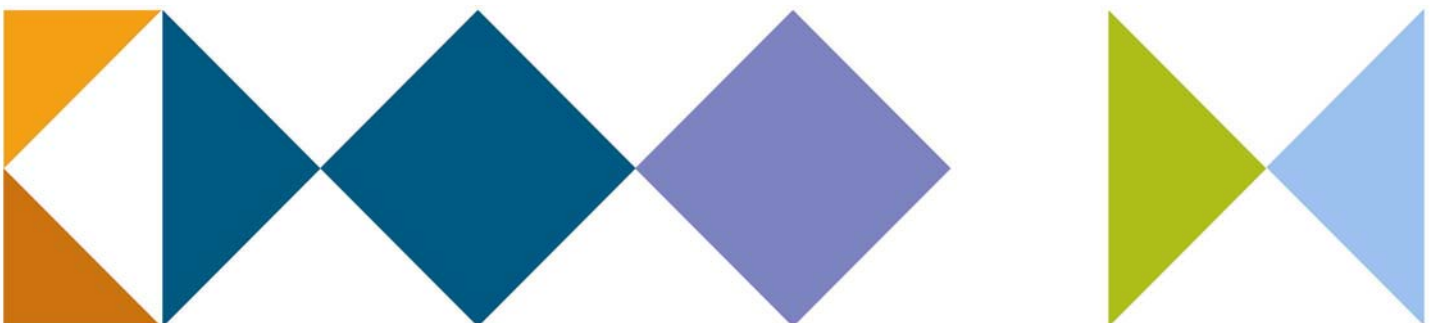




2005:4

# Principles of Good Administration

In the Member States of the European  
Union



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## Summary

The Swedish government has commissioned the Swedish Agency for Public Management to conduct a survey on current regulation on good administration in the Member States of the European Union. The background is that the Swedish government has declared that it intends to work for a law on good administration for the institutions, bodies, offices and agencies of the European Union. Such a law would be based on Article III-398 in the newly signed Treaty Establishing a Constitution for Europe. The article was originally proposed by the Swedish government's representative to the Convention on the Future of Europe and the intention was to allow for the adoption of a law on good administration by giving the right to good administration its own legal base in the Treaty.

The origins of the right to good administration can be traced back to a number of Council of Europe resolutions as well as to the case law of the European Court of Justice. Before the adoption of the new Constitutional Treaty, the concept of good administration had been codified in two documents which are not legally binding. Firstly, in the Charter of Fundamental Rights of the European Union, which only has the ambiguous status of a 'solemn proclamation' by three of the Union's most important institutions. Secondly, the meaning of the concept was further elaborated in the Ombudsman's Code of Good Administrative Behaviour. The legal status of the right to good administration will therefore be significantly strengthened if the new Constitutional Treaty, with its Article III-398, is ratified.

Based on the Charter of Fundamental Rights of the Union and the European Code of Good Administrative Behaviour, the Agency for Public Administration chose a set of rights and obligations which were considered to be essential for the meaning of good administration. These rights and obligations were compiled into a questionnaire consisting of 12 questions. The questionnaire was then distributed to all the Swedish embassies in the EU with a request to identify a suitable English-speaking officer in each respective Member State administration that could answer the questionnaire. The purpose of the survey was to examine if and to what extent some of the core principles of good administration had been transformed into legally binding rules in the Member States of the European Union.

The results of the survey show that:

- A core set of principles of good administration is widely accepted among the Member States.
- Most principles are enacted as general and legally binding rules in constitutional or statutory legislation.
- The material content of the rules varies significantly.
- The interpretation of the principles will vary between, at least, four different traditions of administrative law.



# 1 Introduction

The Swedish Government declared in 2004 that it would take new initiatives with the aim of improving the administration of the European Union.<sup>1</sup> One aim would be to promote a law on good administration for the Union based on Article III-398 in the new Constitutional Treaty. The Article was originally proposed by the Swedish governments representative to the Convention on the Future of Europe. The representatives intention was to provide a legal base for the right to good administration since the existing procedural rules were considered relatively fragmentary and hence difficult for ordinary citizens to comprehend.

In order to support the upcoming negotiations on such a law the Swedish government deemed it important to increase the understanding of the administrative rules in other Member States of the European Union. It therefore commissioned the Swedish Agency for Public Management<sup>2</sup> to conduct such a survey. The main purpose of this project has been to describe the current regulation on good administration in the Member States of the European Union.

Considering the challenge of surveying 25 Member States with different languages as well as legal and administrative traditions, the project team designed a questionnaire focused on key principles of the legal concept of good administration. The project team consisted of project leader Magnus Enzell, and project members Henrik Frykman and Klas Svensson. The questionnaire was distributed to all Swedish embassies in the European Union with a request to identify a suitable English-speaking officer in each respective Member State administration that could answer the questionnaire. These answers will be presented and analysed in this report.

While awaiting the responses to the questionnaire, the Agency also organised an Expert Meeting focused on the question of a law on good administration for the institutions of the European Union as well as the broader question of a European administrative area. During the meeting, a draft version of this report was presented and discussed. The program, participant list and discussion protocol are annexed to this report.

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<sup>1</sup> Press release Swedish Ministry of Finance and Ministry of Justice July 22 2004: “*Bättre förvaltning i EU en prioriterad fråga för regeringen*”.

<http://www.regeringen.se/sb/d/119/a/27798>

<sup>2</sup> The Swedish Agency for Public Management provides support to the Government and Government Offices. Our task is to conduct studies and evaluations at the request of the government and also to modernize public administration with the use of IT. See:

<http://www.statskontoret.se> for more information.

Since many replies were sophisticated and provides a good overview of the regulation of good administration in the Member States, some of them are published on the following Internet address:

[http://www.statskontoret.se/good\\_administration](http://www.statskontoret.se/good_administration)

## **1.1 The Right to Good Administration in the Treaty Establishing a Constitution for Europe**

The initial intention of the Swedish government's representative at the Convention on the Future of Europe was to make sure that the right to good administration would have a specific legal base in part III of the Treaty. The right to good administration is expressed in Article 41 in the Charter of Fundamental Rights of the European Union. The European Ombudsman also called on the Convention to include the charter of fundamental rights in the constitution and establish a clear legal basis for ensuring an open, accountable and service-minded administration. When the presidium presented the draft treaty, the term good administration had been left out and been replaced by the phrase: "open, efficient and independent administration". The current Article III-398 thus states that:

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 III-427, European laws shall establish provisions to that end.

It should be noted that the three adjectives in the first paragraph, open, efficient and independent, should not be seen as exhaustive and that European laws in the second paragraph are written in plural. The article can thus be used for other purposes than enacting a law on good administration for the institutions, agencies and administrative organs of the European Union.

In September 2003, during the debate in the European Parliament on the European Ombudsman's annual report, the responsible commissioner Lloyola De Palacio stated that Article III-398 provides the legal basis for a European administrative law that would apply uniformly to all the institutions and bodies. The current secretary general Mr O' Sullivan subsequently confirmed to the Ombudsman that 2006 would be a possible date for the Commission to present a proposal.<sup>3</sup>

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<sup>3</sup> Ian Harden, Head of the European Ombudsman's Legal Department during the Stockholm expert meeting 6-7 December, See Appendix 3, p. 92.

In the following, the developments leading up to the formulation of the right to good administration as part of the Treaty Establishing a Constitution for Europe and its legal base in Article III-398 will be traced. The purpose is to provide a background for the survey of the administrative laws of the Member States in this area.

## 1.2 Council of Europe Resolutions

In 1977, the Council of Europe argued in its Resolution 77 (31)<sup>4</sup> that since the development of the modern state had resulted in an increasing importance of public administrative activities, individuals were more frequently affected by administrative procedures. The principal task of the Council of Europe was to protect the individual's fundamental rights and freedoms, hence they intended to undertake efforts to improve the individual's procedural position vis-à-vis the administration by promoting the adoption of rules, which would ensure fairness in the relations between the citizen and the administrative authorities. The following principles were stated:

- I - Right to be heard
- II - Access to information
- III - Assistance and representation
- IV - Statement of reasons
- V - Indication of remedies

In order to restrict the scope of application of the principles the Council stated that the proposed principles applied to the "protection of persons, whether physical or legal, in administrative procedures with regard to any individual measure or decision which is taken in the exercise of public authority and which is of such nature as directly to affect the rights, liberties or interests of persons whether physical or legal (administrative act)". The term *administrative procedures* excluded the judicial processes from the scope of its application, while the term *individual measures or decisions* excluded administrative acts of a more general applicability, and finally the term *directly* excluded those who are only indirectly affected by an administrative act.

In retrospect, it can be said that the resolution became an important first step towards establishing good administration as an operative legal concept since it established a set of principles that today are commonly regarded as central for the right to good administration. However, the term good administration was actually used in the resolution as a restricting requirement on the implementation of the principles rather than an individual right, not as a

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<sup>4</sup> Resolution (77) 31 On The Protection Of The Individual In Relation To The Acts Of Administrative Authorities. Adopted By The Committee Of Ministers On 28 September 1977 At The 275th Meeting Of The Ministers' Deputies.



classification for the proposed rights. The principles should be implemented with due consideration taken to “the requirements of good and efficient administration”.

The Council of Europe has continued to issue principles related to good administration.<sup>5</sup> In fact, the Committee of Ministers has recently instructed its Project group on administrative law (CJ-DA) to examine the feasibility of preparing a consolidated model code of good administration based on all principles contained in its Recommendations and Resolutions.<sup>6</sup> In a working paper, 26 principles are taken from different recommendations and listed as being related to good administration.<sup>7</sup> In yet another working paper, 44 principles of good administration from the Member States of the Council of Europe are listed.<sup>8</sup>

### **1.3 Case Law of the European Court of Justice (ECJ) and European Court of First Instance (ECFI)**

The European Courts has stressed the importance of procedural guarantees as a counterweight to administrative discretion. ECJ has further recognised an array of general administrative principles, e.g.:

- The general principle of administration through law,
- The principle of non-discrimination,
- The principle of proportionality,
- The principle of legal certainty,
- The protection of legitimate expectations,
- The right to a hearing before an adverse decision is taken by a public authority.

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<sup>5</sup> See e.g. Recommendation No. R (80) 2 concerning the Exercise of discretionary Powers by administrative Authorities; Recommendation No R (87) 16 on administrative procedures affecting a large number of persons; Recommendation No R (2000) 10 on Codes of conduct for Public officials.

<sup>6</sup> Parliamentary assembly recommendation no 1615 (2003).

<sup>7</sup> Preliminary Draft Report prepared by the Scientific Expert. CJ-DA-GT (2004) 8 rev.

<sup>8</sup> List of principles of good administration in Council of Europe member states. CJ-DA-GT (2004) Misc. 2.

The obligation to provide reasons for decisions is laid down in the Treaty as Article 253 (ex Article 190):

Regulations, directives and decisions ... shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

The ECJ and the ECFI has developed this article into a fundamental right for individuals thus creating an unwritten administrative law through its case law.<sup>9</sup> Such reasoning of ECJ and ECFI might be interpreted as an evolution away from a French-inspired administration-centred tradition towards a more individual-oriented view of community administrative procedures.<sup>10</sup>

## 1.4 Charter of Fundamental Rights of the European Union

The right to good administration as well as the right of access to documents was included in the Charter of Fundamental Rights of the European Union, which was signed and proclaimed in Nice on 7 December 2000. Article 41 contains the Right to good administration:

1. 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.
2. This right includes:
  - a) The right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - b) The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
  - c) The obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language.

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<sup>9</sup> See Schwarze, Jürgen. *European Administrative Law*. London: Sweet and Maxwell, 1992; Nehl, Hanns Peter. *Principles of Administrative Procedure in EC Law*. Hart Publishing, 1999; Bernitz, Ulf and Nergelius, Joakim (eds.) *General Principles of Community Law*. Kluwer, 2000.

<sup>10</sup> For a full argument see e.g. Harlow, Carol. "Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot." *European Law Journal*, Vol. 2. No 1. March 1996, pp. 3-25.

Article 42 contains the Right of access to documents:

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 European Parliament, Council and Commission documents.

Article 41 was based upon case law that had enshrined different principles of good administration.<sup>11</sup> It is worth noting that the right to good administration is treated as a category of rights rather than as a right in its own. It represents the group of rights that is listed in paragraphs two to four. The list should not be seen as exhaustive, so the right to good administration can include other rights than the ones listed in the article. It still leaves ground for the Court of Justice to add further principles to the concept of right to good administration.<sup>12</sup>

## 1.5 European Code of Good Administrative Behaviour

The Maastricht Treaty established the institution of the European Ombudsman with the purpose to combat maladministration in the activities of Community institutions and bodies. Before the Ombudsman, there was only the Committee on Petitions that received complaints from the public. The Committee still exists today but plays a minor role in the work on good administration. Over a number of years, the Ombudsman has continuously worked towards a general law on good administration as a way of preventing maladministration. The Ombudsman has created a Code of Good Administrative Behaviour that contains 27 articles, which in different ways are meant to function as rules on good administration. The introduction states that:

By promoting good administration, the Ombudsman should help enhance relations between the European Union and its citizens. ... The Ombudsman's definition of maladministration in his 1997 Annual Report is that "*maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it*". The European Parliament has approved this definition.

The Code was originally intended to explain in more detail what the Charter's right to good administration should mean in practice. The former Ombudsman Mr. Söderman underlined in a press statement that: "Officials

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<sup>11</sup> For the list of cases that underlie the article and which had included the principle of good administration see: Charter of Fundamental Rights of the European Union. Explanation Relating to the Complete Text. (Brussels, 11 October 2000)

<sup>12</sup> For a discussion of the litigation problem see e.g. Kańska, Klara. "Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights." *European Law Journal*, Vol. 10, No. 3, May 2004, p. 325.

who follow it can be sure that they will avoid instances of maladministration". On 6 September 2001, the European Parliament adopted the Ombudsman's Code in a resolution. The Code is directed towards the institutions and bodies of the European Union and it is expected that their administrations and officials should adopt their own codes or respect the Ombudsman's Code in their relations with the public. The resolution further called on the European Commission to submit a proposal for a regulation built upon the Code of Good Administrative Behaviour. It was proposed that such a regulation could be based on Article 308 of the Treaty establishing the European Community. The Commission has so far not headed this plea because Article 308 because the use of Article 308 demands unanimity by the Council. In some Member States there is a general opposition to the use of Article 308, since it is seen as a way of extending the powers of the Union.

## 1.6 Observations

Before the adoption of the new Constitutional Treaty, the concept of good administration had been codified in two documents with varying status. Firstly, in the Charter of Fundamental Rights of the European Union which only has the ambiguous status of a 'solemn proclamation' by three of the Union's most important institutions. Secondly, the meaning of the concept was elaborated in the Ombudsman's Code of Good Administrative Behaviour, which is not legally binding either. The legal status of the right to good administration will therefore be significantly strengthened if the new Constitutional Treaty, with its Article III-398, is ratified.

A clear trend towards strengthening the procedural rights of individuals affected by administrative decisions has also been noted in most Member States of the European Union.<sup>13</sup> A number of administrative procedures acts have been enacted or reformed over the past 15–20 years, pointing in the direction of a higher degree of regulation of the administrative procedure as well as increased focus on ethical frameworks.<sup>14</sup> This is especially evident among the newer Member States that have recently reformed their administrations. Finland has even incorporated a separate section on procedural principals in their constitution: Section 21 - Protection under the law:

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<sup>13</sup> Schwarze, Jürgen. *European Administrative Law*. London: Sweet and Maxwell, 1992, p.1175-1186.; Harlow, Carol. "Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot." *European Law Journal*, Vol 2. No 1. March 1996, p. 6.

<sup>14</sup> OECD (2000) *Trust in Government: Ethics Measures in OECD Countries*. OECD, Paris, p. 32.

Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.

All Member States of the European Union are furthermore members of the Council of Europe and should thus have been influenced by the recommendations and resolutions that have been issued by the Council of Europe. The Council of Europe has recommended its members to “be guided by” a number of principles that has been set out in recommendations and resolutions as shown above. The term *principles* was consciously preferred to the term *rule* in order to underline that the purpose was not to harmonise national administrative law but rather to promote general recognition of certain principles in the Member States. The idea has been to leave states as much freedom as possible in choosing the means for ensuring that administrative procedures would conform in substance with the proposed principles. In the following presentation, the terms principles and rules will be used in a similar manner. Principles will be used to refer to general principles that in certain cases are codified as legally binding rules, and in other cases as non legally binding codes.

## 1.7 Designing and Distributing the Questionnaire

The purpose of this study is to examine if and to what extent some of the core principles of good administration has been transformed into legally binding rules in the Member States of the European Union. As we have seen above, the right to good administration should not be seen as an enforceable right in itself. Instead, it represents a collection of rights and duties that together creates the right to good administration. It thus needs to be specified in a set of rights and obligations that are more concrete. This specification will inevitably vary in different legal and administrative traditions. The question of what rights and obligations should be included in the right to good administration is therefore a contentious issue.

Based on the Charter of Fundamental Rights of the Union and the European Code of Good Administrative Behaviour the project group selected a set of rights and obligations that were considered essential to the meaning of good administration.<sup>15</sup> Given the practical constraints set by the nature of the survey, the number had to be kept to a minimum. The number of selected principles should therefore not be seen as a assertion of the meaning of good

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<sup>15</sup> Which in their turn are based on the principles developed by the Council of Europe and the case law from the European Court of Justice and the European Court of First Instance.

administration, but rather as a reasonable minimum selection based on practical rather than principled concerns.

The following rights and obligations are, as we have seen, all part of Article 41 and 42 in the Charter of Fundamental Rights of the Union and should naturally be seen as a central part of the concept of good administration.

- to have ones affairs handled impartially and fairly and within a reasonable time (Article 41.1)
- to be heard before any individual measure is taken that would affect the citizen adversely (Article 41.2)
- to have access to his or her file, regarding any individual measure that would affect him or her (Article 41.2)
- the obligation to state reasons in writing for all decisions (Article 41.2)
- the right of access to documents (Article 42).

The following substantive principles are part of the European Code of Good Administrative Behaviour. The following substantive principles were considered minimum substantial requirements for establishing a good administration.

- lawfulness (Article 4)
- non-discrimination (Article 5)
- proportionality (Article 6).

The fundamental value is of course the rule of law and conforming to the law is a minimum requirement for any of the other rights or obligations. The principle of non-discrimination is based on the assumption of equal value of all human beings, which is a corner stone in most legal systems. Finally, the principle of proportionality is one of the most useful tools to control administrative decisions and especially administrative discretion.

The following obligations are further part of the European Code of Good Administrative Behaviour.

- The obligation to be service-minded (Article 12)
- The obligation to give an indication of remedies available to all persons concerned (Article 19)
- The obligation to notify all persons concerned of a decision (Article 20)
- The obligation to keep registers (Article 24)
- The obligation to document administrative processes (Article 24).

Only by means of good record keeping can institutions prove that they have followed a procedure properly. Consequently, only a good record can guarantee the functioning of a good administration. Similarly, if a procedure is not documented from the beginning, many rights become ineffective and meaningless.

These rights and obligations were compiled into a questionnaire consisting of 12 questions (Appendix 2). Instructions were included which explained the questions and the intended scope of the answers. For each individual question, it was asked if they could describe the *regulative framework* regarding the principles in question (primary and/or secondary legislation, case law, administrative rules, or non-codified tradition). It was pointed out that the primary focus was regulation on *national* or *federal* level on the *first administrative level*, not the regulation of the process of appeal. With the benevolent help of the Department of Foreign Affairs, the questionnaire was distributed to all the Swedish embassies in the EU with a request to identify a suitable English-speaking officer in each respective Member State administration that could answer the questionnaire.

## 2 Analysis of the answers

The purpose of the following analysis has been threefold.

- To identify shared principles and rules on good administration in the Member States of the European Union.
- To illustrate similarities and dissimilarities in the material content of the different rules.
- To establish whether a common core of widely accepted rules on good administration exists among the Member States.

The purpose of the study has not been to establish the literal meaning of different national concepts and principles in the area of administrative law, but to collect information relevant for a comparison of the various national systems in order to search for common European values and principles in administrative law. This analysis cannot claim to be exhaustive since it is, it must be remembered, conditioned by the quality of the received answers. The analysis might vary between countries since the quality of the answers tended to vary from very ambitious to less ambitious. The answers varied substantially in one respect – some replies included relevant case law, others did not. The description that is given here is therefore not complete with respect to legal praxis. We have tried to solve this problem by restricting the presentation and analysis to only include written legislation and in some cases codes.

A few notes on the tables. When a square is left empty this means that we either haven't received an answer or the answer haven't provided us with enough information to fulfil the description. In addition, the tables are in many cases not exhaustive of the sometimes very rich answers. The tables are further mainly focused on written legislation while leaving out case law, if not specified elsewhere. Throughout the text, the term *Administrative Procedure Act* has been used to denote the following different laws:



**Table 1 Administrative procedure acts in the Member States**

| <b>Member State</b> | <b>Statute</b>  |
|---------------------|---|
| Austria             | Allgemeines Verwaltungsverfahrensgesetz)  |
| Cyprus              | Law 158 (I) / 99  |
| Czech rep           | Act no. 500/2004 Coll., on administrative proceedings   |
| Denmark             | Forvaltningsloven (lov nr. 571 af 19 december 1985)   |
| Greece              | Code of administrative procedure  |
| Hungary             | Act No. IV. of 1957 on the administrative procedure   |
| Italy               | Act № 241/90  |
| Latvia              | Administrative Procedure Law  |
| Lithuania           | Law on Public Administration  |
| Netherlands         | Algemene Wet Bestuursrecht; AWB   |
| Slovakia            | Law No. 71/1967 Coll. on administrative procedure   |
| Slovenia            | General Administrative Procedure Act  |
| Spain               | Act nº 30/1992 of 26 November. The Legal regime of public administrations and the common administrative procedure act |

By the end of January 2005, the following Member States had answered the questionnaire. The Swedish Agency for Public Administration wishes to extend its gratitude to all the respondents as well as the very helpful personnel at the Swedish embassies throughout the European Union and at the Department for Foreign Affairs. Unfortunately, some answers arrived too late to be included in the analysis, some of these, and other latecomers, will be published on our website:

[http://www.statskontoret.se/good\\_administration](http://www.statskontoret.se/good_administration)

**Table 2 List of respondents**

| Member State   | Respondent   |
|----------------|--|
| Austria        | Federal Chancellery, Constitutional Service  |
| Belgium        | Prof. Frankie Schram<br>Leuven University  |
| Cyprus         | Eleni Symeonidou, Officer<br>The office of the Commissioner for Administration   |
| Czech Republic | JUDR. Otakar Motejl,<br>Public Defender of Rights  |
| Denmark        | Hans Gammeltoft-Hansen<br>Office of the Parliamentary Commissioner for Civil and Military Administration   |
| Estonia        | Kristjan Siigur, Head of public law division<br>Ministry of Justice of Estonia   |
| Finland        | Matti Niemivuo, Deputy Director General<br>Ministry of Justice   |
| France         | Too late for inclusion, but will be published on the homepage  |
| Germany        | Ministry of Interior<br>Too late for inclusion, but will be published on the homepage  |
| Greece         | Michael Roumeliotis with the assistance of Maria Bliati and Rena Papadaki<br>Office of the Greek Ombudsman   |
| Hungary        | Éva Balogh, Head Secretariat for International Affairs<br>Prime Ministers Office   |
| Ireland        | Ministry of Finance  |
| Italy          | Maria Grazia Vacchina, Difensore civico della Valle d'Aosta.<br>Coordinatore della Conferenza nazionale dei Difensori civici delle Regioni e delle Province autonome, Président A.O.M.F. |
| Latvia         | Mrs. Kristine Jarinovska, Director of Department<br>Ministry of Justice  |
| Lithuania      | Jurgita Domeikiene, Deputy Head of Public Administration<br>Department Ministry of the Interior  |
| Luxemburg      | Claude Wiseler<br>Le Ministre de la Fonction Publique et de la Réforme Administrative<br>Too late for inclusion, but will be published on the homepage                                   |
| Malta          | No reply   |
| Netherlands    | Peter van der Gaast, Head International Civil Service Division,<br>Directorate General Management Public Service<br>Ministry of the Interior and Kingdom Relations.                      |
| Poland         | Aleksander Oziewicz<br>Department of Public Administration<br>Polish Ministry of Interior and Public Administration<br>Too late for inclusion, but will be published on the homepage     |
| Portugal       | Luis Valadares Tavares, President<br>National Institute for Public Administration<br>Too late for inclusion, but will be published on the homepage                                       |
| Slovakia       | JUDr. Stachová and JUDr. Henrieta Antalová<br>Ombudsman's Office   |
| Slovenia       | Public Administrations Directorate<br>Ministry of Interior   |
| Spain          | José Pastor Alfonso, Asesora<br>Defensor del Pueblo, Gabinete de Estudios y Documentación  |
| United Kingdom | The Cabinet Office   |



## **2.1 The principles of lawfulness, non-discrimination and proportionality**

### **Lawfulness**

The principle of lawfulness definitely belongs to the core of principles in European administrative law, constitutionally guaranteed in almost every Member State of the EU. In some countries, like Austria for instance, it is explicitly linked to public administration. Article 18, subsection 1 of The Austria Constitution states that: “The entire public administration shall be based on law”. In yet other Member States, it is more of a general principle, stating that all matters under the constitution shall be governed by statutes. Regardless of how it is formulated in the Constitution, the principle of lawfulness is usually also expressed in the respective Administrative Procedure Acts in the Member States.

