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Administrative Procedures and the Implementation of EU Law and Policies

Contribution by the Research Network on
EU Administrative Law (ReNEUAL) project
on administrative procedure to the EU Commission's
'Assises de la Justice' conference in Brussels
21-22 November 2013 to the topic of EU
ADMINISTRATIVE LAW

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Executive Summary

Well-designed rules of administrative procedure for implementation of EU law and policies will have beneficial effects both for effectiveness of implementation as well as for the realisation of general principles of EU law: A codification of EU administrative procedure law has the potential improve compliance with the rule of law and the principle of legality in the EU, to enhance legal certainty and further the principles of good administration, to simplify the diversity of procedures and make more transparent rights and obligations of individuals and administrations alike. This will not be without effect on increasing the legitimacy of exercise of public powers in the Union.

In order to live up to this potential, EU administrative procedure law needs to overcome its fragmentation. So far, each sector-specific legislation, despite addressing common problems, differs with respect to the formulation of procedural provisions. One of the central challenges for regulating EU administrative procedures is finding solutions for the forms of intense procedural cooperation between national and European administrative actors through 'composite procedures' characterised by multi-jurisdictional input into decision-making. The multiplication of composite procedures across the policy fields of the EU, furthering de-central administration of a single legal space under the concept of subsidiarity, currently has the potential of diffusing responsibility and endangering the constitutionally guaranteed right to an effective remedy.

The ReNEUAL draft model rules on administrative procedure have been developed and discussed together with lawyers from practice and academia and from all over Europe. They are designed to offer solutions of how to ensure modern, state of the art and tailor-made solutions to the challenges facing implementation of EU law and policies in today's realities of integrated administration.

- I. The ReNEUAL project: EU administrative procedures based on constitutional principles
 - (1) It is the understanding of the drafters of the Research Network on EU Administrative Law (ReNEUAL)¹ project on administrative procedure that well designed rules for implementation of EU law and policies could improve to the quality of the EU's legal system. They have the potential to add to the compliance with general principles of EU law by contributing not only to the clarity of legal rights and obligations of individuals and participating administrations, but also to the transparency and effectiveness of the legal system as a whole. A codification of administrative procedures, if designed to reach its potential, could help simplify the legal system, enhance legal certainty, fill gaps in the legal system and thereby contribute to compliance with the rule of law. Establishing enforceable rights of individuals in procedures the outcome of which affect them contributes to compliance of the public with principles of due process and fosters procedural justice. Having one basic set of rules for administrative procedures might reasonably be expected to overall reduce litigation. The currently fragmented and mostly policy-specific rules and procedures for administrative procedures could, when replaced with procedural provisions defining rights and obligations throughout the system, be clarified by model cases for many policy-areas at once.
 - (2) The existence or non-existence of administrative procedural rules in the EU is not merely a 'technical' question free of constitutional value choices. Constitutional principles constitute decisive normative standards for the design of administrative procedures in the EU. Their realisation has a considerable potential impact on substantive outcomes.² Administrative procedures are designed for the implementation of EU law and policies by means of administrative action in all its phases. Rules on administrative procedures need to be designed to equally maximise both objectives of public law: Designing instruments for an effective

¹ ReNEUAL is a network of over 100 scholars, academics and practitioners interested in the field of European administrative and regulatory law and its constitutional connotations, for further detail see www.reneual.eu. Starting in 2009, ReNEUAL has developed its 'Draft Model Rules on EU Administrative Procedures' in a procedure designed to ensure broad discussion with and input from in the academic community and professional circles.

² D. Curtin/H.C.H. Hofmann/J. Mendes, Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda, 19 European Law Journal [2013], 1-21, at p. 1.

discharge of public duties whilst, no less importantly, protecting the rights of individuals.

- (3) Constitutional values and principles are therefore the central normative standards for judging the design of procedures for implementation of EU law. They include the protection of the rule of law and its emanations in sub-principles such as legality, legal certainty, proportionality of public action and the protection of legitimate expectations. They further include the concepts of a democratic Union on the basis of a transparent system requiring not only the definition and protection of rights of participation and access to information but also, under Article 9 TEU, equality of citizens in access to Union administration. Prominently, Articles 1(2) and 10(3) TEU require that in the Union, in line with the principle of subsidiarity, “decisions shall be taken as openly and closely as possible to the citizen”.
- (4) Other individual rights and obligations for the design of procedures arise from the principle of good administration as partially restated in Art. 41 (1) EU Charter of Fundamental Rights. Good administration requires that decisions be taken by procedures guaranteeing fairness, impartiality and timeliness. It also requires the protection of rights of defence, language rights and more generally, protection of the notion of due process. This includes the right to reasoning of acts, a requirement also protected by the right to an effective remedy, and the possibility of claiming damages caused by public authorities in the exercise of their functions. Information rights are restated in Articles 8 and 42 of the Charter of fundamental rights. They protect privacy and business secrets as well as access to information.
- (5) The project on draft model rules on EU administrative procedure undertaken by the Research Network on EU Administrative Law (ReNEUAL)³ has the purpose to address how constitutional values of the Union can be best translated into rules on administrative procedure covering non-legislative implementation of EU law and policies.
- (6) The ReNEUAL project on administrative procedure is presented in six ‘books’. These are designed to reinforce general principles of EU law and identify - on the basis of comparative research - best practices in different specific policies of the

³ ReNEUAL is a network of over 100 scholars, academics and practitioners interested in the field of European administrative and regulatory law and its constitutional connotations, for further detail see www.reneual.eu. Starting in 2009, ReNEUAL has developed its ‘Draft Model Rules on EU Administrative Procedures’ in a procedure designed to ensure broad discussion with and input from in the academic community and professional circles. Since 2012 ReNEUAL has joined its forces with the European Law Institute (ELI). ReNEUAL has greatly profited from strong support from the European Ombudsman for the discussion and promotion of its ideas.

