European Parliament

Digitalisation and administrative law

European added value assessment

STUDY

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European Added Value Unit
PE 730.350 – November 2022

EN

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This study seeks to support a European Parliament legislative own-initiative report on digitalisation and administrative law (2021/2161(INL)) currently in preparation. The study investigates the state of play with regard to digitalisation, the use of digital tools in EU administrative law, and procedures to enhance good EU administration.

The analysis identifies five regulatory gaps in the status quo that have negative consequences for society, including a lack of legal certainty and enforcement, a disproportionate burden on citizens, and a lack of awareness about administrative injustice. These consequences ultimately undermine the public's trust in public administration. To address the regulatory gaps identified, the study presents three possible EU-level policy options and assesses their potential added value: an administrative procedure regulation, an administrative activity regulation, and a non-binding code on digital EU administration.

The study finds that EU action has the potential to promote the efficiency and effectiveness of the EU administration and enhance the fundamental right to good administration in the context of digitalisation and the use of digital tools. Moreover, regulatory action to introduce common EU rules on administrative procedure that are fit for the digital era could help deliver the benefits of the digital transformation for both the EU administration and society at large.

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This paper has been drawn up by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament.

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed in November 2022.

PE 730.350
ISBN: 978-92-846-9678-9
DOI: 10.2861/643042
CAT: QA-08-22-263-EN-N

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Executive summary

Why this assessment?

Article 41 of the Charter of Fundamental Rights notes the **right to good administration**, namely that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union'.[1] At present, there are no uniform and binding procedural rules that govern EU citizens' right to good administration, and thus the extent to which this right is ensured is questionable.

Since 2001, the European Parliament has been calling for an open, efficient and independent European Union administration. It presented legislative initiatives in 2012 and 2016, which were not subsequently taken up by the European Commission. However, the problems identified remain, with new issues and challenges emerging with time. This is true, in particular, as regards digitalisation, for example the use of 'automatic' or 'algorithmic' decision-making, which could raise concerns of compliance with fundamental rights, data protection, inclusiveness and non-discrimination, and with principles such as technological neutrality.[2]

The need for uniform and binding procedural rules on administrative law is more urgent considering the **challenges raised by digitalisation** and the need to be 'digital ready'.

Scope of the assessment

On 9 September 2021, the European Parliament's Committee on Legal Affairs (JURI committee) was authorised to draw up a legislative own-initiative report on **digitalisation and administrative law** (procedure file 2021/2161(INL)). This legislative initiative reiterates the European Parliament's 2016 position and considers other appropriate measures to address 'digitalisation from the perspective of administrative law and administrative cooperation'.[3]

This **European added value assessment** (EAVA) is intended to support the European Parliament's legislative initiative on digitalisation and administrative law (2021/2161(INL)). The assessment presents an objective, evidence-based review of the key challenges in the area of digitalisation and administrative law and their impacts. It proposes policy options to address gaps and barriers in the status quo, and assesses their potential impacts and European added value.[4] The EAVA study builds on a 2018 impact assessment[5] and a public consultation[6] that accompanied previous legislative initiatives by the Parliament from 2012 and 2016. It integrates new research and highlights best practices from national public administrations.

What is the current situation?

At present, EU public administration faces challenges that limit its efficiency and effectiveness in guaranteeing EU citizens and businesses the right to public administration. The analysis identified **five regulatory gaps** in the current implementation of EU administrative law:

- Scoping fallacy: unclear what administrative actions should be subject to controls;

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1 Charter of Fundamental Rights of the European Union, 2012.

2 Resolution of 20 May 2021 on shaping the digital future of Europe, 2020/2216(INI), European Parliament.

3 Request for authorisation to draw up a legislative own-initiative report, letter from the Chair of the JURI committee to the Chair of the Conference of Committee Chairs of 18 December 2020, D(2020) 36533.

4 The EAVA is supported an external research paper prepared by the contracted expert, Dr Anne Meuwese (see annex).

5 Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

6 T. Evas, EU law for an open independent and efficient European administration – Summary report of the public consultation, EPRS, European Parliament, 2018.

- Discrepancy problem: limited coherence between different sets of norms governing digital rules and administrative law;
- Known unknown: individuals and legal persons have limited information on the use of their data;
- Unknown unknown: individuals and legal persons cannot know if a mistake has been made;
- Redress gap: avenues for individuals and legal persons to seek redress are not well developed.

Digitalisation plays a key role in all of these gaps, which generate costs for citizens, businesses and EU public administrations. Some Member States offer examples of best practices, as there is a clear link between highly digitalised national public administrations with established administrative rules and a high level of transparency on the one hand, and a high level of trust in government on the other.

How could the EU act?

The EU could take action to promote the efficiency and effectiveness of EU public administration. More specifically, this action could promote legal certainty, reduce the burden on citizens and EU public administrations, tackle administrative injustice, and ultimately break the cycle of mistrust of citizens in EU public administration.

A legal basis for such action to regulate EU public administration can be found in Article 298 of the Treaty on the Functioning of the European Union (TFEU).[7] Moreover, a public consultation from 2018 showed strong support (76 % of respondents) for additional measures at EU level to enhance EU administrative procedures. Improving efficiency and transparency ranked among the top reasons voiced by citizens for an EU intervention.[8]

The EAVA defined three policy options, which are described briefly below.

Policy option 1: administrative procedure regulation. This policy option would aim to update the 2016 proposal in the context of digitalisation, reflecting the rules regarding digital technologies and data adopted recently, and the use of digital tools by EU public administration. The option focuses on individual redress mechanisms in the context of administrative procedures that often result in an administrative act.

Policy option 2: administrative activity regulation. Rather than focussing on the redress phase, this policy option would regulate information rights and procedures. A similar approach has been followed in Denmark as part of the digital-ready legislation concept (see Section 2.2 'Best practices' for more information).

Policy option 3: 'Digital EU administration' code. A soft-law instrument could also be an alternative to a legally binding regulation. This would come in the form of a 'code aimed at digital EU administration', similar to the proposal examined in the 2016 impact assessment, whereby digital

[7] The European Commission has previously confirmed that this provision could be a suitable legal basis. See Follow up to the European Parliament resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union, SP(2013)251, European Commission, 24 April 2013. In its reaction to the European Parliament's 2013 resolution on administrative law, the Commission stated that this provision 'can be interpreted as providing a legal basis for a regulation on administrative procedures of the Union administration'.

[8] T. Evas, EU law for an open independent and efficient European administration – Summary report of the public consultation, EPRS, European Parliament, 2018.

aspects would need to be taken into consideration. Examples of this approach can be found in Spain's Digital Rights Charter and the 2021 Declaration on European Digital Rights.

What could the European added value of EU action be?

EU action through the proposed policy options could promote the effectiveness and efficiency of EU public administration and strengthen its readiness for the future. Table 1 presents an overview of the findings from an assessment by policy option. One key difference between the policy options is the scope of what would be affected. While policy option 1 would focus on administrative procedures between an individual or a legal person and the public administration, usually resulting in an administrative act, policy option 2 would focus on administrative activities more broadly. Another key difference concerns the impacts. Key impacts relating to the objectives of EU action include legal certainty and the right to good administration. Lastly, policy option 3 would be a 'soft-law' measure as compared with the legislative action implied by policy options 1 and 2.

Further added value to EU action could be obtained through complementary measures, for example by promoting the awareness of citizens about their rights to public administration. Doing so could also have the potential to strengthen their trust in EU institutions.

Table 1 – Comparison of EU policy options to promote an open, efficient and independent EU administration

	Policy option 1	Policy option 2	Policy option 3
	Administrative procedure regulation	Administrative activity regulation	Code 'digital EU administration'
Efficiency			
Legal certainty for individuals	+	++	-
Legal certainty for authorities	++	+	-
Burden on citizens and businesses	+	+++	+
Effectiveness			
Enforcement and compliance	+	++	-
Administrative injustice	+	+++	++
Public trust	+	++	-/+
Right to good administration	++	+++	+
Other assessment criteria			
Readiness for digital transition	-	+++	-/+

Source: EPRS. The extent to which the selected policy options could address the regulatory gaps and achieve the set objectives is expressed in the range of +, ++ and +++ (the highest impact).

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1. Introduction

In accordance with Article 225 of the Treaty on the Functioning of the European Union (TFEU), the European Parliament has a right to request the European Commission to take legislative action by adopting **legislative own-initiative reports (INL)**. On 9 September 2021, the European Parliament's Committee on Legal Affairs (JURI committee) was authorised to draw up a legislative own-initiative report on **digitalisation and administrative law** (procedure file **2021/2161(INL)**). The justification letter (D(2020) 36533) from the Chair of the JURI committee to the Chair of the Conference of Committee Chairs confirms the intention for the INL report to build on the JURI committee's competence for administrative law, the 2012 JURI legislative own-initiative report 'Law of administrative procedure of the European Union' (2012/2024(INL)), and the European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration.[9] Where appropriate, the INL should suggest a revised version of the legislative proposal put forward in the 2012 report and the 2016 resolution, coupled with other appropriate measures to address 'digitalisation from the perspective of administrative law and administrative cooperation'.[10] Moreover, the letter notes that 'the current COVID-19 crisis has reinforced the importance of digitalisation of administrative procedures'.

In July 2022, the European Parliament called again attention to its request to the Commission to come up with a legislative proposal on a European law of administrative procedure, taking into consideration the previous efforts by the Parliament on this subject.[11] In its follow-up to the resolution, the Commission noted that 'the overwhelming majority of interactions between citizens and the European administration happen when specific EU acts provide for it', reiterating its support to continue with the sector-specific approach when dealing with 'diverse, mostly highly specialised activities'. The Commission is 'not convinced that bringing the specific, tailor-made rules related to many different administrative procedures within one single legal act would increase the transparency and clarity of existing rules, but rather create complexities and rigidities'.[12]

This **European added value assessment** (EAVA) is intended to support the European Parliament's legislative initiative on digitalisation and administrative law (2021/2161(INL)). The assessment presents an objective, evidence-based review of the key challenges in the area of digitalisation and administrative law and their impacts. It proposes policy options to address gaps and barriers in the status quo, including their assessment. The EAVA study builds on a 2018 impact assessment[13] and a public consultation[14] that accompanied previous legislative initiatives by the Parliament from 2012 and 2016. The annexed study, supported by legal analysis, expert interviews and case studies, provides the basis for this report. The report offers an additional analysis of possible impacts of a more digitised public administration, further evidence on best practices from Member States, and suggestions for complementary action.

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9 Report of 12 November 2012 with recommendations to the Commission on a Law of Administrative Procedure of the European Union, Committee on Legal Affairs, European Parliament; and resolution of 9 June 2016 for an open, efficient and independent European Union administration, European Parliament.

10 Request for authorisation to draw up a legislative own-initiative report, letter from the Chair of the JURI committee to the Chair of the Conference of Committee Chairs of 18 December 2020, D(2020) 36533.

11 Resolution of 7 July 2022 on Better regulation: Joining forces to make better laws, European Parliament.

12 Follow-up to the European Parliament non-legislative resolution on Better Regulation: Joining forces to make better laws, SP(2022)484, European Commission, 20 October 2022 (paragraph 64).

13 Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

14 T. Evas, EU law for an open independent and efficient European administration – Summary report of the public consultation, EPRS, European Parliament, 2018.

2. Current situation and regulatory gaps

Article 41 of the Charter of Fundamental Rights provides for the **right to good administration**, namely that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union'.[15] The handling of citizens' requests through administrative actions varies form one jurisdiction to another, as does the intensity of regulation. As such, there is an absence of uniform and binding procedural rules on EU citizens' right to good administration.

Since 2001, the European Parliament has been calling for a set of norms that would apply to EU-level administration. Such action is needed to ensure citizens' trust in EU administration and their compliance with the rules. The **ongoing digitalisation raises new issues and challenges**, for instance relating to the use of 'automatic' or 'algorithmic' decision-making, which could raise concerns of compliance with fundamental rights such as data protection and non-discrimination, and with principles such as technological and net neutrality and inclusiveness.[16] The need for centralisation and harmonisation is greater with digitalisation, as highlighted back in the 2018 impact assessment. The research presented in the annex to this study confirms the fragmentation of EU administrative procedures and its negative impacts on the openness, efficiency and independence of the EU administration. It notes that these negative impacts will likely worsen with time, on account of the ongoing 'agencification' (attribution of increased regulatory powers to agencies and bodies) and the trend towards digitalisation of public administration.[17]

Policy context

Digitalisation of public services is one of the key objectives outlined in the digital compass for the EU's Digital Decade. The objectives set for 2030 are: 100 % online provision of key public services for citizens and businesses; 100 % of EU citizens to have access to electronic medical records; and 80 % of citizens to use digital identity.[18] Under the new Recovery and Resilience Facility, digitalisation is one of the key aspects. Member States must dedicate at least 20 % of their allocation to projects that contribute to the digital transformation or to tackling the challenges resulting from it. Digital public services, in particular, represent 10 % of total expenditure in the digital policy area, corresponding to €13.1 billion.[19]

The following EU initiatives seek to enhance digitalisation of public administrations, strengthen access to public services for citizens and businesses, and support the EU's transformation towards a digital single market.

- The Single Digital Gateway Regulation (SDGR) aims to bring public administrative services up to date, and facilitate digital access to information, administrative procedures and assistance for citizens and businesses when based in another EU country.[20]

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15 Charter of Fundamental Rights of the European Union, 2012.

16 Resolution of 20 May 2021 on shaping the digital future of Europe, European Parliament.

17 Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

18 2030 Digital Compass: the European way for the Digital Decade, COM(2021) 118, European Commission, March 2021.

19 Recovery and Resilience scoreboard – Thematic analysis: Digital public services, European Commission, December 2021.

20 Regulation (EU) 2018/1724 of 2 October 2018 establishing a single digital gateway.

- The Regulation on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation[21]), currently under review, enables businesses, citizens and public bodies to interact digitally in a secure and seamless way. The Commission's June 2021 proposal aims to establish a framework for a European digital identity, and is designed to provide highly secure and trustworthy electronic systems to enhance the provision of cross-border public and private services.[22] Finally, it provides operational aspects that support the objective of the 'once-only' principle under the SDGR, and is in line with the European strategy for data[23] and the proposed data governance act[24].
- In light of the recently agreed text of a directive on the resilience of critical entities, critical services providers will be subject to risk assessments and obligations to enhance their resilience. Member States will need to identify critical entities in key sectors and adopt national strategies to boost resilience of these sectors. At the request of the European Parliament, public administration was included in the scope of the proposal.[25]

Use of digital technologies in national public services

The 2022 edition[26] of the eGovernment Benchmark provides key insights into the state of play of online government services across Europe.[27] It presents the following indicators concerning national public administrations:

- user centricity: 81 % of government services are available online;
- transparency: 58 % of government platforms inform users whether their personal data have been consulted or processed by public administrations;
- key enablers: 67 % of public services allows an official identification solution (e-ID);
- cross-border services: 46 % of public services can be completed online by cross-border users.

Based on the above indicators, countries receive an overall score in government maturity ranging from 0 to 100. Malta scored the highest, with 96 %, followed by Estonia (90 %) and Luxembourg (87 %), while the average score reached 68 %. Key trends in digitalisation of public administrations point to COVID-19 as an accelerator for the transition; better service for businesses compared with citizens; and lack of cross-border services. User diversity and digital inclusion remain the key challenge, as currently only 16 % of public sector websites meet accessibility criteria.[28]

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21 Regulation (EU) No 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market.

22 Proposal for a regulation establishing a framework for a European Digital Identity, COM(2021) 281, European Commission, June 2021.

23 A European strategy for data, COM(2020) 66, European Commission, February 2020.

24 Proposal for a regulation on European data governance, COM(2020) 767, European Commission, November 2020.

25 Protecting essential infrastructure: committee vote confirms agreement, press release, European Parliament, 10 October 2022.

26 eGovernment Benchmark 2022 Insight Report: Synchronising Digital Governments, study prepared for the Commission's Directorate-General for Communications, Networks, Content and Technology (DG CNECT), July 2022.

27 The study analyses the state of play in 35 European countries: the EU-27 and Albania, Iceland, Montenegro, North Macedonia, Norway, Serbia, Switzerland and Turkey.

28 ibid.

Member States' authorities are increasingly using digital technologies in their interactions with citizens and businesses (see text box below). Despite the rising trend in the use of innovative technologies, data and evidence on their risks and benefits are lacking. The high use of artificial intelligence (AI) in the public sector is of particular concern. The available literature suggests various uses of AI by public administrations, ranging from internal management (streamlining of procedures, recruitment), to public service delivery (chatbots to provide citizens with targeted information), to support in various stages of policymaking (monitoring and implementation of policies, use of cameras and computer vision to monitor road safety). Current research highlights the need for further investigation and evidence collection to assess the potential impacts of AI in the public sector.[29]

'WienBot' voice assistant

In December 2017, Vienna launched 'WienBot', a free chat bot and digital assistant, to help citizens find the right information. During the COVID-19 pandemic, the city decided to use AI to fight against disinformation. The service was transformed to 'Corona-Bot', which played an important role in crisis communication, relieved the pressure on call centres, and provide citizens with targeted answers. On average, 300 000 questions are submitted to 'WienBot' per month.

Source: Stadt Wien website, consulted in October 2022.

'JobNet' AI system

Since 2018, the Flemish Employment and Vocational Training Service (VDAB) has been using 'JobNet', an AI system to enhance job matching. 'JobNet' is used to match applicants' CVs to vacancies and provide recommendations based on jobseekers' preferences, search behaviours, and profiles. According to VDAB, a major challenge in developing the AI algorithm was to avoid data bias and make sure the AI system is gender-neutral.

Source: VDAB gebruikt AI om jobmatching te verrijken, press release, Agoria, 15 May 2019.

'Bürokratt' inclusive virtual assistant

In 2022, Estonia launched its newly established AI-guided platform, 'Bürokratt', designed to change the interaction between the public and government. The country has made the code associated with the platform available to everyone for free. The government envisages a total budget of €13 million, with the platform expected to cut costs and improve government efficiency. 'Bürokratt' will also be accessible to citizens with hearing and visual impairments.

Source: e-Estonia website, 26 January 2022.

In addition to improving performance, efficiency and effectiveness, the use of digital technologies in the public sector could promote citizens' satisfaction, ensuring equality and inclusiveness. Delivering better services to citizens while engaging them in decision-making is expected to result in more transparency, accountability, legitimacy and trust.[30] Recent data demonstrate the erosion of EU citizens' trust in their national governments, with only 36 % of citizens trusting their national governments, and 35 % their national parliaments in 2021. Countries with more digitalised public administration tend to be more trusted by citizens.[31]

[29] C. van Noordt and G. Misuraca, 'Artificial intelligence for the public sector: results of landscaping the use of AI in government across the European Union', *Government Information Quarterly*, Volume 39, Issue 3, July 2022.

[30] G. Misuraca (ed.), Exploring digital government transformation in the EU, Joint Research Centre, European Commission, 2019.

[31] Countries scoring highest in trust in governments, including Luxembourg (78 %), Finland (71.4 %) and Denmark (65.2), also belong to the frontrunners in e-government: according to the 2022 eGovernment benchmark, Luxembourg scores 87 %, Finland 85 % and Denmark 84 %. For more details, see Section 2.2.

Use of digital tools by EU public administration

The EU's 2030 vision builds on its pursuit of a digital economy and society, empowering its citizens and businesses in this transition. Online public services should be accessible to all. In the context of digital public services, the EU aims to ensure that participation in democratic life and public services are accessible to all citizens. The EU is working towards the following objectives by 2030: online provision of key public services for all EU businesses and citizens; access to medical records for all; and use of digital ID solutions by at least 80 % of EU citizens.[32] EU public administration is being increasingly supported by digital systems, including new technologies such as AI (see text box).

EISMEA

The European Innovation Council and SMEs Executive Agency (EISMEA), responsible for implementing EU programmes focussing on support for small and medium-sized enterprises (SMEs), innovation, and the single market, is a frontrunner in the use of digital technologies. The agency uses the EIC AI-based IT platform to facilitate the application process, providing guidance for the both submission procedure and the assessment of funding opportunities. The AI platform also generates analyses of, for instance, financial metrics, which will feed in the evaluation ultimately done by EIC jury members.

Source: EIC Accelerator: Guide for Applicants, European Innovation Council, 25 February 2022.

ETIAS

The European travel information and authorisation system (ETIAS) is an example of automated decision-making, to be used by the European Border and Coast Guard Agency (FRONTEX) as of 2023 in the area of border control and migration. According to Article 33 of Regulation (EU) 2018/1240 establishing the screening system, ETIAS screening rules 'shall be an algorithm enabling profiling'.

Source: Regulation (EU) 2018/1240 of 12 September 2018 establishing the European Travel Information and Authorisation System (ETIAS).

The 2022 Commission digital strategy outlines objectives to enable the institution's support for the delivery of the EU's strategic priorities and lead by example. It seeks to foster digital culture by empowering its staff, enable digital-ready policymaking through guidelines and support across the entire EU policy cycle, and harness the benefits of data and innovative technologies to redesign its administrative processes. The strategy highlights the use of digital channels when communicating internally and externally, in line with the digital compass. The Better Regulation Toolbox provides guidelines for developing 'digital-ready policies' and helping policymakers detect relevant digital dimensions to prepare the ground for use of data analytics and uptake of digital tools. Innovative technologies such as AI, advanced data analytics and language technologies could unlock benefits, including the collection and analysis of data and the automation of processes.[33] The Commission strategy serves as a good example of how EU public administration will evolve in terms of digitalisation of administrative processes on the one hand, and communicating towards the public on the other. This transformation should also be reflected in a set of rules governing administrative procedures, and should be harmonised across the different EU institutions. This is in line with the 2018 impact assessment, which notes that the forthcoming transition requires 'a massive upgrade of processes, communication patterns and procedures across EU administration, which can only be justified by an effective centralisation and harmonisation of the way in which EU bodies deal with the public'.[34]

[32] 2030 Digital Compass: the European way for the Digital Decade, COM(2021) 118, European Commission, March 2021.

[33] European Commission digital strategy: Next generation digital Commission, C(2022) 4388, 30 June 2022.

[34] Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

Regulation of EU administrative procedure

The Commission's response following the Parliament's 2013 and 2016 initiatives, supporting the current sectoral approach to EU administrative rules, suggested a low likelihood of possible regulatory action. In its reply from November 2016, the Commission notes that Parliament's proposal 'does not identify what the gaps and inconsistencies in current law are, and therefore what the justification is for coming forward with horizontal legislative solutions as a proportionate answer to deal with them. Neither does it assess the concrete impact of the provisions it contains'.[35] In response to the Commission the Parliament conducted an impact assessment of the proposal in 2018. The impact assessment also assumed that going beyond the 2016 proposal would not be politically feasible owing to the lack of support by other EU institutions.[36]

The annexed study provides a detailed overview of the norms of administrative law applying to the EU administration, noting that most norms can be found in sector-specific legislation. Academic and policy literature notes significant fragmentation of rules governing EU administrative procedure. Citizens and businesses increasingly engage directly with EU institutions and bodies, for instance when applying for EU funds, requesting a document and submitting a complaint. Moreover, a growing number of agencies and bodies implement EU polices, interacting with citizens and businesses. The Parliament believes that, in order to exercise the right to good administration, citizens need to be provided with effective foreseeable and accessible procedures. The 2016 proposal seeks to provide citizens and the EU administration with a comprehensive, cross-cutting administrative procedure.[37] As digitalisation and the use of digital tools are transforming the way citizens interact with public administrations, potential opportunities and challenges arise. The 2021 legislative initiative on digitalisation and administrative law seeks to revise the Parliament's proposal and consider other appropriate measures to address digitalisation from the perspective of administrative law and administrative cooperation.[38]

To get a proxy for possible maladministration by EU institutions, data from the European Ombudsman might provide insights on the nature of cases of possible maladministration and the EU institutions or bodies concerned. In 2021, the office of the Ombudsman received 2 166 complaints, of which only 729 are covered by the office's mandate. Access to documents accounts for 29 % of all inquiries by the Ombudsman; this involves cases where members of the public faced difficulties in gaining access to documents held by EU institutions or bodies. If an institution rejects the request for access to documents, those seeking access can turn to the Ombudsman. In 2021, the Ombudsman dealt with a total of 214 inquiries relating to administrative procedures and practises, such as a failure of the institution to reply to a question, reply in time to a request, or acknowledge receipt of an infringement.[39]

The Commission remains the main source of inquiries (61 %), while the Parliament accounts for 3.8 % and the Council for 2.1 % of all complaints submitted.[40] This can be explained to a certain extent by the size of the institution and the nature of the policies it deals with, which have direct impact on citizens and businesses. As part of the European public administration country

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35 Follow-up to the European Parliament resolution for an open, efficient and independent European Union administration, SP(2016)613, European Commission, 4 October 2016.

36 Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

37 Explanatory memorandum, Committee on Legal Affairs, European Parliament, 2016.

38 Request for authorisation to draw up a legislative own-initiative report, letter from the Chair of the JURI committee to the Chair of the Conference of Committee Chairs of 18 December 2020, D(2020) 36533.

39 European Ombudsman website, consulted in September 2022.

40 Annual report 2021, European Ombudsman, 18 May 2022.

knowledge (EUPACK) project, the Commission is currently looking into a methodology to assess the cost of maladministration;[41] the study has not been released by the date of publication of this report.

