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ADMINISTRATIVE PROCEDURES IN EU MEMBER STATES

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What is an administrative procedure?

1. An administrative procedure is the formal path, established in legislation, which an administrative action should follow. Usually, an administrative action has to be carried out through a number of steps, which should be known in advance. A pre-established decision-making procedure is essential to any complex organisations if their activities have to be controlled internally and externally, which is particularly crucial if the organisation deals with public interests. At the same time, the procedure has to guarantee the rights of those dealing with the administration. The double guarantee, of the public interest and of the private interest of the citizens, is the crucible of the public administration of any democratic State ruled by law.

Is it efficient being constrained by administrative procedures?

2. Certain public managers tend to sacrifice the administrative procedures for the sake of efficiency. They consider the procedure as something cumbersome and merely formal, a pure legal formality, which should retreat in front of the demanding requirements of efficiency in modern competitive societies. The dilemma between efficiency and due procedure is a false dilemma, as it is not possible in a state that describes itself as subject to the rule of law to speak of efficiency having a "priority" over legality, since these values are of such different orders. Procedural transparency and predictability as well as procedural (formal) guarantees to citizens in their dealings with the public powers are a fundamental piece of the rule of law and consequently those procedures clearly have a constitutional dimension in all EU Member States.

3. On the other hand, given the values that EU Member States have chosen to uphold under Article 6 of the EU Treaty (i.e. the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law"), it is almost certainly no longer an option for those states to subordinate legality to efficiency. Any government pursuing such a policy would be exposed to internal legal challenge and, very possibly, also to external legal challenge, either before the European Court of Human Rights or (if an EU Member State) under the mechanism of Article 7 of the EU Treaty.

4. In democratic welfare states, the quality of public services provided or produced by the state requires managerial efficiency, but public services must be delivered on the basis of equity and entitlements of individuals, as defined and recognised in legislation. Consequently, efficiency in the management of public services is legitimate if it falls within the procedural and entitlement parameters set down in law.

The Main Goals of Administrative Procedures

5. In modern democratic States, three main broad goals can be singled out for administrative procedures, namely to provide a formal guarantee to the rights of the individuals through a practical application of the principle of legality; to provide a formal guarantee to the public interest through demanding transparency in public decision-making and consequently allowing for the administrative action to be controllable; and to create the conditions for capital investments and economic development through

providing a guarantee of that administrative, and by extension, any public decision will be predictable and will respect the legitimate expectations of individuals. Along with sound administrative procedures an adequate organisation of the administration and a professional merit-based civil service should complete the administrative picture.

6. The institutionalisation of the merit system for the civil service and relatively good administrative procedures are a fact in all developed countries, but it is still very weak in, or absent from, countries in transition from planned economies, and even more markedly so in developing countries. These countries are often referred to euphemistically as countries having a "weak institutional environment", which mainly means that they have an unprofessional civil service often accompanied by insufficient constitutional and administrative legal arrangements to effectively constrain the actions of the administration. The end result is usually a public administration incapable of producing the minimal legal certainty necessary for launching economic and social development.

7. In many developing countries the problem is often summarised by an assessment that they do not have the "administrative capacity" or the "necessary institutional minimum". This "institutional minimum" includes several elements, ranging from the very minimal to a more complete threshold, which the state should guarantee: 1) personal safety of individuals and families; 2) guarantee of property rights and contract enforcement; 3) an institutional framework that guarantees macroeconomic and fiscal stability and therefore a positive investment climate; 4) democracy and the rule of law. Each of these elements – we could call them public goods - subsumes all of the preceding elements.

1. Guarantee of individual rights

8. Administrative law is the specific law for doing administrative actions and decisions where the administration has the prerogative of imposing its will to individuals. However, the individuals, or citizens, have personal rights and interests, which in a democracy are legitimate. Public authorities while imposing their will upon individuals have to respect those rights and interests. In order for this to happen, the public authorities have to be subject to the law and take their decisions according to the formal procedures established in legislation (principle of legality).

9. If the principle of legality is to have any effectiveness it needs to be made applicable in practice. Administrative procedures are intended to make effective and operational the principle of legality in the acts and decisions of the administration. Administrative procedures represent a legal technique to make the respect of legality effective in practice. The legal doctrine of the lawful administrative act rests upon the notion of the act having been shaped according the established procedure.

