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This paper will address some of the main issues relating to the drafting of a law bearing on direct EU administration, pointing out the main options for each one of them. The first chapter deals with preliminary issues, in order to define the object of the paper. In the second chapter some fundamental features of the envisaged law are discussed. The third chapter is devoted to the scope of the law. The fourth chapter focuses on some of its possible contents.

1. PRELIMINARY ISSUES.

1.1. *A Law ...*

The first choice, that the EU legislators should make, is the most fundamental one: to regulate or not to regulate?

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Is it really a good idea to regulate the EU administrative procedures with one general law?

The question is not mainly one of legal basis, as it can be easily argued that art. 298 TFEU provides a legal basis for such a law. The question is one of opportunity, which is particularly relevant in a field like administrative law, traditionally adverse to codification. Although many western countries do have general APAs, some important member states, such as France and the United Kingdom, have so far chosen not to have one.

There is, however, in the western world, a general tendency towards the "codification" of the administrative procedure. In the last few decades, many countries, including several EU Member States, have adopted such pieces of legislation. Overall, their experience is good.

The pros and cons of such a codification are very well known and have been discussed by scholars in many national systems. As far as the EU law is concerned, one could notice that the present situation, resulting from several sectoral regulations and some case-law principles, is not completely satisfying, mainly because in some areas the protection of private parties is not adequately ensured by the law.

One additional clarification follows from what has just been observed. A European APA could not be a simple restatement of existing rules, because such general rules do not exist yet. It would not be a "codification à droit constant", but would require the establishment of new principles and rules, or at least the extension of the scope of existing ones.

1.2. *... on Administrative Procedure...*

Laws on administrative procedure, however, do not usually deal only with administrative procedures. This is a second choice for the EU legislators: do they only want to establish procedural rules, or do they want to summarize the status of private parties towards the EU institutions? APAs tend to be bills of rights of citizens in their relations with administrative agencies. If the EU law on administrative procedure will follow this trend, it could also contribute towards building the European citizenship.

If the envisaged law will not be restricted to procedural rules, there will be further choices to make, in order to decide what to regulate. Several typical APA contents do not involve the decision-

making procedure, but also the decision itself, and events which occur after the decision is made. They also involve organizational arrangements. These possible contents will be examined in chapter 4.

1.3. *... for EU Direct Administration.*

The current discussion concerns the administrative procedures bearing on the EU direct administration, within the limits established by art. 298 TFEU.

However, the distinction between direct administration and indirect administration is far from clear or precise. The legal doctrine has described several intermediate models, in which the need for the application of some principles of administrative law is no less strong than in the traditional areas of direct administration. EU institutions, bodies and agencies' competences and procedures are often intertwined with national ones, in "composed" administrative procedures, where the need for legal rules and guarantees is sometimes stronger than in the purely EU-related procedures.

Another important choice, that the European legislators face, is therefore one of definition of the EU administration. Do they only want to regulate the traditional areas of direct administration, or will they rather regulate the performance of all EU administration's tasks? Do they want to limit the relevance of the new rules to some sectors, or will they establish legal principles in broad terms, so that these principles can gradually expand their scope and find their way in the semi-direct administration and in the composed procedures?

1.4. *Eu Law and Member States' administrative procedures.*

A further choice, concerning the purpose of the envisaged law, is available for EU legislators. In issuing it, will they have in mind only the EU bodies and agencies, or will they also aim to cover national administrations? Of course, they cannot regulate the procedures of national administrations, but nothing prevents them from trying to set up a model for national legislation (especially for the states which do not yet have an APA). On the contrary, a European codification, summarizing the common core of the European administrative procedure law, would be perfectly consistent with art. 197 TFEU, which stipulates that "(t)he Union may support the efforts of Member

States to improve their administrative capacity to implement Union law" in this field.

In making this choice, the EU legilsators should take into account that APAs are the main field and the main products of the convergence of national administrative laws. Most national APAs set the same principles, which epitomize the principle of good administration, laid down in art. 41 of the Charter of fundamental rights.

Even for national administrations, the law of administrative procedure is already not a purely national one. It stems from common constitutional principles, from a general understanding of the purposes of regulation, from the case law of the EU Court of Justice and of the ECHR, and from the sectoral European legislation. A EU APA could be the ideal place for a well reasoned development of the common principles, which the EU could establish as a binding regulation for its own administration and as a model for the Member States. In this case, the law should be designed with an eye on the possible extension of its rules to national agencies.

