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# Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?

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## 1 Introduction

In this contribution, the growing convergence between the administrative laws of the EU Member States and of the EU itself is discussed. Section 2 will deal with the top-down and bottom-up judge-made influences, which have already enhanced the process of convergence since the end of the fifties in the past century. Section 3 focuses on the growing Union regulatory influence on general administrative law, in recent years, and will introduce two regulatory initiatives aimed at Europeanization of general administrative law in the future. Section 4 contains some reflections on these initiatives and the main findings will be summarised in section 5.

Before I come to the substantive parts, some introductory remarks concerning the process of convergence of administrative law in Europe are to be made.[1] The process of convergence is connected with the establishment of – what is now called – the European Union and with the way Union law is generally applied vis-á-vis citizens.[2] In the EU application of Union law towards individuals sometimes takes place by EU-institutions, in general the Commission. The most important area in which this so-called *direct application* of Union law exists is competition law. However, in the vast majority of areas of Union law, the application takes place by sincere cooperation between two levels, the Union level – at which the Union institutions lay down general applicable rules, mainly in the Treaties, regulations and directives – and the level of the Member State – at which these rules are applied and enforced towards citizens. This cooperative application is also referred to as *shared or composite administration* and the role

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1 See on this development f.i. P. Craig, *EU Administrative Law*, Oxford: OUP 2006; J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law*, Groningen: Europa Law Publishing 2007; J.-B. Auby & L. Dutheil de la Rochère (éds), *Droit Administratif Européen*, Brussels: Bruylant 2007, T. von Danwitz, *Europäisches Verwaltungsrechts*, Berlin/Heidelberg: Springer Verlag 2008.

2 The process of convergence is also enhanced by recommendations of the Council of Europe, for instance Resolution (77) 31, on the Protection of the Individual in Relation to the Acts of Administrative Authorities, 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, and Recommendation No R (2000) 10, on Codes of Conduct for Public Officials, and by the case-law of the European Court of Human Rights. In this contribution these influences are not discussed. See for the influence of also the ECrtHR's case law on domestic judicial protection, the contribution of Auby to this Volume.

of the Member State when applying Union law is called *indirect application* of Union law.[3]

In this system the administrative law, which governs the implementation of Union law, is often called *European administrative law*. This term was introduced by Jürgen Schwarze at the end of the eighties and is now widely used.[4] European administrative law includes both: the administrative law applicable to the direct application of Union law by Union institutions, and the national administrative laws that are used by the Member State when they implement Union law towards citizens. In this contribution, administrative law includes not only the rules and principles governing the administrative stage of the application of Union law (procedural law), but also the rules and principles concerning judicial review in administrative law Union cases.

In the system of shared composite administration, national administrative law is – so to speak – a 'vehicle' for the effective application of Union law. Therefore, the effectiveness of this application depends to a large extent on the national administrative laws of the Member States. Because of this interdependence it is not at all strange that Union law has already influenced the administrative laws of the Member States to a certain extent and that this process is still on going. The harmonisation of administrative law in Europe, resulting from this, has been enhanced by both the case law of the Court of Justice of the EU (CJEU) and increasingly also by Union legislation. In the ACA seminar – and therefore also in the title of this contribution – convergence related to the case law of the CJEU was labelled as 'natural convergence', and convergence prescribed by EU legislation as 'imposed uniformity'. However, as will be clarified in the next section, the convergence related to the case law of the CJEU is to a certain extent also 'imposed'.

## 2 'Natural' Convergence

The process of convergence of administrative law within Europe is not new. It has been enhanced by both top-down and bottom-up judge-made influences.

The most important top-down influence is the development of *general principles of Union law* by the CJEU since the end of the fifties in the past century.[5]

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3 L.F.M. Besselink, *A Composite European Constitution*, Groningen: Europa Law Publishing 2007.

4 J. Schwarze, *Europäisches Verwaltungsrecht*, London: Sweet & Maxwell 1988, updated in 2006.

5 See Joined Cases 7/56 en 3/57 to 7/57 *Algera*, ECLI:EU:C:1957:7, for the 'discovery' by the CJEU of the first European general principle, namely the principle of legal certainty. The content of the European principle was derived from the national principles of legal certainty of the (at that time six) Member States.

