

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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**Towards an EU
Administrative
Procedure Act – The
Swedish Experience**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Towards an EU Administrative Procedure
Act – The Swedish Experience

NOTE

Abstract

Based mainly on the reasoning and legislative proposal set out in the final report of the Swedish Inquiry on the Administrative Procedure Act, chaired by the author, this briefing note presents some approaches also relevant for the construction of an Act under Article 298 TFEU.

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1. THE TOPIC FROM A SWEDISH PERSPECTIVE

KEY FINDINGS

- Although the current Swedish Administrative Procedure Act (1986), like the previous one (1971), guarantees some basic procedural protection for citizens in their contacts with authorities, it clearly bears the stamp of the authorities' perspective, where a fear of efficiency losses and cost increases has hampered a development of a more comprehensive piece of legislation.
- The recently presented new draft (2010) is based on new approaches, putting the needs of citizens and private legal entities more clearly in focus, which may also be of some interest for the European legislature.

1.1. The first steps

With regard to today's topic, the current situation in the EU resembles the situation in Sweden forty years ago, when we first adopted an Administrative Procedure Act. Prior to that, there was an almost complete lack of any generally applicable rules on how administrative bodies were to manage the matters that came before them. Instead, various procedural rules had been incorporated in the legislation containing substantive provisions on different types of administrative activities. Thus, procedures varied from sector to sector. Certain supplementary regulations occurred in statutes governing the organisation and activities of a particular government agency. Surely, the vacuum left by the legislature was filled by the legal principles that the Supreme Administrative Court – and to some extent the Parliamentary Ombudsmen – formulated in case-law, but it still appeared unsatisfactory to both citizens and authorities that there was no uniform statutory framework in this field.

In much the same way, administrative procedural law in the EU is essentially a product of the case-law developed by the Court of Justice of the European Union, supplemented by the guidance provided by the European Ombudsman. The legislature has largely allowed the various bodies of the Union to develop their own procedural rules or principles. In so far as the Court's case-law has been codified – it is primarily the provisions on good administration in the EU's Charter of Fundamental Rights that I have in mind – this has been done in very general terms. It should thus appear desirable – for EU citizens in the first place, but also for the EU bodies themselves – that a uniform statutory framework be created with more definite, binding rules of substance.

The difficulties involved in such legislation are basically the same, whether at national or EU level. In both cases, it is a matter of offering citizens and private legal entities reasonable guarantees that their affairs will be processed and decided correctly without requiring complicated regulations, which might reduce efficiency or lead to excessive costs. The individual provisions must be detailed enough, so that it is not possible to ignore them, and the legislation should cover enough issues to form a virtually comprehensive procedural order. At the same time, the rules must be sufficiently flexible, so as to be applicable to a wide range of matters and to be applied by a large number of bodies of varying quality. This is not an easy equation to solve. The solution chosen will depend largely on the attitude of the legislature. Do we want to approach the issue from the point of view of the citizen or the authorities?

Sweden's experience illustrates the problems rather well. When Sweden at last adopted its first Administrative Procedure Act in 1971, after years of discussions and inquiries, it was quite clear that the original ambition to provide citizens thorough protection in their contacts with the authorities had been toned down considerably. Even though it was a step forward that the act had come into existence, it still bore the stamp of the authorities' perspective, with a fear of efficiency losses and cost increases clearly acting as a brake. The scope of the Act was limited, derogations from the regulations were allowed by means of secondary legislation, many issues were left out completely and the individual provisions were sometimes rather watered down and came with various reservations attached. The new Act that was adopted in 1986 and is still in force contained some improvements, but the changes were still rather modest.

1.2. The new draft – a turning point?

Times change, however, sometimes even to the better. In April 2008, the Swedish Government decided to order a more comprehensive inquiry which would aim not only to review the current Act provisions but also to deliver a proposal on a wholly new Act. Two years later, the Inquiry, chaired by me, presented its final report *En ny förvaltningslag* (A new Administrative Procedure Act; SOU 2010:29). In the proposal, built on previously achieved results – first and foremost the jurisprudence of the Supreme Administrative Court – and based on the general assumption that the legal protection for citizens has to be strengthened, we adopt, in several respects, new approaches.

A new line appears to be warranted in view, firstly, of the experience of applying the current regulations, which have not fully lived up to the intentions, and the deficiencies that result from their incompleteness. The provisions on reconsideration and correction, for example, have proved to do more harm than good. There are also troublesome omissions in a number of areas, including the responsibility to investigate and the institution of appeals. The act also lacks instruments to prevent excessively long processing times.

A new approach is called for, secondly, on account of the changes that have occurred in the legal environment over the past twenty years, including increased internationalisation. EU membership and the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms entail new requirements. Even though there is nothing to prevent Sweden from continuing to adhere to its own tradition of administrative procedural law, which in some respects is superior to the European standard of legal protection for citizens, the interplay with EU is easier if the differences are not too large.

The consequences of technical progress in recent decades, particularly increasingly advanced information technology, which has gradually exerted its influence on case processing methods, also demand attention. An act that is intended for use over an extended period of time must be constructed in such a way as to avoid being bound by existing technology and be open to the development of new processing methods.

From a purely formal point of view, the current Administrative Procedure Act also reveals certain deficiencies. The order and regrouping of the provisions is flawed, which makes it difficult to find one's way around the act, and the various provisions are also in some need of linguistic modernisation.

It should be noted that the reason why the Act fails to deal with the issue of public access to documents held by public authorities is that in Sweden, ever since 1766, this issue has been regarded as so central that it is regulated in a special fundamental law. I have presented a comparison between Swedish and European standards in this regard in the article *Democratie et transparence. Sur le droit général d'accès des citoyens de l'Union Européenne aux documents détenus par les institutions communautaires* (Scritti in onore di

Giuseppe Federico Mancini, Vol. II, ed. Giuffrè, 1998); cf. also my later article *The Community Courts and Openness within the European Union* (The Cambridge Yearbook of European Legal Studies, Vol. I, Hart Publishing, 1999).