EU. The first book, introduced here, addresses principles of EU administrative law, the general scope of application, relation to sector specific rules and international law. It contains definitions and a summary of principles which guide administrative behaviour and the interpretation all subsequent norms in books II to VI. The latter cover more in-depth administrative procedures in the EU with the potential to directly affect interests and rights of individuals. The books address non-legislative implementation of EU law and policies by means of: rule-making (Book II), single case decision-making (Book III), contracts (Book IV) and, very important for the composite nature of EU administration, procedures of mutual assistance (Book V) and information management (Book VI). The procedures covered are primarily those conducted by EU institutions, bodies and agencies. Given the reality of Member States being more often than not involved in the implementation of EU law and policies, the model rules are – where appropriate - designed to be applicable also to implementation activity by Member States when acting in the scope of EU law.

- (7) The process of drafting the model rules was conducted by, first, screening in a comparative approach policy areas of the EU and national legal systems for joint problems and common or innovate solutions to these problems. A second step consisted of the preliminary drafting of possible approaches to these models and of explanations on the choices made and the sources consulted. In a third phase, these draft model rules are continuously submitted to discussion and review in various fora of practitioners and academics.⁴ This process leads to redrafting of parts for improvements and clarifications.
- (8) The 'Draft Model Rules on Administrative Procedures' are presented in a form adapted to a possible adoption as an EU Regulation. Nevertheless, the term 'Draft Model Rules' shall highlight the academic character of the ReNEUAL project. The Draft Model Rules shall provide the European legal scholarship with a structured framework for debating and further developing EU administrative law and inform competent legislative bodies as well national and Union courts about legal options and best practices.
- (9) We understand that the evolution of the European legal system has reached a moment in which developing such codification would not only possible but also necessary for its future development as regulatory system. In order to maximise the possibilities of this moment, ReNEUAL members concluded at an early stage

⁴ The ReNEUAL project is for this reason associated with the European Law Institute (ELI) in Vienna with which this project is undertaken as joint project. The European Ombudsman has been supporting the discussion of the outcomes with European institutions.

of the process that designing model rules for EU law of administrative procedure requires the approach of an 'innovative codification'. 'Innovative codification' is the exercise whereby a new law takes over existing principles which are usually dispersed in different laws and regulations and in the case law of courts, and modifies existing principles and rules if needed, adding new principles or rules if necessary. This method allows resolving contradictions and filling gaps in the existing law and helps to ensure that further dynamic development of EU law under taking into account especially the development of case law and the changing needs of diverse policies. By contrast, what is known as '*codification à droit constant*' – a technique which amounts to establishing a legally binding consolidated version of existing legislation – would be ill-suited to address the challenges of bringing together the very diverse sources of written law in existing legislation, case law by the Court of Justice of the European Union, and, most importantly, addressing the challenges of an ever closer integration of administrations from different jurisdictions.

II. Administrative Procedure Law in the EU – Characteristics and Challenges

- (10) EU administrative procedure law, covering forms of non-legislative implementation of EU law and policies, not only has to comply with the constitutional values and principles on which the EU is based. It has also to address the main challenges of implementing EU law in the real world and be adapted to some of the main characteristics – and shortcomings - of EU administrative law as it stands.
- (11) First, rules and principles on EU administrative law have largely emerged from the evolutionary development and experimental design of legislation referring to specific policy areas. As a result, the rules applicable suffer from significant *fragmentation* into sector specific and issue specific rules and procedures. Today, this leads to an overburdening *complexity* of often overlapping rules and principles. There is in many respects a growing gap between, on one hand, the proliferation of new forms of administrative action in the EU and their regulatory framework and, on the other hand, their integration into a coherent system of protection of the overarching constitutional values and the various control and legitimacy mechanisms. Further, gaps in regulation result from the fact that some procedural elements are addressed within policy specific rules only partially which

leaves often unspecified general principles of law to fill the void.⁵ This often leads to a lack of transparency, predictability, intelligibility and trust in EU administrative and regulatory procedures and their outcome. Despite the fact, that most legal problems are not specific to only one policy area, only few matters of EU administrative procedure law are subject to a more systematic approach applicable beyond a single policy area. Most transversal issues such the adoption and implementation of binding decisions with identified addressees (single case decision), of generally binding regulatory acts (rule making) and of binding agreements (contracts) or the handling of the collection and use of information as input into decision-making are not addressed in a transversal manner. A very limited partial codification of some of the principles in Article 41 of the Charter of Fundamental Rights on good administration has been adopted for those 'administrative acts' affecting single interests of individuals, groups or businesses adopted by EU institutions, bodies offices and agencies. Addressing a different sub-section, partial guidance is also offered by the European Ombudsman's Code of Good Administrative Behaviour and of the relevant Institutions' internal regulations. The General Principles of EU administrative law as developed by the CJEU, on the other hand, have a broader scope having been developed on the real-life canvass of conflicts arising from EU law and the necessity to protect rights therein. Although these general principles of law can in theory cover rights and obligations arising in the context of rule-making, contracts, planning procedures, information exchange systems, enforcement networks, in reality the development of many of these issues is hampered by the limited standing rights of individuals especially when it comes to rule-making and contracts as well as information management activities.