The Court has derived these general principles from the general principles common to the laws of the Member States and their content is quite similar to, although not always identical with, the equivalent principles of the Member States. Most general principles of Union law apply to the administrative procedures, more particular to single case decision-making. Nowadays they are generally referred to as principles of good administration. Examples of well-known principles are equality (including the prohibition of non-discrimination), proportionality, legal certainty and legitimate expectations, the rights of defence and participation, transparency, impartiality and integrity, fairness and so on. Many of them have been (partly) codified, some in the Treaties and others in the Charter of Fundamental Rights of the European Union (CFR). In this respect especially Article 41 CFR must be mentioned, because it explicitly codifies several principles of 'good administration'. Other general principles of Union law developed by the CJEU apply to judicial review, namely the principle of effective judicial protection, which includes sub-principles such as impartiality, fair trial, reasonable time etc. Also these principle have been codified in the CFR, namely in Article 47 CFR.

General principles are first and foremost binding for the Union institutions. However, they must also be observed by the Member States, at least when they are *acting in the scope of Union law*. As the Court has clarified in the case of *Akerberg Fransson* this scope applies both to the unwritten general principles of Union law, as well as to the principles and fundamental rights which are codified in the CFR.[6] Especially in recent years the Court has developed extensive case law as regards the phrase 'acting in the scope of Union law'. In this case law three categories of situations can be distinguished in which the Member States are acting in the scope of Union law and, therefore, are bound to apply the general principles of Union law and the CFR.[7]

The first category consists of the classical implementation of secondary Union law by the Member States. This category includes the national application of EU regulations and decisions,[8] the transposition of directives and the application of national transposition legislation. The second category contains all acts of the Member States whereby a free movement right or the Union citizen-

6 Case C-617/10 *Akerberg Fransson*, ECLI:EU:C:2013:105. By the way, Article 41 CFR (the right to good adminstration) does as such not apply to the Member States. Nevertheless the Member States have to observe Article 41 CFR, because it is considered by the Court to reflect a general principle of Union law. See Case C-604/12 *H.N.*, ECLI:EU:C:2014:302.

7 See for these categories, Mirjam de Mol, *De directe werking van de grondrechten van de Europese Unie (The Direct Effect of the Fundamental Rights of the EU)*, Oisterwijk: Wolf Legal Publishers 2014 (with summary in English). See for a similar categorization, E. Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: Akerberg Fransson', *CMLRev.* 50, 2013, p. 1411-1431.

8 This category includes the application by the Member States of Regulation (EC) nr. 1/2003, on the application of (now) Article 101 and 102 TFEU, and of Regulation (EC), nr. 659/1999, on procedural matters in state aid cases.

ship of Article 20 TFEU is restricted.[9] The third category of national acts 'within the scope of Union law', are national acts related to the so-called 'remedial context' of national acts and decisions in the first and second category. The 'remedial context' includes all national rules, which are as such not Europeanized by secondary or primary Union law, but are necessary for an effective application and enforcement of primary or secondary Union law or for effective judicial review in cases concerning primary or secondary Union law. As regards judicial review, the already mentioned EU principle of effective judicial protection, as codified in Article 47 CFR, is applicable. Also national enforcement of Union law as part of the remedial context is 'in the scope of Union law', even when the EU rules in question do not prescribe the national imposition of specific enforcement measures or sanctions, as can be derived from the case of *Akerberg Franson*.[10] In this case the Court decided that the national imposition of sanctions against value added tax fraud was 'within the scope of Union law' – and had to respect the principle of *ne bis in idem* (Article 50 CFR) – although the relevant Union legislation did not prescribe the imposition of specific sanctions. The decision was motivated by reference to the general obligation of the Member States under Article 325 TFEU to counter fraud and other illegal activities affecting the financial interests of the Union through measures that are – in short – deterrent, effective and equivalent. Because these enforcement requirements have been codified in many secondary Union laws and – according to the Court in the case of Greec Maïze[11] – also apply when they are not explicitly prescribed in Union legislation, it seems obvious that national enforcement of Union rules is always 'in the scope of Union law'.

