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The Research Network on European Administrative Law's Project on EU Administrative Procedure – Its Concepts, Approaches and Results

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Abstract

This article presents and discusses the concepts, ideas and results of the Research Network on European Administrative Law (ReNEUAL) Project on EU administrative procedure. One of the central objectives of this project was to study means of achieving a double objective: Improving the realisation of constitutional principles in the de-centralised implementation of EU law whilst also simplifying the system of implementation of EU law and increasing intelligibility of rights and obligations for citizens and administrators alike. This article presents the major results and gives an overview over the solutions proposed by the ReNEUAL Model Rules on EU Administrative Procedures.

1 Introduction

Amongst the most challenging design tasks for any rules of EU administrative procedure law is ensuring compliance of the system of decentral implementation with constitutional principles of the EU. In absence of a single rule-book on administrative procedures, within the EU in the past each policy area has developed its own specific rules and principles.[1] In view of the resulting diversity and inspired by the Treaty of Lisbon's Article 298 TFEU, in the past five years, the Research Network on EU Administrative Law (ReNEUAL) – a group of public lawyers from around Europe specialised in national and

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The authors are co-founders and coordinators of ReNEUAL as well as co-authors and editors of the Model Rules on EU Administrative Law.

1 The debate on the necessity of an EU administrative procedure act reaches back over the past two and half decades. See with further references e.g. Harlow, Carol, 'Codification of EC Administrative Procedures, Fitting the Shoe to the Foot or the Foot to the Shoe', 2 *European Law Journal* (1996) 3; Kadelbach, Stefan, 'European Administrative Law and the Law of a Europeanised Administration', in: C. Joerges & R. Dehousse (Eds), *Good Governance in Europe's*

European constitutional and administrative law – have developed a set of Model Rules on EU Administrative Procedure as means to enhance the debate about EU administrative procedural justice.[2] This article aims to introduce the wider academic public to the approach, structure and solutions proposed by the research network's Model Rules on EU Administrative Procedure. The objective of this article is therefore neither to replace reading of the Model Rules, nor to give an external critical evaluation thereof, but to incite interest and explain some of the basic features of the undertaking and the thoughts behind it. It is thereby a contribution to the discussion on the feasibility and usefulness of the creation of possible future EU legislation on administrative procedures.

2 Background to the Project

The work of ReNEUAL took place in the period after the entry into force of the Treaty of Lisbon. The Treaty of Lisbon has been successful in bringing to the foreground various constitutional principles initially developed by the case law of the Court of Justice of the European Union (CJEU). Examples include the principles of equality, democracy, participation and transparency contained in Articles 9-12 TEU. Other examples are the requirements of good administration and access to effective judicial review in Articles 41 and 47 CFR. These restatements of constitutional principles in the Treaty are reminders of the necessity for full compliance in all policy areas of the EU with them, especially but certainly not exclusively in procedural law.

The ReNEUAL drafting team based its work on the certain basic observations on the state of EU administrative law. One of these basic observations is that the past six decades of EU integration has resulted in much evolutionary development and experimental design of legislation containing administrative procedure rules. Most EU administrative procedure law has been developed on a policy-specific basis and no general concept or legislative act regulating EU

Integrated Market, Oxford: Oxford University Press 2002, 167; Ladenburger, Clemens, 'Evolution oder Kodifikation eines allgemeinen Verwaltungsrechts in der EU', in: Trute, Hans-Heinrich; Groß, Thomas; Röhl, Hans Christian & Möllers, Christoph (Eds), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, Tübingen: Mohr Siebeck 2008, 107; Mir Puigpelat, Oriol, 'La codificación del procedimiento administrativo en la union administrativa europea', in: Velasco Caballero, Francisco & Schneider, Jens-Peter (Eds), *La unión administrativa europea*, Madrid: Marcial Pons 2008, 51 (with German translation published as 'Die Kodifikation des Verwaltungsverfahrensrechts im Europäischen Verwaltungsverbund', *Die Verwaltung* (2009) Beiheft 8, 177-210); Shapiro, Martin, 'Codification of Administrative Law: The US and the Union', 2 *European Law Journal* (1996) 26.

2 A full text of the ReNEUAL Model Rules on EU Administrative Procedure is available at www.reneual.eu. The ReNEUAL project was undertaken since 2012 also a joint project with the European Law Institute (ELI).

administrative procedure law exists. Additionally, in some areas, a reader of these policy-specific rules might be forgiven to conclude that compliance with constitutional values might sometimes have been more of an afterthought to the drafters than a central cornerstone of considerations. The fact that EU administrative law today is largely regulated in sector-specific rules and procedures also leads to a certain degree of complexity with overlapping principles coinciding with gaps in regulation. The potential gain of harmonising EU administrative procedure rules thus exists. The key challenge is to maintain the inherent dynamism of the policy-specific approach whilst at the same time eliminating the risk of disjointed developments and unnecessary complications of the legal system, endangering its transparency and the accountability of actors.