2.1. Regulatory gaps in the status quo and their impacts

The analysis identifies **five regulatory gaps** that concern how EU administrative law is currently implemented. These gaps are as follows:[42]

- Scoping fallacy: Unclear what administrative actions should be subject to controls;
- Discrepancy problem: Limited coherence between different sets of norms governing digital rules and administrative law;
- Known unknown: Individuals and legal persons have limited information on the use of their data;
- Unknown unknown: Individuals and legal persons cannot know if a mistake has been made; and
- Redress gap: Avenues for individuals and legal persons to seek redress are not well developed.

These gaps limit the right to good administration and the openness and fairness of the EU administration. Digitalisation is a key element in all of these regulatory gaps. Table 2 presents an overview of the state of play, digitalisation aspects and the negative consequences for each of the gaps.

Table 2 – Overview of regulatory gaps, state of play and aspects relating to digitalisation

Regulatory gap	State of play	Aspects relating to digitalisation	Negative consequences for citizens, businesses and EU public administration
Scoping fallacy	Systematic approach missing; rules developed in some sectors (e.g. competition policy) but not in others	Wide range of activities (e.g. coding choices when programming algorithms) may be relevant for regulation	Legal uncertainty leading to fewer inquiries from individuals and legal persons Many instances of administrative injustice go unnoticed and unaddressed
Discrepancy problem	Individuals and legal persons have to resort to litigation to obtain clarity	Integration of data protection into general information law	Enhanced fragmentation of EU administrative law Legal uncertainty and lack of individual redress
Known unknown	Algorithms used in administrative law draw on personal and non-personal data	Potential bias in the design and functioning of algorithms	Lack of transparency in the process and data used Limited retrievability Lack of trust in EU administration Difficult to obtain remedy
Unknown unknown	Algorithms can make errors that generate subsequent errors	Automated decision-making (ADM) systems tend to be used in the	

[41] The European Commission's Directorate-General for Structural Reform Support (DG REFORM) has requested a study on methodology and feasibility to assess the costs of maladministration as part of the European Public Administration Country Knowledge 3 (EUPACK 3) project (2019-2022), led by ICF.

[42] Annex to this study.

Regulatory gap	State of play	Aspects relating to digitalisation	Negative consequences for citizens, businesses and EU public administration
		preparatory and less regulated stages	
Redress gap	Many EU agencies have appeal procedures, but they are not standardised; specialised legal support is needed	ADM systems add steps to the procedure and where redress can be sought; low share of resolved cases	Individuals and legal persons do not appeal, even if they have been wrongly harmed by an administrative decision

Source: Compiled by the author, based on the annex to this study.

Main impacts of the regulatory gaps

These negative consequences imply costs for people, businesses and EU institutions in the form of lost time and resources, which could have been avoided if the gaps did not exist. The negative consequences also imply threats to fundamental rights including the right to good administration and the right of access to documents. As noted in the Charter of Fundamental Rights, 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union' (Article 41), and 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium' (Article 42). In terms of evaluation, the costs are a loss of efficiency, while the threats to fundamental rights imply a loss of effectiveness.

Despite the recent improvement in transparency of public administrations – including communication on the provision of service and the responsibilities and performance of public bodies, and regarding the use of personal data they hold – challenges remain. Citizens are still largely unaware regarding their personal data held by national administrations: in 64 % of public services, citizens can find out whether their data have been used; in 42 %, when their data are used; and in 17 %, by whom.[43] This means that citizens face difficulties and administrative burden when attempting to verify, submit or correct the data public administrations have on them. The European Commission notes that only 15 % of national administrations make use of national e-ID schemes, which leads to them using alternative authentification tools or refraining from providing certain public services online.[44]

The negative consequences of regulatory gaps may focus on efficiency or effectiveness, or possibly contribute towards both. For example, the lack of legal certainty (evident for the scoping fallacy and the discrepancy problem) can imply that more time and resources are needed to lodge and process an inquiry, which is an inefficiency. Legal uncertainty can also lead to fewer inquiries into cases of administrative injustice being lodged, which would be an example of ineffectiveness. Regulatory gaps (in particular the scoping fallacy, the discrepancy problem and the redress gap) also raise challenges for authorities and the enforcement and compliance with the administrative law in place. This can lead to inefficiencies in the use of resources by EU public administrations and poorer achievement of the objectives of the administrative law.

[43] eGovernment Benchmark 2020, European Commission website. The 36 participating countries were: the EU-27, Albania, Iceland, Montenegro, North Macedonia, Norway, Serbia, Switzerland, Turkey and the United Kingdom.

[44] A public administration fit for the future, Example of components of reform and investments, Recovery and Resilience Plans, European Commission staff document, 2020.

The **negative consequences of the regulatory gaps are likely to worsen over time**, in particular because of two trends: digitalisation and 'agencification' at EU level. Firstly, the ongoing digital transformation and the ambitious digital targets to be achieved by 2030, which are undoubtedly having an impact on our daily lives, including interactions with public administration and administrative procedures, both at national and EU level; secondly, the growing number of EU agencies, their resources, staff and the increased regulatory powers attributed to these bodies.[45] The negative consequences of the regulatory gaps identified are unlikely to be resolved without regulatory intervention.

Other impacts, including inequality and discrimination

The lack of a clear understanding of the potential impact of AI applications' use in the public sector remains a key gap, since at this stage, not many studies exist on their impacts. Research suggests that there are specific risks to the use of AI in different applications, depending on the role and function of AI.[46] Available empirical analysis provides some insights into the governments' use of digital systems. Findings from data analysis of the automated systems for child benefits in Norway confirmed previous evidence of automated systems failing to cover all citizens, and therefore causing administrative burden on those excluded. Digital public services use registry data that favour typical cases and thus lead to unequal service quality. This results in a situation where groups of citizens not covered by the automatic system are required to apply manually.[47]

Research shows that the increasing use of digital tools and systems by governments carries the risk of unequal access and discrimination, as these systems are primarily designed for citizens with advanced digital skills and access to the internet. While digital tools might optimise public service delivery, they might also contribute to a divide between 'average' and vulnerable citizens, excluding seniors, low-income earners and marginalised groups.[48] The 'digital divide' has considerable impact on accessibility of public services for certain groups of citizens, leading to discrimination and exclusion of some. According to Commission data, 5 % of EU citizens do not use the internet because of some form of disability. Less than 10 % of the websites accessible in the EU are suited for disabled citizens.[49] Similar logic could be applied for businesses. The cost of non-Europe in digital transformation also highlights challenges SMEs are facing in the context of digitalisation.[50] SMEs, often struggling to integrate digital technologies and find a digitally skilled workforce, are less likely to digitalise. The EU has put forward several initiatives aiming to promote digital inclusion, such as the Web Accessibility Directive[51] (making digital content for people with disabilities), the European

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45 Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

46 C. van Noordt and G. Misuraca, 'Artificial intelligence for the public sector: results of landscaping the use of AI in government across the European Union', *Government Information Quarterly*, Volume 39, Issue 3, July 2022.

47 K. Larsson, 'Digitization or equality: When government automation covers some, but not all citizens', *Government Information Quarterly*, Volume 38, Issue 1, January 2021.

48 S. Ranchordas and L. Scarcella, Automated Government for Vulnerable citizens: Intermediating Rights, University of Groningen Faculty of Law Research Paper, October 2021.

49 Digital Inclusion in the EU, factsheet, European Commission, May 2019.

50 N. Lomba, L. Jančová and M. Fernandes, Digital transformation - Cost of Non-Europe, EPRS, European Parliament, January 2022.

51 Directive (EU) 2016/2102 on the accessibility of the website and mobile applications of public sector bodies. Currently under review.

Accessibility Act[52] (improving the accessibility of products and services), and the eIDAS Regulation (providing electronic solutions for citizens and businesses)[53].

The impact on **gender equality** is another important aspect. The EU is facing a shortage of women in science, technology, engineering and mathematics (STEM) in both education and careers. While women make up 51 % of the EU population[54] and 57.7 % of tertiary graduates,[55] they are largely under-represented in the digital sector, accounting for only one third of STEM graduates and 19 % of information and communications technology (ICT) specialists.[56] An exploratory analysis of the use of AI in Spanish public administration detected possible discriminatory bias with a significant relevance of gender. Training data are the main problem driver, as the data come from databases in which women are under-represented. Perpetuating gender roles and maintaining social bias results in this bias being reproduced in the use of algorithms.[57] Current inequalities in digital skills, under-representation of women in the digital sector and biased datasets are all expected to be exacerbated by the ongoing digitalisation, including the use of digital technologies.

2.2. Best practices from Member States

The previous section outlined how ever increasing digitalisation of public services might affect the right to good administration, with possible impacts on citizens and businesses. This section looks at efforts by Member States to address these emerging challenges, and provides an overview of best practices for digitalisation of public administration at national level. The rising trend in digitalisation of public administration, and the challenges it is bringing of how to regulate 'digital interaction' with the public, is also reflected in emerging concepts and principles that try to address the changing nature of public administration activities and their interaction with citizens. In Germany, for example, a category of 'automated administrative act' has emerged, meaning that a decision has been taken without human interface. In France, a new 'right to make mistakes' was introduced to allow individuals, subject to conditions, to correct certain mistakes. The French administrative law has also introduced disclosure requirements if a decision has been made in automated way, regarding information on the algorithm and rules applied.[58] Spain has been a pioneer in developing a Charter of Digital Rights,[59] adopted in July 2021, which serves as a reference framework for citizens, companies and public administration. So far, it is a soft-law instrument, intended as a compass for future legislative proposals.[60] A similar charter has been proposed by the European Commission in January 2022, subject to approval by the European Parliament and the Council. The draft declaration

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52 Directive (EU) 2019/882 on the accessibility requirements for products and services.

53 Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions. Currently under review, see the proposal.

54 Gender statistics, Eurostat, 2021. Data consulted in July 2022.

55 In which subjects do EU students graduate?, Eurostat tertiary education statistics, data extracted in September 2020.

56 Women in Digital Scoreboard 2021, news article, European Commission, 12 November 2021.

57 I. García, 'Artificial Intelligence Risks and Challenges in the Spanish Public Administration: An Exploratory Analysis through Expert Judgements', *Administrative Sciences*, Volume 11, Issue 102, September 2021.

58 See the annexed study, Section 4.2.1 for more details.

59 Carta de Derechos Digitales (Charter of Digital Rights), Spanish government, 14 July 2021.

60 Sánchez presents the Digital Rights Charter with which 'Spain is at the international forefront in protecting citizens' rights', press release, Spanish government, 14 July 2021.

on digital rights and principles aims to provide guidance, covering key rights and principles such as freedom of choice, inclusion and participation.[61]

Spain: Charter of Digital Rights

The charter, adopted in July 2021, includes soft-law provisions to protect fundamental rights in the digital age. It contains a section on the rights of citizens when interacting with public administration, including rules on equality, the provision of alternative solutions for citizens who do not use digital technologies, and principles of neutrality and non-discrimination if digital technologies are used by public authorities. New rights are spelled out for cases in which a decision has been taken by AI applications, including the right to receive an explanation, and a requirement to have a decision taken by a human in certain circumstances.

Source: Carta de Derechos Digitales.

Denmark: Digital-ready legislation

In 2018, the Danish Parliament agreed on a 'digital-ready' legislation, meaning all new legislation must be digital by default. The agreement outlines seven principles that should be observed, such as on automated case processing or safe and secure data handling. To support implementation, a special government unit was established, and mandatory assessment of implementation impacts was introduced. The assessment should consider impact on citizens, including risks of automation, and ensure the protection of citizens' personal data.

Source: Danish Agency for Digital Government.

Regulatory gaps in the status quo are present at both national and EU levels, and hence the impacts are pertinent for both levels too. In the same way Member State administrations are adapting to the digital era in their interaction with citizens, so could the EU administration. As some Member States are frontrunners in administrative law, best practices could serve as inspiration. In some cases, such regulations are already in place, and positive impacts can be observed. For instance, countries with a relatively strong tradition of administrative law on the one hand,[62] and a high level of digitalisation of public services on the other, score very high in trust in government. The Nordic countries are a case in point. According to the Organisation for Economic Co-operation and Development (OECD) indicator on trust in government, Denmark (65.2 %), Sweden (63.4 %) and Finland (71.4 %) score among the highest.[63] A link can be drawn between transparency and trust in governments. This is also confirmed for transparency of service delivery where, again, these three countries score above the EU average.[64]

The inefficiencies and ineffectiveness in the current implementation of EU administrative law can ultimately erode the public's trust in EU public administrations. While assessing the impact of the regulatory gaps on the public's trust in EU public administrations is challenging, the available research and evidence suggests that a strong and more digitalised public administration is associated with more public trust (see Section 2). Figures 1 to 3 illustrate the positive correlation

[61] European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 28, European Commission, 26 January 2022.

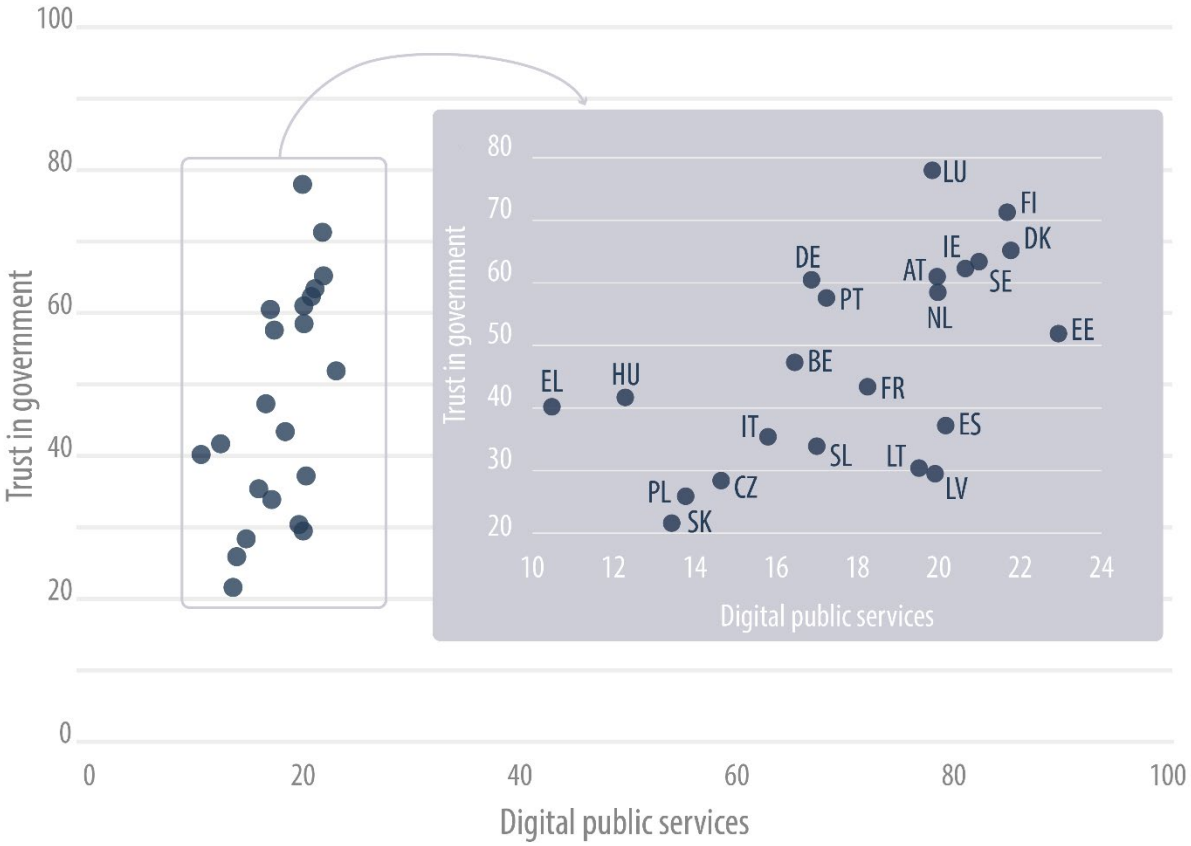
[62] The evolution of EU administrative law and the contribution of Nordic administrative law, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 201.

[63] Trust in government indicator, OECD, 2022.

[64] According to the Digital Economy and Society Index (DESI), 2022 edition, Denmark, Estonia and Finland score above 70, which is above the EU average of 60.

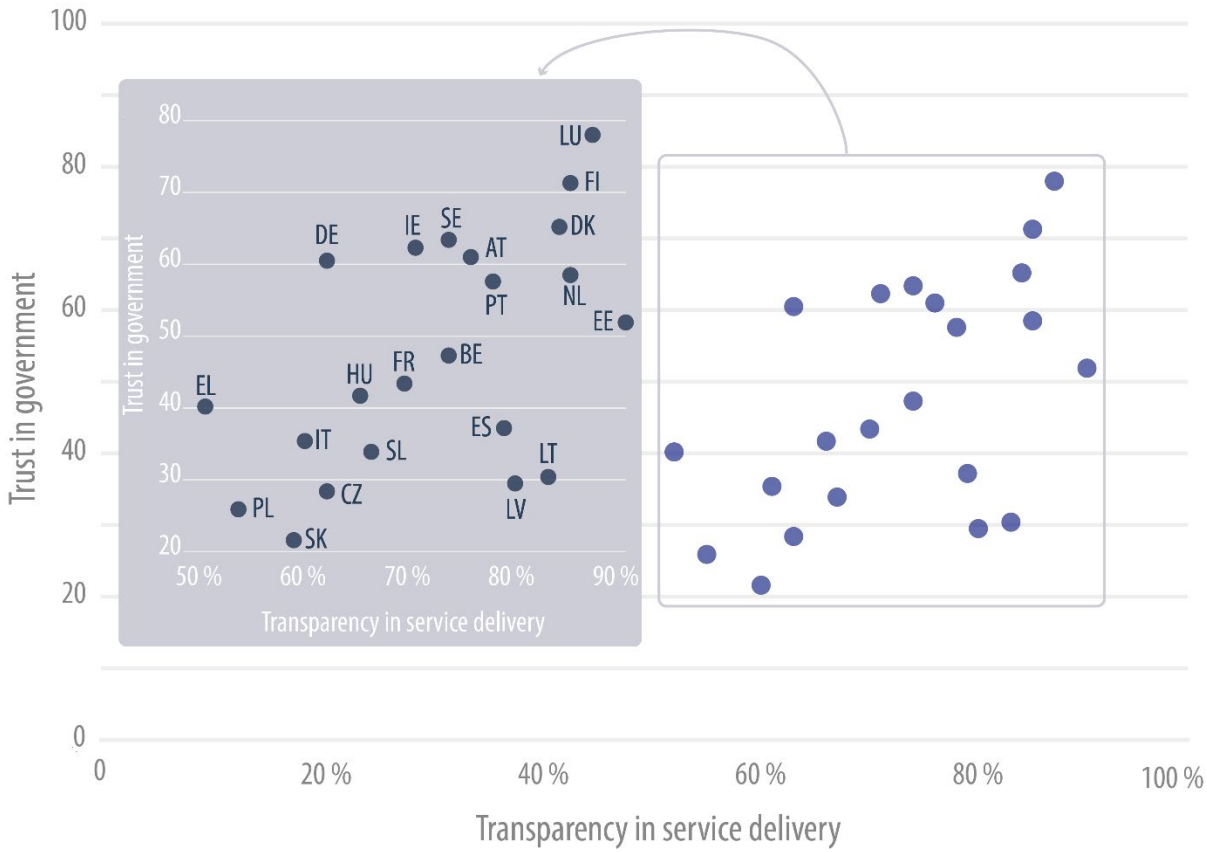
between national-level indicators that measure digital public services, transparency in service delivery and trust in government.

Figure 1 – Association between digital public services and trust in government



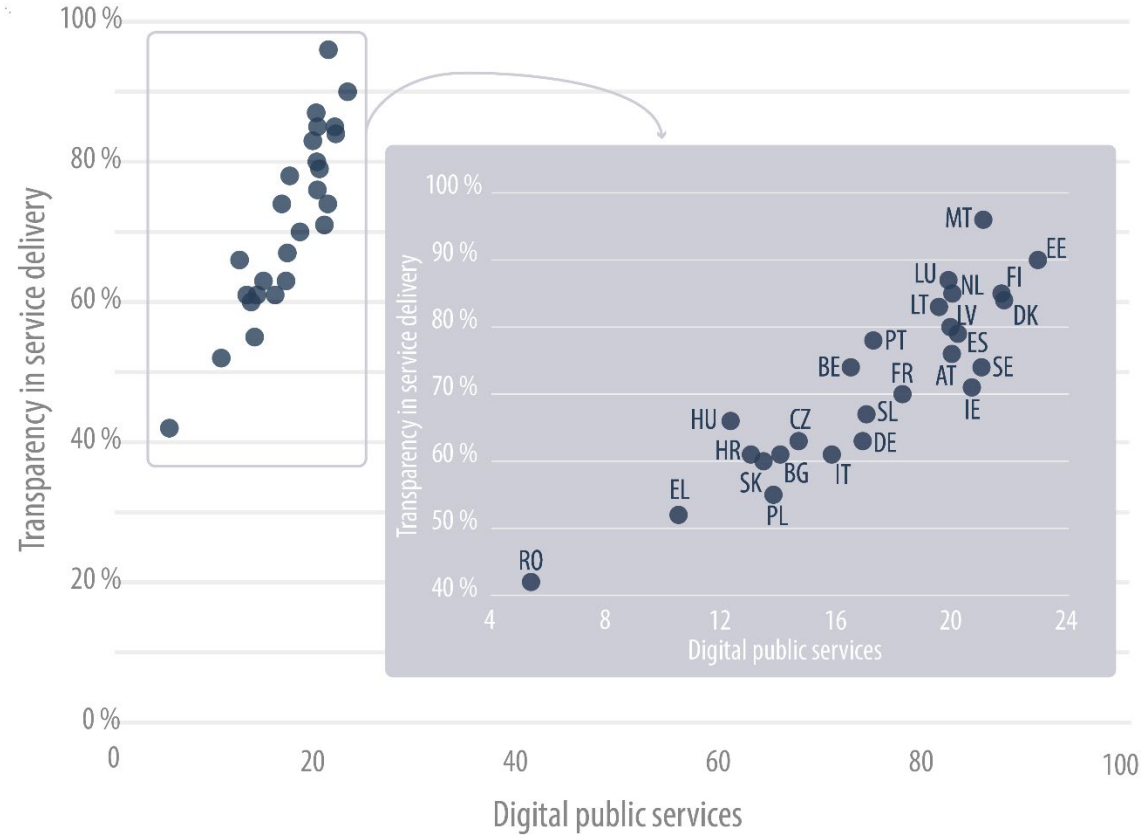
Source: EPRS. Digital public services indicator based on the 2021 Digital Economy and Society Index (DESI); trust in government indicator based on 2021 OECD data. The figure includes results for 22 EU countries. Data were not available for Bulgaria, Croatia, Cyprus, Malta and Romania.

Figure 2 – Association between transparency in service delivery and trust in government



Source: EPRS. Transparency in service delivery indicator based on the eGovernment Benchmark 2022; trust in government indicator based on 2021 OECD data. The figure includes results for 22 EU countries. Data were not available for Bulgaria, Croatia, Cyprus, Malta and Romania.

Figure 3 – Association between digital public services and transparency in service delivery



Source: EPRS. Digital public services indicator based on the 2021 Digital Economy and Society Index (DESI); the transparency in service delivery indicator based on the eGovernment Benchmark 2022. No data available for Cyprus.

3. Need for EU action

The gaps identified in Section 2 imply a hindrance to the right to good administration. This section seeks to demonstrate the need for EU action. Three policy options are proposed to address, to some extent, the gaps and reduce their negative consequences and impacts.

3.1. EU right to act

A **legal basis** for the EU to regulate the European administration so as to achieve greater transparency, efficiency and independence can be found in Article 298 TFEU:

> *1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.*
>
> *2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.*[65]

The European Commission has previously confirmed that this provision could be a suitable legal basis.[66] National administrations were excluded in the European Parliament's earlier proposal for a general act on administrative procedure; this limitation also applies to the present study. The main focus of any potential regulation based on Article 289 TFEU should remain on providing default administrative procedures and building on certain existing rules regulating digital activity.[67]

The previous section assessed how the gaps and barriers identified impact on citizens, businesses and their trust in institutions. The lack of harmonised rules on EU administrative procedure and its impact on both legal certainty and citizens' and businesses' trust corroborates the need for EU action. As this section confirms, Article 289 TFEU provides a suitable legal basis for such action. The need for flexibility to derogate in cases of specific sectoral rules can be observed in existing general administrative laws and from Member States' best practices. Striking a balance between flexibility and maintaining legal certainty will remain key in developing possible regulation on EU administrative law.[68]

The public consultation from 2018 showed high support (76 % of respondents) for additional measures at EU level to enhance EU administrative procedures. Improving efficiency and transparency ranked among the top reasons for EU intervention.[69] The 2018 impact assessment found that fragmentation in administrative procedures across EU institutions and bodies negatively impacts EU institutions' openness, efficiency and independence. The report concluded that negative impacts are likely to worsen with the transition towards digitised administration.[70] The digital context adds more complexity to the current situation where administrative rules are fragmented. As digitalisation is changing the interaction between citizens and administrations, the

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65 Article 298 TFEU.