- (12) Second, EU administrative procedural law is the *multi-jurisdictional* nature of many of its procedures and a *pluralisation* of actors involved. Despite 'Europeanization' of policy areas, there is no fully-fledged EU administration. Instead, implementation of EU law within the joint legal space is generally undertaken de-centrally by national bodies which are in some cases supported by

⁵ An example is the right to a fair hearing. Under the case law of the Court of Justice, an administration implementing EU law can be in violation of the EU general principle of law of the right to a fair hearing even in cases in which the legal basis of its decision which establishes the procedures to be followed does not provide for necessity to organise a hearing (C-135/92 *Fiscano* [1994] ECR I-2885, para 39). This is not only true for decisions taken by EU institutions and bodies but also for Member State authorities when acting in the scope of EU law (C-349/07 *Sopropé* [2008] ECR I-10369, para 36), "even though the EU legislation applicable does not expressly provide for such a procedural requirement" (C-276/12 *Sabou* [2013] ECR I-nyr of 22.10.2013 (Grand Chamber), para. 38; C-383/13 PPU *G and R* [2013] ECR I-nyr, para 35).

EU agencies. In practice, this requires a high degree of procedural cooperation between the actors in many areas achieved by *composite* procedures. Under these complex forms of integrated administrative procedures, irrespective of whether the final decision is taken by an EU or a Member State body, the procedural steps leading up to the decision have been undertaken under a mix of applicable laws by different actors. Composite procedures require joint gathering and use of information as the raw material of de-central decision making. In many policy areas, EU agencies establish shared databases for the collection and exchange of information in those procedures. Today, the design of composite procedures is geared predominantly towards achieving efficiency and optimal use of pre-existing recourses. But their multi-jurisdiction nature may diminish protection of individual rights and possibilities of effective judicial review. Rules of administrative procedure are therefore necessary to avoid that the rights and interests of addressees and third parties in the implementation of EU law fall in a 'black hole' between situations covered by the EU level review and accountability mechanisms and those of Member States.

- (13) Third, rules on administrative procedures for the implementation of EU law have been developed very *dynamically* and in an often experimental fashion. The use of information networks as a flexible model to ensure de-central implementation of EU law whilst creating rules for a single market, are an example for this approach. Model rules should not reduce the dynamic, experimental nature of the system. They should instead allow for building blocks of standard models for decision-making procedures without limiting the possibility of further experimentalist developments in certain policy areas. The approach of defining procedures as *lex generalis* which could cover the general questions of protection of rights in the design of effective decision-making procedures in our view actually allows for a simplified dynamic adaptation of elements in *lex specialis* which require policy specific adaptations.
- (14) Fourth, EU law applies a *mix of tools* to achieve the objectives in the specific and mostly fast evolving contexts of implementation of EU law and policies. Each of these tools has specific requirements for ensuring procedural justice. For example, book II deals with rule-making which represents one of the more frequent forms of implementation on the EU-level. Administrative rule-making can directly affect rights and interests of individuals by defining the scope and content of single case decisions. It thus requires a carefully designed legal framework to ensure procedural rights including possibilities of participation. Rulemaking is a sector where the lack of coherence between different sector specific legislation

and the scarcity of general principles in the case law of the ECJ calls for an effort in clarifying, restating and stating principles which could be applicable across the board.

- (15) On the other hand, books III and IV deal with another element of implementing EU law. In many instances, unilateral decision-making and contractual forms of action are used to mutually supplement each other or are used in subsequent steps of a procedure. Not unknown to national procedural law, this is also an issue with considerable consequences in administrative procedures for implementation of EU law. Being a typical feature of modern, dynamic implementation of EU law, it requires, not least due to its direct effect on rights and obligations of individuals, an innovative approach to regulation. EU-specific issues include that with respect to contracts, unlike decisions, actors have the possibility of choice of applicable law. This carries the risk of non-compliance by the public authorities with certain obligations it might have had if it would have used the form of a decision. Also, regarding contracts, there are deeply rooted differences from one Member State to another – some having a specific regime for ‘public law contracts’ unknown to the legal system of others. Although with regards to procurement contracts entered into by EU bodies, the Financial Regulation codifies some elements of the awarding phase, the Financial Regulation has been drafted mainly in the perspective of sound financial management, whereas administrative procedure needs to take other interests into account: especially those of sub-contractors and of third parties who are not involved in a contract or agreement that may affect their interests.
- (16) Beyond these aspects of administrative procedure, there are numerous problems specific to the integrated nature of EU administration which are addressed in further detail in the draft model procedures for EU administrative law established by ReNEUAL.

III. Models for the codification of EU administrative procedure law?

- (17) Rules for EU administrative procedures do not exist in a vacuum. Legal systems around the world face similar difficulties when it comes to organising administrative implementation of law. Especially during the last century, in line with the development of the ‘administrative state’ many legal systems have turned to codification of administrative procedures. It would however appear to the drafters of the ReNEUAL draft model rules on administrative procedure that the challenges to implementation of EU law and policy might in many cases be

characterised by a greater complexity than the issues encountered within states when implementing their own national law, even in federally organised states. Although national codification experiences are therefore generally not transferable one-to-one to the EU level, they do contain valuable case studies and inspiration to be taken into account when analysing the possibilities of EU administrative procedures.