10. For a long time in certain countries (e.g. France) what was considered important was the administrative act itself, whereas everything preceding or surrounding the act was considered as being of the exclusive incumbency of the administration, something what happened in the secret shadows of the bureaus. Administrative law was the law on the administrative act understood as something awarding or removing individual's rights. The important element was the administrative act itself, not the way through which it was produced. It was necessary that the notion of administrative act evolved --basically by virtue of the jurisprudence of the *Conseil d'État* --to encompass the ways and means through which an administrative act was created. When this finally happened, administrative procedures became an essential part of administrative law. The procedure became the essential required path to be followed by the administration in order for it to produce lawful decisions which could legitimately be imposed upon individuals and impinge upon their rights. Nowadays no valid administrative act can exist which is not shaped by following a pre-established administrative procedure.

11. In continental Europe it is important to understand the difference between individual and general administrative acts, a distinction which is based on the contents of the act and on the singularity or plurality of those affected by the act. In certain countries (France, Belgium, Italy, Portugal, Spain) the notion of administrative act refers to both individual acts and general acts i.e. to acts impinging upon rights of individualised parties as well as to acts regulating a matter of general interest (regulatory acts).

12. In other countries (Germany, Netherlands, Denmark) the notion of administrative act was intimately linked to subjective rights, this is to say to rights or personal interests of an individual. It means that the notion of administrative act was traditionally applied only to individual administrative acts, not to acts affecting a generality of persons or the whole country. However, nowadays administrative procedures are also applied for the preparation of regulatory acts, for example in urban zoning.

13. In UK and Ireland the distinction between individual and general administrative acts is almost irrelevant because the law of administrative acts is mostly a law on the procedure, not on substance or in the generality or singularity of those affected by the act. In UK and Ireland the courts have only recently started to look into substantive aspects of administrative decisions. Previously their focus of interest was almost exclusively whether or not the public authorities had followed a due procedure (i.e. based on well established court case law principles) to shape their decisions.

2. Efficiency and order in the protection of the public interest (transparency)

14. The second goal of a well designed administrative procedure is to ensure a prompt and economically efficient protection of the general interest by the public authorities, which are one of the crucial legitimate interpreters of that general interest. One could add that administrative procedures have also the goal to ensure that decision-making will be transparent, along with orderly and efficient. However, transparency is a relatively recent value in the administration of EU Member States (except in Sweden where the right to anybody to view the files was established by a Law of 1766).

15. Administrative procedures present a problem from the viewpoint of fairness. Public authorities (or administration) are a party in the procedure and also the judge in the procedure insofar as the procedure is aimed at producing an administrative act, i.e. a decision of the administration. For this reason it is crucial that administrative procedures are designed in a way that protects at the same time the public interest or public needs (as interpreted by the public authorities) and the personal or private rights and interest of individuals. This has consequences that we will see below.

3. Economic development

16. Investments occur where there is an adequate legal environment. Good administrative procedures are necessary for preventing arbitrariness in administrative decision-making and to keep administrative discretion under control, i.e. making it controllable by other administrative bodies and by the courts. Administrative procedures help making the administration predictable and respectful of legitimate expectations of individuals. In this regard, as a sub-goal, administrative procedures are important to attract investment and promote economic growth.

17. It is useful at this point to turn to Max Weber, one of the most insightful analysts of modern capitalism and its instruments. Max Weber considered that the rational state rests upon an expert civil service and a rational legal order that is "the only within which modern capitalism can thrive"[1]. The preconditions for the original development of capitalism included: a predictable legal system, and behind that a state bureaucracy; and a habit of treating all people as having rights and as possible partners in law-

[1] Max Weber, *Economic History* (1923), French Translation by Gallimard, Paris, 1991.

regulated commercial dealings, which is a requirement for establishing wider markets intertwined with regular and frequent commercial exchanges.

18. The legal order also requires a bureaucratic state to enforce the law, i.e. professional administrators in the administration and competent jurists in the judiciary. Reliable application of legal procedural and substantive rules is one of the highest values in a well organised bureaucracy. Another feature is the impersonal application of general rules, both to outsiders the organisation deals with and to its own staff. This impartiality is the most important feature of the bureaucracy for Weber – the bureaucracy should act regularly, in a predictable way, and according to what is foreseen in law.

General Principles of Administrative Procedures

1. Adversarial principle

19. It is also called principle of contradiction, meaning that the parties should be as equal as possible in the procedure in spite of the prominent position that the administration has in the procedure (being a party and the decider). This principle converges with that of defence of an individual in front of any public power, which is a consequence of the transformation of the subjects or administered into citizens. The creation of a democratic notion of citizens cannot be dissociated from the adversarial principle. The development of the adversarial principle contributes to the metamorphosis of the subject into citizen within the administrative law order[2].