2. The main features of the law.

2.1. *The Purpose of the Law.*

Some more options, for EU legislators, concern the drafting of the law.

The first choice is about its purpose. APAs may aim at different purposes: ensuring efficiency and a good distribution of work among different bodies and offices; protecting the individuals affected by final decisions of the administration; or allowing citizens and interest representatives to express their views and preferences. These different purposes usually coexist, but some can prevail over the others.

There are two main models of regulation of administrative procedures. In the first, administrative procedure is conceived as similar to the judicial process (its origin can be traced back to the Austrian law of 1925). In the second, it is conceived as similar to the political process (its origin dating to the American law of 1946). In the former, the purpose is mainly to protect the individual interest of the parties involved, while other citizens are excluded. In the latter, the main purpose is to replicate the political debate before adminis-

trative agencies. The former is better suited for adjudication, the second for rulemaking.

The balance between these two demands will affect the choice of the rules and the selection of the parties which are allowed to speak their voice in the procedure.

In art. 41 of the Charter of fundamental rights the first logic prevails, as the right to be heard is only conferred to the person who can be adversely affected and the right of access is given to every person only on his or her file.

On the other hand, many European sectoral regulations follow the second logic. EU legislators should seriously consider the option of adopting this logic in the general law, as such a law may contribute, to some extent, towards enhancing the legitimacy and accountability of EU administration, which obvioulsy has a weaker legitimacy than national ones. National administrations are usually accountable to representative bodies or have democratically elected leaders. EU administrations' relations with electors is quite weaker, therefore they need to strenghten their legitimacy in other ways.

One should not forget, however, that the first and necessary purpose of APAs is to make administrative agencies work properly. The procedure is, in the first place, an organizational tool, an instrument to regulate the bureaucratic work. While regulating it, this aspect should also be taken into account. The legislators should therefore consider the introduction of rules aiming not at protecting private interests, but at fulfilling public interests, such as those on simplification and acceleration of procedures.

2.2. *The Regulatory Approach.*

As for the regulatory approch, the choice is between a long, comprehensive law and a short one, built upon general principles and some details.

Some APAs are drafted in similar terms as those regulating judicial trials: they provide rules for all the steps of the procedures. A good example is the German law, consisting of more than one hundred articles. Such laws are usually designed for complex procedures and often do not apply to simpler ones.

Other APAs are quite shorter and often fragmentary. They do not aim at regulating the whole procedure, but only at establishing some principles and few details. They leave more room to agencies

and courts, and are more generally applied. A good example is the Italian law, consisting of about forty articles.

The choice between these approaches is linked to the one concerning the main purpose of the law. If they only want to provide rules for some sector of direct administration, the EU legislators could decide to go into details. If they want to establish a general regulation of all EU administration and a model for Member States, they will probably adopt a more prudent approach.

2.3. *The Relations with Other Sources of Law.*

Further choices to be made by EU legislators concern the relations with other legal texts. Will the envisaged law exhaust the subject? Will it be the only act regulating, in general terms, the administrative procedures, or will it delegate some decisions to other acts and instruments? This issue concerns different kinds of other sources.

First, some detailed rules could be left to executing regulations. This could happen, for example, for those concerning the deadlines for the different kinds of procedure or the files open to access or excluded from access.

Second, some general provisions exist, which do not constitute a regulation of administrative procedures, but are relevant for it and should be coordinated with it. A good example is the European Code of Good Administrative Behaviour. More generally, the role of soft law and further instruments should be assessed.

Third, it should be reminded that the codification often aims at reducing the role of courts and almost never achieves this goal. The role of courts will remain important in detailing and finetuning the principles established by the law. The legislators, therefore, should not try to enter in details, in order to limit their role.

Finally, the relations between the general law and sectoral legislation should be considered. On the one hand, these relations will be affected by the approach chosen for the law: if the envisaged law regulates different kinds of procedure in details, the sectoral legislation will be affected. On the contrary, if the law establishes only general rules, the sectoral ones will not be affected. This alternative will be assessed in the third chapter.

On the other hand, the law may well leave to the single institutions, bodies, offices and agencies some discretion in its execution.

3. The scope of the law.

3.1. *Concerned Bodies.*

Some more choices, for EU legislators, concern the scope of the law: which bodies will be concerned and which procedures regulated?