66 Follow-up to the European Parliament resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union, SP(2013)251, European Commission, 24 April 2013. In its reaction to the European Parliament's 2013 resolution on administrative law, the Commission stated that this provision 'can be interpreted as providing a legal basis for a regulation on administrative procedures of the Union administration'.

67 Annex to this study.

68 Annex to this study.

69 T. Evas, EU law for an open independent and efficient European administration – Summary report of the public consultation, EPRS, European Parliament, 2018.

70 Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

impact of current gaps is expected to increase, and so is the need for EU action to provide citizens with clear administrative rules, enhance their trust and protect fundamental values.

3.2. EU policy options

The European added value assessment identifies **three possible policy options**, which could contribute towards achieving the following objectives: increasing legal certainty, improving enforcement, alleviating burden on citizens, raising the number of cases of administrative injustice addressed, and breaking the cycle of mistrust. An overarching principle, taking into account the ongoing digitalisation and the changing nature of digital administration, should be reflected in the development of policy options.

Two legislative options and one non-legislative option are proposed for further assessment. Option 1 builds on the proposal put forward by the European Parliament in 2016. Option 2 takes a broader focus, and option 3 focuses specifically on digital administration. Each policy option addresses the five gaps to a different extent. Policy options 1 and 2 represent alternative approaches, while policy option 3 could be complementary to them to reinforce their impact.

Other complementary actions can be suggested based on literature review and available research. Public administration can implement measures to bridge the social and digital gaps, for example by increasing digital literacy and inclusion. In the context of digitalised public administrations, this means making sure that all citizens enjoy quality, proximity and equal access to public services.[71] The proliferation of digital technologies in work, education and public services delivery will only continue, and thus negative impacts, if not sufficiently addressed, are likely to increase. When it comes to gender equality, in particular, possible solutions might involve raising ethical and social awareness of AI professionals and researchers, educating the society, and ensuring high-quality data are used to train AI systems. Literature suggests that open access to public-sector data sources has the potential to reduce such bias.[72] The Parliament has called for reducing gender, social and cultural bias in AI technologies. Using unbiased data sets to train AI systems remains crucial to preventing discrimination and protecting diversity.[73] Literature points to several possibilities of mitigating gender bias in AI: using feminist data to fill data gaps, providing AI literacy training among gender experts, and being aware of who is represented in data being fed into training AI systems.[74]

Policy option 1

Policy option 1 builds on the 2016 European Parliament proposal focussing on regulating administrative procedures, often resulting in an administrative act. This option would aim to update the 2016 proposal in the context of digitalisation, reflecting the rules adopted recently regarding digital technologies and data, and the use of digital tools by EU public administration. The option focuses on individual redress mechanisms.

Policy option 2

Policy option 2 presents a different approach to addressing the current gaps in status quo. Rather than focussing on the redress phase, policy option 2 would regulate information rights and

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71 Supporting public administrations in EU Member States to deliver reforms and prepare for the future, European Commission, 2021.

72 C. Fernández-Aller et al., 'An Inclusive and Sustainable Artificial Intelligence Strategy for Europe Based on Human Rights', *IEEE Technology and Society Magazine*, Volume 40, Issue 1, March 2021.

73 AI technologies must prevent discrimination and protect diversity, press release, European Parliament, 16 March 2021.

74 When Good Algorithms Go Sexist: Why and How to Advance AI Gender Equity, Stanford Social Innovation Review, 31 March 2021.

procedures. Introducing digital rights impact assessment for algorithms or the right to know a decision was taken in a fully automated manner could be examples of potential measures under this policy option. Inspiration can be drawn from existing soft-law documents and practices already present in some Member States (see Section 2.2, 'Best practices').

As there is no clear-cut line between policy options 1 and 2, Table 3 provides a brief overview of key differences. Both policy options build on the Parliament's 2016 legislative proposal, but each from a different standpoint: while policy option 1 focuses on administrative procedures, the focus of option 2 is on administrative activities producing legal effects on individuals or legal persons.

Table 3 – Overview of key differences between policy options 1 and 2

Focus	Policy option 1	Policy option 2
Scope	Administrative procedures/acts	Administrative activities that produce legal effects concerning individuals or legal persons or similarly affect them significantly
Dominant type of rights	Rights of defence	Information rights
Operationalisation of principles	Discretion of the administration/ duty of care	Detailed obligations (e.g. 'by-design' approaches, algorithm register)
Requirements for digital systems	Through 'duties of care'	Through detailed obligations
Primary accountability mechanism	Appeal/(judicial) review	Regulator/disclosure/digital
Illustration: how to incorporate a 'right to make mistakes'	Right exists in the context of a particular administrative procedure	Right to have one's data checked outside of any pending procedure

Source: Annex to this study.

Policy option 3

A soft-law instrument could also be an alternative to legally binding regulation. This would come in the form of a 'code on digital EU administration', similar to the proposal examined in the 2016 impact assessment, whereas digital aspects would need to be taken into account. The Spanish Digital Rights Charter and the 2021 Declaration on European Digital Rights and Principles could serve as inspiration for such a code.

Table 4 – Overview of EU policy options

Policy option	Key elements of the policy option
Policy option 1: administrative procedure regulation for the digital era	Based on the approach from the 2016 legislative text as proposed by the European Parliament, focussing on the regulatory intervention on 'administrative procedures' Updates to ensure coherence with the 'digi-framework' Develop primarily the rights of defence
Policy option 2: 'administrative activity regulation' for the digital era	Broaden focus of administrative procedure beyond individual decision-making Disclosure requirements concerning ADM use Focus on information rights

Policy option	Key elements of the policy option
Policy option 3: code on digital administration	Expand on existing soft-law instruments Implementation requires 'culture shift' and could be supported by training Might lead to an undesirable distinction of digital/non-digital

Source: Compiled by the author, based on the annex to this study.

Each alternative policy option represents a different approach to addressing the set of gaps and barriers identified, and thus enables a broader perspective of possible solutions to the problem. While policy options 1 and 2 would likely be of legislative nature, the accompanying cost would be higher compared with policy option 3. Nevertheless, the soft-law nature of policy option 3 is unlikely to address the regulatory gaps identified in the status quo.

Looking at earlier efforts by the Parliament to regulate EU administrative law, both policy options 1 and 2 are built on the 2016 legislative proposal, albeit from a different angle. While policy option 1 follows the same approach to scoping, and focuses on administrative procedure between an individual or a legal person and administration, usually resulting in an administrative act, policy option 2 would rather focus on administrative activities. From this perspective, policy option 1 corresponds closely to Parliament's 2016 proposal, adding new elements resulting from digitalisation of public administration and its possible impacts on citizens and businesses.

4. Potential impacts and European added value of the policy options

This section assesses the potential impacts and European added value of the policy options presented in Section 3. The assessment of each policy option was made in relation to a status-quo scenario (referred to as policy option 0 in the annexed study). The baseline is not static, as the current situation with gaps is evolving, e.g. the increasing complexity of rules would contribute to an increased legal uncertainty. The lack of EU action would imply costs that would grow over time due to rising complexity of rules stemming from the shifting relationship between citizens and EU administration.

Following the assessment of the status quo (see Section 2.1), the policy options were primarily assessed in terms of their additional efficiency and effectiveness for the implementation of EU administrative law.

With regard to efficiency, key indicators include:

- clarity of the law and rights of citizens and legal persons; and
- ease for citizens to engage with administrations and correct errors.

With regard to effectiveness, key indicators were:

- prevention and/or visibility of cases of injustice;
- adaptation to and compliance with new rules by administrations; and
- the right to good administration.

The policy options were also assessed in terms of their readiness for future trends, in particular digitalisation. The assessment drew on external research (see annex to this study) and an impact assessment conducted by EPRS in 2018.[75] Owing to the nature of the expected impacts and the limited availability of data on digitalisation and administrative law, the findings are mostly qualitative.

4.1. Impacts of policy options

Table 5 summarises the assessment of impacts for the three policy options. While policy options 1 and 2 are legislative, policy option 3 is non-legislative. Policy option 1 corresponds closely to the European Parliament's 2016 proposal – it includes additional elements to align administrative rules to emerging measures regulating digital aspects. For this reason, the impacts of the policy option are expected to be similar to those of the policy option assessed in the 2018 impact assessment. That assessment found that 'the introduction of a set of harmonised rules on administrative procedure would contribute positively to good governance in the EU and lead to enhanced levels of protection, in particular with respect to the right to good administration and to the enhanced openness, efficiency and independence of EU institutions, agencies and bodies, in line with Article 298 TFEU'.[76]

Policy option 2 builds on the 2016 legislative proposal from a different angle. While policy option 1 would focus on administrative procedures between an individual or a legal person and the public administration, usually resulting in an administrative act, policy option 2 would be less restricted

[75] Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

[76] ibid.

and defined, and could also extend to administrative activities. In terms of possible measures, policy option 1 could enhance rights of defence, and therefore access to remedy for citizens. Policy option 2 focuses on information rights, enforceable also outside of any pending procedure. With regard to policy option 3, a non-binding code is likely to have very limited impact on enforceability of rules, and undermine citizens' trust. Ultimately, a non-binding code could lead to less legal certainty in the future.

Policy options 1 and 2 are expected to have positive impacts and are likely to help achieve the identified objectives. At the same time, there are possible trade-offs between the two. While policy option 1 seems more feasible to develop, policy option 2 could have a higher potential to reduce the burden on citizens and businesses. From the point of view of EU public administration, policy option 2 might lead to an increased compliance burden, unless a shift in mind-set is achieved. In the latter case, long-term benefits can be expected, making the possible regulation more future-oriented and digitally sensitive.

The most evident difference in impacts between policy options 1 and 2 remains in burden on citizens. A right to have mistakes corrected is a possible example of demonstrating this distinction: whereas under policy option 1, a citizen could ask for a correction only as part of an existing administrative procedure and could potentially incur legal costs in the process, policy option 2 would offer a possibility for a citizen to request an authority to check his or her data (more details in Section 5.2.2 of the annex to this study).

Table 5 – Comparison of policy options and their impacts

	Option 1	Option 2	Option 3
	Administrative procedure regulation	Administrative activity regulation	Code 'digital EU administration'
Efficiency			
Legal certainty for individuals	+	++	-
Legal certainty for authorities	++	+	-
Burden on citizens and businesses	+	+++	+
Effectiveness			
Enforcement and compliance	+	++	-
Administrative injustice	+	+++	++
Public trust	+	++	-/+
Right to good administration	++	+++	+

	Option 1	Option 2	Option 3
Other assessment criteria			
Readiness for digital transition	-	+++	-/+

Source: Annexed study. The extent to which the selected policy options could address the regulatory gaps and achieve the set objectives is expressed in the range of +, ++ and +++ (the highest impact).

Quantitative assessment

The potential efficiency gains of the policy options, in particular policy options 1 and 2, can be assessed based on findings from the 2018 impact assessment carried out by EPRS.[77] The impact assessment provided a quantitative estimation of the potential costs and cost savings (which can be understood as benefits) of policy options that would set general rules on administrative procedures at EU level. The potential new costs would primarily fall on the EU bodies, while the potential cost savings would accrue to citizens and businesses. The potential new costs would include one-off costs and administrative burden, while the potential cost savings would include lower time and information requirements as compared with the status quo. In an ideal world, citizens and businesses would not face any costs in the status quo – the costs they do face are due to shortcomings in the public administration's handling of the inquiries.[78]

The quantification of costs and cost savings in the 2018 impact assessment hinged on several assumptions. It focused on one point in time, without taking into account how more simplified interactions with the public administration thanks to the policy option may replace or render redundant other types of procedures. Such effects would certainly be likely, but would be difficult to determine from an ex-ante perspective. The estimation in the 2018 impact assessment assumed that on average, about 100 000 administrative acts were adopted each year. In total, the impact assessment found that the cost savings for the public were substantially larger than the costs to EU bodies (see Table 6). The benefit-to-cost ratio ranged from 2.2 to 3.0 – in other words, the quantifiable benefits of the European Parliament's proposal were 220 % to 300 % the level of the quantifiable costs. From an economic perspective, a policy option is appropriate when the ratio of benefits to costs exceeds 1.0.

[77] Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

[78] See annex, Section 5.2.2.

Table 6 – Findings from the European Parliament's 2018 impact assessment

	Impacts	Estimation
EU institutions (costs)	Additional administrative burden	€4.7 million to €6.0 million per year
	One-off costs	<€200 000
Public (benefits)	Reduced time and information costs	€13.3 million to €14.2 million per year
	Responses provided more quickly and within the set time limits Better quality in replies	Not estimated

Source: Possible action at EU level for an open, efficient and independent EU administration, EPRS, European Parliament, 2018.

The estimate of potential benefits does not include shorter waiting times and better quality of replies. These benefits could be substantial and further augment the ratio of the estimated benefits of EU action compared with the costs. An example can be taken from SOLVIT, a free-of-charge online service provided by national public administrations to help EU citizens understand if their EU rights are breached when they are in another EU country.[79] While SOLVIT, established in 2002, is not an EU administrative body, it can nonetheless serve as an example of waiting time costs that could also be evident for EU administrative bodies. Citizens can lodge an inquiry, and, according to the website, SOLVIT would aim to resolve the inquiry within 10 weeks. However, the service faces challenges: SOLVIT's 2020 annual review highlights that many centres lack staff, have high turnover and are overworked.[80] It calls for urgent action in six Member States (Germany, Greece, France, Italy, Austria, Romania), noting that improvement was needed in an additional seven (Croatia, Cyprus, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia). There are set time limits for various stages of the process, for instance relating to the time to establish initial contact with the applicant (7 days maximum), the time to prepare a case for transfer to the lead centre (30 days maximum), and the time for a lead centre to accept a case (7 days maximum). Various factors could contribute to the actual time exceeding the limit, and one of these factors identified in the report was insufficient staffing. The potential benefits of a shorter waiting period could not be estimated owing to unavailability of data.

Based on the evidence available, it appears likely that the potential benefits of EU action exceed the costs. The evidence is clearest for policy option 1, which builds closely on the European Parliament's 2016 proposal. Its key distinction is digitalisation, which would likely lower the costs for EU bodies while enhancing cost savings for the public. Thus, the findings from the 2018 impact assessment provide a strong starting point. One of the key assumptions of that analysis concerned the number of administrative acts adopted per year. This assumption was considered reasonable for the current assessment, given the flat trend in the number of complaints made to the EU Ombudsman between 2017 and 2021.[81] Changes in price levels between 2018 and 2022 would impact similarly on the costs and cost savings, without affecting the overall ratio. Because of the digitalisation aspect, the ratio of benefits to costs for policy option 1 would thus be expected to be higher than the estimated ratio in the 2018 impact assessment.

[79] For more information, see the SOLVIT website.

[80] Single Market Scoreboard – SOLVIT, reporting period 2020, European Commission.

[81] See statistics on complaints to the EU Ombudsman, made between 2017 and 2021, last updated 15 November 2022.

So, how much higher could the benefit-to-cost ratio for the policy options considered in this assessment be? The assumption that digitalisation reduces costs by 10 % and enhances cost savings by 10 % could lead to a benefit cost ratio of 289 % to 346 %. A review of digital government transformation found evidence of a reduction in operating costs.[82] Moreover, a survey of cities found that operating costs declined substantially for the large majority because of digitalisation of services.[83]

While policy option 2 is similar to policy option 1, there are differences that have implications for the potential costs and cost savings. Policy option 2 would impose more detailed obligations, which would lead to higher one-off costs and added administrative burden for EU institutions. However, the burden on citizens and businesses would be reduced substantially, with there being higher potential to correct administrative injustice. Thus, while the costs of policy option 2 would likely be greater than that of policy option 1, the potential cost savings or benefits would probably also be greater. Policy option 3 could be expected to have lower costs than policy options 1 and 2, while potential cost savings would be moderate. The 'soft-law' approach of policy option 3 may help remedy administrative injustice to some extent and for the more obvious cases.

In general, research observes a lack of data on practices of EU institution and bodies as well as on cases of maladministration. EU intervention has the potential to address the lack of knowledge and resources: it can introduce indicators and collect data to understand more effectively the impacts regulatory gaps have on the right to good administration, and evaluate the effects of EU action over time. Possible indicators include:[84] number of cases brought against EU institutions; number of cases the EU Ombudsman finds to be maladministration; number of cases with fundamental rights violations; and indicators based on traffic and content on platforms such as SOLVIT, including online feedback forms. This could be complemented by regular Eurobarometer surveys on citizens' perception of the EU administration's user-friendliness and transparency, and in the broader context of trust in EU institutions.

[82] G. Misuraca (ed.), Exploring digital government transformation in the EU, Joint Research Centre, European Commission, 2019; L. de Mello and T. Ter-Minassian, Digitalisation challenges and opportunities for subnational governments, OECD Working Papers on Fiscal Federalism, April 2020.

[83] The territorial and urban dimensions of the digital transition of public services, ESPON Policy Brief, European Commission, 2017.

[84] Compiled by the author, based on the annex to this study.

5. Conclusions

The present study investigates the added value of EU action in support of the legislative initiative on digitalisation and administrative law. It analyses the status quo of the right to good administration for European citizens and businesses in the context of digitalisation and an increasing use of digital tools in public administration. It pinpoints the following gaps: unclear scope of administrative action; limited coherence between rules governing digital and administrative rules; limited information on the use of data on individuals and businesses; lack of awareness about possible mistakes/injustice; and gaps in redress mechanisms.

The regulatory barriers identified are found to produce negative impacts, including lack of legal certainty for citizens, businesses and authorities; lack of enforcement; disproportionate burden on citizens; and lack of awareness about administrative injustice. Over time, these impacts can lead to erosion of citizens' trust in institutions. The study finds that these negative impacts are cross-cutting and not limited to specific EU acts. A common approach to all EU acts may thus be more effective in addressing the gaps than a sector-specific one.

Digitalisation is a driver of these gaps, and can increase their negative impacts on individuals, legal persons and administrations. Digitalisation of public administrations changes the way civil servants work and make decisions, adding more complexity to the existing fragmented rules, ultimately affecting the right to good administration. The use of digital tools allows for a more efficient interaction, which brings advantages in terms of savings in time and resources. At the same time, this might place disproportionate burden on citizens to engage with public administration, for example if a mistake needs to be corrected. This burden is disproportionate, and increases for vulnerable groups or people with less digital skills.

Building on the European Parliament's 2016 proposal, this study investigates how digitalisation impacts on the right to good administration, and proposes three policy options. It compares the options, assesses their potential impact, and identifies the European added value of potential regulatory action. Policy option 1 complements the earlier proposal with potential new actions to address the impact of increased use of digital tools in public administration. Policy option 2 is a more innovative approach and focuses on preventive measures such as enhancing transparency of administrative decisions. Implementing policy option 2 would require more effort and resources, and its feasibility is therefore deemed lower compared with policy option 1. Finally, policy option 3 proposes to introduce a soft-law instrument, unlikely to enhance legal certainty or enforceability of the right to good administration. The main difference in possible impacts of policy options 1 and 2 is the burden on citizens, which the latter option could decrease significantly. Policy options 1 and 2 are alternative approaches, while policy option 3 could reinforce their impact. The study puts forward examples of complementary actions such as increasing digital literacy and inclusion, raising ethical and social awareness of AI professionals and researchers, educating the society, and ensuring high-quality data are used to train AI systems. Finally, the study recommends introducing indicators and collect data to better understand the gaps and their impact over time.

The added value of EU action has been identified in enhancing effectiveness and efficiency of the EU administration, and strengthening the right to good administration in the context of digitalisation and increased use of digital tools. Regulatory action to introduce common rules of administrative procedure fit for a digital era would be an important building block in preparing the EU administration to seize the benefits of the digital transformation. Digital technologies also bring the opportunity to make public administration more secure, efficient and resilient, in line with the recently adopted initiative on critical entities, which includes public administrations as one of the 11 sectors covered. Ensuring better awareness of citizens' rights vis-à-vis public administration

would also be key to enhancing their trust in EU institutions. Inspiration can be drawn from existing best practices at Member State-level, as there is a clear link between highly digitalised national public administrations with established administrative rules and a high level of transparency on the one hand, and a high level of trust in government on the other.

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Annex

Digitalisation and administrative law: Legal and administrative aspects

Research paper

The right to good administration as laid down in Article 41 of the Charter of Fundamental Rights of the European Union (CFR) aims to ensure an impartial, fair and timely treatment of individuals when they interact with authorities. Whilst this right has always required operationalisation through administrative law norms and procedures, the rapid digitalisation of the administration has made this need more pressing. As new rules are being proposed to regulate different aspects of digitalisation, this study investigates whether a general administrative law act at European Union (EU) level could address problems that citizens face in their interactions with an increasingly digitalised EU administration. Partly, these problems concern existing issues, such as the lack of clarity about the scope of administration action in the EU and complexity of the fragmented legal framework, which are growing as a result of digitalisation. New such problems include the occurrence of novel and unnoticed injustices that are beyond the reach of traditional administrative law procedures and redress mechanisms.

Possible regulatory responses to these problems are 1) an 'administrative procedure regulation' with adaptations to the digital way of working and a reactivation of the rights of defence and 2) an 'administrative activity regulation' which aims for alignment of administrative law values and digital systems in the primary phase of decision-making. Adopting a non-binding code on digital administration is also an option (3).

Whether an administrative law regulation focuses on the extension and harmonisation of redress mechanisms (1) or on the early detection of administrative injustices (2), it is expected to bring benefits, with some variation with regard to the timeline. A non-binding code (3) is less likely to make a difference in some key areas of impacts such as the level of trust in institutions.

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed in June 2022.

PE 730.350
ISBN: 978-92-846-9678-9
DOI: 10.2861/643042
CAT: QA-08-22-263-EN-N

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Executive summary

Scope, aims and methodology of the study

Since 2012 the European Parliament (EP) has called for an EU level administrative law regulation based on Article 298 TFEU which mentions 'regulations aimed at ensuring the pursuit' of the objective of having 'an open, efficient and independent European administration'. A 2016 Parliament resolution contained a proposal for a legislative text. An impact assessment prepared in 2018 with regard to this resolution concluded that the fragmentation of administrative law norms at the EU level undermined standards of good governance and administration and of fundamental rights protection. The current research paper builds on these previous efforts.

Administrative law is the body of law that governs administrative actions and operationalises the right to good administration as laid down in Article 41 of the Charter of Fundamental Rights of the European Union (CFR). Typical elements of an 'administrative law regulation', also mentioned in Article 41, include the right to be heard, the right to access to personal files and the right to a reasoned decision. Although these administrative rights have found expression in a scattered body of sector-specific legislation and soft law, there is currently no general administrative law regulation that applies to administration at the European Union (EU) level.

This study analyses current challenges in the area of EU administrative law and the impact of the absence of uniform and binding procedural rules, with an emphasis on the effects of digitalisation of the administration on citizens' right to good administration. The study answers the following research questions:

1) What are the key challenges and their impacts in the area of digitalisation and administrative law?
2) What are the possible EU-level policy options taking into account the legal basis and issues of proportionality/subsidiarity?
3) What are the potential impacts of each policy option?

The main methods employed are systematic literature review and legal analysis, complemented by expert interviews and case studies.

Current situation

The term 'digitalisation' of public administration refers to a variety of practices: from eGovernment and blockchain technology to the use of (AI-driven) algorithms to automate particular elements of the early phases of decision-making processes. Examples of the latter tools as employed by EU authorities include, for example, biometrics applications and the ETIAS screening rules, which are used in the area of border control and migration. A further example, from a different administrative context is an AI tool designed to aid the selection process in the 'EIC accelerator' grant programme administered by EISMEA. The use of automated decision-making (ADM) by EU-level bodies is still in development. This study looks ahead to incorporate the challenges this growing practice in particular poses for safeguarding the rights of citizens and effectuating good administration.

These challenges can be grouped into the following regulatory gaps:

The 'scoping fallacy': Individuals, legal persons and authorities need clarity as to the object of an administrative law regulation. On the other hand, they also need flexibility, in order to be able to rely on administrative law norms to regulate a wider range of (digital) activities.

The 'discrepancy problem': The new complexity emerging from the expanding web of norms for digital activity is a problem, as they are not written primarily with administrations and administrative decision-making in mind, it is often unclear how they relate to broader norms of good administration.

The 'known unknown': It is difficult for individuals and legal persons, even if they are aware of the existence of a particular ADM system, to find out how it affects them or issues that they care about. This regulatory gap is related to a lack of inherent compliance with many of the main principles of good administration within ADM and other data practices (transparency, reason-giving (explainability), accessibility (intelligibility), reviewability, non-discrimination (absence of bias), non-randomness).

The 'unknown unknown': Many potentially harmful digital activities are hidden from view, mostly because decisions with regard to the use of ADM by public authorities have a tendency not to be formalised. When personal data is involved, and in particular in a data sharing context, the risk of 'chain effects' of mistakes is relevant; individuals may never realise a mistake with their data has been made, or only realise when it is too late.

The 'redress gap': Possibilities for redress in the case of EU administrative action are weakly developed because the legal status of many administrative activities is unclear and digitalisation means that these activities are broadening. Appeal procedures have been developed across many EU agencies, but – in the absence of a general regulation – in a highly scattered fashion.

