



## SIGMA

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## THE EUROPEAN ADMINISTRATIVE SPACE

### Assessing Approximation of Administrative Principles and Practices among EU Member States

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*The public administration is a domestic affair for EU Member States. However, national public administrations have to apply the *acquis communautaire* in a homogeneous way in order to ensure that European citizens are able to enjoy the rights granted to them by the EU Treaties, irrespective of the country in which they live. National administrations have to apply European legislation as if it were domestic legislation. Do the other Member States have an interest in ensuring that each national administration has comparable quality and professionalism? Is there a process of administrative convergence among EU Member States? Are there benchmarks against which this convergence can be assessed?*

#### **Introduction:**

**The democratic rule of law is an EU accession criterion to be introduced in public administrations.**

SIGMA's approach to public administration reform has been driven by the necessities of its beneficiary countries, coupled with the requirements of their future European Union membership. In these countries the reforms have been and still are mainly EU accession-driven, and the preoccupation is to align their civil services and public administrations with standards and principles that are shared by older EU Member States. This entails systemic changes (i.e. changes in values and perceptions), not only changes in administrative processes.

On the other hand, SIGMA was asked by the European Commission to assess the reforms of public administration in EU candidate countries of Central and Eastern Europe, with a focus on the horizontal systems of governance, such as civil service, management of public expenditure, internal audit, financial control, public procurement and policy-making capacities. The concern of the European Commission was, on the one hand, that membership in the European Union required that every administrative domain and economic sector of a member state respect the *acquis communautaire*. In the various domains of the *acquis*, the targets and content of reforms are fairly clear. Candidate countries need to transpose EC legislation into their domestic legal order and then implement and enforce it. On the other hand, the Commission was concerned by the fact that no *acquis communautaire* existed for setting standards of horizontal systems of governance. Targets and orientations for public administration reform in the perspective of EU accession are therefore less distinct.

In spite of the lack of *acquis communautaire* for horizontal governance systems, candidate countries are required: 1) to have administrative systems capable of transposing, implementing and enforcing the *acquis* according to the principle of “effective results” (“*obligation de résultat*”); 2) to meet the criteria required for EU membership, as adopted by the EU Council (referred to as the Copenhagen and Madrid criteria); and 3) to have their progress towards EU accession measured against those criteria, i.e. in the wording of the European Commission’s Regular Reports, in terms of their “administrative and judicial capacity to apply the *acquis*”.

### **1. Convergence of governance systems among EU Member States: A European Administrative Space?**

Horizontal governance systems of a candidate country are expected to meet some requirements that, although not explicit in the Treaties, are crucial for the reliable functioning of the entire administration, including in areas of the *acquis*. However, the lack of general EC legislation applicable in the domains of public administration and governance, along with the disparate administrative arrangements in the internal domestic orders of member states, poses a problem for candidate countries. They need to identify what specifically these requirements consist of and where to find them in practical terms.

In the course of time, a relatively wide consensus on key components of good governance has emerged among democratic states. These components include, among others, the rule of law, technical and managerial competence, organisational capacity and citizens’ participation. EU Member States have different legal traditions and different systems of governance. In spite of that, within the EU this consensus has established over the course of time a set of common principles for public administration, which is shared by its member states. Originally, these principles were defined and refined through the jurisprudence of national courts and, subsequently, by the jurisprudence of the European Court of Justice. They can thus now be considered as part of the *acquis communautaire*<sup>1</sup> 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.

As far as these principles are shared among EU Member States, we can speak of a common “European Administrative Space” (EAS)<sup>2</sup>. The term “European administrative space” is a metaphor. An administrative space, properly speaking, is possible when a set of administrative principles, rules, and regulations are uniformly enforced in a given territory covered by a national constitution. Traditionally, the territory where administrative law has been applicable has been that of sovereign states. The issue of a common administrative law for all of the sovereign states integrated into the European Union has been a matter for debate, unevenly intensive, since the outset of the European Community. No clear outcome has

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<sup>1</sup> The jurisprudence of the European Court of Justice forms part of the *acquis communautaire*.

<sup>2</sup> 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 <http://www.sigmaweb.org>.

yet exists, although the new Constitutional Treaty affects the future evolution of this issue, as we will see below.

The EAS leads to a set of standards for action within public administration, which is defined by law and enforced in practice through relevant procedures and accountability mechanisms. In many EU Member States these principles are usually established by the constitution, and transmitted through a set of administrative laws, such as civil service laws, administrative procedures acts, administrative process and judicial review acts, organic laws on budgeting, and regulations on accountability mechanisms, such as internal control, external audit and ombudsmen.