20. The adversarial principle is linked to the right of defence of an individual in front of the administration, but it does not mean that the inquisitive principle is excluded (see below). Non-contentious administrative procedures have to respect both the adversarial principle (contradiction principle) and the inquisitive principle (finding out the truth *ex officio* by the administration regardless of what the interested parties say) even if these two principles traditionally have represented two opposite ways of proceeding.

21. The adversarial principle has important consequences; many of them have been endorsed by the jurisprudence of the European Court of Justice (ECJ) and the European Court of Human Rights by operating an extension of the literal meaning of article 6 of the European Convention of Human Rights of 1950 from only penal to any kind of legal procedures. More recently the European Charter of Fundamental Rights of the European Union attached to the Treaty of Nice (2000), reinforces this approach, in particular by virtue of its article 41. This article considers this principle as forming part of the right to a good administration.

22. One of the consequences of the adversarial principle is the obligation to hear the interested parties along the whole procedure and especially before producing the resolution. This should enable a party to view the dossier immediately before the resolution is pronounced. The parties should be entitled to propose any proofing means and be present while proofs are being practised. The adversarial principle entails also that the parties are awarded the right to recourse to higher administrative authorities (administrative recourses) and to courts (judicial review), as well as to be noticed of any decision occurring during the procedure and of available recourses.

23. Connected with the adversarial principle is the notion of interested party, which at the beginning of the administrative law development was very narrow, as only those with a direct and personal interest

[2] Jean Louis Autin, based on J. Rivero : « Les progrès du contradictoire contribuent à la métamorphose du justiciable en citoyen dans l'ordre administratif », page 399 dans « Réflexions sur le principe du contradictoire dans la procédure administrative » in Conseil d'État, Rapport Public 2001, Études et Documents no. 52, pp. 389-400. La Documentation Française, Paris 2001.

on the issue could be a party. In the course of time the notion of interested party has been enlarged under the influence of democracies developing and deepening.

24. Nowadays the notion of interested party in many countries includes those organisations and institutions which are in whatever way interested in an issue such as environmentalists, trade unions and others and even those individuals who are only remotely interested in the issue at stake. This enlargement of the notion of interested party has been introduced under the banner of increasing citizens' participation in administrative decision-making. An important recent development is represented by the Aarhus Convention of 25 June 1998, in force since October 2001, and forming part of the EU Law since the Decision of the EU Council of 17 February 2005 (2005/370/EC). This Convention considers the public at large as interested party in environmental matters not only concerning administrative procedures but also concerning the access to justice.

2. Procedural Economy

25. The public administration is obliged to act with promptness and efficiency. Procedural economy should also inspire the interpretation of the procedural rules by distinguishing essential and non-essential procedural steps and the legal consequences of not complying with them, which should be commensurate with their particular importance, because administrative procedures should be designed in a way that favours procedural economy. Additional consequences of this principle are the possibility of accumulating or merging several different procedures into a single one if they deal with the same matter (sort of class action) or, if several ministries or authorities have to intervene in the procedure, that such intervention be simultaneous rather than successive whenever possible.

3. In dubio pro actione

26. In case of doubts based on formal grounds, the idea should prevail that the procedure should continue up until a final resolution is pronounced on the substance of the matter. Formal shortcomings should always be allowed to be corrected in order to keep the administrative procedure alive because this represents a better guarantee of substantive rights of those interested in the procedure.

4. Official impulse

27. Given the fact that the public interest is at stake, the procedure should be pushed on *ex officio*. The administration is obliged to carry on the procedure by implementing all kinds of activities necessary to reach a final resolution to the procedure and to take, on its own motion, any action aimed at knowing the truth (inquisitive principle, which is connected to the principle of official impulse). There are thus reasons why in administrative procedures the adversarial principle (connected to the rights of defence of individuals) has to co-exist with the inquisitive principle (connected with the necessity of objectivity and impartiality of administrative action and decision).

28. This principle bears consequences, particularly in the field of discipline of civil servants in charge of the procedure and in the field of the administration incurring responsibilities for compensating those who result negatively affected in their rights or interest by negligent behaviour of the public officials.