So, in practice the Member States are already obliged to apply general principles of law and the CFR – at least as a minimum standard – when taking decisions (and enforcing them) in many national policy areas such as migration and refugee law, environmental law,[12] services law, customs law, subsidy law,[13] large parts of economic law and parts of tax law. Therefore, these principles

9 Cf. on the relation between citizenship and the CFR, Hanneke van Eijken, *European Citizenship*, Groningen: Europa Law Publishing 2014, in particular p. 69-74. See on the applicability of the CFR in cases concerning the restriction of free movement rights, f.i. Case C-390/12 *Pfleger*, ECLI:EU:C:2014:281, and Case C-483/12 *Pelckmans*, ECLI:EU:C:2014:304.

10 Case C-617/10 *Akerberg Fransson*, ECLI:EU:C:2013:105. See on the substance of the case, J.A.E. Vervaele, 'The Application the EU Charter of Fundamental Rights (CFR) and its *ne bis in idem principle* in het Member States of the EU' [2012-1] *REALaw*, vol. 6, p. 113-134.

11 Case 68/88 *Greec Maïze*, ECLI:EU:C:1989:339. See on these requirements Jans et al. 2007, p. 206-212.

12 Which includes not only environmental law in the strict sense, but also nature preservation law, water law and sometimes planning law.

13 This includes the national application of European subsidy regulations, but also decisions concerning national subsidies in so far the subsidy has been granted contrary to the state aid provisions of Article 107 and 108 TFEU.

and fundamental rights are already applicable to a considerable amount of national administrative decisions.

A second top-down judge-made influence which has contributed to the convergence of administrative law in Europe is the *limitation* in the case law of the CJEU as regards the application in Union cases of national principles and fundamental rights which offer more protection than the Union equivalent.[14] In this respect, the application in national cases 'in the scope of Union law' of national principles which offer more protection, such as the Dutch or German principle of legitimate expectations, is limited considerably by the Union principle of effectiveness.[15] Furthermore, the Court has decided in the case of *Melloni* that the application in Union cases of national fundamental rights, that offer more protection than the Union fundamental rights, is limited by the principles of primacy, effectiveness and unity.[16] It remains to be seen how these limitations of national fundamental rights will be applied in future case law. If their application by the Court is as strict as in the case of the national principle of legitimate expectations, then the general principles of Union law and the CFR will increasingly not only offer binding minimum standards, but also maximum standards.[17]

Finally the process of convergence is favoured by an important bottom-up development, namely the *voluntary adoption* by the Member States of Union principles and standards in purely domestic cases.[18] This influence is also re-

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14 Cf. also Case C-550/07 P *Akzo & Akcros*, ECLI:EU:C:2010:512, for a limitation of the national legal professional privilege (as part of the rights of defence) in EU competition cases based on the Union requirement of unity.

15 See f.i. Joined Cases 205/82 to 215/82 *Deutsche Milchkontor*, ECLI:EU:C:1983:233; Case 5/89 *BUG Alutechnik*, ECLI:EU:C:1990:320; Case C-24/95 *Alcan*, ECLI:EU:C:1997:163; Case C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, ECLI:EU:C:2008:165; Case C-568/11 *Agroferm*, ECLI:EU:C:2013:407. Cf. P. Boymans & M. Elianantonio, 'Europeanization of Legal Principles? The Influence of the CJEU'S Case Law on the Principle of Legitimate Expectations in the Netherlands and the United Kingdom', *EPL* 2013, 715-738; Jans et al. 2007, p. 171-184.

16 Case C-399/11 *Melloni*, ECLI:EU:C:2013:107. Cf. J.A.E. Vervaele, 'The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU' [2013-2] *REALaw*, vol 6, p. 37-54. See f.i. also D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', *CMLRev.* 50 (2013), p. 1267-1304; L.F.M. Besselink, 'The Parameters of Constitutional Conflict after Melloni', *European Law Review* 3 (2014), p. 1-26.

17 In this respect it is at least of some significance that according to the CJEU the reason for pursuing fundamental rights protection in EU law, is 'the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law'. Cf. Case C-206/13 *Siragusa*, ECLI:EU:C:2014:126; and Case C-198/13 *Hernandez*, ECLI:EU:C:2014:2055.