- (18) The move towards codifying administrative procedures is not an EU-specific issue. Inspiration for an approach to codification on the EU level comes from the observation that administrative law is not only national and supranational. Increasingly, regulatory powers are also transferred to international organisations. The study of the conditions on that level, in parts of the literature referred to as 'global administrative law', shows that general principles such as consultation and participation, access to information rights and reasoning are increasingly seen as some of the central ingredients to legitimacy of such administrative action beyond the state.⁶
- (19) The move towards codification of the past decades started in EU Member States have, beginning with Austria's codification of administrative procedures in 1925. Since then, many states have adopted codifications of administrative procedures or are, as the example of France shows, currently engaged in the process of discussing the codification of administrative procedures on the national level. A similar tendency is visible outside of the EU when looking, for example, at the US 1946 administrative procedures act (APA). But national codifications differ with regard to their scope and purpose. In some countries, either there are different laws of administrative procedure for different levels of government, or there have been different dates of entry into force of the law, as in Denmark – 1986 for central government, 1987 for local government. Also, only a limited number of Member States has a regional level with legislative powers – as in Austria, Belgium, Germany, Italy and Spain, as well as Finland, Portugal and the United Kingdom for certain parts of their territory – which would merit such distinction and would give rise to problems of multiple levels. This is important to the issue of codification of administrative procedure. Germany, for example has a parallel existence of a Federal law applicable to federal institutions, departments, bodies and agencies, and laws of each Land which are in turn applicable to the latter's institutions, departments, bodies and agencies. In Germany this was achieved, as far as the Federation and Länder are concerned, in the context of a common and

⁶ See for many S. Cassese, A Global Due Process of Law?, in: G Anthony, J-B Auby, J. Morison, T. Zwart (eds.) *Values in Global Administrative Law* Hart (Oxford 2011), 17-60.

coherent legal and administrative culture. In Spain or in Italy, a general law is applicable to all levels of administration, but there is room for complementary legislation at regional level. The latter experiences seem more adapted as a precedent for EU administrative procedural law.

- (20) Also the depth of regulation differs. Whilst some legislation, such as the administrative procedure code of Italy is built on principles to be fleshed out in specific policy legislation, other procedural acts regulate the matters they cover to greater detail.
- (21) Other differences exist with regard to the scope of application. For example, many national procedures acts apply only to so-called administrative decisions (or adjudication), i.e. to unilateral decisions affecting single interests of individuals, groups or businesses, even if they sometimes contain a few rules applicable to contracts, as in the German code (Verwaltungsverfahrensgesetz) of 1976. Only few laws on administrative procedure, such as for instance the initial Portuguese codification of 1992 also included agreements and contracts between administrative authorities and other private or public bodies or individuals, although later these provisions were brought within a separate law in order to facilitate compliance with the often changing EU directives on public procurement. In France, on the other hand, contracts and agreements entered into by public administration are also considered as 'administrative acts' and would therefore normally be subject to a general administrative procedure law. National approaches also differ as to whether single-case decisions or rule-making is covered. The US APS applies generally to 'rule making', i.e. the exercise of regulatory power by federal administrations establishing famously a 'notice and comment' procedure which aims to the participation of stake-holders in rule making. But in some Member States, like France, 'administrative acts' also include regulatory acts (decrees, ministerial regulations etc.). Most Member States, like the EU, have adopted specific legislation on data protection and access to documents. But only few Member States have a more extensive set of principles on information management. For implementation of EU law, information management is central to a growing number of networks which involve EU institutions, bodies, offices and agencies on the one side, Member States' authorities, on the other.
- (22) Therefore, although inspiration can be drawn from many of the Member States' laws on administrative procedure, no one single model is transferable wholesale. The ReNEUAL's draft model rules on EU administrative procedure are designed to fit the special nature and the specific needs of implementation of EU law. They

naturally differ from what is found within the Member States or other national codifications beyond the EU although drawing inspiration from single solutions.

IV. Legal basis for EU Codification ?

- (23) Although the main objective of the ReNEUAL project on EU administrative procedure is first and foremost an academic exercise in developing ideas for improving the implementation of EU law, naturally, possibilities of adoption of the whole or parts of the project into EU legislation are considered. Within the EU's system of conferral of powers, possible future EU legislation on administrative procedures requires the identification of one or of several articles granting a legal basis for the adoption of such act.
- (24) Article 298 TFEU states in paragraph one that '[i]n 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.' The notion of independence is further outlined in Article 41(1) CFR requiring as part of good administration fair and independent decision making. Openness is a notion which refers both to the accessibility and to legal clarity of procedure and outcome. Efficiency is a requirement also known in the context of the right to an effective remedy with requirements of law and fact. In short, the values evoked in Article 298 TFEU stand as examples, as could not be otherwise in a Union under the rule of law, the compliance with the overall list of constitutional principles outlined above. There is, however, a lively debate amongst scholars and policy makers about the interpretation and reach of Article 298 TFEU's second paragraph, which requires that '[i]n compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.' So far, no case law of the CJEU is at hand to guide the interpretation.
- (25) To the drafters of the ReNEUAL project, at this stage of the debate it appears safe only to exclude the narrowest of possible interpretations of Article 298 TFEU. This would allow using the legal basis only for the regulation of internal procedures of EU institutions, bodies, offices and agencies. Such narrow interpretation would appear neither compatible with the materials of the preparatory work of the 2002-2003 European Convention. Nor is it sustainable in view of the necessary *effet utile* of Article 298 TFEU practically reducing this

article to a mere reference announcing the possibility of staff regulations adopted under Article 336 TFEU or a simple restatement of the principle of institutional self-organisation.⁷