Another basic observation has been that EU Courts have in the past tried to enforce certain minimum standards by the development of constitutional-level general principles of EU law. These general principles resulted from a comparative analysis of Member State law[3] and policy-specific norms of EU law.[4] In practice, EU constitutional principles establishing rights and values have become first-line criteria for reviewing the legality of administrative procedure. The approach to use general principles of EU law as an 'Ersatz' set of procedural standards which an administrative procedure act could offer, has as a disadvantage that the general principles are necessarily vague and are required to be filled on a case-by-case basis with specific meaning. Admittedly, some quite limited and partial 'codification' has been undertaken in Article 41 of the Charter of Fundamental Rights on good administration, predominantly for single-case decision making. Some guidance for administrative behaviour is also being offered by the European Ombudsman's Code of Good Administrative Behaviour. General principles of EU law so far, however, have had a more limited effect on the development of executive rule-making procedures, public contracts and information management activities. Since general principles are developed by the case law of the CJEU, the limited standing rights of individuals before the CJEU has led to a lack of cases addressing these matters and hence a lack of general principles emerging. As a consequence, EU administrative law is governed by a patchwork of rules and principles – the opposite of a visible, accessible and consistent set of rules. The result of some of these developments is, arguably, a lack of transparency, predictability, intelligibility and probably also trust

3 See e.g. the approach in Joined Cases 7/56 & 3-7/57 *Alegera and others v. Common Assembly* [1957/58] ECR English Special Edition 39.

4 As prominently demonstrated by Jürgen Schwarze, *European Administrative Law*, (translation from the original: J. Schwarze, *Europäisches Verwaltungsrecht*, Baden-Baden: Nomos 1988). Such deductive method is not uncommon as studies in 'Global Administrative Law' illustrate. See e.g. Giacinto della Cananea & Aldo Sandulli (Eds), *Global Standards for Public Authorities*, Napoli: Editoriale Scientifica 2012; Gordon Anthony, Jean-Bernard Auby, John Morrison & Tom Zwart (Eds), *Values in Global Administrative Law*, Oxford: Hart 2011.

in fairness of decision-making and the quality of outcome of EU administrative and regulatory procedures.

In this context, one might conclude that the challenges to modern EU administrative law are not entirely foreign to the experiences of the Member State codification of the past decades. To a certain degree, however, these challenges might also be considered to be specific in that EU administrative procedural law is in most cases multi-jurisdictional. 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 by national bodies which are in some cases supported by EU agencies. In practice, this requires a high degree of procedural cooperation between the actors. Procedural cooperation is in many areas achieved in the context of composite procedures. These are procedures in which, 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 actors from different jurisdictions[5] generally through joint gathering and use of information. In many policy areas, an increasing plurality of actors including EU agencies establish shared databases for the collection and exchange of information in those procedures. Linking various jurisdictions' administrative systems through shared databases might be regarded a reasonable choice in order to make effective use of pre-existing structures. But the multi-jurisdictional nature of administrative procedures will have a considerable influence on the protection of individual rights and possibilities of effective judicial review. Rules of administrative procedure can be regarded as being necessary to avoid that the rights and interests of addressees and third parties in the implementation of EU law falls in between situations covered by the EU level review and accountability mechanisms and those of Member States.[6]

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5 Della Cananea, Giacinto, 'I procedimenti amministrativi composti dell'Unione europea', *RTDP* (2004) special edition 1, 307; Hofmann, Herwig C.H., 'Decision-Making in EU Administrative Law – The Problem of Composite Procedures', 61 *Administrative Law Review*, 199; Ruffert, Matthias, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund', *Die Öffentliche Verwaltung* (2007), 761; Sydow, Gernot, 'Die Vereinheitlichung des mitgliedstaatlichen Vollzugs des Europarechts in mehrstufigen Verwaltungsverfahren', 34 *Die Verwaltung* (2001), 517.

6 The literature on composite procedures and their problems discusses several 'typical' situations with composite procedures either starting on the EU level and being finalized by a Member State act, the inverse on the basis of a Member State act finalized on the EU level or forms of horizontal cooperation on the basis of cooperation of different Member State actors under EU law. See with further discussion see the studies mentioned in footnote 5 and the case-law discussed therein. Additionally, see: Herwig C.H. Hofmann, Composite decision making procedures in EU administrative law, in: Herwig C.H. Hofmann & Alexander Türk (Eds), *Legal Challenges in EU Administrative Law*, Cheltenham: Elgar 2009, 136-167.

On the basis of these starting points the ReNEUAL group identified and based its search for solutions to assess whether a general, more abstract set of administrative procedure rules for the Union could contribute to improving the shortcomings described above. A 'deconstruction' of existing rules on EU administrative procedure then resulted in the maybe unsurprising finding, like in Member State law, that also on the EU-level a classification of certain common forms of act can be established. This consists of, firstly, generally binding regulatory acts (rule making), and secondly, binding decisions with identified addressees (single case decisions). Given the use of binding agreements (contracts) supplementing and in some instances replacing single case decisions, the category of contracts was added to this list by the ReNEUAL group next to another more distinctive feature of implementing EU administrative law through decentral networks, which consists of obligations to trans-jurisdictional mutual assistance and information management.