### **Non-discrimination**

This principle is constitutionally guaranteed in an explicit manner in almost every Member State. In some Member States, the constitution also enumerates the grounds on which discrimination is forbidden. The Austrian Constitution for instance, explicitly states that privileges shall not be based upon “...birth, sex, estate, class or religion...”(Article 7, subsection 1). The Slovenian Constitution is even more exhaustive. Article 14 (1) states:

(1) In Slovenia, each individual shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political and other beliefs, financial status, birth, education, social status or whatever other personal circumstance.

Other constitutions, like the Finnish, does not contain such enumerations. Instead, it is simply stated that everyone is equal before the law and that no one shall, without an acceptable reason, be treated differently from other persons on the ground of a reason that concerns his or her person. The administrative procedure acts/civil service acts/state administration acts or similar in the Member States also contain the principle of non-discrimination. These usually contain more exhaustive enumerations on the grounds on which privileges shall not be based. For instance, Article 6 of the Administrative Procedure Act in Latvia states: “In matters where there are identical factual and legal circumstances, institutions and courts shall adopt identical decisions (in matters where there are different factual or legal circumstances – different decisions) irrespective of the gender, age, race, skin colour, language, religious beliefs, political or other views, social origin, nationality, education, social and financial status, type of occupation or other circumstances of participants in the administrative proceedings.”

## Proportionality

The principle of proportionality is not as widely spread as a constitutional principle as the aforementioned principles. However, it is definitely a widely accepted principle in national case law. In some Member States, it is also part of the statutes, most often of an Administrative Procedure Act or similar. In Finland, for instance, section 6 of the Administrative Procedure Act states that the acts of the authority shall be impartial and proportionate to their objective.

## Are the principles defined in a precise manner?

This is not always the case. The principles, as stated in the respective Constitutions, are generally not precisely formulated. Instead, they gain their practical importance from the case law of the courts. Through case law, their meaning can be precisely delineated and applied to specific cases. Although all the above-mentioned principles may be precisely defined, yet, in the same time, definitions are of illustrative manner and they leave a certain margin of appreciation for a decision-maker.

**Table 3** Forms of enactment of certain principles

|                | Lawfulness   | Non-discrimination | Proportionality         |
|----------------|--------------|--------------------|-------------------------|
| Austria        | Constitution | Constitution       | Case law                |
| Belgium        | Constitution | Constitution       | Administrative practise |
| Cyprus         | Constitution | Constitution       | Statutes                |
| Czech republic | Constitution | Constitution       | Statutes                |
| Denmark        | Constitution | Constitution       | Case-law                |
| Estonia        | Constitution | Constitution       | Constitution            |
| Finland        | Constitution | Constitution       | Statutes                |
| Greece         | Constitution | Constitution       | Case-law                |
| Hungary        | Constitution | Constitution       | Constitution            |
| Ireland        |              |                    |                         |
| Italy          |              |                    |                         |
| Latvia         | Constitution | Constitution       | Constitution            |
| Lithuania      | Constitution | Constitution       | Statutes                |
| Netherlands    | Constitution | Statutes           | Statutes                |
| Slovakia       | Statutes     | Statutes           |                         |
| Slovenia       | Constitution | Constitution       | Constitution            |
| Spain          | Constitution | Constitution       | Statutes                |
| Sweden         | Constitution | Constitution       | Case-law                |
| UK             |              | Statutes           |                         |

## 2.2 The right to have one's affairs handled impartially and fairly

In most Member States, these principles are, in one way or another, constitutionally guaranteed. They may also be laid down in statutes, most often in an Administrative Procedure Act. The exact wordings vary: “impartiality” and “fairness” is for instance sometimes replaced by the duty of the public administration to act with “objectivity” or to “treat everyone on an equal basis”.

In 1999 the OECD Public Management Committee (PUMA) launched a survey on managing ethics in the public service in all OECD countries. It is perhaps interesting to note that *impartiality/neutralty/objectivity* was the most frequently stated core public service value in the OECD countries<sup>16</sup>.

### What is considered impartial? On what grounds can an official be disqualified?

#### ***General rules on disqualification***

There are several differences regarding the grounds for disqualification of biased officials. These are usually laid down in statutes, most often an Administrative Procedure Act. In the legislation of some Member States, it is simply stated that an official should abstain from participating in a decision, when he or she has a personal interest in the matter. Such rather unspecified grounds for disqualification appear for instance in § 9 (1) of the Slovakian Administrative Procedure Act and can also be found in article 14 of the Latvian Administrative Procedure Act:

An official in respect of whose impartiality there may exist justified doubts shall not participate in the taking of the decision.

A “personal interest” or “justified doubts about impartiality” are however not very specific grounds for disqualification. In many Member States, it has been left to the case law of the courts to determine how these general provisions should be interpreted. However, when examining statutory regulation in the Member States, there is also definitely a common core of more detailed principal reasons for disqualification. The following reasons are shared by most Member states.

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<sup>16</sup> OECD (2000). *Trust in Government: Ethics Measures in OECD Countries*. OECD, Paris, p. 32.

### ***Specific rules on disqualification***

#### *When personally concerned by the matter*

The perhaps most obvious case of personal interest is when the official him- or herself is a participant in the proceeding. This is a widely accepted ground for disqualification.

#### *Relationship with interested parties*

The Spanish Administrative Procedure Act, has an elaborated definition of what should be considered “relationship”, stating:

- b) Relationship by consanguinity up to four degrees removed or a relationship by affinity up to twice removed with any of the interested parties, with the directors or entities or companies concerned and also with the consultants, legal representatives or attorneys intervening in the procedure, and a shared professional office or association with them for consultancy, representation or the remit (article 28, “abstention”).

The Finnish Administrative Procedure Act, section 28 (1) states that an official shall be disqualified if he/she or a close person is a party to the matter. A close person is defined as:

- (1) the spouse of the official, a child, grandchild, sibling, parent, grandparent of the official, a person otherwise especially close to the official, as well as the spouse of the same;
- (2) a sibling of a parent of the official and the spouse of the same, a child of a sibling of the official and a previous spouse of the official; and
- (3) a child, grandchild, sibling, parent and grandparent of the spouse of the official, the spouse of the same, as well as a child of a sibling of the spouse of the official.

A comparable half-relative shall also be considered a close person. For purposes of this section, a spouse is defined as a partner in wedlock, a domestic partner and a partner in a registered partnership.

#### *Friendship/acquaintance with interested party*

As demonstrated in the Finnish example above, kinship is not the only ground for disqualification. A “close person”, is also defined as a person “otherwise especially close to the official”. Friendship, or acquaintance with an interested party is a common ground for abstention. In Spain, an official shall be disqualified if he or she has an “intimate friendship” with any of the interested parties (article 28, Administrative Procedure Act).

#### *Possible own benefit from the matter*

According to the Finnish Administrative Procedure Act, an official shall be disqualified not only if a specific benefit or a specific loss from the decision of the matter is foreseen for him/her, but also if specific benefit or loss from the decision is foreseen for a close person to him/her (section 28).

### *Commercial relationship with interested party*

A commercial or service relationship to a party is a common ground for disqualification of an official. However, what should be considered a “service relationship” varies. There may also be additional and specific provisions. For instance, the Spanish Administrative Procedure Act includes a time aspect, stating that one reason for abstention is:

A service relationship with an individual or legal entity directly interested in the matter or, in two previous years, to have rendered professional services to it of any sort in any circumstances or place.

In the Estonian Administrative Procedure Act, it is stated that not only is professional relationship with a participant in a proceeding sufficient ground for disqualification, but also professional relationship with a representative of the participant (section 10).

### *Representative of a party in the proceeding*

Another common ground for disqualification occurs when the official, or someone close to him or her, is a representative of a party in the proceedings. For instance, section 28 (2) in the Finnish Administrative Procedure Act, stipulates that an official shall be disqualified if: “... he/she or a close person assists or represents a party or a person due to gain specific benefit or suffer specific loss from the decision of the matter”.

### *When an official has participated earlier in the proceeding*

Some Member States have laid down in legislation that an official, who has participated earlier in the process, shall be disqualified. For instance, Article 35 (4) of the Slovenian Administrative Procedure Act states that an official shall be disqualified if “...he/she has been involved in a procedure in the first instance or has participated in deciding”.

§ 9 (2) of the Slovakian Administrative Procedure Act contains a similar provision, stating that exclusion “shall apply also to the person who took part in the proceedings as an employee of an administrative authority of a different level”.

### *Unspecified reasons*

Even in Member States where the grounds for disqualification are largely specified, there are in some cases also additional and rather elastic provisions. In Finland for instance, section 28 (7) of the Administrative Procedure Act states that an official shall be disqualified:

(7) If his/her impartiality is compromised for another special reason.

In the Swedish Administrative Procedure Act, there is a similar article, stating that an official, apart from the other reasons enumerated, also shall be disqualified:



5. If there is some other special circumstance that is likely to undermine confidence in his impartiality in the matter.

## Exceptions

Exceptions to rules on impartiality do exist. For instance: In article 10 (5) of the Estonian Administrative Procedure Act, which is quite exhaustive on the grounds for disqualification, it is also stated that:

A person shall not be removed if he or she cannot be substituted.

The Austrian Administrative Procedure Act also contains a similar exception, stating in article 7 (2):

In any case of imminent danger, if it is not possible to immediately appoint a substitute, also an administrative officer who is biased is entitled to perform the necessary official acts himself.

**Table 4**      **Examples of grounds for disqualification and exceptions**  
(Summaries of and quotes from received answers)

|           |  |
|-----------|--|
| Austria   | <p>Paragraph 7 of the Administrative Procedure Act: "(1) In exercising their duties, administrative officers shall abstain from the following matters for which they have to appoint a substitute: 1. Matters in which the officer personally, his/her spouse, a relative or in-law in ascending or descending line, a descendant of brothers or sisters or any other person closer related or an in-law of the same degree, is involved; 2. Matters of foster parents or children, wards or persons under their guardianship; 3. Matters in which they were or still are appointed representative of a party; 4. If there are any other important reasons resulting in doubts as to their full unbiasedness; 5. In an appeals proceeding if they had been involved in issuing the ruling appealed against. (2) In any case of imminent danger, if it is not possible to immediately appoint a substitute, also an administrative officer who is biased is entitled to perform the necessary official acts himself"</p> <p><u>Exception:</u> § 7 (2) Administrative Procedure Act: "In any case of imminent danger, if it is not possible to immediately appoint a substitute, also an administrative officer who is biased is entitled to perform the necessary official acts himself".</p> |
| Belgium   | <p>This has to be regarded in relation to the different functions. Statutes of the officials contain specific deontological dispositions.</p>  |
| Cyprus    | <p>According to section 42 of the Administrative Procedure Act, the following officials must not take part in the decision making process: officials who have a special or peculiar relationship or interest, or officials related by blood or affinity, until the fourth degree or officials who are in acute hostility.</p> <p><u>Exception:</u> Participation of an otherwise excluded official in the decision-making process is allowed when: (1) the administrative act cannot be issued by another competent authority or (2) the administrative organ cannot convene to decide on the matter, due to lack of quorum.</p>   |
| Czech rep | <p>According to Section 14 of the Administrative Procedure Act, an official shall be disqualified when her or she: (1) is a participant in proceedings upon which the administrative proceedings in question have an impact (e.g. bankruptcy proceedings, criminal proceedings etc.), (2) has a direct material or other personal interest in the arrangement of the case, and is thus positively motivated towards a positive or negative result of the proceedings, (3) a person close to the worker has such an interest in the arrangement of the case, (4) has a familial or close relationship to the participants in the proceedings or</p>   |

to their representatives, (5) is representing the participant in the given case, (6) is directly subordinate to or superior to the participant in the proceedings or the representative thereof within a working relationship, (7) demonstrates a conspicuously hostile approach to the participant in the proceedings or to persons close to the participant to such an extent that there is a probability that this hostility will have an influence on the worker's objectivity.

Denmark Articles 3-6 Administrative Procedure Act: Personal or economic interest in the matter; relationship; intimate friendship etc

Estonia Article 10, Administrative Procedure Act: “(1) A person acting on behalf of an administrative authority shall not participate in an administrative proceeding if: 1) He or she is a participant in the proceeding or acts as a representative of a participant in the proceeding; 2) he or she is a relative (parent, child, adoptive parent, adopted child, brother, sister, grandparent or grandchild), the spouse or a relative by marriage (spouse's parent, child, adoptive parent, adopted child, brother, sister, grandparent or grandchild), or if he or she is a family member of a participant in the proceeding or of a representative of a participant in the proceeding 3) he or she is in a professional, service or other dependent relationship with a participant in the proceeding or his or her representative; 4) he or she is in any other manner personally interested in the resolution of the matter or other circumstances give reason to doubt his or her impartiality”.

Exception: Article 10 (5), Administrative Procedure Act(5): “A person shall not be removed if he or she cannot be substituted”

Finland Section 28, Administrative Procedure Act: “An official shall be disqualified: (1) if he/she or a close person is a party to the matter; (2) if he/she or a close person assists or represents a party or a person due to gain specific benefit or suffer specific loss from the decision of the matter;

(3) if specific benefit or specific loss from the decision of the matter is foreseen for him/her or a close person as referred to in subsection 2, paragraph 1; (4) if he/she is in service with or in a pertinent commission relationship to a party or a person due to gain specific benefit or suffer specific loss from the decision of the matter; (5) if he/she or a close person as referred to in subsection 2, paragraph 1 is a member of the board, supervisory board or a corresponding organ of, or the managing director or in a comparable position in, a corporation, foundation, state enterprise or institution that is a party or that is due to gain specific benefit or suffer specific loss from the decision of the matter; (6) if he/she or a close person as referred to in subsection 2, paragraph 1 is a member of the executive body or a corresponding organ of an agency or institution, where the matter pertains to the supervision or oversight of the agency or institution; or (7) if his/her impartiality is compromised for another special reason”

Greece Article 7 Administrative Procedure Act (Impartiality of the administrative bodies): “1) The administrative bodies, one-member or collective ones, should provide guarantees of impartial judgement in the performance of their duties.2) The one-member bodies, as well as the members of the collective bodies, should refrain from any action or procedure constituting participation in decision-making or expression of opinion or proposal if: a) the satisfaction of their personal interest is related to the course of the case or b) they are spouses or relatives by blood or affinity, unlimitedly in straight line and up to the fourth degree in oblique line, with one of the interested parties or c) they have a special bond or peculiar relation or animosity with the interested parties. 3) If the body or member of collective body finds that there are grounds for their abstention, they should immediately state them to their superior authority or the chairman of the collective body respectively, and refrain from any action. In such cases, the superior authority or the collective body decides on the matter as soon as possible. 4)An application for the exclusion of an one-member body or a member of a collective body may be submitted by the interested parties at any state of the procedure. The application is submitted to the superior authority or the chairman of the collective body or to the deciding body, as the case may be. For all other matters, the

provisions of the last sentence of the previous paragraph are also applicable in this case. 5) The exclusion may also be order[ed] ex officio by the superior authority or the collective body.”

Exception: Article 7 (6) of the Administrative Procedure Act: “The provisions of the previous paragraphs are not applied in the event that abstention is declared or exclusion is requested of such a number of members of a collective body that the remaining members cannot attain the quorum provided for in paragraph 1 of article 14.”

Hungary The Administrative Procedure Act states that in the administrative procedure, those civil servants whose impartial judgement can be questioned shall not participate.

Ireland A public servant who is covered by the Ethics in Public Office Acts, 1995 and 2001, is required to provide an annual Statement of Interests where an interest of the person or a spouse or child could materially influence the person in discharging his/her official functions. Where an official function falls to be performed and the person has actual knowledge that he/she or a connected person (i.e. relative, business partner, etc.) has a material interest in the matter, the person must resign from performing the function unless there are compelling reasons which must be stated.

Italy

Latvia Article 14, Administrative Procedure Act. “An official in respect of whose impartiality there may exist justified doubts shall not participate in the taking of the decision”

Lithuania Article 21, Law on Public Administration: “(1). A state civil servant or municipality officials shall disqualify himself or must be disqualified from participation in an administrative procedure if: 1) a participant in an administrative procedure is his close relative, a family member, a relative by marriage, or decisions made may entail personal advantage or when in the case at issue he acts as a representative of the party to the procedure; 2) he is employed in the same institution as one of the parties to the administrative procedure; 3) his impartiality is open to doubt because of some other circumstances which may result in a conflict of interests”.

Netherlands Public officials are obliged to declare side jobs and in order to avoid conflicts of interest, following the Civil Servants Law (*Ambtenarenwet*) and codes of conduct. There is a ban on certain side jobs. Disobedience can be followed by disciplinary proceedings.

Slovakia § 9 of the Administrative Procedure Act: An official of the administrative authority is excluded from dealing and deciding in a matter, if in view of his/her relation to the matter, to the parties to the procedure or their representatives, he/she may be expected to be biased. From dealing and deciding about a matter before administrative authorities is excluded also any person which participated in the same matter as an official of the administrative authority of another instance.

Exceptions: § 11 (2), Administrative Procedure Act “The biased administrative authority employee shall take only those actions which may not be delayed”

Slovenia Article 35 of the General Administrative Procedure Act: “The head or the authorised official person of the authority may not decide in the procedure, or perform individual acts: 1. If, in the affair that is the object of the procedure, he/she is the party, a partner of rights, witness, expert, attorney or legal proxy of the party; 2. If the party or his/her legal proxy or attorney is connected with him/her through linear consanguinity or collateral consanguinity one up to the fourth degree included or if he/she is the party’s spouse or connected with him/her through affinity up to the second degree, even if the marriage has been dissolved, or if he/she is living or lived with him/her in de facto marriage; 3. If he/she is the guardian, adopter, adoptive person or foster parent of the party, his/her attorney or legal proxy; 4. If he/she has been involved in a procedure in the first instance or has participated in deciding”.

Spain § 28 (2) of the Administrative Procedure Act: “(2) The following are reasons for abstention: a) A personal interest in the matter or some other whose settlement may influence it; the post of director in a company or entity interested; or litigation pending with an interested party. b) Relationship by consanguinity up to four degrees removed or a relationship by affinity up to twice removed with any of the interested parties, with the directors or entities or companies concerned and also with the consultants, legal representatives or attorneys intervening in the procedure, and a shared professional office or association with them for consultancy, representation or the remit. c) Intimate friendship with or manifest enmity toward any of the persons referred to in the previous point. d) Intervention as expert or witness in the proceeding concerned. e) A service relationship with an individual or legal entity directly interested in the matter or, in two previous years, to have rendered professional services to it of any sort in any circumstances or place”

Sweden Section 11 of the Administrative Procedure Act: “The person charged with handling a matter is disqualified: 1. if the matter concerns himself or his spouse, parents, children, brothers or sisters or someone else who is closely related to him, or if he or someone closely related to him can expect extraordinary advantage or detriment from the outcome of the matter; 2. if he, or anyone closely related to him is the legal representative of someone that the matter concerns or of anyone that can expect extraordinary advantage or detriment from the outcome of the matter; 3. if the matter has been brought before the authority by an appeal against or the subordination of the decision of another authority or by reason of the supervision of another authority and he had taken part earlier under the auspices of the subordinate authority in the final handling of a matter concerning the same material issue; 4. if he as regards the material issue has served someone as a representative or has assisted him for payment, or 5. if there is some other special circumstance that is likely to undermine confidence in his impartiality in the matter”.

Exception: Section 11 of the Administrative Procedure Act: “Disqualification shall be disregarded where the question of impartiality is obviously of no importance”.

UK

## 2.3 The right to have one’s affairs handled within a reasonable time

In some of the EU Member States, this right is constitutionally guaranteed, while in others, it is provided for in statutes, often in an administrative procedure act.

In some Member States, like Latvia, the right is not explicitly laid down in statutes but derives from case law. Article 92 of the Latvian constitution states that “everyone has the right to defend their rights and lawful interests in a fair court”. The Latvian Constitutional Court has in one of its decisions explained that a “fair court”, includes adjudication of the case in a reasonable time. However, the following table, it should be noted, only shows explicit provisions in written legislation.

The general right to have one’s affairs handled within a reasonable time – if legally guaranteed – can be formulated in various ways. The Finnish constitution for instance, stipulates that everyone’s case shall be dealt *without undue delay*. Though other Member States may lack this kind of general

provision, the right to have one's affair handled within a reasonable time, may be even better ensured by the setting of specific time limits for administrative matters.

In Slovenia, the right is only constitutionally guaranteed for court proceedings. For all other proceedings the right is laid down in several different acts. The Civil Servants Act states that a civil servant is responsible for quick and efficient performance of all tasks entrusted to him/her. The State Administration Act further stipulates that the administration is liable to ensure the fastest and easiest possible realization of the clients' rights and legal benefits. In addition, the Administrative Procedure Act contains provisions regarding time limits for the handling of administrative matters.

### **Are there any explicit time limits in statutes?**

The general right to have one's affairs handled within a reasonable time limit automatically raises the question what should be considered "reasonable". While this is not specified in statutes in some countries, like Sweden for instance, others have a general time limit for administrative matters, most often expressed in an administrative procedure act. It is also quite common to have explicit time limits, for specific occasions or matters, laid down in separate acts.

Instead of a general time limit, or in combination with it, the legislation in some Member States stipulates that authorities upon request shall supply the interested party with an estimated time of issue of a decision (Finland, Spain). And § 41 of the Estonian Administrative Procedure Act stipulates that if an administrative measure cannot be taken within a prescribed term, an administrative authority shall promptly "...give notice of the probable time of issue of the administrative act or taking of the measure and indicate the reasons for failure to comply with the prescribed term".

### ***General time-limits applicable to the whole administration***

While some Member States provide a general time limit for administrative matters, others don't. Perhaps it would be more accurate to talk of general time *limits*, rather than just one limit. In Lithuania for instance, there is no general time limit for administrative matters, but general time limits for the authorities decision-making, duration of consideration, giving information, responding to letters and forwarding an application to the competent authority etc. Any general time limits (regardless of the nature of the matter) are mostly provided for in statutes, most often in an administrative procedure act. However, these time limits are only applicable if no other terms are specified in regulatory enactments. The average time limit for the handling of an ordinary administrative matter seems to be about one month, counted from the day when the procedure was instituted. Though some Member States lack general time limits for the handling of administrative

matters, special laws usually enact explicit time limits for special procedural acts.