- (26) By contrast, there are two alternative interpretations of Article 298 TFEU which to the authors of the ReNEUAL model rules would appear reasonably defensible. One would allow for provisions in the form of regulations adopted in the ordinary legislative procedure to be established to cover next to internal administrative organisation, also cooperation between various administrative actors as well as procedures leading to externally binding acts of ‘the institutions, bodies, offices and agencies of the Union’ and the external relation between those EU authorities and citizens or other private as well as public addressees of EU administrative actions. This interpretation could be seen as the basis of the European Parliament’s Resolution of 15 January 2013 containing recommendations to the Commission on a Law of Administrative Procedure of the European Union.⁸ The EP thereby started the debate and brought the issue onto the legislative agenda of the coming years. But it has done so by adopting a limited approach, suggesting only to EU level implementation and single case decision making with one party being a citizen.⁹ Thereby the EP draft leaves aside the pressing issue of composite procedures, rule-making, questions of contracts, information systems or even rule-making.¹⁰
- (27) In our view, a broader interpretation of the second paragraph of Article 298 TFEU is not only possible but preferable. This would explain why Article 298 TFEU contrasts, on one hand, the term ‘European administration’ with, on the other hand, the arguably narrower notion of ‘institutions, bodies, offices and agencies of the Union’. This distinction, in view of the pluralisation of the administrative bodies involved in implementation of EU law on the national and EU levels, helps understanding ‘European administration’ as a term being used to describe the

⁷ Paul Craig, A General Law on Administrative Procedure, Legislative Competence and Judicial Competence, 19 *European Public Law* (2013), 503 at p. 511.

⁸ As much as the ReNEUAL drafters strongly welcome the EP’s resolution of 15 January 2013 we also suggest that the EP has not fully developed the potential of the possible act.

⁹ Recommendation 1 of the Annex to the EP resolution of January 13, 2013. The Annex to the Resolution contains six “detailed recommendations as to the content of the proposal requested”

¹⁰ Recommendation 3 of the Annex to the EP resolution of January 13, 2013 lists principles including that of lawfulness ; of non-discrimination and equal treatment ; of proportionality ; of impartiality ; of consistency and legitimate expectations ; of respect for privacy ; of fairness; and of efficiency and service. Recommendation 4 (on the rules governing administrative decisions) contains indications on: the initiation of the administrative procedure; the acknowledgment of receipt; the impartiality of administrative decisions; the right to be heard; the right to have access to one’s file; time-limits; the form of administrative decisions; the duty to state reasons; the notification of administrative decisions; and the indication of remedies available.

entire corpus of administrative actors implementing EU law which, given the principle of primacy and the possibility of direct effect of EU law, includes Member State administrations and courts. 'Institutions, bodies, offices and agencies of the Union' are, by contrast, only those administrations organised on the EU level. The latter interpretation would appear also well suited to the complexities of implementation of EU law taking into account the importance of composite procedures in the practice of EU administration. Such interpretation might also be best compatible with the case law of the CJEU requiring all administrative actors in the Union to comply with EU law and, where necessary, to dis-apply conflicting national law.¹¹

- (28) Additionally, a joint legal basis for an EU administrative procedures act should not entirely excluded as possible approach. Although practically, the use of joint legal basis for EU legislative acts has become less frequent, they are accepted as legal under the case law of the CJEU especially, where the various legal basis follow the same legislative procedure. This is the case for various provisions allowing for the adoption of 'measures' for the harmonisation of the legislative and administrative provisions of the Member States for the realisation of EU policy goals. For example, the much used 'horizontal' legal basis of Article 114 TFEU with regard to the establishment and functioning of the EU's internal market explicitly allows harmonisation of Member State legislative or administrative provisions. It is also true for the specific provisions empowering Articles 15 and 16 TFEU regarding information law through transparency and data privacy rules. The latter are an essential element of an effective EU administrative procedures act since much of EU administrative law is law of information.
- (29) Provisions laid down in ReNEUAL draft model rules on administrative procedure could also be used as 'boilerplate' or what other authors have referred to as 'stand by codification' provisions to be supplemented with sector specific norms in policy specific legal acts with a single legal basis in, for example, Article 114 TFEU. Alternatively, an EU administrative procedure act might provide for its applicability in absence of any explicitly formulated alternative. Inversely, specific derogations from the generally applicable EU administrative procedures act can be adopted by *lex specialis* be overruled or dis-applied by specific legislation.

¹¹ For a more detailed discussion see e.g. Paul Craig, A General Law on Administrative Procedure, Legislative Competence and Judicial Competence, 19 *European Public Law* (2013), 503 with further references; Oriol Mir, Die Kodifikation des Verwaltungsverfahrenrechts im Europäischen Verwaltungsverbund, in: J.-P. Schneider/F. Velasco Cabrera (eds.), *Strukturen des Europäischen Verwaltungsverbands*, Berlin 2009, 177 (206-209) referring also to Art. 352 TFEU.