3 Drafting of the Model Rules on EU Administrative Procedure

Any future design of EU administrative procedure law obviously has to address also the general conundrum of public law: The necessity to ensure that, on one hand, the procedures and institutions for effective decision-making are established whilst on the other, no less importantly, protecting the rights of individuals. Furthermore, the elements of fairness (or value orientation), effectiveness (or 'output-legitimacy') and procedural legitimacy (or 'input legitimacy') are central features of the design of a system guaranteeing procedural justice in any legal system, including an administrative law system.[7] Procedural justice is thereby anything but an aspect of 'technical' functionality. Procedural justice 'translates' into daily decision-making in important constitutional value choices.[8] In that sense, the law of administrative procedures can be described as a concretisation of constitutional law[9] – a position also implicitly taken by the EP´s resolution of 15 January 2013, in which the EP has called upon

7 These requirements are in legal theory often illustrated with the example of the rules to fair sharing between children: One child divides the treat, the other choses. This rule allows for a simple mechanism which at fair cost achieves acceptable results not least due to the participative element in procedure. See e.g. Rawls, John, *A Theory of Justice*, Cambridge, Massachusetts: Belkamp Press 1971, 85 using this example as a rule ensuring the 'veil of ignorance' over decision-making.

8 Curtin, Deirdre; Hofmann, Herwig C.H. & Mendes, Joana, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda', 19 *European Law Journal* [2013], 1-21.

9 This formulation of the problem goes back to an article in German by: F. Werner, 'Verwaltungsrecht als Konkretisiertes Verfassungsrecht' (1959) *Deutsches Verwaltungsblatt*, 527-533.

the European Commission to develop a proposal for a regulation on EU administrative procedure based on constitutional principles.

Administrative law both on the national level and in the EU has in the past been 'characterised by paradigmatic transformations'. These are often initiated by administrative decision-makers in 'experimental processes' and subsequently formalised as principles or legitimate approaches by court practice and the legislator.[10] Most Member States of the EU have addressed the dynamics of transformations in their legal systems by codification of a basic set of rules on administrative procedure. For the development of EU administrative law, cross-fertilisation by establishing analogies with EU policy areas and Member State law is a normal process.[11] However, sources and inspirations for drafting Model Rules for EU administrative procedure have to be carefully chosen and, at the same time, rules on EU administrative procedure need to take into account and accommodate the very specific conditions under which implementation of EU law takes place. Therefore, a wholesale import of solutions developed on the national levels – from the early Austrian codification of the nineteen-twenties to, for example, the ongoing experience of codification under the Dutch law – does not appear to be an available option. Procedural rules, should be adapted to the different principle forms of administrative action in the EU. For example, unlike in many of the Member States' legal administrative systems, rule-making makes for a large and important part of EU administrative activity. By contrast, some Member State codifications of administrative procedure, such as those of Germany and Italy, concentrate largely on single-case decision-making as opposed to rule making. Single-case decision-making is addressed in all Member State codifications. On the other hand, public contracts are generally addressed in existing Member State codifications if at all, with less detail.[12]

The comparative review underlying ReNEUAL's work revealed, however, that in order to regulate the reality of EU administrative procedures, especially their inter-jurisdictional aspects, it is important to also understand the 'inner workings' of administrations implementing EU policies. Therein, cooperative activity to find and combine relevant information is crucial to the choice between

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10 Ladeur, Karl-Heinz, 'The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law', *Osgoode Hall law School Research paper* No 16/2011, 6; Ruffert, Matthias (Ed.), The Transformation of Administrative Law in Europe, La mutation du droit administrative en Europe, München: Sellier 2007.

11 See e.g. Schmidt-Assmann, Eberhard, *Allgemeines Verwaltungsrecht als Ordnungsidee*, 2nd ed., München: Beck 2006, 3; Kersten, Jens; Lenski & Sophie-Charlotte, 'Die Entwicklungsfunktion des Allgemeinen Verwaltungsrechts', 42 *Die Verwaltung* (2009), 503.

12 Jacques Ziller, *Is a law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects, European Parliament*, Directorate General for Internal Policies, PE 432.771 (2011), 18-21.

different alternatives. Both dimensions, the forms of act and the procedures leading to their adoption, it appeared, needed to be taken into account in the development of an EU administrative law which is capable of both addressing the issues of providing procedures for developing satisfactory outcomes and addressing the requirements of procedural justice in multilevel composite settings.

4 General Questions in Drafting Model Rules on EU Administrative Procedure

One of the starting points in the discussions within the ReNEUAL drafting teams was that a potential general act on EU administrative procedure would not primarily need to redefine general principles of EU law. It should instead codify the links between general principles and specific procedural rules. These links need to be visible and clear to even a casual observer. Therefore, as the largely principles-based European Parliament's resolution of January 2013 has attempted to do,[13] a future codification of EU administrative procedures would potentially benefit from a restatement of the basic constitutional principles on which the norms are based and which form the basis for their interpretation.

Accordingly, amongst those principles which the Model Rules recalls by way of introduction are not only the rule of law and the principles of good administration, but also some central sub-principles of these umbrella concepts. Therefore, the right to fair and impartial decision making and compliance with the principle of care are also mentioned alongside the obligation to ensure equal treatment, non-discrimination and legal certainty. Rights of participation and requirements of transparency are concepts which not only in the more narrow sense require access to documents but also, more broadly, require the design of procedures which allow for understanding decision-making structure, for example, through a clear allocation of responsibilities. Limitations of exercise of public powers arise, as recalled in the introduction of the ReNEUAL Model Rules, from the principles of proportionality, the protection of legitimate expectations and access to effective legal remedies.