The principles enumerated above can be found in administrative law across all older European Union Member States. Although public administrations in these countries are old structures, they have continuously adapted to new conditions including EU membership, which is itself evolving. Constant contact between public servants of member countries and the Commission, the requirement to develop and implement the *acquis communautaire* at equivalent standards of reliability across the EU, the emergence of a Europe-wide system of administrative justice, and shared basic public administration values and principles have led to a certain degree of tacit, but assumed, convergence amongst national administrations.

It is obvious that the main constitutional legal texts of the European Union now in force, namely the Treaty of Rome (1957) and the Treaty of Maastricht (1992), do not provide for a model of public administration to be implemented by EU Member States, which is purposely left to the discretion of member countries. Thus from a formal legal standpoint, member countries have a great deal of administrative autonomy. So far, only certain elements of an eventual European administrative law have been laid down in the Treaties of the European Union and in secondary legislation. Important administrative law principles are 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, mainly based on administrative law principles, which could be the basis for a European Administrative Law, as proposed to the European Parliament by the Ombudsman in a Special Report of April 2000. The European Parliament adopted such a code on 6 September 2001, which contained basic administrative law procedural principles that EU institutions had to comply with.

Nevertheless, the implicit process of convergence among administrations of EU Member States is increasingly perceived as a necessity if the EU is to attain its foundational goals. This perception led to the Constitutional Treaty signed in Rome on 29 October 2004<sup>3</sup>, which foresaw two important developments concerning public administrations of both member countries and EU institutions. One is article II-101, which states the citizen's right to a "good administration", which is defined basically in terms of the administrative law principles that had already been enshrined by the jurisprudence of the European Court of Justice mentioned above.

The other development is set out in article III-285 on Administrative Cooperation among Member States, whereby the "effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest". This is a fundamental development, because it means that a traditional realm of national sovereignty, the public administration, is declared as being of interest to all other member countries and consequently ceases to be the preserve of exclusively national decisions. It is true that some limitations are also foreseen in the Constitution of the EU, such as the subsidiarity principle and others. It is, however, remarkable that the Constitutional Treaty considers that a traditionally national domestic issue, the public administration, which has epitomised the Westphalian notion of state sovereignty, is of "common interest" to all partner states in the Union. It is too early to foresee what the consequences of this shift will be on future developments if the Constitutional Treaty is finally ratified by all Member States.

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<sup>3</sup> Published in the *Official Journal of the European Union* on 16 December 2004, no. C 310/11

On the other hand, only a few horizontal administrative issues have been the subject of legislative activity by European institutions up to now. These matters mainly concern competition policies, namely: issues related to public procurement; ensuring free competition among firms across the EU territory and enabling them to bid in calls for tender in any member country; and issues related to state aid to enterprises, which has to be authorised and closely monitored by European Union institutions.

The absence of a formal legal body regulating public administration, its procedural rules, and its institutional arrangements does not mean that a European supranational general administrative law does not exist. There exists a common *acquis*, which is made up of administrative law principles, and rightly represents a common European general administrative law. There still are significant differences amongst the EU Member States. Indeed, due to the problems raised by these differences, the issue of administrative capacity and reliability was given high prominence in the enlargement process involving countries of Central and Eastern Europe. Candidate countries have needed and will still need to develop their administrations to reach the average level of reliability found within the European Administrative Space.

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

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. 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***

The legislative activity of European institutions aimed at implementing the Treaties is a major source of common European substantive administrative law governing EU Member States, their public administrations, their courts and their citizens. This substantive administrative law has the characteristic of being mainly sectoral. It somewhat affects a varied assortment of policy domains, such as free competition within the internal market, telecommunications, environment, agriculture, industrial policy, science and research, and border controls. This substantive administrative law constitutes the *acquis communautaire*, of which the level of compatibility with corresponding regulations of EU candidate countries is screened and assessed by the European Commission within the framework of the accession negotiation process.

### ***b) Interaction amongst officials***

Another source of administrative approximation is the constant interaction among officials of Member States and between these officials and European Commission officials. These intergovernmental relations are mainly relations between people, and they contribute to 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 results that these policies are meant to attain. Inter-administrative co-operation is one of the concepts fostered and reinforced by the Maastricht Treaty (article 209A), and it also appears in the Constitutional Treaty (article III-285). Co-operation and exchange have the effect of creating informal peer pressure for setting shared standards to better ensure the attainment of the policy results foreseen in the Treaties and in other EU legislation. These intergovernmental relations contribute to spreading and sharing a set of common administrative principles and ways of management, which in turn helps to pattern a shared ideal role model for the behaviour of civil servants throughout the Union. The above-mentioned effects of these intergovernmental relations are possible, to a great extent, because the officials involved are able to develop a rather stable professional career within their own national civil services, which are relatively free of patronage. Such effects are less likely when administrations are rather unstable, as is still the case in some candidate countries and in some new Member States.