These regulatory gaps show that digitalisation is no longer a 'niche topic' for administrative law but one of the main concerns. They generate the following key impacts associated with the status quo (Option 0):

- Lack of legal certainty for individuals and legal persons
- Lack of legal certainty for authorities
- Enforcement and compliance difficulties for administrative duties
- Disproportionate burden on citizens to fix problems
- Many administrative injustices go unnoticed and unrepaired
- Negative cycle of trust

Policy options

Two distinct models have been identified to underpin two different options for legislative interventions on the basis of Article 298 TFEU that could mend the regulatory gaps and meet the objectives derived from the key impact identified above.

Option 1 'administrative procedure regulation'
An adaptation of the traditional model of an administrative law regulation to fit digitalised reality, aimed at individual decision-making, focussed on strengthening redress mechanisms. This approach is aimed at *reparation* of administrative injustices.

Option 2 'administrative activity regulation':
The elaboration of a broader model recognising the centrality of information in digitalised administrative processes, following a citizen-oriented instead of an administrative logic. This approach is aimed at *prevention* of administrative injustices.

A third option is of a non-legislative nature:

Option 3 'non-binding code aimed at digital EU administration'
Instead of taking legislative action, a non-binding code, specifically aimed at digital administration, could be adopted.

Impacts

A mainly qualitative analysis of expected impacts across selected categories of social, economic and technological impacts suggests that both legislative options (Option 1 and Option 2) would have

positive impacts. Option 3 could have a positive impact if the institutions invest heavily in the code being 'internalised' throughout the administration. The option is unlikely to solve issues regarding legal certainty and compliance.

The conclusion of a comparison of Options 1 and 2 is that, if the risk of lower feasibility and the one-off cost of investment in reforming the administrative infrastructure can be overcome, Option 2 (an 'administrative activity regulation') appears to have the highest pay-off, certainly in the longer term. The most important difference between the expected impacts of Option 1 and those of Option 2 is that the former still places a considerable burden on citizens by expecting them to seek redress when the administration causes a problem. In case of an administrative activity regulation as advocated under the heading of Option 2, there is likely to be an increase of the compliance burden on EU authorities. However, the analysis also shows the importance of shifting the administration's mentality with regard to good (digital) administration from a 'burden mindset' to a 'compliance mindset'. Option 2 could be instrumental in steering authorities towards the latter mindset, given the expectation that this option will be costly to comply with unless a shift in the way systems are designed and used is made. In this way, a broader regulation focussing on the preparatory phases of decision-making (Option 2) will encourage investment in ADM systems that are built to comply with the values of good administration.

As administrative action is becoming less of a delineated category, the extent to which an administrative law regulation succeeds in aligning digitalisation, good administration and the working methods of EU level administration will prove crucial. Although any regulation in this area will face trade-offs – regarding the choice for a wide scope or a narrower one and regarding prioritising prevention (Option 2) or reparation (Option 1) – it has the potential to make an important contribution towards higher trust in EU institutions.

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List of abbreviations and acronyms

ADM	Automated decision-making
AI	Artificial intelligence
APA	Administrative Procedure Act
CFR	Charter of Fundamental Rights of the European Union
DPA	Dutch Data Protection Authority
EBP	European Blockchain Partnership
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
eIDAS	Electronic IDentification, Authentication and trust Services
EES	Entry Exit System
EISMEA	European Innovation Council and SMEs Executive Agency
ETIAS	European Travel Information and Authorization System
EP	European Parliament
EU	European Union
FRA	European Union Agency for Fundamental Rights
GDPR	General Data Protection Regulation
IA	Impact assessment
ICT	Information and communication technology
FRA	European Union Agency for Fundamental Rights
RAPEX	Rapid Exchange of Information System
SME	Small or medium-sized enterprise
TFEU	Treaty on the Functioning of the European Union.
US	United States

1. Introduction

1.1. Background

Starting in 2001, the European Parliament (EP) has called repeatedly for a general body of administrative law norms that would apply to EU-level administration. 'Administrative law' is the law that governs 'administrative actions'. As such, administrative law can be seen as an area of regulation that operationalises more abstract constitutional concepts, among which fundamental rights. Apart from offering legal protection, administrative law also concretises constitutional norms at the level of concrete implementation. The most relevant such norm at the EU level would be the right to good administration as laid down in Article 41 of the Charter of Fundamental Rights of the European Union (CFR). Typical elements of an 'administrative law regulation' include the right to be heard, the right to access one's files and the right to a reasoned decision. Administrative law regulations typically not only include concrete rights for citizens, but also duties that they may have as part of administrative procedures. What exactly is meant by 'administrative action' varies from one jurisdiction to another, as does the intensity of regulation of different types of action. In general 'individual decision-making', in the sense of an administrative procedure between an authority and an individual or a legal person, which can be opened at the request of either and ends in a decision is the type of administrative action most heavily regulated.

Initially, the EP proposed a regulation containing a Code of Good Administrative Behaviour.[1] After the entry into force of the Lisbon Treaty and the emergence of a legal basis for 'regulations aimed at ensuring the pursuit' of the objective of having 'an open, efficient and independent European administration' to support EU institutions and agencies, subsequent resolutions asked for a regulation on a Law of Administrative Procedure of the European Union.[2] In 2018, the impact assessment (IA) that was prepared with regard to the latest EP Resolution already concluded that the fragmentation of administrative law norms at the EU level undermined the EU's ability to consistently uphold standards of good governance and administration, as well as to protect citizens' rights when they interact with the administration.[3] Since then, two trends the IA identified as problematic from the perspective of citizens' rights have continued: i) the ongoing[4] 'agencification' of the European Union, with increased regulatory powers being attributed to bodies other than the European Commission; and ii) the accelerating digitalisation of administration.[5] Regarding the latter, the IA concluded that this 'would require a massive upgrade of processes, communication patterns and procedures across EU administration, which can only be justified by an effective centralisation and harmonisation of the way in which EU bodies deal with the public'.[6]

This research paper analyses current challenges in the area of EU administrative law and the impact of the absence of uniform and binding procedural rules, with an emphasis on the effects of

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1 European Parliament, Resolution of 6 September 2001 on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour.

2 European Parliament, Resolution of 15 January 2013 with recommendations to the Commission on a Law on Administrative Procedure of the European Union (2012/2014 (INL)); European Parliament, Resolution of 9 June 2016 on a regulation for an open, efficient and independent European Union administration (2016/2610(RSP).

3 European Parliament, 'Impact Assessment of Possible action at EU level for an open, efficient and independent EU administration', Directorate for Impact Assessment and European Added Value, July 2018.

4 Simoncini 2020.

5 European Parliament, 'Impact Assessment of Possible action at EU level for an open, efficient and independent EU administration', Directorate for Impact Assessment and European Added Value, July 2018.

6 Ibid., p. 6-7.

digitalisation of the administration on citizens' right to good administration. The emphasis on digitalisation is in line with the European Parliament's calls for full compliance of the Union's approach to the digital transformation with fundamental rights such as data protection or non-discrimination, and with principles such as technological and net neutrality, and inclusiveness.[7] Within the theme of digitalisation, administrative activity involving 'automatic' or 'algorithmic' decision-making will be paid special attention, because of the rapid developments in this area and the specific relevance of this practice for good administration.

1.2 Methodology and scope.

This study aims to carve out a role for an administrative law regulation in an era in which digitalisation, to an even greater extent than other important developments such as agencification or globalisation, dominates the debate. After providing definitions and mapping the context (Section 2), the study answers the following research questions:

1) What are the key challenges in the area of digitalisation and administrative law and their impacts? (Section 3)

2) What are the possible EU-level policy options, taking into account the legal basis and issues of proportionality/subsidiarity? (Section 4)

3) What are the potential impacts of each policy option? (Section 5)

The main methods employed are systematic literature review and legal analysis, complemented by expert interviews[8] and case studies. The purpose of including case studies in the study is to achieve a better understanding of the relationship between digital technologies, including AI, and administrative law. This includes mapping changes in administrative interactions between public bodies, on the one hand, and citizens/businesses, on the other hand, because of the use of digital technologies. It is also vital to examine how administrative law can respond to these changes. Three distinct cases help to gain a better understanding of the issues at stake: one on how digitalisation can impact the dynamics between administrations and individuals (Case 1: the Dutch childcare benefits case, Subsection 2.1), one on the use of digital tools by the administration at the EU level (Case 2: the ETIAS screening rules, Subsection 2.2) and one on norm innovation in administrative law (Case 3: digital administrative law in Member States, Section 4). When assessing the potential impacts of the various policy options a distinction is made between quantifiable and non-quantifiable impacts. For the impacts in the latter category a qualitative analysis is presented. With regard to quantifiable impacts, reasoning based on existing findings from the literature, as well as possible indicators for future monitoring are presented. The collection of new data or a modelling approach are outside of the scope of this study.

[7] European Parliament resolution of 20 May 2021 on shaping the digital future of Europe: removing barriers to the functioning of the digital single market and improving the use of AI for European consumers (2020/2216(INI)).

[8] The following experts were consulted via semi-structured interviews or e-mail correspondence for this analysis: Bas van Bockel, Mariolina Eliantonio, Herwig Hofmann, Jonathan Kamkhaji, Tamas Molnar, Marlies van Eck, Aleš Završnik and Jacques Ziller.

2. Definitions and mapping

This section introduces the subject of good administration by placing it in the contexts of the specific 'administrative landscape' of the EU (Subsection 2.1.1) and of digitalisation of administrative activity across different administrations (Subsection 2.1.2). It concludes by providing a brief overview of the use of digital tools by EU authorities (Subsection 2.2).

2.1. Good administration in the era of digitalisation

2.1.1. The EU administrative landscape

Before describing what digitalisation means for EU level administration and identifying current challenges and regulatory gaps, specifying what we mean by administration at the EU level is in order. This is important because of the special nature of administration at the EU level. The EU administrative landscape differs from those found at the Member State level, from which some ideas will be drawn (see Case 3 on p. 25). EU administration is fragmented and diverse with large traditional areas missing, notably social policy areas, such as social security, housing and education, which account for a large part of the literature on digitalisation and administrative law.

'Direct administration' in the sense that decisions with regard to individuals or legal persons are made entirely by EU authorities is concentrated in a few areas, notably competition policy, external trade, certain 'distributive' policy areas, such as fisheries and agriculture, and the 'internal' policy area of the regulation of the civil service. In these areas it is not always clear what role 'the citizen' plays, since those affected by 'decisions' resulting from EU-level administrative procedures are rather companies and EU civil servants. The types of procedures in which the EU administration comes into direct contact with individuals are infringement proceedings (where individuals are the complainants), the award of tenders and grants, execution of contracts, competitions and selection procedures,[9] and sanctions.[10] At the same time, '[t]here is no comprehensive catalogue of services directly provided by the EU administration to citizens or businesses'.[11] In the era of digitalisation, such a catalogue would make little sense however. As a result of the ease and fluidity of electronic communication, perceptions on the part of the citizen as to what counts as 'administrative activity' broaden. Whether or not a particular situation includes a formal decision is less relevant than the way in which it affects people. 'Administrative activity' could also include the choice to develop common repositories of databases, which enable the creation of statistics using AI techniques. Furthermore, administrative law does not just exist to protect 'citizens', but all 'individuals', as well as companies and organisations, large or small. Therefore, this study will, where possible and suitable, use the terminology of 'individuals' and 'legal persons'. The changing dynamics between individuals and administrations are further explored in Subsection 2.1.2 below.

The preceding paragraph lists a number of EU policy areas characterised by 'direct administration'. The other type of administrative involvement by EU authorities, 'mixed administration', refers to the large number of policy areas in which EU bodies are not the only or even the main decision-maker. These policy areas require 'factual involvement' on the part of EU authorities in one or more phases of the decision-making process, the final decision normally being the responsibility of the Member States. An example of this is the implementation of the EU's migration, asylum and external border control policies. In spite of a growing role for EU agencies, such as Frontex, Article 78(2)(e) TFEU

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9 Leino-Sandberg 2012, p. I-30.

10 See, for instance, Council Implementing Regulation (EU) 2022/336 of 28 February 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

11 Study reporting on the findings from the public consultation by the JURI Committee.

stipulates final administrative responsibility at Member State Level.[12] The prevalence of 'mixed administration – as opposed to 'direct administration' – has sometimes been mentioned as an argument for sector-specific regulation of administrative rights and administrative procedure. The multi-level aspect can make administration so complex, or so the argument goes, that a 'one size fits all' approach is not feasible.

However, there are three reasons not to take this argument for granted. First, complexity may serve professionals, but rarely individual. Even if general rules regarding administrative activity could not remove complexity, the fact that they provide a default rule or procedure in complex situations could contribute to reducing it. Second, the relevance of 'mere' factual involvement by EU authorities has increased so much as a result of digitalisation that it has become harder to argue that 'factual actions' ought to remain outside of the scope of any administrative law regulation. An important example is border control and migration, a policy area in which EU level involvement has grown substantially, in response to several crisis situations,[13] precisely because of EU agencies' role in providing informational input for decision-making.[14] Other examples include medicinal registration and marketing authorisation GMOs. As a final example, even in the traditionally Member State area of tax law, however, the EU administration plays a role in facilitating information exchange across Member States to counter tax evasion and fraud.[15] As information is becoming more crucial in decision-making processes, the preparatory phase is more determinative than before. This development does make the regulation of administrative activity more complex, but also more pressing.

In summary, a broad view of the EU administrative landscape and the kinds of activities and situations potentially coming under the scope of a regulation, whilst maintaining sensitivity vis-à-vis its particular nature, is warranted. This analysis of the EU 'administrative landscape' has two specific implications for the current study:

(1) There is a need to look beyond 'individual decision-making' as the main *locus* of administrative activity. In particular, certain more informal elements of administrative processes in which EU and Member State authorities work side by side (assisted or common processing) could fall under the scope of a potential new regulation.
(2) Because of the need to consider a broader range of administrative activities as potentially relevant to an administrative law act, policy areas that do not exclusively fall under the competence of EU institutions, can be affected by a regulation on the basis of Article 298 TFEU – but only with regard to the actions of EU institutions, agencies or other bodies.

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[12] Tsourdi 2020. For instance, the incident with regard to illegal pushbacks of migrants which Frontex stands accused of in the media after journalists gained access to its internal incident report database, revolves around factual actions enabled by digital tools. See Fallon, K., 'Revealed: EU border agency involved in hundreds of refugee pushbacks', The Guardian, 28 April 2022.

[13] Tsourdi 2020.

[14] Schneider 2017.

[15] Council Directive 2011/16/EU on administrative cooperation in the field of taxation [2011] OJ L64/1; Council Directive 2003/48/EC on taxation of savings income in the form of interest payments [2003] OJ L157/38, Article 9; Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1; Council Regulation (EU) 904/2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1.

2.1.2. Digitalisation and the individual-administration dynamics

This subsection lists a few ways in which trends in digitalisation have influenced the dynamics between public authorities and individuals (as well as legal persons in many cases) to the detriment of the latter.

Case 1: The Dutch childcare benefits case

A high profile case highlighting the risks for individuals associated with the use of ADM in the public domain is the childcare benefits case (*Toeslagenaffaire*) in the Netherlands, which led to the resignation of the Dutch Government in 2021. As gradually became clear through a series of political interventions, media reports and a parliamentary hearing, tens of thousands of parents had been wrongfully treated as benefits fraudsters by the Dutch tax authority (*Belastingdienst*).

For many years, the authority had employed a digital fraud detection system. Going further than the average ADM case, both in terms of the factors involved and the damage caused, the case has been described as the 'perfect storm'. Unusually harsh conditions in the law governing childcare benefits, explicitly endorsed by the legislator for political reasons, were implemented without any leniency or feedback loop in place. A failure to repay a sum of a few hundred euros could result in a claim by the tax authorities for restitution of several thousand euros, or even tens of thousands. Joining in this administrative logic, the highest Dutch administrative court (*Afdeling Bestuursrechtspraak Raad van State*) upheld this practice for many years. The inability of the institutions involved to correct the large-scale administrative injustices led to a variety of problems for many of the individuals involved, including debilitating levels of debts and losses of custody of children.

The fact that a large percentage of the affected individuals had dual citizenship led to the impression that algorithmic bias, in the sense of the authority freely letting the ADM system detect and use discriminatory patterns in the data, was to blame. In fact, the bias was caused by a combination of human bias, human error and certain side effects of the digital interface used. Thus, rather than being an illustration of the risks associated with advanced machine learning techniques as such, the childcare benefits case shows how administrative practices and ADM can align to not only achieve harmful outcomes for individuals but also to disregard signals that something is wrong. In theory, the rules aimed at preventing blatant discrimination such as this are in place. The case confirms that the problem is that the rules do not effectively regulate the administrative practices that matter in a digital era. In late 2021 the Dutch Data Protection Authority (DPA) imposed a €2.75 million fine on the Dutch tax authority for unlawful processing data on the (dual) nationality of childcare benefit applicants. This, like the eventual turn in the case law of the highest administrative court, was a correction ex post, which failed to offer the affected individuals a proper remedy. The practice was also condemned in a report by Amnesty International and investigated by the Venice Commission (see Box 1, p. 7).

Although fundamental rights, principles of good administration and the rule of law are established foundations for administrative law systems throughout the EU, the design of procedures often still follows an administrative logic. The ongoing 'transition towards a fully digitised administration'[16] has only highlighted that '[t]he citizen's role is often bent to fit that mould [as they] must split up their problems or requests for help into parts in accordance with the logic of the government body'.[17] Administrative procedures still tend to be organised according to the implementation of individual pieces of legislation. In concrete terms, individuals and legal persons disposing of the needed resources will be able to find information on whether they qualify for a specific grant or other benefit, or are subject to certain regulatory duties. However, an SME may want to know whether EU bodies can help them with a certain problem.[18] Digitalisation makes it possible for authorities to provide tailor-made answers; an example is SOLVIT, although this platform is limited to cross-border breaches of EU rights and certain categories of issues. At the same time, as digital

[16] Ministerial Declaration on eGovernment adopted in Tallinn, 6 October 2017.

[17] Scheltema & Timmer 2022.

[18] Scheltema and Timmer 2022

activities are notoriously poorly documented and communicated, it is becoming more difficult for individuals to know whether an administration is engaged in an activity that they perceive as relevant to them.

The term 'digitalisation' is used in more than one sense and is therefore best understood as referring to a wide spectrum of practices.[19] From eGovernment to the use of AI-driven algorithms in particular phases of decision-making processes, the vast majority of administrative activity is supported by a form of digital technology. For instance, in the policy area of agriculture satellite pictures analysed by AI systems are used to check the legitimate use of agricultural subsidies.[20] The ideal is that of data-driven administration which uses digital tools to solve societal problems, whilst protecting citizens' privacy and adhering to other public values such as transparency and non-discrimination. At the Member State level, recent JRC reports have found that, on the one hand, ambitions for digital transformation in the public sector are often thwarted by a 'lack of dedicated resources, knowledge, organisational resistance and other specific factors, such as quality of available datasets'.[21] On the other hand, 'the interest on the use of AI within governments to support redesigning governance processes and policy-making mechanisms, as well as to improve public services delivery and engagement with citizens is growing'.[22]

In theory automated public decision-making holds a promise to enhance the timeliness, reliability and impartiality of decisions and thereby contribute to good administration. Yet, as has become clear through a series of 'early adapter' scandals, reality is often different. One example is the algorithmic fraud detection system used by the Dutch tax authority (*Belastingdienst*) which used discriminatory variables to 'blacklist' individuals (see Case 1, p. 5). Investigations into this practice were not easy for lack of a sound administration of the decision criteria and variables used. Another example is the EU pilot with an AI-empowered 'video lie detector' for travellers (*iBorderCtrl*) which was halted for lack of accountability.[23] A meta-analysis of such cases shows that human mistakes with regard to how technology is employed are often a big part of the problem. Often, the underlying cause is a lack of policy vision or legal vision on digitalisation on the part of public authorities. When the design and implementation of digital tools are seen as 'merely technical' by the organisation, negative effects on the (legal) position of individuals are likely to occur. But even if digital systems are carefully designed, there is a strong argument to be made that **'automated decision-making' (ADM) is inherently at odds with principles of good administration.**

Although digitalisation is much broader than ADM – for instance it also includes the possibility to communicate electronically with authorities, as well as experiments with blockchain technology to

[19] Mergel, Edelmann & Haug 2019.

[20] European Commission, 'Agricultural Monitoring', EU Science Hub, https://joint-research-centre.ec.europa.eu/scientific-activities-z/agricultural-monitoring_en.

[21] Barcevičius c.s. 2019.

[22] Misuraca & Van Noordt 2020.

[23] Bacchi, U. 'EU's lie-detecting virtual border guards face court scrutiny', reuters.com, 5 February 2021, https://www.reuters.com/article/europe-tech-court-idUSL8N2KB2GT.

achieve more secure public contracts[24] – the focus of this research paper is on this aspect, because

Box 1. ADM according to the Venice Commission

'In the future, more sophisticated artificial intelligence algorithms are likely to be used and it will be much harder to identify which criteria were used by these algorithms due to the very nature of "unsupervised learning" of modern AI systems. Detecting bias in such system can be next to impossible as self-learning AI systems are fed with large amounts of training data. This data comes from the real world; it aggregates individual decisions made by humans. However, in part these past decisions made by humans may have already been made on a discriminatory basis. On the other hand, such bias could normally not be discovered without such aggregation. Therefore, AI also presents an occasion to review past practices, and this should be used to identify bias in administration.'

Source: Venice Commission, 'Netherlands - Opinion on the Legal Protection of Citizens', adopted at the 128th Plenary Session, 18 October 2021, CDL-AD(2021)031-e, p. 20.

it represents the largest current challenge in regulating administrative activity. ADM means that software-based systems, normally using a large quantity of data, support or even replace elements of human decision making. These systems are sometimes referred to as 'algorithms' but the term ADM is preferred here as it reflects better the importance of other 'ingredients' of digitalisation of decision-making, such as software and data. ADM systems that actually take decisions are still rare in the public realm. It is more common for such systems to be used in the 'earlier' phases of the decision-making process as a whole, such as investigation.[25] Yet, even when the systems do not make the decisions but only provide input, they can determine how the 'discretionary space' surrounding many decisions is operationalised. Hofmann sees the approach by the Court of Justice of the European Union (CJEU) in *La Quadrature du Net* (see Subsection 3.1) as an extension of the Meroni doctrine, which limits the possibilities for delegation of powers. The use of ADM can in fact also be seen as such delegation,[26] as the 'software underlying ADM technology will sometimes *de facto* either replace or supplement executive rulemaking in preparation of individual decision-making'.[27]

Some of these ADM systems use AI-based software, which in most cases means that systems are deriving new criteria from large datasets, with or without human supervision. The more 'data-driven' an ADM system is, the further it is removed from classic controls such as legality and judicial review. Also, the quality of the data and control over their collection and use become of paramount importance. Even where no sophisticated AI tools are used, increased data sharing between authorities means that the risk of errors grows and that these can be particularly difficult to correct. Upcoming legislation, for example the Data Governance Act or Data Act, address such risk to some extent, but do not solve the more practical problem of, for instance, an individual not managing to get a reply from a public authority with regard to a request for error correction. Even if the data governance is managed well in a particular ADM system, biases can arise through the design, training and hence functioning of the algorithm and can lead to problems such as discriminatory profiling. A person confronted with an adverse decision may not know that it was produced by or with the help of an ADM system. And even if they do know, it is often difficult to challenge the results of the ADM system, because of a lack of transparency in its process. Even in cases in which it is known that ADM was used and the authority involved is willing to provide openness and explain how the ADM tool relates to the outcome of the process (the decision, in most cases), it may not always be able to do so. Due to the use of many 'layers' of statistical correlations, explaining the inner

[24] Iaione & Ranchordas 2021.

[25] Hofmann 2021.

[26] Hofmann 2021, p. 5.

[27] Ibid.

mechanisms of sophisticated algorithms is difficult and sometimes close to impossible – the infamous 'black box effect'. This phenomenon limits the right to a reasoned decision. In sum, **digitalisation causes new problems for citizens and more knowledge and resources are needed to solve them**. And this problem driver has a mirror image: **public authorities will not always realise new administrative injustices are happening and, even if they do, solving them can be difficult**.

2.2. The use of digital tools by EU authorities

The Digital Agenda for Europe contains an ambitious legislative programme (see Subsection 3.1.2. for a summary of the regulations and directives relevant to digitalisation within EU authorities), as well as some specific targets. For instance the Digital Compass proposal mentions as two of its targets for 2030 that 'all key public services should be available online' and '80% of citizens should use an electronic identity solution'.[28] The European Blockchain Partnership (EBP), through which the European Commission and the Member States cooperate to build a public blockchain infrastructure, may serve as a different illustration of the width of the EU's activities regarding the digitalisation of administration.[29] As part of concrete instances of administrative cooperation between EU authorities and member states, decision-making on the basis of shared data is very common. For instance, within the Rapid Exchange of Information System (RAPEX) information regarding food safety problems and measures is exchanged.[30]

At the level of interactions between the EU administration and individuals or legal persons, the use of digital tools, although to characterise the EU administration as 'fully digitised' would go too far. Given the focus of this study on AI technology and ADM systems, rather than on eGovernment tools, three examples are provided below, each representing a different type of tool from the AI/ADM spectrum.