- (30) Irrespective of any discussion on legal basis, any act would also be scrutinised for its compliance with the principles of subsidiarity and proportionality. We repeat, however, that the exercise of ReNEUAL, is not limited to a legal basis discussion. The project is predominantly designed to show the need for and to also provide for a profoundly discussed set of draft model rules which could be put into action in whichever form the Union legislature might deem helpful and politically expedient.

V. The Six Books of the Draft Model Rules on EU Administrative Procedure Law

- (31) ReNEUAL's 'Draft Model Rules on Administrative Procedures' do not follow in all books the same definition of the scope of applicability. Some specific considerations have to be taken into account, which lead to differentiation between the general scope of the proposed draft model rules as reflected in Book I and the more specific scope of some of the Books.
- (32) In the implementation of EU law most of the relevant single case decisions – regulated in Book III – are taken by Member States' authorities; the need for coherence in the principles of administrative procedure and the consequent rules is therefore especially strong and explains why the scope of Book III extends to composite procedures and shared administration. Composite procedures and shared administration are the reason why the EU is – much more than State administration – in need of rules of administrative procedure that avoid that the rights and interests of addressees and third parties in the implementation of EU law fall in a 'black hole' between situations covered by the EU level review and accountability mechanisms and those of Member States. It is thus indispensable that Books V and VI – regulating mutual assistance and inter-administrative information management – extend to composite procedures and shared administration.
- (33) The situation differs with regard to Books II and IV. As far as rulemaking in Book II is concerned, and contrary to single case decision making, the most important part of this activity, from a qualitative point of view – and maybe to a certain extent also from a quantitative one – takes place at the level of EU institutions. At any rate, Art. 291 (2) TFEU is applicable : "Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council". Furthermore, the institutional context, as framed by Art. 289, 290

and 291 TFEU calls for many specific rules. Therefore the scope of Book II is principally designed to apply to the activities of EU institutions, bodies, offices and agencies – including comitology – but does not exclude being applied by reference in policy specific acts also the Member States rule-making in implementation of EU law.

- (34) As far as contracts – regulated in Book IV – are concerned, the legal situation is particularly complex. The relevant Treaty provisions do not limit the choices of EU institutions, bodies, offices and agencies when it comes to the law applicable to a contract, and in practice there are often good reasons to choose a specific Member State's law, or even the law of a non EU State – for instance for EU Representations in Third countries – which differs from contract to contract; this calls for checks and balances in order to guarantee the rights and interests of addressees and third parties. When it comes to the use of contract by Member States' authorities in the implementation of EU law, there are deeply rooted differences from one Member State to another, especially as in many cases the common civil law of a country applies to public contracts, whereas in other cases there is a specific administrative contract law that applies to part or all of public contracts. Drafting clauses of administrative procedure applicable to all these situations would need a degree of technicality and detail that would go well beyond that of the rules for single case decision making and rule making. Therefore the scope of Book IV also, like Book II, is designed with contracts or EU institutions, bodies, offices and agencies in mind. In both cases, however, nothing would impede Member States' legislators to take over the Model Rules – with the necessary adaptations – in their national legislation, nor would it impede EU legislative acts on specific policies to refer to provisions of a general EU administrative procedure act.
- (35) Information management covered in book VI is central to a growing number of networks which involve EU institutions, bodies, offices and agencies on the one side, Member States' authorities on the other¹². Even if in many cases such networks do not formally participate in a procedure that may lead to the adoption of a decision, regulatory act or agreement, the information they collect, collate and distribute to EU-level and Member State-level actors is often a central factor in decision making. There is currently a considerable lack of legal framework applicable to the exchange and use of information through EU information systems which would be capable of ensuring that the general principles of EU

¹² For details see D.-U. Galetta/H.C.H. Hofmann/J.-P. Schneider (eds.), Special issue: Information Exchange in the European Administrative Union, European Public Law (EPL) 2014 (forthcoming)

constitutional law would be complied with in information networks. The novelty of many of these areas and the specific nature of the cooperation organised therein requires creative approaches for the use of information systems in adjudication, rule-making and contracts.

- (36) This work has also drawn the attention of ReNEUAL to the fact that, beyond the question of information management, developing rules on mutual assistance between EU and Member States' authorities is needed in order to ensure coherence and to keep pace with on-going developments in the implementation of EU legislation and policies. This matter is covered by book V and its relevance for individual rights and interests lies not only in the fact that personal data or business secrets will be affected by such activity. It also arises from the need to better structure and design inter-administrative cooperation which will generally benefit from the application of such rules.

Recommendations

The drafters of the Research Network on EU Administrative Law (ReNEUAL) model rules on administrative procedure suggest that a code of EU administrative procedures should be enacted. This could, if well designed, first, ensure a more effective implementation of EU law by institutions, bodies, offices and agencies of the EU and of the Member States. Second and equally importantly, such act could add to the protection of rights of individuals and participating administrations by clarifying their respective and obligations in the procedure. Such codification also has the potential to contribute to compliance with the principle of subsidiarity by ensuring that decision making can effectively take place by de-centralised administrations without thereby reducing the protection of individuals' fundamental rights and possibilities of independent review of administrative decision-making.