18 Cf. R. Caranta, 'Judicial Protection against the Member States: a New Jus Commune Takes Shape', *CMLRev.* 1995, p. 702-726; R. Caranta, 'Learning from our Neighbours: Public Law Remedies Homogenization from Bottom Up', *Maastricht Journal of European and Comparative Law (MJ)* 1997(4), p. 220-247; M.L. Fernandez Esteban, 'National Judges and Community law: the paradox of Two Paradigms of Law', *MJ* 1997(4), p. 143-151.

ferred to as *spontaneous convergence*. Examples of voluntary adoption can be found in most Member States, including cases concerned with the principles of good administration,[19] but sometimes also with the principle of effective judicial protection. A famous example in the area of judicial protection is offered by the judgment of the House of Lords in the case *M. v. Home Office*. In this case, the House of Lords decided to extend the *Factortame* rule[20] – according to which the UK rule that precluded national courts from granting an interim junction against the Crown had to be set aside in Union cases – to purely domestic cases.[21] The reason for this decision was that the House of Lords wanted to end 'the unhappy situation that while a citizen is entitled to obtain injunctive relief against the Crown to protect its interests under Community law, he cannot do so in respect of other (national) interests which may be just as important'.

Indeed, preventing 'reverse discrimination' of national claims is an important reason for a Member State to voluntary adopt Union principles in purely national cases. Another reason may be that Member States want to avoid the application of two sets of principles within one legal order, namely Union principles in the growing group of cases 'within the scope of Union law', and national principles in the decreasing group of purely domestic cases.

As a consequence of the influences mentioned, the administrative laws of the Member States and the EU have converged at the level of principles and this process will continue in future. At the same time – and that is important to note – there are still differences between the Member States as regards the recognition of some principles, the precise content of similar principles and regarding the detailed rules by which the principles are operationalized in legislation.

## 3 Imposed Uniformity

A more recent development is that, the process of convergence of administrative law is also promoted by statutory Union initiatives. This development is visible in many secondary EU laws, which aim at *unifying or harmonizing* aspects of national administrative decision and rule making and of national judicial review in *specific EU sectors*. Typical for this statutory unification – and different from the judge-made convergence that was discussed in section 2 – is that the EU laws in question sometimes impose very detailed rules

19 F.i. Spain has voluntary adopted the Union principle of proportionality in national cases; France, Luxemburg and the Netherlands have adopted parts of the Union rights of defence in national cases.

20 Case C-213/89 *Factortame*, ECLI:EU:C:1990:257.

21 *Weekly Law Report (WLR)*, 1993, 3, p. 433-448.

on the Member States. Therefore this development may be labelled as 'imposed uniformity'.

Examples of imposed uniformity by secondary Union law (directives, regulations) are many. The 'imposed' rules are concerned with administrative decision and rule making by the authorities of the Member States, national enforcement of Union rules and (increasingly) with judicial protection in Union cases at the national level.[22]

- *Decision and/or rule making* – See for instance: the Framework Directive Telecommunication[23] (rules on participation, publication of decisions and review); the Services Directive[24] (rules on time limits, duty to state reasons and one-stop-shop); the Aarhus Directive[25] (rules on participation and access to information); the modernised Customs Code[26] (rules on procedures and enforcement, including a codification of the applicable general principles); regulations in the area of agriculture and agricultural subsidies[27] (rules on procedures and enforcement, including a codification of the applicable general principles); the Regulation on the application of EU competition law[28] (rules on enforcement, including elements of the rights of defence); and the Regulation on the Protection of the Financial Interest of the EU[29] (rules on the limitation period and several other guarantees as regards the imposition of measures and sanctions).
- *Legal protection* – f.i. concerning: access to the court (Aarhus Directive[30], Services Directive[31]); evidence (various provisions in numerous EU laws[32]); the availability of remedies (f.i. in the area of public procurement[33]); and