1. Many of the current, known uses of EU-level AI systems, such as in the context of the Entry Exit System (EES) or certain facial recognition applications in use by Europol, are related to border control and migration. These applications employ AI technology in the sense that they make use of biometrics but the processing of the data is not AI based.
2. The example of the ETIAS screening rules (see Case 2, p. 9) represents a new generation of ADM tools being developed by EU agencies for assistance in complex and multi-level decision-making and is more similar to the fraud detection systems used in social security law by many Member States (see Cases 1 and 3).
3. An example of an administrative process managed by an EU agency and supported by AI technology is EISMEA's EIC accelerator, a grant programme for start-ups.[31] Applicants are offered an AI tool to help prepare their business plan. Further on in the process, new AI functionalities are offered to the remote experts tasked with the evaluation of proposals. They have access to an AI-empowered 'heat map' showing the team skills and technologies present in the various applications. The AI tool also visualises the markets and submarkets linked to the project, as well as the closest patents and scientific publications. The AI tool compares data from the applications to external data sets in

[28] COM(2021)0118, 9 March 2021.

[29] Iaiaone & Ranchordas 2021.

[30] https://joinup.ec.europa.eu/collection/rapex/about.

[31] EIC Info Day 2022, EIC Accelerator - Application and Evaluation, Presentation by Catherine Eginard, Deputy Head of Unit, EISMEA Operational coordination. The presentation can be downloaded from https://eic.ec.europa.eu/events/european-innovation-council-online-info-day-22-february-2022-2022-02-22_en.

order to help applicants and evaluators expand their ideas and enhance their

Case 2: ETIAS screening rules

The screening rules of the European Travel information and Authorisation System (ETIAS; Regulation 2018/1240) are an example of an ADM system, set to enter into force in mid-2023 and developed at the EU level for application in an area of 'mixed administration': border control and migration. The ETIAS screening rules foresee an algorithm that automatically compares the data provided in a visa-free traveller online application with data already stored in records, files or alerts registered in EU information systems on the basis of specific risk indicators corresponding to identified security, irregular migration or public health risks (Article 33(1), recital 27). These risk indicators are based on a combination of data on age range, sex, nationality, place of residence, education and occupation (Article 33 (4)). The objective is to assess a traveller's risk of irregular migration, or to security and public health, and, if so, to review the application manually (recital 27). The ETIAS Central Unit of Frontex verifies application data against the risk indicators (Article 7, Article 22) and authorised national authorities (ETIAS national units) assess the risks (Article 26 (6)). Safeguards mentioned in the screening rules include:

- Targeted and proportionate use (Article 33 (5))
- Not revealing protected attributes – in compliance with non-discrimination principle (Article 33 (5))
- Human review of risk assessment and of the individual case (Article 22; Article 26)
- Regular reviews of the risks, ex ante and ex post evaluations of the indicators (Article 33 (3), Article 33 (6), Article 7)
- ETIAS Fundamental Rights Guidance Board with the European Union Agency for Fundamental Rights (FRA) as a member (Article 9 (5) and Article 10)
- Access to remedy (Article 64)

Many of the objections voiced in the 2017 written opinion by the European Union Agency for Fundamental Rights (FRA Opinion – 2/2017) have not been addressed in the adopted version of the regulation. The main objection, echoed by the European Data Protection Supervisor (EDPS Opinion 3/2017), related to the 'significant risk of inadvertently discriminating against certain categories of travellers based on prohibited grounds listed in Article 21 of the [CFR]'. Since the risk indicators mentioned in the Regulation are quite wide, the combination of proxy variables could lead, for instance, to discrimination of low-skilled workers. If in a particular country a particular ethnic group tends to work in agriculture, which is mainly set in a certain region, severe obstacles to travelling could be the result.

As a safeguard, FRA recommended a 'a test phase demonstrating that the screening rules are necessary and proportionate and do not result in discriminatory profiling'. In case the testing – which did not take place – would have shown signs of profiling 'the regulation should define the screening rules in more detail, limiting the discretion of implementing rules'.

impressions. In a presentation of this new tool, EISMEA staff emphasised that the AI tool will not replace the expertise of the experts and that the evaluation decision will be theirs alone.[32]

[32] EIC Online Info Day, 22 February 2022, https://www.youtube.com/watch?v=8m7-N5AC5rw&t=17680s

3. Current challenges

This section summarises the key challenges in the area of digitalisation and administrative law and their impacts (research question 1). Subsection 3.1 sets out the current regulatory framework, which consists of administrative law norms applying to the EU level (Subsection 3.1.1) and the regulation of digital activity in general (Subsection 3.1.2). This study refers to the latter part of the framework as 'digi-specific rules'. Subsection 3.2 charts the impact of the status quo by identifying five categories of regulatory gaps (Subsection 3.2.1) and six key impacts (Subsection 3.2.2).

3.1. Current framework

This subsection sets out the current regulatory framework for EU administrative activity, including the use of digital tools and AI by EU bodies. The scope of this section is expressly not limited to the framework for EU administrative *law*. This is so because the previous section has shown that administrative law as traditionally conceived does not necessarily address problems in the administration-citizen dynamics. For this reason, the general administrative law framework only constitutes the first part of the inventory presented here. The second part is an overview of – current and future – regulatory efforts that are potentially relevant for digital activity by EU bodies.

3.1.1. Administrative law norms applying to the EU level

Administrative law norms applying to the EU administration can be found in a wide array of sources. Relevant **international treaties** include the ECHR and the Aarhus Convention. The latter is legally binding for the EU and contains some strict norms regarding participation, access to information and access to court in the field of environmental law. At the level of **primary EU law** several provisions express citizens' rights vis-à-vis the administration, notably the right to an effective judicial remedy (Article 47 CFR), and the right to good administration (Article 41 CFR).[33] The Treaties also regulate access to court for judicial review of administrative action (Article 263 TFEU). Over the years abundant **case law of the CJEU** has developed, albeit often in a highly specific context, for instance with regard to the principle of respect for the rights of the defence.[34] Furthermore, several acts of **secondary EU Law** contain norms regarding a particular aspect of administrative action. One example is the Financial Regulation; another, containing norms of general application across the EU administration, is the Regulation on Access to Documents.[35] **Soft law** is also an important source of administrative law at the EU level, for instance the European Ombudsman's European Code of Good Administrative Behaviour and the European Commission's Code of Good Administrative Behaviour. Finally 'expressions of "self-commitment" and normative elements of internal work processes of parts of EU administration'[36] can be found, constituting **self-regulatory elements** which do not amount to 'law'. Most norms of administrative law and administrative procedure at the EU level may,

[33] Under Article 41 of the Charter of Fundamental Rights of the European Union, every person has the right to: have his or her affairs handled impartially, fairly and within a reasonable time by EU bodies, including the right to be heard before any individual measure which would affect him or her adversely is taken, have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

[34] Judgment of the Court of 18 December 2008, C-349/07 (Sopropé); Judgment of the Court of 12 February 2015, C-662/13 (Surgicare). See also Muzi 2017.

[35] Regulation 1049/2001.

[36] European Parliament, 'Impact Assessment of Possible action at EU level for an open, efficient and independent EU administration', Directorate for Impact Assessment and European Added Value, July 2018, p. 15.

however, be found in **sector specific legislation**. Because this body of law is too vast to cover or even summarise in this study, two examples are provided in Box 2.

Box 2. Sector-specific administrative law norms

Access to environmental information is regulated in Directives 2003/4 (Access to environmental information) and Directive 2007/2 (Infrastructure for Spatial Information in the European Community (INSPIRE)).

The Union Customs Code (UCC) contains several administrative rights, such as the right to be heard before authorities take a decision that would adversely affect the person concerned. See Article 22(6) of the Union Customs Code (UCC).

3.1.2. Regulation of digital activity by EU authorities

The previous subsection contains an overview of norms regulating the actions of EU institutions, agencies and other bodies. The current subsection surveys the regulatory framework specific to 'digital activity' as such. Some of the relevant norms apply to public authorities specifically, but most do not distinguish between the private sphere and the public sphere.

There are currently no **international treaties** dealing with digitalisation specifically. However, the initiative to draft an AI Treaty in the context of the Council of Europe, which could include binding rules, needs mentioning.[37] Within the category of **primary EU law** Article 52(1) CFR, which states that any limitation on the exercise of fundamental rights must be provided for by law, takes on a particular significance in the context of ADM. Not only does this mean that if an ADM system limits rights, there must be a legal basis for it, but also that this legal basis 'must itself define the scope of the limitation on the exercise of the right concerned'[38]. Primary law also has ADM enabling aspects. An argument has been made that the EU's duty of care principle involves 'a legal requirement to use facts where possible in decision making' which in turn implies that 'where data is necessary and sufficient quality of data is available, decision making must make use of such data, and arguably, use available ADM technology to analyse it'.[39] Hofmann links this to the principle of proportionality. If we expect authorities to take proportionate decisions they can only do so if they dispose of full information. Arguably, but as demonstrated in Subsection 2.1 not unproblematically, in a digital era 'full information' means making use of available data-driven possibilities. Another relevant norm of primary law is Article 197(2) TFEU, which stipulates that the EU may support the efforts of EU countries to improve their administrative capacity to implement EU law. This provision has facilitated the growth of composite administrative procedures in which EU authorities have a role in developing ADM systems for the purpose of decision-making at the Member State level.

There is a growing body of **case law of the CJEU** regarding the use of digital tools by public authorities, but the case law is still rather scattered and context-dependent. In the *Vialto Consulting* case the Court of Justice made it clear that making digital copies should be seen as incorporated in the list of competences that OLAF has at its disposal in order to gain access to necessary data.[40] In a case regarding the aforementioned pilot with an AI-empowered 'video lie detector' for travellers (*iBorderCtrl*), the Court of Justice set out norms regarding the transparency surrounding such systems.[41] MEP and civil liberties activist Patrick Breyer had filed the case, based on access to documents rules, in order to argue for the publication of a set of documents on the ethical

[37] https://www.coe.int/en/web/artificial-intelligence/work-in-progress#01EN.

[38] Judgment of the Court (Grand Chamber) of 6 October 2020, C-511-520/18 (La Quadrature du Net) ECLI:EU:C:2020:791, para. 175, referring to judgment of 16 July 2020, (Facebook Ireland and Schrems), C-311/18, EU:C:2020:559, paragraph 175.

[39] Hofmann 2021.

[40] Judgment of the Court (First Chamber) of 28 October 2021, Case C-650/19 P (Vialto Consulting), ECLI:EU:C:2021:879.

[41] Judgment of the Court of 15 December 2021, T-158/19.

justifiability, legality and the results of the technology. While in this case, the technology was not used further and was only in a preliminary research phase, this judgment has significance as the Court reaffirmed that there is a public, democratic interest in transparency when it comes to the use of such technologies.[42] EDRi notes the influence this case may have on the approach of the future Artificial Intelligence Act towards protection of fundamental rights.[43]

The 2020 *La Quadrature du Net* case is about the limits that EU law places on the general and indiscriminate retention of data by electronic service providers on grounds of crime prevention and national security, as was allowed by a French domestic regulation.[44] In this context, the Court also made some determinations regarding minimum conditions for the use of ADM. It indicated that if 'pre-established models and criteria' are used and the databases involved 'comply with the conditions under which fundamental rights may be limited' (Article 52(1) CFR, see below) ADM is allowed. However, 'a regular re-examination should be undertaken to ensure that those pre-established models and criteria and the databases used are reliable and up to date.'[45] Also, the 'models and criteria on which that type of data processing are based should be, first, specific and reliable, making it possible to achieve results'. Furthermore, the Court stated that 'it is essential that the decision authorising automated analysis be subject to effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that a situation justifying that measure exists and that the conditions and safeguards that must be laid down are observed.'[46] However, this norm is laid down in reference to ADM involving 'automated analysis of the traffic and location data of all users of electronic communications systems' specifically, at the Member State level and in the context of law enforcement. Therefore, and this is a general issue with case law of the Court of Justice, it is unclear how generically the conditions imposed apply. A final case that needs mentioning is *Sabou*, in which the Court ruled that exchange of data without notifying the person concerned, does not qualify as a decision that would trigger the principle of the rights of defence.[47]

There is a growing body of **secondary EU law**, some of which is part of the European Data Strategy: the General Data Protection Regulation[48], the NIS Directive, the eIDAS Regulation, the Regulation on the free flow of non-personal data,[49] the Cybersecurity Act,[50] the Open Data Directive,[51] the Digital Services Act, as well as proposals for a Data Governance Act, an AI Act[52] and a Data Act. The AI Act needs special mentioning in this context, as it comes closest to regulating the ADM practices identified in Section 2 as the main development in digitalisation of administrative processes. The proposal sets out a risk-based approach and treats AI systems as 'products'. The 'high risk' systems among these have to undergo procedural requirements such as a conformity assessment. Although

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42 Ibid, para 200.

43 European Digital Rights (EDRi), 'European Court Supports Transparency in Risky EU Border Tech Experiments', 16 December 2021, https://edri.org/our-work/european-court-supports-transparency-in-risky-eu-border-tech-experiments/.

44 Judgment of the Court (Grand Chamber) of 6 October 2020, C-511-520/18 (La Quadrature du Net) ECLI:EU:C:2020:791.

45 Ibid., para 182. The CoJEU refers here to Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paras 173, 174.

46 Ibid., para 179.

47 Judgment of the Court of 22 October 2013, C-276/12 (Sabou).

48 Regulation (EU) 2016/679.

49 Regulation (EU) 2018/1807

50 Regulation (EU) 2019/881.

51 Directive (EU) 2019/1024.

52 European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence, COM/2021/206 final.

the proposal – according to the Explanatory Memorandum – is conceived from a fundamental rights perspective, it has also been criticised for its lack of (individual) redress mechanisms. Simply put, once a high-risk AI system has been approved for the market, there is not much that can be done on the basis of this particular regulation (except that re-approval is required in case of substantial changes to the system; however, a characteristic of some AI systems is that they are constantly evolving). Part of the reason for this absence of individual (or collective) procedural rights is that these cannot be based on Article 114 TFEU in a straightforward manner – leaving a gap to be filled by a potential administrative law regulation based on Article 298 TFEU. An individual complaint mechanism for citizens, or procedures effectuating the right to an effective remedy with regard to AI use by public authorities, are a better fit with a regulation based on the latter provision. The AI act does not – at least not as a starting point – distinguish between the use of AI by private actors and that by public actors. This means that norms applicable to ADM involving AI systems as practised by EU authorities can be derived from this act. In fact, for certain practices, such as 'profiling', the act does impose stricter norms on public authorities. On the other hand, existing ADM systems used for migration and border control purposes are envisaged to be exempt from the requirements specific to AI systems in the Commission proposal for an AI Act.[53]

Box 3. 2016 eGovernment Action Plan

The action plan is 'guided by the vision that by 2020, public administrations and institutions in the EU should be open, efficient and inclusive, providing borderless, personalised, user-friendly, digital public services to all citizens and businesses'. It deals mainly with digital *services* and *communication* by authorities (as opposed to digitalisation of *decision-making*) and proposes a list of principles that mostly refer to this side of digitalisation, such as 'digital by default' and the 'once-only principle', 'ensuring that citizens and businesses supply the same information only once to a public administration'. The perspective of 'the administration as service provider' is not necessarily helpful to tackle the fundamental problems related to ADM. However, the idea that citizens should only benefit from and not bear the burden of digitalisation is a potential source of common ground.

Source : European Commission, EU eGovernment Action Plan 2016-2020, Brussels, 19 April 2016, COM(2016) 179 final

As for **soft law** initiatives, the 2016 eGovernment Action Plan[54] needs to be mentioned, as well as the European Interoperability Framework,[55] the 2019 Ethics guidelines for trustworthy AI[56] and the 2021 Declaration on European Digital Rights and Principles.[57] The latter is a joint solemn proclamation by the European Parliament, the Council and the Commission, containing commitments

[53] European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence, COM/2021/206 final, Article 83 and Annex IX.

[54] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — EU eGovernment Action Plan 2016-2020 — Accelerating the digital transformation of government (COM(2016) 179 final, 19.4.2016). For an explanation, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A4301896.

[55] https://joinup.ec.europa.eu/collection/nifo-national-interoperability-framework-observatory/european-interoperability-framework-detail.

[56] European Commission, Directorate-General for Communications Networks, Content and Technology, Ethics guidelines for trustworthy AI, Publications Office, 2019, https://data.europa.eu/doi/10.2759/177365.

[57] https://digital-strategy.ec.europa.eu/en/library/declaration-european-digital-rights-and-principles.

Box 4. Declaration on European Digital Rights and Principles

'Chapter III: Freedom of choice

Interactions with algorithms and artificial intelligence systems

Everyone should be empowered to benefit from the advantages of artificial intelligence by making their own, informed choices in the digital environment, while being protected against risks and harm to one's health, safety and fundamental rights.

We commit to:

– ensuring transparency about the use of algorithms and artificial intelligence, and that people are empowered and informed when interacting with them.

– ensuring that algorithmic systems are based on suitable datasets to avoid unlawful discrimination and enable human supervision of outcomes affecting people.

– ensuring that technologies, such as algorithms and artificial intelligence are not used to pre-determine people's choices, for example regarding health, education, employment, and their private life.

– providing for safeguards to ensure that artificial intelligence and digital systems are safe and used in full respect of people's fundamental rights.'

Source: European Commission, European Declaration on Digital Rights and Principles for the Digital Decade, Brussels, 26 January 2022, COM(2022) 28 final

across a number of digital subjects, such as digital education, digital identity, but also interaction with algorithms and artificial intelligence systems (see Box 4).

Specific digital tools are governed by **sector-specific rules**. For more information on how such rules can work in the case of the use of AI as part of the administrative process, see the case study ETIAS screening rules (Case 2, p. 9).[58]

In conclusion, two potential problem drivers emerge from this analysis of the current regulatory framework. First, **the regulatory framework is expanding and becoming ever more complex.** Whereas the previous debate on an EU-level administrative law regulation focussed on general rules versus sector-specific rules, a vast array of what will hereafter be called 'digi-specific' rules have now entered the scene, also divided in more general digital rules and sector-specific digital rules. Second, **only a few digi-specific rules and a few general administrative law rules have been written as positive instructions or incentives for authorities.**

3.2. Impact of the status quo

3.2.1. Overview of regulatory gaps

Below five main categories of 'regulatory gaps' are identified. These are all gaps with regard to the regulation of the relationship between individuals and/or legal persons, on the one hand, and public authorities at the EU level, on the other. Known problems regarding the use of ADM systems, for example 'discriminatory profiling', are not listed as such, but are included in the exploration of the administrative law response to such a problem, namely whether or not the problem can be prevented by the administration or remedied at the initiative of an individual or legal person. Each of these categories embodies a variety of failings to adhere to the standards of openness and fairness of the administration. Some of these are of a general nature, others are the direct result of digitalisation. All categories of regulatory gaps and problems show that digitalisation is no longer a 'niche topic' for administrative law but one of the main concerns. The categories are also interconnected to a significant extent. The various links across the regulatory gaps are made visible

[58] Screening rules of the European Travel information and Authorisation System (ETIAS), Regulation (EU) 2018/1240.

through the specific impacts (marked in bold) this subsection identifies, which will subsequently be categorised into key impacts a number in Subsection 3.2.2.

The 'scoping fallacy'

Identifying what kind of administrative action is worth subjecting to the controls of administrative law (principles of good or proper administration, procedural norms such as time limits, the possibility to appeal and apply for judicial review) has been seen as a challenge from the start of the development of administrative law. Most administrative procedure acts solve this conundrum by requiring a concrete, individual decision to trigger the stricter types of control such as the possibility of judicial review, whilst applying certain principles to a much wider range of administrative activity. Domestic administrative law regulations that are less centred on the 'individual administrative decision' tend to adhere to a classification of administrative action[59] for the purpose of clarifying citizens' rights, in particular the rights of defence and redress. In many cases there is also a solution for what is called 'administrative silence' – what happens if the citizen is not receiving a reaction from the administration when they are entitled to one (cf. the Dutch case study, Case 1, p. 5).

The traditional administrative law answer to the scoping issue is to require *individual decisions* to be present for the more detailed and stricter norms to apply and for individuals and legal persons to have a right to appeal. The traditional emphasis on (judicial) review of decisions has meant **a disproportionate burden on citizens to fix what administrations are not doing right in the first place**. Also, because of the complexity of seeking administrative redress (in general, and in the EU, see the 'redress gap' below), **many administrative injustices go unnoticed and unrepaired** (see the Dutch child care benefits case in Subsection 2.1.2).

In the EU, a systematic approach to the scoping issue is absent. In areas where 'individual decision-making' is at the core of administrative decision-making (e.g. competition law), sector-specific approaches have already been developed. In other areas, the 'individual administrative decision' as the main concept is not necessarily the best fit for the EU administration, given that a lot of activity (in 'composite decision-making', but not only there) consists of 'advice', 'standard-setting', 'evaluating', 'certifying', 'monitoring', 'informing', 'data sharing' etc. Yet a legal classification of this activity is notably absent. At the same time, and that is why this gap category is called the scoping *fallacy*, as soon as such a theory would be developed, certain instances of unilateral exercise of power are bound to be excluded. In the era of digitalisation, setting the scope of an administrative law regulation is more of a challenge because of the wide range of activities (coding choices when programming algorithms, 'decisions' to link databases etc.) that may impact the lives of individuals and the interests of legal persons. At the same time, the lack of a systematic approach contributes greatly to **the lack of legal certainty among individuals and legal persons**.

The 'discrepancy problem'

The status quo of the regulation of administrative activity at the EU level, including the use of digital tools by the EU administration, is inevitably changing. That is to say, the regulatory framework is developing fast on one side: the regulation of digital activity. Many of the norms from the digital family will also apply to the activities of public authorities at the EU level. For example, should the Commission proposal for an AI Act be adopted in its proposed format, any new 'high risk' AI system an EU agency wants to apply will need to fulfil the procedural and substantive conditions laid out in the regulation. One risk associated with this development is a **detachment between digi-specific rules and administrative law rules**.

[59] In German this is called *Handlungsformenlehre*, a term sometimes left untranslated in comparative administrative law literature.

From the perspective of the individual or legal person affected by digital administrative activity, 'digi-specific' norms do not necessarily solve the problem. They are also not necessarily designed to do so. Just like liability rules support the implementation of digi-specific norms in the private sector (cf. the Commission initiative regarding adapting liability rules to the digital age and artificial intelligence),[60] administrative law norms have the capacity to be the foundation for digi-specific public sector norms to develop. Indeed, the proposed AI Act is meant to complement 'general public law safeguards developed in human rights, constitutional, or administrative law'. But if these AI-specific norms land in **a regulatory environment that is already characterised by complexity and fragmentation, those existing problems are likely to be exacerbated**. The 'coverage' of EU-level administrative law norms was already described as 'spotty, difficult to access and [leaving] obvious gaps'[61] many years ago and the situation has not improved.

Not only are there discrepancies between the scope and the contents of general instruments and sector-specific norms, with the growth of the body of digi-specific norms, including legislation that is both sector-specific and digi-specific, the risk of new discrepancies increases. Conflicts between different norms can remain below the surface for a while, or have to be resolved by the Court of Justice. Apart from the fact that relying on the appeal phase to clarify legal issues regarding administrative justice favours powerful stakeholders and organised interests (see above), this dynamic only strengthens the fragmentation of EU administrative law. Case law is decided in the context of a specific policy area and is therefore most easily interpreted in that light – and **spurs legal uncertainty with regard to its broader applicability across the EU administration**. Since the Court will always have to rule in a particular case, the scope of applicability of its decisions will often remain rather unclear (see the case law analysis above in Subsection 3.1). For instance, it is unclear to what extent the obligation to control and regularly submit ADM technology to a review, as put in place by the CJEU in *La Quadrature du Net*, applies beyond the specific context of that case. The very fact that, in the absence of a general body of EU-level administrative law, **individuals and legal persons have to resort to litigation to get legal clarity**, is part of the 'discrepancy problem'. Reducing the need to go to court is therefore an important aim under this heading.

A specific area of friction between different types of norms concerns the relationship between general administrative law norms and informational rights from the GDPR. Already in book VI of the ReNEUAL model rules,[62] it was observed that 'data protection needs to be integrated into general information law provisions in order to be effective'. Whereas data protection is still an important theme for law & technology, many experts agree that the focus on personal data is no longer always key to the protection of rights. Not only has the GDPR not been written primarily with a view to algorithmic decision-making, it is also the case that many algorithms that do not make use of personal data as such can still have a major impact on the lives of individuals and the interests of legal persons. Informational duties in the GDPR (Articles 13 and 14 GDPR), also have exceptions (see Section 5) when the effort is disproportionate or when it jeopardizes the objective of the data processing. Thus, **data protection law has outgrown its function as ADM regulation**.

As foreshadowed by a recent joint opinion from the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) regarding the relationship between data protection

60 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence_en.

61 Harlow & Rawlings 2021, p. 333.

62 ReNEUAL Model Rules on EU Administrative Procedure, Book VI – Administrative Information Management, http://www.reneual.eu/images/Home/BookVI-information_management_online_publication_individualized_final_2014-09-03.pdf.

law and future 'AI law',[63] such friction between different types of norms is likely to increase after the proposed AI Act and Data Act are enacted into law. For instance, if a system complies with the AI Act but still causes a problem, **it will be difficult for individuals, associations and businesses, to obtain individual redress**, for want of individual redress mechanisms in the proposal for an AI Act (the 'redress gap' is elaborated on in Subsection 3.2.1). Although the Court decision in *La Quadrature du Net* mentions the possibility of review as a requirement for ADM systems, it is unclear in which context this requirement applies.

