

The European Administrative Space and Sigma Assessments of EU Candidate Countries

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Introduction

Public administration has always been a domestic affair of the EU member states. At the same time, national public administrations have to implement EU directives and regulations in such a way that European citizens are able to enjoy the rights granted to them by the EU Treaties, irrespective of the country in which they live; a fact, which on its own could well justify an interest of the EU in the administrative capacities of their members as it is indeed envisaged in the text of the European Constitutional Treaty.

In addition, EU legislation has a rather great impact on economic and social conditions in member states and thus on their economic competitiveness. National public administrations and judiciaries guarantee its implementation, and, as the highest instance European Court of Justice. The interest of member states in public governance of other member states has increased over time. This interest in the administrative and judicial capacity is even more evident when it comes to the capacity and professionalism of public administrations and the judiciary in candidate countries.

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Given this concern, SIGMA was asked by the European Commission to assess the alignment of public administration in EU candidate countries of Central and Eastern Europe to general EU standards, focussing on horizontal systems of governance, namely policy-making and coordination, civil service and administrative law, public expenditure management, internal financial control systems, public procurement and external audit, and since a few years ago an assessment of the public integrity systems was added.

Common minimum benchmarks, i.e. baselines for horizontal governance systems for candidate countries were developed by Sigma in cooperation with the EC. Since 1999, using these baselines, Sigma has assessed the progress of candidate countries towards general EU standards and the *acquis communautaire*. The Sigma assessments are one of the sources of information for the European Commission's Regular Reports.

The rationale for the Sigma assessments of horizontal governance systems and the baselines are the following basic requirements for Candidate countries before becoming a Member of the EU. Candidate countries are:

- to have administrative systems capable of transposing, implementing and enforcing the *acquis in a way that they achieve the set result/outcomes (obligation de résultat)*;
- to meet the criteria required for EU membership, as adopted by the EU Council, i.e. the so-called Copenhagen and Madrid criteria; and
- to have their progress towards EU accession measured in terms of their »administrative and judicial capacity to apply the *acquis*«.

1. Is there a model for Candidate countries?

Horizontal governance systems of a candidate country are expected to meet some requirements that are crucial for the reliable functioning of the entire administration, including in areas of the *acquis*. However, the lack of general EC legislation applicable in the domains of public administration and governance, along with the disparate administrative arrangements of member states, poses a certain problem for candidate countries as there is no simple model to follow. However, in the course of time, a relatively wide consensus has developed regarding key governance criteria which by now, by virtue of the jurisprudence of the European Court of

Justice, can be considered as part of the *acquis communautaire*¹. They can be grouped into the following four categories, with the rule of law in a prominent position:

1. *Rule of law*, i.e. legal certainty and predictability of administrative actions and decisions, which refers to the principle of legality as opposed to arbitrariness in public decision-making and to the need for respect of legitimate expectations of individuals;
2. *Openness and transparency*, aimed at ensuring the sound scrutiny of administrative processes and outcomes and its consistency with pre-established rules;
3. *Accountability* of public administration to other administrative, legislative or judicial authorities, aimed at ensuring compliance with the rule of law;
4. *Efficiency* in the use of public resources and *effectiveness* in accomplishing the policy goals established in legislation and in enforcing legislation.

As far as these principles are shared among EU Member States, one can speak of a common *European Administrative Space* (EAS).² The EAS implies a common set of standards for action within public administration, which is defined by national law and enforced through relevant procedures and accountability mechanisms.

In most EU Member States the above mentioned governance principles are established by the constitution, and transposed through a set of administrative legislation, such as civil servants acts, administrative procedures acts and administrative disputes acts but also organic budget laws and laws and regulations on financial control systems, internal and external audit, public procurement, etc.

Despite the fact that the main constitutional legal texts of the European Union do not provide for a model of public administration, some important administrative law principles are already stated in the Treaty of Rome, such as the right to judicial review of administrative decisions issued by

¹ The jurisprudence of the European Court of Justice forms part of the *acquis communautaire*.

² A detailed account of these administrative law principles in connection with the European Administrative Space can be found in Sigma Paper no. 27, *European Principles for Public Administration*, OECD, Paris, 1998. See also Sigma Paper no. 23, *Preparing Public Administrations for the European Administrative Space*, OECD, Paris, 1998. Both publications are available at <http://www.sigmaxweb.org>.

EU institutions (article 173) or the obligation to give reasons for EU administrative decisions (article 190). In this vein, the European Ombudsman proposed a *Code of Good Administrative Behaviour* for EU institutions and bodies, which was adopted by the European Parliament in 2001.