### **c) Mutual “contamination” among administrative systems of EU Member States**

A phenomenon of pervasiveness of EU law into national legal orders has been noted. This phenomenon is generated by the fact that it would be very difficult to use, within a given state, different standards and practices for applying national law and EU law. Progressively, national institutions are therefore applying the same standards and using similar practices for applying both national law and EU law. This fact is leading to the idea of a common administrative law being developed amongst EU Member States. This “contamination” of national laws by EU law and legal principles is also contributing to a sort of “Europeanisation” of administrative law.

### **d) The role of the European Court of Justice**

However, it is the European Court of Justice that by and large plays the major role in shaping common administrative law principles within the European Union. Whereas EU secondary legislation is almost exclusively sectoral, the rulings of the European Court of Justice lead to reflections on, and development of, administrative principles, which are more general in nature, even if they are set forth on a case-by-case basis. In fact, the jurisprudence of the Court is the main source of general, i.e. non-sectoral, administrative law in the Union. This prominent role of the Court is only natural because of the fragmented nature of written European administrative law. The Treaties were designed to serve as a framework requiring further and continuous developments.

Within the EU judicial system, national courts of justice are called upon to ensure the implementation of the EU Treaties and secondary legislation. As EU law has to be interpreted in a uniform manner, national courts are induced, when the wording of a piece of legislation could appear to be unclear, to refer 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 has contributed to the leading role<sup>4</sup> that the Court plays in developing common principles, by setting an interpretative framework to be followed by national courts.

The European Court of Justice needs to rely on already established general administrative law principles, which have been created and refined by national administrative courts of EU Member States. The Court, by taking stock of these national case laws, defines and refines general administrative principles binding on all Member States as such, and on their citizens, in the application of EU law. Furthermore, in many cases the interpretation of relevant EU law provisions by the Court leads to modifications in the way principles of administrative law are understood within a Member State. Indeed, it can be said that there is a common *acquis* of legal administrative principles developed by the European Court of Justice.

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 law*. 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.

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<sup>4</sup> The leading role of the European Court of Justice has been criticised by some as excessive judicial activism.

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

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.

In SIGMA we have worked on the assumption that the public administrations of candidate countries needed to reach acceptable standards of reliability, predictability, accountability, transparency, efficiency, and effectiveness in order to meet EU accession requirements. Moreover, we interpreted the substance of the accession requirements defined by the European Council, insofar as public administration is concerned, in terms of this set of administrative standards. The essential reason for this assumption was, firstly, that these standards were based on administrative law principles used to guide the daily behaviour of public officials. Secondly, the European Court of Justice endowed these principles with an EU-wide enforceability.

In this connection, it should also be considered that EU integration is an evolutionary process (principle of progression in the construction of the EU). This means that a candidate country should show a sufficient degree of progress to satisfactorily compare itself with the average level of EU Member States. However, the level of convergence in 1986 (when Portugal and Spain joined the EU) changed in 1995 (when Austria, Finland and Sweden joined the Union), and was different again in May 2004 when ten new Member States joined the Union. This level will still be different in the future, when other candidate countries join the European Union. 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 should be able to fill the gap between the current level of quality of its public administration and its level in the future, when it will effectively join the Union. It will be not enough for a candidate country to compare itself with the “worst” state that is already an EU Member. The comparison has to be made between the candidate country and the average of all Member States.

For that reason these EAS principles should serve to guide public administration reforms in EU candidate countries. The extent to which a given candidate country shares these public administration principles and adheres to the standards of the EAS gives an indication of the capacity of its national public administration to effectively implement the *acquis communautaire*, in accordance with the criteria that have been explicitly defined by the European Council. Countries that aspire to attain EU membership should take these standards into account when reforming their public administrations, as membership status requires Member States’ administrations to perform as executors of EU law and policies. As such, they have to take care, 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 perhaps one of the reasons why the Constitutional Treaty considers the national administrative performance of each Member State as a matter of “common interest”.

From the above-mentioned assumptions, the conclusion follows that a given administrative system can be assessed by scrutinising the extent to which those administrative law principles are actually applied, in both the formal legal arrangements in a country and the daily practice of public authorities and civil servants. In this sense, these general administrative law principles also serve as standards for measuring the reliability of the public administration, the degree of accountability of civil servants and public authorities, and the soundness and practicability of procedures for shaping administrative decisions and challenging them through appeal and redress. In other words, these principles serve to measure the trustworthiness of a candidate to become a reliable member within the EU.

The extent to which different countries share these administrative law principles also gives an indication of the degree of compatibility of their administrative systems. As far as EU integration is concerned, these administrative law principles serve not only as preconditions for a closer integration, but also as yardsticks for measuring the capacity of public administration institutional arrangements in a given country to reliably implement the *acquis communautaire*.