***Extension of time limits***

The Slovenian Administrative Procedure Act, makes a distinction between on the one hand, procedures in which no special procedural investigation is necessary prior to the decision and on the other, matters which demands oral proceedings, inspections, expert-work and so on. If no extraordinary procedures are necessary, the time limit is one month. Nevertheless, if prior procedures are needed, the authority must issue a decision within two months. The Spanish Administrative Procedure Act contains a similar provision, as well as the Administrative Procedure Act of Slovakia.

In some Member States, legislation also contains time limits for the extension of the usual time limits for administrative proceedings. In Latvia for instance, the Administrative Procedure Act prescribes that the time period for handling an administrative matter – in exceptional cases – may be extended up to six months. The time limit may also be extended if the party in an administrative proceeding submits a petition that is incomplete. Then – as in Spain - the time limit starts when the authority has received a complete petition. The Spanish Administrative Procedure Act also permits an extension of the time limit when a prior and mandatory pronouncement must be secured from a European community body.

**Table 5 Provisions regarding time limits**

|                | <b>General rule in statutory or constitutional regulation</b> | <b>General time limits for administrative proceedings (examples)</b>  |
|----------------|---|---|
| Austria        | Yes   | Decisions on submission of parties, or appeals, at latest within 6 months after receipt.  |
| Belgium        | No  | General time-limits can be found in different administrative legislation.   |
| Cyprus         | Yes   | Answering petitions (30 days)   |
| Czech republic | Yes   | Decision at the latest within 30 days of the commencement of the proceedings, to which a period of up to 30 days is added if it is necessary to order verbal negotiations or a local investigation. |
| Denmark        | Yes   | No.   |
| Estonia        | Yes   | No. Special statutes provide explicit time limits for some special occasions  |
| Finland        | Yes   | No. Special statutes provide explicit time limits for some special occasions.   |
| Greece         | Yes   | Decision making (50 days if not specified differently elsewhere). Information demands: 60 days.   |
| Hungary        | Yes   | Decision making (30 days from the date of petition)   |
| Ireland        | Yes (Code*)   | No.   |
| Italy          | No  | 30 days unless provided for in separate statutes.   |
| Latvia         | No  | Decision-making (30 days).  |
| Lithuania      | No  | Forwarding to competent authority (within 5 days). Decision-making (30 days). Consideration of complaint (30 days).   |
| Netherlands    | Yes   | Maximum 8 weeks, if impossible the administration is to contact the citizen concerned and establish new limits.   |
| Slovakia       | Yes   | Decision making: 30 days unless a special law stipulates otherwise. 60 days in very complex matters. Immediately in simple matters.   |
| Slovenia       | Yes   | Decision making (30 days from the date of receiving a complete petition).   |
| Spain          | Yes   | Administrative proceedings (3 months, if not specified elsewhere).  |
| Sweden         | Yes   | No. In exceptional cases though, for example in the financial area and due to EU regulations, there are certain time limits.  |
| UK             | No  | No.   |

\* The Ombudsman's Guide to Standards of Best Practise for Public Servants

## **2.4 The right to be heard, before any individual measure is taken that would affect the citizen adversely**

The right to be heard in an administrative procedure is – not surprisingly – widely accepted as a general principle. In almost every Member State, this right can in one way or the other be derived from the constitution, even though it is seldom explicitly spelled out. The right to be heard is further regulated in statutes, most often in an administrative procedure act. Article 9 (1) of the Slovenian Administrative Procedure Act is a rather representative example:

(1) Before a decision is issued, the party must be afforded the opportunity to be heard on all facts and matters relevant for the decision.

### **If a citizen exercises the right, are there specific criteria for the form of communication between the citizen and the official, e.g. oral or written communication?**

#### ***Oral or written communication?***

In most Member States, there is the possibility of both written and oral communication. Article 40 (1) in the Estonian Administrative Procedure Act reads:

(1) An administrative authority shall, before issue of an administrative act, grant a participant in a proceeding a possibility to provide his or her opinion and objections in a written, oral or any other suitable form.

In Finland, according to the Administrative Procedure Act, the main rule is that the communication is in written form. Oral communication is however possible if it is necessary in order to clarify the matter and if written procedure would cause unreasonable inconvenience to the party (Administrative Procedure Act, Section 37).

#### ***Additional provisions***

A separate article of The Lithuanian Law on Public Administration guarantees the right of a person of diminished capacity to be heard (article 25):

1. A person who has been recognized as being of diminished capacity shall be entitled to be heard upon his own or his guardian's request. The guardian must also be heard in order to protect the interests of the person of diminished capacity.
2. A person of diminished capacity must be heard on the issues relating to the income or property, which he has the right to use or manage.



## **Exceptions**

The right to be heard is not always without exceptions. These however, appear, in various forms. The following categorization is merely an attempt to give a few examples of the most common exceptions.

### ***Rapid decision needed***

When there is a need for prompt action for prevention of damage arising from delay, legislation in some Member States permits the authorities to make exceptions to the right to be heard.

### ***Large number of participants***

Article 40 (3) in the Estonian Administrative Procedure Act contains an exception to the right to be heard, in cases where an administrative act is issued as a general order and the number of participants in the proceeding exceeds fifty. The Danish Administrative Procedure Act contains a similar provision in article 19 (5).

### ***Decision in favour of the applicant***

In Sweden, as well as in Estonia, legislation grant exceptions from the right to be heard, in cases when decisions anyhow are in favour of the participant in the proceeding.

**Table 6 The right to be heard**

|             | General rule in statutory or constitutional regulation | Oral or written communication       | Possible exceptions   |
|-------------|--|-------------------------------------|---|
| Austria     | Yes  | Both                                | Prompt action is required; facts are exceedingly clear etc.   |
| Belgium     | Yes  | Mainly oral                         | In emergencies or when person involved can't be reached.  |
| Cyprus      | Yes  | Both                                |   |
| Czech rep   | Yes  | Both                                |   |
| Denmark     | Yes  | Both                                | Legal time limit for decision might be exceeded; large number of participants in a proceeding etc.  |
| Estonia     | Yes  | Both                                | Prompt action is required; the number of participants in the proceeding exceeds fifty; the participant in the proceeding is not known; if the resolution is not made against the participant in the proceeding.   |
| Finland     | Yes  | Both, but mainly written            |   |
| Greece      | Yes  | Both                                | General decisions that will apply to an indefinite number of persons. To avoid significant risk. Reasons of imperative public interest.   |
| Hungary     | Yes  |                                     |   |
| Ireland     |  |                                     |   |
| Italy       |  |                                     |   |
| Latvia      | Yes  | Both                                |   |
| Lithuania   | Yes  | Both                                | When the application is granted at once and the decision does not violate the interests of other persons; when circumstances call for an immediate decision; when the law provides otherwise.   |
| Netherlands | Yes  | Both                                |   |
| Slovakia    | Yes  | Both                                | If not required by the character of the matter; if not stipulated by special law.   |
| Slovenia    | Yes  | Both                                |   |
| Spain       | Yes  |                                     |   |
| Sweden      | Yes  | Both, form decided by the authority | 1. if the decision is not adverse to the party, if the information is of no importance or if such measures for some other reason are obviously unnecessary; 2. if the matter concerns appointment to official office, admittance to non-compulsory education, issuance of diplomas or grades, appropriation of research grants or comparable matters, provided the matter does not concern a determination by a superior instance on appeal; 3. if it may be feared that implementation of the decision on the matter would otherwise be rendered considerably more difficult, or; 4. if the determination cannot be postponed. |
| UK          | Yes  | Both                                | Exceptions in some areas of public administration.  |

## **2.5 The right to have access to his or her file, regarding any individual measure that would affect him or her**

The right for a party in a proceeding to have access to his or her file in an administrative matter is widely spread among the Member States in the EU. More often laid down in statutes than as an explicit constitutional right, even though many constitutions give the citizens a general right of access to administrative files. In Spain for instance, article 105 (b) of the Spanish constitution states that the law shall make provision for:

The access of citizens to administrative files and records, except to the extent that they may concern the security and defence of the State, the investigation of crimes and the privacy of person.

The further regulation of how this general right works in administrative proceedings, is then usually laid down in an Administrative Procedure Act or similar. In Finland, section 12 of the constitution provides a general right of access to public documents and recordings. This is further specified in section 12 of the Finnish Act on the Openness of Government, which gives every individual the right of access to information contained in an official document and pertaining to themselves, unless otherwise stated in an Act. This provision is complemented in section 11, which stipulates that a party in an administrative proceeding also shall have the right of access to a document which is not in the public domain, if they may influence or may have influenced the consideration of his or her matter.

In Austria, the right is explicitly regulated in relation to ongoing administrative proceedings. The Austrian Administrative Procedure Act (§ 17, subsection 1), states that the authority shall "...as long as not provided differently in the administrative rules and regulations, grant the parties the right of inspection of the files or parts of files concerning their case..." The authority must also grant all parties involved in a particular proceeding access to the files to an equal extent.

In some Member States, there are special provisions regarding the rights of the wider public to have access to the files in a proceeding. In Slovenia, the Administrative Procedure Act states that the right to have access to documents in an administrative matter stretches not only to the parties in the procedure, but also to "...any person credibly showing his/her legal interest to inspect the documents" (article 82, subsection 2). However, only the parties themselves have the right to inspect documents that contain classified data.

According to article 37 of the Estonian Administrative Procedure Act, the right to examine documents relevant in a proceeding, is not limited to the parties, but extends to everyone:

1. Everyone has the right, in all stages of administrative proceedings, to examine documents and files, if such exist, which are relevant in the proceedings and which are preserved with an administrative authority.

### **Special provisions concerning copies**

The Austrian Administrative Procedure Act (§ 17), states that besides the right of having access to their files, the parties are also allowed to make their own copies or have copies made at their own expense, depending on the technical possibilities available. A similar provision is laid down in article 82 (1) in the Slovenian General Administrative Act, the Estonian Administrative Procedure Act (section 37). The Estonian Administrative Procedure Act also stipulates that examination of files and documents shall be done in the workrooms of the authority and in the presence of an official (section 37).

### **What exceptions to this right are accepted (e.g. protection of privacy, protection of commercial interests)?**

The widely accepted right for parties to have access to their file is not without exceptions. There seem to be a core of exceptions, common to almost every Member State. The right to have access to one's file may in almost every Member State be restricted on the grounds of national security, trade secrets or privacy. These can be regarded as general "core exceptions". But to give an exhaustive list of possible exceptions to the general rule is almost impossible. The legislators in many of the Member States seem to have solved this by simply saying that disclosure of information may be prohibited or restricted by another legislative act.

In some Member States, the list of general exceptions laid down in legislation is more exhaustive. Apart from the abovementioned exceptions, it is also quite common to make exceptions when disclosing information may do damage to ongoing proceedings i.e. when it might jeopardize the work of the authority.

It would be difficult to go more into detail here, regarding the exceptions. The focus in our study is on a few general exceptions, common to most Member States. These are of course specified further in each national context, either through statutes or by case law. For instance, in many Member States the right of parties to have access to their files is restricted when this might do damage to "justified interests of either another party in the process, or third parties". What then is to be considered "justified interests"? Suffice to say, it is almost impossible to give an exhaustive list

of how this has been specified in each Member State. Therefore, this presentation focuses on the general rules.

**Table 7 Provisions for access to one's file.**

|                | <b>General rule in statutory or constitutional regulation</b> | <b>Examples of restrictions</b>  |
|----------------|---|--|
| Austria        | Yes   | Possible damage to justified interests of either party or of third parties; jeopardizing the work of the authority; impairing the objective of the proceeding; when provided differently in administrative rules and regulations.  |
| Belgium        | Yes   | When certain interests that can be found in legislation on access to administrative documents are damaged. A person cannot have access to police files and files of the security services about him.   |
| Cyprus         | Yes   | Information which might prejudice the interests of the service, or the interests of a third person   |
| Czech republic | Yes   | Parts of the file which contain confidential information or matters to which a legally imposed or acknowledged obligation to maintain secrecy relate are excluded from study of the file   |
| Denmark        | Yes   | The authority's internal working documents; state security and defence; national economic interests; prevention and clearing-up of any infringement of the law   |
| Estonia        | Yes   | If disclosure of information contained in a document is prohibited by a legislative act.   |
| Finland        | Yes   | When restrictions are provided in an Act.  |
| Greece         | Yes   | National security. Collected information about particularly serious crimes.  |
| Hungary        | Yes   | Personal data.   |
| Ireland        | Yes (Code)*   |  |
| Italy          | Yes   | Person's state of health or sex life.  |
| Latvia         | Yes   | When restrictions are provided in an Act; trade secrets; private life of natural persons, documents intended for internal use in an institution.   |
| Lithuania      | Yes   | When restrictions are provided in an Act; state security; public order; financial interests of the state; protection of rights and freedoms of private persons.  |
| Netherlands    | Yes   | Several exceptions: in any case security-related exceptions.   |
| Slovakia       | Yes   | Banking secrets, tax secrets, business secrets or possible violation of any statutory privacy right imposed or acknowledged by the law.  |
| Slovenia       | Yes   | No right for parties (or third parties) to inspect the record relative to the deliberations and eventual drafts or records in an administrative matter.  |
| Spain          | Yes   | Files containing information on national defence or state security; files on matters protected by commercial or industrial secrecy; files concerning investigation of crimes and the privacy of persons.   |
| Sweden         | Yes   | According to Chapter 14, Section 5, of the Secrecy Act, no document or other material may be disclosed, if and to the extent that with regard to any public or private interest it is of utmost importance that secret information contained in the material is not disclosed. |
| UK             | Yes   | Information about identifiable third party. When subject access would be likely to prejudice the prevention or detection of crime or the apprehension or prosecution of offenders.   |

\* The Ombudsman's Guide to Standards of Best Practise for Public Servants

## **2.6 The right to general access to documents**

In a majority of the EU Member States, this is considered a fundamental right, and it is therefore constitutionally guaranteed as a principle of transparency. According to the Finnish constitution for instance, an official document shall only be secret if it has so been provided in an Act, or if it has been declared secret by an authority by virtue of an Act.

### **How are the exceptions formulated?**

As in Q4, it is impossible to give an exhaustive list of possible exceptions. The most common exceptions are nearly the same as in Q4. The right of access to documents may be restricted when disclosure of information may damage state/public service/commercial or bank secrets. Access to documents may also be denied when threatening foreign policy interest or when documents contain private information about other persons than the applicant.

### **Is it necessary for a citizen to specify a reason when applying for access to documents?**

An essential part of the right of access to document in some Member States, is the provision that the person requesting access need not to identify himself, nor explain the reason for the request. This is for instance the case in Finland, Sweden and Lithuania (see table below) and it seems to be more widely spread than the opposite requirement that the applicant needs to specify any reason for requesting access to documents.

### **Are there fees for accessing documents?**

Handing out a copy of a document may be subject to a charge. This is the case in Finland, according to section 34 of the Act on the Openness of Government Activities. It is also stated that a citizen may also – free of charge – get oral information or inspect the document in the premises of the authority. Still, charging citizens when handing out copies of documents seem to be quite common among the Member States in the EU (see table below). In Latvia, article 13 of the Freedom of information Law stipulates that charges “...for the provision of information shall not exceed the expenses of the searching for, additional processing and copying of documents or information” (subsection 2). According to the same article, subsection 3, an applicant may request exception from the charge.

**Table 8 Provisions for access to documents.**

|             | General rule in statutory or constitutional regulation | Need to give reasons  | Possible charge for copies |
|-------------|--|---|----------------------------|
| Austria     | Obligation of officials to inform the public           | No  | No                         |
| Belgium     | Yes  | Only when asking for documents of personal matter.  | Yes                        |
| Cyprus      | Yes  | Yes   |                            |
| Czech rep   | Yes  | No  | Yes                        |
| Denmark     | Yes  | No  | Yes                        |
| Estonia     | Yes  |   |                            |
| Finland     | Yes  | No  | Yes                        |
| Greece      | Yes  | No  | Yes                        |
| Hungary     | Yes  | Yes   |                            |
| Ireland     | Yes  | No  | Yes                        |
| Italy       | Yes  |   |                            |
| Latvia      | Yes  | Only when asking for restricted info  | Yes                        |
| Lithuania   | Yes  | No  | Yes                        |
| Netherlands | Yes  | Yes   | Yes                        |
| Slovakia    | Yes  | Yes   | Yes                        |
| Slovenia    | Yes  | No  | Yes                        |
| Spain       | Yes  | Yes: individual petition must be formulated   | Yes                        |
| Sweden      | Yes  | No, generally not. In certain cases, and only if it is necessary, the authority may ask for reasons in order to be able to decide whether the document may be made available. | No                         |
| UK          | Yes  |   |                            |

**Table 9 Selected examples of grounds for restrictions**

|             |  |
|-------------|--|
| Austria     | Principle of secrecy: officials pledged to secrecy about all facts of which they have obtained knowledge exclusively from their official activity.   |
| Belgium     | Documents on nuclear material; privacy; an in law formulated secrecy; the secrecy of the deliberations of the federal government; the fundamental rights and freedoms of the citizens; the federal international relations of Belgium; the public order; the security and the defence of the country.  |
| Cyprus      | Information which might prejudice the interests of the service, or the interests of a third person.  |
| Czech rep   | the rights and freedoms of others, security of the state, public security, protection of public health and morality  |
| Denmark     | The authority's internal working documents; state security and defence; national economic interests, Records of meetings of the Council of State; Correspondence between authorities and outside experts for use in court proceedings  |
| Estonia     | Information intended for the authority's internal use, or if disclosure of information is declared secret by an Act; info that might damage foreign relations; private or personal data  |
| Finland     | If declared secret in an act or if declared secret by an authority by virtue of an act   |
| Greece      | Private or family life of a third party; other peoples racial descent/sexual orientation/ religious beliefs; information which might hinder the authorities investigation of an offence.   |
| Hungary     |  |
| Italy       | Person's state of health or sex life.  |
| Ireland     | Privacy, confidentiality, the conduct of government business, security, international relations etc.   |
| Latvia      | Interests of national security, territorial integrity, public safety, fundamental rights and freedoms of individuals or whenever specified in another act.   |
| Lithuania   | State, public service, commercial or bank secret. Foreign policy interests. Private information about other persons.   |
| Netherlands | Right for obtaining all public official documents; however no right to acquire individual internal policy advisory documents.  |
| Slovakia    | Banking secrets, tax secrets, business secrets or possible violation of any statutory privacy right imposed or acknowledged by the law.  |
| Slovenia    | Public security, national security, confidentiality of international relations, business secrets, private information about individuals.   |
| Spain       | Security and defence of the state, the investigation of crimes and the privacy of persons.   |
| Sweden      | 1. the security of the Realm or its relations with a foreign state or an international organisation; 2. the central financial policy, the monetary policy, or the foreign exchange policy of the Realm; 3. the inspection, control or other supervisory activities of a public authority; 4. the interest of preventing or prosecuting crime; 5. the public economic interest; 6. the protection of the personal integrity or economic circumstances of private subjects; or 7. the preservation of animal or plant species. |
| UK          |  |



## **2.7 The obligation to state reasons in writing for all decisions**

The legal requirement that the authorities shall provide reasons in writing for their decisions seems to be widely spread among the Member States of the EU. However, it appears in slightly different forms and with a variety of exceptions. According to article 58 (2) of the Austrian Administrative Procedure Act for instance, reasons must be provided:

(2) Whenever the point of view of the party is not fully shared or decisions are taken on objections or submissions of persons involved, the reasons therefore shall be stated in the ruling.

This means that the only situation in which the giving of reasons can be omitted is when the demands of the requesting party are fully fulfilled and there are no other, contradictory demands by other parties. The Estonian Administrative Procedure Act contain a similar exception to the general principle that reasons shall be stated (article 56, subsection 4). In cases when "...the application of the addressee of the administrative act is satisfied and the rights and freedoms of third parties are not restricted", then the reasoning need not set out the factual basis for issue of an administrative act. Other Member States have more exhaustive, or detailed lists of situations in which reasons shall be stated. Article 54 of the Spanish Administrative Procedure Act for instance, states that the authorities have to state reasons in the following cases:

- a) Decisions limiting rights or legitimate interests.
- b) Those resolving ex officio review procedures of administrative provisions or decisions, administrative remedies, claims prior to litigation and arbitration.
- c) Those differing from criteria applied in previous proceedings or the opinion of consultant bodies.
- d) Resolutions suspending decisions, irrespective of the reasons for such suspension, and the adoption of provisional measures in the terms of Articles 72 and 136 of this Act.
- e) Resolutions for application of urgent formalities or extensions of deadlines.
- f) Those handed down in the use of discretionary authorities, and those which must be handed down by virtue of a specific legal or regulatory provision.

Article 20 in the Swedish Administrative Procedure Act states that reasons shall be provided in each decision, but this general rule is followed by an enumeration of possible exceptions:

1. if the decision is not adverse to any party or if for some other reason it is obviously unnecessary to state the reasons,

2. if the decision concerns appointment to public office, admittance to noncompulsory education, issuance of diplomas or grades, appropriation of research grants or comparable matters,
3. if it is necessary out of concern for the national security, the protection of the private or economic interests or some comparable circumstance,
4. if the matter is of such an urgency that there is no time to formulate the reasons for the decision, or
5. if the matter concerns the issuance of regulations pursuant to Chapter 8 of the Instrument of Government, provided the matter does not concern a determination by a superior instance on appeal

Generally, it seems to be the case that administrative decisions shall be issued in writing. However, in some Member States, like Finland, a decision may also be issued orally, if this is unavoidable due to the urgency of the matter. This is also the case in Latvia. The Latvian Administrative Procedure Act allows the oral issuing of administrative acts in urgent situations, when the case is objectively insignificant and the issuing of an administrative act in writing is impossible or insignificant.

### **Are “reasons” specified in any particular way (e.g. that they must be adequate, clear and sufficient?)**

What then, is to be considered giving reasons? In most Member States, this is at least partly, specified in law. For instance, paragraph 60 of the Austrian Administrative Procedure Act reads:

The reasons given for the decision shall summarize the results of the investigation procedure, the arguments determining the evaluation of the evidence and the opinion on the legal issue in a clear and concise manner.

The Finnish Administrative Procedure Act contains a similar provision, specifying that the statement of the reasons shall indicate the circumstances and information that have affected the decision and the provisions that has been applied (section 44).

In other Member States, like Sweden for instance, specifying what should be considered giving “reasons” has been left to the case law of the courts. Yet another case in point is Lithuania. Here, the specification of “reasons” has been made in a code, namely The Code of Administrative Violations of Law, article 286. However, it contains similar requirements as the above-mentioned acts.

Regardless of the form in which “reasons” are specified, there is definitely, what could be called a “core definition”. Basically, stating reasons require giving the factual and legal basis for the issue and also the considerations made when taking the decision.