The following sections present some key issues in the proposed reform, as described in the summary of our report. The proposed legislative text has been included as an **Appendix**.

1.2.1. Accessibility, instructiveness and arrangement

One general ambition has been to free the legislative text and the reasoning from links to ideas and concepts that have little to do with reality and are often derived from outdated formulations in general procedural law. One important outcome of the efforts to bring the description of the problems and the solutions we advocate closer to reality is our proposal to avoid the concept of 'exercise of public authority' in the new act. This concept, which is embedded in the present act, is an unnecessary complication that is counter-productive from the perspective of both due process and efficiency.

After a few introductory sections on the scope, the fundamentals of good administration that are to be observed in all administrative activities, and the general essential requirements in processing matters, the new regulations follow the course of processing in a systematic manner – from the initiation of a matter to the various stages of its preparation and on to the decision. The possibilities of altering or annulling the outcome that has thus resulted from the procedure, i.e. the decision, are discussed in the two final sections, first, correction by the decision-making authority itself and then intervention by a body of higher instance after an appeal. To make it easy to find one's way in the set of regulations, each of the groups of provisions just mentioned has been provided with a special heading, and with a few exceptions, each individual section within the group has been given its own sub-heading.

1.2.2. Due process and efficiency

Even though many of the matters treated in the new act were naturally also regulated in the old act, virtually no provisions have been taken over completely unchanged. The overall theme has been to remove unnecessary obstacles to due process without thereby impairing efficiency. Our review has shown that in various respects this can be done. Significant results can be achieved even by making minor corrections, so as to offer the individual an access to due process that he or she was previously denied or at least was not explicitly granted by the act. When the two previous administrative procedure acts were drawn up, there was obviously concern about the regulations being so far-reaching that efficiency would suffer and costs would run out of control. In our view, the risks have been exaggerated and now it is also important not just to maintain but to solidify the advanced position that Swedish administrative procedural law does after all occupy in a European perspective.

Our proposal also contains certain types of provisions that have not occurred previously. Matters that were previously not regulated at all in the Administrative Procedure Act have been taken up and treated, and existing institutions have been more or less radically recast. Some of the key innovations deserve special emphasis.

1.2.3. Scope of the act

The core of the Administrative Procedure Act consists of fundamental procedural safeguards that warrant permanence and stability. By the direct authority of our terms of reference, we therefore wish to abolish the present possibility of wholly or partially setting aside the Administrative Procedure Act by means of provisions in secondary legislation. It appears to us fundamentally wrong for the Government to be able – without involving democratically elected representatives – to alter or even undermine the legal protection that the Parliament has wanted to guarantee for the citizens by law.

We also want to eliminate the present limitations in the scope of the act concerning executive and crime prevention activities. We find it unacceptable to fence off entire administrative sectors from the obligation to observe key procedural rules by inserting a derogation in the Act. If it is considered necessary to deviate in some respect from the rules laid down in the Act, this should be done by special legislation. However, the present limitation regarding local government administration should be carried over into the new act.

1.2.4. Fundamentals of good administration

One innovation to which we attach great importance is to establish, in the act, that the authorities involved in all administrative activities are to observe the principles of legality, objectivity and proportionality. These are principles that are accorded the greatest importance in Sweden, in other national judicial systems, in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in EU law, and that have increasingly been codified.

We have seen clear indications that the authorities are not always particularly scrupulous about ensuring that their measures are supported by the provisions of law or other statutes, in other words, respecting the requirement of legality. The risk of overstepping the mark has also grown as traditional administration has increasingly been combined with information responsibilities and more customer-related activities. It therefore seems important to us to send a clear signal that all the activities of public authorities, regardless of their nature, must ultimately be based on written norms and that there is therefore a clear dividing line between the fundamental right of a subject of private law to act freely and the duties of the authorities to carry out certain tasks in the service of the public, and hence also of the citizens.

Moreover, it has become apparent through the work of the Parliamentary Ombudsmen, and in other ways, that it is unfortunately not particularly unusual for the authorities to operate without adequate impartiality and objectivity. There is thus a genuine need for a real incentive to better observe the requirements in this respect as well.

In a series of legal cases, the Supreme Administrative Court has already established that the principle of proportionality, some form of which has been recognised in all European states, also applies in Sweden. In our opinion, codifying this principle would have several advantages. It would then be brought to the general attention of the administrative authorities that no measures may be taken in the public interest without taking account of corresponding individual interests at the same time. If the assessment of proportionality becomes a theme enjoined by the legislator even in the body of first instance, this will improve the prospects that matters will be processed more carefully and the decisions reached will be correct from the start, so that unnecessary appeals can be avoided. Sweden's commitments under EU law and the European Convention for the Protection of Human Rights and Fundamental Freedoms will also be more clearly highlighted for courts, authorities and individuals alike.

1.2.5. Measures in the event of delays

To a greater extent than in the current Administrative Procedure Act, a requirement for prompt action has been incorporated in several of the specific processing rules that we propose. We also advocate a general obligation for the authorities to notify individual parties of expected delays. However, additional measures are required to prevent undue delays.

The need is obvious not least from the disheartening statistics revealed by the Parliamentary Ombudsmen. In addition, Sweden has had, and continues to have, difficulties in meeting the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms and EU law. Particular problems arise from the fact that it has become increasingly common for EU secondary legislation to set definite

time limits for decisions on matters and to specify immediate consequences if these limits are exceeded. In certain cases the rules are formulated so as to assume that the national legal systems of the Member States offer the possibility of bringing a direct complaint against a failure to act before a body of higher instance – a possibility that has not previously existed in Sweden.

