

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Over the years the Union has taken over a number of tasks which involved either its institutions acting together with national administrations to implement Union policies or, in a limited number of cases, the institutions directly administering those policies or procedures. Numerous bodies, offices and agencies were created, some of which also carry out administrative functions. Citizens and economic operators are increasingly involved in matters at Union level: for example when applying for EU funds, when lodging a complaint or when requesting a document.

Such proliferation of actors and the increased complexity of the procedures have not been accompanied by comprehensive and horizontal legislation. The fact is that Union administrative law is fragmented. Only a few areas of the Union's administrative activities are subject to a systematic approach and there are many gaps and uncertainties.

Article 41 of the Charter of Fundamental Rights of the European Union (the Charter) enshrines the right to good administration. It sets out certain principles and rights: the principles of fairness, impartiality and timeliness in the administration's activities, the right to be heard before a negative decision is adopted, the right to have access to one's file, the duty to provide reasons, the right to be compensated for damages caused by the Union's institutions, and language rights.

However, this is not enough. In order to be able to exercise their right to good administration, citizens need to be provided with effective, foreseeable and accessible procedures: principles and rights need to be translated into rules which give clear and simple answers to basic questions concerning issues such as the initiation of an administrative procedure, time limits and remedies.

The European Parliament has repeatedly called for the adoption of a regulation on the administrative procedure of the Union. In its resolution of 6 September 2001¹, Parliament approved with amendments the European Code of Good Administrative Behaviour drafted by the Ombudsman and called on the Commission to submit a proposal for a regulation containing a code of Good Administrative Behaviour based on Article 308 of the Treaty establishing the European Community.

The entry into force of the Lisbon Treaty, which enhances the legal framework for citizens' rights and participation in the democratic life of the Union, gave new impetus the European Parliament's reflections and work on administrative law. The introduction of a new legal basis on the way that the institutions, bodies, offices and agencies of the Union are to carry out their duties - Article 298 TFEU – has brought together the need for efficiency with the goal of openness and independence. On 23 March 2010 its Committee on Legal Affairs set up a working group on EU Administrative Law with the aim to take stock of the existing EU administrative law. The working group benefitted from the help and expertise from

¹ OJ C 72 E, 21.3.2002, p. 331.

practitioners, academics, NGOs and members and officials from other institutions, agencies, bodies and offices.

The findings of the working group's analysis fed into a working document, which suggested the possibility of preparing a legislative initiative for a single general administrative law binding on the Union's institutions, bodies, agencies and offices, providing a minimum safety net of guarantees to citizens and businesses in their direct dealings with the Union's administration. The working document was endorsed by the Committee on Legal Affairs at its meeting of 21 November 2010.

The endorsement at committee level led to the subsequent adoption of a landmark resolution on 15 January 2013, whereby the European Parliament requested the Commission to submit, on the basis of Article 298 of the Treaty on the Functioning of the European Union (TFEU), a proposal for a regulation on a European Law of Administrative Procedure, in line with a number of detailed recommendations, which now constitute the backbone of the current proposal.

The objective of this proposal is to provide citizens and the Union's administration with a comprehensive and horizontal administrative procedure. Citizens and economic operators will benefit from uniform procedural guarantees, enforceable in the EU Courts. The Union's administration will also benefit from a clear and single set of rules. Increased transparency and accessibility will enhance trust and improve the relationship between citizens and the Union's administration, thereby reinforcing also the legitimacy of the Union.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

Legal basis

The proposal is based on Article 298 TFEU which provides that in carrying out their missions, the institutions, bodies, offices and agencies of the Union are to have the support of an open, efficient and independent administration. Article 298 further states that it is for the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, to establish provisions to that end. The objective of this proposal is to guarantee the right to good administration as well as an open, efficient and independent Union's administration by establishing the procedural rules governing its administrative activities.

The legal basis of the proposal is thus Article 298 TFEU.

Subsidiarity

The Lisbon Treaty (Article 5(3) of the Treaty on European Union and Article 3 TFEU) provides that the principle of subsidiarity does not extend to areas falling within the exclusive competence of the European Union. An act such as a proposal for a regulation drawn up pursuant to Article 298 TFEU to establish procedural rules governing the administrative activities of the Union is of an internal organisational character and hence falls within the exclusive competence of the European Union. Therefore, subsidiarity does not apply.

Proportionality

The proposal complies with the principle of proportionality in that it is strictly limited to that which is necessary to achieve its objectives.

3. DETAILED EXPLANATION OF THE PROPOSAL

Subject matter and objective

This Regulation lays down procedural rules governing each stage of the administrative procedure from the initiation to the management and the conclusion of the procedure.