**Table 10 Provisions for stating reasons**

|                | General rule in statutory or constitutional regulation | Decisions for which reasons shall be stated and examples of possible exceptions   |
|----------------|--|---|
| Austria        | Yes  | Whenever the point of view of the party is not fully shared or decisions are taken on objections or submissions of persons involved, the reasons therefore shall be stated in the ruling.   |
| Belgium        | Yes  | All written decisions taken by a public authority in an individual case.  |
| Cyprus         | Yes  | All, except when the administrative act (1) did not involve the application of discretionary powers, (2) favors the interests of the administered, (3) is one of many, issued uniformly and using mechanical or electronic means, (d) has a general context, (e) is not required by law to be reasoned.   |
| Czech republic | Yes  | Whenever the administrative body in its statement does not comply with the wishes of all participants in the proceedings.   |
| Denmark        | Yes  | All. When decision has been issued orally, the addressee may request and shall be given the decisive reasons in written form.   |
| Estonia        | Yes  | All, but not needed if the application of the addressee of the administrative act is satisfied and the rights and freedoms of third parties are not restricted.   |
| Finland        | Yes  | All.  |
| Greece         | Yes  | Every individual administrative deed should contain a justification.  |
| Hungary        | Yes  |   |
| Ireland        | Yes*   | All.  |
| Italy          | Yes  | All, apart from regulatory documents and documents of a general nature where no reasoning is required.  |
| Latvia         | Yes  | All.  |
| Lithuania      | Yes  | All.  |
| Netherlands    | Yes  |   |
| Slovakia       | Yes  | All, except when all parties to the procedure are fully satisfied with the decision.  |
| Slovenia       | Yes  | All.  |
| Spain          | Yes  | a) Decisions limiting rights or legitimate interests. b) Those resolving ex officio review procedures of administrative provisions or decisions, administrative remedies, claims prior to litigation and arbitration. c) Those differing from criteria applied in previous proceedings or the opinion of consultant bodies. d) Resolutions suspending decisions, irrespective of the reasons for such suspension, and the adoption of provisional measures in the terms of Articles 72 and 136 of this Act. e) Resolutions for application of urgent formalities or extensions of deadlines f) Those handed down in the use of discretionary authorities, and those which must be handed down by virtue of a specific legal or regulatory provision   |
| Sweden         | Yes  | All, except: 1. if the decision is not adverse to any party or if for some other reason it is obviously unnecessary to state the reasons, 2. if the decision concerns appointment to public office, admittance to non-compulsory education, issuance of diplomas or grades, appropriation of research grants or comparable matters, 3. if it is necessary out of concern for the national security, the protection of the private or economic interests or some comparable circumstance, 4. if the matter is of such an urgency that there is no time to formulate the reasons for the decision, or 5. if the matter concerns the issuance of regulations pursuant to Chapter 8 of the Instrument of Government, provided the matter does not concern a determination by a superior instance on appeal. |
| UK             |  |   |

\* Code: Ombudsman's guide to standards of best practise for public servants

**Table 11**      **Specification of “reasons”, summaries of and quotes from received answers**

|             |  |
|-------------|--|
| Austria     | § 60 of the Administrative Procedure Act: “The reasons given for the decision shall summarize the results of the investigation procedure, the arguments determining the evaluation of the evidence and the opinion on the legal issue in a clear and concise manner”.  |
| Belgium     | According to the Act of 29 July 1991 on the formal motivation of individual decisions, giving reasons means stating the applied legal norms, as well as the facts pertinent to the case upon which the authority based its decision.   |
| Cyprus      | According to section 28 in the Administrative Procedure Act, reasoning must be clear and unambiguous. Mere reference to general characterizations, that can be applied and operate in every case, as well as simple references to general legal terms, does not constitute sufficient reasoning.   |
| Czech rep   | The administrative body must primarily clarify the reasons which led it to subordinate the actual facts of the case to the legal facts of the case in such manner that the decision as a whole is comprehensible to the person addressed.  |
| Denmark     | Article 24 of the Administrative Procedure Act stipulates that reasoning shall set out the factual and legal basis for the issue. The reasoning for the issue of an administrative act issued on the basis of the right of discretion shall set out the considerations from which the administrative authority has proceeded upon issue of the administrative act.   |
| Estonia     | Article 56 of the Administrative Procedure Act enacts: “(2) Reasoning shall set out the factual and legal basis for the issue. (3) The reasoning for the issue of an administrative act issued on the basis of the right of discretion shall set out the considerations from which the administrative authority has proceeded upon issue of the administrative act.” |
| Finland     | According to section 44 of the Administrative Procedure Act, reasons shall indicate the circumstances and information that have affected the decision and the provisions that have been applied (statutes).  |
| Greece      | Article 17 (2) of the Code of Administrative Procedure: “The justification should be clear, specific, sufficient and derived from the particulars of the file, unless the law expressly stipulates that it should be contained in the deed”.   |
| Hungary     | According to the Administrative Procedure Act, reasons shall consist of facts and relevant accepted proofs; regulation which the decision is based on; involved special administrative organs.   |
| Ireland     | The Irish Office of the Ombudsman’s Guide to Standards of Best Practice for Public Servants it is stated that: dealing “ <i>openly</i> ” with people means -giving people full information on the reasons for a decision which adversely affects them including details of any findings of fact made in the course of the decision.                                  |
| Italy       | Section 3, Act № 241/90 (The Administrative Procedure Act) states that decisions shall specify the questions of fact and of law underlying the decisions by the administration, as related to the results of the preliminary investigation.  |
| Latvia      | Article 67 of the Administrative Procedure Act stipulates that an official has to mention not only norms of law, which has been applied, but also basis for the administrative act, including, in particular, considerations of usefulness.  |
| Lithuania   | According to article 286 of the Code of Administrative Violations of Law decision in administrative procedure must consist of established facts, motivated evaluation of them and the provision of legal acts on which the decision is based.  |
| Netherlands |  |

|          |   |
|----------|---|
| Slovakia | § 47 (3) of the The Administrative Procedure Code stipulates that motivation shall contain facts that were relevant for the decision, the considerations which influenced the evaluation of the evidence and the legal rules on which the decision was taken.   |
| Slovenia | Article 214 of the General Administrative Procedure Act: “ (1) The statement of reasons of the decision shall comprise: 1. explanation of the claims of the parties and their allegation about the facts; 2. the established real state of affairs and the proofs it is based on; 3. the reasons that were decisive for the estimation of individual proofs; 4. the indication of the provisions of the regulations on which the decision is based; 5. the reasons which, on account of the established real state of affairs, had prompted such a decision, and 6. the reasons due to which certain claims of the parties were not granted”. |
| Spain    |   |
| Sweden   | Not specified in statutes.  |
| UK       |   |

## 2.8 The obligation to notify all persons concerned of a decision

The general obligation to notify all persons concerned of a decision is recognized by a large number of the Member States of the EU. However, it is regulated in different forms. For instance, the regulations regarding who is to be notified vary a bit. In Finland, the Administrative Procedure Act states that the authorities must notify not only the party of a proceeding, but also other known persons who have standing to appeal against it or seek its rectification. There is a similar provision in article 62 (2) of the Estonian Administrative Procedure Act regarding who should be notified by delivery:

- 1) persons whose rights are restricted by the administrative act or to whom additional duties are imposed by the administrative act;
- 2) persons against whose interests an earlier administrative act is repealed or amended.

These kind of legal provisions seem to be common to the majority of the Member States. Legislators generally have found it sufficient to state that “the parties” in a proceeding, or “a person adversely affected by a decision”, shall be notified thereof.

### **Are there any particular requirements for such notification?**

#### ***Written or oral notification?***

In Latvia for instance, there is either the possibility of communicating the decision orally or in writing. However, if the decision is unfavourable to the addressee, it must be sent by mail. This is also the case in Finland. If the decision imposes an obligation and if the appeal period or another period affecting the rights of the recipient begins from the service, then it shall be carried out by post against a postal receipt. In Hungary, the decision may be

communicated orally if the citizen is present at the end of the decision-making procedure. However, if he/she requests a written decision, it must be sent to him/her within 8 days. In urgent cases, Hungarian law also allows notification by telecommunications. The Austrian Administrative Procedure Act contains a similar provision. Notification may be written or oral, but when oral, each party has the right to demand a written notice. Yet another variant appears in Estonia. Here, article 62 of the Administrative Procedure Act states that participants in a proceeding shall be notified of the decision in a freely chosen form.

### ***Notification procedure***

Some Member States have quite elaborated rules regarding the procedure for notification. The Spanish Administrative Procedure Act stipulates that notifications may be implemented by any means allowing record or receipt by the interested party or their representative and the date, identification and content of the decision notified. The Spanish administrative procedure act also contains detailed rules on where notification shall take place in proceedings initiated at the request of the interested party. For instance, in situations when an interested party is not present at his or her address at the time of notification, it may be received by anyone present there who identifies themselves (article 59, subsection 2). The Spanish Act covers quite a range of situations, for instance situations where the interested party or their representative rejects notification and how decision should be notified when the last known address is overseas. Regarding technical means for notification, the Austrian Administrative Procedure Act is one of the more elaborated, regulating in paragraph 18, subsection 3, how a written notification might be made:

(3) After submissions have been processed, the result shall be rendered in writing if such procedure is expressly stated in the administrative rules and procedures or requested by the party. The written document on the submission processed may be delivered or communicated by telegram, telex or telefax. Submissions processed in writing may be communicated by e-mail or in any other technically feasible way, if the party has expressly consented to this mode of communication or if it has submitted its submissions in the same manner and not expressly objected to this mode of communication with the authority.

### ***Contents of notification***

In some Member States, it is simply stated that the decision shall be notified. However, as we have seen earlier in this study, there are also separate regulations on how decisions shall be motivated. Still, some Member States also specifies to a large degree what substantial contents the decision shall have when notified. The Spanish Administrative Procedure Act for instance, states that the delivered decision must contain:

“...the full text of the resolution, stating whether or not final in administrative channels, the remedies available, the authority before which they must be brought, and the deadline for doing so, without prejudice of the interested parties exercising any other they may deem fit” (article 58, subsection 2).

### ***Time limits for notification***

The Finnish Administrative Procedure Act contains a rather general prescription that notification shall be made “without delay”. This seems to be the most common sort of formulation regarding time limits for notifying a decision. However, some Member States do have explicit time limits. Article 58 in the Spanish Act n° 30/1992 of 26 November (The Legal regime of public administrations and the Administrative Procedure Act) for instance, prescribes that all notifications must be issued within ten days counted from the date on which the decision was handed down. Moreover, in Slovenia, competent authorities must issue and serve decisions within one or two months from the day of the receipt of the complete petition, depending on who initiated the proceedings.

### ***Exceptions***

Legislation in some Member States also covers situations in which notification cannot be made. For instance, the Spanish Administrative Procedure Act states that when interested parties to a proceeding are unknown, as is the place of notification or the notification was attempted and could not be given, it will be issued in announcements on the edicts notice board of the Municipal Corporation of the last address, in the "Official State Gazette" or in that of the Autonomous Government or Province, depending on the type of Administration where the decision to be notified originated, and the territorial scope of the authority issuing it. Slovenia has the same kind of provisions pertaining to situations in which notification cannot be carried out properly. Article 87 (3) of the Slovenian Administrative Procedure Act states that in these cases:

“... the person serving the documents shall leave a written note indicating the place where the document can be taken over and that it must be taken over within 15 days in the mail box, on the door of the lodging, business place or workshop or at another appropriate spot. The person serving the documents shall indicate on such a note, as well as on the document to be served, the reasons of such service and the date when he/she affixed the note on the door or left it at another appropriate spot, and signs his/her name”

Many Member States also make exceptions from the general notifying procedures, when decisions concern a large number of people. In Hungary for instance, the decision may be communicated in public in such cases.

**Table 12 Examples of notification procedures**

|             | General rule in statutory or constitutional regulation | Notification procedure  |
|-------------|--|---|
| Austria     | Yes  | Written or oral notification. The written document on the submission processed may be delivered or communicated by telegram, telex or telefax. Submissions processed in writing may be communicated by e-mail or in any other technically feasible way, if the party has expressly consented to this mode of communication. Proof of receipt is required if there are important reasons for it, and personal receipt if there are especially important reasons for it, or if an Act so demands. |
| Belgium     | Yes  | Written notification.   |
| Cyprus      | Yes  |   |
| Czech rep.  | Yes  | According to the Administrative Code, the decision is delivered in person or by verbal announcement (Section 72 Paragraph 1).   |
| Denmark     | Yes  | Written form, notification of parties in the proceeding by competent authority. In some cases proof of receipt is required.   |
| Estonia     | Yes  | Parties should be notified in a freely chosen form; notification by delivery to persons whose rights are restricted by the administrative act or to whom additional duties are imposed by the administrative act as well as persons against whose interests an earlier administrative act is repealed or amended.   |
| Finland     | Yes  | Shall be served without delay to parties and other known persons; shall be effected as regular or verifiable service or, if it cannot be so effected, as service by public notice; if decision imposes obligations on recipient, or if it marks the beginning of an appeal period affecting recipient, it shall be effected by post against postal receipt.   |
| Greece      | Yes  | Any suitable means, unless there are special provisions in the law that require specific means.   |
| Hungary     | Yes  | Decision in writing. When the citizen is present at the end of procedure, he or she may be informed orally, but he or she may also request written decision within 8 days. When urgent, decision can be communicated by telecommunication. Decisions may also be exhibited in public depending on the number of concerned persons.  |
| Ireland     |  |   |
| Italy       | Yes  |   |
| Latvia      | Yes  | Orally or in writing. If an administrative act is unfavourable to addressee it has to be sent by mail.  |
| Lithuania   | Yes  | In cases of petition: applicant or his representative shall within 10 days after concluded consideration be informed in writing on the adopted decisions. In the case of administrative violation of law the decision shall be delivered or sent to persons concerned within 3 days from the date when it is made.  |
| Netherlands | Yes  | Dependent on the weight of a particular decision, more precaution is taken in formulating communication-requirements in specific implementing regulations.  |
| Slovakia    | Yes  | The decision is communicated to the party to the procedure by delivery of the decision in a written form, unless the Administrative Code stipulates otherwise. Any important instruments, particularly decisions, are delivered to the own hands of the addressee or a person having provided an authorisation to act as an agent for service.  |
| Slovenia    | Yes  | Depending on who initiated the process, competent authorities must issue and serve decisions within one or two months from the day of the receipt of the complete petition; decision must be served on the party in original; documents shall be served by post, in electronic form or by the authority through its official person.  |
| Spain       | Yes  | Written, within ten days, from the date on which the decision was handed down; record of receipt by the interested party; notification at the interested party's address; if they are not present it may be received by anyone present who identifies themselves; issued by publication on the notice-board of the Consulate if last known address is overseas.   |
| Sweden      | Yes  | The authority decides whether the notification shall be effected orally, by ordinary letter, by service or in some other way. The notification shall, however, always be given in writing, if the party so requests.  |
| UK          |  |   |



## 2.9 The obligation to give an indication of remedies available to all persons concerned

The obligation to give an indication of available remedies seems to be generally accepted in the Member States of the EU.

### What information should be included?

Actually, the Member States do not differ significantly, regarding what information should be included. In Austria, according to paragraph 58 subsection 1 in the Administrative Procedure Act, administrative decisions must include information on whether a remedy is available, of what type (e.g. appeal to the superior administrative authority), deadline for the remedy and to which authority it is to be addressed. The Estonian Administrative Procedure Act contains a similar, but briefer formulation. According to article 57 an administrative act shall contain a reference to the possibilities and place of and terms and procedure for the challenging the administrative decision.

Though some Member States simply state that a party shall be informed of how to appeal, the same sub categorization as in Austria and Estonia appear in the majority of the Member States. Decisions shall include information on whether a remedy is available, which authority is to be addressed, deadline for remedy and procedure for challenging the decision.

### Additional provisions

The Finnish Administrative Procedure Act contains an additional provision. Section 46 states that if the decision is open to appeal only after its rectification has first been sought in specific rectification proceedings, *the instructions for seeking such rectification* shall be issued at the same time as the decision (Section 46). The Latvian Administrative Procedure Act contains another additional provision, stating that if the authorities fail to include indications of available remedies, the validity of the act may be challenged (article 67).

### Are there exceptions?

A general exception from the possibility to make an appeal is when the highest-ranking authority takes the decision. Still, this does not free the authorities from their duty to indicate remedies available (or in this case: that there are no remedies available). On the contrary, section 48 in the Finnish Administrative Procedure Act for instance, states that if appeal is prohibited under a special provision or if decision is not open to appeal the decision shall contain a notice of the same, citing the legal provision under which appeal is precluded. There is of course, still another exception: in cases when decision is in favour of the party, no indication of remedies available has to be done.

**Table 13**                      **Obligation to give information on available remedies**

|             | General rule in statutory or constitutional regulation | Information to be included   | Exceptions |
|-------------|--|--|------------|
| Austria     | Yes  | (1) whether a remedy is available, (2) of what type (e.g. appeal to the superior administrative authority), (3) deadline for the remedy and (4) to which authority it is to be addressed.  | No         |
| Belgium     | Yes  |  |            |
| Cyprus      | Yes  | 1) Nature and form of the available remedies, 2) limitations prescribed by the Constitution, relevant law, 3) the Court which the administered can appeal to, 4) the administrative organ that the administered can apply to.  |            |
| Czech rep.  | Yes  | The instruction must contain a statement of the period for appeal, including indication of the day on which this commences, as well as the appeal body and the body to which the appeal is to be submitted and the fact that appeal has no delaying effect.  |            |
| Denmark     | Yes  | Time-limit and the authority where the appeal can be made.   | No         |
| Estonia     | Yes  | An administrative act shall (1) contain a reference to the possibilities and (2) place of and (3) terms and (4) procedure for the challenging of the administrative act.   | No         |
| Finland     | Yes  | A decision that is open to appeal shall be accompanied by appeal instructions. If appeal is prohibited under a special provision or if decision is not open to appeal the decision shall contain a notice of the same.   | No         |
| Greece      | Yes  | Possibility of appeal, the competent body for examination, the time limit and the consequences of failure to file such appeal.   | No         |
| Hungary     | Yes  | Decision has to include indication of remedies.  | No         |
| Ireland     | Yes (Code)*  |  |            |
| Italy       | Yes  | The body to which an appeal can be made and the time limit for doing so.   |            |
| Latvia      | Yes  | An administrative act shall contain an indication as to where and within what time period such an administrative act may be disputed or appealed.  |            |
| Lithuania   | Yes  | Indication of the appeal possibility and the procedure of challenging the decision.  | No         |
| Netherlands | Yes  |  | No.        |
| Slovakia    | Yes  | Whether the decision can be challenged, time periods for the appeal, the authority and the place to which the appeal shall be addressed.   | No.        |
| Slovenia    | Yes  | What legal remedies can be exhausted with reference to the issued administrative act, the name of the issuing body against which the party concerned can appeal, the name of body to which the appeal should be addressed, period allowed for appeal, and methods of filing an appeal (written form or put on record) as well as indication as to administrative fees and charges. | No         |
| Spain       | Yes  | Decisions must set out the remedies available against them, the administrative or judicial authority where they must be filed and the deadline for doing so.   | No         |
| Sweden      | Yes  | Party shall be informed about how to appeal. and shall at the same time be informed of any dissenting opinions under Section 19 of the Administrative Procedure Act or which have been noted under special provisions.   | No         |
| UK          | Yes  | Government organisations are obliged to have published procedures setting out how members of the public can question decisions or complain about the service provided. The procedures should clearly explain each stage of the process, and the options available to complainants should they remain unhappy with the outcome at each stage.                                       |            |

\* The Ombudsman's Guide to Standards of Best Practise for Civil Servants

## **2.10 The obligation to document an administrative procedure**

Most EU Member States have legal regulations on how to document an administrative procedure, although they differ significantly. The common denominator – the core regulations in this field - seems to be the rules on how minutes of oral applications shall be taken. This obligation may be regulated at a more or less detailed level. The Finnish Administrative Procedure Act is quite general; simply saying that a demand or information submitted orally that might affect the decision in a matter shall be registered or filed in another suitable manner. In other Member States, the rules on the taking of minutes are more elaborated and can be subcategorised into questions regarding *when* and *how* minutes shall be taken, and *what* they should include. However, there are also a few exceptions to this rule. In Latvia, for example there is no obligation on the authorities to document an administrative procedure in any specific way.

### **When shall minutes of verbal statements be taken?**

Article 18 in the Estonian Administrative Procedure Act stipulates that minutes of oral applications shall be taken when:

1. a participant in proceedings submits a reasoned application for taking of minutes;
2. the administrative authority which hears the matter deems it necessary to take minutes;
3. the content of the procedural act is provision of a statement, opinion or explanation to an administrative authority;
4. the duty to take minutes arises from an Act or regulation.

In Hungary, minutes of oral applications shall be taken when it is deemed necessary by the authority in charge, or when the client so requests. The Austrian Administrative Procedure Act contains a similar prescription. Article 14 states that submissions submitted orally by the persons involved shall, in case of necessity, be recorded in writing.

### **How shall minutes of verbal statements be taken?**

In the Lithuanian administrative procedure act, article 26 prescribes verbal statements must be recorded in the verification report and signed by the persons carrying out the verification. Written explanations shall also be attached to the verification report. Article 14 in the Austrian Administrative Procedure Act prescribes that minutes on hearings “...shall be worded in such a manner that, when eliminating everything not pertinent to the matter, the course and the contents of the hearing are recorded correctly and understandably.

### **What should be included?**

According to article 18 in the Estonian Administrative Procedure Act, minutes shall include:

1. the time and place of performance of the procedural act;
2. the name of the administrative authority performing the procedural act, and the names of participants in proceedings, interpreters and translators, experts and witnesses present;
3. the purpose of the procedural act;
4. the applications submitted in the course of the procedural act;
5. the content of explanations of participants in the proceedings, statements given by experts or witnesses or the results of the on-the-spot visit of inspection.

The Austrian Administrative Procedure Act is also quite elaborated regarding what should be included. According to article 14, minutes shall contain:

1. place, date, and subject matter of the official act and, in case there have been any pertinent official acts at an earlier date, a brief presentation of the status of the matter;
2. the name of the authority and of the officer in charge of the official act as well as of other officers involved, of the persons involved who were present and their representatives, as well as of any witnesses and experts examined.
3. the personal signature of the person in charge of the official act.

### **Documenting the administrative process**

Apart from rules on how verbal statements shall be dealt with, some Member States have legislation on how an entire administrative process should be documented. One case in point here is the Estonian Administrative Procedure Act, where article 19 deals with preservation of documents relevant to administrative proceedings.

1. An administrative authority shall preserve requests, applications, evidence, minutes, information concerning the delivery of summonses and documents, and other documents relevant to the administrative proceedings, and create a file if necessary.
2. An administrative authority shall make notations in a file concerning facts relevant to the administrative proceeding which are not evident from the documents contained in the file.
3. The documents specified in subsection (1) of this section shall be preserved pursuant to the procedure prescribed in the Archives Act and the archival rules established on the basis thereof.

The Slovenian regulation in this field is even more detailed. The decree on the Handling of Documentary Material by Public Administration Autho-

rities regulates for instance the operation of public administration when receiving, checking mail and forwarding mail, how documentation of the authorities' work should be done and how documentary material should be archived.

## **2.11 The obligation to keep registers**

The principle that the authorities should keep public registers seems to be recognized by a large number of the Member States of the EU. In Latvia, the Freedom of Information Act states that every institution shall keep a register. There are no general rules on how this should be done, but the act simply states that information shall be registered "...in conformity with the prescribed record-keeping of the institution". Still, it is an established administrative practice that all documents are registered and kept in a certain registry. One exception to this rule, however, is Austria, where there are no regulations on the establishment and keeping of general registers.

The general obligation to keep registers can be subcategorised according to *how* documents should be registered to enhance accessibility, *what* documents should be included in the register and *which* information should be entered into the register to make it searchable for citizens.

### **How shall documents be registered?**

Some Member States, for instance Estonia, have explicitly laid down the legal provision that each agency shall keep a document register in the form of a digital database. The registrars of document registers shall grant access to the document registers and shall create indexes and instructions in order to facilitate the finding of documents. Spain has a similar provision. Article 38 (3) of the Administrative Procedure Act states:

General registers and all those set up by the Public Administrations to receive submissions and communications from individuals or administrative authorities must be stored in a computer support

### **What documents shall be included in the register?**

According to article 12 of the Estonian Public Information Act, the following shall be registered in a document register:

- 1) documents received by the agency and documents released by the agency, on the day on which the documents are received or released or on the following working day;
- 2) legislation prepared and signed in the agency, on the date of signature thereof;
- 3) contracts entered into.

The Spanish Administrative Procedure Act contains a similar provision. Article 38 (1) reads:

Administrative authorities will keep a general register with entry of any submission or communication filed or received in any of its administrative offices. Dispatch of submissions and official communications to other authorities or individuals will also be entered there.