A final point to make under this heading is that the new complexity emerging from the expanding web of norms for digital activity is not only a problem for citizens and others affected by EU digital administrative activity, but **also for administrative actors themselves.**

The 'known unknown'

This category of regulatory gaps concerns the difficulty for individuals and legal persons to find out more about how, where, and why their data has been processed – both in the context of an administrative decision taken at their expense, as well as in situations affecting them more indirectly. As mentioned above, this is not only a matter of personal data, as **many algorithms (e.g. those containing environmental information) can also have a major impact even if only using non-personal data**.

Several well-documented problems regarding algorithmic decision-making can be placed under the heading of 'known unknowns', as the problem in administrative law terms is that the individual might be aware of its existence but does not have the means to address it. It starts from a lack of inherent compliance with many of the main principles of good administration within ADM and other data practices (transparency, reason-giving (explainability), accessibility (intelligibility), reviewability, non-discrimination (absence of bias), non-randomness). Transparency is a problem – both at the level of the data used, as well as, the level of choices made in the design of the algorithm. This, in combination with the fact that – even when technical transparency is assured – certain more advanced algorithms can hardly be explained in natural language terms (explainability), is often dubbed the 'black box effect'. Not only is this in violation of the right to good administration, it is also at odds with requirements of accessibility and intelligibility associated with the notion of law in Article 52(1) CFR.[64] An additional problem is that software code is not always 'open source' or 'open standard'. Finally, problems of bias in the design, training and functioning of the algorithm can easily arise, sometimes simply because of the fact that the data used is normally 'historical', thereby reinforcing existing patterns.

Even if EU authorities do not have ADM systems that take decisions directly at this moment, the supporting role these systems can fulfil in complex procedures may have a significant impact on individuals. If the EU legislator fails to consider the citizen's perspective **the faith in EU-level administration is at risk of being eroded**, possibly resulting in **lower levels of compliance**.[65] The 2018 impact assessment already signalled that the envisaged transition towards a fully digitised administration would require 'a massive upgrade of processes, communication patterns and procedures across EU administration, which can only be justified by an effective centralisation and harmonisation of the way in which EU bodies deal with the public'.[66]

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63 Joint Advice EDPB & EDPS, 5/2021, 18 June 2021, nr. 15.

64 Hofmann 2021.

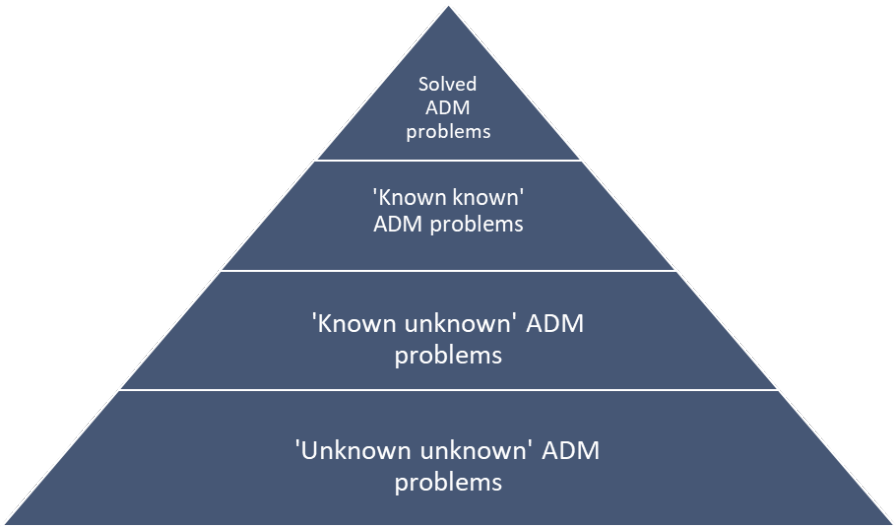
65 Scheltema & Visser 2022, citing Dudley c.s. 2015.

66 European Parliament, 'Impact Assessment of Possible action at EU level for an open, efficient and independent EU administration', Directorate for Impact Assessment and European Added Value, July 2018, p. 6-7.

The 'unknown unknown'

The distinction between 'known unknowns' and 'unknown unknowns' is not always easy to make, as illustrated by the following example. If a statistics repository, retrieving data from several large sector-specific databases, is built for the purposes of applying algorithmic statistics, personal data are not directly involved. However, possible mistakes can have a resounding effect on many policies and decisions and therefore, indirectly, on the lives of individuals. These practices often start as an 'unknown unknown', in the sense that even for specialised civil society actors it is difficult to know about relevant developments, let alone for individuals. Indeed, decisions with regard to the use of ADM by public authorities have a tendency not to be formalised.[67] Sometimes they turn into a 'known unknown', or even a 'known known' (see the Dutch case study, Case 1, p. 5). However, apart from the problem that even in that case **it is difficult for individuals to get a proper remedy** (see above and below), the awareness that there are likely to be more 'unknown unknown' instances of ADM systems impacting the legal position of individuals directly or indirectly, **undermines trust** (see Figure 1).

Figure 1. ADM problems, from 'unknown unknown' to 'solved'



Source: author's own elaboration, based on Subsection 3.2.1

When personal data is involved, and in particular in a data sharing context, the risk of 'chain effects' of mistakes is relevant; **individuals may never realise a mistake with their data has been made, or only realise when it is too late**. Also, there is the well-documented risk of indirect identification of a person in case of inadequate anonymisation or the use of unsuitable proxy indicators. Because ADM systems tend to be used in the – less regulated – preparatory stages of decision-making processes, citizens will not always even know that this is the case. Digi-specific norms do mention the duty to proactively advertise the use of AI or ADM, but only in certain cases (the AI regulation) or in such a way that such **digi-specific administrative duties are difficult to enforce**.

A very different point under this heading is the following: recent efforts by the European Commission to communicate better regarding citizens' administrative rights under Union law[68] do

[67] Sobrino-García 2021, p. 13.

[68] In its 2013 reaction to the 2013 EP resolution the Commission promised to "respond to the Parliament's request to make the existing administrative rights more visible and accessible for citizens, by bringing together the existing EU

not necessarily mean that it can be expected of individuals, or of legal persons with limited means, to know how to translate these into action. Given the lack of a coherent and comprehensive set of codified rules of good administration at the Union level **concrete administrative rights and duties remain an 'unknown unknown'**.

The 'redress gap'

The final category of regulatory gaps revolves around possibilities for 'redress' in two different senses.

First of all, possibilities for redress (review) in the case of EU administrative action are weakly developed because the status of many 'actions' is unclear (see the 'scoping fallacy' above). At the same time, appeal procedures have been developed across many EU agencies, but – in the absence of a general regulation – in a highly scattered fashion.[69] Only a limited list of generally applicable pieces of EU legislation contain accountability procedures and remedies for individuals, associations and businesses: the Financial Regulation, the GDPR, and the Regulation on Access to Documents. Furthermore, the case law regarding composite administration makes clear that administrative actions at the Member State level that do not amount to 'decisions', such as recommendations that are relevant for a decision taken at the EU level should be open to national judicial review.[70] In the reverse situation, however, **judicial review, or even administrative appeal of activities by EU authorities that influence MS decisions, is often not an option**.

With the growing role of (AI-based) ADM systems in the *de facto* procedural design of the implementation of EU policies,[71] redress against a much wider variety of 'activities' is warranted. A lot of elements in the chain of automated administration do not amount to legal acts but are 'factual actions' with the potential to harm individuals or legal persons long before any binding decision is taken (if such a decision is ever taken). The difficulty of appealing certain decisions in the EU context is a problem in general. This problem is exacerbated by the fact that many steps in the chain of automated decision-making are not known or knowable for potential stakeholders (see above). Fragmentation and complexity also mean that **specialised legal support is needed in case someone wants to ask for a review of any but the most straightforward of actions**.

Second, the literature on digitalisation and administrative law has shown that relying on appeals and judicial review in order to correct problems with digital tools at the systemic level, often does not work well. As the Dutch childcare benefits case (see Case 1, p. 5) and the well-known SyRI and AERIUS cases[72] from the same Member State illustrate, courts do act against the use of harmful AI systems, but often many years after the fact. Furthermore, because of the limited range of remedies traditionally available in administrative law, authorities tend to fix the problem through *ad hoc* reparations in individual cases rather than through the (costly!) overhaul of ICT systems. This means **that the share of ADM problems that actually get resolved (see Figure 1) is low**. In general. remedies can be problematic. For instance, in the Dynamiki case the Court held that the lack of a timely response on the part of the EU administration constituted a breach of the duty of diligence

administrative law corpus in one central place on its website" (EC 2013). The result is: https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/citizens-rights/right-good-administration_en#know-your-rights.

69 Chamon, Volpato & Eliantonio 2022.

70 Case 97/91 (Borelli) [1992]; Case C-562/12 (Liivimaa Lihaveis MTÜ [2014].

71 Hofmann 2021.

72 In the SyRI case the Hague District Court ruled that an algorithmic risk scoring system, the "Systeem Risico Indicatie" (SyRI) violated Article 8 ECHR for lack of transparency; Rechtbank Den Haag, judgment of 5 February 2020, ECLI:NL:RBDHA:2020:1878. See also Meuwese 2020. In the AERIUS case, the highest administrative court of the Netherlands, which is part of the Council of State invoked the 'equality of arms' principle to place disclosure requirements on the authority in question; ABRvS, judgment of 17 May 2017, ECLI:NL:RVS:2017:1259.

and good administration, but that this did not have to lead to an annulment of the decision at hand.[73]

3.2.2. Overview of impacts of the status quo

This subsection gathers the specific impacts marked in bold in Subsection 3.2.1. (reiterating them between brackets for traceability) and categorises them under six key impacts:

1. **Lack of legal certainty for individuals and legal persons** ('detachment between digi-specific rules and administrative law rules', 'in a regulatory environment that is already characterised by complexity and fragmentation, those existing problems are likely to be exacerbated', 'the lack of legal certainty among individuals and legal persons', 'spurs legal uncertainty with regard to its broader applicability across the EU administration.');
2. **Lack of legal certainty for authorities** ('also for administrative actors themselves the complexity and ensuing uncertainty can be problematic');
3. **Enforcement and compliance difficulties for administrative duties** ('digi-specific administrative duties are difficult to enforce', 'lack of inherent compliance with many of the main principles of good administration within ADM and other data practices');
4. **Disproportionate burden on citizens to fix problems** ('individuals and legal persons have to resort to litigation to get legal clarity', 'difficult for individuals, but also for associations and businesses to obtain individual redress', 'effort for citizens is high', 'getting redress and justice is limited', 'less effective legal protection', 'it is difficult for individuals to get a proper remedy', 'concrete administrative rights and duties remain an 'unknown unknown', 'specialised legal support is needed in case someone wants to ask for a review of any but the most straightforward of actions');
5. **Many administrative injustices go unnoticed and unrepaired** ('data protection law has outgrown its function as ADM regulation', 'many algorithms (e.g. those containing environmental information) also can have a large impact using non-personal data', 'the risk of 'chain effects' of mistakes', 'lack of reaction on the part of the administration', 'citizens may never realise a mistake with their data has been made, or only realise when it is too late', 'judicial review, or even administrative appeal of activities by EU authorities that influence MS decisions, is often not an option', 'the share of ADM problems that actually get resolved is low');
6. **Negative cycle of trust** ('the faith in EU-level administration is at risk of being eroded', 'lower levels of compliance', 'undermines trust').

Table 1 below provides an overview of the impacts of the key impacts related to the status quo and an indication of their relationship to the regulatory gaps identified in Subsection 3.2.1.

[73] T-59/05, Evropaïki Dynamiki v Commission 2008.

Table 1. Links between the status quo impacts and the regulatory gaps

	Scoping fallacy	Discrepancy problem	Known unknown	Unknown unknown	Redress Gap	Main digital driver
Lack of legal certainty for individuals and legal persons	+	++				Expansion and complexity regulatory framework
Lack of legal certainty for authorities		+++				Digi-specific rules not written as positive instructions or incentives for authorities
Enforcement and compliance difficulties for administrative duties	+	+			+	ADM inherently at odds with principles of good administration
Disproportionate burden on citizens to fix problems	++	+	++	++	+++	Digitalisation causes new problems for citizen and more knowledge and resources are needed to solve them
Many administrative injustices go unnoticed and unrepaired	+++	++	++	++	+++	Digitalisation causes new administrative injustices and solving them is harder for the administration
Cycle of mistrust			++	+++	+	Accumulation of drivers, factors and key impacts

Source: author's own elaboration, based on Subsection 3.2

4. Possible EU actions

This section addresses the possible EU actions taking into account the legal basis and issues of proportionality/subsidiarity (research question 2). It starts by setting out the possibilities and conditions associated with the 'EU right to act' (Subsection 4.1). In the second subsection, several policy options to address the challenges listed in the previous section are identified (Subsection 4.2.1) and elaborated (Subsection 4.2.2).

4.1. EU right to act

The possibility for the EU legislator to take legislative action is provided and restricted by the Treaties.

The competence for regulating the European administration, with the objective of achieving an 'open, efficient and independent' administration, can be found in Article 298 TFEU. In its reaction to the European Parliament's 2013 resolution on administrative law, the European Commission has stated that this provision 'can be interpreted as providing a legal basis for a regulation on administrative procedures of the Union administration'.[74] This study does not reiterate the previous debates regarding the suitability of Article 298 TFEU. The distinction between the 'internal' administration within the institutions and other EU bodies on the one hand and the relationship between the administration and the public on the other, sometimes deemed relevant in the context of Article 298 TFEU is further blurred by digitalisation (see Subsection 2.1.1). As Subsections 2.1.2 and 3.2.2 have demonstrated, an activity that seems 'internal' such as designing an ICT system, can have an indirect or direct impact on citizens' lives. The common interpretation of the limits of Article 298 TFEU (see Subsection 4.1) implies that previous proposals for a general act on administrative procedure at the EU level have excluded Member States' administrations. The same limitation is assumed to exist in the current study.

A limitation of a different nature concerns certain subjects that are relevant to administrative law and already regulated at the level of the TFEU. These include:

- European Ombudsman (Article 228 TFEU)
- Institutions' Rules of Procedures (e.g. Article 249 TFEU)
- Access to judicial review (e.g. Article 263 TFEU)
- Non-contractual liability (Article 340 TFEU)

These limitations mean, for instance, that an administrative law regulation on the basis of Article 298 TFEU would not be able to empower the Court to issue a prohibition on a particular algorithm – a solution sometimes suggested in administrative law literature. In fact, it deserves mentioning that one core feature of many administrative law regulations across the globe, determining the availability and scope of judicial review of administrative actions, is not available to any future EU administrative law regulation.

Furthermore, there are legal bases in the TFEU and the CFR beyond that cover subjects adjacent to Article 298 TFEU, notably:

- Data protection (Article 8(1) CFR and Article 16 TFEU)

[74] European Commission, 'Follow up to the European Parliament resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union, adopted by the Commission on 24 April 2013', SP(2013)251.

- Non-discrimination (Article 18 TFEU)
- Access to documents (Article 42 CFR and Article 15 TFEU)

These provisions, and the legislation that they have produced, should be taken into account both as the contours of a possible EU-level administrative procedure act and as a reminder that such an act cannot amount to a 'fix all' for the problems associated with digitalisation of public services in the EU. The main task for a potential regulation based on Article 298 TFEU is to provide default procedures and norms for administrative activity and build on certain 'digi-specific' norms found in other legal instruments.

4.2. Policy options

4.2.1. Identifying and selecting the policy options

Since all policy options would be limited to regulation of (digital) administrative activity at the EU level and this is an exclusive EU competence, subsidiarity is not an issue. Proportionality, on the other hand, needs to be taken into account when developing and selecting policy options and will therefore be part of the analysis in Section 5.

The policy options presented below are based on different models of 'general act of administrative procedure' or the non-legislative alternative thereof (See Subsection 4.2.1). At face value all three options have the prospect of fulfilling the objectives outlined below. In order to assess these options a minimal idea of the content of the norms included in said regulations is needed. To that end, the policy options are paired with some concrete suggestions for administrative law norms adapted to the digital era. But first, the cross-cutting issues of 'codification' (why and how to produce written norms?) and 'derogation' (are variations and exceptions to the general norms still allowed?) are dealt with.

Objectives

Policy action would need to achieve the following objectives:

A. Increasing legal certainty
   - For individuals and legal persons (Key Impact 1)
   - For public authorities (Key Impact 2)
B. Ensuring a higher degree of enforcement and compliance of administrative and digi-specific rules for EU authorities in the digital context (Key Impact 3)
C. Alleviating the burden on citizens to fix problems caused by the administration (Key Impact 4)
D. Increasing the number of administrative injustices that are 1) noticed and b) repaired (Key Impact 5)
E. Breaking the cycle of mistrust (Key Impact 6)
F. Taking into account the fact that digital administration is evolving (additional objective not linked to the regulatory gaps as such, but of an overarching nature).

Codification and derogation

The codification dimension

The point of any general administrative procedure act is to offer some level of detail, in the form of rules or procedures, in order to clarify what the rights and principles underpinning it mean in practice. If not, 'the officials in institutions, bodies, offices and agencies will probably simply ignore the Administrative Procedure Law and rather use the internal regulation or the guidelines for their application that are issued by their administration; if no such guidelines are issued by the institutions, bodies, offices and agencies, the officials will not find the necessary remedies in the

default rules and principles that are formulated in the Administrative Procedure Law'.[75] Member States have gathered a lot of experience regarding how to balance 'the need for sector-specific rules with clear generally applicable procedures as well as clearly defining individual rights whilst ensuring effective and efficient administrative decision-making'.[76] The new context of accelerated digitalisation in many cases has meant a fine-tuning of existing rules. In the EU context any regulatory effort – and any of the policy options proposed below, except for the 'baseline' – would mean a mix of pure codification ('establishing a legally binding consolidated version of existing legislation') and innovative drafting (taking on board new elements).

The issue of derogation

Any general act on administrative procedure, as is common in such laws around the globe, would need to offer the possibility for derogation in case of sector-specific needs. However, in a digital context, the instrument of derogation from general rules may be used too readily (see the example of the proposed exceptions to AI regulation for certain high risk uses of AI in the migration sector).[77] As Ziller has stated 'the margin left for complementary regulation of administrative procedure might be such that the purpose of ensuring homogeneity and clarification will be in the end defeated'.[78] The challenge is for a regulation to offer the needed flexibility without undermining legal certainty and rights protection.

Previous studies are in agreement that some level of derogation from the general rules should be possible, in line with the general principle of *lex specialis derogat legi generali*. For any assessment of the costs to the administration associated with policy options, choices regarding derogation matter. Therefore, the current study will work with the following assumptions regarding derogation from the general regulation for all policy options involving legislative intervention:

- Derogation from norms in the general act in sector-specific legislative acts is possible;[79]
- Existing legislative acts do not need to be amended where their norms conflict with those of the new general act, but when they are up for revision there would be an expectation – or even a written policy commitment on the part of the European Commission – that they are reviewed for unnecessary and undesirable deviations and amended accordingly;
- It could be made compulsory to indicate derogation in new legislative acts explicitly; in any case there would be an expectation that the legislator gives reasons for any deviation and designs administrative procedures in line with the spirit of the general act.

Even with wide possibilities for derogation such as these, there is still a case to be made for general rules on administrative procedure. As several of the regulatory gaps identified show ('scoping fallacy', 'unknown unknown' and 'redress gap'), an important part of the rationale for codifying such general rules is the absence of norms in situations not covered by procedural norms for actors outside of the administration. Even if the possibility to derogate were to be used extensively, having general rules to fall back on would have added value.

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75 Ziller 2011.

76 Galetta/Hofmann/Mir/Ziller

77 Annex 3 of the proposal.

78 Ziller 2011.

79 In concrete terms, this means that the legislative text of the 2016 Resolution on this point could remain in place in a potential new draft. "Article 3 Relationship between this Regulation and other legal acts of the Union: This Regulation shall apply without prejudice to other legal acts of the Union providing for specific administrative procedural rules. This Regulation shall supplement such legal acts of the Union, which shall be interpreted in coherence with its relevant provisions."

Case 3: 'Digital administrative law' – ideas from selected Member States

A possible trend of widening the scope of application of general administrative law regulation may be evident in **Sweden**. A 2017 reform reinforced legal protection for individuals, extending the application of the general rules of the APA to all administrative activity, with fewer exceptions. 'Factual activity' – a category that has gained importance as a result of digitalisation – is however still formally excluded, although there is some acceptance of a spill-over effect of principles of good administration.

In **Germany** a new category of *Verwaltungsakt* (administrative act) was introduced as a result of the changes in the practice of administrative decision-making brought about by digitalisation: *automatisierter Verwaltungsakte* or *Computer-Verwaltungsakte*. This special category of administrative acts differs from 'digital administrative acts' (*elektronische Verwaltungsakte*) which have existed in German administrative law and are regular administrative acts, decided by humans, only communicated electronically. The new category of 'automated administrative acts' implies that a computer has taken the decision, without human interference. Such acts may only occur when there is a specific legal basis for them in legislation. The effects of distinguishing between 'regular' and 'automated' administrative acts are not yet clear.

In **France** the Government Reform Act for a Trust-Based Society (ESSOC Act) from 2018 introduced the *droit à l'erreur*, known in the international literature as the 'right to make mistakes'. In legal terms, the act gives individuals the possibility to correct 'fixable' mistakes, subject to a few conditions, such as the absence of bad faith. The right also only applies when not correcting a mistake would mean the individual would get sanctioned and exists in a 'proactive' and 'reactive' version. In addition to this, the French general administrative law regulation (*Code des relations entre le public et l'administration*) contains specific disclosure requirements regarding the explicit mentioning in ADM-based decisions. These requirements include not only the fact of an algorithm having been used, but also a reference to the rules the algorithm applied and detailed information about how to receive further information.

In 2021 the **Spanish** Government approved the *Carta de Derechos Digitales* (Charter of Digital Rights). This soft law document is introduced as being of a 'descriptive, prospective and assertive' but not 'normative' nature. The most interesting provision for the purposes of this study is Article XVIII which contains the digital rights of citizens in their interactions with public authorities.

This provision contains, in a non-exhaustive list:

- The assertion and the active promotion of equality as a principle that also applies when it comes to access to public services – including the duty to provide alternatives for those who are not able or willing to use digital resources
- The assertion of transparency and reuse of public data as principles to be actively promoted by public authorities, with reference to the relevant specific regulatory frameworks.
- The promotion of universality, neutrality and non-discrimination in technologies used by public authorities
- The requirement for public bodies who are the 'author' of an activity in the digital environment to identify the organ bearing responsibility for it (AM: this could make it much easier to undertake action as a matter of administrative law)
- The promotion of several rights and principles associated with the use of AI in decision-making specifically, among which the right to receive an explanation of a decision in natural language and the requirement to have discretionary decisions taken by a human being, except in cases in which the law explicitly allows for automated decision-making and puts in place adequate guarantees
- The requirement to conduct a 'digital rights impact assessment' when designing algorithms for the adoption of automated or semi-automated decisions.

Classification of policy options

For the identification of potential policy options, following existing models from the literature is difficult, as many theories are explanatory rather than normative.[80] Also, theories of administrative law tend to be derived from 'theories of the state',[81] and therefore do not fit the *sui generis* nature of the EU well. A well-known conclusion from the administrative law literature is that parliamentary systems tend to have a more 'narrow' administrative law act, focussed on individual decision-making, whereas presidential systems tend to regulate rule-making as well.[82] Precisely the classic distinction between 'individual decision-making' and 'rule-making' was rendered less relevant by digitalisation. A common finding within historical approaches is the apparent existence of some kind of pendulum, meaning that administrative law regulations swing back and forth between restricting administrations in order to 'prevent unlawful or arbitrary administrative exercise of coercive power against private persons' and facilitating their statutory task [83] Harlow and Rawlings depicted these recurrent tendencies as 'red light theories' and 'green light theories' of administrative law respectively.[84] They also relativised this framework as a guide for the selection of regulatory options when they suggested that administrative law could be destined to be 'forever amber', in the sense that it will always have to balance both aims.

There is one approach that transcends the individual decision-making versus rule-making dichotomy to incorporate changes in the administrative realm that are of an 'informational', if not necessarily 'digital', nature.[85] A 'third way' for administrative law regulations, besides the more traditional models of regulating individual decision-making only or regulating rulemaking as well is to abandon the 'pyramidal administrative hierarchy' and view administrative action as a collaborative activity. The 'products' of the administration in this approach are 'not only individual decisions, rules or regulations, but also procedural components to be founded in different policy-making and implementation stages (such as standard-setting, evaluations, certifications, monitoring and the like)'. These broader kinds of administrative law regulations are characterised by their openness 'to develop new solutions that are not previously foreseen by the law'. It is important to note, though, that there are no full-fledged empirical examples of such laws to date. At most, countries have experimented with incorporating ad hoc elements that would typically fit this broader approach. Also, books V and VI of the ReNEUAL model rules may be considered to fit this broader approach.[86]

For the purpose of identifying policy options to fill in the regulatory gaps identified above, this means the following:

- The *traditional model* (of an administrative law act focussed on individual and formal decision-making) should be considered for its empirical dominance across the world. Many administrative law experts believe that the traditional administrative law regulation can be adapted to fit digitalised reality.[87]

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80 The best known being the 'fire alarm' theory, see McCubbins, Noll & Weingast 1987.