Scope

In line with Article 298 TFEU, Article 2 of this Regulation clearly states that this Regulation applies to the administration of the Union's institutions, bodies, offices and agencies with the explicit exclusion of the Member States' administration. This also results from the definition of 'Union's administration' in point (a) of Article 4 of this Regulation and reflects Article 41 of the Charter.

Only administrative activities *stricto sensu* are included in the scope of this Regulation. This is the reason why legislative procedures, judicial proceedings and the procedures for the adoption of delegated acts and implementing acts as well as non-legislative acts directly based on the Treaties are explicitly excluded from the scope of this Regulation. Only administrative acts of general scope have some specific rules, and these rules are laid down in Chapter VI.

Relationship between this Regulation and other legal acts of the Union

Article 3 clarifies that this Regulation is designed as a *lex generalis* to be applied across the board to all Union's administrative procedures. It also reiterates the principle '*Lex specialis derogat legi generali*' by clarifying that the provisions of this Regulation apply without prejudice to Union secondary law instruments providing for specific administrative procedural rules.

However, in order to enhance the guarantee of good administration, Article 3 explicitly provides that the provisions of this Regulation are to be applied to fill the gaps of existing Union secondary law establishing specific administrative procedural rules. It also provides that this Regulation is to be used in interpreting procedural rules contained in other Union secondary law in order to allow for more coherence in the application of similar procedures even if the details thereof remain different.

Initiation of the administrative procedure

As a general principle, administrative procedures may be initiated on the administration's own initiative or by an application.

Article 6 focuses on cases in which the administrative procedure is initiated at the administration's own initiative. It imposes the duty to initiate the procedure by means of a decision of the competent authority. This formal initiation of the procedure provides legal certainty as it sets the starting point of the important mandatory time-limit for the adoption of the final decision laid down by Article 17(1). It also establishes the essential duty to notify the formal initiation and to provide the parties with relevant and comprehensive information that allow them to duly exercise their rights of defence during the procedure. Such information includes the name and contact details of the member of staff responsible

for managing the procedure. The appointment of such a responsible official is important to promote a better management of the procedure and provide a stronger protection of the parties' procedural rights. It furthermore prohibits making public a decision to initiate before it has been notified to the parties and allows to delay or to omit such notification only when it is strictly necessary in the public interest – e.g., when an immediate notification might jeopardise the investigation of the case. Article 6(1) imposes the duty to examine the particular circumstances of the case before taking the decision whether to initiate a procedure, in line with the duty of careful and impartial investigation laid down in Article 9. Finally, the principle of legal certainty requires the administration to act within a certain time from the date of the event which is the basis of the administrative procedure. This limitation period has been set at 10 years.

In cases in which the procedure is initiated by application of a party (Article 7), applications are subject to few formal requirements. On the other hand, certain important procedural rights to applicants are granted, including the right to an acknowledgement of receipt with some relevant information and the right to be given a deadline for remedying a defective application. Administrative efficiency is the central concern of this Article 7, which stipulates that pointless or manifestly unfounded applications may be rejected as inadmissible by means of a briefly reasoned acknowledgement of receipt. It also establishes that no acknowledgement of receipt is necessary in cases where successive applications are abusively submitted by the same applicant.

Procedural rights

A general provision on procedural rights is of essential importance. Article 8 enumerates a number of relevant general rights of the parties which are to be respected at all stages of the administrative procedure. First, it grants the right to be given all relevant information on the procedure in a clear and understandable manner and to be notified of all procedural steps and decisions that may affect the parties. The right to information does not include legal advice in individual cases but only general information on the way the procedure is to be pursued. Second, it establishes the right to communicate and to complete, where possible and appropriate, all procedural formalities at distance and by electronic means, such as videoconferencing. Third, it acknowledges the right to use any of the languages of the Treaties and to be addressed in the language of the Treaties of their choice, in line with point (d) of Article 20(2) TFEU and Article 41(4) of the Charter.

Finally, it also grants the right to pay only the charges that are reasonable and proportionate to the cost of the procedure in question and allows the possibility of lay representation by granting the right to be represented not only by a lawyer but also by a person of his or her choice.

Far from representing an exhaustive list, those rights duly complement other rights of the parties concerning specific stages of the procedure established elsewhere in this Regulation, such as the right to receive an acknowledgement of receipt to an application to initiate an administrative procedure, the right to be heard, the right to access the file and the right to be given reasons for the final decision.