### **What information shall be included in the register?**

How then, to make the register searchable? How to facilitate access to documents? Which information shall be included in the register? Article 12 in the Estonian Public Information Act states that – “at least” the following information shall be included:

- 1) from whom the documents are received or to whom they are released;
- 2) the date of receipt or release;
- 3) the manner in which the documents are received or released (by electronic mail, post, fax, courier or delivered in person);
- 4) requisite information on the documents;
- 5) the type of documents (petitions, memoranda, decisions, requests for information, letters, etc.);
- 6) restrictions on access to the documents.

In Spain, the same type of information shall be included in registers. Article 38 (3) in the Administrative Procedure Act prescribes:

The system must guarantee record in each entry of a number, a heading indicating its nature, date of entry, date and time of filing, identification of the interested party, the referring administrative authority if required, and the person or administrative authority it is sent to and, if applicable, reference to the content of the submission or communication registered.

Similar provisions are enumerated in article 27 of the Slovenian Decree on the Handling of Documentary Material by Public Administration Authorities. In order to enhance accessibility, administration registers shall for instance include the following information regarding the matter:

- the code of the matter.
- the subject of the matter.
- short summary of the matter.
- the state of affairs of the matter.
- the date when the processing began.
- the mark or identification sign of the authority (unit) or the officer processing the matter.

But there are also provisions regarding what data shall be recorded concerning an individual document (Slovenian Decree on the Handling of Documentary Material by Public Administration Authorities , article 33):

- subject,
- date of receipt or delivery of the document and in documents for internal requirements the date of creation (entry, exit and own documents);
- code of the document;
- short summary of the document (identification of the contents);
- the mark whether it is an entry, exit or own document (records of entry, exit or own documents);
- identification sign of the organisation unit or officer processing the matter or compiling the document;
- number and short description of the appendices to the document.

**Table 14 Obligation to register documents**

|             | Generally applicable rule | Documents to be registered   | Exceptions  |
|-------------|---------------------------|--|---|
| Austria     | No                        |  |   |
| Belgium     | No                        |  |   |
| Cyprus      | Yes                       | Incoming documents, files of general nature, personal files.   |   |
| Czech rep.  | Yes                       |  |   |
| Denmark     | Administrative practice   | All documents.   |   |
| Estonia     | Yes                       | 1) documents received by the agency and documents released by the agency, on the day on which the documents are received or released or on the following working day; 2) legislation prepared and signed in the agency, on the date of signature thereof; 3) contracts entered into. | Accounting documents shall not be entered in a document register.   |
| Finland     | Yes                       | Authorities shall maintain an index of any matters submitted and taken up for consideration and any matters considered and decided.  | No.   |
| Greece      | Yes                       | Incoming documents.  | Outgoing documents (though often registered as administrative practice).  |
| Hungary     | Yes                       | Every public administration entity is responsible to develop its own document registration system which has to conform to the general rules.   |   |
| Ireland     |                           |  |   |
| Italy       |                           |  |   |
| Latvia      | Administrative practice   | Not specified.   |   |
| Lithuania   | Yes                       | Documents created or received in the course of the exercising of the powers and activities of state or municipal institutions, agencies or enterprises must be registered.   | Congratulations, invitations, private letters and other documents that are not related to liability and risk concerning not-registration of the document.   |
| Netherlands | Yes                       | All official ingoing and outgoing documents are to be kept. Internal documents up to a certain time and of a certain nature.   | No.   |
| Slovakia    | Yes                       | All documents.   | No.   |
| Slovenia    | Yes                       | All documents.   | No.   |
| Spain       | Yes                       | Administrative authorities shall keep a general register with entry of any submission or communication filed or received in any of its administrative offices. Dispatch of submissions and official communications to other authorities or individuals will also be entered there.   |   |
| Sweden      | Yes                       | The general rule is that an official document shall be registered without delay when it has been received or drawn up by an authority.   | If it is evident that a document is of minor importance to the activities of the authority it does not have to be registered. Also, registration of official documents to which secrecy does not apply may be omitted provided the documents are kept in such manner that it will not present any difficulty to ascertain whether a document has been received or drawn up. |
| UK          |                           |  |   |



**Table 15 Requirements for registers**

| Rules on accessibility |  | Selected examples of information to be included in register  |
|------------------------|--|--|
| Austria                |  |  |
| Belgium                |  |  |
| Cyprus                 | Files in registers must be numbered.   | Incoming documents: a) received from, b) reference, c) received on, d) subject-matter, e) file number.   |
| Czech rep              | Both traditional and modern means of dissemination of information in electronic networks are used for this purpose.  |  |
| Denmark                | Not specified.   | Not specified.   |
| Estonia                | Each agency shall keep a document register in the form of a digital database. Also the registrars of document registers shall grant access to the document registers and shall create indexes and instructions in order to facilitate the finding of documents.                              | 1) from whom the documents are received or to whom they are released; 2) the date of receipt or release; 3) the manner in which the documents are received or released (by electronic mail, post, fax, courier or delivered in person); 4) requisite information on the documents; 5) the type of documents (petitions, memoranda, decisions, requests for information, letters, etc); 6) restrictions on access to the documents. |
| Finland                | Authorities must make sure that their public documents can be easily located. They shall draw up and make available specifications on their information management systems and the public information contained therein  | Not specified, apart from general requirement that information must make sure that documents can be easily located.  |
| Greece                 | Registered with serial number in the incoming book.  | Characterization and reference to the subject, the body to which it is addressed and the incoming date.  |
| Hungary                | Every public administration entity is responsible to develop its own document registration system which has to conform to the general rules.   | Every public administration entity is responsible to develop its own document registration system which has to conform to the general rules.   |
| Ireland                |  |  |
| Italy                  |  |  |
| Latvia                 | Practical issues of registration have been settled by instructions issued by institutions themselves.  | Practical issues of registration have been settled by instructions issued by institutions themselves.  |
| Lithuania              | The Lithuanian Archives Department shall establish general requirements for the creation, arrangement and registration of documents. Registers are in electronic and paper form.   | Register shall contain a reference number, date of receipt, the subject matter or short description of the content of the document and the applicant.  |
| Netherlands            |  |  |
| Slovenia               | Record kept by means of information system.  | The code of the matter.; the subject of the matter; short summary of the matter; the state of affairs of the matter; the date when the processing began; the mark or identification sign of the authority (unit) or the officer processing the matter.   |
| Spain                  | General registers and all those set up by the Public Administrations to receive submissions and communications from individuals or administrative authorities must be stored in a computer support. Each Public Administration will establish the days and times its registers must be open. | The system must guarantee record in each entry of a number, a heading indicating its nature, date of entry, date and time of filing, identification of the interested party, the referring administrative authority if required, and the person or administrative authority it is sent to and, if applicable, reference to the content of the submission or communication registered.  |
| Sweden                 | All authorities shall keep their own register over documents in an order prescribed by law.  | Date of the document, register number, when possible, who has created the document or to whom it has been sent to.   |
| UK                     |  |  |

## 2.12 The obligation to be service-minded

### **Specific requirements to behave in a particular manner (e.g. courteous, correct or accessible in relations with the public)**

Most Member States have some sort of general regulations regarding the behaviour of officials. In Austria, the general statutes on civil servants require civil servants to behave in a way that enables the public to remain confident in the correct discharging of the civil servant's functions.

The Finnish regulations in this field are rather elaborated, compared to many other Member States. The State Civil Servants' Act (750/1994) includes the general provision on the duties of civil servants. According to Section 14 of the Act, civil servants must perform their duties in an appropriate manner and without delay. Civil servants must also conduct themselves in a manner befitting their status and duties. This obligation is interpreted so broadly as to extend even to the leisure time of certain groups of civil servants.

Section 21 of the Finnish Constitution specifies that the dealing of cases shall be appropriate. Based on this provision the Parliamentary Ombudsman and the Chancellor of Justice have stated that the officials should treat their clients in a good and an appropriate manner. In further, Section 7 of the Administrative Procedure Act includes the provisions on the *service principle and appropriateness of service*. It requires that service and the consideration of matters by the authority should be arranged so that the customer of the administration receives appropriate service and that the authority can perform its tasks efficiently.

There is also the *requirement of proper language*, which is included in Section 9 of the Administrative Procedure Act. It provides that the authority shall use appropriate, clear and comprehensible language.

In Estonia there is a Public Service Code of Ethics adopted as an annex of Public Service Act. According the 1<sup>st</sup> paragraph of that code, an official is a citizen in the service of people. The Code of Ethics also enacts that a person exercising public authority is characterised by honesty and respect for the public and co-employees, that an official shall be polite and helpful when communicating with people and that an official shall be respectable, responsible and conscientious.

**Table 16 Rules on behavior of officials**

|             |  |
|-------------|--|
| Austria     | The general statutes on civil servants ( <i>Beamtendienstgesetz</i> for functionaries and <i>Vertragsbedienstetengesetz</i> for contractual civil servants) do require civil servants to behave in a way that enables the public to remain confident in the correct discharging of the civil servant's functions (see e.g. paragraph 43 <i>Beamtendienstgesetz</i> ).  |
| Belgium     | Laid down in different statutes for the civil servants.  |
| Cyprus      | Section 60 (f) of the Public Service Law stipulates that every public officer shall show "...propriety, politeness and truthfulness".  |
| Czech rep   | Article 4 Paragraph 1 of the Administrative Code anchors the general clause that exercise of public administration is a public service and subsequently conveys this by stipulation of the obligation of official persons to conduct themselves in a polite manner towards the persons affected by their statutory activity in the individual case, and to accommodate their wishes. This obligation is specified in the further Paragraphs 2, 3 and 4 in accordance with the principle of co-operation, provision of instruction on the rights and responsibilities of the affected persons, timely information about the function the administrative body intends to effect and also provision of an arena for the effective defence of their rights and justified interests |
| Denmark     | No general regulations.  |
| Estonia     | An official shall be polite and helpful when communicating with people according to . the 1 <sup>st</sup> paragraph of the Public Service Code of Ethics which is adopted as an annex of the Public Serviv Act   |
| Finland     | According to Section 14 of the State Civil Servants' Act (750/1994) civil servants must perform their duties in an appropriate manner and without delay. They must also comply with management and supervisory regulations. This carries the obligation to perform duties as efficiently and cost-effectively as possible. Civil servants must also conduct themselves in a manner befitting their status and duties   |
| Greece      | According to article 27 (1) of the Code of Civil Servants, both in office and outside, the civil servant must conduct himself in a manner that makes him worthy of the public's trust. According to section 2 of the same, Code in work the civil servant must behave decently to the members of the public and attend to the furtherance of their affairs. According to article 107 (1) of the Code of Civil Servants, improper behaviour towards the citizens is a disciplinary offence. So is undue failure to attend to the processing of their affairs  |
| Hungary     | According to the Administrative Procedure Act fast and simple procedures are required.   |
| Ireland     | According to the Ombudsman's Principles of Good Administration and Guide to Standards of Best Practice for Public Servants public official shall deal "properly" (courteously, sensitively, responsibly) in their contacts with the public.  |
| Italy       |  |
| Latvia      | According to the Regulation of the Cabinet of Ministers (passed under Article 81 of the Latvian Constitution) "On disciplinary penalties", behaviour shall not be improper, disrespectful, ungentlemanly or impatient.   |
| Lithuania   | According to the Law on Public Service and Ethic Regulations of Public Servant Activities, established by the Government, a civil servant is obliged to ground his or her activities on:decency and exemplary behaviour.   |
| Netherlands |  |
| Slovakia    | An Ethic Civil Servant Code has been issued, which contains a Summary of Certain Principles which should serve for the civil servants in Slovakia as guidance for their behaviour  |

in performing civil service and in social communication not only with the citizens and legal persons but also with their colleagues.

- Slovenia According to article 7 of the General Administrative Procedure Act the authority is obliged to see that the ignorance and inexperience of a party or other participants are not detrimental to the rights they are entitled to by law
- Spain According to article 3 (2) of the Act n° 30/1992 of 26 November. The Legal regime of public administrations and the common administrative procedure act, the Public Administrations are governed in their actions, by the criteria of efficiency and public service.
- Sweden According to Section 4 of the Administrative Procedure Act, each authority shall provide information, guidance, advice and similar assistance to all persons concerning matters falling within the scope of its functions. The assistance shall be given to the extent that is deemed appropriate with regard to the nature of the matter, the person's need of assistance and the activity of the authority. Enquiries made by people shall be answered as soon as possible.
- UK The Charter Mark scheme is a tool designed to help organisations focus on, and improve, their customer service and delivery to users. The Charter Mark standards contain six recommendations, for instance “set standards and perform well”, “be actively engaged with your users, and staff” etc.

### **Specific requirements regarding language-use**

The majority of the Member States have legal regulations regarding language use in public administration proceedings. Worth focusing on here is of course the possibility to use languages, other than the official one, in administrative proceedings. This seems to be the case in most Member States.

According to Art 8 in the Austrian Administrative Procedure Act the official language of Austria is German, notwithstanding the right of linguistic minorities to use their own languages. This means that in general, the only admissible language in procedures is German, with some exceptions in areas where these minorities live. If necessary, a translation will be provided for or can be organised by the respective party.

In Hungary, everybody can use his or her mother tongue orally and in writing in the administrative procedure.

In Estonia, the question of language in administrative procedure is treated in Administrative Procedure Act as well as in the Language Act. Article 20 of Administrative Procedure Act provides that the language of administrative proceedings shall be Estonian and foreign languages shall be used in administrative proceedings pursuant to the procedure provided for in the Language Act. The Access to public administration in foreign languages is stipulated in article 8 of the Language Act as follows:

## § 8. Access to public administration in foreign languages

(1) If an application, request or other document submitted to a state agency or local government is in a foreign language, the agency has the right to require the person who submits the document to submit the translation of the document into Estonian, except in the case provided for in § 10 of this Act.

(2) If a state agency or local government does not require promptly to submit the translation of an application, request or other document into Estonian, the document in a foreign language is deemed to be accepted by the agency.

(3) In the cases provided by law, a state agency or local government has the right to require notarisation of the translation. If the required translation is not submitted, the state agency or local government may return the document or have it translated with the consent and at the expense of the person who submitted the document.

(4) In oral communication with servants or employees of state agencies and local governments, and in a notary's office, bailiff's office or certified interpreter or translator's office, by agreement of the parties, a foreign language, which the servants or employees understand, may be used. If no agreement is reached, communication shall take place through an interpreter and the costs shall be borne by the person who is not proficient in Estonian, unless otherwise provided by law.

### ***Additional provisions regarding language use***

Yet another aspect of language use in administrative proceedings, is the obligation on the authorities to facilitate communication and dialogue with citizens. In some member states there are statutory requirements for the authorities to express themselves in a clear and comprehensible manner, regardless of whether communication is in oral or written form. This is for instance the case in Greece where there is a set of ministry directives regarding communication in public administration (Regulation of Administrative Services' Communication), with detailed relevant instructions.

In oral communication it is specified that the civil servant should be courteous and show interest in the other party, as well as an honest disposition to help. That he should speak shortly, simply and accurately and avoid excessive gestures or countenance. When calling he should first introduce himself and state accurately and simply the reason for the call, and answer accurately the questions, that are made for reasons of clarification. He should have a written list of the relevant data at hand, and write down all useful information or instructions. When answering a call, he should introduce himself, listen carefully, refer the caller to the competent person straightaway, if this person is not himself, direct the discussion in such a way as to collect all relevant data, repeat, in order to confirm, these data, and answer patiently and courteously, on the understanding that it is his duty to serve the citizens.

Finland has the same kind of provision laid down in Section 9 of the Administrative Procedure Act (Requirement of proper language). It states that the authority shall use appropriate, clear and comprehensible language

### **Specific requirements regarding guidance on how to initiate proceedings, transmit representations to the competent authority, etc**

In Finland, the basic grounds of the obligation to *give advice* have been specified in Section 8 of the Administrative Procedure Act. According to this section, the authority shall provide to its customers the necessary advice, within its competence, for taking care of administrative matters as well as respond to the questions and queries on its service. Advice shall be provided free of charge. If the matter does not fall within the competence of the authority, it should direct the customer to the competent authority.

In Lithuania, Article 12 of Law on the Right to Receive Information from State and Municipal Institutions imposes an obligation of an institution which has no competence to deal with the request to transfer it to the competent institution within 5 days from the receipt. In case of oral request of information, the applicant shall be informed about the competent institution.

In Spain, article 35 (g) in the Administrative Procedure Act, stipulates that it is the citizens' rights:

- g) To obtain information and guidance on the legal or technical requirements imposed in current provisions on proposed projects, actions or applications.”

The Swedish administrative procedure act contains a provision which states: “...If someone by mistake refers to the wrong authority the authority should set him right.

### **Specific requirements regarding accessibility (e.g. opening hours)**

Regarding accessibility, it seems as if in many Member States, it is left to the authorities themselves to decide upon their opening hours. This is for instance the case in Spain, Denmark, Hungary, Latvia and Estonia. In Austria, deciding on the opening hours is also an internal organisational matter of the authority. However, there are general regulations in this field. For instance, according to paragraph 13 subsection 5 in the Administrative Procedure Act the authority has to publish its opening hours on its information board and on the Internet.

However, there are Member States where the opening hours of the authorities are – at least to a certain extent – regulated in law. A case in point here

is Lithuania. Article 20 in the Lithuanian Law on Public Administration deals with hours of acceptance of applications, stating:

1. Every public administration institution must organise its work in such a way that individuals wishing or obliged to submit an application in person could do so at all office hours.
2. For the applications which, in accordance with legal acts, must be submitted in person, the institution must make arrangements for at least 4 reception hours a week after the office hours.

In Finland, the opening hours are regulated by a decree (332/1994). The state authorities shall be open from 8 am to 4.15 pm on working days.

Section 5 in the Swedish Administrative Procedure Act states:

An authority shall remain open for at least two hours on each normal working day, Monday–Friday, to be able to receive and register official documents and to be able to receive requests for the production of official documents that are kept by the authority. However, this does not apply if such day is Midsummer Eve, Christmas Eve or New Year's Eve.

According to Article 64 in the Slovenian Administrative Procedure Act, petitions may be filed every working day during office hours, while petitions in the electronic form may be filed at any time. The office hours, working hours and working time are defined more in detail in the Decree on Office Hours, Working Hours and Working Time in State Administration Authorities.

### **Specific requirements regarding usage of telephone/mail/e-mail**

It appears to be rather common to have regulations regarding the usage of e-mail, but it is more rare to find detailed rules on the usage of telephone.

Under the Lithuanian Law on the Right to receive Information from State and Municipal Institutions request for the information can be oral or written, except request sent by e-mail. Rules for Service of Citizens and Other Persons in Public Administration Institutions, established by the Government, stipulates that the official responsible for communication with the applicants by telephone, shall answer the telephone before third ring if it is possible, present himself or herself to an applicant, listen to the questions carefully, talk politely, provide the requested information at once or inform the applicant about the time and communication form, in which the information would be provided.

In Austria written communication with the authority is always admissible, and, within technical possibilities, can also be effectuated by electronic

means, in particular e-mail. However, the authority can only communicate with a party by e-mail if the party has requested it, or if the party itself has used it before without forbidding its future use by the authority (paragraph 18 subsection 3). If feasible with regard to the subject matter, submissions can also be made in person or by telephone (paragraph 13 subsection 1 in the Administrative Procedure Act).

In Finland, according to the main rule the *way to contact* the authority is *neutral*, unless otherwise is provided in law. Section 19 of the Administrative Procedure Act provides that a matter shall be filed in writing. Upon the permission of the authority, it can be filed also orally. Using of electronic data transmission means, such as telefax and e-mail, is regulated by the Act on Electronic Services and Communication in the Public Sector (13/2003). Section 5 of the Act states that the authority in possession of the requisite technical, financial and other resources shall, within the bounds of these, offer to the public the option to send a message to a designated electronic address or other designated device in order to lodge a matter or to have it considered. Furthermore, the authority shall offer to the public the option to deliver statutory or ordered notifications, requested accounts and other similar documents and messages by electronic means.

In yet other Member States, like Spain, Denmark, Latvia and Estonia, rules regarding mail or telephone are regulated with the agency's internal regulations and not enacted by the legislator.



**Table 17 Rules on accessibility**

|           | Opening hours   | Telephone/mail   |
|-----------|---|--|
| Austria   | The authority has to publish its opening hours on its information board and on the internet. The determination of the opening hours is an internal organisational matter of the authority.  | Submissions and communication can be handled by mail and telephone.  |
| Belgium   | No general regulation. Internal rules.  | Every individual letter from the administration to the public has to mention the name of the person, his phone number and his e-mailadres that can give further explanations.  |
| Cyprus    | According to Regulations 395/90 and 264/98, public offices have the following timetable: 1 <sup>st</sup> September-30 June: Monday-Friday:7:30/8:00-14:30/15:00 and Thursday: 3:00/3:30-18:00/18:30. 1 <sup>st</sup> July-31 <sup>st</sup> August: Monday-Friday: 7:30/8:00-14:30/15:00.  | No.  |
| Czech rep |   | The Administrative Procedure Act does not formally stipulate the appurtenances of submissions in terms of their content, as functions of participants in relation to the administrative body. Section 37 Paragraph 4 regulates only the manners in which it is possible to submit such initiatives – in written form, verbally in a protocol or in electronic form signed by a guaranteed electronic signature. Under the condition of confirmation of submission within the legally stipulated period of 5 days it is possible to effect such submissions also by means of other technical means, in particular by means of telex, fax or public data network without the use of a guaranteed electronic signature. |
| Denmark   | No general regulation.  | No general regulation.   |
| Estonia   | In Estonia, requirements regarding opening hours and usage of telephone etc are usually regulated with agency's internal regulations and not treated in the level of law.   |  |
| Finland   | The state authorities shall be open from 8 am to 4.15 pm on working days.   |  |
| Greece    |   | Extensive guidelines in ministry directives regarding communication in public administration.  |
| Hungary   | No general regulation.  | No general guidelines.   |
| Ireland   |   |  |
| Italy     |   |  |
| Latvia    | No general guidelines. Settled by ministerial regulations.  | No general guidelines. Settled by ministerial regulations.   |
| Lithuania | 1. Every public administration institution must organise its work in such a way that individuals wishing or obliged to submit an application in person could do so at all office hours. 2. For the applications which, in accordance with legal acts, must be submitted in person, the institution must make arrangements for at least 4 reception hours a week after the office hours. | The official responsible for communication with the applicants by telephone, shall answer the telephone before third ring if it is possible, present himself or herself to an applicant, listen to the questions carefully, talk politely, provide the requested information at once or inform the applicant about the time and communication form, in which the information would be provided.  |
| Slovakia  | The opening hours apply for all administrative authorities regularly in a way so that at least one day in a week they are extended after 4:00 pm. The opening days and hours were harmonized and approved in individual sectors. However, there exists no binding rule for determination of the opening days and hours for all sectors.   |  |

|          | Opening hours  | Telephone/mail  |
|----------|--|---|
| Slovenia | General rules in the Decree on Office Hours, Working Hours and Working Time in State Administration Authorities.   | The Decree on the Manner of Public Administration Bodies' Transactions with Customers in Article 4 lays down that the public shall have physical and telephone access to an official who can give general information about administrative services.  |
| Spain    | Rules in this field are made up by the administration itself.  | Rules in this field is made up by the administration itself.  |
| Sweden   | An authority shall remain open for at least two hours on each normal working day, Monday–Friday, to be able to receive and register official documents and to be able to receive requests for the production of official documents that are kept by the authority. However, this does not apply if such day is Midsummer Eve, Christmas Eve or New Year's Eve. | The authorities shall accept telephone calls from the public. Where particular "opening hours" have been decided, the public shall be informed about this decision in an appropriate way. The authorities are also obliged to make it possible for people to contact them by telefax and e-mail and to provide answers using the same means of communication. |
| UK       |  |   |



### 3 Conclusions

The examination of the of the answers shows that most of the selected principles have indeed been codified in binding constitutional or statute legislation. This is more or less true of all the concerned principles to the extent that it at least is possible to outline a shared core of principles of good administration among the Member States of the European Union.