2. Driving Forces for Convergence – in particular, the role of the European Court of Justice

The four liberties embedded in the Treaty of Rome, namely free movement of goods, services, people, and capital, mean that national public administrations of the Member States have to work in a way that renders the implementation of these freedoms effective in all respects. The fact is that, although each Member State has total liberty to decide on the ways and means of achieving the results foreseen in the Treaties, shared means and principles have developed within the Union. This situation is particularly visible in the area of administrative law principles. It is less visible, however, in administrative and organisational arrangements and structures because of the great variety of institutional settings across the various member countries. However, we can identify a number of forces leading to convergence in their public administrations.

a) The legislative activity of EU institutions

The legislative activity of European institutions is a major source of common European administrative law, implemented as national law in the EU Member states. This European administrative law is mainly special administrative law and concerns a variety of sectors, however, there is also horizontal legislation, such as legislation governing public procurement and to a certain extent public internal financial control systems.

b) Interaction amongst officials

Another source of administrative approximation is the constant interaction among civil servants of member states and civil servants of the EC fostering a common understanding of how to implement EU policies and regulations at national level and a fruitful exchange on best practices for achieving the intended results. Co-operation and exchange have the effect of creating a certain peer pressure for setting common standards for the attainment of the policy results foreseen in the Treaties and in other EU legislation.

c) *Increasing influence of EU legislation on the national legal framework*

EU law has over the years influenced the national legal framework and its implementation even in the areas where no EU standards or direct influence exist. This phenomenon occurred due to the fact that it would be very difficult to use, within a given state, different standards and practices for applying original national law and the law based on EU obligations. Progressively, national institutions have therefore applied similar standards and practices for legislation from both legal sources (if in fact standards and practices were different before).

d) *The role of the European Court of Justice*

It is the European Court of Justice that plays a predominant role in the development of common administrative law principles within the European Union. In fact, the jurisprudence of the Court is the main source of general, i.e. non-sectoral, administrative law in the Union.

Within the EU the national courts have to ensure the implementation of the EU Treaties and secondary legislation. In order to ensure a uniform interpretation, national courts should, if an article in a piece of legislation seems unclear, submit the issue to the European Court of Justice for interpretation by means of the preliminary ruling procedure, foreseen in article 177 of the EC Treaty (now article 234 of the EU Treaty in force). This interpretation role of the Court is at the base of the leading role³ that the Court plays in developing common principles.

In the early years, the European Court of Justice case law was influenced by the legal systems of the initial Member States, in particular by concepts stemming from the French administrative law. Yet there has never been a single French influence on the development of EU law, and the growth of EU membership has led to a diversification of the sources of inspiration of the European Court of Justice's legal thinking. This means that the rulings of the Court do not respond specifically to a given national legal background, but that its jurisprudence is rather a composite of influences stemming from virtually all members of the Union. For example, the *administration through law* principle originated in the French *principe de légalité* as well as in the German concept of *Rechtsstaatlichkeit*, which are more or less

³ The leading role of the European Court of Justice has been criticised by some as excessive judicial activism.

close to the British concept of the *rule of law*. It is worth noting that even though these three notions have different national roots, they are nowadays conducive to similar practical effects. The concept of *fair procedure* can be traced back to British and German legal traditions; the principle of proportionality came mainly from the German legal tradition; and so forth.

3. Assessing the Approximation of Candidate Countries to the European Administrative Space

The EU accession criteria, as defined by the Council of the European Union, with a direct influence over administrative systems may be summarised as follows:

1. *Copenhagen 1993*: stability of institutions guaranteeing democracy, rule of law and human rights;
2. *Madrid 1995*: adjustment of administrative and judicial structures so as to be able to transpose EU Law and effectively implement it;
3. *Luxembourg 1997*: institutions strengthened and improved and made more dependable;
4. *Helsinki 1999*: obligation of candidate countries to share the values and objectives of the European Union as set out in the Treaties.

SIGMA works on the assumption that the public administrations of candidate countries need to reach acceptable standards of reliability, predictability, accountability, transparency, efficiency, and effectiveness in order to meet EU accession requirements.

In this context it should be noted that the requirements for joining the Union evolve in line with the development and the progression in the construction of the EU. This means that a candidate country should at the time of accession show a sufficient degree of progress to satisfactorily compare itself with the average level of EU Member States and it should show the capacity to further develop at the same pace as the other members. This is to clarify that the requirements (the level of convergence) of 1986 (when Portugal and Spain joined the EU) changed in 1995 (when Austria, Finland and Sweden joined the Union), and were again different in May 2004 when ten new Member States joined the Union and once again in 2007. The requirements will again be different in the future, when other candidate countries join the European Union.