22 See for some examples also, P. Craig, 'A General Law on Administrative Procedure, Legislative Competence and Judicial Competence', *EPL* 10, no. 3 (2013): 503-524, especially 506-509.
23 Directive 2002/21/EC, as amended by Directive 2009/140.
24 Directive 2006/123/EC.
25 Directive 2003/35/EC, amending Directive 85/337/EEC and Directive 96/91/EC.
26 Regulation (EC) nr. 450/2008.
27 F.i. Regulation (EC) nr. 796/2004.
28 Regulation (EC) nr. 1/2003.
29 Regulation (EC, Euratom) nr. 2988/95.
30 Directive 2003/35/EC, amending Directive 85/337/EEC and Directive 96/91/EC, prescribing wide access to the courts for NGOs in environmental matters.
31 Directive 2006/123/EC, prescribing the system of *silencio positivo* in case of 'administrative silence' when deciding on applications for services permits.
32 F.i. Directive 2006/54/EC, concerning the burden of proof in cases regarding equal treatment of men and women. See for other examples Jans et al. 2007, p. 301-308.
33 Directive 89/665/EEC, as amended by Directive 2007/66/EC, prescribing the remedies of annulment, interim relief and of liability for damages.

judicial scrutiny of certain decisions (f.i. in the Recast Directive on common procedures in asylum cases).[34]

Typical for the imposed uniformity by means of secondary legislation is that it leads to a patchwork codification ('codification of bits and pieces') of administrative law, driven by the specific needs of the sector concerned. Therefore, it lacks a vision on administrative decision-making or judicial protection in general. In some areas – for instance the areas covered by the Services Directive and the Aarhus Directive – the imposed rules strongly favour the interests of individuals, while in others – for instance in the area of EU (agricultural) subsidies and customs – they primarily aim at efficient administration and strict national enforcement. From a general perspective on administrative law, this seems not very coherent.

This conclusion leads to the question whether there is a need for a more general codification of administrative law in Union cases, a codification which applies a more balanced and coherent approach. In respect of this question, two important initiatives can be mentioned.

In the first place, on 15 January 2013 the European Parliament has adopted a Resolution in which it requests the Commission to submit a proposal for a regulation on a *European Law of Administrative Procedure of the EU*.[35] In the regulation the Commission should codify nine general principles that govern the EU administration, including for instance the principles of lawfulness, equal treatment, consistency and legitimate expectations, transparency, fairness and efficiency and service. Furthermore, the European regulation should contain quite detailed rules on administrative decision-making. The law will be applicable only to the direct application of Union law by the EU institutions, but the recommendation explicitly also aims at enhancing spontaneous convergence of national administrative law. To my expectation such convergence is likely to happen because the future codification and also the case law of the CJEU regarding it, will probably have a spill over effect into national cases within the scope of Union law.

A second important initiative is the *Research Network on EU Administrative Law (RENEUAL)*. In the beginning of September 2014 this academic network published a first version of the so-called Model Rules on EU Administrative Procedures.[36] The Model Rules consist of six books of more or less every

34 Recast Directive 2013/32/EU, prescribing a full and *ex nunc* examination of both facts and points of law in appeals procedures against asylum decisions before a court or tribunal of first instance.

35 European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024 (INI)).

36 See for more details the contribution of Hoffmann in this Volume.

part of general administrative law, with the exception of judicial review. The titles of the books are: General Provisions (I); Administrative Rulemaking (II); Single Case Decision-Making (III); Contracts (IV) Mutual Assistance (V); Information Management (VI). Different from the European Parliament (EP) initiative, the model rules do not codify general principles of EU law in general terms, but contain detailed provisions, which aim at the operationalization of these principles in a specific context. Book II, III and IV will only be applicable to the direct application of EU law by EU institutions and authorities. Nevertheless, these books may gain binding force in the Member States, namely in cases where EU sector-specific laws render them applicable to the acts of the Member States in those specific sectors.[37] Moreover, the Member States are encouraged to use the model rules as guidance when they are implementing Union law in accordance with their national procedural law.[38] Book V and VI will be applicable to the Member States regarding their relations with other Member States and the EU.

## 4 Some Reflections

At the ACA seminar several participants entertained doubts as to the desirability of this tendency to 'imposed uniformity'. These doubts did not so much concern the possible applicability of a codification of general principles (EP initiative) or model rules (ReNEUAL) to the direct application of Union law by EU authorities.

