



ASSISES DE LA JUSTICE

DISCUSSION PAPER 3: EU ADMINISTRATIVE LAW AND NATIONAL ADMINISTRATIONS

This discussion paper was produced as input to discussions leading up to and during the Assises de la Justice conference (Brussels, 21-22 November 2013). It will also contribute to the preparation of the Commission's Communication on future initiatives in the field of Justice. The content of this paper does not reflect the official opinions of the European Commission or other institutions of the European Union.

I. Introduction:

Individuals and companies need effective public administrations in order to fully enjoy the rights enshrined in EU law¹.

As regards EU administrations, there are a number of principles and rules which already exist, including the right to good administration enshrined in Article 41 of the EU Charter of Fundamental Rights ('Charter'). In its Resolution of 15 January 2013, the European Parliament asked the Commission to submit a proposal for a regulation on administrative procedures applicable to any EU administration. The Commission shares the Parliament's commitment to achieving the highest administrative standards, and a detailed stocktaking exercise is currently assessing the present situation and to identify gaps or weaknesses in the existing legal framework. The Commission will consider all options to promote an open, efficient and independent EU administration.

As regards national administrations, their role is crucial for the functioning of the EU. Unlike a federal state with its own federal administration, the EU relies to a significant extent on national administrations to effectively administer EU law and thereby to ensure its proper implementation. This explains why in overall terms direct EU administration remains relatively small. The discussion in the *Assises de la justice* will focus more specifically on this essential function of national administrative authorities when implementing and applying EU law.

II. What has been achieved?

Administrative law and administrative justice have always been key drivers for improving the effectiveness of EU law. At EU level certain common principles and rules relevant for national administrations when implementing EU law have been developed progressively.

¹ See in this regard the speech of Vice-President Viviane Reding, EU Justice Commissioner, at the occasion of the opening of the European Law Institute of 17 November 2011: http://europa.eu/rapid/press-release_SPEECH-11-764_en.htm?locale=en

1) Case law of the Court of Justice of the European Union

The case law of the Court of Justice of the European Union (ECJ) in the area of administrative law relates not only to direct administration by EU institutions but also to rules and principles that need to be applied by national administrations. The case law relating to administrative authorisation (for example, when setting up a new business) is a good illustration of how the Court has progressively developed common key principles applicable in different policy areas. For example, according to these principles, administrative authorisation schemes can only be justified by overriding reasons of general interest and must be proportionate.

Many other cases could be quoted defending the rights of individuals and companies in administrative procedures in Member States connected to the implementation of EU law. For example the judgements on state liability in case of violations of EU law, or the cases establishing the right to have reasoned decisions from administrative authorities.

2) Secondary EU legislation codifying administrative law

The case law of the ECJ referred to above has been partly codified in acts of EU secondary legislation. The chapter on administrative simplification of the Directive on services in the internal market is one example of codification relating to access to a service activity or its exercise. It concerns in particular the procedure of national authorisation schemes, including the principle of tacit agreement if the administration fails to respond within the applicable time period. Other examples of codification could be mentioned as well: for instance the European Customs Code, or the Regulation on genetically-modified food and feed.

3) EU rules requesting the setting up of specific administrative authorities

Certain acts of EU legislation require Member States to set up specific authorities with powers in a particular policy field. The characteristics of these authorities vary. In certain cases, EU law requires the establishment of *independent* authorities at national level. The data protection authorities are a prominent example as their establishment is required by the TFEU, the Charter and the 1995 Data Protection Directive. There are other examples where EU legislation requires the setting up of independent authorities, such as the regulatory authorities for electricity and gas, and those for electronic communications.

4) EU rules on administrative cooperation

Various mechanisms for administrative co-operation have been established at EU level. They address different types of cooperation:

- **Cooperation between national administrations or authorities** ('horizontal cooperation'), to ensure the effective application of EU law or to solve problems which individuals encounter when trying to benefit from their rights and freedoms. For example, such cooperation exists in the area of internal market (SOLVIT², IMI³), taxation, electricity and gas, electronic communications and competition. Another example is the Regulation on Consumer Protection Cooperation which aims at addressing the growing cross-border problems for consumers in the internal market. Individuals who encounter problems in cross-border shopping can turn to the European Consumer Centres network.
- **Cooperation between national administrations and EU institutions and agencies** ('vertical cooperation'). This is well known in competition law where there is a division of tasks between the European Commission and national authorities, as well as in the area of electricity and gas and in electronic communications where tasks are divided between national regulatory authorities, an agency at EU level, and the European Commission.

² SOLVIT is a network created in 2002 by the European Commission and the EEA States. The aim is to provide rapid and pragmatic solutions to cross-border problems caused by misapplication of EU rules by public authorities.