This means that it is not sufficient for a candidate country to reach the current average level of administrative capacity of present EU Member States. It will be necessary for each candidate country to reach the future

average level of Member States. In other words, a candidate country will have to fill the gap between its current administrative capacity and the average administrative capacity of EU Member States at the point in time when the candidate country effectively joins the Union. It will not be enough for a candidate country to compare itself with the »worst« country that is already an EU Member. The comparison has to be made between the candidate country and the average of all Member States.

Candidate countries have to ensure that their administrations and courts have the capacity to work in line with, defend, and safeguard the common interests of the European Union resulting from *structural subsidiarity* and from the duty of *loyal co-operation*, as laid down in the Treaties and in the jurisprudence of the European Court of Justice. This is the reason why the administrative systems of Candidate countries are assessed by scrutinising the extent to which those administrative law principles are applied in practice. This assessment does not only concern the formal legal arrangements but increasingly the daily practice of public authorities, civil servants and courts. This includes the soundness of policy-making and coordination, reliability of public administration, accountability of public authorities and civil servants, the impartiality and transparency of administrative decision making and adequate structures and procedures for challenging them through redress and appeal.

4. Public Management and Civil Service Reforms in EU Candidate Countries

The reform of public administration in candidate countries has become one of the main EU accession requirements since the EU Summit in Copenhagen in 1993. The Copenhagen criteria call for a professional civil service free of undue politicisation, based on merit, and working according to acceptable integrity standards. They also require the clear separation between politics and administration. To achieve professionalism of the civil service there is a need for adequate training strategies and training, but also a clear definition of rights and duties and disciplinary arrangements, including incompatibilities and conflict of interest regulations. Finally, sound and transparent structures and procedures of the whole administration are called for, too.

The importance given to the day-to-day work of public administration and its staff has in fact gained further importance over time as the assessment of reform possibilities and capacities of the private sector have shown

that a major requirement for the development of a *good* market economy is a well functioning public administration which in turn relies to a large extent on the professionalism of its staff.

Civil service reform and the general reform of public administration cannot be dissociated from each other. It is necessary to address these reforms in parallel, set the right priorities and respect the logical sequencing. However, reforms have to take into account the capacity to really implement them. Adopting new legislation and then not creating the capacity, namely the institutions and the necessary staff, is in reality the opposite of a reform as it gives incentives to disregard the law and is therefore rather counterproductive. Linkages between two reform fields, e.g. administrative procedures and administrative justice have to be respected, in order to make a reform successful. The same is true for good HRM and performance management which depend for their implementation on good administrative structures and procedures as well as an delegation of responsibility. Neglecting these linkages usually leads to failure of the reform and the frustration of the staff.

Accession-driven public administration reform has been largely about building a new legal order for public governance compatible with EU membership. It was understood that legal change was the precondition for changing the rules of the game and building the necessary administrative capacity to cope with the requirements of EU membership. Reform based on changing the legal order is to a great extent rooted in the administrative traditions of continental Europe, a tradition largely shared by countries in South Eastern Europe.

Given this common administrative law tradition one could assume that these countries would be able to quickly adapt to the common principles of the EAS. However, it seems that this is not necessarily the case as administrations and governments often show little willingness to accept the need for real reform and actively promote it. One cannot help the impression that some of the governments in the region think that the only rationale for change is the accession and that sometimes window dressing will suffice. There seems to exist a considerable lack of understanding that being an active Member of the Union is the more difficult part and that this implies constant reform and adaptation of the national public administration to be in line with EU rules and regulations and at the same time provide an efficient and effective framework for economic development.

Conclusions

1. The EC regular reports on progress as well as the Sigma assessments are targeted to evaluate the extent to which general administrative law principles are reflected in national legislation, and whether this legislation is implemented and the principles observed in the everyday work. The effective implementation of legislation on the ground has gained importance in the assessments as it is indicative of, and correlates with, the capability of a given country to effectively adopt and implement the *acquis communautaire*.
2. Implemented reforms of national civil services, administrative law and practices as well as a judicial review in line with the continuously developing general European standards are decisive for a successful path towards accession and active membership; reform of governance systems is a continuous task for EU member states and even more so for Candidates.
3. Lacking acceptance and understanding of candidate countries and potential candidate countries of the need (in their own interest) to review and reform their legislative and institutional framework and even more so their administrative practices is seriously hampering economic, social and democratic development in the countries and not only their accession to the EU.
4. Countries tend to work for accession forgetting the requirements of an active membership and the national interest in reform to foster an economic development based on sound democratic market principles.