We are therefore launching a completely new institution, a form of action against delay, framed so as to retain the traditional structure of Swedish administrative law. In rough terms, under the new system, the examination of processing time by a body of higher instance will be set in motion using the usual rules on appeals. This assumes that the authority that is obliged to take a particular decision has manifested its disinclination to bring the matter to a conclusion at a time when, in the view of the party concerned, it is ripe for decision. If the appeal is granted, the body of higher instance – normally a court – will order the decision-making authority to make a decision on the matter within the time determined by the body of higher instance. As no appeal will be allowed against the order and the procedure indicated may only be used once in the course of the processing of a case, it will be possible to avoid the new institution being counter-productive and giving rise to new delays.

1.2.6. Initiation of matters

The present Administrative Procedure Act reveals a remarkable omission in the description and regulation of the various phases involved in processing. There is not a word about the initial stage. We propose the introduction of two sections laying out what is required of a petition by which an individual wishes to initiate a matter and how a defective petition is to be treated.

We also wish to introduce new, simpler and more easily applied rules on the determination of a deadline by which a document is deemed to have been received by an authority. The problematic issues of evidence that arise in applying the existing provisions will be minimised by introducing a few simple rules of presumption.

1.2.7. Responsibility to investigate

One frequently noted inconsistency in the present system will be remedied by the introduction of a rule on the responsibility of an authority to investigate – the most tangible innovation in the provisions on the preparation of matters. While the Administrative Court Procedure Act expresses the position that the 'ex officio' principle is to apply, i.e. that the responsibility for investigation rests primarily with the court, and also gives some indication of how the investigation is to be conducted, the current Administrative Procedure Act lacks corresponding provisions. It seems rather irrational to explicitly require the courts to ensure that a case is adequately investigated after an appeal, without demanding at least as much of the authority that originally processed the case and took the decision that is being appealed.

The provision on this subject that we propose, which also contains certain instructions on how a party is to assist in the conduct of the investigation, clearly emphasises that the main focus in the procedure is to rest with the body of first instance – a principle we have endeavoured to follow across the board.

1.2.8. Communication

The principle that 'no one is to be judged without a hearing' is one of the cornerstones of the rule of law. In Swedish administrative law, this is formulated as a principle of communication, according to which the authority actively informs the parties to a matter of any new information and gives them the opportunity to express their standpoint on the content of such information. In the current Administrative Procedure Act, this principle is surrounded by restrictions that we find unacceptable. Thus, it only applies to the processing of cases concerning the 'exercise of public authority' towards an individual, and

communication is only required before the case is 'settled', i.e. before the authority has taken a final decision.

In the proposed provision, these restrictions have been removed and the scope of application has thus been broadened. The obligation to arrange for communication has been made generally applicable in connection with all decision-making, irrespective of the stage in the processing. This means, for example, that parties no longer need to risk decisions with far-reaching effects – e.g. the temporary taking in charge of persons or items, or orders to report for a medical examination or to open up one's home for inspection – being taken without all material being brought to their knowledge, solely because the decision has not settled the case, but has been taken at an intermediate stage of the procedure. We have also specified more clearly what proper communication requires and have limited the number of explicitly prescribed exceptions.

1.2.9. Statement of reasons for a decision

Similarly, the provision on statements of reasons has been strengthened; this provision is perhaps the most important of those listed in the new act under the general heading 'The authority's decision'. Current limitations, which are similar to those mentioned in connection with communication, i.e. the link to the concepts of exercise of public authority and final decision, should also be removed from the section bearing on the statement of reasons, on similar grounds. We have considered it reasonable to require that all decisions that are subject to appeal should be accompanied by a statement of reasons. In addition, the number of exceptions should be reduced. Furthermore, we propose that the description of the contents of a statement of reasons should be made clearer than in the current provision, which gives a rather vague indication of what should be included.

In our opinion, it is obvious that the obligation to state reasons should be made more stringent and clarified. A requirement that a decision is to be underpinned by supporting reasons will encourage a thorough and objective consideration of matters, which may be rather more time-consuming than quick and careless processing. However, any such loss of time is more than compensated by the time gained from the reduction in the number of corrections and appeals that can reasonably be expected. The gains will also be multiplied by the fact that bodies of higher instance, should the decision nevertheless be appealed, will have to take a position on a well-considered and clearly reasoned product.

The requirement on the contents of the statement of reasons should be formulated on the basis of the needs of the individual. He or she must be able to understand how the authority has reasoned in order to be convinced that the reasoning is sound, or to be able to find grounds for an appeal. The primary concern is not that the statement of reasons is perfectly formulated and a model of legal drafting but that it is generally comprehensible. The decision must therefore not only, as the present provision puts it, "contain the reasons that settled the outcome"; these reasons must be presented so that the individual can understand them. We attach great importance to the new formulation, according to which the decision is to contain an "explanatory statement of reasons", including information on "the regulations that have been applied" and "the circumstances that have decided the outcome."

1.2.10. Enforceability of decisions

The question of the enforceability of decisions is one of the more obscure issues in general administrative law. Roughly speaking, the problem can be said to concern whether a decision may be enforced when it has been given final form and those concerned have been notified, or whether it is necessary to wait until the time allowed for appeals has expired and the decision has thus – to use conventional legal terminology – become final and non-appealable. Even though uncertainty about how this issue should be dealt with has been confirmed from many parts of the administration, until now this subject has been omitted from the Administrative Procedure Act. The case-law does not provide any very precise guidance either.

In our opinion, the failure to regulate this issue is attributable to exaggerated ambitions – the attempt to find a formula that solves the problem more or less completely. However, this is hardly what is required. In general, what is desired is something more modest – the establishment of a general rule and guidelines indicating when it is possible to deviate from the rule. Such a provision is included in our legislative proposal.