ReNEUAL has developed a set of draft model rules on administrative procedure designed to increase compliance with principles under the rule of law and good administration to the benefit of individuals and the system of EU law as a whole. Its design draws inspiration from various solutions identified as best practices in specific EU policies as well as Member State codifications and the success they have had in most EU member states in enhancing compliance of the legal system with the rule of law. However, no single approach is wholesale applicable to the EU. Instead, the drafters of

the ReNEUAL model rules on administrative procedure suggest that the EU should legislate on the issues covered in the annex to this contribution. This would constitute a first step towards achieving the benefits of a modern codification tailor-made for the necessities and possibilities of the EU's system of implementation. The full report of ReNEUAL with details of its rules, explanations and detailed introductions will be discussed at a conference in Brussels in May 2014 and subsequently published.

The draft is currently being discussed widely amongst legal scholars and practitioners throughout Europe including by the European Law Institute, Vienna, of which has joined ReNEUAL in 2012 to further the project.

Please do not hesitate to contact any of the ReNEUAL members or the speakers of ReNEUAL (Professor Herwig C.H. Hofmann, Luxembourg; Professor Jens-Peter Schneider, Freiburg i.Br.; Professor Jacques Ziller, Pavia) for any further consultation or information.

Annex:

Structure of ReNEUAL Draft Model Rules on EU Administrative Procedures

Book I – General Provisions

Chapter 1: Scope and definitions

- I-1 Field of application
- I-2 Relation to sector specific norms of the European Union
- I-3 Relation to national law
- I-4 Interpretation
- I-5 Definitions

Chapter 2: Good administration in administrative procedures

- I-6 General Principles of Good Administration
- I-7 Principles of sincere cooperation and clear allocation of responsibilities

Book II – Administrative Rulemaking (by the EU)

- II-1 Scope
- II-2 Initiative
- II-3 Preparation of the Draft Act and the Reasoned Report
- II-4 Consultation and Participation
- II-5 Expedited Procedures
- II-6 Control Mechanisms and Adoption of the Act

Book III – Unilateral Single Case Decision-Making

Chapter 1: General provisions

III-1	Scope and application of Book III
III-2	Definitions

Chapter 2: Initiation and Management of procedures

III-3	General Duty of Fair Decision-making
III-4	Management of procedures.....
III-5	Online information on existing procedures.....
III-6	Initiation.....
III-7	Special rules on application procedures
III-8	Special rules on complaints
III-9	Time limits for concluding procedures

Chapter 3: Gathering of information and law of evidence

Section 1: General rules

III-10	Principle of investigation by competent authority
III-11	Power to investigate by simple request
III-12	Power to investigate by mandatory decision
III-13	Duties to cooperate for parties to the proceedings
III-14	Privilege against self-incrimination and (legal) professional privilege
III-15	Burden of proof

Section 2: Inspections

III-16	Inspection powers of EU authorities
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III-17	Duties of inspecting EU officials
III-18	Duties of sincere cooperation during inspections by EU authorities.....
III-19	Participation of EU authorities in Member State inspections
III-20	Joint inspections of Member State authorities
III-20a	Relation to Book V

Chapter 4: Right to a Hearing and inter-administrative consultations

Section 1: Access to the File

III-21	Access to the File
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Section 2: Hearing, participation and consultation

III-22	Right to be heard for potential addressees of decisions
III-23	Right to be heard: addressees of individual decisions resulting from composite procedure
III-24	Right to participate: third parties
III-25	Consultation with Member States.....
III-26	Consultation with EU institutions, bodies, offices and agencies

Chapter 5: Conclusion of the procedure

III-27	Duty of careful consideration
III-28	Duty to give reasons
III-29	Formal and language requirements
III-30	Decisions in electronic form
III-31	Mandatory information included in a decision
III-32	Notification of a decision
III-33	Correction of obvious inaccuracies in a decision

Book IV – Contracts by EU Authorities

Chapter 1: General provisions

Section 1: Scope

IV-1 Scope

Section 2: Definitions

IV-2 Definitions

Section 3: Determination of applicable law

IV-3 Determination of the law applicable to an EU public contract

IV-4 Rules applicable to EU public contracts solely governed by EU law

IV-5 Rules applicable to EU public contracts governed by Member State Law.

Chapter 2: Procedures for the conclusion of contracts

Section 1: Elaboration of general terms of contracts

IV-6 [not finally considered]

Section 2: Standard procedure

IV-7 Applicability of Book II Chapter 1

Section 3: Competitive award procedure

IV-8 Scope

IV-9 General Principles

IV-10 Obligation to ensure adequate advertising

IV-11 Content of the advertisement and the contract documents

IV-12 Cases justifying use of the negotiated procedure without prior advertisement

IV-13 Equal access for economic operators from all Member States

IV-14 Limit on the number of applicants invited to submit an offer

IV-15 Equal treatment

IV-16 Contracts of low value

IV-17 Contract award decision

IV-18 Standstill period before signature of the contract

Section 4: Procedures involving subcontracting (cf Ombudsman)

Chapter 3: Validity, invalidity, Termination, Changes of circumstances

Section 1: Rules applicable to all EU public contracts

IV-19 Decisions of the EU Authority concerning the contractual relationship

IV-20 Representation of EU Authorities and formal requirements of EU public contracts

IV-21 Protection of Legitimate Expectations

Section 2: EU public contracts governed by EU law

Subsection 1: Consequences of illegality and unfair terms

IV-22 Invalidity

IV-23 Termination because of an infringement of the provisions of Chapter II of these model rules