#### 3.1 A core set of principles on good administration is widely accepted among the Member States of the European Union

The following principles of good administration are embraced by a majority of the Member States:

1. The principles of lawfulness, non-discrimination, proportionality
2. The right to have ones affairs handled impartially and fairly and
3. within a reasonable time.
4. The right to be heard before any individual measure is taken that would affect the citizen adversely.
5. The right to have access to his or her file, regarding any individual measure that would affect him or her.
6. The right of access to documents.
7. The obligation to state reasons in writing for all decisions.
8. The obligation to give an indication of remedies available to all persons concerned.
9. The obligation to notify all persons concerned of a decision.
10. The obligation to be service-minded.

One should keep in mind that, as mentioned above, at least four of these principles were part of the Council of Europe resolution from 1977: the right to be heard, the right to access information, the obligation for authorities to state reasons, the obligation to indicate remedies. For this reason, the answer is not very surprising. Another Recommendation from the Council of Europe, from 1980 established both the principles of objectivity and impartiality. This means that the signatory states should have implemented these principles in some form or another. In one case, the obligation to document administrative processes, it was not possible to tell from the answers received, if there indeed were clearly enacted rules in that area. The only other principle, which does not seem to enjoy equal recognition as the others, is the obligation to keep registers.

### **3.2 Most principles are enacted as general and legally binding rules in constitutional or statutory legislation**

Most Member States, with the notable exception of the common law countries, seem to have adopted a rather detailed administrative procedure act in which most of the above mentioned principles are included. The acts are further often subsidiary to other legislation. This means that if other legislation specifies more detailed vertical procedures (e.g. for planning processes) or horizontal procedures (e.g. protection of personal data) these will take precedence over the rules in the administrative procedure act.

- The principles of impartiality and fairness as well as the principles of lawfulness, non-discrimination, and proportionality are often constitutionally guaranteed.
- The right to have one's affairs handled within reasonable time, to be heard, to have access to one's file is often regulated in an administrative procedure act with varying degree of specificity.
- The obligation for officers to state reasons, to give notification and indicate remedies and the service-mindedness are also mostly enacted through an administrative procedure act.
- The right to a general access to documents is often laid down in a freedom of information act or a similar act.

By looking at the enactment dates on many of the administrative procedure codes we note that 14 out of 18 acts represented here has been created or modified after 1990.

**Table 18**      **Year of codification**

| Year of codification                                    | Member State   | Act  |
|---|----------------|--|
| 1976  | Germany        | Federal Administrative Procedure Act   |
| 1985  | Denmark        | Administrative Procedure Act   |
| 1986  | Sweden         | The Administrative Procedure Act   |
| 1990  | Italy          | Italian Administrative Procedure Act   |
| 1991  | Portugal       | Administrative procedural code   |
| 1925 (“modified countless times” and thoroughly 1991).  | Austria        | General Administrative Procedure Act   |
| 1992  | Netherlands    | General administrative law act   |
| 1992  | Spain          | The Legal regime of public administrations and the common administrative procedure act |
| 1960 amended in 1980 and 1998.                          | Poland         | Code of Administrative Procedure Act   |
| 1967 amended several times especially during the 1990s. | Czech Republic | Act on Administrative Procedure  |
| 1999  | Lithuania      | Law on public administration and Law on administrative proceedings                     |
| 1999  | Greece         | Administrative Procedure Code  |
| 2002 (amended and supplemented)                         | Slovakia       | Coll. on Administrative Proceedings, 1993  |
| 2002  | Estonia        | Administrative Procedure Act   |
| 2002 (substantially amended)                            | Slovenia       | General Administrative Procedure Act and Public Administration Act from 1956           |
| 2004  | Finland        | Administrative Procedure Act   |
| 2004  | Latvia         | Administrative Procedure Act   |

### **3.3      The material content of the rules varies significantly**

Even though we can discern a common core of principles of good administration, it is equally true that the different legislators have shown great creativity in how they designed the different rules in practice. A common difference between different legislators is whether they use a *general concept* in order to let the courts specify its closer meaning afterwards, or alternatively specify *a list* that attempts to capture essential provisions beforehand. Latvia for example uses the term “justified doubts” in order to capture the grounds for disqualification while e.g. Finland has a long list of possible grounds. The obvious advantage with the abstract alternative is that one doesn’t prevent a dynamic development in the field. On the other hand, an abstract concept leaves plenty of room for administrative discretion in its application. Lists of conditions can therefore serve to minimize the scope for administrative discretion in fields where control might be more desirable than allowing for a dynamic development. For the same reason, a list of clearly worded conditions are easier for a citizen to comprehend than a bulk of case-law that through different cases specifies the more precise meaning of a concept.

Another characteristic difference is the amount of exceptions that are created in conjunction with a rule. Some rules are clear and foreseeable in the sense that there are few exceptions, while others are combined with a large number of exceptions. Some legislation however is constructed in a strikingly similar manner with few differences in substance. The obligation to state reasons is a good example. There seems to be a general understanding between Member States when it comes to stating legal and factual grounds as well as the main reasoning for a decision. The obligation to notify and the obligation to indicate remedies are two other examples. In other areas there are less similarities. Documentation is one example of a principle where the legal provisions differ a great deal between the Member States.

Having said that the Member States indeed share many principles of good administration, although they have implemented them differently, we must take note of the differences. As noted above, even though a rule looks the same across a number of countries, it doesn't mean that it is applied the same way. It will be interpreted in different ways and thus mean different things in different countries. In order to appreciate these differences it is useful to outline four different traditions of administrative law.

### **3.4 The interpretation of the principles of good administration will vary between four European traditions of administrative law**

The development of administrative law has always been deeply influenced by European history, culture and constitutional contexts and it is important to keep in mind that the subject of this survey, principles and rules of good administration will look different depending on the Member State in question. From the literature, we can infer at least four traditions of administrative law in Europe.<sup>17</sup>

- The *administration-centred* tradition views administrative law as a tool for governments to run an efficient administration. As such, it is designed for the construction of efficient administration and implementation of policies. Such a view is often associated with France and countries heavily influenced by French legal traditions. In France, the *Conseil d'Etat* is the supreme court of the administrative hierarchy of courts and has both judicial and administrative functions. Its members are, at the

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<sup>17</sup> See e.g. Harlow, Carol. "European Administrative Law and the Global Challenge." European University Institute, Working Paper RSC No 98/23, 1988, p. 3-4; Schwarze, Jürgen. *European Administrative Law*. London: Sweet and Maxwell, 1992, p.1173-1197; Solé, Julio Ponce. "Good Administration and European Public Law: The Fight for Quality in the Field of Administrative Decisions." *European Review of Public Law*, vol. 14, no.4, winter 2002.

same time, judges of the "administration" (public service) and central legal advisers to the government.<sup>18</sup> The French tradition is governed by the notion that the most important reason for providing legal protection against the administration is not the protection of the rights of the individual, but rather to ensure that the administration adheres to law and statute.<sup>19</sup>

- The *individual-centred* tradition tends to treat administrative law as an instrument for controlling government and protect individuals from infringements of their rights. It views administrative law as the rules that keeps the government within its legitimate boundaries and thus regulates the relationship between the State and the Citizens. Such views are often associated with Anglo-Saxon common-law countries, which possess a single jurisdiction for all types of cases.<sup>20</sup> In the USA, the well-known "due process" clause in the American Constitution is mainly concerned with the protection of citizen's rights. The courts have over the past decades developed what is called the "hard look" doctrine. This doctrine includes the duty of listening to citizens, the obligation to state reasons, carefully studying the regulation before making a decision. This development has however created a judicial pressure on the administrative system, sometimes demanding more than hundred pages of explanation, a phenomenon that is called "ossification".
- The *legislator-centred* tradition relies on the legislator to design administrative procedures, often in the form of a very detailed administrative procedure act, or in some cases in the form of constitutional provisions. This represents the German ethos of the *Rechtsstaat* where the administration is viewed as a mere executant of the law. The result is a formalist, almost court-like, approach to administration. Germany might be seen as the typical case, but also some of the newer Member States of the European Union can be said to represent this tradition.
- The *ombudsman-centred* tradition is representative of the Scandinavian countries. Characteristic of this more pragmatic tradition is that an independent person, who is often appointed by the parliament, works outside of the executive in order to identify, investigate and recommend solutions to cases of maladministration. In those cases where an Ombudsman has emerged as the primary means of redress for citizens who have suffered injury by the administration, the development of a strong litigation culture has often not taken place.

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<sup>18</sup> Its origin lies in a particular law from 16-24 August 1790, which barred the competence of the civil courts in administrative matters and came to be centred on a particular institution, *Conseil d'Etat*, which sits in the *Palais-Royal* in Paris, and was created in its modern form by Napoleon at the end of 1799.

<sup>19</sup> Schwarze, Jürgen. *European Administrative Law*. London: Sweet and Maxwell, 1992, p.1182.

<sup>20</sup> Historically we find its origin in the strength of the English judiciary which was established after the Revolution of 1688.



In reality, none of these traditions can single-handedly represent any singular state. Where one tradition may dominate, the others are likely to be represented in part. This is especially true on the European level where the European Union has generated its own particular blend of traditions. While the administrative system of the European Union was initially modelled on the French system, subsequent developments<sup>21</sup> led to a growing emphasis on individual rights in administrative procedures and lately, after Maastricht, by an independent Ombudsman focused on the fight against maladministration.

As we have seen above, at least five institutions have, in their own way, contributed to this development and to what we today mean by the legal concept of good administration: the Council of Europe, the Court of Justice and the Court of First Instance, the European Ombudsman, and some of the Member States of the European Union. Today the Charter with its Article on the right to good administration, III-101, is a central part of the new Constitutional Treaty even though its applicability is still limited by the so-called horizontal clauses in chapter seven of the Charter. E.g. Article II-112 states that the provisions of the Charter may be implemented by legislative and executive acts taken by the institutions, bodies, offices and agencies of the Union, and the principles of the Charter shall only be judicially cognisable in the interpretation of such legislative or executive acts and in the ruling on their legality. This could mean that the right to good administration must be implemented through a legislative or executive act before it will have legal force. Article III-398 might thus function as a necessary legal base upon which a law on good administration for the institutions, bodies, offices and agencies of the Union can be based. The development of the legal concept of good administration is, however, by no means finished and will continue into the future.

### **3.5 The challenge of designing a law on good administration for the European Union**

There seem to be several arguments in favour of adopting a law on good administration for the European Union institutions based on this article. Firstly, the current rules of EC administrative procedure have been described as a: “patchwork codification tailored to the specific requirements of sectorial policy implementation. They are barely co-ordinated with one another, suffer from serious gaps – in particular as regards individual

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<sup>21</sup> For a discussion on countervailing tendencies, see Harlow, Carol. “European Administrative Law and the Global Challenge.” European University Institute, Working Paper RSC No 98/23, 1988, p. 10.

protection.”<sup>22</sup> A standardisation of otherwise sectorialised rules would lead to a simplification and rationalisation of the administrative processes of the Union. Secondly, today we can see that European administrative law is mainly advancing with the help of the European Court of Justice and the European Court of First Instance. According to some, this is a natural and healthy development. However, to others it would be more legitimate if the relevant legislator of the European Union advanced the development of procedural law in this area. Thirdly, as a consequence of the enlargement of the Union there are also reasons of practicality. When the Court consisted of six or even twelve judges, it was not unreasonably difficult to identify common legal principles. When the Union now consists of 25 Member States and the court therefore consists of 25 judges, each trained in his/hers own legal tradition, it will undoubtedly become much more difficult to identify common legal principles as a foundation for advancing European administrative law. Finally, enacted rules are clearer and more accessible to the average citizen than principles developed in case law. An administrative procedure act would not only enumerate and articulate existing principles of the Union; it would further clearly set out the principles of relevance for the relation between the administration of the Union and the citizens.

However, while it is important to achieve a sufficient protection of individual rights, it is equally important to promote efficiency and dynamism as well as to avoid ossification by over-regulation. Too many rules can incite civil servants to work out techniques for evasion or shift focus to compliance rather than quality of results. This can lead to unduly cautious behaviour in order to minimise legal errors blocking experiments and innovations.<sup>23</sup> The European Ombudsman has stressed his role in ensuring “good administrative practices” while underlining the importance of steering clear of the dangers of judicialisation by not attempting to define too strictly what may constitute maladministration. “The open character of the term is justly one of the elements which distinguishes the role of ombudsman from that of the court.”<sup>24</sup> The crux lies in striking the right balance between citizen’s legitimate rights and the public interest in the form of the administrations need for efficient procedures. A too strong emphasis on individual rights might lead to undue judicialisation of administrative procedures. Since specialised administrative economic law make up a large part of the Union’s administrative law is, it might even provoke the development of a strong litigation culture. This is already present danger in EC

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<sup>22</sup> Nehl, Hanns Peter. *Principles of Administrative Procedure in EC Law*. Hart Publishing, 1999, 188.

<sup>23</sup> Harlow, Carol. “Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot.” *European Law Journal*, Vol 2. No 1. March 1996, p. 11.

<sup>24</sup> Annual Report of the European Ombudsman for 1995, p. 17.

administrative law,<sup>25</sup> although the danger should not be overestimated. Many of the relevant rights are already part of the *acquis communautaire* and at least some of the codes of good administrative behavior are already adopted by the institutions as well as published in the official journal. No one has tried to bring an action in the Court of First Instance based on any of these sources even if there, in principle, was no reason why they should not.<sup>26</sup>

The general idea behind a law on good administration is that if public administrations follow proper procedures, the probability of making good decisions increases dramatically. Designing procedures that ensures that the official considers all relevant facts, balances all relevant interests and ensures that all parties can hold him/her accountable during the process by transparent procedures and forcing the public authority to explicitly state the grounds for their decision, will ensure a minimum level of rational reflexivity in the process. It is therefore important to acquire a level of detail sufficient to ensure proper procedures while keeping the rules sufficiently general to allow for the necessary variations between different institutional contexts. By making such a law subsidiary to other legislation, it would not impede horizontal or vertical legislation that are more detailed.

The right to good administration and its legal base in Article III-398 seems to have the potential to further develop the particular blend of administrative law traditions characteristic of the European Union. The future designers of a law on good administration thus needs to learn from the different traditions of the Member States in order to bring out the best qualities of each tradition while preventing the negative effects of each. Subsequently they need to continue to complement the original administration-centred tradition with an appropriate blend of the individual-centred, legislator-centred and ombudsman-centred tradition in order to properly balance the rights of the individual and the European public interest.

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<sup>25</sup> For a discussion of the litigation problem see e.g. Kańska, Klara. "Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights." *European Law Journal*, Vol. 10, No. 3, May 2004, p. 320-321.

<sup>26</sup> Ian Harden, Stockholm expert meeting, see Appendix 3, p. 92

# Appendix 1

## Directive from the Swedish Government



Regeringsbeslut 1

2004-07-22

Ju2004/6511/L6

Justitiedepartementet

Statskontoret

|                    |                   |
|--------------------|-------------------|
| Till svd.....      | S                 |
| Kontakt med.....   |                   |
| Beslut.....        | ED                |
| Datum 17/8-04..... | Sign. [Signature] |

Box 2280  
103 17 STOCKHOLM

|                 |
|-----------------|
| STATSKONTORET   |
| Registrator     |
| Ink. 2004-08-17 |
| Dnr. 2004/421-5 |

Uppdrag att kartlägga förvaltningsregler och förvaltningstraditioner i EU:s medlemsländer

1 bilaga

Regeringen uppdrar åt Statskontoret att kartlägga förvaltningsregler och förvaltningstraditioner i EU:s övriga medlemsländer i enlighet med vad som anges i *bilagan*.

På regeringens vägnar

Gunnar Lund

Roger Petersson

Tjänstkonteckning:

Efter samtal med Maria Hellberg, Ju-L6  
har överens kommit om 31 januari för leverans  
av uppgiften.

2004-11-10

Magnus Buzell

Kopia till

Statsrådsberedningen  
Utrikesdepartementet/EU  
Finansdepartementet/F

Postadress  
103 33 Stockholm  
Besöksadress  
Rosenbad 4

Telefonväxel  
08-405 10 00  
Telefax  
08-20 27 34

E.post: [registrator@justice.ministry.se](mailto:registrator@justice.ministry.se)  
Telex  
178 20 PREMIER S

Justitiedepartementet

### Uppdrag att kartlägga förvaltningsregler och förvaltningstraditioner i EU:s medlemsländer

#### Sammanfattning av uppdraget

Statskontoret skall kartlägga övriga medlemsländers förvaltningsregler och förvaltningstraditioner. Såvitt det är möjligt bör kartläggningen utgå från ett antal principer som kan användas som utgångspunkter för jämförelser mellan olika länders system.

#### Bakgrund

EU:s institutioner, myndigheter och organ saknar för närvarande gemensamma bindande regler om god förvaltning.

Det finns i stället ett antal olika artiklar som rör god förvaltning i EG-fördraget, i EU:s stadga om de grundläggande rättigheterna, i sekundär-rätten samt i t.ex. kommissionens och rådets uppförandekodex. Dessa är dock av skiftande rättslig status.

Några exempel på sådana artiklar är:

- Artikel 41 i EU:s stadga om de grundläggande rättigheterna ger medborgarna en rätt till god förvaltning.
- Rätten att vända sig till institutionerna på ett av de officiella språken slås fast i artikel 21 i EG-fördraget.
- Institutionerna är enligt artikel 253 i EG-fördraget skyldiga att ge motivering till beslut.
- Skadeståndsskyldigheten finns stadfast i artikel 288 i EG-fördraget
- Rätten till ett effektivt rättsmedel anges i artikel 47 i stadgan, men saknar uttryckligt stöd i fördraget utöver den rätt till överprövning av EG-domstolen av beslut som anges i artikel 230 i EG-fördraget.
- Enligt artikel 255 i EG-fördraget och tillhörande förordning har envar rätt till tillgång till rådets, kommissionens och parlamentets handlingar.

De spridda regler som finns är alltså inte heltäckande och de är relativt svåra för medborgarna att ta del av.

Inom EU har den europeiske ombudsmannen på ett synligt sätt drivit frågan om generella regler för god förvaltning. Han har på eget initiativ undersökt om institutionerna har antagit regler om god förvaltning. Han har lagt fram förslag till en s.k. förvaltningskodex och uppmanat institutionerna att anta liknande interna regler. Därefter har han i en särskild rapport till Europaparlamentet konstaterat att institutionerna inte antagit tillräckligt bra och för allmänheten tydliga regler, och därför rekommenderat att sådana regler i stället skall antas i form av en europeisk förvaltningslag. Europaparlamentet antog på grundval av Ombudsmannens rapport en resolution<sup>1</sup> i vilken kommissionen uppmanas att lägga fram ett lämpligt förslag till förordning som innehåller en kodex för god förvaltningsssed på grundval av artikel 308 i EG-fördraget. Kommissionen har emellertid inte presenterat något sådant förslag.

I syfte att läka denna brist föreslog den svenska regeringsrepresentanten i Europeiska konventet för EU:s framtid, Lena Hjelm-Wallén, att det i det nya fördraget skall finnas en rättslig grund för antagande av en europeisk förvaltningslag. Förslaget mötte inte någon kritik under konventet eller i regeringskonferensen och har nu i huvudsak förts in i artikel III-304 i det nya konstitutionella fördrag som Europeiska rådet kom överens om den 18 juni 2004.

Artikel III-304 (i dess preliminära översättning) lyder:

”Artikel III-304

1. När unionens institutioner, organ och myndigheter fullgör sina uppgifter skall de stödja sig på en öppen, effektiv och oberoende europeisk administration.
2. Med beaktande av de tjänsteföreskrifter och anställningsvillkor som antagits på grundval av artikel III-333 får<sup>2</sup> särskilda bestämmelser för detta ändamål fastställas i europeiska lagar.”

Efter fördragets ikraftträdande ankommer det på kommissionen att presentera ett lagförslag som sedan skall förhandlas i rådet och Europaparlamentet.

#### **Behovet av en kartläggning**

Frågan om en europeisk förvaltningslag, som skall gälla för samtliga institutioner, myndigheter och organ, är en prioriterad fråga för regering-

<sup>1</sup> Europaparlamentets resolution om särskild rapport från Europeiska ombudsmannen till Europaparlamentet efter undersökningen på eget initiativ av om de olika gemenskapsinstitutionerna och -organen antagit någon kodex för god förvaltningsssed som är tillgänglig för allmänheten (C5-0438/2000 - 2000/2212(COS)), antagen den 6 september 2001.

<sup>2</sup> Jfr ”shall” i den engelska versionen.

en. Den nya artikeln har tillkommit på svenskt initiativ och regeringen avser med kraft fullfölja detta genom att verka för att EU:s framtida förvaltningsregler utformas på ett sätt som är väl anpassat för en modern, effektiv och öppen förvaltning.

För att regeringen på bästa sätt skall kunna medverka till att så bra och tydliga regler som möjligt antas så snart som möjligt är det angeläget att ha kunskap om övriga medlemsländers aktuella förvaltningsregler – i de fall sådana finns – och deras förvaltningstraditioner.

En sådan kartläggning av övriga medlemsländers förvaltningsregler och förvaltningstraditioner finns inte samlad och tillgänglig. Inför de kommande förhandlingarna i rådet bör en sådan kartläggning därför göras.

#### **Redovisning av uppdraget**

Uppdraget skall redovisas till Regeringskansliet (Justitiedepartementet) senast vid utgången av år 2004.



## Appendix 2 Missiv

DATUM  
2005-01-27

ERT DATUM  
2004-07-22

DIARIENR  
2004/421-5

ER BETECKNING  
Ju2004/6511/L6

Regeringskansliet  
Justitiedepartementet  
103 33 Stockholm

### Uppdrag att kartlägga förvaltningsregler och förvaltningstraditioner i EU:s medlemsländer

Justitiedepartementets grundlagsenhet gav den 15 juli 2004 Statskontoret i uppdrag att kartlägga vilka förvaltningsregler, om några, som gäller i EU:s övriga medlemsländer. Kartläggningen skulle också omfatta förvaltnings-traditionerna i respektive medlemsland. Såvitt möjligt skulle kartläggningen utgå från ett antal principer som kan användas som utgångspunkter för jämförelser mellan olika länders system.

Uppdraget skulle redovisas till Regeringskansliet (Justitiedepartementet) senast vid utgången av år 2004. Efter muntlig överenskommelse med berörd handläggare den 10 november har överenskommit att slutrapport skall lämnas vid utgången av januari 2005.

Statskontoret överlämnar härmed slutrapporten *Principles of Good Administration In the Member States of the European Union*. Den innehåller en kartläggning av tolv principer som ansetts vara centrala för begreppet god förvaltning.

Generaldirektör Knut Rexed har beslutat i detta ärende. Direktör Thomas Pålsson, chef för Enheten för styrningsfrågor, avdelningsdirektör Magnus Enzell, föredragande, samt byrådirektörer Henrik Frykman och Klas Svensson, var närvarande vid den slutliga handläggningen.

Enligt Statskontorets beslut

Magnus Enzell





## Appendix 3

### Swedish Summary

Justitiedepartementets grundlagsenhet gav den 15 juli 2004 Statskontoret i uppdrag att kartlägga vilka förvaltningsregler, om några, som gäller i EU:s övriga medlemsländer. Kartläggningen skulle också omfatta förvaltnings-traditionerna i respektive medlemsland. Såvitt möjligt skulle kartläggningen utgå från ett antal principer som kan användas som utgångspunkter för jämförelser mellan olika länders system. Bakgrunden till uppdraget är att regeringens representant i Konventet om Europas framtid föreslog att rätten till god förvaltning skulle ges en uttrycklig rättslig grund i det nya konstitutionella fördraget. Denna rättsliga grund ges i Artikel III-398 i det nya fördraget. Inför förhandlingarna om en förvaltningslag för unionens institutioner, myndigheter och organ bedömdes det vara viktigt att ha en översikt över hur rätten till god förvaltning regleras i unionens andra medlemsländer.