In my opinion, there are indeed good reasons for such codifications being limited to the direct application of Union law. As the EP in it resolution rightly points out, 'citizens are increasingly confronted with the Union's administration, without always having the corresponding procedural rights that they could enforce against it in cases where such action may prove necessary'.[39] Moreover, the existing rules and principles on good administration are 'scattered across a wide variety of sources', such as primary Union law (f.i. the CFR), secondary Union law, the case law of the CJEU and soft law.[40] This fragmentation leads to a complex system of often overlapping rules and principles, but with gaps as well.[41] Therefore, the system lacks coherency and transparency. A more systematic and comprehensive codification will enhance the accessibility of the current standards and make it less difficult for citizens to understand their administrative rights under Union law. Finally it is important to note that

37 See explicitly Article 1-1(2) Book 1.
38 Article 1-3 Book 1.
39 EP resolution on a Law of Administrative Procedure of the European Union, point A.
40 EP resolution on a Law of Administrative Procedure of the European Union, point C.
41 ReNEUAL Model Rules, Introduction, point 20 and 21.

Article 298, second paragraph, TFEU seems to provide a legal base for a codification of principles or rules, limited to the direct application of Union law.[42]

At the ACA seminar several participants, however, did entertain serious doubts as to the desirability of a codification of general administrative law, also applicable to the Member States 'when acting in the scope of Union law'. As stated in section 3, ReNEUAL has finally opted to (mainly) limit the scope of their model rules to the direct application of Union law. However, at the time of the ACA seminar this limitation was not yet clear and there were serious discussions to extend the model rules of Book III (Single Case Decision-Making) to the Member States when they were acting in the scope of Union law.

The fact that ReNEUAL has limited its ambitions seems to me a wise decision for several reasons. In the first place it is uncertain whether the Treaty provides a sufficient legal base for a codification that is also applicable to the Member States (when acting in the scope of Union law).[43] The regulatory competence of Article 298(2) TFEU, is concerned with the 'European administration' and this term seems to refer to the administration of the EU institutions and authorities in the strict sense, and not to the administrations of the Member States. The flexibility clause of Article 352 TFEU offers in principle more opportunities for a codification which is also applicable to the Member States, but – as ReNEUAL itself admits – not in sectors where the EU only has competence for supporting, coordinating or supplementing action.[44] Moreover, it seems to me difficult to 'prove' that, in the light of the principle of subsidiarity (Article 5(3) TEU), such a wide codification is really necessary to achieve the objectives of the many sector-specific areas in which it will apply. After all, during more than fifty years the Member States have applied Union law in these areas quite effectively and generally in line with the rule of law without having a general codification of procedural rules.

Secondly the applicability of the ReNEUAL model rules to the Member States (when acting in the scope of Union law) would have far-reaching consequences, especially for those Member States that already have a national codification of general administrative law. The reason for this is that these model rules may be quite different from such national codifications in respect of structure, regulated topics and detailed rules. At least, this is the case when comparing the model rules with the Dutch General Administrative Law Act. Of course, in theory it would be possible for the authorities of the Member

42 Cf. the second consideration of the EP resolution on a Law of Administrative Procedure of the European Union, ReNEUAL Model Rules, Introduction, point 37.

43 See on this matter Craig 2013, and, extensively, the Introduction to the ReNEUAL Model Rules, section IV. Legal bases for EU codification, point 34-52.

44 Introduction to the ReNEUAL Model Rules, section IV. Legal bases for EU codification, point 48.

States to apply the ReNEUAL rules when acting in the scope of Union law, and to apply their national codification in purely domestic cases. However, in practice such a division is hard to make in many areas, for instance in the area of environmental law, where some decisions are in the scope of Union law (because they implement a Union environmental standard), but others are purely domestic.[45] Therefore, the mandatory applicability of the ReNEUAL model rules to the Member States when acting in the scope of Union law, would more or less force the Member States to replace their codification's with the model rules entirely; and thus would lead to the situation that these models rules will also apply in purely domestic cases. In my opinion that is a bridge too far (at least at this moment).