13 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).

4.1 Scope of Application

One of the most important and maybe also most discussed aspects during the drafting of the Model Rules was the possible 'scope of applicability' of general rules on EU administrative procedure. This question has both a dimension of whether a set of rules on administrative procedure should contain only minimum standards for all administrative activity or whether they should contain a higher level of detail and definition of individual procedural rights.

The Model Rules are designed to go beyond a simple minimum standard. They are designed to ensure a generally applicable best-practice oriented set of procedural rules.[14] The idea is to provide a transparent balancing between requirements of protection of rights of individuals and effective decision-making by public bodies. This approach also has as a consequence that, contrary to the demand in the EP resolution of January 2013, they would establish not a generally applicable minimum standard. Instead, they contain detailed rules from which policy-specific legislation could – if explicitly stating alternative rules – could 'opt-out' of. Policy-specific *lex specialis* rules could, under this model and if explicitly provided, then offer alternative rules more specifically adapted to the needs of the policy even if, as a consequence, they reduce procedural rights of individuals below the high level that is generally applicable. In the absence of any policy specific rules, however, the general principles of EU law would be applicable to the situation. This approach of, in principle, guaranteeing a high level or protection of procedural rights with the possibility of introducing justified yet limited exceptions in policy-specific legislation would appear to ensure a certain flexibility allowing to cater to the specific demands of specific policy areas. The important element is thereby that any exception to the generally applicable standards should be made explicit and any possible justification subject to full and public scrutiny. Being exceptions, by their very nature, they would also have a narrow scope of application.

A second important issue relating to the discussion about the possible scope of application of EU administrative procedure law is its relation to the procedural law of the Member States. Whether the Model Rules should suggest the application of EU administrative procedure rules to Member States when implement-

14 In this regard the Draft Model Rules deviate from the approach of the 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)), Recommendation 2 of the Annex: 'The regulation should include a universal set of principles and should lay down a procedure applicable as a *de minimis* rule where no *lex specialis* exists. The guarantees afforded to persons in sectoral instruments must never provide less protection than those provided for in the regulation.'

ing EU law at all, only in the parts on information cooperation, or even fully, has been subject to many debates within the in the ReNEUAL network. The Model Rules finally were formulated to suggest that procedures leading to specific forms of action such as rule-making, single case decision making and contracts are generally applicable to EU authorities only. This would leave it to policy-specific legislation to if so desired to refer to a set of EU law to be also applicable fully or partially to cases of Member States implementation of EU law. Therefore, under this model, it would be possible to declare, in principle, EU administrative procedure law to be applicable to EU authorities only. This is in line with the definition in Article 41 CFR which defines its institutional scope to include institutions, bodies, offices and agencies of the Union. At the same time, this approach does not put into question the well-established case law of the CJEU that Member States are obliged to comply with general principles of EU law when they implement EU law or act within its scope. Although such limited scope of applicability has *a priori* disadvantages for the protection of individuals, at this stage of the European integration process the advantages of a more step-by-step approach might outweigh the disadvantages. In such a constellation, any EU rules on administrative procedures might be used as models or inspirations for administrative procedural law of the Member States rather than constituting a binding codification of national law. However, any rules relating to mutual assistance and information management systems necessarily must be applicable also to Member State actors when participating in such action. The reason is obvious: It would be extremely dysfunctional to regulate only the input or actions of EU authorities in such inter-administrative arrangements of intensive collaboration.

4.2 Rule-Making

Executive rule-making is both qualitatively and quantitatively speaking an important part of the EU executive's activity. It includes not only adopting delegated and implementing acts under Articles 290 and 291 TFEU but also includes the issuance of internal guidelines of EU services as well as guidelines by EU institutions, bodies and agencies addressed at Member States agencies. Executive rule-making, thereby, is an essential tool in transposing general legislative requirements to individual commands.

Executive rule-making, however, is a sector in EU administrative law where the lack of coherence between, on one hand, constitutional principles such as the ones outlined in Article 11 TEU, and on the other hand, the procedural

reality is particularly pronounced.[15] So far, rule making outside of legislative procedures has been much less influenced by the evolving constitutional principles of EU law than procedures of executive rule-making. Different sector-specific legislation and the scarcity of general principles in the case law of the CJEU makes for a compelling area for clarifying, restating and stating principles, potentially yielding results in terms of improving the functioning and accountability of administrative action in the EU. In this context, it might be interesting to note that rules on rule-making proposed by ReNEUAL are mainly focused on the phase prior to the presentation of the draft act by the Commission to the Parliament and Council under Article 290 TFEU or to the institutional channels envisaged in the Comitology Regulation (Regulation No182/2011) in the case of Implementing acts under Article 291 TFEU.

The Model Rules are based on the distinction of three pre-adoption phases of rule-making procedures which can – from a procedural point of view – be treated separately. Firstly, the phase of initiation during which the authority in charge of preparing the rule should make public the intended act and its potential scope. Such is necessary to allow for later active participation. Procedures designed for rule-making should be applied only once, even in the case of multi-level, composite rule-making procedures. In the latter cases, the guiding principle should be that the administrative organisation between and amongst actors should have no effect on procedural rights and compliance with requirements of participation and transparency.