³ Regulation (EU) No 1024/2012 of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

5) Administrative justice

Administrative courts play an important role in ensuring the implementation of EU law in the Member States. Whenever a national court applies EU legislation, it acts as a 'Union court' and must provide an effective judicial protection to everyone, individuals and enterprises, whose rights guaranteed in EU law are violated (Article 47 of the Charter). In practice, administrative courts intervene in a wide range of cases of unlawful intervention by public authorities and play a key role in upholding the effectiveness of fundamental rights in the EU.

There is also secondary EU legislation laying down specific procedural rules harmonising administrative court proceedings, for example, the Remedies Directives in the area of public procurement.

III. The challenges ahead for EU administrative law applicable to national administrations

In many areas such as financial services, protection of personal data, migration, energy, tax or customs, national administrations act more and more 'on behalf of the EU' and have seen their supervision powers significantly reinforced by EU legislation.

Furthermore, new and more interwoven forms of co-operation between EU institutions and national authorities have been proposed or recently adopted by the Council and the European Parliament. For the banking union, for example, the new Single Supervisory Mechanism provides for new rules on the cooperation between the European Central Bank (ECB) and national supervisory bodies.

These trends require a strong level of mutual trust. National administrations must function effectively and work together in full respect of the rights of individuals. Already in its White Paper on European governance⁴, the Commission shared its reflections on better application of EU rules at national level, including through regulatory agencies.

1) Enhancing co-operation between administrative authorities

To deliver the benefits of EU legislation, administrations at national and EU level need to work effectively together. Cooperation between EU institutions and national authorities plays an increasingly important role. For example, the proposal for the Single Resolution Mechanism provides for a new system of co-operation involving the ECB, the European Commission and national supervisory authorities which work closely together to recommend or not the resolution of a bank. The functioning in practice of these complex forms of cooperation will need to be closely monitored; lessons could be learned which are relevant for arrangements with similar arrangements in other policy areas as well.

2) Improving consistency in the application of EU law

There is a large body of EU law governing national administrations. Its interpretation and application in Member States requires particular attention in order to ensure that the effectiveness of EU law is not negatively affected by possible disparities at the implementation stage.

For instance, more attention could be given to the power to impose *sanctions* given to national administrations by certain acts of EU legislation. Would it be necessary in certain areas to have more detailed rules on the power to impose administrative sanctions? For example, reference is made to the detailed rules in the proposal by the Commission in the context of the Data Protection Reform (on supervisory authorities in all Member States which shall be empowered to impose effective, proportionate and dissuasive administrative sanctions for specified infringements).

⁴ European governance – a white paper, COM (2001) 428 final.

Another example of an area of interest could be how EU legislation requiring the setting up of *independent* authorities is applied in practice. Case law at national and EU level is emerging on this issue and may require further attention.

More generally, the need for developing certain key principles and model definitions for improving the consistency of EU administrative law could be explored.

3) Strengthening administrative procedural rights

The strengthening of enforcement powers of administrations in certain areas requires an adequate level of protection of the rights of individuals and companies vis-à-vis these administrations. Administrative procedural rights are important in that respect. The case law of the ECJ contains cases where administrative procedural rights are applied to national administrations when implementing EU law, notably by identifying the principles of equivalence and effectiveness which must be applied and which may limit the procedural autonomy of the Member States in such cases⁵.

Ways could be explored to further promote the consistent application of procedural rights by national administrations when implementing EU law. This would reinforce mutual trust, facilitate cooperation between administrations and contribute to the effective application of EU law. In this context the possibility for individuals to have an administrative review (in addition to the right to an effective remedy before a tribunal) could be further explored. Concerning the functioning of national courts, it could be further examined how interim measures (with suspensive effects) are being applied in practice in cases relating to EU law.

4) Enhancing the effectiveness of administrations to support economic recovery

A high quality public administration is important for economic competitiveness and the well-being of citizens. Some of the administrative reforms requested at EU level are partly financed with EU funds. During the 2007-2013 period, the European Social Fund supported activities to strengthen institutional capacity and the efficiency of public administrations in 18 Member States.

The modernisation of public administration is also an essential objective in the 2014-2020 programming period. The main challenge is to better identify what precisely needs to be reformed and how, and what additional role the EU should play. At a time when Member States are facing increasing pressure on public budgets, technological, organisational and legal innovation could help to ensure high quality public services.

Training is also a driver for quality. Based on existing training initiatives, like the European Judicial Training Network, the scope for training programmes for public administration should be examined.

IV. Questions

1. *How can the EU help facilitate the effective application of EU law by national administrations?*
2. *Are there cases where you consider that administrative procedural rights relating to national administrations would need to be promoted or reinforced at EU level?*

Full information on submitting contributions:

http://ec.europa.eu/justice/events/assises-justice-2013/discussion_papers_en.htm

⁵ See, for instance the judgment in Case 33/76 Rewe vs. Landwirtschaftskammer für das Saarland, paragraph 5, case C-312/93, Peterbroeck c.s. vs. Belgian State, paragraph 12, and case C-426/05 Tele2 Telecommunication GmbH vs. Telekom-Control-Kommission, paragraph 57.