#### **4. Public Management and Civil Service Reforms in EU Candidate Countries are accession-driven**

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. In order to fulfil the Copenhagen criteria, civil services in candidate countries need to become professional, free of undue politicisation, and based on acceptable integrity standards. The distinct separation between politics and administration is a precondition. Selection systems for recruitment and promotion based on merit and carried out through competitive and transparent procedures, together with adequate training strategies, have been the basic means proposed to attain professionalism of the civil service. Other means are a clear definition of rights and duties and disciplinary arrangements, including limitations to political involvement and incompatibility of certain economic activities with the civil servant status, as well as decent salary levels set objectively by legislation. Finally, a sound organisational set-up for the administration and for public agencies, with clear accountability lines, and clearly defined administrative procedures both aim to create more accountable and transparent environments and to promote professionalism and an administration ruled by law.

The presence of administrative law principles featured in the European Administrative Space can be traced by looking at a number of elements, such as:

1. The vigour of the principle of legality, i.e. of the rule of law, in the internal legal order of countries;
2. The legal arrangements for accountability of public officials and for protecting impartiality and integrity of civil servants as basic components of their professional independence;
3. The legal arrangements for taking administrative decisions based on sound mechanisms established in law so as to ensure predictability of public decision-making and to facilitate judicial review of administrative decisions and actions;
4. The legal arrangements for the management of, and control over, public funds and for ensuring that financial management and control work in favour of transparency and accountability;
5. The overall strength of administrative and judiciary systems in applying and enforcing the above legal arrangements.

An assessment of the above elements provides indications of the degree of preparedness of candidate countries' public administrations for EU membership. Where no specific European regulations exist, the SIGMA methodology for assessment is based on administrative law principles as translated into a set of baselines. This is the case, for example, for the civil service and general administrative law and, to some extent, for the management of public expenditure. Where some EU-wide regulations or international standards do exist, the baselines take them into account along with general principles of administrative law. This is the case, for example, for public internal financial control, external audit and public procurement. In every case, the baselines cover both the formal aspects (such as the legal basis and institutional framework) and the dynamic aspects of such a framework, i.e. its practical performance.

Civil service reform and more general administrative reform cannot be dissociated from each other. The legal administrative framework is the milieu where the civil service has to operate. It forms the civil service context. It is necessary to address in parallel the reform of the civil service and the reform of legislation on the organisation of the administration (ministries and agencies) and on administrative procedures, as well as on reinforcing accountability and control mechanisms, which are basically internal and external control, ombudsmen and judicial review of administrative actions. Likewise, it is also necessary to look into policy-making and co-ordination capacities and at legislation on public expenditure management (encompassing the whole budget process, from budget formation to budget execution, including public procurement legislation and practices). Policy practices and substantive and procedural

legislation are important elements in shaping a civil service behaviour that is in keeping with democratic requirements. This legal administrative context, if properly designed, will shape an adequate institutional environment. Otherwise, civil service reform will either lead to nowhere or to frustration.

The first – and more difficult – concern in many central and eastern European candidate countries has been to put into practice the notion of a public administration governed by law. The democratic rule of law, in its dimensions of legal certainty and predictability of public actions and decisions, is crucial in terms of the reliability of future EU partners. The *acquis communautaire* has to be applied homogeneously across the European Union, and the national administration in each Member State is the main implementing authority of the *acquis* in that country. In the intellectual atmosphere that was prevalent in the 1990s, dominated by managerial approaches<sup>5</sup> to public administration, an emphasis on the importance of the administration as an interconnected legal system faced at times the disdain of the mainstream theoretical and academic bandwagon.

EU accession-driven public administration reform has been basically and necessarily a legal approach because the change required from candidate countries by the EU is mainly about changing the rules of the game and building a new legal order for public administration that is compatible with EU membership aspirations. It was understood that legal change was the precondition for building a new and sufficient administrative capacity to cope with the requirements of EU membership. This approach basically – but not only – stems from administrative traditions in continental Europe, where public administrations have a strong legal component. In the majority of central and eastern European countries, this tradition, which is anchored in European continental administrative law, existed, particularly in those countries which had been influenced by the Prussian, Austro-Hungarian and French legal administrative traditions.

## Conclusions

1. The extent to which general administrative law principles inspire national legislation and affect the real behaviour of public officials is indicative of, and correlates with, the capability of a given country to effectively adopt and implement the formal *acquis communautaire*.
2. Developments in national civil services and reforms of administrative law and administrative practices are decisive instruments for either ensuring or hindering the transformation of these administrative law principles into actual public actions and decision-making processes.
3. However, stressing the harmonising potential of public administration principles does not mean that administrative institutions should be homogeneously set up across EU Member States. The important point is that, independently of specifically national institutional arrangements, national systems of governance must recognise principles and adhere to standards that are shared by EU Member States.

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<sup>5</sup> in particular, the approaches referred to as “new public management”