Naturally, our considerations have been based on the point that the institution of appeals must not be made meaningless by an appealable decision being perhaps irreversibly enforced even before the party entitled to appeal has been given a chance to have the decision reviewed by a body of higher instance. A general rule based on this premise therefore implies that enforcement must wait until the time allowed for appeal has expired. A general exemption from this rule will be allowed for temporary orders, which for obvious reasons should be immediately enforceable. In other respects, the provision has been constructed so as to leave the authority responsible for enforcing a decision – regardless of its nature – a certain degree of freedom to determine whether this can be done before the decision has become final and non-appealable. However, the scope to act is limited by certain instructions.

If for essential public or individual interests a decision has to be enforced immediately, this may be done, but only after the authority has carefully considered the consequences. Under some circumstances the authority may defer enforcement; such case might notably arise when a decision would have very far-reaching consequences for an individual, or when enforcement would be irreversible, in case the decision is annulled after an appeal. The possibility of deviating from the general rule is thus limited by what might be qualified as a principle of proportionality drawn up especially for the purpose.

1.2.11. Correction by authorities of their own decisions

Another central area that until now has been left essentially unregulated concerns the freedom or obligation of authorities to reconsider and alter their own decisions. The current Administrative Procedure Act only contains rules governing two already rather clear situations, where the result can be regarded as more or less a matter of course. The first concerns correction of obvious clerical or other similar errors, and the second the obligation of the authorities to alter a decision that for some reason has been found to be manifestly incorrect, if this can be done quickly and easily and without it being to the disadvantage of any individual party. Otherwise, the modalities to be followed by authorities for the correction of their own decisions, that is a very important matter, has been left to the case-law.

We have attempted to remedy this defect by taking a broader approach to the issue while eliminating the problems that the present regulations have given rise to. As we elaborate in greater detail in the report, the concepts of 'reconsideration' and 'alteration' have been mixed up, and the reconsideration mentioned in the Act has in practice come to be understood as obligatory, even in situations that are not covered by the provision. One result thereof has been that the examination of appeals has been delayed.

The provisions on 'correction' – the designation we use for the new institution in its entirety – that we want to bring into the new Administrative Procedure Act have in view an authority's correction of its own decisions and cover all types of grounds for altering a decision. The institution would not be conditioned upon any particular formalities. If it is more widely possible to remedy defects by the decision-making authority itself undertaking a correction, the need to make use of the more drawn-out procedure of an appeal will be reduced. However, such correction is no substitute for and in no way complicates recourse to the institution of appeals.

After a few introductory sections on correction before the decision has been made available to persons outside the decision-making body and on correction on grounds of clerical or

other similar errors, comes the main provision, which regulates correction in view of new circumstances or because the original decision appears to be incorrect for some other reason. One important feature of the regulation is to prevent an individual who has received a favourable decision suddenly losing what he or she has gained by the authority revoking its decision. Based on what may be regarded as established case-law, three alternative conditions are set, which must be met in order to allow a decision, which by its nature favours some individual party, to be corrected. The possibility of undertaking a correction subject to the conditions specified is strengthened, and in fact correction becomes obligatory, if the authority finds that the decision is obviously wrong in some essential respect, and if a correction can be made quickly and easily and without this being to the disadvantage of any individual party.

Once an appeal has been lodged against the decision, the following section prescribes that the decision may be corrected only if the conditions for the last case mentioned above are met, i.e. when the decision is found to be obviously wrong, etc.; a further condition is set, namely that the appeal and other documents in the case have not yet been delivered to the body that is to examine the appeal - which is to be done 'promptly' after establishing that the appeal has been lodged within the relevant deadline. These restrictions will prevent appeals from 'getting stuck' at the decision-making authority.

The increase in the number of corrections that can be expected as a result of this possibility being explicitly underlined in the legal provisions – and which is generally desirable – must of course not occur at the cost of the interests of a party. What has just been stated about the essential immutability of a favourable decision is central. A concluding section also directs that a correction may not be made until parties to the case have been given the opportunity to state their opinion, unless this is obviously unnecessary. The general provisions on notification included in the proposed Act make it clear that parties are to be notified of the decision that replaces the corrected decision.

1.2.12. Appeals

According to the proposal, the provisions on appeals have been extended and include rules on the appealability of a decision, which were previously missing, as well as more comprehensive regulations on the right of appeal, e.g. the options open to an authority in this respect. The criteria under which a decision may be appealed have also been reformulated so as to eliminate the frequently found and misleading connection with 'legal effects'. The change in vocabulary is by no means aesthetic; it has real significance. It involves a certain liberalisation of the requirements for having recourse to the institution of appeals, but above all it is further clarified in comprehensible guidelines for both authorities and citizens on how the appeal is to be examined, notably on which criteria the examination should be based.

The entire body of legislative text is presented in terms that are simpler and closer to real life, and the provisions have been rearranged in a more straightforward and clear manner. To combat the confusion between the responsibilities of the decision-making authority and those of the body of higher instance – a confusion that has been detrimental to the functioning of the institution of appeals – we have used a new heading to clearly separate the functions of each body.

1.2.13. Consequences

Our assessment is that overall, the reform will save money. For each point on which we propose measures to improve due process, we have also taken account of efficiency aspects. Prompt processing has been a recurrent theme in its own right.

2. DEMANDS ON AN ADMINISTRATIVE PROCEDURE ACT UNDER ARTICLE 298 TFEU

KEY FINDINGS

- For an Administrative Procedure Act under article 298 TFEU to be adopted within a reasonable time frame, it would need to be relatively uncomplicated and not too wide in its scope. It should be clearly stated that the act only indicates a minimum standard. At the same time, it is essential that the legal provisions are sufficiently concrete that they can be expected to give citizens something of real substance and provide a basis for meaningful legal controls.
- For the construction of the Act, the main point of departure most naturally has to be the jurisprudence of the Court of Justice on procedural issues. Just a word of warning - one should not to be too uncritically bound by case-law outcomes, as this could hinder further progress. Alongside the material produced within the EU itself, there is also reason to look at what has happened and is happening at national level in the area.