Statskontoret har därför genomfört en kartläggning av hur rätten till god förvaltning regleras i EU:s medlemsländer. Kartläggningen utgick från 12 principer som Statskontoret bedömde vara centrala för begreppet rätten till god förvaltning. De representerade ett urval av principer från Europarådets resolutioner, Europeiska unionens stadga om de grundläggande rättigheterna, samt Europeiska ombudsmannen Kodex för god förvaltningssed. Dessa principer låg till grund för en enkät som, genom ambassadernas försorg, skickades ut till medlemsstaterna. Vid tryck hade 19 av 24 svar erhållits.

Analysen av svaren visade att medlemsstaterna delar en gemensam kärna av principer för god förvaltning. Dessa principer ligger ofta till grund för konstitutionell eller annan lagstiftning, ofta i formen av en förvaltningslag. Även om den principiella grunden för gällande lagstiftning är gemensam skiljer sig länderna åt i hur de har valt att formulera lagtexten. Principen om rätt till god förvaltning delas av de flesta medlemsstater även om den uttrycks på olika sätt i konkret lagstiftning. För att förstå hur rätten till god förvaltning skiljer sig mellan de olika medlemsländerna bör man dock särskilja minst fyra olika förvaltningsrättsliga traditioner: en fransk administrationscentrerad, en engelsk individcentrerad, en tysk lagstiftarcentrerad, och en skandinavisk ombudsmanscentrerad. EU:s rättstradition kan ses som en blandning av dessa. Utmaningen inför förhandlingarna om en förvaltningslag ligger i att säkerställa att de positiva egenskaperna hos varje tradition bevaras medan de negativa stävjas.



## Appendix 4 The Questionnaire

### Questionnaire concerning the Regulation of Good Administration in the Member States of the EU

On July 22, 2004, the Swedish Government gave priority to the adoption of an Administrative Law for the European Union, based on article III-398<sup>27</sup> in the new Constitutional Treaty. Consequently, it commissioned the Swedish Agency for Public Management to conduct a survey of current regulations on Good Administration in the Member States of the European Union.

We would be grateful if you could answer and return the following questionnaire before Monday October 25.

Before you start answering the individual questions, please give a short overview of the structure and nature of the administrative regulation and its place in the legal system. If no single framework exists, please specify central policy-documents or relevant case law.

For each individual question, please describe the *regulative framework* regarding the principles in question (primary and/or secondary legislation, case law, administrative rules, or non-codified tradition). We are primarily interested in regulation on *national* or *federal* level on the *first administrative level*, not the regulation of the process of appeal. Start by *summarising* the material content of the rules and provide *references* to relevant legislation, case law, general administrative rules (e.g. circulars, codes of practice, notes of guidance or instructions and administrative guidelines) or non-codified tradition. We would appreciate both a *general* description of the principles mentioned as well as *specified* descriptions of the sub-questions relating to each principle. In the appendix, we provide a frame of reference for each question in the form of the European ombudsman's code of good administrative behaviour.

For each individual question, please *quote central sections* of the regulation *in English*, if they are available. If they are not available in English translation, please summarize the material content of the central *phrases* and/or *concepts* in English. For your convenience, we have provided web addresses to English versions of Administrative Procedure Acts in the countries where we have been able to identify any. If you know of an English translation that is not listed in the appendix, please give a reference to it.

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<sup>27</sup> Article III-398 (III-304 in the draft version) reads: In carrying out their missions, the Institutions, bodies and agencies of the Union shall have the support of an open, efficient and independent European administration. ... European laws shall establish specific provisions to that end.

## Questions

### A. Citizen's Right to Good Administration

#### **Q 1: How is the right to have ones affairs handled impartially and fairly regulated?**

- a. Are there such general principles?
- b. What is considered to be impartial? On what grounds can an official be disqualified? E.g. financial or other interest, family, friends or opponents.

#### **Q 2: How is the right to have ones affairs handled within a reasonable time regulated?**

- a. Is there such a general principle?
- b. Are there any explicit time limits?
- c. Are there any specific criteria that determine "reasonable" (e.g. in relation to the complexity of the matter)?

#### **Q 3: How is the right to be heard before any individual measure is taken that would affect the citizen adversely, regulated?**

- a. Is there such a general principle? If not, in what – if any – areas of law does the principle exist?
- b. If a citizen exercises the right, are there specific criteria for the form of communication between the citizen and the official e.g. oral or written communication?

#### **Q 4: Are there any regulations that cover citizens' right to have access to his or her file, regarding any individual measure that would affect him or her?**

- a. Is there such a general principle? If not, in what – if any – areas of law does the principle exist?
- b. What exceptions to this right are accepted (e.g. protection of privacy, protection of commercial interest)?

#### **Q 5: How is the right of access to documents regulated?**

- a. Is there such a general principle? If not, in what – if any – areas of law does the principle exist?
- b. How are the exceptions formulated?
- c. Is it necessary for a citizen to specify a reason when applying for access to documents?
- d. Are there fees for accessing documents? If so, how are they calculated?

#### **Q 6: How are the principles of lawfulness, non-discrimination and proportionality expressed or regulated?**

- a. Are there such general principles? If not, in what – if any – areas of law do these principles exist?
- b. Are they defined in a precise manner?

## **B. Obligations of Agencies or Officials concerning Good Administration**

### **Q 7: How is the obligation to state reasons in writing for all decisions regulated?**

- a. Are “reasons” specified in any particular way (e.g. that they must be adequate, clear and sufficient)?

### **Q 8: How is the obligation to notify all persons concerned of a decision regulated?**

- a. Is there such a general obligation? If not, in what areas – if any – of law does it exist?
- b. Are there particular requirements for such notification (e.g. is proof of reception required)?

### **Q 9: How is the obligation to give an indication of remedies available to all persons concerned regulated?**

- a. Is there such a general obligation? If not, in what areas – if any – of law does it exist?
- b. Are there exceptions to this rule?

### **Q 10: How is the obligation to document an administrative process regulated?**

- a. Is there such a general obligation? If not, in what areas – if any – of law does it exist?
- b. Do all administrative processes need to be documented? If not, what are the exceptions?

### **Q 11: How is the obligation to keep registers regulated?**

- a. Is there such a general obligation? If not, in what areas – if any – of law does it exist?
- b. Do all documents need to be registered? If not, what are the exceptions?

### **Q 12: How is the obligation to be service-minded regulated?**

Are there specific requirements

- a. to behave in a particular manner? E.g. *correct*, *courteous* or *accessible* in relations with the public?
- b. regarding language-use?
- c. regarding guidance on how to initiate proceedings, transmit representations to the competent authority etc?
- d. regarding accessibility, e.g. opening hours?
- e. regarding usage of telephone/mail/e-mail?



## **Appendix 5 Protocol from Expert meeting: An Administrative Law for the European Union?**

*Monday 6 December*

### **Day 1: Regulating Good Administration in the Institutions of the European Union: The Experience so far and the Potential of Article III-398**

Mr. Enzell, started out by welcoming the distinguished guests which represented a fine mix of fellow Europeans and told them about the background of the meeting. The Constitutional Treaty, will hopefully provide the Member States with new means to improve the administration of the Union. The purpose of the gathering was one of fact finding and open discussion, and was to be seen as a meeting in an academic spirit, yet in a quite informal sense. The meeting was a first attempt to discuss these issues.

The topic of the first day was the possibility to improve the direct administration of the European Union, by endorsing legally binding rules on good administration based on article III-398. The European Ombudsman has been a frontrunner, in this field for many years, here represented by Mr. Ian Harden, the Head of the legal department at the European Ombudsman who was also part in the making of the Ombudsman's Code on good administrative behavior.

#### **Mr. Ian Harden**

##### **Head of the Legal Department at The European Ombudsman**

*The Experience from creating The European Ombudsman's Code of Good Administrative Behavior.*

Mr. Harden started off by giving some general information about the European Ombudsman. He then went on to talk about the origins of the Code on good administrative behavior.

The first main purpose of the Code was to create transparency towards citizens, so that they would know what rights they have vis-à-vis the community administration. The parliament had asked for and was given a definition of maladministration, but what they really wanted was to be able to know what criteria the Ombudsman was applying when deciding and pointing out non-functioning practices. The second main purpose was to encourage service-mindedness in the administration.

The word "code" covers both legally binding instruments and soft law. Calling it a code had a certain advantage since the Commission and the



Council earlier had voluntarily adopted a code on the access to documents. This Code of good administration is written in terms of general principles and has been challenged before the Court of Justice. It was decided that it still created enforceable legal rights for individuals. The idea was not to establish specific rules of procedure to govern particular fields of activity. There are existing procedures and case law in some areas and so the Code was not to replace those but to establish general horizontal principles. When drafting the Code, the European Ombudsman wrote to his fellow national ombudsmen, asking them whether their country had a law on good administration or other sources which could inspire a code on the European level. Other sources of inspiration when drafting the Code was the case law of the Court of Justice, academic commentaries, the European Council's handbook *The Administration and You* and Jürgen Schwarze's monumental work on European administrative law.

In this work, the Ombudsman was not trying to achieve a lowest or highest common denominator nor trying to put together national experiences, but rather looking for best practices. An aim was thus to be able to guarantee that citizens won't be treated worse by the European administration, than they would by any national or regional administration they are dealing with.

In an Ombudsman's special report to the European Parliament it was recommended that the Parliament considered a law on good administration. Mr. Harden explained that the reason for proposing a law was that each institution and body was doing its' own thing today. The non-coherent system is difficult to explain and justify to citizens: "Under the Charter of fundamental rights, article 41, you have a right to good administration by the Union institutions and bodies, but to find out what that means you have to consult each institution and body." The primary motivation for the Ombudsman to call for a law was thus to achieve the necessary uniformity. The EP has called on the Commission to propose such a law but the Commission has over the years responded by saying: "yes, yes, yes, but not yet".

The legal basis that the Ombudsman originally proposed was article 308 of the Treaty, a "catch all-provision", which enables the Community to take action when there is no other provision available. However the use of article 308 demands unanimity by the Council and in some Member States there is a general opposition to the use of article 308, since it is seen as a way of extending the powers of the Union. So in November 2002 the Ombudsman called on the Convention drafting the constitution to put into it a clear legal basis for ensuring an open, accountable and service-minded administration. In September 2003 in the EP debate on the European Ombudsman's annual report, the responsible commissioner Mrs. Lloyola De Palacio proposed the article III-398 to provide the legal basis for a European administrative law that would apply uniformly to all the institutions and bodies. Current secretary general Mr. O' Sullivan confirmed subsequently to the Ombudsman

that 2006 would be a possible date for the Commission to present a proposal.

Mr. Harden summed up by commenting a few issues that might be raised in the future debate on an European administrative law. One of the concerns he expects to be expressed, by the legal services of the institutions in particular, is the danger of encouraging litigation and exposure of the institutions to actions for damages. If you create a legally binding law on good administration, instead of improving relations with citizens, there is a risk you will poison them with an adoption of a defensive attitude by the institutions, trying to minimize their possible exposure to claims for damages. Mr. Harden himself was not persuaded by this argument. In fact the codes are already adopted by the institutions and published in the official journal and according to Mr. Harden no one has tried to bring an action in the Court of First Instance based on one of these codes even if there, in principle, was no reason why they should not. These codes already do create legally enforceable rights for citizens.

Another issue of future discussion is the differences between the institutions and bodies and how a single set of rules can apply to all of them. Mr. Harden does not see this as a valid argument against common horizontal rules. On the contrary, the broad general principles apply to all institutions and bodies.

Another possible issue of debate is the fear that an administrative law for the Union might in some way affect the administrations in the Member States. "I don't think there will be a direct impact, however there could be an indirect impact", Mr. Harden said and continued: "If we succeed in creating the highest standard for the EU institutions and bodies, it will be difficult to explain to citizens why they should have less rights in their Member States. I believe that an administrative law for the EU will create a race to the top."

### **Questions and comments**

Question from the audience: In the Code there is a right to complaint to the Ombudsman. Have you received many complaints regarding maladministration and what is the experience of these complaints?

Mr. Harden: The Ombudsman receives a significant number of complaints that mention the Code. Some complainants certainly are aware of the Code and formulates their complaints in terms of articles of it. This facilitates the work of the Ombudsman and also the possibility of good answers from the institutions.

Mrs. Hellberg: Do you foresee that you will have a close cooperation with the Commission if they are supposed to put forward a proposal in 2006 as they have stated. Have they asked you to do any research?

Mr. Harden: The Commission has not yet asked the Ombudsman to make any research. Commissioner de Palacio saw the possibility of a European law on good administration since a legal basis exists in the Constitution. The date 2006 came up on the initiative of the Ombudsman after meeting with the secretary general of the Commission. I am not certain of which commissioner of the new Commission will claim responsibility for this issue.

Question from the audience: Is anybody working on a draft for 2006 and is it indeed the article III-398 that you think should be the legal basis?

Mr. Harden: The European Ombudsman's office is not working on a draft and I am not certain whether there is anyone in the Commission working on it or not.

Question from the audience: Is the Ombudsman's Code in any way in conflict with any specific tradition of public administration?

Mr. Harden: There are different traditions of public administration. When drafting this Code the Ombudsman was concerned only with the EU institutions and was not trying to follow any particular national tradition or a lowest common denominator. I certainly see a conflict with "the old culture" within the Commission and the Code. However tradition of a closed administration of the Commission has changed over the last years, since the dominant culture now is one that recognizes the necessity for good relations with the citizens.

Question from the audience: Could you say something more about the relation between article 41 about the right to good administration in the Charter and the Ombudsman's Code?

Mr. Harden: The right to good administration in the Charter is a fundamental right. The Charter is not legally binding as such so there exist no case law of the Court of Justice on the article 41. I see this article as a statement of general principle and leave to the Court to develop these legal principles through case law.

Even if the Ombudsman's Code is a more detailed definition what the right to good administration involves, it still is at the level of general principles applicable across the public administration.

### **Mr. Magnus Enzell**

**Adviser, The Swedish Agency for Public Management.**

*Presentation of the survey on Current Regulation of Good Administration in the Member States of the European Union.*

Mr. Enzell explained that the political scientists of the Statskontoret working group are used to treat problems of good government and administration as a problem of policy-making, management or culture. This task though, had required the group to look at administrative law as an enabler of good administration. A natural starting point for providing a context to the study was therefore to read up on how to define good administration in the legal sense.

The idea of an Ombudsman was invented by the Swedish absolutist king Charles the XII. When the administration of the state at one time in 1713 had become difficult to control he appointed an Ombudsman to make sure that the public authorities followed the rules and regulations of the country. However, it was not until 100 years later that the concept of the Ombudsman took on its' more modern meaning of an independent controller chosen by the parliament.

Historically, constitutional and administrative law has shared the task of controlling public power by setting up different kinds of legally binding rules on how the political and administrative realm can act. The working group's concern here is one particular aspect of administrative law, namely administrative law as a mean to achieving good administration.

Within these legal limits public authorities often enjoy different degrees of freedom to act: discretionary power to take binding decisions. Administrative law has classically only provided limits for such choices and has not attempted to influence the quality of that choice.

A complementary view of administrative law is about designing proper administrative procedures through legislation rather than on judicial review. If public administrations follow proper procedures, the probability of making good decisions increases dramatically. Elements crucial for the quality of decision making are principles, accountability, efficiency, the officials reflection on arguments, the citizens information, understanding and possibility for defense. Even if these frameworks have developed within national contexts, there are today several trends towards ascertaining citizens procedural rights on the European level.

Article III-398 could have an importance for creating binding rules on procedures. The article explicitly shifts the responsibility for the openness, efficiency and independence of the Unions administration to the hands of the Council. Today we can see a clear trend towards codification of rules on administrative procedures in the Member States. The purpose of this study is to see whether indeed it is possible to identify a common core of rules on good administration in the Member States.

Mr. Enzell clarified that since the working group is still in the process of collecting answers, the analysis at the time of the expert meeting had to be considered a tentative product that was still evolving. Statskontoret had at this point still to receive the answers from fourteen Member States. It is also important to remember that Statskontoret has no intention to evaluate or judge among different countries or point to a best practice. Mr. Enzell went on to presenting the results of the first draft of the survey. (The final version is included in this report.)

One can, at least tentatively, start talking about a common core of European principles of good administration.

There is a set of principles on good administration that is widely accepted among the Member States of the European Union.

Most principles are enacted as general and legally binding rules in constitutional legislation or in statutes.

The material content of the rules varies significantly.

Mr. Enzell concluded that the beginning of a common core of principles can discerned. Just by looking at the number of countries that has enacted the different principles, one can see that a majority of the principles are represented in a majority of the countries.

### **Questions and comments**

Mr. Druesne: For the time being we can only speak of rules of good administration in European countries.

Mr. Enzell: The title of this tentative paper may sound a bit too ambitious. Europe is not the same thing as the EU. The working group has been trying to understand their work as common European heritage.

Mr. Vogel: It is a well known fact that European administrative law developed since the time of the French revolution and continued through the continent so the similarities are not very surprising.

Primary sources and footnotes are always preferred. There are other studies made on this subject. The work of Jürgen Schwarze concerns many of these questions. Why not start with that instead of a questionnaire?

Mr. Enzell: The quality of the study is of course conditioned by the answers received since we have not got the resources to get hold of primary sources.

The only purpose with the study is to map out the administrative regulation in the Member States and then look for similarities and a common core of

principles. The working group did not want to take it that far as testing it against the law on the European level today but rather wanted to see how it is instituted in the different Member States.

Mr. Harden: Are you going to publish the answers from each Member State or in some way make clear what country says what?

Mr. Enzell: The working group is discussing that. There are legal issues involved. They will be accessible in Sweden as public documents but whether we can publish them or not is a different matter.

### **Seminar on the potential of Article III-398 in the Constitutional Treaty: *How should an Administrative Law for the EU be constructed?***

#### **Participants of the panel**

**Mrs. Maria Hellberg**, Deputy Director, Ministry of Justice, Sweden

**Mr. Jörgen Hettne**, Researcher in European Integration Law, Stockholm University, Sweden and former Legal Secretary at the Court of First Instance.

**Mr. Herman Hill**, The Research Institute for Public Administration, German University of Administrative Sciences Speyer.

**Mr. Peter van der Gaast**, Head International Civil Service Division, Directorate General Management Public Service, Ministry of the Interior and Kingdom relations, Netherlands.

**Richard Murray** (moderator), Chief Economist, Swedish Agency for Public Management.

Mr. Murray started by asking a broad question of how to overcome the administrative differences and traditions of the Member States in order to be able to formulate a legal basis for a good administration for the whole Union.

#### **Opening statements**

Mrs. Hellberg emphasized the importance of looking upon the paper produced by Statskontoret as a snapshot of the situation in the “old” as well as the new Member States. The Statskontoret working groups’ main task has been to gather facts rather than to do a full analysis.

The Ombudsman’s Code is a good initiative and ever since the beginning of the Union there has been a need for rules on good administration. The article III-398 can very well function as a basis for a law. As the EU now is spreading its’ competences and is dealing with penal law, human rights law etc. it is increasingly important to establish common rules in all areas and

that is why words like integration, transparency and good administration are key words to increase the confidence and the feeling of participation among the European citizens. Today there is a clearer need than ever to establish rules of this kind. The E-government and the access to information for the regular citizen plays an important part in this development, she added.

Mr. Murray asked about possible political conflicts with such a law.

Mrs. Hellberg pointed out that wanting to go in the direction of bad administration is not an alternative. There can of course be difficulties with internal organisations that already feel that they have functioning administrative cultures and because of that are not willing to compromise with a set of new, common rules.

Mr. Hill asked if we already have a common understanding and a common use of good administration in the Member States or if the traditions differ. Is there a policy transfer today? The answer is that this happens only in organisational fields, and it is called legal isomorphism under which context experience and culture transfer. Mr. Hill continued by formulating two other questions. Firstly, do we have clusters of administrative cultures?; and secondly, will the new Member States change this common view?

The second question is related to what Mr. Hill calls “*Europeanisation eastern end style*”. The new states of the EU can change the traditional understanding of administration in the Union. In this context one has to decide what the main task or purpose of this process is. Is it to establish the Rechtstat, the management, the governance, the multi-level governance, the customer orientated attitude, the service mindedness or merely to deliver outcomes? Some would say it is a tool in the development of a leadership for the common good.

Other questions of importance are: “Is good management and good governance the same thing? Is the Code or law a gentlemen’s agreement, a self commitment, a base for judicial control of binding law, a base for self assessment, a coordination or a criteria for good administration?”

Mr. Hettne’s opening speech intended to answer two questions. The first one was if there is a need for a law on good administration?

Mr. Hettne is convinced that a codifying into a written law is a good idea. The Court is already occupied with these questions and it would be of great help to codify from practice to written law. This would improve the visibility for the individual and clarify our common values that already are part of the *Acquis Communautaire*.

Mr. Hettne also sees this question as a balance between efficiency and individual rights. He promotes that the focus should be on the individual rights because it is a law and laws exist to protect the individuals. This follows from the article 41 of the Charter of fundamental rights which states that the legal requirements are the most important.

Mr. Hettne's second question was if it is necessary that the law correspond to the legal traditions of the 25 Member States?

The traditions are the base of the case law and therefore also one base in the European Convention of human rights law. The Court has a research division which have a lawyer from each Member State. This kind of comparative analysis has been used in many cases and have been the base for the Court to develop principles, so of which today are a part of the Convention on Human Rights. It will however differ from the law of the Member States in the sense that it has to be quite broad for the case law to develop. Mr. Hettne speaks of leading principles and examples rather than the common denominator.

Mr. van der Gaast pointed out that officials in countries like the Netherlands and Sweden have a different view on these traditions than the Germans or the French. The Netherlands would be very sure, before stepping into a administrative procedures act, that it could not be interpreted on a European level which would decrease their national policy making competences.

The view on the principles of equality, for example, is a bit more pragmatic than the German. Mr. van der Gaast raised a question that was mainly addressed to the Scandinavian participants: What culture will we get after this project?

### **Questions and open discussion**

Mr. Druesne advised us all to be modest and prudent at this stage since there is no legal basis today, according to him. The only provision today applicable is article 39.4 which states that the free movement of workers is not applicable to public administrations. With such a negative approach everything is an improvement. The understanding is growing also without a law - is a European law necessary? And if so, to what extent?

Another question is the understanding of the term E-government and the French word for it, administration électronique. Do we mean the same thing?

Mr. Nergelius continued the discussion on the different rules and administrative cultures of the different institutions. If one does not take this into account when elaborating a new administrative law for the whole EU you will probably find this work more difficult than otherwise. The Court of Justice,



for example, is powerful, conscious of its' own importance but also very formally regulated in terms of what the civil servants may do and how they may communicate with their surroundings. The Committee of Regions on the other hand is not very influential, it is one of the weakest and smallest institutions. Their rules are not enforced with the same kind of seriousness. The task is also to influence the surrounding world and therefore you are allowed to take initiatives and contact the surrounding world.

Mr. van der Gaast saw this description as a management problem: "Even though the rules have changed, many of the "managers" have not and are keeping their eyes closed." Mr. van der Gaast informed us that there have been efforts made by his organisation of putting this on the agenda and invitations to all institutions to come up with their implementation policies but three of the five refused. The Commission considered the subject to be far too delicate to put on the agenda in the first place. Thus, even if the laws are changeable, lots of other factors are just as important when achieving real changes. "One should not have to much believe in the law itself." The most important development up till today is that the issue has been put on the table by the Ombudsman, he said.

