept the need for real reform and actively promote it. One cannot help the impression that some governments in the region think that the only rationale for change is the accession and that some window dressing will suffice.

30. These attitudes show a considerable lack of understanding of the fact that being an EU Member is more difficult than becoming one of them. “Being” implies constant reform and adaptation of the national public administration to be in line with EU rules and regulations and at the same time provide an efficient and effective framework for economic development. “Being” also implies capability to compete and to cooperate at the same time with other Member States and this requires a high degree of administrative competence and capacity.

CONCLUSIONS

1. The regular reports of the EU as well as the Sigma assessments are targeted to evaluate the extent to which general administrative law principles are reflected in national legislation and administrative practice.

2. The effective implementation of legislation has gained importance in the assessments as it is indicative of, and correlates with, the capability of a given country to effectively adopt and implement the *acquis communautaire*. Implementing the reforms is decisive for a successful path towards accession and towards active membership.

3. Countries tend to work for accession forgetting the requirements of an active membership and the national interest in reform to foster an economic development based on sound democratic principles and market economy.