As for the concerned bodies, it must be noticed that defining the sphere of application for general statutes of administrative law is often difficult. There is a core of bodies which are certainly included, but there are several grey areas, of semi-public, semi-national or semi-autonomous subjects, to whom such laws may apply or not.

As for the EU administration, for example, the Commission and the agencies should be included, but for other subjects, such as EU contractors, the answer might be less clear.

The law could therefore contain a rule or criterium, offering guidance to the administration and courts in delimiting the sphere of its application.

3.2. *Concerned Procedures.*

As for the kinds of procedures, there are several further choices to make.

First of all, APAs may regulate rulemaking, adjudication or both. The American law was issued mainly in order to limit administrative discretion in rulemaking, while many European laws focus only, or primarily, on adjudication. A modern law should probably address both.

A second choice is between a law providing only general rules, imposing themselves over sectoral legislation or applicable by default, and a law containing not only general rules, but also special ones for each kind of procedure (such as those relating to antitrust, access to documents, infringement, data protection, and civil service). Most APAs adopt the first approach. One could think that the second approach is suitable for the EU, owing to the limited number of direct administration procedures. Such option, however, would limit the chances that the law sets itself as a general model, consisting of principles fit for extensive application. Moreover, if one considers all bodies and agencies, the number of EU administration procedures is already remarkable, and such procedures are so different

from each other, that it would be very difficult to regulate each one of them in detail. In such a case, of course, the law would not be a high-flying law of principles.

Rather than exhaustively regulating all kinds of procedures, the law could, however, set some rules for the main families of procedures. For example, for the procedures involving fines and penalties, it could set some guarantees for the accused party and require the distinction between prosecution and decision. For authorizations, it could set the same rules that the EU law imposes on national administration, as set in general terms in the Services Directive.

4. The Principles of Administrative Procedure.

4.1. *The Rules of Good Administration.*

Some further remarks should be made with regard to the contents of the law on EU administrative procedure.

Its natural contents will be, of course, those which constitute the core of the principle of good administration: participation, duty to give reasons, transparency, time limits. The choices bearing on these rules concern just their details.

As for participation and the right to be heard, what has been observed in chapter 2 about the purpose of the law should also be recalled here. If the main purpose is the protection of individuals, participatory rights can be conferred only to those who may be adversely affected by the administrative act. But if the purpose has to do with citizenship and accountability, such rights should be provided for in broader terms. One should consider that administrative participation is a multi-task tool: in can be used in the interest of the administration, in the interest of individuals or for balancing different interests.

The same can be said about administrative trasparency. In order to protect individuals, it may be sufficient to allow individual access to personal files. But in order to promote good administration and strenghten the EU bodies' legitimacy, a different kind of transparency is needed, based on publication of administrative information and data, internal reports and office rules.

As for the duty to give reasons, the main problem is to define its scope: is it necessary for all administrative acts? Will it be mandatory,

for example, for the issuance of the required act? It should be considered that this is a time-consuming rule, whose costs can sometimes be more important than its advantages.

As for the time limits for the conclusion of the procedures, the choice is between a general clause, such as the one of art. 41, or a more precise deadline, which should, however, depend on the complexity of the procedure.

4.2. *Further Contents.*

As noted at the outset, APAs do not usually deal only with procedures, but also with other matters: another choice to be made bears, therefore, on whether such matters will be included or not.

For some matters not strictly dealing with administrative procedures, such as the right of access to files and the obligation to give reasons, the inclusion is quite obvious. For others, such as administrative remedies, it is not.

The administrative procedure is a decision-making process: it embraces all the events which take place before the adoption of the final administrative act. It does not embrace, however, the merits of the decision nor its execution or the following events.

Many APAs contain rules not only about procedure, but also about administrative acts: their merits (principles of proportionality, fairness, legitimate expectation); and their life (communication, validity, vices, legal effects, modifications, revocation). Some APAs also regulate their execution and implementation by administrative agencies and by private parties.

Public procurement is usually not regulated by APAs, but — in the absence of a satisfying discipline — the EU law on administrative procedure may choose to include rules on contracts.

Finally, there are organizational issues which are linked to the administrative procedures or to the citizens' rights towards administrations. For example, the law may decide to provide for the appointment of an officer in charge of each procedure. And it may include the regulation of personal data protection in the context of administrative procedures as well as lobbying.