2.1. Fundamental requirements

Although the contemplated Administrative Procedure Act will only relate to procedures at the Union's institutions, bodies, agencies and offices, it can be expected to influence legislation and the application of the law in the various national legal systems. States that completely lack national legislation in the area, or that have very incomplete legislation, are likely to seek guidance in a new EU administrative procedure act even when processing internal matters that are completely outside the domain of EU law. Even where more developed national regulations in the area do exist, the EU act may be referred to as embodying a standard that Member States must not fail to meet or which they do not need to surpass. Therefore, such a standard might present both a challenge and a risk.

For a new procedural act to be adopted within a reasonable time frame, it would need to be relatively uncomplicated and not too wide in its scope. As this is the first time that such a project is being undertaken, there is reason to fear that concern about efficiency losses and cost increases will lead to a relatively watered down product – rather like the first Swedish equivalent from 1971. If that happens, communication efforts will be important to make it clear that the act does not resolve all procedural problems encountered and that it will not always be possible to make do with the standard that it provides.

It should therefore be clearly stated in the act that the act only indicates a *minimum standard* and does not prevent more far-reaching procedural guarantees, where warranted in view of the gravity of the matters concerned and their special importance to the individual. For various types of special legislation within EU law, the legislature should consider whether more refined and far-reaching procedural safeguards are required in that particular area than the generally applicable administrative procedure act provides. The existence of an administrative procedure act that applies across the board to all EU bodies must therefore not be taken to mean that the legislature can ignore the need to regulate procedural issues in all other respects. Similarly, the EU courts, when supervising the application of the law by the institutions, should be free to set higher procedural requirements than those of the administrative procedure act, if a particular case so requires.

Having said that, it is essential that the legal provisions are sufficiently *concrete* that they can be expected to give citizens something of real substance and provide a basis for meaningful legal controls. Bringing in legislation to guarantee citizens a general ‘right to defence’, for example, or an unspecified ‘right to be heard’ is rather meaningless without clarifying the concrete elements making up those rights and their practical application. The body applying the act should know with a reasonable degree of precision what it is required to do, in order to meet its obligations under the law, and the citizen concerned – as well as a court following an appeal – must be able to verify whether this has been the case. Based on my experience as a judge at the Court of Justice of the European Union, I feel a certain scepticism with regard to the ability or will of EU bodies to formulate, accept and maintain strict procedural rules and principles.

The minimum standard that is expected to be established in a new EU administrative procedure act must therefore not be confined to fine-sounding generalities about a desirable state of affairs. Even if we probably have to accept that the act – at least first time around, before we have experience of its application – focuses on a limited number of fundamental rules, these rules must include firm principles for providing citizens with genuine protection. If this is done, not only can the EU legislature raise legal standards in the Union, but the act can also serve as a source of inspiration for national legislation and application of national law.

2.2. Useful sources of inspiration for drafting such an Act

There is no lack of regulations in EU law concerning how EU bodies are to conduct themselves, both in more general terms and with regard to the citizens, in particular. Such regulations or recommendations exist in various types and levels of EU rules – none mentioned, none forgotten – ranging from the Treaties and the Charter of Fundamental Rights to codes of conduct with general application or adopted for particular bodies. Here there are abundant sources to draw on, particularly for formulating the provisions of an administrative procedure act aiming at an administration of service, accessibility and collaboration.

With regard to more purely procedural provisions, however, the first resort must be to turn to bodies that, in the absence of written, generally applicable rules, have until now determined the contents of administrative procedural law in the Union. It seems reasonable to start by establishing what has been done in practice to fill the gap left by the legislature and assess whether this practice is satisfactory and should therefore be codified, or whether perhaps it should be modified or replaced with something else. More precisely, to begin with, the positions taken by the Court of Justice on procedural issues must be established and evaluated. The decisions of the lower EU courts may also be worth considering with regard to issues that have not been examined by the highest court. This also applies to decisions taken by the European Ombudsman in individual matters.

Where Sweden is concerned, it has been pointed out above that the existing Administrative Procedure Act, as well as the new act that is now being proposed, has been based to a considerable extent on case-law from the Supreme Administrative Court, which was created in 1909. It was considered that established case-law from the highest body in the court hierarchy could not be neglected without very strong reasons. In a similar – though naturally not wholly comparable – manner, the decisions taken by the Parliamentary Ombudsmen in their very wide scope of competence have served as a source of inspiration with regard to procedural issues that rarely or never come up before the courts.

Having said that, a warning bell should be sounded here against the adoption of all case-law outcomes without any scrutiny. A subservient attitude towards case-law will hinder progress towards a system that protects the interests of citizens and various economic operators better than the present system. Although, generally speaking, I have the greatest respect for the court of which I was once a member, I cannot refrain from voicing

the scepticism I have sometimes felt in the face of the rather modest demands the Court of Justice has made regarding the institutions' observation of procedural law principles. It was obvious in many cases during my period at the Court of Justice that EU institutions often take a minimalist approach to meeting their procedural obligations. In my valedictory speech at the formal sitting in October 2000, I took the liberty of expressing the hope that both the Court of Justice and the General Court would in future prove less tolerant towards the institutions in this respect. I hope, but am not fully confident, that there is movement in this direction.

Alongside the material that the EU's own legislators and legal practitioners can contribute, there is also reason to look at what has happened and is happening at national level. Many Member States already have more or less well-developed legislation on administrative procedures to regulate the way in which *their own agencies* process matters, whether these involve the application of purely domestic rules or the application of EU law. As citizens are increasingly faced directly with *the Union administration*, it must be difficult for them to understand why they should be obliged to accept less favourable treatment in their dealings with EU institutions, bodies, agencies or offices than in their dealings with national agencies.