Mr. Nergelius' second remark had to do with the prospects of success in terms of elaborating an administrative law. There are at least two different administrative traditions in Europe. The entry of the Sweden, Finland and Ireland in 1995 has increased the importance of transparency and so the timing is good for talking of a new code. Mr. Nergelius considers this to be an area where Sweden can do some good work and has a role to play in the development process.

Mrs. Hellberg does not see any problems with having different administrative cultures. A European law for the institutions and the bodies of the Union does not in anyway exclude that you have specific solutions on the national level. The networks that deal with the management and the cultures must complement not exclude each other, she thinks.

Mr. van der Gaast reacted to this comment by raising the question of what the legal base is for having a legal administrative procedures act without having an effect on the outcome of certain proceedings for individuals in Member States. He considers the establishing of a general public administration procedures act on the European level to take it a step to far. In the article III-285 he does not find anything but the legal base for some sort of cooperation.

Mrs. Hellberg sees a legal base in article III-398 for an administrative law, though it's not worded in the way that Sweden, in support of Ireland and Finland, proposed. Still the intention is to have a law focusing on the individual rights.

Mr. van der Gaast sees the risk of such a law leading to a administrative procedures act that would allow anyone to go to the Court with an issue of for instance proportionality of something that is a consequence of that act.

Mr. Tarchys then spoke of the Nordic “tribe” and its’ culture of transparency and a great deal of oral decisions. According to him this culture is a lot about avoiding putting things on paper and in that way not committing oneself in the same way one would if decisions could be read and controlled by citizens. The tradition of the Union, on the other hand, is to get everything spelled out very carefully. One question is whether there are any formal motivations for the new Code from this perspective. Are there signs of longer motivations for the decisions made as the majority of the continental Member States would use?

Mr. Hettne answered by informing the audience that there is no lesser openness due to transparency regulation. The Commission is today making efforts to clarify what it is doing.

Mr. Hill carried on by talking of deregulation and asked if it is politically correct to talk about new regulation? Giving new rights may contribute to the reduce of administrative burdens for the citizens but also to create more bureaucracy and work for lawyers.

There are several examples of good administration developed electronically and transferred to the traditional methods of working. In the Netherlands they have presented an E-citizen-Charter. One could thus claim that E-government is more about government than about E.

There is a border between internal procedures and external law. 1) Do we get juridification of the inner space? 2) The relation between subsidiarity and integration? 3) What is the function of the law supposed to be? Is it to follow the real word, give a ratification of a behavior or to shape the behavior for the future?

Mr. van der Gaast sees a positive development in going towards making rules less complicated and more applicable so that officials are able to be more pragmatic in their practice. However, there is a possibility that this process will take to much time and cost to much.

Mr. Harden then clarified that the Ombudsman is focusing only on the administrative law as it might apply on the Union and that a code for the Members States is something completely different. The law is not meant to restrict the court but nor will it enlarge its competence and expand its jurisdiction. The issue of who has access to the Court is a different question and it is that which limits people to make generalized policy interventions as

Mr. van der Gaast is concerned of. The Member States will not alter their current position in this aspect in the future Constitution.

Mr. Hettne then stated the fact that principles differ in different fields. The revisions on the right to be heard, reasonable time, nondiscrimination, proportionality, obligation to state a reason, amongst others are already included today but in different legislative acts. There is also general applicable principles of law from the Court of Justice that are in use but they are unwritten and that is what is causing the vagueness. If it's possible to develop an accepted code and a law that would be legally binding, the visibility between fields would increase.

Mrs. Hellberg agreed and pointed out that the principles are often developed in the Court and comes from a particular case. It is often complicated even for lawyers to know what they are. Thus, there is a need for a law.

Mr. Aroso de Almeida, however, sees the article III-398 is an organisational article. It is not the kind of article that fits with a code of conduct. The article says that institutions, bodies, offices and agencies have to support an open, efficient and independent administration. There is a distinction between the three and the European administration that supports them. Is this distinction something new? How build it, rule it and define it? The Code is an independent issue.

Mr. Hettne also distinguishes problems on how the article could function as a legal basis for a law. But besides article 41 in the Charter there is no other expressed basis for having the Ombudsman's Code as a legal instrument. The Code is more directed from the institutions towards the ordinary citizens than the staff regulation which is more internal. The Code is hopefully enough for such a basis.

Mr. Hill does not think the article deals with citizen rights like the Charter of fundamental rights. It's purpose is merely to regulate internal organisational rules. Nonetheless he sees the possibility to leverage and transfer these internal provisions into external citizen rights.

Mrs. Hellberg repeated that the article III-398 very well can be the legal basis for a new European law on good administration and that it would include individual rights. The article III-285 concerns only the work in the Member States and says nothing about the Member States coming together and decide what the institutions should do and how they should work.

Mr. van der Gaast interprets the word *open* in the article in the meaning that only purely transparency related procedures are allowed. Certainly not lawfulness, nondiscrimination, proportionality and so on.

*Tuesday 7 December*

**Day 2: Integrating the Administrations of the Member States: Can there be a Roadmap for a European Administrative Area?**

**Mrs. Danuta Wisniewska Cazals**

**Secretary of the Council of Europe's Working Party of the Project Group on Administrative Law.**

*The Council of Europe's (CoE) experience of creating a model code of conduct for public officials in the Member States.*

Mrs. Wisniewska-Cazals started out by outlining the background of the ongoing work in the Council of Europe on the right to good administration. The Committee of Ministers has instructed the project group on administrative law (CJ-DA) to examine the feasibility of preparing a consolidated model code of good administration. In December 2003 the CoE arranged a pan-European conference on the right to good administration with the purpose to determine whether a right to good administration should be recognized.

The CJ-DA was established in 1977 by the CoE and is an intergovernmental plenary committee of experts which meet once a year. The most recent development arising from CJ-DA activities concern the preparation of the report on the feasibility and desirability of preparing a recommendation and/or a consolidated model code of good administration as envisaged in parliamentary assembly recommendation no. 1615 (2003). This recommendation invites the Committee of Ministers to elaborate two instruments. Firstly a model text for a basic, individual right to good administration and secondly a model code of good administration.

According to Mrs. Wisniewska-Cazals the right to good administration exists in substance in most European states, though it is rarely included as such in the different constitutions. The concept of good administration is rather vague and therefore problematic. The CJ-DA considers that a model code of good administration could help to create a greater awareness among officials.

The working party of the CJ-DA held its first meeting in September 2004. It examined existing international and national instruments and texts on the subject and attempted to identify principles that were not contained in those texts, with the aim of drawing up a list as complete as possible with principles on good administration. The working party further instructed the scientific experts to prepare a preliminary draft report on the feasibility of preparing a recommendation. It was agreed that the concept of good administration is linked to that of good governance. A draft report has been drawn up, listing 44 principles of good administration. The report concludes that it

will be useful to prepare a European consolidated model code of good administration. (The second meeting of the CJ-DA working party started in December 2004, and the final version is now available.)

### **Questions and comments**

Question from the audience: You told us that the working group has come up with a list of 44 principles of good administration, which is quite a big number. The Ombudsman's Code on good administrative behavior only contains 27 articles. Can you perhaps relate the European Ombudsman's selection to the selection made by the working party?

Mrs. Wisniewska-Cazals: All the principles included in the Ombudsman's Code are also included in the list of the working party. However, there were other important principles that ought to be included, many of them found in national legislation. Some members of the working party also had innovative and good ideas on important principles, which also were included. Therefore, the number added up to 44.

Question from the audience: Has the Council of Ministers expressed a commitment to introduce all these principles in their respective national legislations?

Mrs. Wisniewska-Cazals: Regardless of whether it will be a recommendation, or a model code it will have the legal status of a non-binding instrument.

Question from the audience: Does your code include anything about the remedies that should be available to the citizens or is it focused exclusively on the substantive principles that should guide decision makers?

Mrs. Wisniewska-Cazals: The working party has not discussed this issue yet.

Question from the audience: The working party has been given the mandate to look at the feasibility of creating a non-binding instrument so it's quite vague. I'm curious regarding the feasibility study. None of these principles are even controversial. Why do the experts connected to the working party consider this to be a useful code? What will it lead to?

Mrs. Wisniewska-Cazals: The Council of Europe has adopted 20 different recommendations concerning the relation between the administration and the public. The idea here, was to consolidate these by bringing them together in one single instrument, which could be useful both for the administration and the citizens. And also to add new principles, since society evolves and new issues are added frequently. This new instrument should reflect this development.

Mrs. Wisniewska-Cazals summed up the discussion by emphasizing the difficulty of initiating activities concerning administrative law, since each Member State has its own administrative system. It is difficult to justify the necessity to elaborate an instrument for all Member States.

### **Knut Rexed**

#### **General Director of The Swedish Agency of Public Management**

*The Experience from Administrative cooperation between Member States: EPAN and OECD PUMA.*

Mr. Rexed began by drawing the historical outlines of the OECD. The organisation was built up after the second world war, very much in economic cooperation, in funding for reconstructing activities, but rapidly came into the reconstruction of adequate national institutions and later into adequate global institutions. These institutions are today necessary for markets and private entrepreneurship to work. The OECD is an organisation without mandatory powers and it works by the commitment of the Member Countries.

The basic method in the OECD work is discussions between the Member Countries, backed up by analytical papers prepared by the OECD secretariat in cooperation with national experts. Mr. Rexed himself spent two years in sessions in Brussels trying to convince the European Trade Union Confederation of the benefits of an active labor market policy. When you have a common view of what is good and what is bad, a peer review is organized and a Member Countries examined. After drawing conclusions of practices this method has a very harmonizing effect since nobody wants to be the bad example.

Codes are in some countries adopted as conventions on the institutions necessary for the interaction between the national economies of the Member Countries in various fields such as taxation, corruption, financial markets and management, governmental support, private activities and on integrity of a public administration. Integrity of public employees is a field of growing importance. Measures are taken to help non OECD members to build adequate national institutions in order to compete on the world market and to grow towards a level where they can be members themselves. For this the OECD has developed the SIGMA program, a cooperation with the EU to support the administrative and economic development of institutions of the ten former Candidate Countries.

Similar cooperation has developed with the government of China. The OECD is also about to set up a broad program for the Middle East and north Africa supported by the heads of state of all the Arab countries. The cooperation, supported by the USA, will include the issues of openness, integrity and government by law.

The OECD has played an important role in the field of budget issues for Europe the last 10-20 years. There has been a convergence in the OECD countries built on the same principles, not only the bookkeeping but also the accountability, the distribution of responsibility, evaluations etc. One of the strongest networks of the OECD is the group of senior budget officials that meet twice a year to discuss and organize peer reviews of budget systems in order to create more practical and efficient tools in their national economies.

In the traditional view on public administration was very reliant of the due process so innovations and other deviations were not regarded as positive contribution. That created a system that tended to be risk minimizing and not very innovative or customer oriented. The administration was not supposed to ask the customer what he wanted. Nowadays the administrations are providing an extensive range of services, including health, education, etc. but are also collecting customs dues and making it easier on enterprises to enter markets and so on. Accountability is nowadays a prime requisite for the government by law which is why the OECD works with performance management. In this work it's determined what should be the process in arriving to a decision and who the right person is to take that decision.

This work lead the OECD to discuss the performance of public employees and the question of how to reward innovations and to encourage people who take initiatives. This discussion is related to the complicated issue of how to combine this with questions related to integrity. How can we protect a public administration and the integrity while at the same time build a more citizen- and performance oriented organisation. How do we decide the pay systems for our public employees in this new environment?

Mr. Rexed then went over to cover the developments of the European Administration Network (EPAN) framework. Looking into the future more focus will be on the outreach and how to support the countries close to us to go the same way to create institutions necessary for economic and democratic development. The EPAN is a newcomer on this arena. In 1999, during the Finnish presidency, meeting in Helsinki the Finnish minister started to work on more systematic long term programs. Medium term programs with a more stable organisation were adopted. The EPAN was still a very informal organisation. Then, during the Swedish presidency there was an agreement on the workings of a troika and a secretary of a troika and this was a step towards a more organized cooperation and, this year, during the Irish and Dutch presidencies further steps have been taken.

During the Luxemburg presidency in 2005 the Ministry of public administration will have an informal meeting where the issue of adopting a new medium term program and whether to organize it in more strict forms and more concrete goals to be achieved will be discussed. It is gradually

moving from an informal cooperation into something that is still informal but much more organized and goal oriented than before.

The basis is of the EPAN discussions are backed of analytical papers. The network does not have a standing secretary and relies on contributions from the members. It is engaging in benchmarks between the public administrations in different European countries. Recent examples are public procurement and road safety. This kind of activities are always just voluntary. Examples of studies is a paper of a framework on integrity and the behavior of public employees where the conflict of performance orientation and the due process is an important issue.

There is a possibility that the members in the future will agree on a document on what constitutes good administration and agreeing on starting to work towards specific goals. This will be very challenging because of the differences of systems and will take a long time to overcome. A troika meeting at ministerial level was held this autumn to discuss how a public administration should fit into the Lisbon strategy aiming at making Europe the most competitive area in the world. Quality conferences and learning activities are also organized.

The Commission provided support to the Candidate Countries during the extension period in the strengthening of their capacity to handle the demands of membership. It has provided support to the EPAN, especially in the field of promoting the mobility between the public administrations. The work done in the e-Europe program is also important and concerns the creation of an electronic government and administrations that are using the technology in order to become as open, efficient and as servant orientated as possible. In the future it will not be enough to have joined up governments on the national basis. The long term goal must be to have joined up governments on the European level. Some states have opted for very central solutions, while others like Sweden have gone in the opposite direction by telling the agencies to go ahead and solve it themselves, not having any central comments on the solutions of technology, relying completely on cooperative solutions and common back office services. Even if there are big deviations of solutions on national level this has to be solved.

Mr. Rexed concluded by stating the importance of integrity in this development. The Commission has to receive staff who have served and been socialized in the public administrations of the 25 different Member States. Coming to Brussels they bring an administrative culture, expectation from the practices of their home countries. These practices differ wildly and create misunderstandings, conflicts and internal fractions. Creating a more homogeneous administrative structure is probably a necessary prime requisite if we are going to make the Commission's administration the 26<sup>th</sup> public administration of Europe to work properly.



## Comments and Questions

Mr. Druesne: It's probably a good thing that we today have various organisations dealing with the same thing so that the public awareness can grow. On the other hand, do you think that we face a risk of duplication of works, of overlapping of activities?

The EPAN is now operating an important program in China named the China Europe Public Administration Program (CEPPA) with the purpose to improve the understanding of the European public administration systems. What is important to consider when avoiding that work is done twice?

Mr. Rexed: Duplication is a common problem in all development cooperation. There is often confusion between donors operating in the same country. In dealing with these problems it's important to allow the recipient country to have a strong voice and to achieve the sharing of information. It is always important to keep the OECD informed on what the EPAN is doing.

Social dialog is a complicated issue and has been on the agenda of the DGs for a long time. The way to get a formal social dialog is very long.

Mr. Murray: The cooperation between the EPAN Member States is informal which traditionally is considered to be a virtue. Will the Commission now turn it in to a more formal cooperation?

Mr. Rexed: The Commission has always participated but has been represented by the DG administration and has been very active in the issue of mobility between different administrations but acting more as an observer on other issues. Member States, among them Sweden, have been calling for a more active involvement by the Commission, not merely in its capacity as an administration, but as the Commission. The convention will maybe make it possible for the Commission to finance a standing secretary even though the DGs are holding back in that respect.

Mr. van der Gaast: During the Dutch presidency it has been obvious that the Commission has taken a different role. They have been fighting in the Human Resource Management Group with an ethical conduct code and they are clearly heading, sooner or later, to make the foresight thing on the pension issue. This is an example of that the Commission is starting, with all there DGs, to operate on a broader front in the EPAN framework and they see the EPAN more formalized in the future.

Mr. Rexed: This is what Sweden has wanted all along. The increasing interest on European level will effect the national level. The question is not *if*, it's *how*. Mr. Rexed believes in a compromise between a the French system

where everything is regulated in law and a Swedish-like way of governing everything in collective agreements.

## **Henning Christophersen**

**Partner at KREAB in Brussels, member of the Presidium of the Convention on the Future of Europe, former vice-president of the European Commission.**

*The potential of article III-285 in the new Constitutional Treaty.*

Mr. Christophersen started out by pointing to the article I:17, which makes possible for the EU to support administrative cooperation between the Member States. The forms for cooperation are further specified in III-285.

Mr. Christophersen went on to sketching out the historic background to article III-285. Mr. Christophersen was a chairman of the working party on competences in the Presidium of the Convention. The work of creating a catalogue of competences is merely intended to clarify the existing division of competences. However, there were exceptions to this rule: In the field of shared competences energy policy was added. In the field of supplementary actions three new policy areas were added, one of them being administrative cooperation.

The administrative cooperation came up because some members of the working party were interested in how the EU could strengthen its' democratic legitimacy. One of the questions that was raised concerned the achievement of a more reliable and coherent implementation of EU legislation and measures in the Union as a whole. There were particularly three reasons why the working group wanted to add administrative cooperation to the list of areas where the EU can take supplementary measures. The first reason was that regional and local municipalities became much more involved in the implementation of EU policies in the 80:s than they had been before. This development created a big challenge for local and regional units since some of them did not have a very profound knowledge of EU policies.

Another reason was the ongoing enlargement process. When Spain, Greece and Portugal joined, one experience was the lack of administrative readiness in Greece. Spain and Portugal had also considerable problems. There were fears of a similar lack of administrative capacity in east and central European Member States that joined the Union in 2004 and also in the candidate countries, Romania and Bulgaria.

The third reason was the fundamental shift in how the Commission view EU-financing of training schemes. Until recently it was possible for the Union – even without a legal basis - to allocate limited financial credits to certain institutes like EIPA for instance. That is however no longer accep-

ted. The budgetary discipline now demands a legal basis, which can only be created if you have at text in the Treaty saying that this is within the competence.

In conclusion there were a number of reasons for why the working group decided to look into the issue of administrative cooperation and so the Commission helped out in drafting a text.

According to Mr. Christophersen the administrative cooperation is not a transfer of competence, but a supplementary measure, which was difficult to explain to a couple of Member States. This means that that the EU can give financial support to training institutions within the Union with a European objective. It also means that the EU can give financial support to training programs, initiated by the Member States themselves the legislator of if secondary legislation wants to use this possibility.

Mr. Christophersen is convinced that the possibility of training schemes will be used, by the existing institutes, by the national and regional authorities and perhaps even by new institutes. It will be useful to create some sort of status report, to get an overview of the situation regarding the need for training schemes. So far the picture is fragmented and there is a need for a report on the status in each Member State. On the basis of such a report there can be an open discussion leading to a list of priorities and a working party discussion on a secondary legislation. Several questions need to be addressed:

- How should article I-17 and III-285 be implemented?
- What should be the contents of a European law on cooperation in public administration and how should such a law be implemented?
- What should be the role of the Member States, the Commission and the institutes?

Such an effort will not only improve the public administrations in the Member States, but will also facilitate a better exchange of experiences, perhaps the exchange of officials and improvement of the quality of the existing EU-legislation. Finally, Mr. Christophersen is convinced that it will improve the democratic legitimacy of the EU if people know that there is a proper and coherent implementation of EU-legislation regardless of the Member State in question.

### **Questions and comments**

Question from the audience: Are there any subjects that could not be discussed under article III-285?

Mr. Christophersen: The Commission's own activities not should be based on this article. The Commission has the right to do its' own training pro-

grammes for its' own staff. It is a rather wide paragraph and the work on a European law on cooperation in the field of public administrations will have to narrow the scope.

Mr. Druesne: In the EPAN, there is a lack of consensus on what the next phase should be. While the governments in some Member States awaits a formal proposal from the Commission, others are in favor of taking the initiative by creating an own proposal. What would be the right way to proceed in your opinion?

Mr. Christophersen: The most productive way of doing it is in as a cooperation between the Commission and the Member States. Mr. Christophersen's proposal would be to have a two-stage process with consultations, leading to a green book, with an invitation to all parties concerned to come forward with their ideas. Finally it would be for the Commission to make up its' mind.

Question from the audience: There are other measures to achieve a proper implementation (funds etc.). Could these in some way be connected to the supplementary measures we are talking about? For instance, would it be possible to say that unless you take part in this or that, these funds will not be forthcoming anymore?

Mr. Christophersen: It's an absolute possibility, but it includes a provision in for example the structural fund regulation, giving that opportunity to the Commission. There must be a legal basis for withdrawing funds. Today you can withdraw funds but that possibility is not connected to training in any way.

Question from the audience: Are there any current initiatives for simplifying the *Acquis Communautaire* which is often very difficult for the Member States to implement?

Mr. Christophersen: It's rather the Member States themselves that make the legislation more complicated, since they often want special arrangements and so on. The Member States will have to accept a more simple legislation, but with all the consequences that would have.

Question from the audience: Are there any guidelines regarding which administrative capacity is necessary for implementing the *Acquis*?

Mr. Christophersen: The normal rule is that the Member States have the responsibility for the implementation of the EU legislation and that there are no general guidelines regarding administrative capacity. He does not think that article III-285 can be used to that purpose.

Question from the audience: Do you see any obstacle to the use of article III-285 to finance cooperation between those who supervise administration, including off course national, regional and local ombudsmen?

Mr. Christophersen: It is quite possible to get training schemes for ombudsmen financed.

## Appendix 6 Program for Expert meeting in Stockholm, December 6-7 2004

### Monday 6 December: Regulating Good Administration in the Institutions of the European Union: The Experience so far and the Potential of Article III-398

- 12.00-13.30 Welcome speech and lunch buffet.  
**Dan Eliasson**, State secretary, Ministry of Justice.
- 13.30-14.30 The Experience from creating The European Ombudsman's Code of Good Administrative Behaviour.  
**Ian Harden**, Head of the Legal Department at The European Ombudsman.
- 14.30-15.00 Coffee break.
- 15.00-16.00 Presentation of the survey on Current Regulation of Good Administration in the Member States of the European Union.  
**Magnus Enzell**, PhD, Adviser, The Swedish Agency for Public Management.
- 16.00-16.15 Short break.
- 16.15-18.00 Seminar on the potential of Article III-398 in the Constitutional Treaty: How should an Administrative Law for the EU be constructed?  
**Maria Hellberg**, from the Swedish Department of Justice.  
**Jörgen Hettne**, Former Legal Secretary at the Court of First Instance.  
**Peter van der Gaast**, Head International Civil Service Division, Directorate General Management Public Service, Ministry of the Interior and Kingdom relations, Netherlands.  
**Prof. Dr. Herman Hill**, Deutsche Hochschule für Verwaltungswissenschaften Speyer, Tyskland
- 19.00 Dinner at Restaurant *Leijontornet* at *Lilla Nygatan 5* in the Old Town.

**Tuesday 7 December: Integrating the Administrations of the Member States:  
Can there be a Roadmap for a European Administrative Area?**

- 8.30-9.00 Coffee.
- 9.00-9.45 The Council of Europe's Experience from creating the Model Code of Conduct for Public Officials in the Memberstates.  
  
**Danuta Wisniewska-Cazals**, Secretary of the Council of Europe's Working Party of the Project Group on Administrative Law.
- 9.45-10.30 The Experience from Administrative Co-Operation between Member States: EPAN and OECD PUMA  
  
**Knut Rexed**, The Swedish Agency for Public Management.
- 10.30-11.00 Coffee break
- 11.00-11.45 The potential of Article III-285 in the new Constitutional Treaty.  
  
**Henning Christophersen**, Partner at KREAB in Brussels, member of the Presidium of the Convention on the Future of Europe, former vice-president of the European Commission.
- 11.45-13.00 Conclusions and debate.
- 13.00-14.30 Lunch buffet and departure.

## **Appendix 7 List of participants, Expert meeting in Stockholm, December 6-7 2004**

### **Speakers (in order of appearance)**

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