Duty of careful and impartial investigation

The duty of careful and impartial investigation has been extensively developed in the case law of the Court of Justice of the European Union (CJEU). This duty is a significant element of the principle of good administration, and as such implied in Article 41(1) of the Charter. Article 9 further enumerates some relevant instruments of information gathering envisaged by the Union's sector-specific

legislation, such as evidence of parties, witnesses and experts, visits and inspections and the request of documents and records. With a view to effectively ensuring the rights of defence, this provision explicitly sets out the parties' right to produce evidence.

Duty to cooperate and witnesses and experts

Articles 10 and 11 complement the principle of *ex officio* investigation laid down in Article 9. By establishing the duty of the parties to cooperate with the competent authority in ascertaining the facts and circumstances of the case, Article 10 contains important procedural safeguards for the parties to the procedure. It requires that a reasonable time-limit be given to the parties to reply to any request of cooperation and acknowledges the privilege against self-incrimination, an important element of the rights of defence developed by the CJEU, in cases where the administrative procedure may lead to an administrative penalty.

Article 11 specifies that witnesses and experts may be heard at the initiative of the competent authority or where proposed by the parties, and that experts chosen by the competent authority need to be technically competent and not affected by a conflict of interest. This latter requirement is particularly important considering the key role consulted experts have in many Union's administrative procedures, such as those where the final decision relies on an accurate scientific risk assessment.

Inspections

In light of the significant impact that inspections may have on citizens and businesses, the relevance of these inspections for administrative decision-making and the existence of a number of procedural rights that can be granted in the context of inspections, Article 12 sets out the applicable basic rules. First, it subjects the power to inspect to two conditions: it has to be established by a legislative act of the Union and the inspection must be necessary to fulfil a duty or achieve an objective under Union law. Second, it establishes some basic rights for the parties that are subject to inspection. Finally, it takes account of the principle of proportionality by establishing that the inspection has to be carried out without causing undue inconvenience to the object of the inspection or the person possessing it.

Conflict of interests

Article 13 addresses the key issue of impartiality and potential conflict of interests of members of staff participating in the administrative procedure. The right to be treated impartially by EU authorities is a facet of the fundamental right to good administration enshrined in Article 41(1) of the Charter. This provision obliges any member of staff to abstain from participating in the procedure where he or she has, directly or indirectly, a personal interest, including, in particular, any family or financial interest, such as to impair his or her impartiality. Instead of including an exhaustive list of grounds, this provision opts for a broader and functional approach. It further regulates how this duty is to be fulfilled and grants the right of the parties to request the exclusion of a member of staff affected by a conflict of interest

Right to be heard and right of access to the file

The right to be heard is certainly the oldest and most important procedural right established in the different legal traditions. It has been recognised by the CJEU as a general principle of Union law and is a core element of the fundamental right to good administration enshrined in point (a) of Article

41(2) of the Charter. Article 14 of this Regulation reproduces the provision of the Charter and specifies four important aspects deriving from the CJEU case law: the right of the parties to receive sufficient information, the right to be given adequate time to prepare their defence, the right to be assisted by a person of their choice and the right to express their views in writing or orally.

Closely related to the right to be heard is the right of access to the file, another core element of the fundamental right to good administration. Article 15 of this Regulation not only reproduces the corresponding provision of the Charter but also adds two important elements: it establishes that the access to the file needs to be 'full' and imposes the duty to give reasons for restrictions to access. In line with the case law of the CJEU, this provision also establishes that where no full access to the entire file can be granted, it is necessary to give the party an adequate summary of the content of those documents. It is important to clarify that Article 15 is applicable irrespective of the general right of access to documents, which in itself is a fundamental right, protected by Article 42 of the Charter and Article 15(3) TFEU.

Duty to keep records

In line with the case law of the CJEU, Article 16 enumerates the obligation on the Union's administration to keep a record of its incoming and outgoing mail, the documents it receives and the measures it takes, and the obligation to establish an index of the files kept. This duty to keep records is a very useful complement to the right of access to the file and it is clearly in the interest of not only a transparent but also an efficient Union's administration, as called for by Article 298 TFEU. Keeping an adequate file is also crucial to allow the parties to exercise their rights of defence and to judicial review.

Time-limits

An important problem of the current state of regulation of the Union's administrative procedures is the general absence of clear time-limits imposed on the Union's administration in the sector-specific legislation. This is seen as one of the reasons for undue delays and leads to legal uncertainty for the parties concerned. After reproducing the duty established by the CJEU to adopt decisions within a reasonable time, Article 17 addresses this problem by laying down a default time-limit of three months in the event that no time-limit is fixed by the sector-specific legislation.