In principle, I can agree with the recommendations that the Working Group on EU Administrative Law recently (October 2011) submitted to the Committee on Legal Affairs. This applies both to the desirability of an administrative procedure act for EU bodies, based on the provisions of Article 298 TFEU, coming into effect without unnecessary delay and the considerations that are necessary in this connection. The purpose of my modest briefing note is to provide an example illustrating the approach taken in one Member State to problems that are relevant in this context. Perhaps the European legislature can derive some inspiration from Swedish experiences.

APPENDIX – LEGISLATIVE PROPOSAL (SOU 2010:29)

1 Proposed Administrative Procedure Act

The following is hereby enacted.

Scope of the Act

General rule

Section 1

This Act applies to the processing of matters by the administrative authorities.

The Act shall also apply to the processing of administrative matters by the courts.

The provisions of Sections 4–7 also apply to other administrative activities conducted by administrative authorities and courts.

Limitations concerning local government administration

Section 2

The provisions of Sections 9–11, 14–17 and 19–47 do not apply to matters handled by municipal and county council authorities where decisions are subject to appeal under Chapter 10 of the Local Government Act (1991:900).

Conflicting provisions

Section 3

If another Act contains a regulation that conflicts with this Act, that regulation shall prevail.

If the Government has issued regulations pursuant to Chapter 8, Article 13, first paragraph, point 2 of the Instrument of Government¹ concerning loans and grants of state funds that conflict with Sections 35 and 36 of this Act, those regulations shall prevail.

Fundamentals of good administration

Legality, objectivity and proportionality

Section 4

Authorities may only take measures that are supported by law or other regulations.

Authorities shall observe objectivity and impartiality in their activities.

Authorities may only intervene in substantial individual interests if it can be assumed that the intervention will lead to the intended result. The intervention must never be more far-reaching than is necessary and may only be made if the intended result is in reasonable proportion to the inconvenience caused to the party that is subjected to the intervention.

¹ Chapter 8, Article 7, first paragraph, point 2 of the Instrument of Government, according to Govt. Bill 2009/10:80.

Service

Section 5

Authorities shall ensure that contacts with individuals are smooth and easy. Authorities shall provide assistance to individuals so as to enable them to look after their interests in matters pertaining to the activities of the authority. Such assistance shall be provided without unnecessary delay and to the extent that is appropriate with regard to the nature of the matter, the individual's need of assistance and the activities of the authority.

Availability

Section 6

Authorities shall be available for contacts with individuals. If particular times are set for receiving visits and telephone calls, the public shall be notified of this by appropriate means.

Authorities shall make the email address or other electronic address to which messages can be sent known by appropriate means. If a message has arrived at the address indicated, and if there is no particular impediment, the authority shall notify the sender, stating the time when the message was received. If it has been wholly or partly impossible to understand the message or attached materials, the sender shall also be notified of this.

Cooperation

Section 7

Authorities shall cooperate within their respective areas of activity.

As far as can be considered reasonable, authorities shall assist individuals by obtaining information or statements from other authorities.

General requirements concerning the processing of matters

Guidelines for processing

Section 8

Matters shall be processed as simply, quickly and economically as possible without detriment to the legal rights of the individual.

Processing shall take place in writing. However, unless it is inappropriate, the authority may decide that the matter shall be wholly or partly processed orally.

Parties' right of access

Section 9

Parties to a matter have a right to access all material that has been brought into the matter. However, the right of access to information applies with the restrictions that follow from Chapter 10, Section 3 of the Public Access to Information and Secrecy Act (2009:400).

Measures in the event of delays

Section 10

If an authority expects that the decision in a matter that has been brought by an individual party will be substantially delayed, the authority shall notify the party of this, stating the reasons for the delay.

Section 11

If six months have passed without a matter that has been brought by an individual party having reached a decision in the first instance, the party can demand in writing that a decision be made. Within four weeks after such a demand has been made, the authority shall either make a decision in the matter or make a special decision rejecting the petition, stating its reasons for doing so. Such a rejection may be appealed in the same sequence as the decision in the matter.

Recourse may be had to this procedure only once during the processing of the matter.

Interpretation and translation

Section 12

When an authority has contact with someone who does not have a command of Swedish or who has a serious hearing or speech impairment, the authority is to engage an interpreter and have documents translated if this is necessary to enable the individual to safeguard her or his rights.

With regard to a person who is seriously visually impaired, conversion from Braille to text and vice versa shall be provided in the same way as translation.

Legal representative and counsel

Section 13

A party to a matter may engage a legal representative or counsel. However, a party acting through a representative shall participate in person if the authority requests this.

The authority may request that a representative prove her or his authorisation by means of a written or oral power of attorney, which is to contain information about the representative's name and the scope of the mandate. If the representative is allowed to appoint a substitute, this shall be stated in the power of attorney.

If a representative does not prove her or his authorisation, the authority may order the representative or the party to remedy this deficiency. If a document in an application or an appeal has been signed by a representative, the order shall state that the petition otherwise risks being dismissed.

The authority may strip a representative or counsel who has proved unsuitable for her or his assignment of the right to be further engaged in the matter.

Conflict of interest

Section 14

A person dealing with a matter in such a way that their participation in the processing of the matter may influence its outcome is disqualified by a conflict of interest

1. if they personally or someone close to them is a party to the matter or can be assumed to be substantially affected by the outcome,

2. if they or someone close to them has acted as a proxy or legal representative for a party to the matter or someone who can be assumed to be substantially affected by the outcome,
3. if they, by participating in the final processing of a matter by another authority, have already taken a position on issues that the authority, following an appeal or because it is responsible for supervising the other authority, has the task of examining, or
4. if there is any other special circumstance that is likely to impair confidence in their impartiality in the matter.

The issue of conflict of interest shall be ignored when the issue of impartiality obviously lacks relevance.