81 Harlow & Rawlings 2021.

82 Jensen & McGrath 2011.

83 Stewart 2003, p. 439.

84 Harlow & Rawlings 2021.

85 The author, Javier Barnes, refers to the different models of administrative law regulations as 'generations', but the approach can also be used irrespective of the temporal element. Barnes 2010.

86 ReNEUAL Model Rules on EU Administrative Procedure, Book V and VI, http://www.reneual.eu/projects-and-publications/reneual-1-0. A working group on 'Digitalised Public Administration in the European Union' (ReNEUAL 2.2) is currently studying digitalisation specifically, see www.reneual.eu/projects-and-publications/reneual-2-0.

87 Coglianese 2021.

- The *broader model* (with a wider scope) is of particular interest to the EU level. Not only has the collaborative nature of administrative activity long been a reality, but also – as mentioned above – the absence of a European administrative law regulation means that there is less path dependency than in most other jurisdictions with potentially more space for innovation.
- It is important to keep in mind that, also within the broader model which at face value appears to be more adapted to the current administrative reality, an administrative law regulation will still need to balance many considerations.
- For both models, the assumption is that a regulation would not necessarily cover delegated rulemaking, given the complications of including an activity already so deeply institutionalised in combination with the fact that delegated rulemaking does not necessarily feature highly in the list of problems associated with digitalisation.
- The preference for one model over the other in part follows from a prioritisation of regulatory gaps, key impacts and their corresponding objectives to be addressed. Prioritising the redress gap points to a regulatory approach aimed at strengthening procedural rights and duties (*traditional model*). Prioritising the gaps more directly linked to digitalisation, the known unknown and the unknown unknown, means that informational rights and duties will be predominant (*broader model*).

4.2.2. Proposing policy options

Two legislative policy options are selected and developed: a more traditional approach, focussed on individual decision-making, but adapted to the digital context (Option 1) and a wider approach that prioritises the collaborative, informational character of contemporary administrative activity (Option 2).

Roughly, these two approaches mirror a current debate in comparative administrative law literature regarding the extent to which traditional administrative law concepts suffice to control unwanted effects of digitalisation. For instance, the duty to give reasons goes a long way in forcing public bodies to explain their decisions – as they would with a decision taken without the help of an ADM system. On the other hand, the AI community has taken up the challenge of finding ways to provide meaningful information about how particular ADM systems work through technological means, e.g. by designing 'white box algorithms', although for the moment few systems able to offer more than a standard explanation are in use. Also, a 'simple' application for traditional administrative law principles will often lead to a blanket prohibition on the use of self-learning or 'case-based' algorithms, which can also lead to the public being deprived of responsible and useful ADM practices. In the further elaboration of policy options the aim has been to look beyond this debate: more traditional options can still take on board some innovative elements, just like 'bolder' options should not discard well-tested administrative law mechanisms.

In order to evaluate the added value of legislative interventions along these lines, a soft law option, but one that goes further than the existing codes and declarations, is also proposed (Option 3). Below a short description of each policy option follows. An 'intermezzo' illustrates the differences between Option 1 and 2 in more concrete terms, by showing how the 2016 resolution could be adapted to reflect the approaches these options stand for.

Option 0: Maintain the current framework (baseline)

As set out in Subsection 3.2, of course in this area the baseline will not remain static, since initiatives regarding the regulation of AI as well as other digital practices are underway. Yet, the baseline option needs to be taken into account as the European Parliament is dependent on the European Commission for taking legislative initiatives on the basis of Article 298. This option will be analysed on the basis of the assumption that – given the historical track record – existing and future 'digi-specific rules' will be implemented in a fragmented manner, using sector-specific internal

regulations where possible. Also, the expectation is that case law by the Court of Justice will continue to develop, but also in a sector-specific context with the known effect of enduring legal uncertainty with regards to its wider applicability.

Option 1: An 'administrative procedure regulation' for the digital era

This policy option follows the approach to scoping from the 2016 legislative text proposed by the European Parliament, which is to focus the regulatory intervention on 'administrative procedures'. The key of this approach is to assume that regulation of the administration requires a procedure between an authority and an individual or legal person, which can be opened at the request of either party. Such an administrative procedure has a clearly marked beginning and will often result in an 'administrative act'.

In terms of the substance of the norms involved, this regulation would contain updates as compared to the 2016 proposal, resulting from the developments regarding digitalisation. These changes would mainly serve the purpose of avoiding clashes with the 'digi-framework' and would leave the substantive regulation of data-driven practices to sector-specific and digi-specific rules. Such a regulation would primarily develop the rights of defence. For instance, because it can take so long for data errors to surface, it is important that the term for appealing a decision is sufficiently long. Finally, in the operationalisation of principles of good administration, including principles related to digitalisation such as 'explainability', the administration would have a margin of discretion as to how to meet these standards, possibly expressed in a 'duty of care' type provision in the regulation. The approach behind Option 1 relies on stronger individual redress mechanisms to develop and fine-tune this process of operationalisation.

Option 2: An 'administrative activity regulation'

This option considers that the traditional focus on individual decision-making on the one hand and the related focus on the appeal phase (redress) is not sufficiently suited to the digital era. Instead of focussing on the appeal phase, an 'administrative activity regulation' would pay a lot of attention to the phase of primary decision-making, the preparation of administrative acts and possibly to all activities that can negatively impact individuals and legal persons. The insight 'that algorithmic-bureaucratic practices tend to operate at a level that prevents them from engaging with the justification of decisions at an individual level'[88] means to codify norms take the reality of these practices into account. This is not necessarily a matter of new substantive rules. Those, such as non-discrimination legislation and fundamental rights frameworks are largely in place, but they do not always have the desired effect on the authorities as the Dutch childcare benefits case illustrates (see Case 1, p. 5).

A regulation of this kind would primarily develop informational rights and procedures requiring proactive actions from authorities, such as a digital rights impact assessment when new ADM systems are designed or purchased. Typically, the right to know that a decision will be taken in a fully automated manner could be developed in such a regulation. This right is already present in the current soft law framework (see Subsection 3.1) and in the GDPR when personal data is involved. A more general right arguably already exists as well, as it can be deduced from the right to good administration.[89] However, it is precisely this unnecessary lack of legal certainty, for the administration and the citizen, that a regulation would seek to reduce.

[88] De Vries 2022, p. 157.

[89] Hofmann 2021.

Box 5. The 2016 EP proposal on scope

'Article 1 Subject matter and objective

1. This Regulation lays down the procedural rules which shall govern the administrative activities of the Union's administration.

2. The objective of this Regulation is to guarantee the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union by means of an open, efficient and independent administration.

Article 2 Scope

1. This Regulation applies to the administrative activities of the Union's institutions, bodies, offices and agencies.

2. This Regulation shall not apply to the activities of the Union's administration in the course of: (a) legislative procedures; (b) judicial proceedings; (c) procedures leading to the adoption of non-legislative acts directly based on the Treaties, delegated acts or implementing acts.

3. This Regulation shall not apply to the administration of the Member States.'

Source: European Parliament, Resolution of 9 June 2016 on a regulation for an open, efficient and independent European Union administration (2016/2610(RSP).

There is no absolute reason why a broader, informational 'administrative activity regulation' could not include strengthening of redress mechanisms as well. In fact, a minimum of harmonisation of appeal procedures is probably a necessity for any administrative law regulation. However, a regulation that would introduce appeal/administrative review for the broad range of activities that would be within the scope of this regulation (i.e. the design of an ADM system) would probably backfire as it would only increase legal certainty and put a high burden on both individuals/legal persons and the administration. Therefore, it is assumed that other accountability mechanisms would be used to ensure compliance with the norms in an 'Option 2 regulation'. For instance, in contrast with the approach of Option 1, principles of good administration would be operationalised as more detailed (procedural) obligations, for example by introducing an obligatory algorithm register. It would be more fitting to have a regulator supervise compliance and enforcement, rather than to leave this to private initiatives to appeal activities such as these.

Intermezzo: Distinguishing and concretising Option 1 and Option 2

The distinction between Option 1 and Option 2 is not clear cut. Rather, they represent two different perspectives on building on the legislative text proposed by the European Parliament in 2016. In order to provide insight into the textual difference these two distinct approaches would lead to, this subsection presents some examples and Table 2 sums up the key differences as they emerge from these examples.

1. In the case of both Option 1 and Option 2, the two initial provisions of the 2016 resolution could remain (see Box 5). Although the heading of the Article 2 as proposed in 2016 reads 'Scope', the real 'scoping' occurs in subsequent provisions, which detail the prerequisites for actually triggering the norms, duties and rights of the regulation. The content of provisions in a typical Option 1 regulation would diverge from Option 2 from the point where the text connects procedural rights for individuals and legal persons to existing 'administrative procedures'. Option 1 would take an approach similar to the 2016 proposal by approaching the scoping issue (see Subsection 3.2) predominantly formally. Option 2 would leave the type of activities to which the regulation applies more open, seeking to define the scope in a substantive manner. Of course, the scoping issue would still need to be dealt with, in order to avoid a lack of legal certainty for the administration. To this end, Article 22 GDPR can serve as a source of inspiration: 'The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, *which produces legal effects concerning him or*

her or similarly significantly affects him or her.' The criterion of 'affecting significantly' in a manner that is 'similar' to having legal effects, could be a way to include, for instance, activities concerning ADM use which do not immediately produce legal effects. Whether or not these activities could be challenged by means of administrative appeal, and by whom, is a separate policy choice. For the purposes of the impact analysis in Section 5, it is assumed that this would be rather the territory of an ADM regulator, possibly on the basis of a complaint mechanism (in turn empowered by greater informational rights). Option 2 could still have a list of administrative activities that are subject to administrative review and propose some harmonised rules for those procedures.

2. Disclosure requirements regarding ADM practices would be an important part of the regulation as proposed under Option 2 – the intersection with EU rules on access to documents being an important point of attention. It would fit with a broader regulation such as the one proposed here as Option 2 to include requirements for ADM systems as such, for instance the duty to check systems for citizen-friendliness before they are put in place. In the literature on digital administrative law the option of codifying requirements that apply to IT systems is the subject of discussion. Looking for ways to ensure digital good administration by EU authorities before decisions are taken – regardless of the level at which the final decision-making takes place – is a way to take the pressure off the appeal phase. Still, individual rights could get a place, too. For instance, the novelty in French administrative law of a facility for individuals and legal persons to have a public body check the correctness of data and obtain a declaratory order (see Case 3, p. 25), is an interesting suggestion.[90] This is in line with the pro-active attitude encouraged under Option 2. By contrast, in a regulation as proposed under Option 1, this right would be limited to the context of a concrete administrative procedure as thus formally defined. So, once an individual is involved in such a procedure, one single mistake, as well as any obvious mistakes on the part of an individual cannot be held against them.
3. Another illustration concerns how to deal with 'administrative silence' (when an individual or legal person requests something from an authority and does not receive any reaction). There is case law on this issue, at least in as far as the requirement for the administration to act within a 'reasonable time' as laid down in the Charter is concerned. [91] However, the case law is sufficiently flexible and sector-specific to conclude that there is a gap to be filled by a new regulation with a choice to be made as to how. Under Option 1, the situations in which someone is entitled to a reaction would be defined. The advantage of this is that a lack of a reply can then be qualified as a ('fictitious') 'administrative procedure', leading to the right to appeal the 'administrative silence' if the conditions of Article 265 TFEU are fulfilled. Under Option 2, there could be a broader duty for authorities to reply to any request (possibly with a few conditions). The advantage of this is that more 'known unknowns' or 'unknown unknowns' could be uncovered. However to make any 'administrative silence' subject to administrative review would put a burden, not only on the authorities, but also on citizens, who may then actually have to resort to appeals to 'enforce' their right to receive an answer. Therefore, additional accountability mechanisms would be needed and digital tools could probably help enforcement of norms of this kind.

Table 2. Key differences between the two legislative options

Focus	Option 1	Option 2

[90] Loi n. 2018-727, art. L. 124-1.

[91] For a detailed analysis see Leino-Sandberg 2012.

Scope	Administrative procedures/acts	Administrative activities which produce legal effects concerning individuals or legal persons or similarly significantly affect them
Dominant type of rights	Rights of defence	Informational rights
Operationalisation of principles	Discretion of the administration/ duty of care	Positive obligations (e.g. 'by design' approaches, algorithm register)
Requirements for digital systems	Indirectly, through 'duties of care'	Directly
Primary accountability mechanism	Administrative/(judicial) review	Regulator/disclosure/digital
Illustration: incorporation of a 'right to have mistakes corrected'	Right exists in the context of a particular administrative procedure	The right to have one's data checked outside of any pending procedure + proactive duties for authorities

Source: author's own elaboration, based on the analysis under the heading of 'Intermezzo'

Option 3: A code aimed at digital EU administration

A final option would be to expand on existing soft law instruments from the 'administrative law' category (see Section 3.1.1) and the 'digi-specific' category (see Section 3.1.2) and develop a code aimed at digital administration. Importantly, such a code would need to go far beyond regulating the 'service' aspect of eGovernment, which is so prominent in the 2016 Action Plan. For substantive inspiration, the new Spanish Charter of Digital Rights (see Case 3) is an interesting source, being much more concrete than the 2021 Declaration on European Digital Rights and Principles. It would also need to be more than a 'solemn declaration' on the part of the main institutions. Instead, a way would need to be found to make the code part of the culture throughout the EU administration, including staff not employed in traditional legal or policy roles, but rather in technical roles, for instance through training and job promotion criteria.

A drawback of this option is that, paradoxically, in the digital era the distinction between 'digital/non-digital' activity is not desirable – as the 'non-digital' can become digital. Also, more procedures are already 'digital' than one might think as information is almost always shared through a digital interface, for instance.

5. Impacts

This section addresses the potential impacts of each policy option across a selected number of categories of impacts in order to compare the various policy options proposed above (research question 2). Subsection 5.1 introduces the various categories of impacts and proposes indicators for monitoring and evaluation for selected categories of impacts, Subsection 5.2 analyses the expected impacts of various policy options and Subsection 5.3 compares the policy options. In assessing the status quo (Option 0) it is assumed that it is dynamic, in the sense that – for instance – complexity will continue to increase over time.

There is evidence in the literature which is relevant to the topic of this study in a global sense, for instance regarding a citizen-friendly approaches in delivering public services.[92] Such evidence is useful for making a *prima facie* case for adopting an administrative law regulation. For instance, research has been done on the extent to which the adoption of a general administrative law act (normally referred to as 'administrative procedure act' (APA) in the US context) actually helps legislatures control administration.[93] Finally, we know from the Member State level that well-drafted provisions in administrative law regulations can turn costs associated with the enactment of binding rules into positive impacts.[94] Analyses such as those carried out in the studies referred to above provide interesting and relevant background information.

However, since this study focusses on the added value of different options for regulation of EU administrative activity in the context of digitalisation specifically, a different approach is warranted, one that unpacks the intervention logic of the different policy options and complements it by numbers where possible. This section sheds light on what possible impacts could be generated by defining a typology of impacts and characterising them in qualitative terms. It also aims to contribute to future monitoring of possible legislative interventions by proposing indicators where relevant. In doing so, this section builds on the 2018 impact assessment[95] and its overall conclusion that 'the introduction of a set of harmonised rules on administrative procedure would contribute positively to good governance in the EU and lead to enhanced levels of protection, in particular with respect to the right to good administration and to the enhanced openness, efficiency and independence of EU institutions, agencies and bodies, in line with Article 298 TFEU'.[96]

5.1. Categories of impacts

The following categories of impacts, which are elaborated on in the subsections below and listed in Table 3 below, can be derived from the objectives identified in Subsection 4.1.

[92] Dudley c.s. 2015.

[93] McCubbins, Noll & Weingast 1987.

[94] European Added Value Assessment of the Law of Administrative Procedure of the European Union, EAVA 1/2012, European Added Value Unit, European Parliament, p. 21.

[95] European Parliament, 'Impact Assessment of Possible action at EU level for an open, efficient and independent EU administration', Directorate for Impact Assessment and European Added Value, July 2018.

[96] *Ibid.*, p. 109.

Table 3. Categories of impacts

Main cat.	Sub cat.	Effects on	Objective	Quantifiable	Data available	Monitoring indicator
SOCIAL	Legal	Legal certainty	A	No	N/A	N/A
SOCIAL	Administrative	Compliance	B	Yes	No	Yes
SOCIAL	Administrative	Administrative injustice	D	Yes	Partially	Yes
SOCIAL	Societal	Level of trust	E	Partially	Yes	No
SOCIAL	Cross-cutting	Fundamental rights	Several	No	N/A	N/A
ECONOMIC	Financial	Citizen burden	C	Yes	Partially	Yes
TECHNOLOGICAL	Technological	Future-orientedness	F	Partially	Partially	No

Source: author's own elaboration, based on Subsection 5.1

5.1.1. Social impacts

Legal certainty

Within the main category of social impacts a first important sub-category consists of effects on legal certainty, which is treated here as an objective condition that can be assessed through legal analysis of the (changes in) clarity of the law for individuals and legal persons. Subjective impressions associated with legal certainty are considered part of the wider category of 'level of trust'. Although some pointers with regard to the legal certainty implications of the various policy options will be offered in Subsection 5.2, firm conclusions with regard to legal certainty can only be drawn once the exact drafting of the various provisions of a regulation or code are known.

Changes over time in the number of court cases brought against the European Commission and agencies by individuals and legal persons across a number of defined issues (e.g. the duty to give reasons, respect of time limits, administrative silence) could give an indication as to the level of legal certainty. However, this would need to be combined with a content analysis, as only some of the cases will be related to legal certainty. Furthermore, since difficulties in accessing judicial review is part of the problem (see the redress gap, Subsection 3.2.1.), it is difficult to interpret the meaning of a shift in 'litigation traffic'. For instance, if new informational rights make it easier to know what exactly agencies are developing in terms of aggregated ADM systems, it may also be easier to bring a court case arguing that EU law with regard to delegation was violated.

Compliance by EU authorities

The effects on enforcement and compliance of administrative and digi-specific rules by EU authorities is a second sub-category. 'Compliance' under this heading relates to rule following by public authorities themselves, being the 'regulatees' of administrative law regulations. The ideal situation is that an administrative law regulation makes it easier to comply with a range of (broader constitutional *and* digi-specific) rules, not only those laid down in the regulation itself. For instance, it is conceivable that an institutionalised practice of digital rights impact assessments for ADM systems, incentivised by a legal obligation in an administrative law regulation, will improve GDPR compliance on the part of an agency. To some extent these effects are quantifiable. One important indicator could be the number of times the European Ombudsman concludes that the EU authorities are engaged in maladministration on a yearly basis. Because of 'spill-over' compliance

effects, findings of other watchdogs, such as the EDPS could be an indication of compliance impacts as well. For opinions and decisions of these 'institutional watchdogs' to serve as an indicator, it would be helpful if these documents were labelled in a more fine-grained way than is currently the case and made available as textual data to facilitate quantitative analysis.

One important aspect of compliance by EU authorities is related to the wider issue of cost savings through eGovernment services. In the light of the recent literature on building IT systems inherently geared towards compliance with administrative law principles (e.g. 'contestability by design'), having a set of general rules is likely to incentivise leadership and internal communication on this front and to reduce 'redundancy of IT systems and functionalities and thus resource inefficiencies'.[97] Of course the one-off investment costs of such an overhaul would need to be taken on board, as well as a qualitative analysis of the kind of organisational changes administrations would need to make in order to comply with the new obligations.

Administrative injustices

A third sub-category concerns the number of administrative injustices that are 1) noticed by authorities and 2) repaired as a result of regulatory intervention. The difference with the previous category of impacts is that 'compliance by EU authorities' deals with compliance with the actual rules in force. Certain policy options will be easier to comply with than others – the effects on 'compliance' with broader principles such as 'service-mindedness' could be captured as a lateral effect, but is not the main focus of this previous category. By contrast, within the sub-category of 'administrative injustices' it is assumed that – precisely because of digitalisation – there are instances of administrative behaviour that result in widely felt 'injustices' without necessarily counting as 'illegal' in strict legal terms.

An example of this is an individual who was placed in a worse position because of an administrative error (for instance, in relation to a grant application), but since the individual never appealed the injustice never becomes an established fact; let alone that it is repaired. Because of the very nature of this kind of individualised, scattered impacts on vulnerable groups, data is hard to find. There are no reliable statistics of the problems that citizens are facing in their relations with the EU administration.[98] Still, assuming that a percentage of individuals and legal persons affected *will* find their way to the European Ombudsman, an indicator could be the amount of complaints submitted to the European Ombudsman under the heading of 'Administrative procedures and practices'[99] – more specifically the changes in this figure over time.

The link between the growing 'unknown unknowns' in administrative practice and the risk of administrative injustice as illustrated in the Dutch case (Case 1, p. 5) also points to the importance of steering institutional behaviour. Here, too, the difference with the previous category is that compliance is linked to 'rules' whether binding or non-binding, whereas reducing administrative injustice requires a wider awareness among those working for EU authorities. Achieving this wider awareness cannot all rest on the shoulders of an administrative law regulation. Still, possible regulatory interventions need to be scrutinised for elements that are amenable to greater institutional and personal awareness of (digital) administrative injustices and those that could undermine this development.

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97 European Added Value Assessment of the Law of Administrative Procedure of the European Union, EAVA 1/2012, European Added Value Unit, European Parliament, p. 23.

98 *Ibid*.

99 https://www.ombudsman.europa.eu/en/search?topic=topic.6.

Level of trust

Levels of trust in EU authorities among individuals and legal persons are measurable and are in fact being measured. The Eurobarometer has several questions related to citizen trust and the extent to which citizens feel heard. Changes in trust levels could be linked to administrative law mechanisms, but this would require the incorporation of specific questions in the relevant surveys or a stand-alone survey. There are also more generic findings on the relevant factors playing a role in overall trust in government which can be taken on board as part of a more qualitative assessment of the likely impact the various policy options will have on this issue. This category of impacts, therefore, is treated as 'partially quantifiable'.

Fundamental rights

Fundamental rights permeate many of the issues discussed in this research paper. Rights of a more procedural nature, such as the right to good administration and the accessibility of procedures are very directly at stake. Substantive rights, such as the right to a private life and non-discrimination are often relevant in a more indirect but profound manner. Because of the vast catalogue of rights involved an empirical assessment of fundamental rights impacts is not possible. Instead, since the other 'social' categories of impact each have a clear relationship with fundamental rights, the latter will be qualitatively assessed as an overarching category.

5.1.2. Economic impacts

Burdens on citizens

The burden put on individuals to proactively seek justice, particularly in the digital context which creates many more known unknowns and unknown unknowns for them with regard to the activities of administrations, is much broader than 'economic/financial'. However, since the 'social' categories of impacts already cover some aspects of this (legal certainty, fundamental rights, trust), this impact will be treated in economic terms.

The 'administrative burden on citizens' is a common concept in Better Regulation policy, but the specific burdens caused by difficulties of getting the right information, receiving a timely answer or decision or rectifying unfair treatment (whether as a result of ADM use or not) are rarely analysed. For instance the Standard Cost Model for Citizens (SCM Citizens)[100] was developed with the idea in mind that a citizen must comply with certain rules and that triggers financial costs and compliance costs. But in the case of an administrative law regulation it is first and foremost the public authority that must comply. Of course, citizens have duties under administrative law acts, such as time limits for appeals to respect or the duty to send certain information when they are involved in particular procedures. The relevant type of burden in the context of this study refers to the cost to citizens to fix problems that should not be there in the first place, had the administrative decision-making been done correctly. This means that one quantitative approach to assessing the impacts in this category is to calculate costs for a typical administrative problem to be solved, and calculate how this would change over time with an increase or decrease in 'administrative injustices' and clearer or more complex procedures (see Subsection 5.2.2 for an example).

As for indicators, there are several options. The first makes use of court case statistics. Of course, a significant part of administrative complaints, appeals and litigation is about individuals or legal persons defending their interests and the public authority on the other side of the dispute is making a legitimate effort to defend the public interest. Yet, as three of the regulatory gaps identified have made clear (the known unknown, the unknown unknown and the redress gap) another part amounts to disputes that are easily avoidable if the administration works well. With the caveat that

[100] Ministry of the Interior and Kingdom Relations, 'Standard Cost Model for citizens. User's guide for measuring administrative burdens for citizens', The Hague, November 2008.

changes in the number of court cases in a particular areas can have opposite meanings (less cases can mean that more injustices are resolved at earlier, less costly, stages, but can also mean that access to court has become more expensive) it would be important to follow the development of applications for judicial review across a selected number of issues, such as access to one's files. Reduction of the need for specialised legal support is another relevant mechanism in this category. It would, for instance, be possible to ask citizens in (Eurobarometer) surveys whether or not they enlisted professional legal help when solving a particular problem involving EU authorities.