5. Impartiality

29. The principle of impartiality is structurally weakened in administrative procedures because the administration is party and judge in the procedure. Therefore it is necessary to establish legal measures to re-establish the equilibrium between the parties or at least to reduce the likelihood of unfairness. A minimum of impartiality should be guaranteed. Therefore the withdrawal from the procedure of those officials who have a personal interest (typical conflict of interest situation) in the outcome of the procedure

should be mandatory. Otherwise the administration would incur into abuse of power. Another requirement for impartiality is that any party in the procedure should be entitled to recuse any intervening official suspect of having an interest in the outcome of the procedure or having qualified friendship or enmity or kinship relationships with any of the parties.

General Law on Administrative Procedures and Special Procedures

30. In the majority of countries the creation of principles and rules for administrative decision-making has been the result of the jurisprudence of the courts. Judicial case-law pressured for the administration to develop administrative procedures. The view is prevailing that a modern administration needs systematised (or even codified) and publicised procedural rules for decision-making. However, not all EU MS have a general Law on Administrative Procedures.

31. The first General Law on Administrative Procedures in Europe was probably the Spanish Law of 19 October 1889 (known as the Azcárate Law after the MP who proposed it). It was a framework Law establishing a number of principles giving guidance to ministries to write their own ministerial procedures. This approach proved to be a failure because the Law was so general and imprecise that it left plenty of room for different and contradictory developments through ministerial secondary regulations and finally it did not prevent ministries from multiplying their special procedures.

32. In spite of the Spanish Law's failure, it revealed an underlying problem which was common to many national administrations in the Europe of the time and which the Law wanted to address. That problem was the proliferation of special procedures, which created intricacy and opaqueness of administrative decision-making. This is still a problem in many national administrations of EU Member States and EU candidates. The Spanish Law of 1889 was replaced by the Law on Administrative Procedures of 17 July 1958, which is still in force as amended by a Law of 1992. This Law had several drawbacks and was amended several times (1993, 1999, and 2003). The Spanish Law regulates the successive phases of the decision, its revision and redress through administrative recourses, the delegation of competences and of signature, the withdrawal and recusation and the administrative responsibility. It also contains an inventory of rights for citizens such as the right to access to administrative documents.

33. Austria enacted its first Law on Administrative Procedures in 1925, which as several times amended, is still in vigour. This Law was influential on other national Laws in European countries. Along with Spain and Austria a number of countries have a General Law on Administrative Procedures (or a codification): Germany (1976), Denmark (1986), Italy (1990), Netherlands (1994), Poland (1960), Hungary (1957), Portugal (1991).

34. The current trends in administrative law are towards a codification of administrative procedures through a General Law, as a modern administration is considered as needing codified and published procedural rules with a view to limit the bureaucracy[3]. Even if the number of countries having a codification tends to increase, not all EU Member States have a General Law on Administrative Procedures. This is the case, among others, for countries such as Belgium France, Greece, Ireland, and the United Kingdom.

35. The fact that these countries do not have a general codification does not mean that they do not have general procedural rules for administrative decision making. Usually they have been created by courts as general principles for administrative decision-making. For example the British principle of using public powers according to what is authorized by statute law (law adopted by parliament), which translates into

[3] See J. Ziller: *Administrations Comparées: Les systèmes politico administratifs de l'Europe des douze*. Paris, Montchrestien, 1993, pages 297 ff.

principles such as procedural fairness or reasonableness. In France principles created by the jurisprudence have been translated into specific pieces of legislation such as the French Laws on access to administrative documents (1978) or on the obligation to give reasons for administrative decisions (1979) and, especially by the Decree of 28 November 1983 reinforced by Law of 12 April 2000, which represents a sketch of a true non-contentious Administrative Procedural Code in France.

36. The dilemma arises, though, between the tendency to codify the administrative procedure into a single general procedure on the one hand and on the other the proliferation of specific procedures for decisions that are to be taken in this or that administrative or ministerial sectoral field or for decisions taken by local self-governments or other public administration settings. As a matter of principle, special procedures should be limited to a minimum and cross-references should be made to the general codification.

Main characteristics of a (good) General Law on Administrative Procedures

37. The Law should take into account constitutional requirements and constraints, in particular those stemming from international covenants on human rights and those reflecting the principles upon which the state is built (rule of law, subjection of all authorities to the law, etc.).

38. The scope of the Law should be precise but wide enough to ensure that –with very justified exceptions-- all types of public actions and decisions that could impinge upon individual rights or legitimate interests of citizens are awarded full legal protection.