Section 15

A person who is disqualified by a conflict of interest may not process a matter or be present when a decision is made in the matter. However, they may carry out tasks that no one else can perform without inconvenient delay.

A person who is aware of a circumstance that can be assumed to disqualify them must immediately give notice of this.

If a question of a conflict of interest involving someone has arisen and an alternate has not been called in, the authority shall decide on the issue of conflict of interest without delay. The person concerned may only take part in examining the question of a conflict of interest if the authority would otherwise not have a quorum and no one else can be summoned without inconvenient delay.

Bringing of matters

Petitions from individuals

Section 16

An individual can bring a matter before an authority by means of an application, complaint or other petition.

The petition shall include name, address and other information needed for the authority to be able to contact the individual.

The petition is to state what the matter is about and what the individual wants the authority to do. Unless it is obviously unnecessary, the circumstances behind the individual's request are also to be stated.

Section 41 contains special provisions on the form and contents of an appeal.

Treatment of defective petitions

Section 17

If a petition is incomplete or unclear, the authority shall, first of all, under its general obligation to provide service, help the individual to correct it.

If any remaining defect is of such a nature that the petition cannot serve as the basis for an examination of the matter, the authority may order the individual to remedy the defect. The order is to state that the petition may otherwise be dismissed.

Establishing the date of arrival

Section 18

A document has been received by an authority on the day on which it has arrived at the authority or has reached the hand of a competent official.

When a document has arrived at an authority or reached the hand of a competent official on a certain day, either by postal consignment or by notice of a paid postal consignment containing the document, the document shall be deemed to have been received on the immediately preceding working day.

A document that is in an authority's letter box when the authority first empties it on a certain day shall be deemed to have been received on the immediately preceding working day.

A document that has been sent to an indicated electronic address shall be deemed to have been received when it has been received there.

Preparation of matters

Responsibility to investigate

Section 19

An authority shall see to it that a matter is investigated as thoroughly as its nature requires.

An individual party that has brought a matter before an authority shall submit the investigation that is available to the party and that the party wants to rely on in support of the claim advanced. If the authority considers that the investigation is incomplete, it shall instruct the party how it should be supplemented.

Oral information

Section 20

An individual party that wants to submit information orally shall be given the opportunity to do so, unless this appears to be unnecessary. The authority shall decide on an appropriate form for this to be done.

Communication

Section 21

Unless it is manifestly unnecessary, before issuing a decision authorities shall notify parties of all material that is relevant to the decision and shall give them an opportunity to state their opinion of it within a set time. However, authorities may refrain from such communication

1. if there is reason to fear that it would otherwise be considerably more difficult to implement the decision, or
2. if a substantial public or individual interest requires that the decision be issued immediately.

Authorities shall determine the manner in which notification shall take place. Notification may take place by service of documents.

The obligation to notify applies with the restrictions that follow from Chapter 10, Section 3 of the Public Access to Information and Secrecy Act (2009:400).

Referral for consultation

Section 22

Authorities may obtain statements from other authorities or individuals by a process of referral for consultation, if this is necessary for the satisfactory investigation of a matter.

If statements need to be obtained from several sources, this shall be done simultaneously, unless there is reason to choose another course of action.

The referral for consultation shall make it clear what the statement is to be about and the time within which it must be received.

Documentation

Section 23

An authority that receives information by some means other than a document shall document this information without delay, if it may be relevant to a decision in the matter. The documentation shall be dated and include a note on who has made it.

The authority's decision

Forms of decision and voting

Section 24

A decision may be taken by a single official or by several officials collectively. A rapporteur and other officials may participate in the final processing of a matter without taking part in the decision.

When several officials are to take a decision collectively and they are unable to agree, the chair shall present the various proposed decisions that have been put forward. Each proposal shall be presented so that it can be answered either 'yes' or 'no'. After those who are taking part in the decision have taken a position on the proposals, the chair shall declare what he or she perceives to have been decided. This will stand as the decision, unless a vote is demanded.

If a vote is demanded, the vote shall be taken openly. If there are more than two proposals, it shall first be decided which proposal shall be set against the decision that the chair perceives to have been taken. The outcome shall be settled by a simple majority. In the event of a tied vote, the chair has the casting vote.

Each member taking part in the final processing of the matter is also obliged to take part in the decision. However, no one is obliged to vote for more than one proposal.

The chair is always obliged to vote when this is necessary for a decision to be made in the matter.

Dissenting opinion

Section 25

When a decision is taken by several officials collectively, an official taking part in the decision can enter a reservation against the decision by having a note made of their dissenting opinion. An official who does not do so shall be deemed to have supported the decision.

Irrespective of the form of decision used, the rapporteur and other officials present at the final processing of a matter without taking part in the decision have the right to have a note made of their dissenting opinion.

A dissenting opinion shall be entered before the authority sends the decision out or otherwise makes it available to individuals outside the authority.

Documentation of decisions

Section 26

For every written decision, there shall be a document that shows

1. the date of the decision,
2. the contents of the decision,
3. who has taken the decision,
4. who has been rapporteur, and
5. who has been present at the final processing of the matter without taking part in the decision.

Statement of reasons for decisions

Section 27

Unless it is manifestly unnecessary, a decision that is subject to appeal under Section 36 shall contain an explanatory statement of reasons giving information about the regulations that have been applied and the circumstances that have decided the outcome. Such a statement may, however, be wholly or partly omitted

1. if it is necessary with regard to national security, the protection of individual people's personal or financial circumstances or some other comparable circumstance, or
2. if a substantial public or individual interest requires that the decision be issued immediately.

If a statement of reasons has been omitted, the authority shall provide such a statement afterwards upon request from an individual, if this is necessary to enable them to safeguard their rights.

Notification of decisions

Section 28

Unless it is manifestly unnecessary, parties to a matter shall be notified without delay of the entire contents of a decision issued in the matter.