The third and final reason why I am not in favour of extending the scope of the ReNEUAL model rules to the Member States (when acting in the scope of Union law) is the relative inflexibility of Union law. From the Dutch experience with the General Administrative Law Act, we have learned that the introduction of a general codification of administrative law leads to unexpected legal and practical problems, which have been solved by judicial creativity and sometimes by changing the law. Moreover, also a general codification of administrative law should adapt to new – and possibly innovative – views in the area of public administration. In this respect it can be doubted whether the Union system is flexible enough for two reasons. Firstly, Union laws can only be adapted with the same majority of Member States that adopted the law initially. In practice it may be hard to find such a majority, because the need for change that is felt in some Member States is not always experienced in other Member States at the same time. Secondly, if general rules of administrative law, also applicable in the Member States, are codified at the Union level, the interpretation of these rules becomes a matter of Union law. Therefore, national courts are no longer allowed to solve possible problems in the application of the rules by means of (creative) judicial interpretation, but have to refer these matters to the CJEU. The question can be raised whether the preliminary procedure of Article 267 TFEU is not too precious (and time-consuming) to be burdened by the many, and also trivial procedural, references that are to be expected. In my opinion this question should be answered in the affirmative.[46]

All in all, it is a wise decision of ReNEUAL to restrict the scope of the most important model rules, of Book II to IV, to the direct application of

45 As stated in section 3 , avoiding the situation in which in one Member State two sets of legal principles apply – Union principles when the Member State acts within the scope of Union law and national principles in purely domestic cases – is an important reason for voluntary adopting Union principles in purely domestic cases. Working with two sets of detailed codifications is even more impractical than with two sets of principles.

46 This disadvantage does not apply in the same manner to the applicability of the ReNEUAL model rules to the direct application, because a direct appeal against a EU decision will rarely if ever only be concerned with a possible breach of the procedural ReNEUAL-rules.

EU law. That, however, does not mean that these rules are irrelevant for the Member States. To the contrary, the ReNEUAL codification is in general innovative and may indeed be used by the Member States authorities, albeit on a voluntary base, for guidance (as is stated in Article 1-3 of Book I). Furthermore, national legislators might draw inspiration from the ReNEUAL rules when adapting or supplementing their national codification of general administrative law. Finally, the Member States' observance of the ReNEUAL rules can be mandatorily prescribed by sector-specific Union law (as is stated in Article 1-1(2) of Book I). Such an imposition of the balanced ReNEUAL rules by means of secondary EU legislation is, in my opinion, preferable above the current patchwork EU codification, described in section 3.

## 5 General Conclusions

This contribution dealt with the process of convergence between the administrative laws of the EU Member States and the EU itself. In section 2 I described the top-down judge-made influence that has enhanced this process. In its case-law the CJEU has developed general principles and fundamental rights, which must be observed by the Member States – as a minimum standard and increasingly also as a maximum standard – in the growing group of cases where the Member States are acting within the scope of Union law. The process of convergence is furthered by the bottom-up voluntary adoption of Union standards by the Member States in purely domestic cases.

Section 3 focused on the EU imposed 'patchwork' uniformity concerning aspects of administrative law, in sector-specific secondary legislation. Along with introducing two regulatory initiatives aimed at a general codification of administrative law in future, the resolution of the EP on a Law of Administrative Procedure of the EU and the ReNEUAL Model Rules on EU Administrative Law. As motivated in section 4, it is – in my opinion – a wise decision of the EP and ReNEUAL to only prescribe their codifications to the direct application of EU law by EU institutions and authorities. Prescribing them to the Member States (when acting in the scope of Union law) would probably have been contrary to the principles of conferral and subsidiarity, and would have had too far-reaching consequences for national codifications of general administrative law; as well as maybe having disadvantages because of the inflexibility of Union law.

Nevertheless the ReNEUAL codification is of importance for the Member States, because it may be used, on a voluntary base, as guidance when they (re)design their national codifications of general administrative law. Moreover, elements of the codification can be mandatorily prescribed to the Member States by means of sector-specific Union Law. The imposition of the

balanced ReNEUAL rules is preferable above the current imposed patchwork 'uniformity'.