The second phase of the rule-making procedure consists of steps necessary to comply with the general principle of the 'duty of care',[16] a principle which the Court of Justice sometimes also describes as the requirement of public bodies to undertake 'full and impartial assessment of all relevant facts' prior to decision making or simply the 'duty of diligent and impartial examination'.[17] In order to ensure compliance with the requirements of full and impartial assessment of all relevant facts, during the investigatory phase of the rule-making process, the body in charge of drafting the act – generally the Commission or an EU agency – should assess the impact of a proposed rule against identified

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15 Jacques Ziller, *Is a law of administrative procedure for the Union institutions necessary? Introductory remarks and prospects, European Parliament*, Directorate General for Internal Policies, PE 432.771 (2011), 18-21.

16 See, in particular, Cases T-211/02 *Tieland Signal Ltd v. Commission* [2002] ECR II-3781, para. 37; Case T-54/99 *max.mobil v. Commission* [2002] ECR II-313, paras 48–51; Case C-449/98 P *IECC v. Commission* [2001] ECR I-3875, para. 45; Case T-24/90 *Automec v. Commission* [1992] ECR II-2223, para. 79; Case T-95/96 *Gestevisión Telecinco v. Commission* [1998] ECR II-3407, para. 53; Joined Cases 142/84 and 156/84 *BAT and Reynolds v. Commission* [1987] ECR 4487, para. 20.

17 See, in particular, Case C-269/90 *Technische Universität München v. Hauptzollamt München-Mitte* [1991] ECR I-5469, para. 14.

alternatives. This phase is also relevant for inclusion of scientific expertise and undertaking of cost-benefit analysis. The results of these studies then should be summarised in an explanatory memorandum, which is the basis for the third phase of rule-making, the phase of consultation.

During the third phase of a rule-making procedure, effect needs to be given to the obligations in Article 11 TEU. This is the phase of consultation. The publication of the draft rule with the explanatory memorandum should, under the Model Rules, be accompanied by an open invitation for any person to comment. Such comments would made visible to other commentators. The possibility for public debate and deliberation on rule making proposals and its alternatives would add to compliance with the concept of taking into account all the relevant facts and legally protected interests. This is an important aspect of overall quality of rule-making.

The final rule resulting from the executive rule-making procedure will, according to the suggestions of the Model Rules be accompanied by a reasoned report. This reasoned report shall explain whether and how comments which were made during the consultation were taken into account or, as the case may be, why they were disregarded. The reasoned report when published alongside the final act is a contribution to more effective administrative and judicial review. Therefore it shall, if applicable, explain which changes have been introduced to the initial draft which was consulted in comitology procedures (in the case of implementing acts under Article 291 TFEU) or control by the Council and the EP in the case of Article 290 TFEU.

Amongst the drafting team of the Model Rules, the scope of applicability of the rules on rule-making by EU institutions, bodies, offices and agencies were subject to much debate. An important question which requires in depth consideration is whether to submit rule-making which is not directly externally binding vis-à-vis private parties to the full rigour of a formalised rule-making procedure sketched above. Considerations to be taken into account in making this decision include that the dividing line between formally binding and formally non-binding acts can be blurry, especially in cases where informal rules are used, for all practical purposes, to replace formal rule-making. Often, internal administrative guidelines are an important steering tool of the administration and can have decisive influence on the outcome of decision making. Although it might appear problematic to exclude non-binding executive rule-making from the procedural rules designed to ensure that constitutional principles are complied with by executive bodies in the EU, given the great diversity of forms of non-binding acts of general content some of which benefit especially from flexibility for adoption and annulment. Comparative studies into jurisdictions which have submitted this kind of rule-making to the more formal procedural rules, such as California, cautioned against an over-aggressive expansion of

formalised rule-making procedures as contained in this proposal.[18] Therefore, as much as one might hope for formal rules to be applied as a matter of good administrative practice also to informal acts of general application, it may be a more cautious approach to first test the functioning of a more formalised procedure in the context of binding acts before also including informal acts.

4.3 Single-Case Decision-Making

'Administrative acts' for single case decision-making are the core of most of the procedural rules of Continental European legal systems. In this vein, the main focus of the developments of general principles of EU law on procedure such as the rights of defence as restated by Article 41 of the EU Charter of Fundamental Rights (CFR) apply mainly to unilateral decisions affecting single interests of individuals, groups or businesses.

Although many sector-specific provisions in EU law contain some rules on single case decision-making, the level of detail of regulation in various policy areas is very uneven. Not all offer the same levels of detail or protection of individuals on matters such as, for example, rights to a hearing or rules on conditions of withdrawal of acts. As Paul Craig pointed out, even lawyers well-versed in EU procedural law will often need to undertake considerable research into legal acts and case-law in order to answer otherwise rather straightforward questions of procedure such as the conditions under which withdrawal of a decision benefitting the addressee could be possible.[19] Similarly, the legislature has no guideline on how to draft the rules for new policy areas since no standard best-practice set of rules exist. As a consequence similar or equal problems are regulated in a different manner. Too often, the 'wheel is being reinvented' in different policy areas with the result of rather unnecessary complication of the EU's legal system. This leads to diminishing transparency and accessibility of rules, combined with an associated reduction of accountability of actors.