If a party is entitled to appeal against a decision, notification shall also be given of how this can be done. Such instructions on appeal shall contain the information indicated in Sections 41 and 42. Information shall be provided at the same time regarding dissenting opinions of which a note has been made in accordance with Section 25 or special provisions.

The authority shall determine the manner in which notification shall take place. However, if a party so requests, notification shall always be in writing. Notification may take place by service of documents.

This Section also applies when someone else who is entitled to appeal against the decision requests to be notified of the decision.

Enforceability of decisions

Section 29

A decision that is subject to appeal within a certain time may not be enforced before the time allowed for appeal has expired, unless the group of persons entitled to appeal is so wide or indeterminate that this point in time cannot be established.

However, if the decision only applies temporarily it is not necessary to wait for the time allowed for appeal to expire.

Nor is it necessary to wait for the time allowed for appeal to expire if a substantial public or individual interest requires an authority to enforce the decision immediately. Before enforcement takes place in such cases, the authority shall carefully consider any circumstances that call for a deferment, such as the decision having very far-reaching consequences for an individual or enforcement being irreversible if the decision were to be annulled after an appeal.

Correction by authorities of their own decisions

Correction before the decision has been made available to persons outside the authority

Section 30

An authority can always correct a decision before it has been sent out or otherwise made available to persons outside the authority. After this point in time, the decision can be corrected subject to the conditions given in Sections 31–33.

Correction on grounds of clerical error or the like

Section 31

A decision that contains an obvious mistake as a result of a clerical error, arithmetical error or similar oversight on the part of the authority or another actor, may be corrected by the authority that has issued the decision.

Correction on other grounds

Section 32

If an authority considers that a decision that it has issued as the first instance is erroneous on account of new circumstances that have emerged or for some other reason, the authority may correct the decision. However, if the decision by its nature is to the advantage of some individual party, a correction may only be made

1. if it is clear from the decision or from the regulations under which the decision has been issued that under certain conditions the decision may be revoked,
2. if compelling security reasons require immediate correction, or
3. if the wrong decision has been reached as a result of a party submitting incorrect or misleading information.

If the conditions for correction given in the first paragraph are fulfilled and the authority considers that the decision is manifestly incorrect in some essential respect, the decision is to be corrected if this can be done quickly and easily and without it being to the disadvantage of any individual party.

Correction after the decision has been appealed

Section 33

If an appeal has been lodged against a decision, it may only be corrected under Section 32 in cases referred to in the second paragraph of that Section and on condition that the appeal and other documents in the matter have not yet been handed over, as directed in Section 44, to the body that is to examine the appeal.

Notification to parties in connection with a correction

Section 34

Before a correction is made under Sections 31–33, the authority shall give parties the opportunity to state an opinion, unless this is manifestly unnecessary. As is clear from Section 28, parties are to be notified of the decision that replaces the corrected decision.

Appeals

Forum for appeal

Section 35

Decisions may be appealed to a general administrative court.

Appealability

Section 36

An appeal may be lodged against a decision if the decision can be assumed to have a substantial impact on someone's situation from a personal, financial or other perspective.

However, no appeal may be lodged against a decision if it concerns regulations referred to in Chapter 8 of the Instrument of Government.

Right of appeal

Section 37

An individual whose situation can be assumed to be substantially affected by a decision may appeal against the decision, if it was possible to take their interests into account when the decision was issued.

Section 38

A local authority may appeal against a decision by a central government authority subject to the same conditions that apply to an individual under Section 37.

Section 39

A central government authority may not appeal against a decision by another authority except in cases referred to in Section 40.

Section 40

If a higher court has annulled or altered the decision of an authority after an appeal, the authority may appeal against this decision.

Form and contents of an appeal

Section 41

Appeals shall be made in writing. The appeal shall be addressed to the higher court that is to examine it (the court of higher instance). In the appeal, the appellant shall state the decision being appealed and the alteration that is requested. If the appeal is to be heard by a general administrative court, further regulations in Sections 3 and 4 of the Administrative Court Procedure Act (1971:291) apply.

Submission and time limit for appeals

Section 42

The appeal is to be submitted to the authority that issued the decision (the decision-making authority). The appeal must be received there within three weeks of the date on which the appellant was notified of the decision by the authority. If the appellant is a party representing the public, however, the appeal must be received within three weeks of the date on which the decision was issued.

Measures of the decision-making authority

Section 43

The decision-making authority shall check that the appeal has been received in time. If it has arrived too late, the authority shall dismiss it, unless otherwise indicated by the second or third paragraph.

The appeal shall not be dismissed if the delay is due to a failure on the part of the authority to provide correct instructions on how to appeal.

Nor shall the appeal be dismissed if it has been received by the court of higher instance in time. In that case, the court of higher instance shall forward the appeal to the decision-making authority, stating the date on which the appeal was received by the court of higher instance.

Section 44

If the appeal is not dismissed under Section 43, the decision-making authority shall promptly hand over the appeal and other documents in the matter to the court of higher instance. If the appealed decision is corrected under Sections 31–33, the new decision shall also be handed over.

Measures of the court of higher instance

Section 45

Questions concerning dismissal of an appeal for some reason other than that it has been received too late shall be decided by the court of higher instance.

Section 46

The court of higher instance may decide that until further notice, the appealed decision shall not apply.

Section 47

If an appeal against a decision rejecting a petition, as referred to in Section 11, is granted,

the decision-making authority shall be ordered to make a decision in the case within the time specified by the court of higher instance. No appeal may be made against the decision of the court of higher instance.

1. This Act enters into force on 1 January 2012, when the Administrative Procedure Act (1986:223) will cease to apply.

2. If a regulation that has been adopted by the Government and that is in effect when the Act enters into force conflicts with this Act, that regulation shall prevail even after the Act enters into force.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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