IV-24 Renegotiation because of an infringement of the specific obligations of EU Authorities as a public authority

IV-25 Unfair terms

IV-26 Effects of invalidity, renegotiation and termination on contracts between the contractor and a subcontractor

Subsection 2: Change of circumstances and related clauses

IV-27 Change of circumstances

IV-28 Termination to avoid grave harm for the common good

IV-29 Termination, for a compelling reason, of contracts for the performance of a continuing obligation

IV-30 Termination of subcontracts [not finally considered]

Section 3: EU public contracts governed by Member State Law

- IV-31 Applicable Law
- IV-32 Obligations of EU Authorities as Public Authorities
- IV-33 Precautionary Measures to Ensure Compliance with EU Law

Chapter 4: Implementation (execution and performance)

Section 1: Rules applicable to all EU public contracts

- IV-34 Decisions of the EU-Authority concerning the contractual relationship

- IV-35 Decisions of the EU-Authority with extra-contractual basis

Section 2: EU public contracts governed by EU law

- IV-36 Good faith and fair dealing

- IV-37 Contractual rules

Section 3: EU public contracts governed by Member State Law

- IV-38 No ipso iure prerogatives of the EU Authority

Chapter 5: Monitoring and supervision

Section 1: General principles

- IV-39 Supervisory Powers of EU institutions

- IV-40 Supervisory Powers and Subcontractors

- IV-41 Supervisory Powers of Member State's public authority

Section 2: Supervision by the European Ombudsman

- IV-42 Supervision of EU Public contracts

- IV-43 Subcontracting

Section 3: Supervision by the European Data Protection Supervisor

- IV-44 Supervision on the conclusion of contracts

- IV-45 Supervision on the implementation of contracts

Section 4: Supervision by the European Court of Auditors

- IV-46 Supervision of EU contracts by the European Court of Auditors

Chapter 6: Judicial review

Section 1: Litigation on the conclusion of contracts

- IV-47 General principles
- IV-48 Standing
- IV-49 Time limit
- IV-50 Consequences of an annulment judgement

Section 2: Litigation on the execution of contracts

Subsection 1: Litigation between the contracting parties

- IV-51 Jurisdiction
- IV-52 Jurisdiction of the Court of Justice of the European Union
- IV-53 Validity of an arbitration clause in the sense of Art. 272 TFEU
- IV-54 Arbitration clauses in the sense of Art. 272 TFEU and EU Public Contracts governed by Member State law
- IV-55 Scope of jurisdiction Member States courts
- IV-56 Enforcement of judgements of the Court of Justice of the European Union
- IV-57 Enforcement of judgements of the Member State's Courts

Subsection 2: Litigation and subcontracting

Book V – Mutual assistance

- V-1 Scope and application of Book V
- V-2 General concept of mutual assistance
- V-3 Duties of the requesting authority
- V-4 Duties of the requested authority
- V-5 Right of a person concerned to be informed

V-6 Allocation of costs

Book VI – Administrative Information Management

Chapter 1: General Provisions

- VI-1 Scope and application of Book VI
- VI-2 Definitions (list not finalized)
- VI-3 Need for a basic act
- VI-4 Evaluation of information management activities
- VI-5 Duties of sincere cooperation with regard to information systems
- VI-6 Competent authorities
- VI-7 Contact points
- VI-8 Management authorities for IT systems
- VI-9 Principle of transparent information management
- VI-10 Principle of data quality

Chapter 2: Structured information mechanisms

- VI-11 General standards for structured information mechanisms

Chapter 3: Duties to inform other public authorities without prior request and databases

Section 1: General standards for duties to inform and databases

- VI-12 General standards for duties to inform
- VI-13 General standards for databases
- VI-14 Verification

Section 2: Management of information

Subsection 1: Access to data and information

- VI-15 Access for data subject

VI-16 Access for competent authorities

VI-17 Access management rules in information systems

Subsection 2: Alteration and deletion of data and information

VI-18 Competences to alter and delete data

VI-19 Obligations to update, correct or delete data

Subsection 3: Use of data and information

VI-20 Duty to use information in activities and to consult databases

VI-21 Duty to independently assess information provided through information systems

VI-22 Duty to take specific action as a result of information

VI-23 Exemption clause

VI-24 Restrictions on the use of data and information

Subsection 4: Data protection and information security

VI-25 General data protection duties

VI-26 Storage, blocking and deletion of data exchanged under a duty to inform

VI-27 Storage, blocking and deletion of data beyond administrative procedures

VI-28 Confidentiality

VI-29 Security standards for IT systems

Chapter 4: Supervision and dispute resolution

Section 1: General supervision and dispute resolution

VI-30 Establishment of a Supervisory Authority

VI-31 Mediation procedure between participating authorities

VI-32 Binding inter-administrative decisions

VI-33 Power to grant access to data and to alter or delete data

Section 2: Data protection supervision of databases

VI-34 Internal supervision by Data Protection Officers

VI-35 Cooperative external data protection supervision of databases

VI-36 External supervision by the European Data Protection Supervisor

VI-37 External data protection supervision by National Supervisory Authorities

VI-38 Cooperation between National Supervisory Authorities and the European Data Protection Supervisor

VI-39 Data protection supervision of databases by the European Data Protection Board

Chapter 5: Remedies and Liability

VI-40 Right to compensation in relation to composite information management activities