Another problem regarding the drafting of decision-making procedures is the fact that in many areas, composite procedures are the norm rather than the exception. Composite procedures structure the input into a single decision-making procedure from different jurisdictions. This is especially the case in the areas of risk-regulation such as medicines, food safety or others. Decision-making procedures in these matters often involve administrative authorities

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18 See also: Strauss, Peter, 'Rulemaking in the ages of Globalisation and Information: What America can Learn from Europe, and Vice Versa', 12 *Columbia Journal of European Law* (2006), 645.

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

from different jurisdictions giving input into a final act. This factor needs to be taken into account when designing procedural rules that are not only oriented at a subsidiarity-friendly, efficient linking of pre-existing national actors to an administrative network, but that also look at the rights and interests of individuals.

Single case decision making procedures can be structured in phases: from its inception, the investigation and hearings, to the making of the final decision and obligations flowing therefrom. In these phases procedural rules need to address a host of matters. These include *inter alia* the way in which applications should be made and acknowledged, the identification of handling officers, time limits, the administration's powers of investigation and inspection, the rules that govern the nature of a hearing and who can be a party to it and process rules in composite procedures in which both EU and national administrations play a central role in the final decision. The Model Rules on single case decision making are accordingly designed to develop the minimal codification contained in Article 41 CFR addressing *inter alia* issues of fair and impartial decision-making and rules relating to conflict of interest. One practically very important but often underdeveloped procedural step are investigations. Questions of procedural rights and obligations in that context are rules of proof and cooperation between Member State and EU bodies. Also defence rights are important to address in this context relating to rules of proof, the extent of professional privilege and rules concerning witnesses and expert opinions. Further, the procedures applicable to hearings, such as rights of individuals to a hearing and access to documents as rights of defence in a hearing require clarification. In EU administrative procedure law, this importantly includes hearing procedures in composite procedures and in cases in which decisions will foreseeably affect a large number of possibly previously non-identifiable persons. In view of the latter, rules on hearings can to some degree be designed akin to the provisions on participation in rule-making. Also, more generally, the distinction between rule-making and single case decision making can be fluid, especially where decision-making affects an unidentified amount of persons.

Finally, matters of the conclusion of administrative decision-making need to be addressed. These include the duty to specify the decision, the duty to give reasons, the duty to indicate available remedies, obligations relating to the notification of decisions, and language requirements. No set of rules on decision-making can be complete without considerations on conditions of and procedures for withdrawal and rectification of decisions – both when decisions have a beneficial effect as well as when they have a potentially adverse effect.

4.4 Contracts and Agreements

Contractual forms of administration are ubiquitous in EU law yet under-represented in legal theory. Adding to the understanding of this particular instrument of EU administrative law is an important contribution to knowledge of EU administrative procedures. Contracts are used in far more diverse contexts than merely as tools for procurement of goods and services. They have become a major tool of policy implementation in many important sectors such as research and technological development, development aid, judicial cooperation in civil matters as well as in criminal matters and police cooperation, and, more generally, in the fields of supporting, coordinating and supplementing actions of the Union. To use just one example: in the area of merger control, contractual means are used either as a supplement to a merger decision or as a condition for its existence. Such contracts, *inter alia,* refer to divestment requirements and the use of trustees to oversee behavioural commitments. Furthermore, contracts are also used for settlement of disputes about administrative duties.

One central problem relates to the substance of public contract law itself. Several basic questions need to be addressed with implications for administrative procedure. These include whether public contract law should be specific for public procurement or whether a single approach may also be used to the conclusion and execution of all types of contracts concluded by public authorities implementing EU law, including matters such as settlement of conflicts. Another fundamental question is whether contracts between public entities should be included into the scope of applicability of a possible general EU law on public contracts. Given the different and often diametrically opposed national approaches to this issue, an especially delicate question is whether or not the same or similar rules should apply to public contracts between public administration and private persons as those applicable to contracts between private parties. If not, why not and what to replace ordinary contract law with in the public setting of EU contracts.

In the EU, there are very few mandatory provisions on contracts with EU authorities which can be drawn upon as models for a more general codification of procedural rules. Despite this, the EU's Financial Regulation contains rules especially regarding the awarding phase of a contractual relation.[20] The effect

[20] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (*OJ* L 248, 16.9.2002, p. 1), amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006, Council Regulation (EC) No 1525/2007 of 17 December 2007 and Regulation (EU, Euratom) No 1081/2010 of the European Parliament and of the Council of 24 November 2010.

of this codification appears limited at best since each of the institutions has its own standard contractual clauses and model contracts. Further, more often than not, contracts are not concerned with spending EU funds, thus falling outside of the applicability of the rules of the Financial Regulation. Limited standing rights of individuals before the CJEU are the reason also for a limited development of procedural standards by case law, with the result that in some policy areas the European Ombudsman 'ombudsprudence' is more developed than the CJEU's case law.