Form of administrative acts

The administrative act concluding the administrative procedure has to be in writing and signed and drafted in a clear, simple and understandable manner. The latter requirement on drafting is not to be interpreted in a formalistic manner and includes within its scope also the substantive duty to duly specify the decision in such a way as to enable the parties to understand their rights or duties.

Duty to state reasons

The duty to state reasons is another crucial element of the fundamental right to good administration enshrined in point (c) of Article 41(2) of the Charter and of Article 296(2) TFEU. Therefore, in line with the existing case law of the CJEU, Article 19 requires that the statement of reasons to be clear and indicate the legal basis, the relevant facts and the way in which the different relevant interests have been taken into account. This Article does not envisage any exceptions and only allows replacing the individual statement of reasons by a general statement of reasons where a large number of parties

are concerned. The latter provision needs however be interpreted restrictively and not serve as an excuse to provide formulaic statements of reasons.

Remedies

The duty to indicate available remedies laid down in Article 20 facilitates the use of existing remedies by the parties. Attention needs to be drawn to the parties not only to the administrative and judicial remedies, but also to the possibility of lodging a complaint with the European Ombudsman.

Notification of administrative acts

The principle of legal certainty is applicable to all kind of decisions having legal effects and entails in particular the obligation by the administration to notify to the parties about the adoption of an administrative act and the requirement that an act only take effect upon notification.

Correction of errors in administrative acts, rectification or withdrawal of administrative acts which adversely affect a party and rectification or withdrawal of administrative acts which are beneficial to a party

The possibility of rectification or withdrawal of unlawful administrative acts adopted by the EU administration has been dealt with by the CJEU since the very beginning of its case law, for example in *Algera* of 1957. In that judgment, the existence of a general principle of revocability of illegal measures at least within a reasonable period of time was confirmed on the basis of ‘*the rules acknowledged by the legislation, the learned writing and the case-law of the Member States*’¹. Also many sector-specific Union regulations contain provisions on the rectification and withdrawal of acts.

The provisions set out under Chapter V introduce general rules on the rectification and withdrawal of acts that have been adopted by the Union's administration, expressly taking into account the need to differentiate between, on one hand, the procedure to be followed for the revision of decisions adopted which affect adversely the interests of a person and, on the other, those decisions which are beneficial to that person.

Article 24 codifies the principles stated in the CJEU case law concerning the protection of legitimate expectations by specifying that due account needs to be taken of the consequences of the rectification or withdrawal on parties who legitimately could expect the act to be lawful. From that point of view, the provision takes also into account the distinction between lawful and unlawful administrative acts and properly specifies that, in case of a lawful administrative act which was beneficial to a party, its withdrawal does not have retroactive effect with regard to that party.

Respect for procedural rights and legal basis, statement of reasons and publication

Since much of the Union's administration covers the adoption of administrative acts of general scope, Articles 26 and 27 lay down the relevant specific requirements. In particular, where an act is of general scope, certain specificities need to be taken into account in the procedure for its adoption and for the notification and publication requirements.

¹ Court of Justice, 12.07.1957, in joined cases 7/56, 3/57 to 7/57.

The objective of Article 26 is to ensure that the procedural requirements set out in this Regulation are also applicable to administrative procedures resulting in acts of general scope. This explicitly stresses that an administrative act of general scope cannot derogate from the rules set up in the Regulation.

Article 27 lays down specific requirements as regards the entry into force of acts of general scope. The regime of entry into force of such acts derives from the relevant treaty provisions (Article 297 TFEU), which makes a distinction between ‘decisions which do not specify to whom they are addressed’ and those which ‘specify to whom they are addressed’. Article 27 therefore explicitly refers to the possibility of making an act known ‘by means directly accessible to those concerned’ which for all practical purposes would cover publication via the internet or in the Official Journal of the European Union.

Online information on rules on administrative procedures

By establishing the duty to promote the provision of updated online information on the existing administrative procedures, Article 28 aims to ensure citizens’ access to applicable law and procedures in real-life and thus contribute to the overall transparency of the administrative system. It is important to emphasise that the expression ‘existing administrative procedures’ in paragraph (1) must not be interpreted as ‘ongoing administrative procedures’. Instead, it refers to information on specific elements of categories of procedures established according to the Treaty provisions, acts of the institutions or any other form of regulation of soft-law instrument. Such information will allow potential applicants to know in advance the applicable legislation and the procedural and substantive legal requirements that have to be fulfilled in order to submit necessary notifications or to obtain, for example, the necessary permits or available subsidies. This also has the advantage of efficiency in that it helps to avoid the public authority having to advise in individual cases and to reduce wasteful processing of defective applications and notifications.

4. BUDGETARY IMPLICATION

The proposal has no impact on the European Union budget.