A second category of data sources that could help get an idea of the scale of the problem and changes therein over time include the SOLVIT database, as well as a content analysis of questions submitted to YourEuropeAdvice.[101] SOLVIT 'an informal problem-solving network that can help EU citizen or businesses when their rights are breached by public authorities in another EU Member State'.[102] This means that SOLVIT reports only on Member State level administrative problems, which is not the focus of the policy options analysed in this study – as national administrations cannot be regulated on the basis of Article 298 TFEU. However, citizens undoubtedly also complain about EU level administrative problems. If it were possible to receive or collect statistics with regard to this category (in a sense, misplaced SOLVIT complaints) these would be useful as an indicator for burdens that citizens experience.

5.1.3. Technological impacts

Future-orientedness

Since the use of digital tools by public authorities and the technologies themselves are changing rapidly, it is important that any regulatory intervention can either adapt to such developments or is sufficiently flexible to embrace them. To some extent this is a matter of 'technology neutrality' of the concrete legislative provisions. But it is also related to the capacity that a regulation or a code has for encouraging administrative innovation. Technology neutrality can be analysed through a qualitative assessment; innovation capacity can be measured, but only as a matter of expert opinion and not within the scope of this study.

5.1.4. Environmental impacts

Although digitalisation as such certainly has many environmental impacts – for instance the environmental cost of large data centres – these are not the focus of this study, as the way in which administrative law deals with digital activities of public authorities is unlikely to have a major, direct effect on the environment.

5.2. Analysis and assessment of the policy options

In this subsection the policy options are being assessed with respect to each category of impact: legal certainty, compliance by EU authorities, administrative injustices, level of trust, fundamental rights (social impacts), burdens on citizens (economic impacts), and future-orientedness (technological impacts).

[101] https://europa.eu/youreurope/advice/index_en.htm#shortcut-4.

[102] https://single-market-scoreboard.ec.europa.eu/governance-tools/solvit.

5.2.1. Social impacts

Legal certainty

With respect to Policy Option 0, legal certainty for citizens regarding what their rights and legitimate expectations in front of EU authorities are would likely decrease over time.

An administrative procedure regulation along the lines of Policy Option 1 is likely to result in a short term improvement, as at least in formal administrative procedures the mutual rights and duties will be clearer. However, as informal administrative activity stands to gain in importance, it will become clear that – across all regulatory gaps – uncertainty remains.

Policy Option 2 implies an investment in better systems in order to achieve longer term legal certainty. Although the requirement to actually put in place systems that work *for* public values and the rights of individuals is likely to cause some organisational problems at first, in the longer term the 'wider approach' appears to have a better chance of breaking the closed cycle through which administrative logic and algorithmic logic mean that only a small share of problems will ever be dealt with in administrative law terms (see Figure 1, p. 18 and Case 1, p. 5). Legal certainty in the short term may be uneven, for instance because in order to determine whether a certain situation falls under the scope of the new act, a substantive determination needs to be made (as per the suggestion made in Subsection 4.2.2. 'does it produce legal effects concerning individuals or legal persons or similarly significantly affect them?'). However, as shown in Subsection 3.2.1. addressing the scoping fallacy will always involve a trade-off.

A seeming advantage of a Code for Digital Administration as proposed under the heading of Policy Option 3 is that the provisions can be drafted in more accessible language (see the examples from the Spanish Charter in Case 3, p. 25) because they do not trigger binding legal effects. However, this could lead to an overall reduction in legal certainty, as individuals are not actually entitled to the treatment they will have come to expect on the basis of the provisions in a non-binding code. Whether or not such a code will have a 'spill-over effect' on legal obligations, for instance because the Court will derive inspiration from it is uncertain and unlikely, given the track record on this point.

Compliance by EU authorities

If no legislative action on the basis of Article 298 TFEU is taken (Option 0), the expectation is that compliance with sector-specific administrative law rules – as measured by their own specific content – will remain relatively high, whereas a broader form of compliance, namely with higher norms and principles may be expected to remain low. The level of compliance with new digi-specific rules by public authorities is an unknown factor.

If legislative action is taken (Options 1 and 2) and there presumably is some normative change, the costs and benefits associated with compliance depend on the approach taken by the administration. In line with earlier argumentation by the European Commission,[103] additional administrative rights for individuals and legal persons and the procedures to accompany them (e.g. the duty to respond to any request) may be seen as 'additional' distractions from important ('real') duties. This type of reception of a new administrative law regulation may be called the 'burden mindset'. The introduction of a citizen-oriented administrative law regulation (whether according to the model of Option 1 or of Option 2) could also be seen as an occasion to redesign aspects of the EU administration's way of working.[104] For instance, if informational rights regarding the development and functioning of ADM systems (beyond the existing rights in the 'access to documents' or 'data protection' contexts) are codified, this may be taken as an incentive to invest in 'explainable' systems. Also, apart from such integration of the administrative and the digital, a

[103] As documented in Leino-Sandberg 2012.

[104] Leino-Sandberg 2012.

proactive approach that sees an administrative law framework as something an authority would want to comply with, is likely to save resources if it reduces complaints and litigation. This alternative approach may be called the 'compliance mindset' and is akin to the service-mindedness promoted by the European Ombudsman.[105]

A regulation that follows the model of Option 1 makes it easier to comply with if one takes a more technical view on compliance ('burden mindset'). For instance, the adaptation of principles such as the duty to give reasons to the statistical nature of ADM-based reasoning – which would be left to the discretion of the public authority under this option – can be implemented passively or proactively. With a burden mindset minimal adaptations can be made, waiting for a court to rule *ex post* whether these suffice. With a compliance mindset, complying with the new rules could be difficult and therefore costly, as it will be clear *that* there is a duty, but not what it entails exactly. With regard to Option 2, there would be more direct requirements for digital systems and *ex ante* checks in place. Related to the issue of legal certainty for institutions, the mismatch between broader informational rights and existing procedures for 'dealing' with citizens is likely to generate costs. With a 'Compliance mindset', however, the regulation will provide an incentive to ask 'how can we make this system work *for* citizens from the beginning?'.The main expense of an Option 2 regulation would consist of a one-off investment in institutional reform and ongoing investments in the training of staff.

Table 4 below illustrates how the impact of Options 1 and 2 differs according to the institutional mindset'. Indeed, which option would incur greater costs depends on the institutional mindset. Option 1 fits better with a burden mindset, whereas Option 2 is aligned with a compliance mindset. This could also mean that the latter option would incentivise institutions to adopt a compliance mindset in order to reduce costs.

Table 4. Impact depends on 'institutional mindset'

	'Burden mindset'	'Compliance mindset'
Option 1	Minimal adaptations possible because of reliance on traditional administrative law mechanisms	Compliance costly because of uncertainty. Closed procedures may hinder a new design of working methods
Option 2	Significant costs as rights have to be translated to old procedures	One-off costs and training costs. In the longer run large savings because of streamlining and inherent compliance.

Source: author's own elaboration, based on the analysis under the heading of Compliance by EU authorities

Apart from the effects of the two distinct institutional mindsets outlined above, the literature suggests that having more detailed provisions in administrative law regulations is often in fact a positive element from the perspective of compliance by public authorities.[106] Codifying positive instructions and institutional incentives for authorities should encourage 'inherent compliance' in the primary phase of decision-making. This finding is also in line with the experiences from Regulation No 1049/2001 on access to documents, which 'would also suggest that the adoption of legally binding rules is an effective way of influencing the everyday institutional practices'.[107] On the

[105] Mendes 2009, p. 5.

[106] Leino-Sandberg 2012, p. I-34, citing Finnish and Swedish experiences.

[107] Leino-Sandberg 2012.

other hand, the track record of non-binding codes (Option 3) suggests that these have little effect on institutional practices.[108]

Administrative injustices

As the Dutch case study (see Case 1, on p. 5) has shown, the use of ADM systems and their negative consequences for citizens, even if they do not immediately or directly translate to an administrative act, easily remain hidden if ADM is not seen as part of administrative activity but only as 'preparation'. This means that finding a way of 'counting' administrative injustices, for instance through the indicator of European Ombudsman results, gives only a limited idea of the effects in this category. Allowing injustices to surface, whilst keeping burdens to citizens as low as possible, could be a first step in decreasing administrative injustices in the longer term. Since the EU legislator cannot influence the scope and availability of judicial review in the way that many national legislators can, it is important to organise mechanisms for recognising administrative justice in the primary phase of decision-making.

Thus, in this category a distinction must be made between proximal impacts and more distant impacts. After a temporary increase of *visible* administrative injustices as a result of the introduction of an administrative law regulation, whether according to Option 1 or to Option 2, a reduction in the longer term can be expected. Since Option 1 relies heavily on the operationalisation of the individual rights of defence to tackle administrative injustices, there may be peaks in complaints or appeals. Option 2 is designed to decrease the number of administrative injustices by means of *prevention*. It could, for instance, include duties for public authorities to apply bias checks to their ADM systems, or subject them to regular review. Because of this the expectation is that an 'administrative activity regulation' will not only decrease the level of administrative injustice as a result of the activities of EU public authorities, but will also decrease the need for individuals and legal persons to assert their rights in appeal procedures or judicial review procedures (see the impacts category 'Burdens on citizens to fix administrative problems' assessed in Subsection 5.2.2.).

If no action is taken (Option 0) it is likely that many administrative injustices will remain invisible and difficult to tackle. This could lead to scandals erupting (see Case 1, p. 5), with the inevitable impact on public trust levels (see next subsection). As for Option 3, a non-binding code, the effects are likely to depend on the extent to which the norms in the code are being 'internalised' in all levels of the organisations involved. Greater awareness of digital rights of citizens and their relevance in early phases of the decision-making process could certainly help avoid some injustices and solve others. However, this is a matter of investment in the institutional 'absorption' of the code through training, inclusion in job promotion criteria etc. – not an inherent attribute of Option 3.

Level of trust

Regular Eurobarometer surveys include a question about trust in institutions. For the Member State level, 'public administration' has its own question, as do 'local and regional authorities', the national government (and parliament, the police etc.). The first EU level version of the trust question is aimed at 'the European Union', with follow-up questions distinguishing between the institutions. The 'European Commission' is one of them, but there is no equivalent to the 'public administration' question from the national level. A limitation here is that it is difficult to isolate trust in EU institutions per se and trust in EU administration as carried out (partially) through Member State institutions. A Special Eurobarometer (517 Future of Europe) included a question on the best ways of ensuring your voice is heard by decision-makers at the EU level. One possible answer concerned joining or supporting a civil society organisation or NGO. Changes in the percentages of citizens choosing this answer could be seen as a proxy for the openness of the EU administration, although the pitfall here, as is the case with many questions from the Eurobarometer, is that respondents are probably

[108] Mendes 2009.

thinking of 'policy-making' rather than 'administrative activity'. On the one hand this distinction is essential for the specific effect of an administrative law regulation. On the other hand we have seen that 'administrative activities' such as building aggregated databases in order to analyse trends and feed the findings into the policy-making cycle *are* linked to policy. As 'administrative action' – as measured by its impact on citizens – is becoming less of a delineated category (see the scoping fallacy, Subsection 3.2.1.), the extent to which an administrative law regulation is successful in (re)capturing '[g]ood administration […] as a natural way of working'[109] could become more important in enhancing trust in institutions overall.

Changes in the general administrative law of Member States (see Case 3, p. 25) are too recent for evaluation results of those interventions to be available. Also, methodologically the added value of many of these changes, such as the operationalisation of 'a right to make mistakes' in terms of trust levels is hard to assess. Except for dedicated surveys, using a methodology that controls for other factors, the impact of a particular administrative law provision is difficult to isolate.

Trust research indicates a link with transparency,[110] which is also the most recurrent subject of complaints submitted to the European Ombudsman.[111] Although an administrative law regulation on the basis of Article 298 TFEU cannot encroach upon the legislation regarding access to documents, it can encourage transparency beyond 'documents', such as openness and communication with regard to ADM systems that are being developed. This regulatory approach is present more strongly in Option 2 than in Option 1, because of the former's wider approach as to what constitutes 'administrative action'. As Figure 1 (p. 18) suggests, the growing awareness that authorities are working on ADM systems the general public is not informed about (the fact that large scandals have occurred at the Member State level only so far, see Case 1, p. 5, is not relevant for the perception), can be detrimental for trust. Therefore regulatory solutions that work towards greater legal certainty (for a digital era) and better compliance not just with hard rules, but also with the ethics of good administration and a lower level of administrative injustices occurring, without the full burden falling on the citizen, are best suited to break the cycle of mistrust.

Fundamental rights

The enormous importance of fundamental rights to protect citizens in the face of an increasingly digitalised administration is being asserted in various places, not in the least in the proposal for an AI regulation. Fundamental rights need to be operationalised though, in order to be effective in their protective function. This category suffers from a predicament similar to that mentioned for other categories: the most obvious indicator of changes in levels of fundamental rights effectuation is the number of court cases across a variety of different rights. However, since this indicator is dependent on a) the access to court (in itself a fundamental right with varying levels of operationalisation across legal systems) and b) the level of fundamental rights problems, it is not suitable for measuring the actual fundamental rights situation 'on the ground' in a particular jurisdiction.

Assessing fundamental rights as an 'overarching category', through its link with other categories, means that the impacts in this category can be seen as the sum of the other types of social impacts. The more proximal impacts on fundamental rights are likely to be minimal for Options 0 and 3. In the current system, fundamental rights violations (framed as 'administrative injustices' for the

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[109] European Added Value Assessment of the Law of Administrative Procedure of the European Union, EAVA 1/2012, European Added Value Unit, European Parliament, 2012.

[110] OECD (2022), Trust in government (indicator). doi: 10.1787/1de9675e-en. Scandinavian countries with an administrative law system known for favouring transparency score highest.

[111] European Parliament, 'Impact Assessment of Possible action at EU level for an open, efficient and independent EU administration', Directorate for Impact Assessment and European Added Value, July 2018, p. 36.

purposes of this study, so as to avoid an overly formal approach) are of course tackled. However, they need to surface in some way and this is more difficult if they happen within or because of ADM systems. As complexity grows, citizens do not know what they can expect from the authorities. Authorities, in turn, do not have sufficient incentives to align digitalisation, good administration and their daily way of working. This implies that rights violations are likely to grow, some action in the wake of scandals aside. Options 1 and 2 would require some immediate changes, although the expected positive effects on fundamental rights would occur in the longer term. As Option 1 strengthens the rights of defence it would be easier to tackle violations (although more costly for individuals, see below in Subsection 5.2.2.). Option 2 aims rather for prevention of fundamental rights violations in the primary phase of decision-making and for *ex ante* controls of fundamental rights conformity. Mechanisms designed with the latter goal in mind, are likely to encourage debate on the meaning of fundamental rights in a digital era.

5.2.2. Economic impacts

Burdens on citizens

An important rationale for adopting binding rules of general administrative law is that such a set of rules should make it easier and less costly for citizens to challenge administrative action and provide incentives for the administration to avoid or repair problems in administrative decision-making.

In order to present an approximation of the differences in burdens on citizens across the four policy options an estimate of how many complaints, appeals and judicial review proceedings would be saved as compared to the baseline (Option 0) would be needed. In addition, an estimate of the difference in time and money spent on solving one particular issue according to the redress mechanisms offered by the various policy options is helpful for the purpose of comparison. As part of this approach, the basic formula recommended as part of the Standard Cost Model for Citizens,[112] can be used: administrative burdens on citizens = T x Q (in hours) + C x Q (in €). T and C are the costs of an administrative activity (T and C stand for Time and Costs) and Q as the number of times the administrative activity is performed. Q is derived from the number of citizens and the frequency of an activity and will be left out of the equation for the purposes of the present exercise, as the number of citizens taken action (assuming a burden) because of an administrative problem cannot be held constant against the variation in administrative injustices expected to remain across the different policy options.

Taking one of the examples featuring in Table 2, the assumption is that an administrative law regulation would include a version of the right to have mistakes corrected. Under Option 1 an individual would need to apply to have mistakes corrected once discovered and only when they are part of an existing procedure. As part of Option 2 an individual could apply for a quick check in addition to duties on authorities to regularly check their systems for possible mistakes.

Option 0

There is no right to have mistakes corrected. However, once an individual is confronted with a mistake in an administrative procedure, he or she will need to take costly action, seeking specialised legal advice, to explore whether the error can be corrected.

Burden per individual = 80 hours (20 hours citizen's own research, 20 hours hiring a lawyer and interacting with the lawyer, 20 hours travel time, hearings and preparation, 20 hours overhead) + €5000 legal costs (20 hours specialised legal advice valued at €250 an hour)

[112] Ministry of the Interior and Kingdom Relations, 'Standard Cost Model for citizens. User's guide for measuring administrative burdens for citizens', The Hague, November 2008.

Option 1

The right to have mistakes that are part of existing administrative procedures corrected implies that an individual will need to make use of a specific procedure designed for this purpose. For instance, the practical implementation of the French right to correct mistakes includes a website listing recommendations on how to avoid the most common mistakes as well as a one-stop shop for reporting and correcting mistakes across different agencies and departments.[113] The individual may need some help or advice, but not necessarily from a specialised professional.

Burden per individual = 10 hours (finding the form, gathering the information, filling out the form and overhead) + €500 legal costs (the amount refers to an estimate of the average costs: assuming that 1 in 5 cases will still need the assistance of a professional lawyer at half the cost of the procedure without a formal right to correct mistakes in place (Option 0), i.e. €2500, the average cost is €500)

Option 2

The individual can apply for a check on his or her data. This, in combination with the duty on authorities to perform frequent quality checks on data sets, means that mistakes with grave consequences are likely avoided.

Burden per individual = 1 hour (for asking an authority for information about a personal algorithmic score using a template on a website) + €1 (for the internet connection and electricity)

Option 3

A code may lead to greater willingness to correct mistakes, both proactively and reactively, in some parts of the EU administration but less so in others. The estimate below therefore reflects both the situation in which the adoption of a code on good digital administration has led to an easier procedure (but likely without 'one-stop shop') and the situation in which there is no change in the handling of errors.

Burden per individual = 15 hours (finding the form (no 'one-stop shop'), gathering the information, filling out the form and overhead) + €500 legal costs (the equivalent of Option 1) OR 80 hours + €5000 legal costs (the equivalent of Option 0)

It is unknown how many of the 'easy access' interactions facilitated by Option 2 will save a legal interaction (complaint/appeal/judicial review), especially because receiving information of this kind can also prompt individuals to launch legal action. The assumption is, however, that a lot of problems will be solved or prevented by having easier interaction with authorities in an earlier stage or beyond the defined context of an administrative procedure. Also, the mechanism of shifting from more costly legal proceedings to less costly but more frequent 'easy access' interactions (as is the expectation, see Subsection 5.1.1 'Compliance by EU authorities' above) would need to be studied in relation to its effect on the level of administrative injustices. This can only be done through in-depth case studies. However, the likely large difference in burden for the citizen from one type of proceedings to another in itself is noteworthy.

5.2.3. Technological impacts

Future-orientedness

General laws on administrative procedure have the potential to motivate administrative innovation, for instance in the area of eGovernment, according to the majority (59%) of experts who responded

[113] https://www.plus.transformation.gouv.fr/j-ai-droit-a-l-erreur/particulier.

to a German survey on the subject.[114] A similar perspective on the possibilities of Article 298 TFEU, namely one that regards good administration as an area for regulatory leadership, would fit the EU's role as a pioneer in technology regulation. The link between the two is not only that we need administrative law controls to minimise the negative effects of digitalisation on citizens, but also that well-designed administrative law regulations can incentivise the development of state-of-the-art systems. An argument can be made that legal systems 'that understand the limitations of machine inferences that feed on machine readable human behaviors will gain a competitive advantage compared to jurisdictions that fail to [understand this]'.[115]

Both Option 1 and Option 2 represent efforts to adapt administrative law norms and procedures to the specific risks of digitalisation (see Subsection 2.1). For Option 1 the extent to which it can be seen as 'future-oriented' and 'digi-proof' depends on how far the legislator would go in this adaptation. Option 2 incorporates many open mechanisms and could therefore be qualified as forward-looking. However, embracing mechanisms such as algorithm registers, audits and 'by design' solutions also carries the risk of 'outsourcing' norms. This means that the governance of ADM systems is a crucial element in ensuring that the role of the 'administrative activity regulation' remains normatively in the lead. A final factor to consider under this heading is the extent to which the regulation implicitly provides incentives for the AI industry to develop systems that contain an inherent propensity to comply with administrative law norms.

5.3. Comparing the policy options

The categories of impacts identified above are a way of operationalising the criterion of effectiveness (the extent to which an intervention will meet the objectives). These categories of impacts, together with the criteria of proportionality and feasibility, are used as a basis for the comparison of the options in this section and in Table 5 in particular.

Since the likelihood that the Policy Options 0 and 3 will meet the objectives (Subsection 4.2.1) and address the regulatory gaps (Subsection 3.2.1) that inspired them seems low, the costs of Policy Option 1 and Policy Option 2 would have to be high for these options to be disproportionate. Although this analysis does not rely much on cost calculations, it has been argued that there is a way to reduce cost in the longer term if an administrative law regulation makes it easier for authorities to work together on systems that are aligned with the norms of good administration. For Policy Option 3, a non-binding code with specific norms for digital administration the proportionality issue is reversed: since it is not straightforward for such a code to prompt behavioural change or affect the legal position of individuals and legal persons, even limited costs could render this option disproportionate. Only a significant investment in making the code a central part of working procedures within EU authorities – likely needed to have some effects – could make this otherwise. But that raises the question of why not simply introduce binding rules. As for feasibility, the assumption is that the lack of enthusiasm on the part of the Commission for legislative action on the basis of Article 298 TFEU persists and that a more ambitious administrative law regulation (Option 2) will be harder to achieve.

In order to adapt its way of working to a digital era, the EU administration is likely to need some help from such an administrative law regulation, either in the guise of an 'administrative procedure regulation' (Option 1) or a, wider, 'administrative activity regulation' (Option 2). As the comparison, summarised in Table 5 below, shows, on the basis of a predominantly qualitative analysis, both Options 1 and 2 have an overall positive impact and are likely to contribute towards the objectives. If the risk of lower feasibility and the one-off cost of investment in reforming the administrative

[114] Blomeyer and Sanz 2012.

[115] Hildebrandt 2020.

infrastructure can be overcome, Option 2, an 'administrative activity regulation' appears to have the highest pay-off.

The most important difference between the expected impacts of Option 1 and those of Option 2 is that the former is less positive with regard to the burden on citizens. In case of an administrative activity regulation as advocated under the heading of Policy Option 2, there is likely to be an increase of the compliance burden on EU authorities. However, if such a regulation succeeds in shifting the administrative mindset to a proactive one, referred to above as 'compliance mindset', there are likely to be long-term benefits related to the expected positive effect of having a more future-proof and digi-sensitive administrative law regulation in place.

In Table 5 below the expected impacts across the various sub-categories are summarised. Options 1, 2 and 3 are assessed against the baseline (Option 0). This baseline, however, is a dynamic one. Many of the impacts associated with the status quo (Subsection 3.2.2.) are likely to increase over time. For instance, along with growing complexity caused by further development of the digi-specific regulatory framework, legal certainty is likely to be further reduced over time.

Table 5. Comparison of policy options

	Option 0	Option 1	Option 2	Option 3
	'Status quo'	Administrative procedure regulation	Administrative activity regulation	Code 'digital EU administration'
Legal certainty	Reduction over time	Short-term gains	Long-term gains	Reduction over time
Compliance	High compliance with sector-specific rules Low compliance with higher norms and principles	Gains in 'burden mindset' Costs in 'compliance mindset	Costs in 'burden mindset' Gains in 'compliance mindset'	General literature on codes suggests low compliance
Administrative injustice	Many injustices likely to remain 'unseen'	Temporary increase because injustices will be 'seen' Long term reduction with some appeal or complaint peaks	Temporary increase because injustices will be 'seen' Significant long term reduction	Some positive effect if the spirit of the code is internalised
Level of trust	Decrease; with risk of scandals	Increase but also risks of conflict	Increase	Likely no or little impact
Fundamental rights	Only obvious violations tackled	Fewer violations; those remaining more easily addressed	Fewer violations; more public debate on meaning of fundamental rights in a digital era	Only obvious violations tackled; slight overall improvement if the code is 'internalised'
Citizen burden	High	Medium	Decrease	Likely no or little impact
Future orientedness	N/A	Depends on the amount of 'digitalisation' included	Easy to achieve; but 'outsourcing' norms to assessments, audits etc. is a risk.	Easy to amend, but less strong incentives
Proportionality	N/A	Less interventionist options unlikely to fulfill objectives	Less interventionist options unlikely to fulfill objectives	Investment in 'cultural change' possibly relatively costly
Feasibility	N/A	Medium	Medium-Low	High

Source: author's own elaboration, based on Subsection 5.3

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OA-08-22-263-EN-N

This European added value assessment seeks to support a European Parliament legislative own-initiative report on digitalisation and administrative law (2021/2161(INL)), asking the European Commission to present a legislative proposal on an EU law on administrative procedure.

The study investigates the current state of play with regard to digitalisation and the use of digital tools in EU public administration.

The analysis identifies five regulatory gaps and their impact on citizens and businesses. It presents three broad possible policy options for EU action that could address the identified gaps to some extent and generate positive impacts for citizens and businesses.

This is a publication of the European Added Value Unit
EPRS | European Parliamentary Research Service

PDF ISBN 978-92-846-9678-9 | doi:10.2861/643042 | QA-08-22-263-EN-N