Equally, there is little guidance from the administrative procedure law of the Member States. Only few Member State laws include rules on administrative procedure concerning contracts and agreements. Some legal systems such as that of France treat as administrative acts also as contracts and agreements entered into by public administration. Others, such as German administrative procedure law, submit public contracts largely to the rules of the civil code – an approach which is not without its difficulties in practice. Additionally, with regard to EU law on public contract, the possibility of choice of law is an important aspect, which can result in rules of different jurisdictions applicable to a single contract. This further complicates the legal situation both for the contracting authorities as well as for individuals as parties to an agreement or third parties, often resulting in discrepancies between the rules applicable to the contract depending on where and by whom it has been concluded.

One of the basic principles regarding contracts is to ensure that the flexibility inherent to this tool can be fully exploited without allowing for a public authority to use the tool of contracts to discard itself from generally applicable principles of public law and, more specifically, of decision making. The Model Rules on contracts refer to many of the basic provisions on decision-making and suggest making them applicable regarding contracts also. Such issues include requirements of fairness and transparency of responsible actors, principles of investigation, treating expertise and other information sources, as well as questions of the obligations of duties of reasoning, granting hearings, clarifying legal remedies and language requirements. Similarly, general terms of contract by EU authorities are submitted under the proposals of the Model Rules *mutatis mutandis* to the procedure designed for executive rule-making. This approach has also led the drafters of the Model Rules to suggest a specific set of rules applicable to public contracts. This results in focusing on the specificity of the nature of public contracts as well as the necessary procedural protections which need to be afforded to parties and third parties of a contractual situation.

The solutions developed to address these issues by the ReNEUAL Model Rules on EU Administrative Procedure apply, as the other matters discussed so far, the phase model. Firstly, looking to the phase leading to the conclusion of a public contract, secondly, to the conclusion of the contract and, thirdly, to

its execution and termination. The Model Rules on contracts address the process of standard award procedures which are designed specifically to ensure independence of the procedure and procedures of termination. A special section on problems of subcontracting reflects the astonishingly rich experience of the 'ombudsprudence' in these questions. Especially important is the definition of obligations of the EU authority towards subcontractors and the rules on applicable law on subcontracting.

On the other hand, the ReNEUAL Model Rules have not developed provisions specifically designed for agreements designed to settle disputes about the application of EU law between the EU bodies on one side, and private parties or Member State agencies on the other. One of the reasons for this is that this is a matter of law which requires further development in the case law of the Court of Justice. The question whether and under which circumstances settlement agreements and mechanisms of alternative dispute settlement are legally available tools in the field of public contracts is one of great differences between national legal traditions in Europe. This heterogeneity is based on the different views on the principle of legality of administration. Much research remains to be undertaken in this respect.

4.5 Mutual Assistance

Support between authorities in the exercise of administrative tasks within the scope of EU law is an under-researched element of EU administrative law. Mutual assistance takes place when an authority in a Member State or on the level of the EU requests administrative support from an authority which is located in a different EU jurisdiction acting in the scope of EU law. Mutual assistance covers not only simple forms of exchange of information but also is applicable to more complex forms of cooperation such as conducting inspections for a requesting authority or the service of documents. Mutual assistance is a real life necessity not least because of potential clashes between, on one hand, the territorial limitations of jurisdictions who are, on the other hand, in some cases in charge of taking decisions with an effect across the EU. So far, in absence of any general piece of legislation providing clear procedures for cross-border or multi-level mutual assistance, EU and Member State authorities rely either on occasional sector-specific rules, on a convention of the Council of Europe, or on the obligation to adhere to the principle of sincere cooperation pursuant to Article 4(3) TEU. The latter is a broad general principle of EU law which in many cases is not sufficient to deduce concrete obligations for mutual assistance especially horizontal mutual assistance between Member States in implementing EU law. Given the complexity of procedural implications both in vertical and horizontal assistance cases, some degree of conflict rules are necessary in establishing which law is applicable to which part of the procedure.

The drafters of the Model Rules found that a good starting point to remedy the (unnecessary) complexity resulting from the variety of applicable legal rules to mutual assistance was to adopt as a basic assumption that the law of the requesting Member State should be used to govern the permissibility of the request, while the law of the requested Member State governs its compliance with a request. This approach can be used irrespective of the fact that any action undertaken by the relevant authorities must adhere to the general principle of sincere cooperation and other specific conditions laid down by relevant EU law. Obligations to grant mutual assistance should, in view of the ReNEUAL draft, rest on two additional substantive preconditions: Firstly, that the requesting authority cannot fulfil one of its tasks by itself. Secondly, that the requested authority from another Member State or the EU is in the position to comply with the request. Rights in question are both those of parties to the initial procedure,[21] as well as those 'collaterally' affected by the actual assistance. The rules on mutual assistance therefore should establish the right to be informed where personal data is about to be transmitted to another authority. Although this is currently not standard practice in all policy areas, this is a requirement arising from Data Protection law and is an important innovation to be rolled out across EU policies.[22]

4.6 Information Management

The ReNEUAL Model Rules on EU Administrative Procedure importantly addresses with some detail specific categories of inter-administrative information management. Information management law is admittedly a rather novel and, to the degree discussed here, EU-specific problem. It consists of authorities implementing EU law through structured forms of information exchange or in databases – often managed by EU agencies – that are directly accessible to public authorities. Networks involve EU institutions, bodies, offices and agencies as well as Member States authorities and possibly interest groups and NGO's. The sharing of information through common exchange systems and databases is a common feature of a growing number of policy areas.