39. Administrative disputes (also called administrative process) should not be regulated in the Law on Administrative Procedures. Although it can be said that "no complete separation exists between the administrative phase and the judicial phase"[4] those who are called to apply the law are different. The ones are civil servants or public authorities whereas the others are judges. From a practical viewpoint thus, the organisation of appeal processes before administrative courts should be the object of a different law on contentious-administrative. Administrative Procedures regulate the administrative non-contentious decision making process as well as recourses (hierarchical or not) within the administration. Administrative Process is the process whereby administrative decisions are reviewed by the courts.

40. It is not appropriate to use the Law on administrative procedures to allocate competences among public authorities. This matter should be dealt with in a separate piece of legislation such as a Law on Organisation and functioning of the State Administration. However, the procedure to solve conflict of competences between two or more bodies should be regulated in the Law on Administrative Procedures.

41. Likewise the conditions and circumstances of the delegation of administrative decision-making powers should be regulated in the Law on Administrative Procedures. Certain ways and means for inter-administrative cooperation should also be the object of the Law on Administrative Procedures.

42. Concerning evidences, the Law should not define at length which are the proofs legally admitted in the administrative procedures. A cross-reference to the general regulation, which is usually contained in the Civil Procedural Code or in the Penal Procedural Code for sanctions, should suffice. Administrative discretion in deciding which facts can be taken as evidence should be restricted.

43. The notion of interested party should be clearly regulated in a way that allows for administrative openness while protecting the privacy of individuals. The notion should be neither too narrow nor too

[4] Jean Marie Woehrling: "Judicial Control of Administrative Authorities in Europe: Toward a Common Model". Paper presented at Sigma Workshop in Budva, 5 December 2005.

wide. The regulation of access to administrative documents by interested parties should be a matter to be dealt with in the Law on Administrative Procedures, although in some countries this is the object of a specific law on access to public information. The same could be said regarding the protection of individual personal data. This regulation could be either included within the Law on Administrative Procedures or regulated in a separate piece of legislation.

44. Regarding standing rights, that is the right to be heard in the procedure, it is advisable that the Law on administrative procedures establishes clearly them by distinguishing the hearing in administrative individual acts of an adjudicating nature and those acts of a regulatory nature. The hearing procedures in either case require to be organised differently

Administrative Procedures in Context: The Legal Framework for the Administration

45. As concluding remarks we need to draw attention to the fact that administrative procedures regulations operate within a broader legal framework which is necessary to develop if the administration is to be well equipped with legal instruments. We could name it as the General Legal Framework for the Administration.

46. The general legal framework for the administration is comprised, first and foremost, of administrative law. A first approximation of the definition of administrative law is that it is a part of national public law (in EU countries it is now also a part of the supranational legal order of the EU) regulating the powers, competences (responsibilities), organisation and functioning of public authorities or the public administration as a whole. This includes relations established internally between administrative bodies and externally with other administrative bodies and with the general public. Administrative law is the refined product of the pursuit in the course of history of the liberal goal to submit public powers to the law, which is crystallised in the fact that any action of the state is subject to the law or ruled by law. Modern states derive their administrative law from their constitutions. The study of administrative law cannot be dissociated from that of constitutional law, even if in academic circles the two have been divided into separate disciplines. Likewise, administrative reform cannot ignore the country's constitutional set-up.

47. The general legal framework for the administration is composed of all necessary laws, by-laws and regulations to ensure that the administration as a whole – as a legal system and as a system of organisations – works in line with the general principles of administrative law and with the generally accepted tenets of organisational theory. This leads us to include within the general legal framework of the administration, in addition to general administrative laws such as the law on administration, law on administrative procedures, judicial redress and appeals (administrative justice), all laws regulating horizontal systems of the public administration as an organisation, even if such laws regulate sub-systems, aspects or elements of the organisation.

48. From this standpoint, general regulations on the organisation and functioning of the administration, on self-governments and regions, and on administrative procedures (including access to information and personal data protection), as well as general legislation on the civil service, taxation, financial management, public procurement, external audit, normative production, ombudsman, judicial control of the administration and so forth would all belong to the category of horizontal administrative systems. These regulations are applicable everywhere, throughout the administration. Other regulations that could be included in this category are those on the functioning of the government (insofar as they contain rules for decision-making and policy-making), on normative production, and on conflict resolution among ministries.

49. No administrative reform would be complete without reviewing all these horizontal systems of governance and the legislation shaping them.