Information management related matters are essential preconditions for the realisation of the right to good administration. In requiring fair and impartial decision-making, good administration depends on procedures which allow ad-

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21 C-276/12 *Sabou* [2013] ECR I-nyr of 22.10.2013 (Grand Chamber), para. 38

22 The CJEU in *Sabou*, did not understand the right to be informed prior transmission as a right which is mandated by the rights of defence, but sought to protect it as a procedural right of an individual natural or legal person concerned. Not every transmission of data will lead to a decision adversely affecting the individual with all associated hearing rights. But where no decision is reached this should not leave the individual without protection.

ministrations taking into account and reasoning about the relevant facts of a case including those which arise from other jurisdictions within the EU. This is a requirement stemming from the principle of care. The regulation of forms of composite information management activities, therefore, reflects the reality of an integrated system of implementation of EU law. It should thus be an essential part of an EU administrative procedure code. Since national law can only regulate unilateral approaches to legal issues of trans-national dimension, the EU rules on information management would have to be applicable both to EU institutions, offices, agencies and bodies as well as to Member State administrations.

One of the central problems for individuals facing composite procedures is the diversity of legal rules applicable. The various administrations involved in a single procedure apply generally their home jurisdictions' rules. Accordingly, it has become increasingly difficult to achieve effective judicial review of decisions based on input stemming from information systems. National Courts often lack jurisdiction to review the legality of input into final decisions resulting from other jurisdictions. ReNEUAL Model Rules contain provisions which also allocate responsibilities and allow for single standards of review across the EU. These are essential tools to turn the trend of reduced levels of possibilities for individual judicial review and other forms of accountability mechanisms for decision making in the face of composite procedures. Such rules may therefore contribute to ensuring effective judicial review within the EU under the principle restated by Article 47 CFR.

The emerging law of information networks in the EU requires a combination of rules on structural issues (procedures, organisation, inter-administrative obligations) with rules on data protection and aspects of access to information. The rationale behind this integrative approach is that both data protection and access to information rules needs to be integrated into general information law provisions in order to be effective but not provide additional burdens outside of the ordinary administrative procedures. This does not mean simply duplicating general information law rules but rather adapting them to the problems and needs of inter-administrative information exchange through databases. General provisions on information law can thus reduce complexity of sector specific law so far integrating data protection rules.[23] They should be based on

[23] See Regulation (EU) 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation') [2012] *OJ* L316/1 last amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) 1024/2012 on administrative operation through the Internal Market Information System ('the IMI Regulation') [2013] *OJ* L354/132, Arts 13ff.

the principle of transparent information management including duties to record data processing activities and to foster inter-administrative accountability with regard to collaborative information gathering, use and exchange. Rules on information management then add provisions on the allocation of agencies in charge of supervising information systems obligations to update, correct or delete data. This will ensure that individuals can seek redress with one actor under EU law instead of having to turn to several different bodies under different legal systems.

5 Conclusions

EU administrative procedure law, covering forms of non-legislative implementation of EU law and policies, has to comply with the constitutional values and principles on which the EU is based. Essential constitutional principles include those ensuring a democratic Union based on the rule of law in which transparency, possibilities of participation and the respect of defence rights are not just theoretical objectives but are instead real-life organisational features. EU administrative law has grown very complex due to diversification of rules in various policy areas, a multiplication of administrative actors and the requirement of a subsidiarity-based, de-central implementation of EU law. Well-designed procedural rules have the potential to contribute to a significant simplification of this body of law by allowing the offload of much detail of policy-specific rules to one single procedural rule-book for administration of the Union. Ideally, this would add to the intelligibility of procedures, transparency of allocation of responsibilities and enable both effective administration as well as protection of individual procedural and substantive rights. The objective of the ReNEUAL project on EU administrative procedure was to contribute to that objective by studying forms of non-legislative implementation of EU law and policies. The Model Rules on EU Administrative Procedure developed approaches to ensure compliance of implementation with the increasing constitutionalisation of values and principles on which the EU is based. The Model Rules are separated into six major parts, addressing general concepts, executive rule-making procedures, single-case decision-making procedures, public contracts, mutual assistance and, finally, information systems. These various elements can benefit from being addressed in a general administrative procedure law of the EU which would set high standards as *lex generalis*. The question whether there is a legal basis in EU law to adopt such piece of legislation has been discussed in detail in other forums.[24] Suffice to state here that, in the view

24 See e.g. Craig, Paul, 'A General Law on Administrative Procedure, Legislative Competence and Judicial Competence', 19 *European Public Law* (2013), 503.

of the ReNEUAL drafting team, Article 298 TFEU allows for adopting Union legislation to support the administrative organisation and procedural rules. The reference in the first paragraph of Article 298 TFEU to a 'European administration' as explicitly opposed to the otherwise mentioned 'institutions, bodies, offices and agencies of the Union' not only allows for the adoption of measures addressed at Union bodies, but also contains a legal basis for provisions on information management and mutual assistance which Member State administrations undertake in implementation of EU law – thus acting as European administration but not as administration of the European Union.